



**THE REPUBLIC OF KENYA**

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**THE PERSONS DEPRIVED OF LIBERTY ACT**

CAP. 90A

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Kenya

## Persons Deprived of Liberty Act

Cap. 90A

Legislation as at 31 December 2022

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# PERSONS DEPRIVED OF LIBERTY ACT

## CAP. 90A

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**AN ACT of Parliament to give effect to Articles 29(f) and 51 of the Constitution and for connected purposes**

### Part I – PRELIMINARY

#### 1. Short title

This Act may be cited as the Persons Deprived of Liberty Act.

#### 2. Interpretation

In this Act, unless the context otherwise requires—

"advocate" has the meaning assigned to it under section 2 of the Advocates Act (Cap. 16);

"Cabinet Secretary" means the Cabinet Secretary responsible for matters relating to the administration of justice;

"child" has the meaning assigned to it under Article 260 of the Constitution.

"competent authority" means any person, officer or body responsible for or dealing with matters relating to persons deprived of liberty;

"Consultative committee" means the committee established under section 29;

"detained person" means a person deprived of liberty under authority of the law either by a law enforcement official for the purpose of investigation of a crime or so as to be charged with an offence or by a private person where there is reasonable suspicion that a crime has been committed; or a person deprived of liberty by order of or under de facto control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship or for protection;

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

"family member" in relation to a person deprived of liberty, means a spouse, parent or legal guardian, child, brother, sister, grandparent, grandchild, brother or sister of a parent, nephew, niece, half-brother or half-sister;

"family day" means a day designated for friends and family to visit persons deprived of liberty at the institution in which they are held;

"imprisoned person" means a person held in lawful custody, whether or not convicted of an offence;

"intersex" means a person certified by a competent medical practitioner to have both male and female reproductive organs;

"law enforcement official" means any officer responsible for the administration of the law relating to a particular category of persons deprived of liberty;

"medical officer of health" has the meaning assigned to it under the Public Health Act (Cap. 242);

"older member of society" has the meaning assigned to it under Article 260 of the Constitution;

"person deprived of liberty" means a person who has been arrested, held in lawful custody, detained, or imprisoned in execution of a lawful sentence.

## **Part II – RIGHTS OF PERSONS DEPRIVED OF LIBERTY AND DUTIES OF PERSONS IN CHARGE**

### **3. Rights of persons deprived of liberty**

- (1) Every person deprived of liberty is entitled to the protection of all fundamental rights and freedoms subject to such limitations as may be permitted under the Constitution.
- (2) Nothing in this Act may be construed as limiting the rights and freedoms of persons deprived of liberty otherwise than in accordance with Articles 29(f) and 51 of the Constitution.
- (3) An institution holding persons detained in custody or imprisoned shall maintain a register which shall be used by the law enforcement official to record the following—
  - (a) personal details of the person detained, including name, age and address;
  - (b) physical condition of the person detained, held in custody or imprisoned;
  - (c) reason for the detention, custody or imprisonment;
  - (d) steps taken to ensure that the person arrested or detained is subjected to due process of the law; and
  - (e) the medical history of the person detained, held in custody or imprisoned.

### **4. Limitation of right to privacy**

The right to privacy set out in Article 31 of the Constitution, may be limited in respect of a person deprived of liberty—

- (a) if the limitation is for the purposes of maintenance and preservation of national security to the extent provided for in the Constitution;
- (b) if the limitation is for the purposes of security and safety of law enforcement officials and the persons deprived of liberty under their care;
- (c) where the enjoyment of that right prejudices or is likely to prejudice the rights and fundamental freedoms of others;
- (d) where there is need for humanitarian assistance of migrants, refugees, asylum or refugees status seekers, stateless and undocumented persons;
- (e) where there is need for psychiatric treatment of persons with mental, or sensory disabilities; or
- (f) if the limitation of the right is for the purposes of the security and safety of children, elderly persons and persons with disability.

### **5. Right to humane treatment and human dignity of persons deprived of liberty**

- (1) A person deprived of liberty shall at all times be treated in a humane manner and with respect for their inherent human dignity.
- (2) Any person who subjects a person deprived of liberty to cruel, inhuman or degrading treatment commits an offence and shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding two years, or to both.

## 6. Additional rights upon arrest

In addition to the rights conferred to an arrested person under the Constitution, or any other written law an arrested person has the right to—

- (a) a reasonable opportunity to secure any personal property within their possession that is not subject to exhibition as evidence in relation to any charge; and
- (b) notification of legal aid where it is available and its use.

## 7. Due process of the law

Subject to Articles 50 and 51 of the Constitution, any person arrested and held in lawful custody in relation to any criminal proceedings is entitled to the due process of law, and in particular—

- (a) the right to be promptly informed in a language the person understands of the reasons for their deprivation of liberty and of the charges, if any, preferred against them;
- (b) a fair hearing and trial in accordance with the law relating to criminal procedure;
- (c) the right to present their defence either personally or by a defence counsel of the person's choice;
- (d) the right to be informed of their constitutional rights and guarantees relating to personal liberty and other fundamental rights and freedoms;
- (e) the right to be informed of the basis for limitation of the rights referred to in paragraph (d) consistent with their arrest or detention;
- (f) the right to access the services of an interpreter or other intermediary during detention and legal proceedings;
- (g) the right to communicate with their family or other person of one's choice;
- (h) the right not to be compelled to make a confession;
- (i) the right not to be compelled to plead guilty to any charge preferred against them; and
- (j) the right to communicate privately with their advocate.

## 8. Right to communicate

- (1) A person deprived of liberty shall have the right to communicate whether by telephone or other means with any person of his or her choice in any of the following circumstances—
  - (a) upon the first instance of detention, being held in custody or imprisonment; and
  - (b) upon transfer or movement from one institution to another.
- (2) The person in charge of a facility at which the person deprived of liberty is held shall facilitate the communication specified in subsection (1) without charge.
- (3) Nothing in this section shall limit the right of any person deprived of any liberty to communicate with any other person except in such circumstances as may be specified in Regulations.

## 9. Right to inspect receipt book, personal property etc

- (1) An institution holding arrested persons shall maintain a receipt book which shall be used by the law enforcement official to list the property in the possession of the person upon arrest.
- (2) The person arrested or held in detention shall have the right to inspect the receipt book and verify the accuracy of the record specified in subsection (1).

- (3) Upon release, the person arrested or detained, shall have the right to restoration of all his or her property.
- (4) If any of the personal property to which this section relates is not restored to the person deprived of liberty on his or her release, a record of the reason for its retention shall be entered in the receipt book.
- (5) Nothing in this section limits the right of any person deprived of liberty to authorize the release of their property to which this section relates to a person of their choice and a record of that authority or direction shall be recorded in the receipt book.

#### **10. Restriction on searches**

- (1) A person deprived of liberty shall not be subjected to an unreasonable body search.
- (2) A body search of any person shall be carried out only by a person of the same sex.
- (3) Despite subsection (2), an intersex person has the right to decide the sex of the person by whom they should be searched.
- (4) An intrusive search or search in or around a concealed body cavity shall only be undertaken in privacy and by a person of the same sex with due regard to personal safety and health.
- (5) A person who carries out the search shall conduct it with decency and in a manner that affords the person being searched the privacy and dignity consistent with the purpose of the search.

#### **11. Aliens deprived of liberty**

- (1) Aliens deprived of liberty, shall be informed, without delay and in any case before they make any statement to the competent authorities, of their right to consular or diplomatic assistance, and to request that consular or diplomatic authorities be notified of their deprivation of liberty forthwith.
- (2) Where consular assistance is not available, the alien will be entitled to legal aid and assistance in accordance with any written law.

#### **12. Right to reasonable accommodation**

- (1) A person deprived of liberty shall not be confined in crowded conditions.
- (2) The Cabinet Secretary shall by Regulations determine the maximum number of persons deprived of liberty that may be accommodated in any given facility or prison and the minimum space or area of such accommodation.
- (3) Every Competent Authority shall ensure that—
  - (a) men and women who are deprived of liberty, detained, held in custody or imprisoned are accommodated in separate detention facilities;
  - (b) children deprived of liberty, detained, held in custody or imprisoned are held separate from adults in facilities conducive to their special needs and age;
  - (c) male and female children are accommodated in separate facilities;
  - (d) mothers with infant children are accommodated in facilities separate from those in which other persons deprived of liberty are held;
  - (e) intersex persons deprived of liberty are held separate from other persons;
  - (f) older members of society deprived of liberty are held in accommodation appropriate to their special needs and age;



- (g) refugees, asylum seekers or refugee status seekers are held separately from persons charged with or convicted of criminal offences; and
- (h) persons deprived of liberty on account of a civil debt are held separately from persons charged with or convicted of criminal offences.

### **13. Right to nutritious diet**

- (1) A person deprived of liberty shall be entitled to a nutritious diet approved by competent authorities.
- (2) A diet under subsection (1) shall take into account the nutritional requirements of children, pregnant women, lactating mothers and any other category of persons whose physical conditions require a prescribed diet.
- (3) For the purposes of this subsection (1), "competent authority" means a qualified medical practitioner or qualified nutritionist.
- (4) A medical officer of health may prescribe a particular diet for a particular person deprived of liberty, depending on the medical condition of the patient.
- (5) As far as possible in the circumstances of any case, in providing food and water to persons deprived of liberty, consideration shall be made for their various religious needs.
- (6) Subject to any limitations prescribed in Regulations, persons deprived of liberty may be entitled to receive food and non-alcoholic beverages from any person.

### **14. Decent beddings and clothing**

- (1) A person deprived of liberty shall be provided with beddings sufficient to meet the requirements of hygiene and climatic conditions.
- (2) A person deprived of liberty shall be provided with clothing sufficient to meet requirements of hygiene, climatic conditions and special needs on account of gender and religion.
- (3) The Competent Authority shall ensure that beddings and clothing referred to in subsections (1) and (2) are maintained in good repair and hygienic conditions.
- (4) In addition to appropriate beddings and clothing, women who are deprived of liberty shall be provided with adequate sanitary materials.

### **15. Right to healthcare**

A person detained, held in custody or imprisoned is, on the recommendation of a medical officer of health, entitled to medical examination, treatment and healthcare, including preventive healthcare.

### **16. Confidentiality to health information**

- (1) A person deprived of liberty has a right to confidentiality regarding his or her health status.
- (2) Notwithstanding the provisions of subsection (1), a medical officer of health shall disclose to the law enforcement official in charge of an institution, health information of a person deprived of liberty which relates to infectious or communicable diseases in order to—
  - (a) facilitate effective health care for the person deprived liberty ; and
  - (b) facilitate the protection of other persons deprived of liberty and the officers under whose charge such persons are accommodated.

**17. Right to freedom of conscience, religion, belief and opinion**

- (1) Nothing in this Act may be construed as limiting the right to freedom of conscience, religion, belief and opinion of any person deprived of liberty, except to the extent that the right or freedom is incompatible with the fact that the person is deprived of liberty.
- (2) Subject to subsection (1), every competent authority under whose charge a person deprived of liberty is placed shall take all practical and reasonable measures to ensure the enjoyment of the rights and freedoms protected under Article 32 of the Constitution.
- (3) A person deprived of liberty shall not be subjected to treatment that unreasonably violates their religious practices and convictions.

**18. Right to education and access to information**

- (1) Persons deprived of liberty shall be entitled—
  - (a) to access educational opportunities and reading material that is beneficial to their rehabilitation and personal development; and
  - (b) to reasonable access to news media.
- (2) Subject to subsection (1), every Competent Authority under whose charge a person deprived of liberty is placed shall take all practical and reasonable measures possible to facilitate enjoyment of the right to education and access to information.
- (3) So far as is practically reasonable, the education of children detained in prison shall be integrated with the current system of education.

**19. Freedom from forced labour**

- (1) Except in the execution of a lawful sentence, a person deprived of liberty shall not be subjected to forced labour.
- (2) Notwithstanding subsection (1), a person deprived of liberty may be required to perform such tasks as are necessary—
  - (a) to ensure cleanliness of the premises at which they are accommodated; or
  - (b) to facilitate their rehabilitation and personal development, by among other things, being engaged in such day to day activities as the Cabinet Secretary may prescribe.

**20. Recreational and cultural activities for persons deprived of liberty**

The Cabinet Secretary shall take such reasonable and practical measures to ensure the establishment of recreational and cultural facilities in all institutions in which persons deprived of liberty are held for the benefit of their mental and physical health.

**21. Right of children detained or held in prison**

- (1) Where a child is detained or deprived of liberty in execution of a lawful sentence, the competent authority shall within forty eight hours notify a parent or guardian of the child of such detention or deprivation of liberty.
- (2) Where a child arrested or detained in prison is transferred from one institution to another, the Competent Authority effecting the transfer shall within seven days notify a parent or guardian of the child of such transfer.
- (3) Where no parent or guardian is traceable the Competent Authority shall notify an administrative officer in the area where the child's home is located.

- (4) Where a child is born of a person deprived of liberty, the fact of the birth in a detention facility or prison shall not be entered in the certificate of birth.

## **22. Care of infants by mothers**

- (1) A mother deprived of liberty is entitled to take personal care of the child until such child attains the age of four years.
- (2) A mother and child held in detention are entitled to diet, clothing, healthcare and facilities necessary for the developmental needs of the child.

## **23. Rights of persons with disabilities**

- (1) Where persons with disabilities are deprived of liberty under any legal process, they shall be treated on an equal basis with others and shall be entitled to such guarantees as are in accordance with the Constitution and the law relating to the protection of the rights of persons with disabilities.
- (2) Persons with disabilities deprived of liberty shall be accommodated in facilities that adequately meet their personal needs, taking into account the condition and nature of their disability.
- (3) The Competent Authorities shall take appropriate measures to facilitate humane treatment and respect for the privacy, legal capacity and inherent human dignity of persons with disabilities deprived of liberty.

## **24. Right to visits**

- (1) A person held in lawful custody or detained in prison shall be entitled to receive at least one visitor once every seven days.
- (2) Any person detained in prison in execution of a lawful sentence is entitled to be visited at least once every fourteen days.
- (3) Nothing in this section limits the number of days on which a person deprived of liberty may be visited by his or her legal counsel or other representative in exercise of his or her right of access to justice.
- (4) Any discussion between a legal counsel and the person deprived of liberty pursuant to subsection (3), shall be held in privacy.
- (5) Subject to Regulations, the right to visits under this section includes the right of persons deprived of liberty to be visited by human rights officers of duly recognized institutions for the purposes of inspecting and assessing the conditions under which such persons are held.

## **25. Family days**

The Competent Authorities in charge of the premises in which persons deprived of liberty are accommodated shall designate certain days as family days during which persons deprived of liberty may be visited by and interact with their family members at least once every three months.

## **Part III – PROVISIONS ON IMPRISONED OR DETAINED PERSONS**

## **26. Rehabilitation based programmes**

The Cabinet Secretary shall take all reasonable measures to ensure that institutions in which persons deprived of liberty are held implement programs and actions that facilitate—

- (a) the rehabilitation of—
  - (i) persons imprisoned or detained under the Community Service Orders Act (Cap. 93); and

- (ii) child offenders held under the Probation of Offenders Act (Cap. 64), Borstal Institutions Act (Cap. 92), and the Children Act (Cap. 141);
- (b) upon release, the reintegration of imprisoned or detained persons including child offenders into the community.

## **Part IV – COMPLAINTS AND DISCIPLINARY PROCEDURES**

### **27. Complaints by persons deprived of liberty**

- (1) Any person deprived of liberty who considers that his or her right under this Act has been denied or violated may lodge a complaint either orally or in writing to the administrative officer in charge of the facility in which the person is detained.
- (2) In addition to the provisions of subsection (1), complaints may be instituted by a person acting on behalf of a person deprived of liberty who cannot act in their own name.
- (3) Where the complaint is made orally, the officer in charge shall cause it to be recorded in writing.
- (4) Upon receipt of the complaint, the officer in charge shall investigate and take reasonable measures to address the complaint and report the complaint and furnish the complainant with—
  - (a) a written statement of the measures taken to address the complaint;
  - (b) the recommendations made in settlement of the complaint.
- (5) The administrative officer in charge of a facility in which a person deprived of liberty is held shall maintain a register of complaints containing the following particulars—
  - (a) name of the complainant;
  - (b) nature of the complaint;
  - (c) time and date the complaint was lodged;
  - (d) the measures taken to address the complaint; and
  - (e) the findings and recommendations made in settlement of the complaint.
- (6) Where a complaint is made against the officer in charge of the facility, the same may be lodged with the Cabinet Secretary, whereupon the procedure specified in subsections (3) and (4) of this section shall apply with necessary modification.
- (7) Any person dissatisfied by the findings and determination of a complaint by the officer in charge may within sixty days from the date the decision was notified to him or her, appeal to the Cabinet Secretary.
- (8) Nothing in this section limits the right of any person to lodge a formal complaint with the Commission on Administrative Justice or the Kenya National Commission on Human Rights in accordance with any written law.
- (9) Any law enforcement officer who wilfully obstructs, conceals or fails to act on a complaint lodged by or on behalf of a person deprived of liberty commits an offence and shall, upon conviction, be liable to a fine not exceeding five hundred thousand shillings or a term of imprisonment not exceeding two years, or to both.

### **28. Prison discipline**

- (1) A person deprived of liberty and who is charged with a prison offence shall be informed in writing of the nature and particulars of the offence.

- (2) Prison discipline of the offending person deprived of liberty shall be administered in accordance with the Prisons Act (Cap. 90).
- (3) All disciplinary proceedings referred to in subsection (1) shall be conducted in accordance with the principles of fair administrative action prescribed under Article 47 of the Constitution.

## **Part V – ESTABLISHMENT OF CONSULTATIVE COMMITTEE ON PERSONS DEPRIVED OF LIBERTY**

### **29. Establishment, functions and composition of Consultative Committee**

- (1) There is established a committee to be known as the Consultative Committee on Persons Deprived of Liberty.
- (2) The Consultative Committee shall deliberate on and resolve matters relating to persons deprived of liberty.
- (3) The Consultative Committee shall be composed of—
  - (a) the Cabinet Secretary responsible for matters relating to persons deprived of liberty or his or her representative appointed in writing, who shall be the chairperson;
  - (b) the Attorney-General or his or her representative;
  - (c) the Commissioner of Prisons or his or her representative who shall be the secretary;
  - (d) the Director of Medical Services or his or her representative;
  - (e) the Inspector-General of Police or his or her representative;
  - (f) the Director of Probation Services or his or her representative;
  - (g) a representative of the Kenya National Commission on Human Rights;
  - (h) a representative of the National Gender and Equality Commission;
  - (i) a representative from the Council of the Law Society of Kenya;
  - (j) one person nominated and representing Public Benefits Organizations responsible for matters relating to persons deprived of liberty, appointed by the Cabinet Secretary; and
  - (k) one representative from the National Council of Persons with Disabilities.
- (4) The Consultative Committee shall regulate its own procedures.

## **Part VI – PROVISIONS ON DELEGATED POWERS**

### **30. Regulations**

- (1) The Cabinet Secretary may make Regulations generally to give effect to the provisions of this Act.
- (2) Without prejudice to the generality of subsection (1), such Regulations may provide for—
  - (a) the restriction on the supply of food and drink from outside the institution in which the person deprived of liberty is held;
  - (b) the form and manner of communication for persons deprived of liberty;
  - (c) the maximum number of persons deprived of liberty that may be held in a facility;
  - (d) the form and manner of visits to persons deprived of liberty;

- (e) the form and manner of accommodation with respect to the separate categories of persons deprived of liberty;
- (f) the form and manner of family days held in institutions holding persons deprived of liberty;
- (g) individuals or groups that may visit persons deprived of liberty during family days;
- (h) instances when a person deprived of liberty may be allowed to leave the institution in which the person is held;
- (i) practical and reasonable measures for the enjoyment of the rights to freedom of conscience, religion, belief and opinion by persons deprived of liberty;
- (j) the form and manner of vocational training and active employment opportunities available to persons serving a lawful sentence;
- (k) the form of prison discipline and manner of disciplinary proceedings to be undertaken with regard to prison offences; and
- (l) prescribing for any other matter necessary for attaining the objectives this Act.

## **Part VII – GENERAL PROVISIONS**

### **31. General penalty**

- (1) Any person who wilfully and without lawful justification denies or deprives a person deprived of liberty any of the rights protected under this Act, commits an offence, and shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two years, or to both such fine and imprisonment.
- (2) A person is not guilty of an offence under this Act if it is shown to the satisfaction of the court that the denial or deprivation of rights mentioned in subsection (1) is justified on the grounds of limitation of such rights under this Act or any other written law.

### **32. Non-derogation from other laws relating to rights of persons deprived of liberty**

- (1) The provisions of this Act shall be in addition to and not in derogation from any other law relating to the rights of persons deprived of liberty.
- (2) Notwithstanding subsection (1) this Act does not apply to persons deprived of liberty in consequence of disciplinary action under any law relating to persons serving in the Kenya Defence Forces.