

SUBMISSION TO THE
COMMISSION ON THE IMPLEMENTATION OF THE CONSTITUTION

THE KENYA NATIONAL HUMAN RIGHTS COMMISSION BILL 2011



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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.

SUBMISSION on the KENYA NATIONAL HUMAN RIGHTS COMMISSION BILL, 2011.

Introduction

In accordance with Article 59 of the new *Constitution of Kenya 2010*, the Parliament will be asked to pass a law to establish a new Kenya National Human Rights and Equality Commission. It is understood that once a law is enacted, the existing Kenya National Commission on Human Rights will transition to have the powers, functions and responsibilities outlined in the new Act.

This submission represents the Commonwealth Human Rights Initiative's (CHRI) consideration of the draft Kenya National Human Rights Commission Bill ("hereinafter the Draft Bill") and our corresponding recommendations. We have analysed the Draft Bill, identified gaps and weaknesses, provided suggestions for amendment as well as recommended the inclusion of provisions. We have also considered the question as to whether there should be one National Human Rights Institution or multiple.

CHRI is an independent, non-partisan, non-governmental organisation headquartered in New Delhi, India. CHRI's areas of work are focused on the right to information, access to justice, and human rights advocacy.¹ Since 2001, CHRI's Access to Justice programme has been promoting police reform in the Commonwealth East African countries of Kenya, Tanzania and Uganda. CHRI has also published two reports on policing for each country, conducted regional roundtable conferences and helped establish civil society police reform networks. In 2009 and 2010, CHRI has been working in partnership with the African Policing Civilian Oversight Forum (APCOF) and the East African Police Chiefs Cooperation Organisation (EAPCCO) and in collaboration with the East African Community to articulate common standards for policing in the region.

In Kenya, CHRI was instrumental in the establishment of the civil society forum TURF - The Usalama Reform Forum - which is an organisation that brings together non-government organisation's working in the area of security sector reform. Through TURF, CHRI has made contributions to the legislative reform process underway in the policing and general human rights arena, with submissions made to the Police Reform Implementation Committee (PRIC) on Bills including the Independent Policing Oversight Authority Bill, National Police Service Bill, National Police Service Commission Bill and the Private Security Industry Regulation Bill.

¹ For more information on CHRI's activities, please visit www.humanrightsinitiative.org



GENERAL MATTERS

How many commissions?

The Constitution allows for either one Commission (called the *Kenya Human Rights and Equality Commission*) or for that Commission to be restructured into two or more separate Commissions (Article 59). The Commission for the Implementation of the Constitution (CIC) have drafted three bills to implement section 59, indicating a preference to have three separate Commissions - namely:

- the Kenya National Human Rights Commission;
- the National Commission on Gender and Equality; and
- the Commission for Administrative Justice.

In addition to this, Article 79 of the Constitution of Kenya directs Parliament to establish an Independent Ethics and Anti-Corruption Commission.

CHRI acknowledges that there is debate in Kenya regarding whether there should be one body to deal with human rights, equality and administrative matters, with various arms/commissioners, or whether there should be separate commissions for key areas. It is acknowledged that this debate is complex with strong arguments for both having one large institution mandated to deal with all human rights related matters (including equality matters) and having separate, distinct institutions that ensure rights of vulnerable groups are adequately addressed.

It is submitted that in particular, human rights and equality matters are interconnected, and it is suggested that the government consider merging the equality commission with the national human rights commission. The question of merging the Commission on Administrative Justice is more difficult, as arguably administrative law is more of a distinct subject area, and might be better suited to being a separate body.

In summary, CHRI suggest that the government consider:

- the option of one Human Rights and Equality Commission with designated commissioners with allocated budgets for particular vulnerable groups within society (for example, the groups listed under Part 3 of the Constitution: children, persons with disabilities, minorities and marginalised groups and older members of society - also women/gender could also be included)
- Either a separate administrative body, which investigates decisions and actions made by public bodies - it is suggested that this is called an Ombudsman instead of a Commission, or that this body be combined into the Independent Ethics and Anti-Corruption Commission
- In the case where the government decides to keep the Human Rights Commission and Gender and Equality Commission separate, that it is made clear in the relevant pieces of legislation what discrimination matters the Gender and Equality Commission will consider - such as discrimination on the basis of disability, ethnicity, age.

This position is set out in full below.

National Human Rights Institutions: Standards

Any commission dealing with human rights should, at a minimum, meet the basic standards detailed in the *United Nations Principles Relating to the Status of National*

*Institutions (the Paris Principles)*². The principles set the basic guidelines for the operation of National Human Rights Institutions (“NHRI”).

According to the collaborative study undertaken by the International Council on Human Rights and Office of the United Nations High Commissioner for Human Rights in 2005, “*Assessing the Effectiveness of National Human Rights Institutions*”, the following features must be present for national human rights institutions to be effective:

- Enjoy public legitimacy
- Are accessible
- Have an open organisational structure
- Ensure the integrity and quality of their members
- Have a diverse membership and staff
- Consult with civil society
- Have a broad mandate
- Have an all-encompassing jurisdiction
- Have power to monitor compliance with their recommendations
- Treat human rights systematically
- Have adequate budgetary resources
- Develop effective international links
- Handle complaints speedily and effectively

Regardless of whether there is one or multiple NHRIs in Kenya, each must meet the Paris Principles and have the features outlined above to ensure that they are effective in the carrying out of their mandate.

Although international law and guidelines discuss the minimum standards for NHRIs and the features required for NHRIs to be effective, it does not provide a definitive opinion on whether a single NHRI is a better model than multiple single-issue NHRIs, but rather leaves it open for nations to decide the best model for their country, based on their own particular national context. However, a recent article by Richard Carver, Senior Lecturer at in Human Rights and Good Governance at Oxford Brookes University, argues that a human rights institution that can adequately deal with equality matters including the specific needs of particular vulnerable groups, is the best functional model for NHRIs, and as such, has a better chance of meeting the Paris Principles and best practice standards.³

International practice and commentary

There are strong arguments for both a single human rights commission and multiple, specialized human rights institutions.

A single commission, or at least a combination of the human rights and equality commissions, is likely to be a more efficient use of resources, be a visible and easy point of contact for the public and have greater public and political legitimacy, hence increased power to hold people/government accountable and have consistent standards and practices due to the one legal and policy framework.

On the other hand multiple, specialized commissions regarding equality can ensure specialized knowledge and advocacy for particular vulnerable groups, and will not have to compete for resources from within a large, broad NHRI.

² Adopted by an international conference of NHRIs in 1991 and then adopted by the United Nations as an Annex to General Assembly resolution 48/134 of 20 December 1993 (<http://www.nhri.net/pdf/ParisPrinciples.english.pdf>).

³ Richard Carver “*One NHRI or Many? How Many Institutions Does it Take to Protect Human Rights? – Lessons from the European Experience*”, *Journal of Human Rights Practice*, Volume 3, Number 1, 2011

Practice within Africa

In Africa, the organisation of NHRIs has varied across countries, with some countries opting for one large commission, and others adopting multiple commissions.

In Ghana, the government decided to establish one large integrated body incorporating the work of an ombudsman (investigation into maladministration), anti-corruption commission, a human rights commission and equality commission⁴.

However, this model was rejected in Uganda, where, after establishing one large body similar to Ghana, the new Constitution of Uganda (1995) instituted two separate bodies: one for maladministration including corruption, and one for human rights and equality.

Zambia has followed a similar path to Uganda, except that it has a distinct ombudsman for dealing with maladministration, an anti-corruption commission and a separate human rights commission that also has responsibility for equality issues.

South Africa has a range of institutions that were set up under the Constitution, including a human rights commission, office of the ombudsman (Public Protector), a Commission for Gender Equality and a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.⁵

Previous consideration of this issue in Kenya

The review of the Constitution in Kenya in 2002⁶, referred to the experience of Uganda and South Africa, and subsequently recommended having a Commission for Human Rights and Administrative Justice, which would include investigation and recommendation into human rights and equality matters and administrative justice matters. The Report recommended that a separate Commission should be maintained for ethics and anti-corruption.

It is useful to note that the report stated the following about having multiple commissions relating to interconnected issues:

“The experience of Uganda and South Africa cautions us against having too many independent institutions. They are expensive, it is hard to raise money for them and it is not easy to find enough people with the necessary skills to staff them. Their functions overlap; this is likely to cause confusion amongst the public who may have some doubt as to where to take their complaints (for example, would treatment by a public official which suggests bias against women be a matter for the Gender Commission or the Human Rights Commission?). And different officials too may get confused - different commissions are likely to develop different approaches to similar issues. And unfortunately, it is hard to avoid competition between commissions, especially if more work means better resources..”⁷

Commentary

⁴ Commission on Human Rights and Administrative Justice in Ghana (CHRAJ)

⁵ See Chapter 7 of the 1996 South African Constitution.

⁶ The Constitution of Kenya Review Commission, *The People's Choice*, 2002

⁷ Ibid, p.82



Recently there has been some academic analysis of whether there should be a single human rights and equality body or whether there should be separate equality commissions, with some commentators arguing that a single NHRI, with the ability to cater for particular vulnerable groups, is usually the best option in practice due for reasons of efficiency, visibility, consistency in standards and legal framework and maintenance of human rights knowledge.

It is acknowledged however that each nation must form its own organisation of NHRIs according to the specific social, cultural and political context.

Richard Carver argues that the principle of universality and indivisibility of rights may be threatened by single-issue institutions for some vulnerable groups but not others (i.e. having a separate Commission for Women, but not for Indigenous Peoples). The proposed *National Commission on Gender and Equality* avoids this criticism somewhat, as it is not just focussed on gender, but rather has a broader function to, among other matters, “*promote equality and freedom from discrimination*” and “*to act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalized persons, women, persons with disabilities, and children*”⁸.

Carver also contends that arguments of practicality and efficiency strongly favour a single NHRI to deal with human rights and equality matters, stating that “*a single institution applies consistency in standards, can share good practice, is more cost-effective, is more publicly identifiable, has more impact on the authorities and is likely to enjoy broader public support*”.⁹ In order to ensure that one NHRI has sufficient expertise and sensitivity for vulnerable groups, Carver recommends specialized sections with dedicated funding within the NHRI, to advocate for particular groups.

Further, Renshaw, Byrnes and Durbach note that there is a trend to move away from the establishment of multiple, single-issue equality commissions (such as a gender commission) “*towards the “mainstreaming” of women’s and children’s rights within institutions with a broad-based mandate.*”¹⁰

United Nations specialized committees, such as the Committee on the Rights of the Child, have suggested that, in nations where resources are limited, to assist with the institutional protection of rights, that:

*“consideration must be given to ensuring that the available resources are used most effectively for the promotion and protection of everyone’s rights, including children’s, and in this context development of a broad-based NHRI that includes a specific focus on children is likely to constitute the best approach. A broad-based NHRI should include within its structure either an identifiable commissioner specifically responsible for children’s rights, or a specific section or division responsible for children’s rights.”*¹¹

* Usually, because commentators do note that it may not be the case in some nations

⁸ Section 8(a) and (c), *National Gender and Equality Commission*

⁹ Richard Carver “*One NHRI or Many? How Many Institutions Does it Take to Protect Human Rights? – Lessons from the European Experience*”, *Journal of Human Rights Practice*, Volume 3, Number 1, 2011, p.21

¹⁰ Catherine Renshaw, Andrew Byrnes and Andrea Durbach, *Human Rights Protection in the Pacific: The emerging role of national human rights institutions in the region*, 8 NZJPIIL 117, 2010

¹¹ *The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child* CRC/GC/2002/2 (2002).

Suggested options for the Way Forward

Option One: Consider merging the KNHRC and the Commission on Gender and Equality

CHRI suggest that the government considers merging of the National Commission on Gender and Equality and the Kenya National Human Rights Commission. CHRI suggest the model of one commission that deals with all human rights and equality matters, with various Commissioners mandated to deal with particular human rights areas.

The question of Administrative Justice is more difficult. It is recognised that traditionally administrative law has been considered separately by nations, primarily through the office of an ombudsman. However some countries, such as Ghana, have subsumed administrative oversight within the human rights commission.

CHRI suggest that the committee consider keeping the Commission on Administrative Justice remain separate, to investigate decisions and actions of the government and public bodies, as the functions of the current proposed administrative justice commission relate to investigating matters that may not traditionally be considered a breach of human rights (i.e. ineptitude of public servants). Although this overlaps with human rights, arguably it is a distinct area that deals with the administration of public office.

It is recognised that the Independent Ethics and Anti-Corruption Commission (or similar anti-corruption commission) will be set up in Kenya in accordance with Article 79 of the Constitution of Kenya. There is a question as to whether there needs to be a separate Commission for Administrative Justice and a separate ethics and anti-corruption commission as their functions and mandates clearly overlap. It could be combined (as in Uganda) or kept separate (as in Zambia).

The title of the Commission could be amended to refer to it as an Ombudsman, in line with the definition set out by the International Bar Association:

An office provided for by the constitution or by action of the legislature or parliament and headed by an independent high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons [alleging maladministration] against government agencies, officials and employees or who acts on his/her own motion, and who has the power to investigate, recommend corrective action and issue reports.¹²

Further the legislation regulating the administrative body and the Kenya National Human Rights Commission can be amended to require each body to collaborate and cooperate in relation to matters that involve public officials.

This model of organisation of institutions: one human rights and equality commission, one ombudsman to deal with maladministration and one anti-corruption commission; is the model followed in Zambia.

However it is noted that, in a situation where there is limited funding or other resources it may be better to combine the commission within the human rights commission, and a set up a separate commissioner or committee for administrative oversight. It would need to be ensured that the human rights commission is adequately funded to provide such broad oversight.

¹² Resolution, International Bar Association, 1974

Following the model where human rights and equality matters are combined, there could be one overarching commission with the suggested following separate Commissioners:

- Commissioner for general Human Rights (also the Chairperson)
- Commissioner for Gender
- Commissioner for Children
- Commissioner for Race Relations
- Commissioner for Internally Displaced Persons, Migrants and Refugees
- Commissioner for Indigenous Peoples
- Commissioner for Persons with Disabilities
- Commissioner for the Older members of society¹³

It is noted that Part 3 of the Constitution sets out the specific rights for the following groups: children, persons with disabilities, minorities and marginalised groups and older members of societies. These groups are included in the suggestion above, save for the fact that minorities and marginalised groups has been expanded to include ethnic groups, internally displaced persons, migrants, refugees (or asylum seekers) and indigenous peoples. In outlining the key groups above, consideration was also given to the significant issues that National Human Rights Institutions commonly face as outlined in the 2001 report of the Commonwealth Secretariat, *“National Human Rights Institutions: Best Practice”*, Chapter VI.

The Commissioner for Human Rights could oversee the distinct areas of the other Commissioners, as well as undertake inquiries into human rights matters that do not fall specifically under the other topics, such as rights to freedom of assembly, freedom of religion, economic social and cultural rights, corporate social responsibility etc.

The Constitution of Kenya allows for up to 9 members of a commission. Each Commissioner and specialized area should have designated funding within the budget of the NHRI. This will help to ensure that the work progressed by different Commissions to date can continue.

Such a model would ensure that each specific human rights area have staff that have thorough expertise and knowledge in the area, whilst also enhancing efficiency in relation to cost-savings and broad knowledge of all human rights areas within the one commission. For example, a complaint that relates to gender, human rights and indigenous persons could be considered in collaboration by the different Commissioners or staff of the Commissioners. In short, one human rights commission will reduce overlap in human rights areas and concentrate knowledge and expertise in the one body.

Additionally one commission incorporating human rights and gender may enhance women’s rights through gender mainstreaming and enhancing gender sensitivity into all human rights areas. A separate commission has the danger of fragmenting women’s concerns from mainstream human rights dialogue. Further, it is likely that one national human rights and equality commission with strong powers, adequate resources and guaranteed independence will have more visibility within Kenya, rather than two or more separate commissions.

¹³ This is the general model followed in Australia – separate Commissioners or deputy- Commissioners for particular groups.

Lastly, one legal and policy framework will reduce confusion and overlap. As John Hatchard states “*Fundamentally it is conceptually impossible (and unnecessary) to seek to divide the two sets of rights (human rights and equality) and, in practice, relatively few countries have adopted the two institutions model.*”¹⁴

If the government decides to merge the Gender and Human Rights Commissions, CHRI submits that all the functions and powers of the National Commission on Gender should be incorporated as functions of designated Commissioners under the *Kenya National Human Rights Commission Bill 2011*.

Option 2: Commissions remaining separate

In the event that the government decides to keep the commissions separate, CHRI submit that *The National Commission on Gender and Equality Bill 2011* and *Commission on Administrative Justice* should be amended to include the following same provisions as the *Kenya National Human Rights Commission Bill 2011*, including all the suggested amendments outlined by CHRI in the body of this submission:

- General Powers of the Commission
- Powers of a Court
- Powers relating to investigation
- Inquiry into complaints
- Action after inquiry
- Reporting and remedial action

CHRI note that Article 59(5)(b) of the Constitution of Kenya *requires* that each commission set up under Article 59(4) “*shall have powers equivalent to the powers of the Commission under this Article*”.

Further, if the commission are kept separate, there should an explicit clause in the founding legislation of all three bodies obliging them to coordinate and cooperate to avoid overlap, enhance cohesion and better protect the citizens they are mandated to serve. The South Africa Human Rights Act stipulates that the human rights commission:

“s7(1)(b) shall maintain close liaison with institutions, bodies or authorities similar to the Commission in order to foster common policies and practices and to promote co-operation in relation to the handling of complaints in cases of overlapping jurisdiction;”

Canada also has an almost identical provision.

The example of Hungary is also worth considering if the government would like to maintain separate institutions but also avoid some of the pitfalls of multiple institutions. Hungary maintains separate institutions that are established under the one legal framework. These institutions share an office building, have a combined budget, consider some complaints together, publish some reports together and have some staff in common.¹⁵

¹⁴ Hatchard, J., “*The Inter-relationship between Commonwealth Human Rights Commissions and other National Human Rights Institutions*”, 2003, http://www.britishcouncil.org/john_hatchard_inter_relation.pdf p26

¹⁵ Richard Carver “*One NHRI or Many? How Many Institutions Does it Take to Protect Human Rights? – Lessons from the European Experience*”, *Journal of Human Rights Practice*, Volume 3, Number 1, 2011, p.6

ANALYSIS OF THE CONTENT OF THE DRAFT BILL

Part 1 - Preliminary

SECTION 2: INTERPRETATION

Section 2 of the Draft Bill sets out the definitions of terms used throughout the Bill.

There are limited definitions in the Bill. CHRI suggest that the Draft Bill be closely considered and that all unclear terms be appropriately defined, and that consideration be given to the definitions included in the *Kenya National Commission of Human Rights Act 2002*, to be included in this Draft Bill where appropriate.

CHRI notes that the definition of “human rights” is currently stated as “*the fundamental rights and freedoms protected under the Constitution, and the laws of Kenya*”. Best practice recommends that human rights should be defined also by reference to all international human rights instruments, whether adopted by the State or not¹⁶. In accordance with this recommendation, CHRI submit that the committee consider expanding the current definition of human rights to include rights and freedoms protected in international human rights instruments.

Currently the word inquiry is used intermittently in the draft Bill, but the powers and functions of the Commission refer mainly to ‘investigations’. To reduce confusion, it should be made clear that a reference to an inquiry can include an investigation.

Recommendation: That the definition of human rights is redrafted as follows:

“means the fundamental rights and freedoms protected under the Constitution, the laws of Kenya and international human rights instruments”

That a definition of “inquiry” is included that states “*Inquiry means an investigation or consideration of a matter relating to human rights undertaken on the receipt of a complaint or at the initiative of the Commission*”

Part 2 - Establishment and Status of the Commission

SECTION 7: GUIDING PRINCIPLES

This section details the guiding principles that will direct the operation of the Commission.

CHRI suggest that the committee consider expanding this section to include a principle regarding adequate funding of the Commission to enable all functions to be carried out to the highest possible standard, similar to section 4(5) of the *Independent Policing Oversight Authority Bill 2011*¹⁷.

¹⁶ Commonwealth Secretariat, *National Human Rights Institutions: Best Practice*, 2001.p.18

¹⁷ Version of the bill released in July 2011

Recommendation: that the committee consider whether it is appropriate to include a subsection regarding adequate funding of the Commission, similar to that proposed under the *Independent Policing Oversight Authority Bill 2011*:

“Parliament shall ensure that the Authority is adequately funded for it to effectively and efficiently perform all of its functions”

SECTION 8: FUNCTIONS OF THE COMMISSION

Section 8 explains the functions that the Commission will carry out.

CHRI submit that, although some of the functions outlined in Article 59 of Constitution are good broad aspirations, to ensure that they are able to be implemented effectively, further details need to be added. For example, part of the current section 8(c) states that one of the functions of the Commission is *“to monitor, investigate and report on the observance of human rights in all spheres of life in the republic...”*. CHRI submit that this section can be expanded on to provide further guidance regarding the methods the Commission can undertake to carry out its functions.

In accordance with best practice, CHRI submit that a function of the Commission should be to comment, analyse, and participate in the drafting of laws and policy regarding human rights, to ensure that the best international standard is maintained in Kenya.¹⁸

Additionally CHRI believes that subsections 8(1)(d) and (e) are slightly confusing. For example, in the current draft it seems to make the following distinctions:

- the function of receiving and investigating complaints - and to take steps to secure appropriate redress where a violation is established;
- the function of, on its own initiative or on the basis of complaints, to investigate a human rights matter and make recommendations to improve the functioning of State organs

This seems to state that the Commission can only make recommendations when they investigate a matter at its own initiative - and only recommendations to improve State organs. So in this case, it appears that the Commission does not have the function of investigating, at its own initiative, a human rights matter relating to an act by a Corporation, and then taking subsequent appropriate action as required. Although these sections are included in Article 59 of the Constitution, CHRI submit that it should be clarified in the draft bill that the Commission has the functions of:

- Receiving, investigating and solving complaints in accordance with this Act
- Either on the basis of a complaint or at its own initiative, investigating a human rights matter and undertake appropriate action in accordance with this Act

On another note, if the National Commission on Gender and Equality (or the Commission on Administrative Justice) is combined within the mandate of the Kenya National Human Rights Commission, the functions of these Commissions as outlined in the respective bills should be incorporated into this draft bill.

Recommendation: that section 8 is amended as follows:

8 (1) The functions of the Commission are:

¹⁸ Commonwealth Secretariat, *National Human Rights Institutions: Best Practice*, 2001.p.24

- a. *to promote respect for human rights and develop a culture of human rights in the Republic, and without prejudice to the generality of the foregoing, to;*
 - (i) *participate in the drafting of national policy and laws regarding human rights;*
 - (ii) *on its own initiative, or when requested by the Minister or Parliament, to report on the laws that should be made, or current laws or bills that should be amended, by the Parliament, or action that should be taken by the Republic, on matters relating to human rights, including in order to comply with international instruments; and*
 - (iii) *encourage, cooperate with, and where possible collaborate with, other organisations, including international organisations, working to protect and promote human rights in Kenya in order to foster common policies and practices and promote cooperation in relation to the handling of complaints in cases of overlapping jurisdiction.*
- b. *to promote protection, and observance of human rights in public institutions and private institutions, and without prejudice to the generality of the foregoing, to;*
 - (i) *monitor and report on the compliance with human rights and international instruments by public and private institutions;*
 - (ii) *provide training and education to public and private institutions*
- c. *to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs and disciplined forces, and without prejudice to the generality of the foregoing, to;*
 - (i) *publicly report all complaints of human rights abuses registered with the Commission and compliance with international treaty obligations;*
 - (ii) *provide regular reports to the public of Kenya;*
 - (iii) *cooperate and collaborate with the Independent Policing Oversight Authority and the Commission for Administrative Justice; and*
- d. *to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated, in accordance with this Act.*
- e. *on its own initiative or on the basis of complaints, to inquire into a matter in respect of human rights, and to take steps to secure appropriate redress including by making recommendations to improve the functioning of state organs if necessary;*
- f. *to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights and without prejudice to the generality of the foregoing, to;*
 - i. *monitor compliance with international instruments and promote ratification of treaties;*
 - ii. *cooperate and collaborate with international treaty bodies in monitoring compliance to international treaty obligations;*

- iii. *make recommendations to both the Minister and the Parliament to ensure compliance with obligations under treaties and conventions relating to human rights;*
 - iv. *contribute to State reports regarding compliance with obligations under treaties and conventions relating to human rights*
- g. *formulate, implement and oversee programmes intended to raise public awareness of the human rights, obligations and avenues for redress available to citizens under the Constitution, laws of Kenya and international human rights treaty instruments.*
 - h. *Work with other human rights organisations and oversight bodies including the Commission on Administrative Justice, Independent Police Oversight Authority to ensure activities are efficient, effective and complementary and to establish mechanisms for referrals and collaboration*
 - i. *Monitor, investigate and take appropriate action on matters relating to administrative justice in the private sector;*
 - j. *To monitor, and where necessary pursue enforcement, of recommendations and other orders of the Commission;*
 - k. *to perform such other functions as the Commission may consider necessary for the promotion and protection of human rights*

SECTION 9: MEMBERSHIP OF THE COMMISSION

This section outlines the number and composition of the members of the Commission.

In the situation where the government consider that the Commission should have designated Commissioners for particular areas, as per the discussion in the Introduction, this needs to be reflected in the bill. One of these Commissioners, such as the Human Rights Commissioner, can also be elected as the Chairperson. The Commissioner for Human Rights could oversee the distinct areas of the other Commissioners, as well as undertake inquiries into human rights matters that do not fall specifically under the other topics, such as rights to freedom of assembly, freedom of religion, economic social and cultural rights, corporate social responsibility etc.

Recommendation: Section 20 be amended as follows:

(1) “The Commission shall consist of the following Commissioners, appointed in accordance with the Constitution and provisions of this Act:

- *Commissioner for Human Rights*
- *Commissioner for Gender*
- *Commissioner for Children*
- *Commissioner for Race Relations*
- *Commissioner for Internally Displaced Persons, Migrants and Refugees*
- *Commissioner for Indigenous Peoples*
- *Commissioner for Persons with Special Needs*
- *Commissioner for the Older members of society*

(2) The Commissioner for Human Rights will be the Chairperson of the Commission.



(3) Each Commissioner will be responsible for carrying out the functions of the Commission in reference to their particular area.

SECTION 10 : QUALIFICATIONS OF CHAIRPERSON AND MEMBERS

This section seeks to set out the requirements for holding office as the Chairperson or a member of the Commission.

The current draft states that a person is not qualified for the position of Chairperson if they have been “*removed from office for contravening the provisions of the Constitution or any other law*”. To ensure the integrity of the Commission, CHRI submit that the committee consider whether this subsection should be redrafted, or a further subsection included, stating that a person is not qualified to be a Chairperson or member of the Commission if they have been convicted of a criminal offence. This is different to subsection 10(3)(e) that states that a person is not qualified if they have been removed from office.

Recommendation: That the Committee include the following subsection under section 10(3):

(f) has been convicted of an offence under the laws of Kenya

SECTION 20: TERMS AND CONDITIONS OF SERVICE

This section states the remuneration of members and other terms and conditions of service will be determined by the Salaries and Remuneration Commission.

CHRI submit that the committee should consider expanding this section to provide a general standard for remuneration. The Commonwealth Secretariat “*National Human Rights Institutions: Best Practice*” publication of 2001 recommends that “members should be accorded a rank and salary comparable to that of senior judicial officers”¹⁹. This will encourage educated Kenyans to undertake the member position.

Recommendation: That the Committee consider incorporating a section in the draft bill that states that members shall be accorded a salary comparable to that of senior judicial officers.

SECTION 23: APPOINTMENT OF STAFF

This section outlines the procedure by which the Commission can appoint staff to carry out its functions.

CHRI submit that the draft bill should include provisions regarding training of relevant staff to ensure accreditation in investigation and complaint handling and knowledge, accreditation in negotiation, mediation and conciliation, human rights and sensitisation training for assisting the various groups of the Republic of Kenya.

¹⁹ Commonwealth Secretariat, *National Human Rights Institutions: Best Practice*, 2001.p.13

CHRI suggest that the Commission consider the establishment of a distinct legal section of the Commission to:

- Provide legal assistance and advice in relation to the undertaking of investigations or inquiries;
- Assist in the referral of matters to the Director of Public Prosecutions (as per section 41);
- Assist in conciliation, mediation and negotiation; and
- Provide other legal advice as required by the Commission in accordance with the functions of the Commission.

Recommendations:

That the bill incorporates sections relating to training of staff such as:

- *“All staff will be appropriately trained to carry out the functions of their position”*
- *“Staff will be provided with adequate training on human rights and sensitised training for working with various groups in the Republic”*
- *“Staff undertaking investigations into complaints will be accredited with investigative training certificates by a respected institution in Kenya ”*
- *“Staff undertaking negotiation, conciliation and mediation will be accredited with certificates in negotiation, conciliation and mediation by a respected institution in Kenya”*

That the committee consider the establishment of a legal section in the Commission to:

- Provide legal assistance and advice in relation to the undertaking of investigations or inquiries;
- Assist in the referral of matters to the Director of Public Prosecutions;
- Assist in conciliation, mediation and negotiation; and
- Provide other legal advice as required by the Commission in accordance with the functions of the Commission.

SECTION 26: GENERAL POWERS OF COMMISSION

CHRI submit that the powers outlined in the current Draft Bill need to be strengthened to ensure that the Commission will adequately be able to carry out its functions.

CHRI suggest that section 19 of the current *Kenya National Commission of Human Rights Act 2002* provides a good model of strong powers and at a minimum that these powers should be incorporated into the Draft Bill. For example, the current *Kenya National Commission of Human Rights Act 2002* has the power to visit prisons and places of detention or related facilities with a view to assessing and inspecting the conditions under which the inmates are held and make appropriate recommendations. Best practice also dictates that National Human Rights Institutions should have the power to inspect on custodial facilities and places of detention.²⁰ The Commission needs the power to inspect all places of detention including refugee camps.

Furthermore, the Commission should have the power to make binding recommendations, and to provide a mechanism for enforcement. This is a key

²⁰ Commonwealth Secretariat, *National Human Rights Institutions: Best Practice*, 2001.p.19

requirement to ensure that the Commission will be effective in protecting human rights in the Republic of Kenya. This is also addressed in relation to section 41 below, Action after Inquiry.

Although the Bill currently gives the Commission the power to issue summons, require statements and the production of any information, the bill should also place a positive onus on government agencies and public servants to cooperate with the Commission. This will encourage public servants to cooperate with the Commission from the beginning of an inquiry.

The Draft Bill should also include a provision for keeping the identity of a complainant, witness and/or person assisting the Commission, and any other relevant material, confidential. Witness protection should also be afforded in certain situations. (CHRI acknowledge that the current draft bill includes a section (s50) for maintaining confidentiality.) Such a provision will encourage people who fear reprisal to come forward and lodge complaints or provide evidence. To further protect complainants and witnesses, it may be useful to include a power allowing the Commission to restrict the publication of certain evidence or information, and to restrict any hearings of evidence held (which should ordinarily be open to the public - see section 38 below).²¹

The current draft Bill (s26(c)) empowers the Commission to “*adjudicate on matters relating to human rights*”. It is submitted that this sub-clause is confusing and should be redrafted to clarify the exact powers of the Commission in relation to providing resolution of any matter relating to human rights. For example, the bill could be amended to empower the Commission to “*on the basis of a complaint, or on its own initiative, to, as expeditiously as possible, investigate into any matter relating to human rights and to undertake any appropriate subsequent action in accordance with this Act*”. Further section 38 refers to hearings of the commission - it is useful to clarify that the Commission has the power to undertake hearings.

Best practice also dictates that human rights commissions should be given the power and standing to bring complaints to court in their own right and to assist individuals seeking a remedy for an alleged violation of human rights in the court system.²²

Recommendation: That the Commission is granted the following powers (either in this section or in section 27 or 28):

- ***On the basis of a complaint, or on their own initiative, to investigate alleged human rights violations*** (although this is a function of the Commission it is useful to reiterate it as a power as well)
- ***As part of the investigation, to conduct hearings in accordance with this Act***
- ***Negotiate, mediate or conciliate a human rights matter as appropriate***
- ***To visit prisons and places of detention or related facilities with a view to assessing and inspecting the conditions under which the inmates are held and make appropriate recommendations thereon;***
- ***Require the cooperation of government agencies and public actors***
- ***To be a respondent party or provide specialised reports to courts in relevant judicial proceedings regarding human rights;***
- ***After completion of an inquiry or investigation, make a binding recommendation in accordance with this Act*** (see Action after Inquiry)

²¹ Commonwealth Secretariat, *National Human Rights Institutions: Best Practice*, 2001.p.19

²² Commonwealth Secretariat, *National Human Rights Institutions: Best Practice*, 2001.p.29

- *Where necessary, the Commission may give directions prohibiting the disclosure of the identity of complainants, witnesses or those providing information to the Commission;*
- *Where necessary for the physical safety of any person, direct that any evidence given before the Commission or any information given to the Commission shall not be published except in such a manner, and to such persons, as the Commission specifies;*
- *To bring a proceeding before the Court in relation to a human rights matter in circumstances where referral to the Director of Public Prosecutions is not appropriate, or where a recommendation has not been acted upon;*
- *To assist a person or body in relation to a human rights matter before the Courts;*
- *To analyse existing and proposed legislation and make recommendations for amendment to maximize protection and promotion of human rights;*
- *To cooperate with the United Nations and other appropriate human rights bodies*

SECTION 27: POWERS OF A COURT

Again, CHRI suggest that the government consider section 19 of the current *Kenya National Commission of Human Rights Act 2002* and include some of these powers in the draft bill. For example, the current *Kenya National Commission of Human Rights Act 2002* states that the Commission has the powers of a court to order the release of an unlawfully detained person; the payment of compensation; or any other lawful remedy or redress.

Recommendation: That the government consider the powers of the current Commission under the *Kenya National Commission on Human Rights Act 2002* and include relevant powers.

SECTION 28: POWERS RELATING TO INVESTIGATIONS

This section details the powers of the Commission in relation to carrying out investigations into complaints.

As discussed above, CHRI believe that a section should be included that allows for complainants and witnesses to remain anonymous, similar to section 7(1)(a)(ix) of the *Independent Policing Oversight Authority Bill 2011*.

The complainant should be able to choose anonymity when lodging the complaint.

Recommendation: Either in section 26 above or section 28 to include a section regarding the preservation of anonymity of a complainant, such as s23(16) of the *Independent Policing Oversight Authority Bill 2011*:

“The Commission shall upon request from a complainant keep his/her identity confidential unless it is demonstrably in the interest of justice not to do so, until the investigation has been concluded, provided that the Commission may in exceptional cases determine that the identity of a

complainant many not be published even after conclusion of an investigation or only on terms determined by the Commission”

SECTION 30: LIMITATION OF JURISDICTION

As discussed above in section 8 (Functions of the Commission), provision should be made for the Commission to confer with the Independent Policing Oversight Authority and the Commission on Administrative Justice, and in the case of a complaint that overlaps in jurisdiction, refer the matter to either the Authority or the Commission to consider.

Recommendation:

That the following section be included in the Draft Bill:

“Where a complaint has been made to the Commission; and because the Commission is of the opinion that the subject-matter of the complaint could be more effectively dealt with by either the Independent Policing Oversight Authority or the Commission for Administrative Justice in accordance with the law; the Commission may:

- (a) discuss the matter with the complainant, and only with the complainants consent, refer the complaint to either the Independent Policing Oversight Authority, the Independent Ethics and Anti-Corruption Commission or the Commission on Administrative Justice;*
- (b) give notice in writing to the complainant stating that the complaint has been transferred and citing the reasons; and*
- (c) give to the Independent Policing Oversight Authority or Kenya Ombudsman Commission any information or documents that relate to the complaint and are in the possession, or under the control of, the Commission.*

Nothing in the above section shall limit the discretion of the Commission to conduct an inquiry into a matter that is currently being investigated or has been investigated by another Authority or Commission, such as the Independent Police Oversight Authority or Commission for Administrative Justice.”

SECTION 33: FORM OF COMPLAINT

This section details how a person/s can lodge a complaint and the process followed by the Commission after a complaint has been lodged.

CHRI submit that the section should be amended to state that the Commission must decide whether to investigate the complaint, and provide a response with reasons to the complainant within a reasonable timeframe.

That section 33(4) be amended as follows:

“Upon receipt of a complaint under subsection (1), the Commission shall:

- (a) make preliminary inquiries into the complaint, including but not limited to:*
 - (i) interviewing or taking a statement from the complainant;*

- (ii) *calling for relevant information regarding the complaint from the Government or any other body within a timeframe specified by the Commission;*
- (iii) *making any other relevant preliminary inquiries deemed necessary*
- (b) *decide within two months of receipt of the complaint whether to pursue an investigation into the complaint;*
- (c) *notify the complainant in writing of the decision made under subsection (b) above and detail the reasons for the decision*

SECTION 38 : HEARINGS OF THE COMMISSION

This section states that hearings of the Commission will not be open to the public. This is contrary to best practice, which recommends that hearings of National Human Rights Institutions should be open to the public, save for special circumstances (such as to protect a witness).²³

Additionally CHRI submit that this section should be expanded upon to provide further detail regarding the hearing process. It is worth clarifying:

- When hearings can be held (purpose): to gather evidence, but are not held to conduct negotiations, mediations or conciliations?
- What rulings the hearings can make: section 41 states that the Commission may refer the matter to the Director of Public Prosecutions or make other “action” as the Commission deems fit - it is not clear what kind of action the Commission can make. Can it make a ruling requiring specific action to be undertaken or for a penalty (fine) to be enforced? Can it, similar to powers under the current Kenya National Commission on Human Rights, make an order for the release of a detained person?

Further the bill should make it clear that a person has a right to assistance from an advocate, similar to section 9(5) of the South Africa *Human Rights Act 1994*. Although the current section 39(1)(b) states that person can be represented by an advocate, this is limited to the situation where the person is likely to be prejudiced by the inquiry. A general provision regarding assistance is useful.

Recommendations:

Section 38 is redrafted similar to the following:

“The hearings of the Commission shall be open to the public, except in circumstances where the Chairperson of the Commission deems it in the best interests of the inquiry to hold the hearing in private.”

That section 38 provides further detail regarding the purpose for a hearing and any rulings that can be made by a hearing.

Include a provision ensuring access to representation by person of choice, including a legal practitioner such as:

“Any person assisting or appearing before the Commission in accordance with this Act may be assisted by and advocate of their choice”

²³ Commonwealth Secretariat, *National Human Rights Institutions: Best Practice*, 2001.p.19

SECTION 41: ACTION AFTER INQUIRY

This section details the steps that the Commission can take after completion of an inquiry.

Section 41 should be amended to refer to steps made after an inquiry or investigation generally, not just to steps made after an inquiry into a complaint.

CHRI submit that a further section be added which outlines a process for ensuring that recommendations made by the Commission are considered seriously by government and must be adopted. Any recommendation or cause of action recommended by the Commission that is not followed should subject that person/body to penalties or should be enforceable by the Court. This is similar to section 28(3) of the *Independent Policing Oversight Authority Bill 2011*. Best practice also recommends that “*there should be an expressly established mechanism for the enforcement of appropriate NHRI decisions by the courts*”.²⁴ The *Commission on Human Rights and Administrative Justice Act 1993* (Ghana) empowers the Commission to bring a proceeding before the Court in the circumstances where the recommendations of the Commission have not been acted upon appropriately.²⁵

Further CHRI suggest that the committee consider including a clause that states that the Commission will monitor complaints for six months after the resolution of the complaint. This may help to reduce any reprisal taken against the complainant.

Recommendation: Section 41 should be redrafted as follows:

(1) The Commission may take any of the following steps after completing an inquiry under this Act:

- (a) Where the inquiry discloses, on the balance of probabilities, the possibility of the commission of a criminal offence, the matter must be referred to the Director of Public Prosecutions or any other relevant body to undertake such other action as the Commission may deem fit;***
- (b) Make a recommendation to the appropriate body for a remedy including, but not limited to, recommendations for an award of compensation or other form of restitution;***
- (c) Recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution;***
- (d) Provide a copy of the inquiry report including recommendations to all interested parties; and***
- (e) Submit summonses as it deems necessary in the fulfilment of its mandate.***

(2) “The recommendations of the Commission are binding on the relevant parties.

And, as per section 18(2) of the *Commission on Human Rights and Administrative Justice Act 1993* (Ghana), “*If within three months after the recommendation is made no action is taken which seems to the Commission to be adequate and appropriate, the Commissioner, may after considering the comments, if any, made by or on behalf of the department, authority or person against whom*

²⁴ Commonwealth Secretariat, *National Human Rights Institutions: Best Practice*, 2001.p.29

²⁵ Section 18(2), *Commission on Human Rights and Administrative Justice Act 1993* (Ghana)

the complaint was made, bring an action before any court and seek such a remedy as may be appropriate for the enforcement of the recommendations of the Commission.”

(3) After completing an inquiry the Commission must monitor the implementation of its recommendations for at least six months.

Part V - Financial Provisions

SECTION 45: FUNDS OF THE COMMISSION

This section explains how the Commission will be funded to carry out its functions.

Section 45(a) states that the funds of the Commission shall consist of “*monies allocated by Parliament for the purposes of the Commission*”. CHRI agree that the monies of the Commission shall be allocated by Parliament, however it is submitted that a minimum amount be required to be provided to the NHRI each year. This is in accordance with best practice, which states that “*members should be able to rely on a specific allocation from Parliament at a level sufficient to ensure an active and professional NHRI*”²⁶.

Section 45 (c) states that the Commission can receive funding from “*any other source provided, donated or lent to the Commission*”.

The funds of the Commission should only be those monies from the Government and any others that accrue to the Commission in the course of its functioning. It is submitted that, in order to maintain independence, subsection (c) should be deleted, and that the Commission not receive funds from any other source, either by way of donation or otherwise.

Alternatively, there is an argument that funds from external bodies should be allowed for the purpose of assisting with the functioning of the Commission. In this case, only funds from recognised international donor agencies should be allowed, not donations from individual people or corporations.

At the very least the previous drafting of the Bill (June 2011 draft) should be included (so that it adds the disclaimer “*provided that such donations and grants shall not be made or received for the purposes of influencing the decision or ability of the Commission in any way and shall be disclosed in the annual report of the Commission*”).

Recommendations:

That section 45(a) be redrafted to state:

“monies allocated annually by Parliament to enable the Commission carry out its functions in an active and professional manner”

Section 45(c) is redrafted as follows:

²⁶ Commonwealth Secretariat, *National Human Rights Institutions: Best Practice*, 2001.p.13

“all monies from any other registered international governmental aid agency donated to the Commission, provided that such donations and grants shall not be made with any conditions attached, save for the carrying out of the functions of the Commission and relevant legal and financial requirements”

Part VI - Miscellaneous Provisions

SECTION 52: OFFENCES

The current draft bill includes a provision regarding offences for failure to comply with the directions of the Commission (i.e. failure to provide information etc). The inclusion of this section is commended by CHRI. Best practice also states that human rights commission must have the power to *“effectively address non-co-operation, obstruction, or victimisation in an investigation, e.g. a refusal to produce evidence”*²⁷

The current section details the penalties for failing to attend the Commission, provide information to the Commission or generally obstruct the work of the Commission, including through intimidation, coercion or other threatening behaviour.

CHRI submit that the committee consider that threatening or prejudicial behaviour towards complainants should also be included as an offence (not just threatening behaviour towards the Commission) as per the *Australian Human Rights Commission Act 1986*.

Recommendation:

Consider amending the 52 of the Bill as follows:

“A person who:

- a. fails to attend before the Commission in accordance with any summons or order issued in accordance with this Act; or***
- b. fails to provide information or documentation to the Commission in accordance with this Act; or***
- c. having attended before the Commission, refuses to be sworn or to make an affirmation, or having been sworn or affirmed, refuses without lawful excuse, to answer any question or to produce any document; or***
- d. fails to comply with any lawful order or direction of the Commission; or***
- e. knowingly gives any false or misleading information to the Commission; or***
- f. causes an obstruction or disturbance in the course of any proceedings before the Commission; or***
- g. hinders, obstructs, assaults or interferes with:***
 - i. a member, or personal acquaintance of a member, participating in an inquiry, investigation or other matter in accordance with this Act;***
 - ii. a person acting for or on behalf of the Commission in relation to an inquiry or investigation or other matter under this Act;***

commits an offence which may attract a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding six months, or to both.

²⁷ Commonwealth Secretariat, *National Human Rights Institutions: Best Practice*, 2001.p.21

That the Committee consider the providing defences to the above offences included in a. and b. above, such as provision of a reasonable excuse.

That the Committee consider including a section similar to section 26(2) of the *Australian Human Rights Commission Act 1986*:

“A person who:

- a. refuses to employ another person; or*
- b. dismisses, or threatens to dismiss, another person from the other person’s employment; or*
- c. prejudices, or threatens to prejudice another person in the other person’s employment; or*
- d. intimidates or coerces, imposes any pecuniary or other penalty upon or takes any other disciplinary action in relation to another person*

by reason that the other person:

- e. has made, or proposes to make, a complaint to the Commission; or*
- f. has alleged, or proposes to allege, that a person has done an act or engaged in a practice that is inconsistent with or contrary to any human right; or*
- g. has furnished, or proposes to furnish, any information or documents to the Commission or to a person acting for or on behalf of the Commission; or*
- h. has given or proposes to give evidence before the Commission or to a person acting on behalf of the Commission;*

is guilty to an offence punishable upon conviction:

- i. in the case of a natural person - by a fine not exceeding ## or imprisonment not exceeding ##, or both; or*
- j. in the case of a body corporate - by a fine not exceeding ## (or other criminal sanctions against directors), or both.*

That the Committee consider the providing defences to the above offences such as where it appears to the Commission that the allegation or complaint being investigated or considered by the Commission was not made in good faith.

SECTION 53: REPORT OF THE COMMISSION

This section explains the reporting requirements of the Commission.

CHRI submit that an additional subsection should be included under s53(1) that states that the annual report will include a compilation of statistics of all complaints (types complaints made, inquiry undertaken, resolution met, whether any recommendation made has been adopted by the relevant body).

Further to enhance accessibility, CHRI submit that the annual reports of the Commission should be published on the Commissions website.

Recommendation: that section 53(1) be amended as follows:

The annual report shall contain, in respect to the year it relates -

- a. The audited financial statements of the Commission;*
- b. A table of all complaints lodged, inquiry undertaken, steps taken after inquiry, resolution, monitoring of inquiry after resolution.*
- c. The activities the Commission has undertaken to carry out its functions;*
- d. Recommendations on specific actions to be taken in furtherance of the Commission’s findings;*

- e. Recommendations on legal and administrative measures to address specific concerns identified by the Commission; and*
- f. Any other information the Commission may consider relevant.*

That section 52(2) is redrafted to state:

The Commission shall publish the report in the Gazette, in one newspaper with national circulation and on the website of the Commission.

Submission by:

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