

Act No: No. 28 of 2012

Act Title: NATIONAL INTELLIGENCE SERVICE

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PART I – PRELIMINARY

1. Short title

This Act may be cited as the National Intelligence Service Act, 2012.

2. Interpretation

(1) In this Act, unless the context otherwise requires—

"activities of foreign interference" means activities relating to the Republic that are carried out by or on behalf of, or directed or financed by or undertaken in collaboration with a foreign power, being activities that—

(a) are clandestine or deceptive and—

(i) are carried on for intelligence purposes;

(ii) are carried on for the purpose of affecting economic, social, political or governmental processes; or

(iii) detrimental to national security; or

(b) involve a threat to any person;

"Board" means the Intelligence Service Complaints Board established under section 66;

"Cabinet Secretary" means the Cabinet Secretary for the time being responsible for matters relating to national intelligence;

"classified information" means information of a particular security classification, whose unauthorized disclosure would prejudice national security;

"Council" means the National Intelligence Service Council established under section 64;

"counter-intelligence" means information gathered and activities conducted to impede or neutralize the intentions and activities of foreign powers, counter subversion, sabotage, espionage or any hostile activity aimed at or against the people, institutions, installations, processes or resources of the Republic;

"departmental intelligence" means information which relates to any power, duty or function concerning the security of Kenya which has been entrusted to a State Department or Agency under any law and which may be required by that State Department or Agency in the exercise of powers, duties or functions under this Act;

"Director" means a director of a division of the Service appointed under section 15;

"Director-General" means the Director-General of the Service, appointed under section 7;

"domestic intelligence" means intelligence on an internal threat or potential threat to national security or opportunities relevant for the protection and promotion of national security and national interests;

"external intelligence" means intelligence on any external threat or potential threat to national security, capabilities, intentions and activities of foreign powers and intelligence regarding opportunities relevant to the protection and promotion of national security and national interests;

"foreign power" means—

(a) a foreign government;

(b) a foreign organization;

(c) a foreign person; or

(d) an entity

that is directed or controlled by a foreign government, foreign organization or foreign person;

"intelligence" means information which has been collated, evaluated and analyzed and which is relevant to a government's decision making formulation or implementation of policy in relation to any internal or external threat or potential threat to national security as well as opportunities relevant to the protection and promotion of national security and national interests;

"monitor" means to intercept, listen to, record or copy using any device;

"national security" has the meaning assigned to it under Article 238(1) of the Constitution;

"National Security Council" means the National Security Council established by Article 240(1) of the Constitution;

"member of the service" means a person employed by the Service whether on temporary or permanent terms and includes the Directors;

"paramilitary activities" means activities involving the use of an armed unit or other armed group that is not part of a country's official defence or law enforcement forces;

"person" has the meaning assigned to it under Article 260 of the Constitution;

"protective and preventive security" means assessment of threats and vulnerabilities, measures and activities conducted to safeguard or protect classified information, critical installations, key government infrastructure and important personalities;

"public officer" has the meaning assigned to it under Article 260 of the Constitution;

"Public Service Commission" means the Public Service Commission established by Article 233 of the Constitution;

"Republic" has the meaning assigned to it by Article 260 of the Constitution;

"security clearance" means an authorization entitling a person to have access to classified information;

"Salaries and Remuneration Commission" means the Salaries and Remuneration Commission established by Article 230 of the Constitution;

"security intelligence" means information other than counter intelligence which relates to or may be relevant to the assessment of any internal or external threat or potential threat to national security and includes measures and strategies aimed at impeding or neutralizing such threat or potential threat;

"security vetting" means a systematic procedure used to examine and appraise a person to determine his or her suitability, loyalty and eligibility based on security competencies and considerations;

"serious crime" includes organized crime, terrorism, human trafficking, drug trafficking and money laundering;

"Service" means the National Intelligence Service established by Article 242 (1) of the Constitution;

"State office" has the meaning assigned to it by Article 260 of the Constitution;

"threat" means—

- (a) any activity relating to espionage, sabotage, subversion, terrorism, organized crime, or intention to commit any such activity which is or may be directed against, or detrimental to the integrity, sovereignty, economic well-being or other national interests of Kenya and includes any other activity performed in conjunction with any activity relating to espionage, sabotage, organized crime, terrorism or subversion;
- (b) any activity directed at undermining, or directed at or intended to bring about the destruction or to overthrow by unlawful means of the constitutionally established system of government in the Republic;
- (c) any act or threat of violence or unlawful harm that is directed at or intended to achieve, bring about or promote any constitutional, political, industrial, social or economic objective or change in Kenya and includes any conspiracy, incitement or attempt to commit any such act or threat; and
- (d) any action or intention of a foreign power within or outside Kenya that is detrimental to national security and is clandestine or deceptive or involves a threat to the well-being of the Republic and its citizens or any other person lawfully resident in Kenya,

but does not include any lawful advocacy, protest or dissent unless carried out in conjunction with any of the activities referred to in paragraphs (a) to (d);

"vulnerable position" means a State office, public office or position in either level of government requiring the holder of the position to have, in the performance of his or her official duties, access to sensitive or classified information or any other position as may be required under any written law.

(2) Despite subsection (1), until after the first general elections under the Constitution, references in this Act to the expression "Cabinet Secretary", "Principal Secretary" or "State department" shall be construed to mean "Minister", "Permanent Secretary" and "Ministry" respectively.

3. Guiding principles

(1) The Service shall, in fulfilling its mandate, observe and uphold the Bill of Rights, values and principles of governance under Article 10(2), the values and principles of public service under Article 232(1) and the principles of national security in Article 238(2) of the Constitution and shall within the Service—

(a) strive to achieve the highest standards of professionalism and discipline amongst its members;

(b) prevent corruption and promote and practice transparency and accountability;

(c) comply with the constitutional standards of human rights and fundamental freedoms;

(d) train its staff to the highest possible standards of competence and integrity and to respect rights and fundamental freedoms and dignity; and

(e) ensure that recruitment to the Service reflects the diversity of the Kenyan people in equitable proportions.

(2) The powers and functions of the Service are to be exercised and performed only in the interests of national security, Kenya's foreign relations or national economic well-being.

PART II – COMPOSITION, FUNCTIONS, POWERS AND ADMINISTRATION OF THE SERVICE

4. Composition of the Service

(1) The National Intelligence Service established under Article 242(1) of the Constitution shall be a disciplined civilian service.

(2) The Service shall consist of—

(a) the Director-General appointed under section 7;

(b) the Directors appointed under section 15; and

(c) such other members of the Service appointed under section 16.

(3) The Service shall consist of such maximum number of members as shall be determined from time to time by the Council in consultation with the Director-General.

(4) In appointing a person as the Director-General, the President and the National Assembly, shall observe the provisions of Article 73(2)(a) of the Constitution.

(5) In appointing persons as members of the Service, the Director-General and the Council shall ensure that the composition of the Service meets the gender requirement under Article 27 of the Constitution and shall observe the principle of regional balance and ethnic diversity of the people of Kenya.

(6) The Director-General shall formulate and adopt administrative measures and affirmative action programs to ensure the realization of Article 27 of the Constitution.

5. Functions of the Service

(1) The Service is responsible for security intelligence and counter intelligence to enhance national security in accordance with the Constitution and shall—

(a) gather, collect, analyse and transmit or share with the relevant State agencies, security intelligence and counter intelligence;

(b) detect and identify threats or potential threats to national security;

(c) advise the President and Government of any threat or potential threat to national security;

- (d) safeguard and promote national security and national interests within and outside Kenya;
- (e) gather, evaluate and transmit departmental intelligence at the request of any State department or organ, agency or public entity;
- (f) regulate, in co-operation with any State department or agency, the flow of security intelligence between the Service and that State department or agency;
- (g) undertake security vetting—
 - (i) for persons seeking to hold a vettable position;
 - (ii) for persons seeking to be registered as a citizen of Kenya;
 - (iii) for foreign institutions seeking documents or seeking to undertake any activity in the Republic which may have a bearing on national security; or
 - (iv) as may be required under any written law;
- (h) carry out protective and preventive security functions within State departments, agencies, facilities and diplomatic missions;
- (i) safeguard information systems and processes within State departments or agencies;
- (j) support and aid law enforcement agencies in detecting and preventing serious crimes and other threats to national security;
- (k) commission research relevant to the protection and promotion of national security;
- (l) make recommendations to the National Security Council on policies concerning security intelligence;
- (m) make recommendations to the President, National Security Council and the Cabinet Secretary on policies concerning security measures which need to be taken by a State department or agency; and

- (n) obtain, in accordance with the Constitution, this Act or any other written law, intelligence about the activities of foreign interference and capabilities, intentions or activities of people or organizations outside Kenya;
 - (o) liaise with intelligence or security services, agencies or other authorities in other countries;
 - (p) co-operate with and assist other national security organs or agencies in the exercise of their powers and discharge of their functions;
 - (q) provide material support, advice and assistance to State offices, State departments and public entities on matters relating to the security and integrity of information that is processed, stored or communicated by electronic or similar means;
 - (r) to advise county governments on appropriate security and intelligence matters; and
 - (s) subject to the provisions of the Constitution and any other written law, perform such other duties and functions as may, from time to time, be determined by the President to be in the national interest.
- (2) The provisions of subsection (1) shall not be construed as—
- (a) depriving any person or authority any power, duty or function conferred upon that person or authority under the Constitution or any other written law; or
 - (b) limiting the performance of an intelligence related function by a State organ, department or agency.
- (3) Unless otherwise provided for under this Act, the Service shall not—
- (a) carry out police functions;
 - (b) undertake paramilitary activities;

(c) commit an act of violence against a person; or

(d) undertake any activity for the purpose of furthering the interests of a political party or political organisation whether within or outside Kenya.

(4) Subsection (3) does not prevent—

(a) the provision of firearms or training in the use of firearms in accordance with the First Schedule;

(b) the Service from obtaining intelligence and communicating any such intelligence that is relevant to serious crime to the appropriate law enforcement authorities; or

(c) members of the Service from performing the functions and exercising powers conferred by this Act or any written law.

(5) In the performance of its functions and exercise of its powers, the Service shall not—

(a) act in a partisan manner;

(b) further the interest of any political party or cause; or

(c) prejudice a political interest or political cause that is legitimate under the Constitution.

(6) A member of the Service who contravenes subsections (3) and (5) commits an offence and shall on conviction, be liable to a fine not exceeding five million shillings or imprisonment for a term not exceeding ten years or to both.

6. Powers of the Service

(1) The Service shall have all the powers necessary or expedient for the performance of its functions under the Constitution, this Act or any other written law.

- (2) Without prejudice to the generality of subsection (1), the Service shall have the power to—
- (a) investigate, gather, collate, correlate, evaluate, interpret, disseminate and store information which is relevant in the performance of its functions, under this Act, whether within or outside Kenya;
 - (b) co-operate with or enter into arrangements with any person, body, organization or authority for the performance of its functions under this Act;
 - (c) monitor and record electromagnetic emissions, acoustic emissions and other emissions subject to section 42; and
 - (d) take steps and measures to safeguard and promote national interests.

(3) The powers referred to in subsection (1) may be exercised—

- (a) for the purpose of detecting and identifying any threat or potential threat to national security;
- (b) for the purpose of safeguarding and promoting national security and national interests; or
- (c) for the purpose of ensuring the enjoyment of the rights and fundamental freedoms by an individual in so far as they do not prejudice the rights and fundamental freedoms of others.

(4) A member of the Service who exercises powers contrary to the provisions of this section commits an offence and shall on conviction be liable, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding ten years or to both.

6A. Stoppage and detention

- (1) An officer of the Service may stop, arrest and handover any person to the nearest police station whom the officer-

- (a) witnesses engaging in a serious offence; or
- (b) finds in possession of any object or material that could be used for the commission of a serious offence.

7. Director-General

(1) There shall be a Director-General of the Service who shall, with the approval of the National Assembly, be appointed by the President.

(2) The President shall nominate a person for appointment as the Director-General and submit the name of the nominee to the National Assembly.

(3) The National Assembly shall, within fourteen days after it first meets after receiving the names of the nominee—

(a) consider the suitability of the nominee;

(b) either approve or reject the nominee for appointment; and

(c) the Speaker shall notify the President of the decision of the National Assembly.

(4) If the National Assembly approves the nominee, the President shall, within seven days after receiving the notification to that effect, appoint the nominee as the Director-General.

(5) If the National Assembly rejects a nominee submitted by the President, the National Assembly shall request the President to submit a new nominee and the provisions of this section shall apply with necessary modifications with respect to the new nominee.

If, after the expiry of a period of sixty days from the date of the nomination of a person for appointment as a Director-General under subsection (2), the National Assembly has neither approved nor rejected the nomination of the person, the nominee shall be deemed to have been approved by the National Assembly.

8. Qualifications of the Director-General

(1) A person is qualified for appointment as the Director-General if the person—

- (a) is a citizen of Kenya;
- (b) holds a degree from a university recognized in Kenya;
- (c) has knowledge and at least fifteen years experience in intelligence or national security;
- (d) has served in a senior management position in the Service or public service for at least ten years; and
- (e) meets the requirements of Chapter Six of the Constitution.

(2) A person is not qualified for appointment as Director-General if that person —

- (a) is a member of Parliament, a member of a county assembly, a governor or a deputy governor;
- (b) has, in the immediate preceding period of five years, served as a member of Parliament, a member of a county assembly, a governor, a deputy governor, a trade union official or held an office in a political party;
- (c) holds dual citizenship;
- (d) has been convicted of a criminal offence and has been sentenced to imprisonment for a term exceeding six months without an option of a fine;
- (e) has previously been removed from office for contravening the provisions of the Constitution or any other written law; or

(f) is an undischarged bankrupt.

9. Functions and powers of the Director-General

(1) The Director-General shall—

- (a) be responsible for the overall, management and administration of the Service;
- (b) be responsible for the overall operational control of the Service;
- (c) be the principal advisor to the President and Government on national security based on security intelligence and counter intelligence to enhance national security;
- (d) report to the President, the National Security Council and the Cabinet Secretary on threats and potential threats to national security and national interests as is appropriate;
- (e) take all necessary steps to ensure that the actions of the Service are limited to what is necessary for the proper performance of its functions under the Constitution, this Act or any other written law and that no information is gathered or disclosed by the Service except in so far as may be necessary for the proper performance of its functions;
- (f) ensure that the Service is not, in the performance of its functions, influenced by considerations not relevant to such functions and that no act is performed that could give rise to any reasonable suspicion that the Service is concerned in furthering, protecting or undermining the interests of any person, particular section of the population or of any political party or other organization in Kenya;
- (g) as far as is reasonably practicable, take steps to ensure that classified information, intelligence collection methods, Service operations, sources of information and identity of members of the Service are protected from disclosure otherwise than in the strict performance of the functions of the Service under the Constitution and this Act;
- (h) participate in the formulation of national intelligence policy and strategy;

- (i) make recommendations to the Cabinet Secretary on the formulation of the policy and implement the national intelligence policy and strategy;
- (j) ensure effective utilization of resources as required by Article 201 of the Constitution;
- (k) undertake education, training and development of members of the Service;
- (l) oversee the development of mechanisms to ensure that members of the Service discharge their functions and exercise of their powers in accordance with the Constitution, this Act and any other written the law;
- (m) administer, control and manage the Service as a disciplined civilian service;
- (n) put in place mechanisms, steps and systems—
 - (i) to ensure that the members of the Service are not unduly influenced in the performance of the functions of the Service;
 - (ii) to ensure that the Service is impartial in the execution of its functions;
 - (iii) to prevent disclosure of the operations of the Service;
 - (iv) to prevent disclosure of classified information;
 - (v) to protect the identity of sources of information to the Service;
 - (vi) to protect the identity of members of the Service;
 - (vii) to prevent unauthorized access to the premises of the Service; and
 - (viii) to prevent interference with any installations of the Service; and
- (o) perform any other lawful function as may be assigned by the President or the Cabinet Secretary or any other written law.

(2) The Director-General shall have all the powers necessary or expedient for the performance of his or her functions under the Constitution, this Act or any other written law.

(3) The Director-General may, in writing, delegate any power or assign any function conferred upon him or her under this Act or any other written law to a member of the Service.

(4) The delegation of a power or assignment of a function under subsection (3) shall not prevent the Director-General from exercising the power or discharging the function in question in person.

(5) Subject to subsection (3) the Director-General may—

(a) impose such conditions as are necessary for the performance of the function or exercise of the power; or

(b) withdraw any decision made by the person to whom the power or function had been delegated.

10. Repealed

Repealed by Act No. 19 of 2014, s. 53.

11. Vacancy

(1) The office of the Director-General shall become vacant if the holder—

(a) dies;

(b) resigns by notice, in writing, to the President; or

(c) is removed by the President.

(2) Where the Director-General resigns from office, he or she shall cease to hold office one month after receipt by the President, of the written notice of resignation.

12. Temporary incapacity

(1) Where the Director-General is unable to perform the functions of the office as a result of temporary incapacity or any other reason, the President shall appoint one of the Directors to act in place of the Director-General.

(2) A person appointed under subsection (1) shall not act in that position for more than six months.

(3) In this section, temporary incapacity means any inability to carry out duties under the Act or other written law due to an illness or other incapacity lasting continuously for a period of not less than three months.

13. Remuneration and other benefits

The remuneration and other benefits of the Director-General shall be set and regularly reviewed by the Salaries and Remuneration Commission.

14. Divisions of the Service

(1) The Service shall have the following divisions—

(a) an internal intelligence division which shall be responsible for gathering domestic intelligence;

(b) an external intelligence division which shall be responsible for gathering foreign intelligence;

(c) a counter-intelligence division which shall be responsible for gathering and performing counter-intelligence; and

(d) such other divisions of the Service as may be necessary for the proper and efficient performance of the functions of the Service under this

15. Directors

(1) A division of the Service shall be headed by a Director appointed by the Director-General in consultation with the Council.

(2) A person is qualified for appointment as a Director if the person—

(a) is a citizen of Kenya;

(b) holds a degree from a university recognized in Kenya;

(c) has knowledge and at least seven years experience in intelligence or national security;

(d) has served in a senior management position in the Service or government for at least five years;
and

(e) meets the requirements of Chapter Six of the Constitution.

(3) A person is not qualified for appointment as a Director if the person—

(a) is a member of Parliament, a member of a county assembly, a governor or a deputy governor;

(b) has, in the immediate preceding period of five years, served as a member of Parliament, member of a county assembly, a governor or a deputy governor, a trade union official or held office in a political party;

(c) holds dual citizenship;

(d) has been convicted of a criminal offence and has been sentenced to imprisonment for a term exceeding six months without an option of a fine; or

(e) has previously been removed from office for contravening the provisions of the Constitution or any other written law.

(4) In the recruitment of Directors, the Director-General and the Council shall comply with Article 232(g), (h) and (i) of the Constitution.

(5) A Director shall be the administrative head of a division but shall be subject to the direction and control of the Director-General.

16. Other members of the Service

(1) The Council shall appoint such number of members of the Service as may be necessary for the proper and efficient discharge of the functions of the Service.

(2) The Director-General may, in consultation with the Council, request for a public officer to be seconded or temporarily attached to the Service from either level of government for a specific period of time and on such terms and conditions as may be agreed upon between the Director-General and the seconding body.

(3) For the purposes of this Act, a public officer who is seconded to the Service under subsection (2) shall be regarded as a member of the Service and be subject only to the operational control and direction of the Director-General.

17. Security screening of members of the Service

(1) A person shall not be eligible for appointment as a member of the Service unless—

(a) information regarding that person has been gathered in the prescribed manner, in a security screening investigation by the Service; and

(b) the Service, after evaluating the gathered information, is of the reasonable opinion that such a person may be appointed as a member without the possibility of such a person being a security risk or acting in any way prejudicial to national security.

(2) For the purpose of subsection (1) the Service may, in a prescribed manner, have access to—

(a) criminal records;

(b) financial records;

(c) personal information; and

(d) any other information which is relevant to that determination of the security clearance of the person.

(3) The Director-General may, in the prescribed manner, issue directives on—

(a) polygraph testing or any other method of testing;

(b) the level of security clearance; and

(c) the criteria for evaluating the security competency.

(4) The Director-General may, after evaluating the information gathered under this section, issue, degrade, withdraw or refuse to grant security clearance.

18. Functions and powers of members of the Service

(1) A member of the Service shall—

(a) perform the functions and duties assigned to the member by or under this Act or any other written law; and

(b) obey lawful orders and directions which he or she may from time receive from a person having the authority to give such directions.

(2) A member of the Service shall for purposes of this Act be considered to be always on duty when required to act as such, and shall perform the duties and exercise the powers granted to him or her under this Act or any other written law at any place where he or she may be deployed.

(3) A member of the Service shall have all the powers necessary for the performance of the functions of the Service under this Act, and may exercise such powers as are conferred on him or her by or under this Act or any other written law.

19. Oaths and affirmations

(1) The Director-General and every member of the Service shall, before assuming office, make and subscribe to the respective oaths or affirmations as prescribed in the Third Schedule—

(a) in the case of the Director-General, before the President; and

(b) in the case of every other member of the Service, before the Director-General.

(2) The oath shall bind the Director-General and every member of the Service during and after expiry or termination of employment or engagement with the Service.

20. Certificate of appointment

(1) The Director-General shall cause to be issued to a member of the Service on appointment, a certificate of appointment.

(2) The certificate of appointment shall be in such form as the Director-General may prescribe by notice in the Gazette.

(3) A member of the Service shall produce the certificate of appointment issued under subsection (1) on being requested to do so by any person in relation to whom that officer is exercising or is about to exercise a power conferred by this Act.

(4) A member of the Service may, where necessary for the performance of his or her functions under this Act and with approval of the Director-General, carry and use an official firearm.

21. Scheme of service

The Director-General shall, in consultation with the Public Service Commission and on the advice of the Salaries and Remuneration Commission prescribe a scheme of service setting out the terms and conditions of service for members of the Service which shall provide for—

(a) appointments, confirmation of appointments, promotions, resignations, retirements and termination of appointment;

(b) scales of salaries and allowances; and

(c) the designations and grades of members of the Service.

22. Pension scheme and other benefits

The Director-General—

(a) shall with the approval of the Council establish—

(i) a pension scheme for the members of the Service; and

(ii) a medical scheme for the Service to provide for in-service and retirement medical benefits; and

(b) may with the approval of the Council and subject to any written law, establish such other schemes as the Director-General may consider to be necessary.

23. Disciplinary Code

(1) Subject to Articles 234(2)(g) and 47 of the Constitution, the Council shall, in consultation with the Public Service Commission, issue and maintain a disciplinary code for the Service which may—

(a) prescribe disciplinary offences;

(b) provide for the investigation, hearing and determination of disciplinary cases and the hearing of any appeals therefrom; and

(c) provide for the delegation by the Director-General to any Director or a member of the Service of such disciplinary powers as he or she may consider necessary.

(2) The disciplinary code may, in addition to any other penalties provided for under this Act or any written law, provide for the following disciplinary penalties—

(a) dismissal from the Service;

- (b) retirement in public interest;
- (c) reduction in rank or grade as the case may be;
- (d) reprimand;
- (e) admonition;
- (f) stoppage of salary increments;
- (g) fines;
- (h) recovery of the cost or part thereof in respect of any loss or damage to the property of the Service caused by the default or negligence of any member of the Service subject to disciplinary proceedings where such recovery has not been effected through any other lawful Government procedure; and
- (i) recovery of any loss of public funds used contrary to the law from a member of the Service who approves the use of the public funds, whether the person remains the holder of the office or not.

24. Code of Conduct and Ethics

(1) In accordance with section 3(9) and section 5 of the Public Officer Ethics Act (Cap. 183), and the law relating to matters of leadership and integrity enacted pursuant to Article 80 of the Constitution, the Director-General may issue and maintain a code of conduct, ethics, leadership and integrity for the members of the Service which may provide for—

- (a) professional conduct;
- (b) political neutrality;

(c) conflict of interest;

(d) conduct of private affairs;

(e) dealings with foreigners; and

(f) submission of declarations.

(2) For the avoidance of any doubt, members of the Service are bound by the Public Officers Ethics Act (Cap. 183) or any other written law regulating matters of ethics and integrity issues for public officers.

25. Information to members of the Service

The Director-General shall ensure that the code of conduct and ethics, disciplinary code and other rules, regulations, guidelines or information relating to and affecting members of the Service are made available to the members of the Service.

26. Mechanism for determination of grievances

The Director-General shall establish procedures for the consideration and adjudication of grievances in relation to members of the Service.

PART III – CIVILIAN AUTHORITY

27. Effective civilian authority

In order to give effect to the requirement under Article 239(5) of the Constitution, effective civilian authority shall be exercised through the Cabinet Secretary.

28. Functions of the Cabinet Secretary

(1) The Cabinet Secretary shall, subject to this Act—

(a) ensure that there are satisfactory arrangements in place for the carrying out of policy directions;

- (b) in consultation with the Director-General, develop national intelligence policies and strategies;
- (c) monitor the implementation of the national intelligence policies and strategies;
- (d) receive and take appropriate action on reports submitted by the Director-General;
- (e) facilitate the Service by ensuring that the Service is adequately resourced and capacitated to achieve its mandate;
- (f) submit an annual report to Parliament on the activities of the Service during the period covered by the report indicating the activities and accomplishments of the Service and including such recommendations as he or she may consider appropriate; and
- (g) perform any other function conferred under the Constitution, this Act or any other written law.

29. Functions of the National Security Council

Pursuant to Article 240(3) and (6) of the Constitution, the National Security Council shall—

- (a) exercise supervisory control over the Service;
- (b) integrate domestic and foreign policies relating to national security in order to enable the Service to co-operate with other national security organs and function effectively; and
- (c) perform any other function in relation to the Service as may be prescribed under any other written law.

30. Compliance with Article 59(2)(d) of the Constitution

The Service shall ensure compliance with Article 59(2)(d) of the Constitution.

PART IV – LIMITATION OF RIGHTS AND FUNDAMENTAL FREEDOMS

31. Rights and fundamental freedoms

(1) A person to whom this Act applies shall enjoy all rights and fundamental freedoms enshrined in the Constitution unless the rights or fundamental freedoms have been limited to the extent specified in this Act or any other written law.

(2) Notwithstanding subsection (1), a limitation under this Act shall not derogate from the rights and fundamental freedom in Article 25 of the Constitution.

32. Conditions for limitation of rights and fundamental freedoms

(1) Notwithstanding section 31, the purpose of this Part is to limit or restrict the rights and fundamental freedoms as contemplated by Article 24 of the Constitution.

(2) Limitations of rights and freedoms under this Part is necessary for purposes peculiar to intelligence services and operations, based on human dignity, to ensure —

(a) the protection, maintenance and promotion of national security;

(b) the protection of classified information;

(c) the security and safety of members of the Service;

(d) good order and discipline in the Service; and

(e) that the enjoyment of the rights and fundamental freedoms by a person do not prejudice the rights and fundamental freedoms of others.

(3) Limitation of rights and fundamental freedoms under this Part—

(a) shall satisfy the criteria set out in Article 24(1) of the Constitution; and

(b) shall—

- (i) ensure the protection, maintenance of and promotion of national security, public safety, public order and protection of the rights and freedoms of others;
- (ii) be necessary to achieve the mandate of the Service;
- (iii) be done without discrimination; and
- (iv) be exceptional and not derogate the core or essential content of the right or freedom being limited.

33. Limitation of freedom of expression

(1) The freedom of expression set out under Article 33 of the Constitution may be limited in respect of a member of the Service under the conditions set out in subsection (2).

(2) Limitation of the freedom of expression shall be to the extent that it is done—

(a) in the interest of national security, public safety, public order, public morality or public health;

(b) for the purpose of protecting the integrity of Service operations;

(c) for the purpose of protecting the reputation, rights and freedoms of the members or private persons concerned in legal proceedings;

(d) for the purpose of preventing the disclosure of information received in confidence;

(e) or the purpose of regulating the technical administration or the technical operation of telecommunication, wireless broadcasting, communication, internet, satellite communication or television; or

(f) for the security and protection of information within the Service.

34. Limitation of political rights

(1) The political rights set out in Article 38 of the Constitution may be limited to the extent that a member of the Service shall not—

(a) form, join, participate in the activities, campaign for a political party or political cause or recruit members for a political party; or

(b) serve as a member of Parliament, the Senate, a county assembly or any other political body.

(2) The provisions of subsection (1) shall not apply to the members' right to register as a voter and to vote in an election, by-election or a referendum.

35. Limitation to freedom of movement and residence

The freedom of movement and residence set out in Article 39 of the Constitution may be limited in respect of a member of the Service—

(a) by restricting the right of the member to leave Kenya in the interest of national security;

(b) when entering or having entered, to remain within or around designated areas for purposes of attending training or securing the performance of duties by the member; or

(c) under any other circumstances which that member may be subjected to in respect of movement or residence within or outside Kenya.

36. Limitation to the right to privacy

(1) The right to privacy set out in Article 31 of the Constitution, may be limited in respect of a person who is subject to investigation by the Service or suspected to have committed an offence to the extent that subject to section 42, the privacy of a person's communications may be investigated, monitored or otherwise interfered with.

(2) The Service shall, prior to taking any action under this section, obtain a warrant under Part V.

37. Limitation of the right to access to information

(1) The right of access to information set out in Article 35(1) and (3) of the Constitution may be limited in respect of classified information or information under the custody of the Service under the circumstances set out under subsection (2).

(2) Subject to subsection (1) the Service shall not—

(a) comply with a request to furnish a person with classified information;

(b) disclose or publicize information relating to sources of information, intelligence collection methods and covert operations of the Service; or

(c) disclose or publicize information, the disclosure or publication of which would be prejudicial to national security.

(3) The Cabinet Secretary may by regulations determine the categories of security classification.

(4) The categories of classified information referred to under subsection (3) may include—

(a) "top secret" which means information whose unauthorized disclosure would cause exceptionally grave damage to the interests of the State;

(b) "secret" which means information whose unauthorized disclosure would cause serious injury to the interests of the State;

(c) "confidential" which means information whose unauthorized disclosure would be prejudicial to the interests of the State; and

(d) "restricted" which means information whose unauthorized disclosure would be undesirable in the interests of the State.

38. Limitation of the right to freedom of association

(1) The freedom of association set out in Article 36 of the Constitution, is limited by preventing a member of the Service from joining or participating in the activities of an association.

(2) Notwithstanding subsection (1), a member of the Service may join or participate in the activities of a professional association.

39. Limitation of the right to assembly, demonstrate, picket and petition

The right to assemble, demonstrate, picket and petition public authorities set out in Article 37 of the Constitution is limited by prohibiting, the officers from assembling, demonstrating, picketing or petitioning public authorities except for the purposes of maintaining good order and discipline in the Service.

40. Limitation of the right to labour relations

The right to fair labour practices set out in Article 41 of the Constitution, is limited by prohibiting a member of the Service from forming, joining, agitating or participating in the activities of trade unions or going on strike to extent necessary for maintaining good order and discipline in the Service.

41. Limitations to economic and social rights

The economic and social rights set out in Article 43 of the Constitution, may be limited in respect of members of the Service to the extent necessary for intelligence training and operation.

PART V – SPECIAL OPERATIONS

42. Authority to undertake covert operations

(1) In this Part "special operations" means measures, efforts and activities aimed at neutralizing threats against national security.

(2) Where the Director-General has reasonable grounds to believe that a covert operation is necessary to enable the Service to investigate or deal with any threat to national security or to perform any of its functions, the Director-General may, subject to guidelines approved by the Council, issue written authorization to an officer of the Service to undertake such operation.

(3) The written authorization issued by the Director-General under subsection (2) —

(a) shall be sufficient authorization to conduct the operation;

(b) may be served on any person so required to assist the Service or facilitate the covert operation or investigations required to be undertaken;

(c) may authorize any member of the Service to obtain any information, material, record, document or thing and for that purpose —

(i) enter any place or obtain access to anything;

(ii) search for or remove or return, examine, take extracts from, make copies of or record in any manner the information, material, record, documents or thing;

(iii) monitor communication;

(iv) install, maintain or remove anything; or

(v) take all necessary action, within the law, to preserve national security; and

(d) shall be specific and accompanied by a warrant from the High Court in the case of paragraph (c), and shall be valid for a period of one hundred and eighty days unless otherwise extended.

43. Repealed

Repealed by Act No. 19 of 2014, s. 56.

44. Repealed

Repealed by Act No. 19 of 2014, s. 56.

45. Repealed

Repealed by Act No. 19 of 2014, s. 56.

46. Repealed

Repealed by Act No. 19 of 2014, s. 56.

47. Repealed

Repealed by Act No. 19 of 2014, s. 56.

48. Repealed

Repealed by Act No. 19 of 2014, s. 56.

49. Repealed

Repealed by Act No. 19 of 2014, s. 56.

50. Repealed

Repealed by Act No. 19 of 2014, s. 56.

PART VI – OFFENCES

51. Prohibition against torture or cruel treatment

(1) A member of the Service shall not subject any person to torture, cruel, inhuman or degrading treatment.

(2) A member of the Service who subjects a person to torture commits an offence and is liable on conviction to imprisonment for a term not exceeding twenty five years.

(3) A member of the Service who subjects a person to cruel, inhuman or degrading treatment commits an offence and is liable on conviction to imprisonment for a term not exceeding fifteen years.

(4) In this section—

"cruel, inhuman and degrading treatment or punishment" means a deliberate and aggravated treatment or punishment not amounting to torture, inflicted by a person in authority or the agent of the person in authority against a person under his or her custody, causing suffering, gross humiliation or debasement to the person;

"torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for the purpose of—

- (i) obtaining information or a confession from the person or from a third person;
- (ii) punishing the person for an act which that person or a third person has committed or is suspected of having committed;
- (iii) intimidating or coercing that person or a third person; or
- (iv) for any reason based on discrimination of any kind,

when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

52. Prohibition of certain conduct of members of the Service

A member of the Service, who—

- (a) acts as an agent, campaigns for or otherwise engages in the activities of a political party; or
- (b) enters, searches any private premises or seizes any material otherwise than as provided for under Part V,

commits an offence and is liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding ten years, or to both.

53. Desertion

Any member of the Service who remains absent from duty without leave or just cause for a period exceeding twenty-one days commits an offence and is liable, on conviction, to—

- (a) dismissal;
- (b) imprisonment for a term not exceeding two years;
- (c) a fine not exceeding three hundred thousand shillings; or

(d) both imprisonment and a fine.

54. Surrender of Service property on exit

(1) A member of the Service who is dismissed, resigns or otherwise leaves the Service, shall surrender any property of the Service held to an officer designated under subsection (2).

(2) The Director-General may by Regulations—

(a) designate property which should be surrendered under subsection (1); and

(b) designate an officer of the Service to receive property which is surrendered under subsection (1).

(3) A member of the Service who—

(a) fails to comply with subsection (1); or

(b) who returns property in a damaged condition, the damage not being attributed to the proper discharge of duties in the Service,

commits an offence.

(4) A person who commits an offence under this section shall, on conviction and notwithstanding any other penalty that may be imposed on him or her, be liable for the cost of replacing or repairing such property.

(5) The cost of replacing or recovering property under this section may be recovered—

(a) by making deductions from any monies due to such person; or

(b) as a civil debt.

55. Prohibition of false representations as to association with Service

A person who, without prior written approval of the Director-General, in connection with any activity carried out by him or her, uses any name, description, title or symbol which is likely to lead another person to believe that the activity is carried out under the provisions of this Act or under the patronage of the Service, commits an offence and shall on conviction be liable to imprisonment for a term not exceeding seven years or to a fine not exceeding one million shillings or to both.

56. Offences in connection with members of the Service

Any person, who—

- (a) falsely represents himself or herself to be the Director-General or a member of the Service;
- (b) exercises or attempts to exercise undue influence over the Director-General or any member of the Service; or
- (c) is an accomplice in the commission of an act whereby any lawful order given by the Director-General or any member of the Service or any regulation or directive or any rule may be evaded,

commits an offence and is liable on conviction to imprisonment for a term not exceeding ten years or to a fine not exceeding one million shillings or to both.

57. Prohibition of disclosure of identity

Any person who discloses, publishes, broadcasts, causes to be published or otherwise makes public, without the approval of the Director-General, the identity of a person who—

- (a) is a confidential source of information to the Service; or
- (b) is a member of the Service engaged in a covert operation,

commits an offence and is liable on conviction, to imprisonment for a term not exceeding fourteen years.

58. Prohibition of access to premises of the Service

(1) The Cabinet Secretary may, by notice in the Gazette, prohibit or restrict access to land or premises under the control of the Service.

(2) Any person who enters the land or any premises or takes a photograph of the land or premises which has been gazetted pursuant to subsection (1) without having first obtained the authority of the Director-General commits an offence and is liable on conviction to imprisonment for a term not exceeding two years or a fine not exceeding three hundred thousand shillings, or to both.

59. Prohibition of unauthorized access and retention of information

Any unauthorized person with intent to aid a foreign power or entity or endanger national security obtains, attempts to obtain or is found in possession of classified information without lawful excuse commits an offence and is liable on conviction to imprisonment for a term not exceeding five years or a fine of five million shillings.

60. Interfering with the Director-General and members of the Service

A person who obstructs, assaults, hinders, the Director-General or any member of the Service or any person acting under the direction of the Director-General or such member in the due execution of his or her duties under this Act, commits an offence and is liable on conviction to—

(a) imprisonment for a term not exceeding two years;

(b) a fine not exceeding three hundred thousand shillings; or

(c) to both a fine and imprisonment.

61. Prohibition of unauthorized disclosure of information

(1) Any person who discloses or uses any information gained by him or her by virtue of his or her employment otherwise than in the strict course of his or her official duties or without the authority of the Director-General commits an offence.

(2) Any person who, by a warrant—

(a) is authorized to obtain or seize any information, material, record, document or thing or any other source material; or

(b) is requested to give any information, material, record, document or thing or any other source material or to make the services of other persons available to the Service,

discloses the warrant, or discloses or uses any information gained by or conveyed to him or her when acting pursuant to the warrant, otherwise than as authorized by the warrant or by the Director-General commits an offence.

(3) A person who—

(a) discloses information gained while in the course of duty in the Service without the authority of the Director-General;

(b) receives classified information by virtue of his or her engagement with the Service and discloses such information without the authority of the Director-General;

(c) receives classified information from the Service while being entitled to receive the information and uses that information otherwise than in the strict course of his or her duty;

(d) receives classified information from the Service while being entitled to receive and discloses the Service as the originator or author of such information without the authority of the Director-General;

(e) receives classified information, knowing or having reasonable grounds to believe that the information was obtained or communicated to him or her in contravention of this Act and discloses such information to any person other than the Director-General or an officer of the Service; or

- (f) discloses any classified information to any person other than the person whom he or she is authorized to disclose it to,

commits an offence.

(4) A person who commits an offence under this section is liable, on conviction to imprisonment for a term not exceeding fourteen years.

(5) The provisions of this section shall apply to a person even after expiry or termination of employment, association or engagement with the Service.

(6) The limitation on disclosure in this section shall not be construed to prevent a person from disclosing criminal activity.

62. Attempts, etc.

Any person who—

- (a) attempts to commit any offence under this Act;
- (b) solicits or procures another person to commit an offence under this Act; or
- (c) aids or abets or does anything preparatory to the commission of an offence under this Act,

commits an offence and is liable, on conviction, to imprisonment for a term not exceeding three years or a fine not exceeding five hundred thousand shillings, or to both.

63. Prohibited communications by former members

(1) A person who is or was a member of the Service shall not without the authority of the Director-General disclose or communicate, whether in Kenya or elsewhere, classified information or any information the disclosure of which is detrimental to national security.

(2) A person who contravenes subsection (1) commits an offence and is liable, on conviction, to imprisonment for a term not exceeding fourteen years.

PART VII – OVERSIGHT BODIES

64. National Intelligence Service Council

(1) There is established a Council to be known as the National Intelligence Service Council which shall consist of—

(a) the Cabinet Secretary, who shall be the chairperson;

(b) the Cabinet Secretary for the time being responsible for matters relating to foreign affairs;

(c) the Cabinet Secretary for the time being responsible for matters relating to finance;

(d) the Attorney-General;

(dd) such other public officer as the President may appoint; and

(e) the Director-General.

(2) The Council shall appoint a member of the Service to be the Secretary to the Council.

(3) The Secretary shall be responsible for—

(a) communicating the decisions of the Council; and

(b) the performance of any other function as may be assigned to him from time to time by the Council.

(4) The functions of the Council shall be to advise the Service generally on all matters pertaining to—

(a) the national intelligence policies and strategies;

(b) the administration of the Service; and

(c) the expenditure of the Service.

(d) to perform such other functions as may be conferred on the Council by this Act or by any other written law.

(5) For the better carrying out of its functions under this Act, the Council may establish such functional committees as it may consider necessary.

(6) The Council may co-opt into the committees established under subsection (5) other persons whose knowledge and skills are found necessary for the performance of the functions of the Council.

(7) A person who is co-opted into the committee of the Council under subsection (6) may attend the meetings of the Council and participate in its deliberations, but shall have no right to vote at the meeting.

(8) The business and affairs of the Council shall be conducted in accordance with the Fourth Schedule, but subject thereto, the Council may regulate its own procedure.

65. Parliamentary Oversight

National Assembly shall pursuant to Article 238(2) of the Constitution exercise oversight over the Service through the relevant Committee.

66.

Intelligence Service Complaints Board

(1) There is established a Board to be known as the Intelligence Service Complaints Board which shall consist of the following members, appointed by the Cabinet Secretary on the recommendation of the Public Service Commission—

(a) a chairperson who shall be a person who qualifies to be a judge of the High Court;

(b) four other members of whom—

(i) one shall be a person nominated by the Kenya National Commission on Human Rights;

(ii) one shall be an advocate of not less than seven years standing;

(iii) one shall be a retired senior intelligence officer; and

(iv) one shall be a person who has at least seven years experience in public service.

(2)

In the appointment of members of the Board, the Cabinet Secretary shall comply with Articles 73(2)(a) and 232(1)(i) of the Constitution and ensure that not more than two-thirds of the members of the Board are of the same gender.

(3) A member of the Board shall hold office for a period of three years but shall be eligible for reappointment for one further term.

(4) A member of the Board shall be paid such remuneration and other benefits as the Cabinet Secretary, may on the advice of the Salaries and Remuneration Commission, determine.

(5) A member of the Board may resign from his or her office by notice, in writing, addressed to the Cabinet Secretary and the resignation shall take effect from the date of receipt of the letter of resignation by the Cabinet Secretary.

(6) Where a member of the Board vacates office before the expiry of his or her term of office, the Cabinet Secretary shall, on the recommendation of the Public Service Commission, appoint another person in his or her place.

(7) Where a member of the Board is unable to perform the functions of his or her office due to any temporary incapacity, the Cabinet Secretary may appoint a substitute for the chairperson or member until such time as the Cabinet Secretary determines that the incapacity has ceased.

67. Powers and functions of the Board

(1) The functions of the Board shall be—

(a) to receive and inquire into complaints against the Service made by any person aggrieved by anything done by the Director-General or any member of the Service in the exercise of the powers or the performance of the functions of the Service under this Act;

(b) to inquire into any other matter referred to it by the President or the Cabinet Secretary under this Act; and

(c) to make its recommendation thereon to the President or the Cabinet Secretary.

(2) Subject to the provisions of subsection (4) and for the purpose of investigating any complaint under this Act, the Board shall have the powers of the High Court—

(a) to summon any witness;

(b) to administer oaths or affirmations; and

(c) to order the production of any records or documents relevant to the investigation.

(3) No person shall be compellable under any such summons to produce any document which he or she could not be compelled to produce at the trial of a suit.

(4) In the discharge of its functions under this Act, the Board shall have regard to the requirements of national security and for that purpose shall—

(a) subject to subsection (1)(b), consult the Director-General and the Council; and

(b) take all the necessary precautions to prevent the disclosure of—

(i) any information which in its opinion may not be disclosed in the course of, or in relation to any inquiry; and

(ii) the source of such information.

(5) The Board may hear separately and in private, such evidence as may be tendered by a complainant and the Director-General or any other member of the Service in relation to a complaint.

(6) If during the inquiry, the Board receives evidence of a breach of duty or misconduct against any member of the Service, it shall notify the Cabinet Secretary and the Council or the Director-General, as the case may be, and subject to the provisions of this Act, recommend appropriate disciplinary action against such member.

(7) At the end of the inquiry, the Board shall inform the complainant, in writing, of its findings and shall make a report of its findings and recommendations to the Cabinet secretary and the Council.

(8) The Cabinet Secretary shall make regulations, prescribing the manner in which the Board shall discharge its functions under this Part including the procedure for proceedings of the Board, but subject thereto, the Board shall regulate its own procedure.

68. Proceedings, findings, etc.

(1) Proceedings shall not lie against any member of the Board in respect of anything done in good faith in the performance of the functions of the Board or the exercise of the powers of the Board under this Act.

(2) A member of the Board shall not be called upon to give evidence in any court or in any proceedings of a judicial nature, in respect of anything in his or her knowledge by virtue of the powers or the functions of the Board under this Act.

(3) Anything said or any information supplied or any document or material produced by any person in the course of any inquiry by, or proceedings before the Board shall be privileged in the same manner as if the inquiry or proceedings were proceedings in a court.

69. Funds of the Board

The National Assembly shall allocate the Service adequate funds to enable the Board perform its functions.

PART VIII – FINANCIAL PROVISIONS

70. Funds of the Service

(1) The funds of the Service shall consist of—

(a) monies allocated by Parliament for purposes of the Service;

(b) such monies or assets as may accrue to the Service in the course of the exercise of its powers or the performance of its functions under this Act; and

(c) all monies from any other source provided or donated to the Service.

(2) Monies donated to the Service under subsection (1)(c) shall, subject to the provisions of this Act, be disclosed and reported in accordance with the law relating to public finance.

(3) The funds of the Service shall be in a separate vote.

71. Accounts and audits

The Service shall cause to be kept all books and records of account of its revenue and expenditure in accordance with the Public Finance Management Act, 2012 (Cap. 412C).

PART IX – MISCELLANEOUS PROVISIONS

72. Protection of classified information, records, etc.

Subject to Article 35 of the Constitution and any other written law, the Cabinet Secretary shall, in consultation with the Director-General, by regulations prescribe procedures for the classification, declassification, protection, and destruction of classified information and other records held by the Service.

73. Protection of Director-General and members of Service for acts done in good faith

Proceedings shall not lie against the Director-General or any member of the Service in respect of anything done or omitted to be done in good faith in the performance of the functions of the Service or the exercise of the powers of the Service under this Act.

74. Duty to co-operate

(1) It shall be the duty of every person, State organ, State department or agency or public entity to afford the Service the co-operation and assistance necessary to enable it perform its functions under the Constitution, this Act or any other written law.

(2) It shall be the duty of every State organ, State department, State agency or public entity that is in possession of national security intelligence or other intelligence related information which may be of value to the Service for the purposes of performing its functions under this Act to transmit that intelligence and information to the Service without delay.

(3) It shall be the duty of every State Organ, State department, agency or public entity —

(a) that receives intelligence from the Service to act on or otherwise utilize the intelligence; and

(b) to provide information requested for by the Service:

Provided that for purposes of the intelligence referred to in paragraph (a), it shall be specific, actionable and timely.

75. General Penalty

A person who is convicted of an offence under this Act for which no penalty is expressly provided shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding five hundred thousand shillings or to both.

76. Extraterritorial application of the Act

(1) Any act, omission or other conduct constituting an offence under this Act, shall constitute an offence even if the act, omission or conduct takes place outside Kenya.

(2) The provisions of this Act shall apply to the Director-General and members of the Service within and outside Kenya.

77. Annual report

The Director-General shall, within three months after the end of each calendar year, furnish the President, the Cabinet Secretary and the National Security Council with a report of the activities of the Service during that year.

78. Regulations generally

(1) The Cabinet Secretary may, in consultation with the Council make regulations generally prescribing anything required by this Act to be prescribed or generally for the better carrying out of the provisions of this Act.

(2) Regulations made under subsection (1) relating to members of the Service shall not be published in the Gazette, but shall be notified to the members of the Service to whom they apply in such manner as the Cabinet Secretary may in consultation with the Director-General determine.

79. Regulations by the Council

(1) Notwithstanding the provisions of section 78(1), the Council may make regulations providing for—

- (a) the terms and conditions of service of the members of the Service subject to section 21 and 23;
- (b) the appointment, seniority in rank or grade, posting, transfer and promotion of members of the Service subject to section 21 and 23;
- (c) the distribution, organization and duties of the Service;
- (d) operational matters of the Service;
- (e) personal and document security;

- (f) protective and physical security;
- (g) the control, issuance, storage and use of firearms and ammunition in the Service;
- (h) training of members of the Service;
- (i) the discipline in the Service subject to section 23;
- (j) the determination of grievances in the Service;
- (k) the administration and management of the funds and assets of the Service; and
- (l) affirmative action within the Service.

(2) Regulations made under this section shall not be published in the Gazette but shall be notified to the members of the Service to whom they apply in such manner as the Director-General shall determine.

80. Regulations by the Cabinet Secretary

Notwithstanding the provisions of section 79(1), the Cabinet Secretary may make regulations generally providing for—

- (a) the protection, classification and destruction of classified information and records;
- (b) the discharge of functions of the Council; and
- (c) the discharge of functions of the Board.

81. Transitional and saving provisions

(1) Every person who immediately before the commencement of this Act, was a member of staff or employee of the National Security Intelligence Service established under the National Security Intelligence Service Act (No. 11 of 1998) shall, at the commencement of this Act, be deemed to be an officer or employee of the Service.

(2) Subject to section 31(2) of the Sixth Schedule to the Constitution, a person who immediately before the commencement of this Act was a Director-General of the National Security Intelligence Service shall continue to hold office for the unexpired period of the term.

(3) A person who immediately before the commencement of this Act was an employee of Government seconded to the Service, shall, upon commencement of this Act be deemed to have been seconded to the Service under this Act.

(4) Anything done, including any regulation made or directive or instruction issued or other administrative measure taken or any contract entered into or any obligation incurred under the National Security Intelligence Service Act (Cap. 205) or any other law repealed by this Act and in force immediately before the commencement of this Act, shall remain in force and shall be deemed to have been made, issued, taken, entered, into or incurred, as the case may be, under this Act.

(5) All Service Orders, Rules or Regulations existing before the commencement of this Act shall be reviewed, amended, or revised to conform to the provisions of the Constitution and this Act within twelve months after coming into force of this Act.

(6) Until the orders, rules or regulations or other instruments made in exercise of a power conferred by a written law applicable and having the force of law are amended in accordance with subsection (5), they shall apply and be construed with such alterations, qualifications and exceptions as may be necessary to bring them in conformity with the Constitution and this Act.

(7) Any pension scheme, medical scheme existing immediately before the commencement of this Act shall continue existing and shall be deemed to have been established in accordance with this Act.

(8) All property, assets, rights and liabilities, obligations, agreements and other arrangements existing at the commencement of this Act and vested in, acquired, incurred or entered into by or on behalf of the National Security Intelligence Service shall upon commencement of this Act be deemed to have been vested in or to have been acquired, incurred or entered into by or on behalf of the Service to the same extent as they were enforceable by or against the Service before the commencement of this Act.

(9) Any reference to the National Security Intelligence Service Act (Cap. 205) under any written law shall be construed to as a reference to this Act.

(10) The provisions of section 7 are suspended until the expiry of the term of office of the person who was a Director-General of the Service at the commencement of this Act.

(11) The provisions of section 15(2)(b) are suspended until the expiry of a period of five years from the date of commencement of this Act.

(12) The provisions of this Act shall apply without prejudice to the appointment and terms and conditions of service of the Director-General and members of the Service in office at the commencement of this Act.

82. Repeal of No. 11 of 1998

The National Security Intelligence Service Act is hereby repealed.

FIRST SCHEDULE

[Section 5(4).]

USE OF FIREARMS

A – CONDITIONS AS TO THE USE OF FIREARMS

1. A member of the service shall use a firearm only where less extreme means are inadequate and for the following purposes—

(a) saving or protecting the life of the member of the Service or any other person; and

(b) in self-defence or in defence of another person against imminent threat of life or serious injury.

2. A member of the Service who intends to use a firearm shall identify himself or herself and give a clear warning of his or her intention to use a firearm, with sufficient time for the warning to be observed, except—

(a) where doing so would place the member of the Service or other person at risk of death or serious harm; or

(b) if it would be inappropriate in the circumstances.

3. A member of the Service who uses a firearm shall, whether or not a person is injured as a result of such use, report the matter to his or her superior.

4. Where the use of a firearm results in death or serious injury to a person, the member of the Service in charge or a direct superior of the member who caused the death or injury shall report the matter to the Director-General or other relevant authority who shall investigate the matter.

5. The Inspector-General is not precluded by virtue of paragraph (4) from conducting investigations into the matter.

6. A member of the Service who makes a report to the Director-General or any other relevant authority in accordance with paragraph (4) shall—

(a) secure the scene of the act for purposes of carrying out investigations; and

(b) notify the next of kin, their relative or friend of the death or injury as soon as reasonably practical.

7.

(1) The Cabinet Secretary shall, in consultation with the Director-General, make further regulations on the use of firearms under this Act.

(2) Notwithstanding the generality of subparagraph (1), the regulations shall—

(a) prescribe the circumstances under which a member of the Service may carry firearms and the type of firearms and ammunition permitted;

- (b) regulate the control, storage and issuing of firearms, including procedures that ensure that officers are accountable for the weapons and ammunition issued to them;
- (c) regulate the selection, training and testing of members of the Service authorised to carry firearms including techniques that could diffuse tension and reduce the likelihood of the need to use force;
- (d) provide for the testing of members of the Service carrying firearms at regular intervals, but at least once a year and consequences where a member refuses to submit to the tests; and
- (e) provide for a reporting system whenever a member of the Service uses a firearm in the performance of his or her duty.

B – SPECIFIC RESPONSIBILITIES OF SUPERIORS

1. The Director-General shall put in place measures to prevent the unlawful use of force or firearms.
2. A superior officer shall, where an officer of the Service uses force or a firearm contrary to the provisions of this Act, submit a report to the Director-General or such other relevant authority.
3.
 - (1) A member of the Service who fails to comply with an order requiring him to use unlawful force or a firearm contrary to this Act does not commit a disciplinary offence and shall not be penalised for such refusal.
 - (2) A member of the Service who issues an order for the use of force or a firearm contrary to the provisions of this Act commits a disciplinary offence.

SECOND SCHEDULE

[Section 10(3).]

TRIBUNAL ON REMOVAL FROM OFFICE OF THE DIRECTOR-GENERAL

1. A person desiring the removal of the Director-General may present a petition to the Public Service Commission in writing, setting out the alleged facts constituting the grounds for the removal of the Director-General.
2. The Public Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground for removal under section 10, it shall send the petition to the President.
3. On receipt and examination of the petition, the President shall, within fourteen days, suspend the Director-General from office pending action by the President in accordance with paragraph 4 and shall, acting in accordance with the advice of the Public Service Commission, appoint a tribunal consisting of—
 - (a) two members appointed from among persons who hold or have held office as a judge of a superior court, or who are qualified to be appointed as such;
 - (b) one person who is an advocate of the High Court of Kenya of not less than fifteen years standing;
 - (c) one person who has served with distinction in a national security organ; and
 - (d) one person with experience in public affairs.
4. The tribunal shall inquire into the matter expeditiously and report on the facts and make recommendations to the President, who shall act in accordance with the recommendations of the tribunal.
5. A Director-General who is suspended from office under paragraph 3 shall be entitled to half of his or her remuneration pending his removal from, or reinstatement in, office.
6. A tribunal appointed under paragraph 3 shall elect a chairperson from among its members.
7. A tribunal appointed under paragraph 3 shall regulate its own proceedings.

8. Any person dissatisfied with the findings of the Public Service Commission may appeal to the High Court.

THIRD SCHEDULE

[Section 19(1).]

OATHS AND AFFIRMATIONS

OATH/AFFIRMATION OF ALLEGIANCE AND SECRECY FOR DIRECTOR GENERAL

OATH/AFFIRMATION OF ALLEGIANCE AND SECRECY BY MEMBERS OF THE SERVICE

FOURTH SCHEDULE

[Section 64(8).]

CONDUCT OF BUSINESS AND AFFAIRS OF THE NATIONAL INTELLIGENCE SERVICE COUNCIL

1. The Council shall meet as often as may be necessary for the dispatch of its business but shall hold at least one meeting in each quarter in every financial year.
2. A meeting of the Council shall be held on such date and at such time as the Council shall decide.
3. The chairperson shall, on the written application of one-third of the members of the Council, convene a special meeting of the Council.
4. Unless the majority of the total membership of the Council otherwise agree, at least fourteen days' written notice of every meeting of the Council shall be given to every member of the Council.

5. The quorum for the conduct of business at a meeting of the Council shall be five members but the quorum of the Council shall not be properly constituted in the absence of the Cabinet Secretary and the Director-General.

6. The chairperson shall preside at every meeting of Council at which he or she is present and in the absence of the chairperson at a meeting, the members present shall elect one of their numbers who shall, with respect to that meeting and the business transacted thereat, have all the powers of the chairperson.

7. Unless a unanimous decision is reached, a decision on any matter before the Council shall be by concurrence of a majority of all the members.

8. Subject to paragraph (5), no proceedings of the Council shall be invalid by reason only of a vacancy among the members thereof.

9. Unless otherwise provided by or under any written law, all instruments made by and decisions of the Council shall be signified in writing under the hand of the chairperson and the secretary.

10. The Council shall cause minutes of all proceedings of meetings of the Council to be entered in books for that purpose.

11. If any person is present at a meeting of the Council or any committee at which any matter is the subject of consideration and in which matter that person or that person's spouse is directly or indirectly interested in a private capacity, that person shall as soon as is practicable after the commencement of the meeting, declare such interest and shall not, unless the Council or committee otherwise directs, take part in any consideration or discussion of, or vote on any question touching such matter.

12. A disclosure of interest made under subsection (11) shall be recorded in the minutes of the meeting at which it is made.

13. A member of the Council shall not transact any business or trade with the National Intelligence Service.

14. A member of the Council who is subject of a discussion in a meeting of the Council shall be disqualified from attending, participating and voting on the matter