

# Highlights of CHRI's Submission to the Kenyan National Constitutional Conference (NCC)

**A**fter the Roundtable Conference on Police Reform held in Nairobi, Kenya in April this year, CHRI and the Kenya Human Rights Commission (KHRC) sent a submission to the delegates of the National Constitutional Conference, the forum which is debating the Draft Constitution developed by the Constitution of Kenya Review Commission. Below are the salient points raised in the submission.

The ongoing constitutional review process represents a historic opportunity to break with the past practice of policing in Kenya. By defining the principles according to which law enforcement will be conducted in the new Kenya, by ensuring that police leaders will be able to make operational decisions free of illegitimate interference from outside the chain of command, by establishing new channels for holding the police accountable, and by strengthening existing channels of accountability, the National Constitutional Conference can create a legal and institutional environment in which reform can take place.

The National Constitutional Conference needs to ensure that the following priority areas are enshrined in the new Constitution.

1. Define the government's obligation with respect to police service. There is no statement in current law that describes the kind of police service to which Kenyan citizens are entitled or that imposes any particular obligation on the government to provide police service. The Draft Constitution can correct that deficiency and, in so doing, define the standard against which the police will henceforth be judged. CHRI proposes the following language: It is an obligation of the government of Kenya to maintain a police service that provides security to the people of Kenya, that protects the fundamental rights recognized in this Constitution, and that adheres to the rule of law at all times.
2. Establish a broad-based process for the appointment and removal of the Commissioner of Police. Under current law, the President has unbounded authority to appoint, and to dismiss, the

Commissioner of Police. The President can change the leadership of the police force at any time and for any reason. This has resulted in the police leadership having to prioritise, above all else, the task of maintaining the patronage of the President and the ruling party. The Draft Constitution proposed by the CKRC begins to correct this problem by requiring the approval of Parliament before any individual can be appointed to the office of Commissioner. The Draft Constitution might also establish a role for Parliament in any attempt to remove the Commissioner before the conclusion of his or her term of office. In other countries, like South Africa, the President is also required to convene a commission of inquiry prior to seeking the removal of the head of the police force.

3. Provide security of tenure and a fixed term of office for the Commissioner of Police. With some amount of job security, the Commissioner of Police would be able to prioritize the rule of law and the interests of the Kenyan people over the demands of powerful individuals outside the regular chain of command. The Draft Constitution proposed by the CKRC achieves this by establishing a fixed term of office for the Commissioner of Police and by providing that he or she may only be removed "for good cause."

Many police officers and observers of the police have argued that the duration of the term of office that the Draft Constitution would establish—ten years—is too long. These critics have said that such a long term of office might retard the process of change in the police force and demoralize junior officers by slowing down promotion through the ranks. They have advocated for a term of office lasting three to five years, renewable once.

4. Establish institutions of civilian oversight. There is a worldwide trend toward the establishment of independent institutions that allow citizens from outside the government to participate in overseeing the functioning of police force. These institutions have

been embraced by citizens and police officers alike for a number of reasons. First, they can help the police become more efficient and fair in certain aspects of their operations. Second, they can make administrative processes, like the promotion and transfer of officers, more transparent. Third, by making police processes more efficient, transparent, and fair, they can render the police more credible in the eyes of the public and thereby improve the relationship between the police and the public. This improved relationship, in turn, strengthens the capacity of the police to enforce the law.

Broadly speaking, two kinds of institutions have been established in other countries for the purpose of making the police more directly accountable to the people.

The first type of institution exerts actual supervisory power over the police force in certain areas of police functioning. One such supervisory institution, Nigeria's Police Service Commission, has disciplinary control over the Nigerian police force, and has power to appoint all of the officers in the police leadership below the rank of Inspector General, the top officer in the force. Nigerian law mandates that the members of the Police Service Commission shall be prominent citizens from outside the government and the police force. The members of the Commission serve fixed terms of office and have security of tenure.

The second type of civilian oversight institution does not have supervisory powers but instead has responsibility for handling the investigation of certain categories of citizen complaints against the police and other allegations of police misconduct.

Both types of institutions were established by the UK Parliament when it reorganized the Northern Ireland police in 2000 after decades of violence between religious communities in that country: a supervisory entity, the Northern Ireland Policing Board, and a complaints entity, the Police Ombudsman.

Some have argued that the Draft Constitution should establish a single entity for civilian oversight of the entire Kenyan Government, rather than specialized

entities for oversight of individual agencies. According to this argument, having too many civilian oversight entities dilutes the impact and institutional prestige of each one. Even accepting this argument, however, a stronger case can be made for establishing specialised entities for the oversight of the police than for other agencies of government. As discussed above, the police are more present in the lives of ordinary Kenyans than other agencies of government. Moreover, unlike other agencies of government, the police are authorized to use physical force against Kenyan citizens. For these reasons, the volume and sensitivity of complaints against the police are particularly high, and the need for civilian oversight of the police is particularly great.

5. Create a unitary police force. Whatever arguments may once have existed for maintaining both the regular Kenyan police force and the Administration Police, the purpose of the dual structure of policing in Kenya is no longer clear. Not only are most Kenyan citizens uncertain of the relationship between the two police forces, it appears that police officers themselves are often confused about the division of labor and about their answerability to provincial and district authorities. Moreover, it appears that the Administration Police have been more vulnerable to illegitimate political control, and consequently more implicated in past abusive practices, than the regular Kenya police. The National Constitutional Conference should seriously consider the creation of a unitary police force under the command of the Commissioner of Police.

At the very least, the division of labour between the two police forces must be clarified, their lines of command and responsibility must be disentangled, and the Kenyan people must be made better aware of their relationship.

By addressing the five priorities listed above, the National Constitutional Conference can lay a foundation for deep, sustainable police reform. Constitutional provisions that define the Government's law enforcement obligation, that protect the police from illegitimate influence, that create accountability mechanisms to restore and maintain public trust, and that clarify the institutional structure of policing are the first steps toward a renaissance in the relationship between the Kenyan police and the Kenyan public. ■