Draft Kerala Police Act, 2008

Analysis and Recommendation for Amendments

COMMONWEALTH HUMAN RIGHTS INITIATIVE

Commonwealth Human Rights Initiative
B-117, 2nd Floor
Sarvodaya Enclave
New Delhi - 110017
INDIA

Tel: 91-11-2652 8152, 2685 0523
Fax: 91-11-2686 4688
www.humanrightsinitiative.org

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international NGO working for the practical realisation of human rights in the countries of the Commonwealth.

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Introduction

CHRI is an independent, non-partisan, non-governmental organisation headquartered in New Delhi. We are mandated to ensure the practical realisation of human rights in the countries of the Commonwealth. For the past 10 years, CHRI has been campaigning for police reform in India. The organisation participated in the Police Act Drafting Committee which drafted a Model Police Act, 2006 to replace the existing Police Act, 1861. CHRI has also intervened in the proceedings leading up to the Supreme Court decision in *Prakash Singh* and continues to make submissions to the Monitoring Committee struck by the Court to evaluate compliance with the ruling. For more information on CHRI's activities, please visit www.humanrightsinitiative.org.

This submission represents CHRI's comprehensive consideration of Kerala's Draft Act and our corresponding recommendations.

A new police legislation is being proposed after almost 150 years to replace the 1861 Police Act. Whilst having several provisions which are progressive, we believe that the Draft Act falls short of principles of democratic policing, undermines civil liberties and does not reflect a strong progressive legislation to meet modern day needs of society or police. There are several provisions which we feel need amendment or need to be deleted from the Draft Act. (Please note that our analysis does not discuss those sections in the Draft Act which we approve.) We hope that the Government give our submission careful consideration. We do not claim that the recommendations made by CHRI are complete in themselves. However CHRI would be keen to consult with the government and the select committee examining the Draft regarding the contents of this document.

We also urge the Select Committee to publicise their mandate and invite feedback and suggestions from the public and interested groups. This could be done by holding district wide debates on the Draft Act and inviting comments/recommendations on the Draft Act. This will ensure that the legislation adequately reflects the needs and aspirations of the people in relation to the police service they want. Communities are after all the main beneficiaries of good policing and the main victims of bad policing – community and civil society participation in the process is essential if the police is going to be efficient, effective and accountable.
Overall, we believe this Draft represents the foundation for a strong and progressive legislation. However, there are several areas which we feel could be improved. CHRI is interested in consulting with the Review Committee further, in person, regarding the contents of this document. In the future, we would like to work closely with the Government and Police Service to ensure that Kerala's statute becomes the pre-eminent example of modern, progressive, democratic police legislation in India.

ANALYSIS

Preamble

A preamble is the foundation of a law and sets the purpose and principles of an Act. The Act itself will be interpreted in the light of the preamble and it is therefore crucial that the preamble is carefully drafted.

The current Draft Kerala Police Act, 2008[1] is silent on the police service upholding the civil, political, social, economic and cultural rights of the people. It is crucial that these rights are included in the preamble to ensure that the police organisation will render police service to everyone regardless their political opinions, religion, social and economical status or cultural beliefs. Indeed the authors of the law have rightly pointed out that policing today has different purposes than under colonial times. Central to this purpose is to provide security. The provision of security requires the maintenance of law and order, the detection and prevention of crime as a core function. However, it also requires that the police ensure not only that life and property are secure but, in a constitutional democracy, that liberty can be enjoyed and rights realised. This is recognised as party of the broader definition of 'security'. The preamble, in the result, must make clear that any new policing service must protect liberty and rights.

Preamble Recommendation A
The fourth paragraph in the preamble should be amended with the addition of the following words at the end of the sentence:
"(…) of the people and protection of their civil, political, social, economic and cultural rights"

In addition, the Preamble makes reference to the police being "responsive to the needs of a modern democratic society". In our view, this language is diluted — we favour the use of the term accountability in addition. "Accountable" references a higher standard than "responsive", and lends credibility to the idea that police are to not only serve the people, but also be responsible to them. The notion of accountability is already used in different parts of the Draft Act, 2008 such as sections 37 and 43. Moreover, accountability is stressed repeatedly in the foreword to the Draft Act, 2008 which mentions on page one and two that the Police "has to be accountable to the people" and "accountable to the law". In our view, having a police service that is accountable to the law, is paramount, and would ensure that the Draft Act, 2008 reads more consistently.

Preamble Recommendation B
The preamble should be amended by adding the following sentence to the sixth paragraph:
"and accountable to the law;"

CHRI would also urge that an additional paragraph be added to the Preamble stating as below:

Preamble Recommendation C

[1] Hereafter: Draft Act, 2008

"Whereas it is necessary that each member of the Kerala Police Force acts in a manner which places integrity above all; upholds the rule of law; preserves the rights and freedoms of individuals, seeks to improve the quality of life by community involvement in policing; strives for citizen and police satisfaction; and most importantly ensures that authority is exercised responsibly."

Section 4 – The Functions of the Police

Section 4 sets out the functions and duties of the police. There are several difficulties with this section. Some of the sections are vaguely drafted, whereas other functions and duties are missing or narrowly defined.

Vaguely drafted

Sub-sections (a) and (g) are imprecisely drafted. Section 4(a) states that one of the functions of the police shall be to "lawfully enforce the law". In addition to this it is the imperative of the police to uphold the law *impartially* to ensure professional and efficient policing to every member of society, without fear or favour. Both the Model Police Act, 2006[2] (drafted by the Soli Sorabjee Committee) and the Kerala Police Bill (drafted by the Kerala Law Reforms Commission) mentions this idea. Further, the Draft's preamble also references the notion of impartiality.

4.a Recommendation

Section 4(a) should be deleted in its entirety, and replaced with the following:

"4(a) To enforce the law impartially, without fear or favour"

Section 4(g) resorts to the use of conditional language. It states that the police shall prevent crimes "to best of their ability". This is a subjective criterion and will create inconsistency in the service rendered by the police. For the Kerala Police Service to be responsive and accountable to the needs of a modern democratic society, police functions should be drafted with objective criteria. Additional language in this section, regarding "reducing opportunities for the commission of crimes" is unnecessary and unwarranted.

4.g Recommendation

Section 4(g) should be deleted in its entirety and replaced with the following:

"4 (g) To prevent crimes;"

Drafted Incompletely

Sub-sections (f) and (h) are not fully drafted. Sub-section (f) states that the police must protect public property, vital installations and establishments against vandalism. It is our view that police must not only protect public property but also private property against vandalism, in order to be a fully responsive force.

4.f Recommendation

Section 4(f) should be amended by inserting the words "private and" after the word "all" on the first line.

[2] Hereafter: MPA, 2006

Re-drafting needed

CHRI welcomes the inclusion of section 4(m) as it addresses a concern for the physical safety and well-being of those in custody. The Draft Act, 2008 states that the police shall "take care" of all persons in custody. The criterion of "take care" can vary widely. We consider that this sub-section should be more precisely drafted. Instead of the words "take care" the text should state "ensure and uphold human rights, physical safety and well being". Such an amendment will limit variance and subjectivity, and ensure that any person in custody throughout the State of Kerala is ensured the same, uniform level of treatment, as measured against human rights standards.

4.m Recommendation

Section 4(m) should be deleted in its entirety and replaced with the following:

"4(m) To ensure that accused persons are afforded all protections and rights as guaranteed by the law and to be responsible and accountable for their safety and well being"

Section 4(n) directs officers to obey and execute commands lawfully issued by competent authorities and official superiors. CHRI recognises that this clause is required for the functioning of day-to-day policing. Nevertheless, we remain concerned about undue influence and interference with the police on the part of political authorities. The effect of this clause may be tempered by including language stipulating that wherever possible, such lawful commands will be reduced to writing. Such an insertion will enhance accountability and limit undue interference with police functioning.

4.n Recommendation

Section 4(n) should be amended by inserting the following clause at the end of the sentence:
"wherever possible, such lawfully issued commands shall be provided in writing;"

Sub-sections (p), (q) and (r) contain well-intended, though redundant language. These clauses fall under the categorisation of exhortations, rather than traditional duties or functions. The duty of the police service to protect and uphold human rights in section 4(b) is sufficient, and can be tested for breach— whereas the duty to "instil and uphold the confidence of the people" cannot. While we laud the effort to include this type of language, in our view, given section 4(b), and our suggested language for section 4(m), the text found in sub-section (p), (q) and (r) is not needed.

4.p,q,r Recommendation

Sections 4(p), 4(q), and 4(r) should be deleted in their entirety.

Section 5 – Government to establish Police Stations

Section 5 of the Draft Act, 2008 sets out that the Government shall notify and establish police stations. This section also includes reference to who shall be in charge of such police stations — section 5(3) stipulates that the person designated Station House Officer shall have "such rank as may be decided by the Government

or the State Police Chief". The determination of the appropriate rank for SHOs is an operational decision that should properly rest within the police service (see our discussion below regarding the division between superintendence and administration at section 22.1). This type of decision must be seen to be, immune to political interference. In our view, the word "or" in section 5(3) ought to be replaced with "on the recommendation of".

5.3 Recommendation

Section 5.3 should be amended to read as follows:

"A Police Station shall function (…) of such rank as may be decided by the State Police Chief or on the recommendation of the State Government (…) the Police Station.

Section 8 – Rights of the Public at a Police Station

Section 8 addresses the rights of the public at a Police Station. Section 8.3 refers to the right of a complainant to have his/her grievance recorded in a register maintained in the police station. However to address the problem of people having to struggle at police stations to have their complaints - both cognisable and non cognisable cases registered it would be a positive step to have this right of the public to be crystallised into law.

In view of this we would recommend section 8.3 to be amended as follows:

8.3 Recommendation

Section 8.3 should be deleted in its entirety and replaced by the following:

"8.3. All persons shall have the right to have the substance of any grievance or complaint that he or she has given at the Police Station (either orally or in writing or sent by post,) to be accurately entered simultaneously in a chronologically and contemporaneously maintained permanent register maintained at the police station.

In case of cognisable offences such complaint shall be entered into the FIR register. All persons shall be promptly provided with a stamped and duly acknowledged copy of such FIR free of cost.

In case of non cognisable offences the complaint shall be entered into the daily diary maintained in every police station. The complainant shall be directed to a magistrate with the complaint and a copy of the daily diary entry number shall be provided free of cost to all persons making such a complaint.

In non cognisable cases the police shall not proceed with any inquiries without the order of a magistrate."

Further, section 8.5 provides for the right of a citizen to enquire if a particular person is arrested. However, this right should not only be limited to *enquire* about a particular person. The Draft Act, 2008 must also provide the right to

communicate with the particular person and verify his/her physical and mental well-being. The Draft Act, 2008 already contains provisions prohibiting the torture or abuse of those in police custody (sections 105 and 128). Complementary to those rights, the Draft Act, 2008 should include a provision that permits *any member of the public* (not any "citizen") to verify that such human rights abuses have not taken place. True transparency, as strived for in the opening preamble, requires such an amendment. We acknowledge that the right to see and speak with a person in custody must be qualified by legitimate security concerns that could arise.

8.5.B Recommendation
Section 8.5 should be deleted in its entirety and replaced with the following:

"Any member of the public shall have the right to know whether any particular person is in custody at the Police Station, together with the right to communicate with that person and ensure their physical and mental well-being, subject to reasonable restrictions, if any."

The inclusion of rights of the public at section 8 in a Police Act is a positive move. However we feel that the rights of the public are adequately listed in existing laws. The problem remains with the implementation and the lack of consequences that flow if such rights are not protected.

We believe that if a statute guarantees these rights then the police officer has a statutory duty to enforce or implement them. We would thus urge that a section be included that would impose liability for failing to enforce these rights.

8.7 Recommendation: Inclusion of Section 8.7
Section 8.7 should be added as follows:

"whoever being a police officer fails to comply with the above or acts in a way that substantially denies any member of the public his/her rights under this section would be dealt with departmentally under the Police Discipline Punishment and Appeal Rules and or punished with a term not exceeding three months with or without fine."

Finally, section 8 suffers from very inconsistent wording. It uses the terms "persons", "members of the public" and "citizens". For the purpose of consistency and in order to comport with the section title "RIGHTS OF THE PUBLIC AT A POLICE STATION" in our view, all references should be made only to "members of the public".

8.6 Recommendation
Section 8.1 and 8.6 should be amended by deleting the word "persons" and replacing it with "members of the public"

8.1 and 8.6 Recommendation
Sections 8.1 and 8.6 should be amended by deleting the word "person" and replacing it with "member of the public"

Section 13 – Persons competent to verify Station Diary and Custodial Facility

Maintenance of the General Diary (GD), as per section 12 in the Draft Act, 2008 is laid down clearly in the Kerala Police Manual. There is a duty placed on the Circle Inspector to examine the diary. Copies of the GD are also to be sent to the District Police Office. Whilst these procedures ensure sufficient checks, it is crucial that as a step towards increased transparency and accountability, these diaries be opened up to the general public rather than merely the State Human Rights Commission, State Women's Commission and State or District Complaints Authorities. These bodies have an existing mandate towards the protection of human rights, especially the rights of those in police custody. By virtue of this mandate, they would automatically be ensured access to general diaries. Opening up diaries to public scrutiny would be a step in the direction of accountable and transparent policing.

Further, the GD falls within the purview of section 74 of the Indian Evidence Act which defines public documents. However this definition does not indicate that the diary will be publicly accessible. According to the Kerala Police Manual, the main object of the GD is to 'safeguard the interest of the public…..' When the maintenance of the GD is in the public interest, it must also be disclosed in the public interest unless public interest is better protected by non disclosure.

Under the regime of transparency required by the RTI Act, the GD as a category of documents has not been excluded or exempted from disclosure. As a public document falling with the definition of information under section 2(f) of the RTI Act, citizens are in principle entitled to seek and obtain access. However, exemptions may apply to specific bits of information contained in the GD. Even these exemptions are subject to a public interest override under the RTI Act. Disclosure of contents of the GD should be the prevailing norm and non disclosure of specific bits should be the exception.

13.1 Recommendation

Section 13.1 should be deleted in its entirety, and replaced with the following:

"13.1 Any member of the public can examine requested entries in any Police Station Diary maintained as per section 12.

Such examination may be furthered to verify the condition of any person kept in custody. Provided that disclosure of the name of the accused, complainant or witness will not jeopardise his or her life, physical or mental safety. In all such instances the entries may only be examined by the chairpersons and members of the State Human Rights Commission or the State Women's Commission or the State or District Police Complaint Authorities or officers deputed by such Chairpersons or members."

Section 22 - State Police Chief

Administrative Control:

The Draft stipulates, at section 22.1 that authority over "administration, supervision, direction and control" vest in the State Police Chief, "subject to the control of the Government." In our view, the different responsibilities over administration, as compared to superintendence, must be more clearly defined, as this has historically been the root of the problem of policing in India. In both theory and practice, there is a strong distinction between the notions of "administration" and "superintendence". The former term, relates to the day to day management of the police. The latter term, superintendence, relates to overall control of policy, laying down guidelines, and setting state-wide standards for policing. In CHRI's view, these two functions are distinct, and must be exercised by different parties in a modern democracy. The superintendence is the ultimate purview of the State Government, whereas the former, administrative function can and must rest with the Police alone.

It is of extreme importance to define the areas of where the political executive can and should intervene in policing matters. It is only through a clear expression of the dual roles of executive superintendence and police administration that the operational responsibility and accountability of police can be assured, without sacrificing the important function of legitimate political oversight and supervision.

Taking guidance from other jurisdictions CHRI recommends the following scheme which clearly delineates the Chief of Police's responsibilities to the political executive (through the Minister in charge) and also, importantly what duties and functions the police are *not* responsible to the executive and which must be acted on independently by the police.

22.1 Recommendation

We recommend that section 22.1 be amended to read as follows:

22.1 Responsibilities and independence of State Police Chief

The supervision, direction and control of the police throughout the State shall, be vested in an officer of the rank of Director General of Police designated as the State Police Chief.

22.1.1 The State Police Chief shall be responsible to the Minister for

(a) carrying out the functions and duties of the Police;
(b) the general conduct of the Police;
(c) the effective, efficient, and economical management of the Police;
(d) tendering advice to the Minister and other Ministers of the Crown;
(e) giving effect to any lawful ministerial directions.

22.1.2 The State Police Chief shall not be not responsible to, and must act independently of, the Minister regarding:

(i) the maintenance of order in relation to any individual or group of individuals; and
(ii) the enforcement of the law in relation to any individual or group of individuals; and
(iii) the investigation and prosecution of offences; and
(iv) decisions about individual Police employees.

22.1.3 The Minister may give the Director General of Police directions on matters of Government policy that relate to-

- **i) the prevention of crime;**
- **ii) the maintenance of public safety and public order;**
- **iii) the delivery of police services; and**
- **iv) general areas of law enforcement.**

22.1.4 No direction from the Minister to the Director General of Police may have the effect of requiring the non-enforcement of a particular area of law

22.1.5 The Minister must not give directions to the Director General of Police in relation to the following:

- **i) enforcement of the criminal law in particular cases and classes of cases**
- **ii) matters that relate to an individual or group of individuals**
- **iii) decisions on individual members of the police**

22.1.6 If there is dispute between the Minister and the Director General of Police in relation to any direction under this section, the Minister must, as soon as practicable after the dispute arises,

- **i) provide that direction to the Director General of Police in writing; and**
- **ii) publish a copy in the Gazette; and**
- **iii) present a copy to the Legislature**

Selection Criteria:

The Draft Act, 2008 sets out certain criteria upon which the State Police Chief will be selected. The criteria are however falling short of the Supreme Court directive. The Supreme Court, in *Prakash Singh*, clearly set out that the senior most police officer in the state must be chosen based on "their length of service, very good record and range of experience". The Draft Act, 2008 omits the first of these three criteria. In our view, the Draft ACt, 2008 ought to be amended to bring it into compliance with the Apex Court's Order, and so that it properly acknowledges the importance of seniority in selecting the State Police Chief. The objective is to ensure some predictability in the appointment process — so that where the merits of candidates are relatively equal there is little room for patronage or personal preference.

22.2.A Recommendation

Section 22.2 of the Draft Act, 2008 should be amended by adding the term "length of service" so that the conclusion of the first paragraph reads:

"considering his overall good record of service, length of service and experience for leading the police force of the State:"

Selection Method:

In addition, the Draft Act, 2008 does not require that the state government select a DGP (State Police Chief) from a panel of three candidates chosen by the Union Public Service Commission. This plainly violates the Order of the Supreme Court, which stated that "the Director General of Police of the State shall be selected by

the State Government from amongst the three senior-most officers of the Department who have been empanelled for promotion to that rank by the Union Public Service Commission". It is important that an out-of-state organisation nominate candidates for the position of DGP to preserve objectivity, and immunise the process from potential improper influence from within the state. The Act should be amended accordingly to put it into compliance with the Apex Court's ruling.

22.2.B Recommendation
Section 22.2 of the Draft Act, 2008 should be amended so that the opening sentence reads:

"The State Police Chief shall be appointed by the Government from among those officers of the State cadre of the Indian Police Service empanelled for promotion to that rank by the Union Public Service Commission who have either…"

Section 28 – Separation of Investigation from Law and Order

Act is Speculative:
The Supreme Court's directive in the *Prakash Singh* decision is extremely clear. The Court stipulated that in order to ensure expedited investigations, improved expertise and improved rapport with persons, "the investigating police shall be separated from the law and order police". Although the Court's directive was intended to have immediate effect, in our view the Kerala Draft legislation makes the separation of investigative police from law and order police completely speculative. Through the use of the word "may" in the first sentence of section 28.1, the Draft Act, 2008 leaves the critical decision about separating these two functions entirely in the Government's discretion. This constitutes an open violation of the Apex Court's Order, and in our view the language must be amended to comply with the Supreme Court Decision.

28.1.a Recommendation
CHRI recommends that section 28.1 be amended to read as follows:
"the government *shall* having regard to the population in such area (…) professional investigation."

Objectives of Separation:
Second, section 28.1 of the Draft Act, 2008 has been altered so that the language no longer mirrors the language used in the Government's Ordinance of 12 Feb 2007, which was enacted in response to the decision in *Prakash Singh*. The Kerala Police (Amendment) Act, 2007 at section 3 A (1) stated that separation of the investigating police may occur "in order to ensure speedier investigation, better expertise and improved rapport with [the] people." However, the Draft Act, 2008 at section 28.1 reads "in order to ensure speedy, effective and professional investigation." The difference is significant. The earlier language, which tracked the exact terms used by the Supreme Court, denotes that improving the investigative expertise of the officers, and their relations with the public, are two of the principal objectives being pursued. In our view, the language of the Supreme Court, as set out in the Kerala Police (Amendment) Act, 2007, should be more closely followed.

28.1.b Recommendation

CHRI recommends that section28.1 be amended by adding the following words at the end of the sentence:
", and better expertise and improved rapport with the people."

Substance of Actual Separation:

Finally, the Draft Act, 2008 does not substantively address the manner in which the separation of investigative from law/order functions is intended to be carried out. In this respect, we find that guidance can be sought from the Model Police Act. The MPA, 2006 sets out in detail, several sections that pertain to the separation of the investigation function. In our view, these sections are vital in terms of their comprehensiveness, and the safeguards they provide to ensure the new investigative units receive sufficient infrastructure, training, support and tenure. In particular, the MPA provides for forensic science training, advice and facilities. In our view sections 122-137 of the MPA, 2006 should be inserted into the Kerala Act, with the amendment that the staff allocated to the Special Crime Investigation Units does not have a maximum tenure and does not get rotated to law and order duties.

28.3-28.18 Recommendation

The following sections from the MPA, 2006 be inserted into the Draft Act, 2008, at section 28.2ff:

Investigations by district police

28.3. The State Government shall ensure that in all urban Police Stations and those in the crime-prone rural areas, a Special Crime Investigation Unit, headed by an officer not below the rank of Sub-Inspector of Police is created with an appropriate strength of officers and staff, for investigating economic and heinous crimes. The personnel posted to this unit shall not be diverted to any other duty, except under very special circumstances with the written permission of the State Police Chief.

28.4. The officers posted in Special Crime Investigation Units will be selected on the basis of their aptitude, professional competence and integrity. Their professional skills will be upgraded, from time to time, through specialised training in investigative techniques, particularly in the application of scientific aids to investigation and forensic science techniques.

28.5. Officers posted to Special Crime Investigation Units will normally have a minimum tenure of three years

28.6. (1) The officers posted to the Special Crime Investigating Units will investigate crimes such as murder, kidnapping, rape, dacoity, robbery, dowry-related offences, serious cases of cheating, misappropriation and other economic offences, as notified by the State Police Chief, besides any other cases specially entrusted to the unit by the District Superintendent of Police.

(2) All other crimes will be investigated by other staff posted in such Police Stations.

28.7. Each Police Station shall be provided with an appropriate number of Crime Scene Technicians to promptly visit the scenes of crime along with the Investigating Officer concerned to spot and gather all available scientific clues. These Crime Scene Technicians will be specially selected and adequately trained for the purpose.

28.8. Necessary legal and forensic advice will be made available to investigating officers during investigations.

28.9. The investigation of cases taken up by the Special Crime Investigation Unit personnel, over and above the supervision of the Station House Officer concerned, will be supervised at the district level by an officer not below the rank of Additional Superintendent of Police, who will report directly to the District Superintendent of Police. This supervisory officer may be assisted by an appropriate number of officers of the rank of Deputy Superintendent of Police, posted for the specific purpose of ensuring quality investigation on professional lines:
Provided that in smaller districts where the volume of work does not justify posting of an Additional Superintendent of Police, an officer of the rank of Deputy Superintendent of Police shall be posted for this purpose.

28.10. At the headquarters of each Police District, one or more Special Investigation Cells will be created, with the requisite strength of officers and staff, to take up investigation of offences of a more serious nature and other complex crimes, including economic crimes. These Cells will function under the direct control and supervision of the Additional Superintendent of Police mentioned in Section 28.9.

28.11. The officers and staff to be posted to this Cell shall also be selected and specially trained, as provided in Section 28.4.

Criminal Investigation Department
28.12. The Criminal Investigation Department of the state shall take up investigation of such crimes of inter-state, inter-district or of otherwise serious nature, as notified by the State Government from time to time, and as may be specifically entrusted to it by the Director General of Police in accordance with the prescribed procedures and norms.

28.13. The Criminal Investigation Department will have specialised units for investigation of cyber crime, organised crime, homicide cases, economic offences, and any other category of offences, as notified by the State Government and which require specialised investigative skills.

28.14. The officers posted to the Criminal Investigation Department will be selected on the basis of their aptitude,

professional competence, experience and integrity. They will undergo appropriate training upon induction, and their knowledge and skills will be upgraded from time to time through appropriate refresher and specialised courses.

28.15. Officers posted to the Criminal Investigation Department shall have a minimum tenure of three years and a maximum of five years.

28.16. The Criminal Investigation Department will be provided with an appropriate number of legal advisors and crime analysts to guide, advise and assist the investigating officers.

28.17. The Criminal Investigation Department shall be provided with adequate staff and funds. The head of this Department will be vested with financial powers of a head of the department.

28.18. The Crime Investigation Units in the Police Stations, the Specialised Investigation Cells at the district level and the Criminal Investigation Department shall be equipped with adequate facilities of scientific aids to investigation and forensic science including qualified and trained manpower, in accordance with the guidelines, if any, issued in this regard by the Directorate of Forensic Science or the Bureau of Police Research and Development of the Government of India.

Section 29 – State Security Commission

To shield the police from the undue interference of politicians and ensure appropriate policy directions, the Supreme Court directed the establishment of a State Security Commission. The proper formulation of this section is crucial in ensuring true reform of the police service.

The Draft Act at Section 29 does create such a Commission. However it employs the words "The Government *may* (…) constitute a State Security Commission", and thereby leaves the decision about the creation of the Commission at the discretion of the Government. This constitutes an overt disobedience of the Court's Order.

29.1 Recommendation

CHRI recommends that section 29.1 be amended so that the opening sentence reads:
"29.1 The Government shall, by notification in the Official Gazette constitute a State Security Commission…"

Composition:

The Supreme Court stipulated that the composition of the SSC must reflect both the Government's ultimate responsibility for the issues of law and order, plus the need for independent civilian oversight of the State Police. The Court said that governments could create its SSC based on any of three different models — the Model proposed under the Model Police Act, 2006, the National Human Rights Commission or the J F Ribeiro Committee. The Draft Act, 2008, fails to comply with any of the three models. In our view, the most suitable model for creating the SSC is the template proposed under the MPA, 2006. This model ensures that the Government is ultimately responsible for law and order, while simultaneously

guaranteeing that independent members play a key role in exercising important police oversight.

29.2.1 – 29.2.3 Recommendation

CHRI recommends that section 29.2 of the Draft Act, 2008 be deleted in its entirety, and replaced with the following:

"29.2.1 Composition
The State Security Commission shall have as its members:
(a) the Home Minister as its Chairperson;
(b) the Leader of the Opposition in the State Assembly;
(c) a retired High Court Judge, nominated by the Chief Justice of the High Court;
(d) the Chief Secretary;
(e) the Secretary in charge of the Home Department;
(f) the State Police Chief as its Member-Secretary; and
(g) five non-political persons of proven reputation for integrity and competence (hereinafter referred to as "Independent Members") from the fields of academia, law, public administration, media or NGOs, to be appointed on the recommendation of the Selection Panel constituted under Section 29.2.2.

(2) The composition of the Commission shall reflect adequate gender and minority representation, and will have not less than two women as members.

(3) No serving government employee shall be appointed as an Independent Member.

(4) Any vacancy in the State Security Commission shall be filled up as soon as practicable, but not later than three months after the seat has fallen vacant.

29.2.2 Composition of the panel for selection of Independent Members

Independent Members of the State Security Commission shall be appointed on the recommendation of a Selection Panel, which shall consist of:

(a) a retired Chief Justice of a High Court as its Chairperson, to be nominated by the Chief Justice of the High Court;
(b) the Chairperson of the State Human Rights Commission, or in the absence of such Commission in the state, a person nominated by the Chairperson of the National Human Rights Commission; and
(c) the Chairperson of the State Public Service Commission.

29.2.3 Method of selection of Independent Members
The Selection Panel shall evolve its own procedure to select Independent Members through a transparent process."

Term Limits:
Kerala's Draft Act, 2008 does not put a limit on the number of terms that an independent or non-official member of the SSC may serve. Term limits are crucial to ensure that there is adequate renewal among the membership of the SSC. Placing new members periodically on the SSC prevents views from stagnating and positions from becoming entrenched. It ensures that fresh perspectives and ideas are brought to the important issue of policing, and helps guarantee that the State Security Commission's oversight function remains robust.

29.4 Recommendation
Section 29.4 of the Draft Act, 2008 should be amended to include the following insertion at the end of the sentence:

29.4 "(…) and shall be eligible for re-nomination for a maximum period of one additional term."

Removal of Independent Members:
The Draft Act, 2008 (section29.5) speaks to the issue of removing independent or non-official members, however, it provides the Chairman of the Commission the unilateral right to effect such a removal where an independent member has missed three consecutive meetings without sufficient cause. In our view, the unilateral authority of the Chairman should be qualified, to limit the possibility of arbitrary reprisals. The MPA, 2006 stipulates that such removals should only occur on the approval of two-thirds of the members of the SSC itself. In our view, if an independent member has indeed been absent without justification for 3 consecutive meetings, undoubtedly the approval of two-thirds of the SSC for removal would be forthcoming.

29.5 Recommendation
Section 29.5 of the Draft Act, 2008 should be amended by adding the following phrase at the end of the first paragraph:

"Provided that no member shall be removed by the Chairman under the provisions of this sub-section unless two-thirds of the members of the State Security Commission consent."

Salary of SSC members:
Lastly, the Draft Act, 2008 sets out that fees and allowances payable to nominated members of the SSC "shall be such as may be prescribed". The MPA, 2006, on the other hand, is more explicit, and creates a positive obligation. Section 49 of the MPA 2006 states that the expenses of independent members of the SSC regarding travel, allowances and remuneration shall be paid by the State Government. This limits the potential that non-public salaried individuals may be prevented from fulfilling their duty to provide independent oversight, because of financial pressures.

29.8 Recommendation
Section 29.8 of the Draft Act, 2008 should be amended with the insertion, after the words "State Security Commission" of the following terms:

"shall be borne by the State Government,"

Grounds for Ineligibility of Independent Members:
The Draft Act, 2008 does not address grounds of ineligibility for independent or "non-official" members. In our view, such grounds of ineligibility are critical to ensure persons selected to serve on the SSC as independents function in an objective and non-partisan manner. Further, to ensure the effectiveness of SSC oversight, it is crucial that independent members are competent, and possess corruption-free records. We base our suggested grounds of ineligibility in part on those suggested in the MPA, 2006.

29.9 Recommendation
Section 29 of the Draft Act, 2008 should be amended to include the following insertion as sub-section 9:

"29.9 Grounds of ineligibility for Independent Members
No person shall be appointed as an Independent Member of the State Security Commission if he:
(a) is not a citizen of India; or
(b) has been convicted by a court of law or against whom charges have been framed in a court of law; or
(c) has been dismissed or removed from service or compulsorily retired on the grounds of corruption or misconduct; or
(d) holds an elected office, including that of Member of Parliament or State Legislature or a local body, or is an office-bearer of any political party or any organisation connected with a political party; or
(e) is of unsound mind; or
(f) is in the service of any statutory body or any other body which is owned or controlled by the government or in which the government has a controlling share."

Section 30 – Functions of the State Security Commission

Functions of SSC:
The draft legislation sets out the functions of the State Security Commission in section 30.1. However, this section does not set out the purpose for which the SSC is meant to serve. The Supreme Court expressly stated that the role of the SSC is "to ensure that the State Government does not exercise unwarranted influence or pressure on the State police". The exclusion of this kind of language from the Draft Act, 2008 dilutes the purpose behind the creation of such a body and demonstrates a limited commitment to the central goal of making the police accountable only to the law.

30.1 Recommendation
The first sentence in section 30.1 of the Draft Act, 2008 should be deleted and replaced with the following:
"1. In order to provide the people of Kerala with responsive, independent, professional policing, the Government shall create a State Security Commission with the following functions:"

Evaluation:
The Draft Act, 2008 at section 30 (1)(c) stipulates that the function of the SSC is to evaluate the performance of the police from time to time. Any evaluation of police performance is a continuing ongoing feature and cannot merely be a time to time event. The Draft Act, 2008 should set out this mandate clearly.

30.1.c Recommendation

Section 30.1(c) of the Draft Act, 2008 should be amended by deleting the words "from time to time" and replacing them with the word "annually".

Annual Report:
In addition, while the Draft Act, 2008 calls for an annual report to be prepared by the SSC for the State Government, which the Government is then obligated to place before the Legislature (section30.1(d),(2)) these provisions do not fully comply with the Court's order. The Supreme Court directive clearly states that the report of the SSC must proceed directly from the SSC to the State Legislature. This aspect of the Court's decision ensures that the report proceeds on a timely basis without modification to the Legislature itself. The MPA, 2006 also delineates that the report of the SSC must be made available to the public.

30.1.d – 30.2 Recommendation

Section 30.1(d) of the Draft Act, 2008 should be amended by deleting the words "to the Government" and replacing them with the words "to the State Legislature. The Annual Report shall be made accessibly to the public."

Section 30.2 of the Draft Act, 2008 should be deleted in its entirety.

Powers:
The Supreme Court in the Prakash Singh case mandated the SSC to have binding powers. Sections 30.4 and 30.5 of the Kerala Draft Act, 2008 sets out the powers of the SSC. There is ambiguity on the nature of the powers the SSC will have. The Draft Act, 2008 at section 30.5 makes the recommendations binding on the police department however inserts a clause stipulating that the "Government may, for reasons to be recorded in writing, fully or partially reject or modify any direction or recommendation of the Commission"
This clause is reason for concern. It fails to respect the Supreme Court directive. The composition of the SSC already has sufficient representation from the Government in the form of the Home Minister as Chair, another Government Minister, plus two senior Government Secretaries. The body has been specifically created to remove undue political interference. Past experience has shown that any body that has not been given binding powers has not been able to fulfil its mandate. In view of this CHRI makes the following recommendations.

30.5 Recommendation

CHRI recommends that section 30.5 be amended by deleting the words "Provided that the Government may, for reasons to be recorded in writing, fully or partially reject or modify any recommendation or direction of the Commission."

Section 36 – Police to Keep Information Confidential

Section 36 addresses the requirement to keep information confidential. The formulation of section 36 needs to be harmonised with the obligations of transparency expected of the police vis-à-vis the RTI Act. It is possible to interpret section 36(1) in a restrictive manner and limit access to information collected by the police for purposes that are deemed to be official under the Police Act. However the use of the phrase 'any official purpose' must be qualified with the phrase 'including requests made under the RTI Act.'

The disposal of information requests made to the police under the RTI Act is also official business. As the RTI Act has an overriding effect on all other laws with regards to providing access to information it is important that no legislation exceeds the scope of exemptions provided therein. Disclosure of information that may impede the investigation or prosecution or that may endanger the life of any person or that may reveal the source of information given in confidence for law enforcement purposes is already exempt under the RTI Act. However even these exemptions are subject to a public interest override. These provisions provide adequate protection for information that the police may legitimately want to keep confidential. There can be no justification for multiplying the grounds for non disclosure under the present Draft Act. The Draft Act, 2008 cannot exceed the ambit of confidentiality already articulated in the RTI Act without risking a serious legal challenge.

In our view, this section is inconsistent with the RTI Act passed by a superior law making authority on matters relating to transparency and accountability in ought to be omitted in its entirety.

36. Recommendation
Section 36 should be deleted in its entirety.

Section 39 – Complaints to Police How Made

Section 39 describes the manner in which complaints can be made to the police. It is encouraging to see that this has been laid down in the Draft and will allow people to hand in complaints in various forms. However a clause has been added in the section which states that the police officer may take appropriate action unless he has reason to believe that the complaint is frivolous. This goes against the existing law which requires that if a cognisable offence is made out the police are bound to register an FIR and have no right to exert any discretion at this point or go into the veracity of the case without registering an FIR. Further the Supreme Court in *State of Haryana and Othrs v Ch Bhajan Lal and Othrs* clearly laid down the law in relation to the registering of FIRs by stating *"It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer incharge of a police action satisfying the requirements of Section 154(1) of the Code, the void police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."*[3]

Thus taking section 154 CrPC and the directions of the apex court section 39 of the Kerala Draft should be amended as below.

39 Recommendation

[3] AIR 1992 SC 604 at para 33

Section 39 should be amended to read as follows:

"A complaint to the police may be made orally, or in writing, or by gestures or signals, or by digital or electronic means and if the complaint discloses a cognisable offence the officer in charge of the Police Station is bound to register an FIR for the same and then conduct appropriate investigation as the case requires."

Section 53 – Procedures for Arrest

We notice that the section reflects the D K Basu guidelines as laid down by the Supreme Court. However the procedure in some areas is not in conformity with the provisions contained in the CrPC as well as the guidelines laid down in Basu. These guidelines are binding and any officer who fails to adhere to these is liable to contempt proceedings before the High Court. Further some of the guidelines have been incorporated into the CrPC vide the amendment act of 2005 and the Amendment Act of 2008 (still to be notified).

We recommend that the D K Basu guidelines be reproduced as they are in the Kerala draft Act.

53.2-53.12 Recommendation

Section 53.2 - 53.12 should be deleted in its entirety and replaced with the following wording from the Supreme Court:

"(2) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(3) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

(4) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(5) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next

friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(6) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(7) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(8) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(9) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory. Director, Health Services should prepare such a penal for all Tehsils and Districts as well.

(10) Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record.

(11) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(12) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

Section 72 – Community Policing

CHRI is encouraged that community policing has been addressed in the Draft Act, 2008. Through community policing the public can be informed of the difficulties police are facing in different stages of their work and the police may learn about specific community issues that can be addressed before crime occurs. In this way

community policing permit the police to work proactively rather than reactively. The key element in community policing is to build trust and this is done through ensuring the right composition of the community liaison groups, and by having regular meetings attended by both the public and police.

Although community policing is a relatively new concept in India and is not addressed in the 1861 Police Act, it can be found in police acts all over the Commonwealth such as Northern Ireland, New South Wales, Australia, the United Kingdom, Ontorio, Canada and South Africa. To ensure that all this is achieved, CHRI recommends that language should be adopted from section 18 of the South African Police Act, 1995 that comprehensively addresses the objectives of community policing. Further, the Model Police Act 2006 states that the meetings of the community liaison group should be attended by the Sub-Divisional Magistrate as well as the Sub-Divisional Police Officer, Station House Officer and Circle Inspector. CHRI endorses this provision as it is important that representatives from the police and magistracy are present at the meetings so that the public can discuss pressing matters with the police in a less intimidating environment than the police station.

Moreover, for community policing to be truly effective, it should be inclusive and allow for maximum participation. The language in the Draft Act, 2008 suggests that the District Police Chief shall appoint members of the Community Liaison Groups and this is worrying as it can lead to members being chosen who are neither able to adequately articulate the needs of the community nor are necessarily representative of it. CHRI urges that the language be amended so as to ensure that members be chosen in a transparent manner by a Selection Committee empanelled for the purpose.

72.1 Recommendation

Section 72.1 should be deleted in its entirety and replaced by the following adopted from section 18 of the South African Police Act, 1995:

"72.1 The objectives of the community liaison groups shall be as follows:
(a) establishing and maintaining a partnership between the community and the police;
(b) promoting co-operation between the police and the community in fulfilling the needs of the community regarding policing;
(c) promoting communication between the police and the community;
(d) improving the rendering of police services to the community at the state, district and local levels;
(e) improving transparency in the police and accountability of the police to the community;
(f) promoting joint problem identification and problem-solving by the police and the community."

72.2 Recommendation

Section 72.2 should be deleted in their entirety and replaced with the following:

"72.2 The Community Liaison Group shall have eight representatives. Persons wanting to serve in the Group shall submit an application to a Selection Panel constituted for the purpose consisting of the Station House Officer, Judicial Magistrate and District Superintendent/Commissioner of Police. The Selection Committee shall induct members from the applicant pool in a transparent manner."

72.3 Recommendation
Section 72.3 should be amended to read as follows:

"72.3 No person who is connected with any political party or an organisation allied to a political party, or has a criminal record, shall be eligible to be inducted into the Community Liaison Group."

72.6 Recommendation
Section 72.6 should be amended to read as follows:

Provided further that the meetings shall be attended by the Sub-Divisional Magistrate, Sub-divisional Police Officer, officer in charge of the Police Station and the Circle Inspector."

Section 72.4 provides that the Community Liaison Group should identify existing and emerging policing needs and develop action plans for ensuring the security of the area. CHRI also recommends that the identification of existing policing needs and the action plans prepared should be taken into due consideration by the Station House Officer while preparing the annual policing strategy as recommended in section 86 of the Model Police Act 2006.

72.4 Recommendation
Section 72.4 should be deleted in its entirety and replaced by the following:

"72.4 The Community Liaison Group will identify the existing and emerging policing needs of the area which will be taken into consideration by the Station House Officer while preparing the annual policing strategy and action plan for the jurisdiction for submit the plan to the District Chief of Police"

Further, CHRI feels that the Liaison Groups should meet at least once every two months, as opposed to "whenever necessary" as provided in the Draft Act, 2008, to ensure that there is a constant two-way communication occurring between the police and the public. This communication is an essential element to building an effective police-public partnership.

72.5 Recommendation
Section 72.5 should be amended by the insertion of the following in the end of the sentence:

"and at least once every two months."

Section 91- Special Security Zones

The Draft Act, 2008 stipulates that Government may notify an area as a Special Security Zone either temporarily or permanently on the recommendation of the State Police Chief. In such a Zone, the Government may restrict the movement of people, vehicles and objects.

Police laws are put in place to regulate policing. The rationale for any police legislation is to regulate policing; to provide the police with a new vision of itself; to change the underlying assumptions on which it functions; articulate the relationships that the police establishment will have with the political executive, the civil administration and the public; define its role and function; delimit its powers and activities and define its structure.

The Draft Act should not go beyond this remit to give extraordinary powers to the police or create obligations for the public. Consequently, section 91 has no place in the Draft Act and should be removed.

The idea of special, privileged enclaves, where extraordinary measures for security will be provided, is misconceived, and based on a misunderstanding of the challenges of terrorism, organised crime and law and order administration, which the proposed Special Security Zones are intended to address. Emergencies of public order and the problems of "high security threats" and "high rate of prevalence of crime" in specific areas require a coordinated and integrated approach that goes beyond the policing requirements and includes action by various other wings of administration. The overly far reaching provisions and resulting constitutional implications of section 91 go well beyond the scope of this Draft Act and should, if at all required, be addressed in separate security or emergency legislation by the government. The same was acknowledged by the National Police Commission, which made no mention of such provisions in the model Police Act they drafted but instead recommended a separate "special law for dealing with serious and widespread breaches of disturbance of public order."

91. Recommendation
Section 91 should be deleted in its entirety.

Section 106 – Minimum Tenure of Police Officers

DGP and Superannuation:
Once objectively chosen, the Director General of Police (DGP) is assumed to enjoy the trust of the political executive, the police service and the public. It would be anomalous to retain the ability of the executive to remove the head of police at will. The Supreme Court provides for a minimum tenure of *two years* for the DGP. In practice, this does not mean that erring DGPs cannot be removed, it only makes removal consequent on grounds laid-down in law:

- An action taken against her/him under the Discipline and Appeal section of the All India Services Rules;
- A conviction in a court of law for a criminal offence or a case of corruption; or
- Being otherwise incapacitated from discharging duties.

Retirement cannot be justification for limiting such tenure. Under the current Draft Act, 2008, tenure could potentially run for as little as a matter of months, if the State Police Chief was appointed immediately prior to his date of retirement. Such a scenario will hinder the Police Service and the public in the State of Kerala, which stands to benefit a great deal from continuity in its top leadership.

106.1 Recommendation
Section 106.1 of the Draft Act, 2008 should be amended by deleting the "superannuation" from the second sentence, as it applies to the post of Director General of Police.

Section 106.1 further states that the minimum tenure for an officer is not applicable in the case of "reversion" and "leave". These grounds exceed what was permitted by the Supreme Court in the *Prakash Singh* case. In addition, these terms are undefined. The vague terms could potentially be employed to 'revert' or place on 'leave' an officer who was no longer popular with the ruling government. To fully commit to the goal of operational autonomy in policing, free from unwarranted interference, we urge the Kerala Government to omit these two terms.

106.1.C Recommendation
Section 106.1 of the Draft Act, 2008 should be amended by deleting the words "reversion" and "leave" from the final line of the first paragraph.

Premature Removal:
Security of tenure is similarly important for other police officers on operational duties in the field. In order to help them withstand undue political interference, have time to properly understand the needs of their jurisdictions and do justice to their jobs, the Supreme Court provides for a minimum tenure of *two years*. The Draft Act, 2008 deals extensively with the issue of premature removal of the various officers.

When an officer is removed in the exceptional cases, as listed in the Draft Act, 2008, safeguards need to be put in place. The transferring authority must give reasons in writing for the transfer and the aggrieved officer should be given an opportunity to be heard as well as appeal the decision. These provisions will ensure against arbitrariness and unwarranted influence.

106.3 Recommendation
Section 106 of the Draft Act, 2008 should be amended to add a third sub-section, "106.3" which would read:

"3. Provided that an officer who is removed pursuant to sub-section 2, above, must receive a written order from the transferring authority specifying the reasons for such removal, and must be provided the opportunity to respond."

Further, the proposed legislation does not contemplate any role whatsoever for the State Security Commission in the premature removal of the DGP. This goes against the Supreme Court Order, which stated that "the DGP may, however, be relieved of his responsibilities by the State Government acting in consultation with the State

Security Commission". The Draft Act, 2008, in contrast, permits the State Government to unilaterally remove the DGP based on one or more of the enumerated grounds under section 106. This section must be revised to comply with the Court's Order and provide a fetter for the potential arbitrary use of the removal power.

106.4 Recommendation

Section 106 of the Draft Act, 2008 should be amended by adding sub-section "106.4" which would read:

"4. Provided that no removal of a DGP will be effected under this section absent the approval of two-thirds of the members of the State Security Commission."

Section 115 - Police Establishment Board

To counter the prevailing practice of subjective appointments, transfers and promotions, the Supreme Court in Prakash Singh provided for the creation of a Police Establishment Board (PEB) in each State. In effect, the PEB brings the crucial service related matters largely under police control (such as transfers, postings and promotions). Notably, a trend in international best practice is that Government has a role in appointing and managing senior police leadership, but service related matters of other ranks remain internal matters. Experience in India shows that this statutory demarcation is absolutely required in order to decrease corruption and undue patronage, given the prevailing illegitimate political interference in decisions regarding police appointments, transfers and promotions.

This directive is mandatory, and intended to have immediate effect. Nevertheless, the Draft Act, 2008 leaves the set up of the Board at the discretion of the State Government. Section 115.1 of the Act employs the words "The State Government *may* constitute a Police Establishment Board (…)". This is against the Apex Court's order and thus the language must be amended accordingly.

115.1 Recommendation

CHRI recommends that section115.1 be amended with the insertion of the word "shall" to replace the word "may" in the opening sentence.

Section 116 - Functions of the Police Establishment Board

Mandate of the PEB

The reasoning behind setting up a PEB was to ensure that transfers, postings and promotions are made purely by the police leadership to avoid the current practice of rampant political interference in internal decision making processes.

Section 116.1 lays down the mandate of the PEB. However, the mandate does not fall within the scope of the Apex Court decision in the Prakash Singh case.

Whilst Section 116.1 gives powers to the PEB to decide on matters relating to postings, transfers and promotions of officers below the rank of Inspector of Police, nowhere does it mention a similar mandate in relation to officers above the level of Inspector of Police. Though the intent of the directive is crystal clear – to ensure

transfers, postings and promotions are decided within the police leadership- it can cause some practical difficulties. The DGP would not be in the position to judge where every constable should be transferred in the state of Kerala. A practical solution has been provided in the Karnataka Police Draft Act, which sets up district PEBs, stating that the recommendations for transfers of Sub-Inspectors and Inspectors of Police shall be made by Inspector General, Deputy Inspector General and the Superintendent of Police of the particular district. This provision could be broadened to provide that the district PEBs shall also look into appointments and promotions as well as transfers. A district PEB will still ensure that the decision is taken by several superior officers who have a sound knowledge over the subordinate officers' work.

However, when it comes to the transfers and promotions of police officers of and above the rank of DySP, these decisions should be made by the DGP and the four senior officers as envisaged by the Supreme Court.

Power of the PEB

The Supreme Court envisaged binding powers for the PEB in relation to its decisions on transfers, postings and promotions for DySP and below. Furthermore, the Supreme Court's order provides that the Government shall *normally accept* the recommendation of the PEB for officers of the rank of SP and above. However, the draft is silent on the nature of powers extended to the PEB in relation to both aspects.

In view of the above CHRI recommends that:

116.1 Recommendation

Section 116.1 should be deleted in its entirety and replaced by the following:

"1. The Board shall discharge the following functions, namely:-

a) to decide on appeals, complaints and give general guidelines relating to all transfers, postings, promotions and other service related matters of police officers of and above the rank of DySP, subject to the provisions of the relevant service laws as may be applicable to each category of police officers;

b) to make recommendations to the state government on postings and transfers of officers of and above the rank of Superintendent of Police. The State Government shall give due consideration to the recommendations of the Board and normally accept them;

c) to function as a forum for appeal for disposing representations from officers of the ranks of Superintendent of Police and above regarding their promotion, transfer, disciplinary proceedings, or their being subject to illegal or irregular orders;

d) to review the functioning of the Police in the State either in general or with regard to specific instances; or

e) to discharge such other functions as may be assigned to the Board by the Government;

f) transfers, postings, promotions and other service related matters of officers below the rank of Inspector of Police shall be decided by a district PEB consisting of the Inspector General, Deputy Inspector General and Superintendent of Police"

Further, section 116.2 should be deleted in its entirety since the power of the PEB has been included under section 116.1.

116.2 Recommendation

Section 116.2 should be deleted in its entirety

Transfers and Tenure:

It is crucial that the powers extended to the PEB in relation to transfers and postings should respect the provision in the draft guaranteeing a minimum tenure to all officers.

In view of the above CHRI recommends the following:

116.4 Recommendation

Section 116.4 should be inserted into the Draft Act, 2008, stating the following:

"4. While effecting transfers and postings of police officers, the Board shall ensure that every officer is ordinarily allowed a minimum tenure of two years in a posting. If an officer is to be transferred before the expiry of this minimum term, the Board must record detailed reasons for the transfer."

Section 120 – Police Complaints Authority

General

The effectiveness of any Complaints Authority, Ombudsmen's office or Human Rights Commission depends on their function and how truly separate they are from Police and Executive influences, and how autonomous and well embedded their status is in the country's legal architecture. Their effectiveness also depends upon the width and clarity of their mandate, the scope of their investigative powers, the composition and competence of their leadership and staff, and the adequacy and sources of financing. A particularly crucial factor is their ability to compel obedience to their recommendations and the attention and clear support their reports and findings receive at the hands of the government and police. The Draft Act, 2008 sets up Police Complaints Authorities (PCA) on State and District levels

however the bodies are not in line with the Courts directives nor in line with international best practice.

Mandate of State PCA:

The State level PCA is only mandated to investigate death, rape and grievous hurt in custody caused by *DySP and below.* This is in direct violation of the Supreme Court directives. Such offences must be investigated regardless of ranks and thus the section must be amended to be inconformity with the directive.

> *120.1.ii Recommendation*
> **Section 120.1 (ii) should be amended by deleting the words "other ranks" and instead insert "Superintendent and above"**
>
> **"serious complaints against officer of the rank of Superintendent and above relating to (…)"**

Section 120.1 of the Draft Act, 2008 sets out the mandate of the State level PCA. When setting up a PCA it is crucial that such oversight mechanism has a broad mandate to sufficiently deal with the most common complaints against the police. According to the Draft Act, 2008 the State level PCA will look into complaints of molestation of women, death, grievous hurt or rape against any person in custody. Best practices indicates that apart from investigating individual complaints, oversight bodies also need to be able to review patterns of police behaviour and the functioning of internal discipline and complaints processing systems. Without these powers to monitor and review trends, they may end up receiving repeated individual complaints about similar forms of police misconduct, without being able to identify and address their root causes.

> *120.1.iii - vi Recommendation*
> **Further, section 120.1 should be amended by inserting the following additional clauses:**
>
> **"(iii) arrest or detention without due process of law. Provided *that* the State level Police Complaints Authority shall inquire into a complaint of such arrest or detention, only if it is satisfied prima facie about the veracity of the complaint.**
>
> **(iv) The Authority may monitor the status of departmental inquiries or departmental action on the complaints of "misconduct" against officers through a quarterly report obtained periodically from the State Police Chief, and issue appropriate advice to the police department for expeditious completion of inquiry, if in the Authority's opinion the departmental inquiry or departmental action is getting unduly delayed in any such case;**
>
> *Explanation:* **"Misconduct" in this context shall mean any wilful breach or neglect by a police officer of any law, rule, regulation applicable to the police that adversely affects the rights of any member of the public**

(v) The Authority may also call for a report from, and issue appropriate advice for further action or, if necessary, a direction for a fresh inquiry by another officer, to the State Police Chief when a complainant, being dissatisfied by the outcome of, or inordinate delay in the process of departmental inquiry into his complaint of "misconduct" as defined above, by any police officer, brings such matter to the notice of the Authority.

(vi) The Authority may lay down general guidelines for the state police to prevent misconduct on the part of police personnel."

Composition and selection procedures of the State level PCA

The main purpose of setting up civilian oversight mechanisms is to ensure that complaints against the police will not be influenced in an untoward or biased manner, particularly by the Executive. Independence is determined by the extent to which the body is separated from the Executive and the police. It is established that independence and credibility are improved when the oversight body comprises of leadership and staff drawn from outside government and police.

The composition of the State level PCA, according to the Draft Act, 2008 consists of a retired High Court Judge as Chair; a serving officer of the rank of Principal Secretary to the State Government; and a serving officer of the rank of Additional Director General of Police. It goes without saying that the overwhelming presence of serving IAS and IPS officers (knowing the power and influence such officers hold) kills the spirit behind this urgent necessity of the set up of these bodies and entirely defeats any independence for these bodies.

Further, neither the Chair nor the members of the State level PCA is selected in an independent manner as envisaged by the Supreme Court. This is a blatant violation of the Apex Court's decision. Ensuring that the Chief Justice empanels candidates for the Chair of the PCA is an important step. The final decision remains with the State Government, as is appropriate. However, giving a role to the Chief Justice adds a further layer of objectivity to the selection process and safeguards against the possibility of unwarranted influence from the Government.

The Supreme Court also set out a selection process for the members of the State level PCA. The members must be selected by the Government out of a panel of names prepared by the Lok Ayukta, the State Human Rights Commission or the State Public Service Commission. Failing to insert this language puts the Kerala Draft in violation of the Court's ruling. As stated above, inserting a role for independent bodies/institutions to empanel the candidates for the PCA contributes to an additional layer of objectivity and reassures the public that wrongful interference is kept to an absolute minimum. Without these selection procedures, experience shows that closed processes and narrow pool from which leaderships and staff are chosen, seriously erode perceptions of impartiality and every façade of an independent body is lost.

120.2 Recommendation

Sections 120.2 should be deleted in its entirety and replaced by the following:

"2. The State Authority shall consist of the following members, with a credible record of integrity and commitment to human rights:-

(i) A retired Judge of a High Court who shall be the chairman of the Authority, selected by the Government out of a panel of names proposed by the Chief Justice.
(ii) A retired officer not below the rank of Principal Secretary to Government; and
(iii) A retried officer not below the rank of Additional Director General of Police
(iv) a person with a minimum of 10 years of experience either as a judicial officer, public prosecutor, practicing advocate, or a professor of law;
(v) a person of repute and standing from the civil society;
(vi) provided that at least one member of the Commission shall be a woman

Provided that **all members other than the Chair shall be selected by the Government out of a panel of names proposed by the Lok Ayukta, the State Human Rights Commission and the State Public Service Commission."**

Composition and selection procedures of the District level PCAs

In accordance with the Supreme Court directive the Draft Act, 2008 sets up District level PCAs. However, these district level PCA suffers from the same shortcomings as the State level PCA. For the same reasoning above it is crucial that the Chair and members of the District level PCAs are empanelled by independent body/institution and ensures that the members are not serving officers, to gain credibility.

120.4 Recommendation

Section 120.4 shall be deleted in its entirety and replaced with the following:

"4. The District Police Complaints Authorities shall look into death, grievous hurt, or rape in custody, allegations of extortion, land/house grabbing or any incident involving serious abuse of authority.

Further, the District Police Complaints Authorities shall consist of the following members, with a credible record of integrity and commitment to human rights

(i) A retired Judge of a District Court who shall be the chairman of the Authority, selected by the Government out of a panel of names proposed by the Chief Justice
(ii) A retired District Collector
(iii) A retired District Superintendent of Police
(iv) a person with a minimum of 10 years of experience either as a judicial officer, public

prosecutor, practicing advocate, or a professor of law;

(v) a person of repute and standing from the civil society;

(vi) provided that at least one member of the Commission shall be a woman"

provided that all members other than the Chair shall be selected by the Government out of a panel of names proposed by the Lok Ayukta, the State Human Rights Commission and the State Public Service Commission."

Salary:

It is welcoming that the Draft Act, 2008 refers to the issue of providing remuneration and allowances to members of both the State and District Level Authorities, however, the text is incomplete. Nothing in the Draft Act, 2008 creates a positive obligation on Government to provide salary to the members of the Authority. This needs to be explicitly stated as it limits the potential that non-public salaried individuals may be prevented from fulfilling their duty to provide independent oversight, because of financial pressures.

120.5 Recommendation

Section 120.5 should be amended by inserting a new sentence at the beginning of the sub-section which reads:

"5. Remuneration and other allowances of the members of the State Authority and District Authorities shall be paid by the Government."

Section 120.5 should further be amended by inserting the following at the end of the paragraph:

", and shall not be varied to their disadvantage during tenure."

Staff:

The Draft Act, 2008 addresses the need to provide "facilities" for the "proper functioning" of the Police Complaints Authorities; however, it fails to expressly reference the need to provide staff. Strong investigative powers are a key factor for the success of these oversight agencies. The most effective oversight bodies require not only powers to investigate independently but also to call for evidence and compel police cooperation. The PCAs must also be able to make recommendations about individual cases as well as systemic improvements. These recommendations must also be acknowledged and acted upon.

Additionally, the Draft Act, 2008 must adequately address the problem with a pool of independent investigators. If the PCA does not have sufficient funds it will not afford such pool and rely solely on serving police officers for their investigations, ensuring that the PCAs will never be satisfactorily independent from the police. To avoid this scenario and to ensure the effectiveness of the PCA, the Authorities should be given investigative powers and sufficient funds to afford a pool of independent investigators. Therefore the funding and budgets should be adequately raised to properly empower the PCAs.

120.6.i - 120.6.iv Recommendation

Section 120.6 should be removed in its entirety and replaced with the following:

"6.1 (i) The Government shall, in consultation with the authority or authorities, provide all necessary facilities for their proper functioning;

(ii) Members of the Authorities shall be assisted by adequate staff with requisite skills, for efficient discharge of their functions of the Authority.

(2) The strength of the staff may be prescribed by the Government, keeping in view the size of Kerala, its population, and the average number of complaints against the police, and shall be periodically reviewed and revised.

(3) The staff shall be selected by the Authority, *inter alia*, on a contractual basis, through a transparent process.

(4) The remuneration and other terms and conditions of service of the staff shall be as prescribed from time to time.

Court-like Powers of Complaints Authorities:

The powers of the Authorities to compel evidence, etc. are fairly broad in the Draft Act, 2008. However, the full scope of powers awarded to the Complaints bodies under section 168 of the MPA, 2006 are absent. We consider these provisions very significant. For example, the MPA, 2006 includes clauses regarding requisitioning public records and issuing authorities for the examination of witnesses. The MPA, 2006 also contemplates the power to require persons to furnish information, to protect witnesses and statements, and visit stations and lock-ups. This language must be included in the Draft Act, 2008, in order to ensure that the Complaints Authorities may not only receive complaints, but that it has the full scope of broad powers to investigate and address the complaints. Absent these various powers there is a potential that the Complaints Authorities may be needlessly delayed or actually prevented from fulfilling the mandate given them by the Supreme Court.

120.7 Recommendation

Section 120.7 should be amended by deleting the current clause (d), and incorporate a new clause (e) and sub-sections (2) – (6):

"(d) requisitioning any public record or copy thereof from any court or office;
(e) issuing authorities for the examination of witnesses or documents; and
(f) any other matter as may be prescribed.

(2) The State or District Authority shall have the power to require any person, subject to legal privilege, to furnish information on such points or matters as, in the opinion of the Authority, may be useful for, or relevant to, the subject matter of the inquiry, and any person so required shall be deemed to be legally bound to furnish

such information within the meaning of Sections 176 and 177 of the Indian Penal Code, 1860.

(3) The Authority shall have the power to advise the State Government on measures to ensure protection of witnesses, victims, and their families who might face any threat or harassment for making the complaint or for furnishing evidence.

(4) The Authority may visit any police station, lock-up, or any other place of detention used by the police and, if it thinks fit, it may be accompanied by a police officer.

(5) No statement made by a person in the course of giving evidence before the Authority shall subject that person to a civil or criminal proceeding or be used against him in such proceeding, except a prosecution for giving false evidence:

Provided that the statement
(a) is made in reply to the question which he is required by the Authority to answer; or
(b) is relevant to the subject matter of the inquiry

Provided further that on conclusion of the inquiry into a complaint of 'serious misconduct' against the police personnel, if the Authority is satisfied that the complaint was vexatious, frivolous or *mala fide***, the Authority may immediately dispose of the complaint.**

(6) If, at any stage of the inquiry, the Authority considers it necessary to inquire into the conduct of any person, or is of the opinion that the reputation of any person is likely to be prejudicially affected by the inquiry, it shall give that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his support

Provided *that* **nothing in this section shall apply where the credibility of a witness is being impeached.**

Section 120.9 sets out the binding nature of the powers held by PCAs, however this has not been done in conformity of the Supreme Court directive. The Supreme Court states that the recommendations of the PCAs regarding criminal and disciplinary matters must be *binding on the Government*. The Draft Act, 2008 qualifies the "binding" nature of PCA disciplinary recommendations, stipulating that any such recommendation "shall, however, not prejudice the application of mind by the enquiry officer or the investigating officer when he is conducting the departmental inquiry or criminal investigation, as the case may be."

Experience shows that even independent oversight agencies with sufficient resources and strong investigative powers have been ineffective if the police and governments routinely ignore their recommendations. If these bodies only have recommendatory powers they will be reduced to toothless institutions causing the opposite effect for which they are created and public hopes of effective remedies

will be lost. Thus it is crucial that the Police Complaints Authorities will be given the power to make binding recommendations. The police must be obligated to report back to an Authority on action taken on Authority recommendations, within a stipulated time.

120.9 Recommendation

Section 120.9 should be amended by deleting the entire second sentence of the paragraph. The following words should be removed: "Such recommendations shall, however, not prejudice the application of mind by the enquiry officer or the investigating officer when he is conducting the departmental enquiry or criminal investigation, as the case may be."

Who can make a Complaint:

The Draft Act, 2008 does not address who is permitted to make a complaint to the State or District Police Complaints Authorities. In our view, this matter needs to be specified. The MPA, 2006 expressly stipulates that complaints must be accepted from a number of sources, including the victim him/herself. Providing a broad list will assist the public in understanding how the Authorities operate. More importantly, an expanded list will ensure the highest level of public accountability possible—the key is to avoid a situation whereby complaints can be dismissed at first instance simply because they have not been submitted by the correct individual.

120.13 Recommendation

Section 120 should be amended by inserting the following sub-section 13:

"13. The State or District level Authority shall inquire into allegations either *suo moto* **or on a complaint received from any of the following:**

(a) a victim or any person on his behalf;
(b) the National or the State Human Rights Commission;
(c) the police; or
(d) any other source.

Rights of Complainants:

The Draft Act, 2008 does not address the rights of the complaints making a complaint to the PCAs. Any inquiry process that follows the principle of natural justice must be in harmony with the rights of the complainant. This is vital for the legitimacy of the process itself, as well as to win public trust. The new Kerala Police Act should enshrine these rights to ensure that the complainant is kept informed throughout the inquiry process; can participate in the proceedings; and is adequately protected from any threats.

120.14 Recommendation

Section 120 should be amended to include a new section 14, which states:

The complainant shall have a right to be informed of the progress of the inquiry from time to time by the concerned inquiring authority. Upon completion of inquiry or

departmental proceedings, the complainant shall be informed of the conclusions of the same as well as the final action in the case at the earliest.

(4) The complainant may attend all hearings in an inquiry concerning his case. The complainant shall be informed of the date and place of each hearing.

(5) All hearings shall be conducted in a language intelligible to the complainant. In a case where hearings cannot be conducted in such a language, the services of an interpreter shall be requisitioned by the Government if the complainant so desires.

(6) Where upon the completion of the departmental inquiry, the complainant is dissatisfied with the outcome of the inquiry on the grounds that the said inquiry violated the principles of natural justice, he may approach the State or District Complaints Authority for appropriate directions.

Annual Reporting

An annual report must be prepared by any Police Complaints Authority, summarising the cases monitored, and providing recommendations to the Government regarding measures that can enhance police accountability. The Draft Act, 2008 is silent respecting any reporting duties of Complaints Authorities whatsoever. In our view, it is vital that the Draft Act, 2008 be amended to include such a provision. The job of the Complaints Authorities is to hold the police to account. However the Authorities themselves must be accountable, to the Government, the Legislature and the people of Kerala. By requiring the PCAs to complete a report, place it directly before the State Legislature during the Budget session, and make accessible to the public, the Government can maximise the public accountability of both the police and the Complaints Body that oversees the police.

120.15 Recommendation

Section 120 should be amended by inserting a new sub-section 15 stating:

"120.15 Reports of the State Police Complaints Authority
(1) The State Authority shall prepare an annual report at the end of each calendar year, *inter alia*, containing:

(a) the number and type of cases of "serious misconduct" inquired into by it;
(b) the number and type of cases of "misconduct" referred to it by the complainants upon being dissatisfied by the departmental inquiry into his complaint;
(c) the number and type of cases including those referred to in (b) above in which advice or direction was issued by it to the police for further action;
(d) the number of complaints received by the District Accountability Authorities, and the manner in which they were dealt with;

(e) the identifiable patterns of misconduct on the part of police personnel in the state; and
(f) recommendations on measures to enhance police accountability.

(2) The annual report of the State Police Complaints Authority shall be laid before the State Legislature in the budget session and shall be a public document, made easily accessible to the public.

(3) The State Police Complaints Authority may also prepare special reports with respect to specific cases directly inquired into by it. These reports shall also be made easily accessible to the public.

Section 123 – Expeditious Disposal by Complaints Authorities

The Draft Act, 2008 makes reference to the speedy disposal of complaints lodged with either the State or District Level Complaints Authorities. Past experience has shown that similar Commissions have taken long periods to conclude inquiries. This has resulted in loss of faith in the efficiency or effectiveness of the Commissions. Thus a clause for expeditious disposal in the current Draft Act is encouraging. However we propose a few amendments that will go to strengthen the present section.

The language in section 123.1 must be mandatory. We thus urge replacement of the word "may" with "shall". Further to give it more teeth it would be essential to fix an outer time limit within which it would be mandatory to dispose of a complaint. The Fifth Report of the Second Administrative Reforms Commission (June 2007), closely examined the issue of Police Complaints Authorities, both in India and internationally with comparative data. It concluded by recommending that "it should be mandated that all complaints should be disposed of within a month." In our view, a time period of between one but not more than 3 months is recommended.

In view of the above argument we recommend that the section be amended as under.

123.1 Recommendation
Section 123.1 should be amended by replacing the word "may" with "shall" on the first line.

Section 123.1 should be amended by inserting the following sentence at the end of the first sentence:
"All complaints shall be disposed as expeditiously as possible and in no case longer than three months to dispose of a matter."

Section 124 – Protection to Police Officers

The good faith exemption clause and the provision that no Court may take cognisance of any complaint or suit against police officers and persons authorised by them in section 124 of the Draft Act, 2008 mirrors the language used at section 197 of the CrPC which requires sanction for prosecution from the state

government. Section 124 of the Draft allows the Court to take cognisance only after a report from the station house officer. The immunity clause under the CrPC itself is under much debate and there have been several recommendations and suggestions to modify or repeal the same. Since a similar clause is already provided for in the CrPC it would be needless to include a similar and improvised version of it in the Draft Act as well.

Recommendation 124
Section 124 should be deleted in its entirety.

Section 136 – Cognisable and Bailable Offences

Section 136 sets out which offences are cognisable and bailable according to the Draft Act, 2008. The section does not follow the provisions of the first schedule of the CrPC. For instance, *torture* is regarded as a bailable offence according to the Draft Act, 2008. Though torture is not defined explicitly in the Indian Penal Code, it is held equivalent to grievous hurt as defined in sections 322, 325, 326, 329, 330, 331, 333, 335 and 338 of the IPC. All these offences are non bailable offences. Giving them the character of bailable offences would take away the seriousness of the offence, undermine existing statutory law, as well as make the victim of torture susceptible to threats and intimidation.

Since all of the offences in the Draft Act, 2008 originate from the IPC, it is crucial that these offences follow the classification of offences under the first schedule of the CrPC to avoid any discrepancy of law.

136. Recommendation
Section 136 should be deleted in its entirety.

Section 138 – Compoundability of Offences

Section 138 provides for the procedure to compound offences. This section is in direct violation of the provision in the Criminal Procedure Code and would most likely be struck down by a Court.

Section 320 of the CrPC clearly lists which offences can be compoundable and by whom. It also contains a prohibition clause which states that no other offences than the ones listed in the section can be compounded. However, the Draft Act, 2008 states that non-cognisable offences under the Draft can be compounded. As discussed above the offences listed in the Draft Act, 2008 have its equivalent in the CrPC and only one of those offences fall under that list.

Further the Draft Act, 2008 states that an offence can be compounded on request of the accused. This is contrary to section 320 CrPC which clearly sets out who can request to compound a case. Mostly it is the prerogative of the victim and not by the Station House Officer on behalf of the accused.

The Draft Act provides that the compounding of offences can be done by an Executive Magistrate. This is also in violation of the CrPC provision, only a Court has the power to compound a case and this power cannot be delegated.

Additionally, there is no obligation in law for the accused to pay a fee to compound a case. Some kind of gratification can be given to the victim in exchange of him/her abstaining from prosecution. However this compensation will be paid directly to the victim and not to the Station House Officer.

The Draft Act also states that the compounding of the case will be for all purposes be viewed as an acquittal however it may be used as evidence to prove any case that arises in the future. This goes against the principle of compounding of offences.

Section 138 of the Draft Act, 2008 is in direct violation of the CrPC and should be deleted.

138. Recommendation
Section 138 should be deleted in its entirety

New Delhi
Date: 10 March 2010