MAHARASHTRA POLICE (AMENDMENT) ORDINANCE 2014

CRITIQUE AND RECOMMENDATIONS FOR AMENDMENTS

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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.

Maharashtra Police (Amendment) Ordinance, 2014

Analysis and Recommendations for Amendments

INTRODUCTION

This submission represents the Commonwealth Human Rights Initiative's (CHRI) consideration of the Maharashtra Police (Amendment) Ordinance 2014 and our corresponding recommendations. We have analysed the Ordinance, identified gaps and weakness, and provided suggestions for amendments.

CHRI is an independent, non-partisan, non-governmental organisation headquartered in New Delhi. CHRI's areas of work are focused on the right to information, access to justice, and human rights advocacy.[1] For over 10 years now, CHRI has been campaigning for police reform in India. The organisation was a member on the Police Act Drafting Committee (PADC) better known as the Soli Sorabjee Committee which drafted the Draft Model Police Act, 2006 to replace the existing Police Act of 1861. CHRI has also intervened in the proceedings leading up to the 2006 Supreme Court decision in the *Prakash Singh case.*[2] CHRI also made regular submissions to the Justice (retd.) Thomas headed Monitoring Committee set up by the Supreme Court to monitor state compliance with its directives. CHRI's submissions were taken on board and widely used in the final report of the Committee which was submitted to the Court in August 2009.

The Ordinance makes amendments to the Maharashtra Police Act, 1951 to supposedly set the state on the path of police reform. It was promulgated by the Governor on 1st February 2014. It is clear that the Ordinance is intended only to incorporate the directives of the Supreme Court in the *Prakash Singh* case in the Maharashtra Police Act, 1951. The government has not taken the opportunity to overhaul the Police Act completely. As significant as they are, comprehensive legal reform has to go beyond the Court's directives. Any new law to govern policing must take into account all the prescribed recommendations without dilution as well as the needs and values of modern policing. This will require legal research, expert advice and opinion, and significant re-drafting. Even with regard to the Court's directives themselves, the Ordinance is not in compliance.

The Ordinance unfortunately fails to follow the schema as laid down by the Apex Court. Processes of checks and balances and independent accountability bodies explicitly drawn up by the Court's directives have been diluted or removed altogether in the Ordinance. It needs extensive review and certainly is not fit to be passed into law. CHRI recommends that when the Ordinance comes up for ratification, it should be allowed to lapse. Our abiding recommendation is that a comprehensive review of the Maharashtra Police Act, 1951 in its entirety must be done. A time-bound extensive exercise to draft a new law should be

[1] For more information on CHRI's activities, please visit: www.humanrightsinitiative.org
[2] *Prakash Singh and Others v Union of India and Others* (2006) 8 SCC 1

initiated, with wide public debate and consultation as an integral part of the pre-legislative process.

The Ordinance route

The need to pass an Ordinance also must be interrogated. When the legislature is not in session and the Governor of a state is satisfied that extraordinary, unforeseen and emergent circumstances exist wherein legislation cannot wait, he is empowered under Article 213 of the Constitution to legislate by promulgating an Ordinance.[3] Issuance of an Ordinance without there being unusual and exceptional circumstances makes this satisfaction incomplete and improper.

It is difficult to understand the urgency or special circumstances that prevailed which merited the passing of the same reforms ignored for so many years in the form of an Ordinance now. Ordinance-making power, a rare and unique power under the Constitution of India, essentially to meet urgent situations should be used conscientiously and diligently only in emergent circumstances where there is no other legislative alternative.

Unlike the passing of a regular Bill, there is no scope for detailed discussion, public consultation and arriving at consensus when promulgating an ordinance. Legislation when done by an elected body is open to criticism whereas promulgating an ordinance is purely an executive decision, which is not open to criticism or open discussion.

The Maharashtra Legislature does not have a Standing Committee that vets Bills related to policing. If the state government is truly interested in engaging in informed discussions on the Bill, it could introduce the Bill in the Legislature and have it referred to a Select Committee for detailed deliberations. The Select Committee can then open up the Bill to the public as well as seek or invite input or recommendations. If this process cannot be completed within the six week deadline, the Ordinance may be re-promulgated.[4] It is a valid action in law for Government to re-promulgate an Ordinance if it has not been able to get the approval of both Houses to the Bill which seeks to replace the Ordinance. The options are available. However it is up to the Government to display the sagacity necessary to make judicious use of the Ordinance-making power to ensure that a good police law is instituted in Maharashtra.

A new police law to govern future policing is a significant piece of legislation. Considering the fact that the functioning of the police has a direct impact on the upholding of the law and protecting of fundamental rights and freedoms of people it is vital that such a law be passed after wide public consultation. The government needs to take time to invite wide public debate on the type of police service that people would like to see and include an open dialogue with the rank and file at all levels of the police about the type of service they want to be part of.

[3] As per the procedure in the Constitution, any Ordinance that is promulgated will lapse within six weeks of its date of promulgation, unless it is ratified by the State Assembly at its immediate next session from the Ordinance's date of promulgation.

[4] Though we absolutely warn against this in the Ordinance's current form. As stated above, the Ordinance is not fit to be passed into law in its current form. It should be allowed to lapse.

ANALYSIS

Clause 3 (amending Section 6 of the principal Act): Appointment, Term of Office, and Removal of Director General of Police

The Ordinance adds new sub-clauses to Section 6 of the principal Act on appointment of the DGP and the post's tenure. It also lays down the criteria for removal before expiry of tenure. These new provisions do not comply with the Court's directive in the following ways:

- There is no shortlisting process. To immunise the process of selection from potential undue influence, the Supreme Court specifically required that the Chief of Police be selected from a panel of three candidates chosen by the Union Public Service Commission. The Ordinance omits this, and allows the Chief of Police to be appointed on the sole discretion of the state government. This violates the Court's order and again creates a situation of possible patronage. CHRI recommends that the State Security Commission be the body responsible for empanelling potential candidates who would then be eligible for the post of Director General of Police.[5]
- The DGP has been given a minimum tenure of two years subject to superannuation. The Court had directed that the DGP should have "a minimum tenure of at least two years irrespective of his date of superannuation".

The Ordinance lays down the specific conditions under which the DGP can be removed prior to the expiry of the post's tenure by the state government, but there is no requirement that this should be done in writing. CHRI recommends there should be a stipulation that this can be done only through a written order with reasons specified.

CHRI recommends the deletion of the new sub-clauses 6(1A) and 6(1B). We recommend these are replaced with the following sub-clauses:

(1A)The State Government shall appoint the Director General of Police from amongst three senior-most officers of the state Police Service, empanelled for the rank.

(1B)The empanelment for the rank of Director General of Police shall be done by the State Security Commission established under Section 22A of Chapter II-A of this Act, considering, inter alia, the following criteria:

(a) length of service;

[5] Empaneling by the State Security Commission is dependent on the composition of the Commission being as prescribed. That is not the case here. Going by the present design of the Commission, we do not recommend that it carries out the empanelment function. Our recommendation stands for a State Security Commission that is constituted as per the Court's directive and Model Police Act, 2006 formulation. If the present formulation of the SSC is retained, then the empanelment should remain with the Union Public Service Commission.

(b) assessment of the performance appraisal reports of the previous 15 years of service by assigning weightages to different grading, namely, 'outstanding', 'very good', 'good', &'satisfactory';

(c) range of relevant experience, including experience of work in central police and intelligence organisations, and training courses undergone;

(d) indictment in any criminal or disciplinary proceeding or by Inquiry Committee or Commission duly appointed by the Central or State Government for any offence, in particular corruption and/or negligence in duty; or charges having been framed by a court of law in any case shall make a person ineligible for consideration.

(1C) The Director General of Police so appointed shall have a minimum tenure of two years irrespective of his normal date of superannuation: Provided that the Director General of Police may be removed from the post before the expiry of his tenure by the State Government through a written order specifying reasons, consequent upon:

(a) conviction by a court of law in a criminal offence or where charges have been framed by a court; or

(b) punishment of dismissal, removal, or compulsory retirement from service or of reduction to a lower post, awarded under the provisions of the All India Services (Discipline and Appeal) Rules 1969 or any other relevant rule; or

(c) suspension from service in accordance with the provisions of the said rules; or

(d) incapacitation by physical or mental illness or otherwise becoming unable to discharge his functions as the Director General of Police; or

(e) promotion to a higher post under either the State or the Central Government, subject to the officer's consent to such a posting.

Powers and Responsibilities of the Director General of Police

While putting in place a process for appointment and tenure for the Chief of Police, the Ordinance does not touch in detail upon his role. At present, Section 6 of the principal Act provides that the role of the Chief of Police is the "direction and supervision of the police force" and he shall "exercise such powers and perform such functions and duties and shall have such responsibilities and such authority as may be provided by or under this Act or orders made by the State Government".

Going further than the Court's scheme, CHRI recommends that the Chief of Police's role be defined with specificity, not only to make it clearer but also to delineate one aspect of the precise contours of the police-executive relationship (further details on

this below). We recognise this is adding provisions to the Ordinance which are outside its current purview, but as this is directly related to the appointment and tenure of the police chief, from our view, these provisions are essential to delineate the DGP's role and responsibilities.

CHRI recommends the insertion of the following sub-clauses following the new sub-clauses suggested by us on appointment, tenure and removal of the DGP:

> ***(1) The Director General of Police shall be responsible to the Minister-in-charge 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; and***
> ***(d) giving effect to any lawful directions.***
>
> ***(2) The Director General of Police shall act independently of the Minister regarding:***
>
> ***(a) the maintenance of order in relation to any individual or group of individuals;***
> ***(b) the enforcement of the law in relation to any individual or group of individuals;***
> ***(c) the investigation and prosecution of offences; and***
> ***(d) decisions about individual police officers.***

Superintendence of the Police (or Relationship between the Police and Political Executive)

The present reality demands that police legislation must address separating the police from undue political interference. The Court as well as various Committees that have deliberated on police reforms have relied on providing statutory tenure coupled with a buffer body like the State Security Commission to deliver the separation of policing from politics. While welcome, we do not think that these arrangements are sufficient.

It is only through a clear expression of the dual roles of executive superintendence and police administration that the operational responsibility and accountability of the police can be ensured, without sacrificing the important function of legitimate political oversight and supervision. Unfortunately, as above, this is an issue that the Ordinance does not include, but that we feel is essential to include.

Section 4 of the principal Act states that the superintendence of the police force "vests in and is exercisable by the State Government and any control, direction or supervision exercisable by any officer over any member of the Police Force shall be exercisable subject to such superintendence".

There is no question that the police are accountable to the political executive. But the language in law has to expand beyond notions of "control" and "superintendence". The

law needs to be more precise and explicit in conditioning the roles of the police and political executive. It needs to lay down with precision the powers of the Minister-in-charge on one hand and the DGP on the other, the scope of directions that can be given from the political executive to the police chief and importantly those that cannot, and identify processes to be followed and the consequences for when they are not. Following on from the formulation regarding the police chief's specified role, the below mentioned provisions provides the practical means by which the relationship between the political executive and the police chief can be precisely specified.

CHRI recommends the following new sub-clauses are inserted into the Ordinance in the appropriate place (this essentially deletes and re-drafts Section 4 of the principal Act):

> ***(1) It shall be the responsibility of the State Government to ensure an efficient, effective, responsive and accountable Police Service for the entire state. For this purpose, the power of superintendence of the Police Service shall vest in and be exercised by the State Government in accordance with the provisions of this Act.***
>
> ***(2) The State Government shall exercise its superintendence over the police in such manner and to such an extent as to promote the professional efficiency of the police and ensure that its performance is at all times in accordance with the law. This shall be achieved through laying down policies and guidelines, setting standards for quality policing, facilitating their implementation and ensuring that the police performs its task in a professional manner with operational responsibility.***
>
> ***(3) The Minister-in-charge may give the Director General of Police directions on matters of government policy that relate to:***
>
> ***a) the prevention of crime;***
> ***b) the maintenance of public safety and public order;***
> ***c) the delivery of police service; and***
> ***d) general areas of law enforcement.***
>
> ***(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***
>
> ***(5) The Minister must not give directions to the Director General of Police in relation to the following:***
>
> ***a) enforcement of the criminal law in particular cases and classes of cases***
> ***b) matters that relate to an individual or group of individuals***
> ***c) decisions on individual members of the police***
>
> ***(6) If there is dispute between the Minister and the Director General of Police in relation to any direction under this sub section, the Minister must, as soon as practicable after the dispute arises,***

a) provide that direction to the Director General of Police in writing; and
b) publish a copy in the Gazette; and
c) present a copy to the Legislature

CHAPTER II-A: STATE SECURITY COMMISSION, POLICE ESTABLISHMENT BOARDS AND POLICE COMPLAINTS AUTHORITIES

In seeming compliance with the Court's directives, the Ordinance introduces a new Chapter II-A into the principal Act to establish a State Security Commission, Police Establishment Boards, and Police Complaints Authorities. As laid down in the Ordinance, none of these comply with the Court's directives.

Clause 22B: State Security Commission

Clause 22B of the Ordinance requires the state government to establish a State Security Commission. The premier value of a Security Commission lies in its ability to be a bipartisan, impartial body that can ensure that policing functions are performed away from the pulls and pressures of the government of the day. Membership that includes varied expertise, professional skills, life experiences and citizens' interests can enrich its functioning and assure its legitimacy.

The Supreme Court required that:
• the Commission "shall" be headed by the Chief Minister or Home Minister as the Chair; it should also have the Leader of Opposition as one of its members and have the Director General of Police of the state as the ex-officio Secretary;
• *"the other members of the Commission shall be chosen in such a manner that it is able to function independent of Government control".*

The Court identified three models – the NHRC model, the Ribeiro Committee model or the Sorabjee Committee model, for states to choose from. In all the three models identified by the Court, there was representation of the Home Minister/Chief Minister/Minister in charge of police, the Leader of the Opposition, at least one member from the judiciary in addition to the members from the executive, police and between three and five independent members.

There are problems with the composition of the Commission in the Ordinance, when seen against the Court's guidance, that dent the Commission's independence:

- There is no judge as a member of the SSC as suggested by the Court's identified models. Instead, there are three members from the political executive – the Home Minister, Chief Secretary, and Additional Chief Secretary (Home). This needs to be corrected particularly considering that the state government has given itself the sole discretion to select (and effectively, remove) the non-official members. This leads to the perception that almost all the members will be tilted in favour of the political executive.

- There is no independent selection panel for the appointment of the five non-official members. The state government is to nominate these members. The state government has diluted its own July 2013 government order (Home Department Resolution, dated 10 July 2013)[6] setting up an SSC which had an independent panel to shortlist candidates for appointment as non-official members. This was made up of a retired High Court judge, Chair of the state Human Rights Commission and Chair of the state Public Service Commission. This panel is in line with the selection panel laid down in the Model Police Act, 2006 and must be brought back.
- While the non-official members have been given two-year tenure, the Ordinance stipulates that the Chair of the Commission (who is the state Home Minister) can remove a member before the expiry of their tenure for specific reasons. Even though the Ordinance states that a member will not be removed without being given the opportunity to be heard, this is a huge amount of discretion for the Home Minister. The Model Police Act, 2006 provides a process for removal which must be considered.
- The Court had stipulated that the recommendations of the Commission are to be binding. The Ordinance makes them "advisory in nature". Without binding powers, the SSC may be reduced to a toothless body with the state government disregarding its recommendations when they are inconvenient.
- As per the Court directive, the Commission should produce an Annual Report to be laid before the state legislature and made public. The Ordinance omits this.

CHRI recommends the following:

Redraft 22B sub-clause (2) to state:

(2) The State Security Commission shall have as its members:

(a) The Minister-in-charge of Home Department as its Ex-Officio Chairperson;

(b) The Leader of the Opposition in the State Assembly;

(c) A retired High Court Judge, nominated by the Chief Justice of the Bombay High Court;

(d) The Chief Secretary;

(e) The Director General of Police as its Member-Secretary; and

(f) Five non-official Members to be appointed on the recommendation of the Selection Panel constituted under Section 22B.

Insert a new sub-clause before 22B sub-clause (4) to state:

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

(a) a retired Chief Justice of Bombay High Court as its Chairperson, to be nominated by the Chief Justice of the

[6] Government Resolution No. SSC-1013/CR-108/Pol-3

High Court;

(b) a person nominated by the Chairperson of the Maharashtra Human Rights Commission; and

(c) a person nominated by the Chairperson of the State Public Service Commission.

Delete sub-clause (6) and replace it with the following three new sub-clauses:

(6) An Independent Member may be removed from the State Security Commission by a two-thirds majority of members of the Commission on any of the following grounds:

(a) proven incompetence; or

(b) proven misbehaviour; or

(c) failure to attend three consecutive meetings of the State Security Commission without sufficient cause; or

(d) incapacitation by reasons of physical or mental infirmity or otherwise becoming unable to discharge his functions as a member.

Provided that no member shall be removed under the provisions of this clause except after giving him a reasonable opportunity of being heard.

(7) In addition, an Independent Member shall be removed from the State Police Board if he incurs any of the grounds of ineligibility specified under Section 22B(4).

(8) The State Security Commission shall explicitly state in writing the grounds for such removal.

Delete sub-clause (10) and replace it with the following:

(10) The recommendations of the State Security Commission shall be binding.

Insert new sub-clauses (11) and (12) to state the following:

(11) The State Security Commission, shall, at the end of each year, present to the State Government a report on its work during the preceding year including its evaluation of the performance of the police force.

(12) The State Government shall lay the Annual Report before the State Legislature in the budget session. The Annual Report shall be made easily accessible to the public.

Clauses 22C to 22N: Police Establishment Boards

Several new Sections are added to the principal Act by the Ordinance in clauses 22C to 22N to set up Police Establishment Boards (PEBs) at various levels. In Maharashtra, the issues of tenure and transfers of government servants cannot be seen with reference only to the Court's directive. Maharashtra also has a state law – the Government Servants Regulation of Transfers and Prevention of Delay in Discharge

of Official Duties Act, 2005 (the 2005 Act from here on) – which predates the 2006 judgment. This law covers all government servants, including police officers, in terms of tenure and transfers.

The very idea behind setting up Establishment Boards was to give the day to day functioning of the police back into the hands of the police. In effect, the Board is intended to bring crucial service related matters largely under police control. The thinking was that this statutory demarcation will decrease corruption and undue patronage, given the prevailing illegitimate political interference in decisions regarding police appointments, transfers and promotions.

Insulating decisions on transfers from political interference is the central plank around which the Court's directive is designed. The directive stipulates that the PEB "is to be a departmental body" made up of the DGP and four senior officers. The Court had directed that the PEB has the power to **decide** all transfers, postings and other service related matters of officers of and below the rank of Deputy Superintendent of Police – and it stipulated that the state government "may interfere" with PEB decisions only "in exceptional cases only after recording its reasons for doing so". The PEB is also to make recommendations to the State Government regarding the posting and transfers of officers of and above the rank of Superintendent of Police – here again it was stipulated that the "government is expected to give due weight to these recommendations and shall normally accept it". It was also to function as a forum of appeal for officers of the rank of SP and above. Clearly, the Court envisaged that the PEB and its decisions and recommendations were to be insulated as much as possible from the political executive.

This is not the case in the Ordinance. The Ordinance sets up Police Establishment Boards at four levels. PEB 1 is to advise and make recommendations to the state government on postings and transfers of police officers (and on officer's grievances of these decisions) of and above the rank of Deputy Superintendent of Police. PEB 2 is to "decide" transfers and postings of Police Inspectors and below. A Range-level and a Commissionerate-level PEB are also set up to decide transfers, postings and other service related matters of subordinate officers (Sub-Inspectors and Inspectors) within their jurisdictions. We point out that there is overlap between the mandates of PEB 2 and the Range and Commissionerate PEBs, this may lead to confusion in practice. This will have to be carefully re-considered and may require amendment.

There are glaring inconsistencies with the Court's directive:

- PEB 1 and PEB 2 each have Secretary-level officers.[7] The Additional Chief Secretary (Home) is the Chair of PEB 1. The Secretary or Principal Secretary (Appeal and Security) is a member of PEB 2. This defeats the Court's design of PEBs being "departmental" bodies, made up only of police officers.
- Ultimately, as deemed by the 2005 Act and a new Section 22N in the principal Act (the Police Act) inserted by the Ordinance, the Chief Minister is the "competent authority" for general transfer of all IPS officers, and the Home

[7]The Range and Commissionerate PEBs are made up only of police officers.

Minister for state cadre officers of and above the rank of Deputy Superintendents.[8] With this already in place, and PEB 1 only with the powers to advise and recommend, there is no reason that the Additional Chief Secretary has to Chair PEB 1.

- With reference to PEB 2, which has ostensibly been given the power to decide postings and transfers of Police Inspectors and below, a problematic clause is Clause 22F sub-clause (3) in which the State Government may, "from time to time, give directions in public interest and administrative exigencies in respect of postings, transfers and disciplinary matters relating to Police Officers and such directions shall be binding on the Board". This is broad discretion which has been made binding, a huge clip on the powers of PEB 2. This kind of proviso defeats the Court's insistence on keeping the political executive at arms- length from decisions on transfers and postings.

One of the biggest blocks to compliance with the Court's directive is the unchecked power the state government has given itself to order mid-term transfers. The PEBs have been kept out of this entirely, and there is no requirement to record reasons in writing for mid-term transfers.

- All police personnel are given a "normal" tenure of "two years in one post or office", subject to promotion or superannuation in the Ordinance.[9]
- The State Government has kept the power to effect mid-term transfers with itself for ranks of and above Sub-Inspectors. The "competent" authorities to order mid-term transfers are defined in Clause 22N. The Chief Minister is the "competent authority" for IPS officers, the Home Minister for state police service officers of the ranks of Police Sub Inspectors to Deputy Superintendents, and the DGP and IGP for constables to Assistant Sub-Inspectors. It must be noted that in the 2005 Act, the Home Minister is the transferring authority only for gazetted officers, but for mid-term transfers in the Ordinance, the Minister's remit has been extended to Inspectors and Sub-Inspectors.This is not consistent with the PEBs established. It gives two different authorities the power to order transfers. This requires clarification and a possible amendment.
- The same clause lays down the grounds on which mid-term transfers can be ordered, which are largely in keeping with the Court's guidance. The problem is sub-clause (2) which lays down that in addition to these, "in exceptional cases, in public interest and on account of administrative exigencies", the competent authority (cited above) can order a mid-term transfer. Again, these are broad grounds with too much ambiguity. If these are misused or applied in an ad-hoc manner, there is great potential for clashing with the PEBs. Allowing this kind of discretion ultimately defeats security of tenure.

[8]This is in line with the scheme laid down in Section 6 of the Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act (2005) which defines the "transferring authority" for different levels of government servants. The Ordinance reproduces this in 22N specific to the police rank structure.

[9]This is at odds with what is laid down in the Government Servants Regulation of Transfers and Prevention of Delay in Discharge of Official Duties Act (2005) which provides a three-year tenure for virtually all levels of government officers. This will have to be addressed.

A combined reading of these clauses of the Ordinance shows that the political class is in no mood to loosen its grip over the police. Through these provisions, it is ensuring that government largely retains control of the transfers or postings of the police.

CHRI recommends:

Remove the political executive from PEB 1 and PEB 2. Ensure Police Establishment Boards are in line with the Court's order that stressed these should be departmental bodies.

Delete sub-clause (3) of Clause 22F

Review the Home Minister's remit to order mid-term transfers for non-gazetted officers

Delete sub-clause (2) of Clause 22N

Insert the following second proviso following the proviso after sub-clause (1) of Clause 22N:

> ***Provided that in all such cases, the competent authority shall report in writing the matter with all details to the next higher authority as well as to the Director General of Police. It shall be open to the aggrieved officer, after complying with the order, to submit a representation against this premature removal to the relevant Police Establishment Committee, which shall consider the same on merit and recommend due course of action to the competent authority.***

Clause 22O - Separation of Law & Order from Investigation

The separation of law and order from investigation functions is partly done in Clause 22O. However, it is not sufficient. The Ordinance only prescribes that already existing crime branches or investigation cells should focus exclusively on investigation and not be entrusted with law and order duties. Unit commanders are given the responsibility to coordinate between the two wings. In effect, this is separation and can be seen as complying with the Court. But this could be expanded to setting up professional crime investigation units, with the requirement of suitably qualified investigating officers who have a minimum security of tenure and regular upgrading of skills and specialised training.

Clauses 22P to 22S: State and Division level Police Complaints Authorities

Clauses 22P to 22S of the Ordinance establish state and division level Police Complaints Authorities. These are extensive provisions that go into detail on several aspects related to the functioning and jurisdiction of these bodies. We commend the inclusion of Clause 22Q sub-clauses (8) and (9) on witness protection and visits to police stations and lock-ups. CHRI has observations of the gaps and weaknesses related to different aspects which are given below.

Composition

- At both the state and division levels, the Complaints Authorities have serving police officers as members. At the state level, an officer not below the rank of Add. DG and IGP is the Member-Secretary. At the division level, there are two serving officers as members – DCP (Headquarters) and a DySP rank officer as Member-Secretary.[10] CHRI recommends that serving police officers are not placed as adjudicating members of Police Complaints Authorities.This is not questioning their integrity or credibility. But the very presence of serving officers on these bodies entirely defeats a fundamental principle of natural justice – that one cannot be a judge in their own case. Also, 22Q sub-clause (2) says all members "shall" work for the Authority on a full-time basis. On a practical level, this is not possible for serving police officers.
- There is no process of appointment stipulated for PCA members. The Court had prescribed that other members be chosen by the government from an independent panel prepared by the State Human Rights Commission/LokAyukta/State Public Service Commission. This is an important check and balance. Selection must be open and transparent. Oversight bodies such as these need a wide base of skill sets, perspectives, and life experiences to be truly effective. CHRI strongly urges the state government to initiate a new mode of selecting members by calling for applications through advertisements and publicity of vacancies. This will widen the pool of potential candidates, move towards making Complaints Authorities more diverse and representative, and help to move away from discretionary and non-transparent appointments.
- Both the state and division level PCAs include a civil society member. This is very welcome. We do recommend that all members are chosen on the basis of objective criteria and specified qualifications. We also suggest there should be a one year cooling off period before any retired official is appointed as a member. The Ordinance is lacking this specificity.

Powers

- Sub-clauses (5), (6), and (7) of 22Q invoke several penal offences related to essentially the giving of evidence such as refusal to produce a document, refusal to sign statements, among others.
- These are needed for Authorities' to be able to properly exercise their powers of a civil court. The judicious use of these powers by Complaints Authorities is paramount. This goes back to the importance of having a well-thought out process of selection of Members which appoints individuals based on relevant knowledge, skills, and experience, particularly knowledge of criminal law and police procedures, as well as legal standards on human rights.
- Also linked to the powers of Authorities is the importance of independent

[10] In fact, at the division level, there is over-representation of the police perspective, with two serving officers and one retired police officer as Members. Out of the Chair and 4 Members, only the Chair and one other Member are from outside the police. In the interest of balance and diversity, this must be re-considered.

investigators. 22Q sub-clause (10) does state that a Complaints Authority 'may direct any person as it deems fit to inquire" for "the purpose of field inquiry". This does not connote that the Authorities will take on regular staff to conduct field inquiries which is what is needed, not on an ad-hoc basis. In its directive, the Court recognized the fact that Complaints Authorities may need the services of regular staff to conduct field inquiries and recommended that they utilize the services of retired investigators from the CID, Intelligence, Vigilance or any other organisation for this purpose. Quasi-judicial bodies such as these should be able to do strong, credible and comprehensive investigative work. The veracity of their findings comes from the evidence they are able to gather. We recommend that the Complaints Authorities take on full-time independent investigators as a priority.

Recommendations of the Authorities

Clause 22R states that the Complaints Authorities shall submit reports of their findings to the state government on completing an inquiry. This Clause dilutes the Court's directive in significant ways.

- Sub-clause (3) allows the state government to reject the Authority's final report "in exceptional cases for reasons to be recorded in writing". The state government can require the Authority to hold a fresh inquiry and submit a fresh report. In effect, this does not make the Authorities' findings binding. This is inconsistent with the Court's directive. The Court was unequivocal in its directive that '*the recommendations of the Complaints Authority, both at the district and State levels, for any action, departmental or criminal, against a delinquent police officer shall be binding on the concerned authority'.* The *binding* nature of the Authority's recommendations is what gives it "teeth", without which its effectiveness as an accountability mechanism will be completely diluted. The sub section must be amended in order to ensure that the Authority is adequately empowered to fulfil its function.
- There is no requirement in the Section for Complaints Authorities to send their final reports to the Director-General of Police or Police Commissioners. In addition to the state government, all final reports should be sent to police leadership, this is a significant omission.
- Rather than rejecting findings and issuing fresh inquiries, the Model Police Act 2006 prescribes that before finalizing their findings in cases, Complaints Authorities must confer with the Director-General of Police to get the department's view and gather any additional facts. Based on this, Authorities can review their findings if necessary. This way, it is ensured that the Authorities have done the fullest inquiries and adequately conferred with the police before issuing their findings. We recommend this is adopted.

CHRI recommends:

Remove serving police officers as adjudicating members of the Police Complaints Authorities.

Delete sub-clause (4) of Clause 22P and replace with the following new sub-clauses to enshrine an independent selection panel for selection of the

Chairperson and Members of the State Police Complaints Authority, as well as an open process for selection of Members:

> ***(4) The Chairperson of the State Police Complaints Authority shall be appointed by the Government out of a panel of three retired High Court Judges, received from the Chief Justice of the High Court.***
>
> ***(5) Members of the State Police Complaints Authority, other than the Chairperson, shall be appointed by the Government from among a panel of names recommended by a Selection Panel consisting of***
>
> ***(a) The Chairperson of the State Police Complaints Authority appointed under sub-clause (4), who shall be the Convenor;***
>
> ***(b) The Chairperson of the State Public Service Commission; and***
>
> ***(c) The Chairperson of the State Human Rights Commission; or a member thereof nominated by the Chairperson.***
>
> ***(6) (a) The Convener shall, with the help of adequate staff placed at his disposal by the Government, advertise the vacancies in the State Police Complaints Authority, calling for applications from eligible candidates giving due publicity and may also, if necessary, additionally obtain the consent of other qualified and eminent persons who are considered suitable for these appointments.***
>
> ***(b)The selection panel shall consider the suitability of all those who have given applications or consent and by adopting such transparent criteria as the selection panel may deem fit, prepare a panel of names separately for each vacancy.***

Insert the following new sub-clauses following sub-clause (2) of Clause 22S:

- ***The Chairperson and other members of the Division level Police Complaints Authorities will be appointed by the Government on the recommendation of the Selection Panel referred to in Section 22P(5).***

- ***The process to prepare a panel of names by the selection panel will be the same as provided in Section 22P(6) for the Division level Police Complaints Authorities.***

Enshrine objective criteria and qualifications as the basis of selection of Members. The Model Police Act, 2006 contains the following criteria which could be replicated:

- ***A person with a minimum of 10 years of experience either as a judicial officer, public prosecutor, public administrator, practicing advocate, or a professor of law; or***
- ***A person appointed by virtue of their knowledge and at least ten years' experience in the fields of criminology, psychology, law, human rights, or gender issues***

Insert a sub-clause to enshrine ineligibility criteria for appointment as a Chairperson or Member of any Police Complaints Authority:

> ***A person shall be ineligible to be the Chairperson or member of any Police Complaints Authority, if he or she:***

(a) is not a citizen of India;
(b) is above 70 years of age;
(c) is serving in any police, military or allied organisation, or has so served in the twelve months preceding such appointment;
(d) is employed as a public servant;
(e) holds any elected office, including that of Member of Parliament or State Legislature or any local body;
(f) is a member of, or is associated in any manner with, an organisation declared as unlawful under an existing law;
(g) is an office-bearer or a member of any political party;
(h) has been convicted for any criminal offence;
(i) is facing prosecution for any offence; or
(j) is of unsound mind and has been so declared by a competent Court

Delete sub-clauses (3) and (4) of Clause 22R. Redraft Clause 22R with the following new sub-clauses:

(1) In the cases directly inquired by the State Police Complaints Authority, it may, upon completion of the inquiry, communicate its findings to the Director General of Police and the State Government with a direction to:-

(a) Register a First Information Report; and/or
(b) Initiate departmental action based on such findings, duly forwarding the evidence collected by it to the police.

(2) Such directions of the State Police Complaints Authority shall be binding:

Provided that the State Police Complaints Authority, before finalising its own opinion in all such cases shall give the Director General of Police an opportunity to present the department's view and additional facts, if any, not already in the notice of the State Police Complaints Authority:

Provided further that the State Police Complaints Authority's findings/order shall be annexed to the charge sheet or the final report that is submitted to Court

Clause 22T: Prosecution for false complaints against police officers

- Clause 22T sub-clause (1) makes complainants liable to punishment if it is found that a "false" or "frivolous" complaint was made. It is unlikely that a victim would put himself at the risk of not only complaining against the police, but also taking the risk of imprisonment or fine in case his complaint does not meet the required standards of satisfying the Authority on its veracity. No other Commissions or authorities who receive complaints against police officers include this. The terms of imprisonment prescribed, as well as the requirement for anyone convicted to pay compensation to the concerned police officer are unjustifiable. We strongly recommend this is deleted.

CHRI recommends Clause 22T is deleted in its entirety.