

Office of the Council of State

Ratdamnuen
Bangkok 10200
webmaster@krisdika.go.th

15 August 2018

Dear Members of the Council of State,

Recommendations concerning the Draft Criminal Inquiry Act and Draft National Police Act

We write to your office concerning the Draft Criminal Inquiry Act B.E. ... ('Draft Criminal Inquiry Act') and the Draft National Police Act B.E.... ('Draft National Police Act'), scheduled for public consultation between 2 and 16 August 2018.

We welcome the Committee Considering Draft National Police Act's efforts to enhance the effectiveness and fairness of the criminal justice system in Thailand. We however wish to make the following recommendations to further strengthen provisions in the Draft Criminal Inquiry Act and the Draft National Police Act.

Draft Criminal Inquiry Act

a. Section 7. Receipt of complaints and/or allegations by inquiry officers

This provision is welcome as, if properly implemented, it should improve access to justice for individuals by imposing obligations on inquiry officers to receive complaints or allegations from individuals from any location in which the officers are operating, and ensuring that inquiry officers must keep complainants apprised of progress in their cases within a timeframe specified by the Police Committee, including through electronic means. Allowing for the provision of updates through electronic means in particular should assist in increasing the regularity and consistency of provision of updates.

In this respect, we would like to highlight that updates on the developments and progress in a case should be regular and consistent, and proactive efforts should be made by the designated inquiry officer and/or liaison person to provide updates, whether or not the complainant proactively seeks such updates.¹ We urge the Police Committee to be guided by this in setting a reasonable timeframe which will ensure the provision of such regular and consistent updates.

Recommendation (a): This provision should be extended to expand the duty of inquiry officers to provide regular and consistent updates within a reasonable timeframe to complainants, whether or not complainants proactively seek such updates.

¹ See for example, in the case of investigating potentially unlawful deaths, the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), para 35.

b. Section 16. Prohibitions against violation of the presumption of innocence

Prohibition of prejudicial release to the public by authorities of visual images or audio recordings, media coverage or press interviews of a suspect and/or arrested person

This provision is welcome in so far as it protects the right of a suspect and/or arrested person to the presumption of innocence until proven guilty in a court of law by prohibiting the prejudicial release to the public by authorities of any visual images or audio recordings of a victim, a suspect and/or arrested person and in banning prejudicial media coverage or forcing a suspect and/or arrested person to be interviewed by or before the press.

Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR), to which Thailand is a State party, protects the right to the presumption of innocence. In its General Comment on State obligations under article 14 and the right to fair trial, the Human Rights Committee affirmed that all public authorities have a duty to refrain from prejudging the outcome of a trial, for instance by preventing the making of any public statement about the guilt of a suspect.²

At the same time, it will be important that the provision not be interpreted or applied in a way that would allow law enforcement authorities to invoke it to refuse to provide any evidence of ill-treatment or other violations of the rights of a person in their custody to the person's lawyer or others with a legitimate interest, or to prevent the person from voluntarily communicating with persons outside of the place of detention where he or she would otherwise be entitled to do so.

In the current draft provision, section 16 paragraph 1 on the duty of fair, prompt and consistent investigation of suspects and/or arrested persons applies only to "inquiry officers during an inquiry", section 16 paragraph 2 on the prohibition of media interviews of suspects and/or arrested persons pertains only to "arrest or inquiry officers during an arrest or inquiry", and section 16 paragraph 3 on the prevention of disclosure of visual or audio recordings of a victim, a suspect and/or arrested person applies to "public authorities and inquiry officers". This discrepancy within one section is a cause for confusion. Safeguards to protect the presumption of innocence should be the duties of all law enforcement officers and public authorities, and not just limited to certain officers.

Reenactment of an alleged crime at crime scene

Section 16 paragraph 3 also specifies that the reenactment of an alleged crime at the crime scene for the purposes of criminal inquiry does not fall within the scope of the prohibition.

The right to presumption of innocence, protection against self-incrimination including the right to silence, impacts on the fairness of the trial, and the protection of privacy and reputation, must necessarily underpin any rules on the use of reenactments for the purposes of a criminal inquiry. In Thailand, we have observed that reenactments of alleged crimes have, in practice, been conducted in a manner that particularly undermines a suspect's right to presumption of innocence, including where reenactments are conducted publicly in front of the media, victims, victims' family members and friends, and members of the public.³ Cases of public or mob violence against suspects

² UN Human Rights Committee, 'General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial', 23 August 2007, CCPR/C/GC/32, para 30. ('HRC GC No. 32') <http://www.refworld.org/docid/478b2b2f2.html>

³ See for reference, Saengpassa, 'Crime re-enactments: a violation of suspects' rights?', *The Nation*, 28 October 2014, <http://www.nationmultimedia.com/politics/Crime-re-enactments-a-violation-of-suspects->

and/or arrested persons, and police officers tasked to protect these persons, during such reenactments have also been reported.⁴

In this respect, we note that any circumstances in which a suspect is involuntarily forced to participate in or be present at a reenactment would be inherently highly prejudicial to the presumption of innocence and should be absolutely prohibited.

Particularly in the context of continuing concerns about torture and other coercive or abusive interrogation and investigative techniques in Thailand, it is also difficult to have a high degree of confidence in the voluntariness of any given confession or agreement to participate in a reenactment.

For these reasons, we recommend that the current practice of reenactments involving or in the presence of suspects, in the context of criminal inquiries, be stopped in Thailand.

This should also be reflected in amendments to Order of the Royal Thai Police No. 855/2548 ('RTP Order No. 855/2548') in so far as it currently permits reenactment of an alleged crime at the crime scene, albeit only in certain circumstances, and with preventive measures to be applied in an "appropriate" manner, so as not to "threaten" or "injure" a suspect.⁵

In the event that, despite our recommendation, Thailand chooses to maintain a practice of reenactments of an alleged crime at a crime scene involving or in the presence of the suspect, the practice should be strictly restricted to situations where the accused has already voluntarily confessed and further agrees to be present at the re-enactment, after being fully advised of his or her rights following confidential access to independent legal counsel, where there are effective guarantees and compelling proof of the voluntariness of the confession and agreement to participate, that the lawyer be informed and have the right to be present at the reenactment, and then only with appropriate safeguards in place to protect the suspect's rights to presumption of innocence and protection of privacy and reputation, and to protection from mob or other violence, in line with international human rights law and standards.

Practical measures to this end would include ensuring the movement of a suspect to a crime scene is not publicized and the person's identity kept confidential; ensuring the duty of law enforcement officers and public authorities to refrain from revealing to the public any information about reenactment of an alleged crime; ensuring that the reenactment of an alleged crime is conducted in private, i.e. through cordoning off and

[rights-30246398.html](https://www.nationmultimedia.com/politics/Crime-re-enactments-a-violation-of-suspects-rights-30246398.html); US Department of State, 'Thailand 2014 Human Rights Report', <http://www.nationmultimedia.com/politics/Crime-re-enactments-a-violation-of-suspects-rights-30246398.html>

⁴ For example, on 29 February 2016, local residents of Koh Kut attacked five Cambodian fishermen accused of the rape and assault of four French tourists when they took part in a crime scene re-enactment, see Waewkrai Hong, 'Crowd mobs Trat rape suspects at reenactment', *Bangkok Post*, 29 February 2016, <https://www.bangkokpost.com/news/general/880488/crowd-mobs-trat-rape-suspects-at-reenactment>; in January 2015, hundreds of villagers in the Pla Pak district of Nakhon Phanom province attempted to attack a man at a reenactment of the rape and murder of a nine-year-old girl, see 'Angry mob try to attack rape suspect', *Bangkok Post*, 11 January 2015, <https://www.bangkokpost.com/archive/angry-villagers-try-to-attack-suspect-in-girl-rape-and-murder/456015>

⁵ Section 2.4 of the Order of the Royal Thai Police No. 855/2548 explicitly discourages the practice of reenactment of an alleged crime at the crime scene to just support the accused's confession, referring to the Supreme Court's Judgment 7562/2537 where such evidence was not admissible as supporting evidence for the accused's confession. The National Human Rights Commission of Thailand, in its Finding No. 244/2556 on 'Rights in the justice system and the rights of individuals in honor and reputation: a case of bringing the accused in a criminal case to the scene includes a confession and a press releases', dated 27 March 2013, also confirmed this same principle, referring to the Constitution of Thailand where the presumption of innocence is guaranteed.

screening the area from any members of the public, victims, victims' family members or friends, or the media.

Recommendation (b)(i): In the interests of protecting the presumption of innocence and to ensure accordance with Thailand's obligations under the International Covenant on Civil and Political Rights, sections 16 paragraphs 1, 2 and 3 should be amended to apply to all law enforcement officers and public authorities, including officers in charge of inquiry and arrest, and for the entire period of time until the suspect and/or arrested person is proven guilty in a court of law.

It should also be clarified under section 16 paragraph 2 that authorities cannot compel a suspect or arrested person under any circumstances to participate against his or her will in media interviews or appearances at press conferences, whether "during an arrest or inquiry" or at any other time, while on the other hand, authorities cannot restrict a suspect who wishes to communicate with the news media from doing so, other than such restrictions as may be necessary and proportionate for instance with respect to the order and functioning of the place of detention of a person deprived of liberty.

Recommendation (b)(ii): We highlight that the amendment in section 16 paragraph 3 to prevent "commission of any actions which may shame a victim, arrested person and/or suspect" should expressly include abstaining from making public statements prejudging the guilt of a suspect, in line with international human rights and legal standards.

Recommendation (b)(iii): The exception for reenactments in section 16 paragraph 3 should be amended (and RTP Order No. 855/2548 amended) in line with the recommendations set out above.

c. Section 16 paragraph 1. Duty to conduct prompt, continuous and fair investigations

This provision is welcome as it enshrines within law the duty of all inquiry officers to conduct prompt, continuous and fair investigations and to refrain from the commission of any act that can be deemed inconsistent with human rights principles.

The revised Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), formally launched in Thailand on 25 May 2017, reflecting broader standards on effective remedies under international human rights law, provides that investigations must be prompt, effective, thorough, independent, impartial and transparent.⁶ Other relevant international standards, principles and codes should also guide the conduct of investigations of inquiry officers, law enforcement officials and public authorities, including the 1979 UN Code of Conduct for Law Enforcement Officials and the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the UN Office of the High Commissioner for Human Rights' Commission of Inquiry Guidance, the 2015 updated UN Standard Minimum Rules for the Treatment of Prisoners, the 1985 UN Basic Principles on the Independence of Judiciary, the 1990 UN Basic Principles on the Role of Lawyers and the 1990 UN Guidelines on the Role of Prosecutors.⁷

⁶ See the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), paras 22 to 33. See also more generally, Human Rights Committee General Comment no 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2001), paragraphs 15 and 18; and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, para 3(b).

⁷ See the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), para 34.

Recommendation (c)(i): In the interests of ensuring that investigations are fully in line with human rights standards which will guarantee the right to effective remedy of suspects and/or arrested persons, the entirety of this provision should be extended to all law enforcement officers and public authorities involved in the investigation process, including inquiry officers, investigators and public prosecutors.

This provision should also be extended to enshrine within law the duty of all law enforcement officers and public authorities to conduct investigations that are not only prompt, continuous and fair, but also independent, impartial, transparent and effective.

Recommendation (c)(ii): We further recommend that this provision be amended to include that all law enforcement officers and public authorities should "refrain from the commission of any act that can be deemed inconsistent with human rights principles, including in accordance with international standards, principles and codes governing the conduct of all public authorities and law enforcement officials".

Apart from ensuring that investigations will be conducted in a manner consistent with human rights principles, these concrete international guidelines and principles which have been drafted with the involvement of experts from around the world can provide further essential guidance to aid the work of law enforcement officers and public authorities in Thailand.

d. Section 17. Prohibition against entry into a search area and audio and/or visual recordings of the operations of officers by unauthorized personnel

In its application to searches of private premises, this provision may help to safeguard against potential violations of the right to presumption of innocence, and protection of privacy and reputation, of a suspect and/or arrested person, in prohibiting the dissemination of information by public authorities or law enforcement officers about a search in relation to an investigation and in preventing the entry into a search area of an unauthorized person. It would be a serious concern, for instance, if law enforcement officers alerted and invited television media to enter a private premises and film those subject to the search and subsequently make public the film so as to publicly suggest the guilt of the subjects of the search.

However, this provision further specifies more generally that audio and/or video recordings of the operations of law enforcement officers during a search should not be conducted by unauthorized personnel.

In this respect, we note that video and audio recordings should in principle be conducted during all searches (as well as interrogations and interviews)⁸ involved in an investigation, and such recordings be made available to the accused person and his or

⁸ Video and/or audio recordings should be conducted not only during all searches, but also during all interrogations or interviews in an investigation, as such recordings are an important safeguard against potential violations of the rights of suspects and/or arrested persons, including in particular, torture or other ill-treatment, coercion or other unlawful or improper conduct or use of force by authorities. See Committee Against Torture, 'General comment no. 2, Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment', 24 January 2008, CAT/C/GC/2, para 14, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhskvE%2BTuw1mw%2FKU18dCyrYrZhDDP8yaSRi%2Fv43pYTgmQ5n7dAGFdDalfzYTJnWNYOXxeLRAIVgbwcm2ZXXH%2BcD%2B%2F6IT0pc7BkqqlATQUZPVhi>; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 'Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment', 10 August 2010, UN Doc. A/65/273, para 75, <http://www2.ohchr.org/english/issues/torture/rapporteur/docs/A.65.273.pdf>; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 'Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38', 17 December 2002, E/CN.4/2003/68, para 26(g), <https://undocs.org/E/CN.4/2003/68>

her legal counsel, to ensure that an investigation is conducted in a transparent and verifiable manner.

Furthermore, a blanket prohibition of video and/or audio recording of police activities by “unauthorized persons”, in so far as this could be interpreted to include persons (such as residents or owners or other targets or subjects of the search) already present in a place where a search takes place, or members of the public generally as regards searches conducted in public view, would appear to be inconsistent with freedom of expression, particularly given the role that video and/or audio recordings by victims and other members of the public can have in exposing and prompting appropriate responses to wrongful acts by law enforcement officers in such circumstances. That aspect of the provision should be deleted or amended to protect the rights of members of the public in relation to law enforcement operations carried out in public view, and the rights of subjects of searches and other individuals already present in a private premises, to freedom of expression and to scrutinize the conduct of police activities.

Recommendation (d)(i): This provision should be amended to clearly state that video and/or audio recordings should be conducted during all searches involved in an investigation. Such video and/or audio recordings can be conducted by authorized law enforcement officers or public authorities, including officers in charge of the search themselves or other law enforcement officers or public authorities who are independent from the investigation.

Recommendation (d)(ii): It is recommended that this provision explicitly include a sub-provision stating that *“This provision does not override the necessity of undertaking other preventive measures, including the provision of adequate training for law enforcement officers on the legitimate use of force and prevention of torture and ill-treatment during the conduct of a search.”*

Draft National Police Act

With respect to the Draft National Police Act, we wish to comment on one particular article that raises concerns about the use of firearms and force by police officers.

e. Section 105. Use of firearms and/or force against a police officer in a situation of dereliction of duty, in strictly unavoidable circumstances

It is welcome that this provision enshrines within law that use of force and/or firearms against a police officer in a situation of dereliction of duty should only be legitimate when cumulatively “strictly unavoidable”, “in good faith” and “proportionate”.

In this respect, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) (‘UN Basic Principles’) clarify that law enforcement officers should, in carrying out their duty, as far as possible, first apply non-violent means before resorting to the use of force or firearms. Although the “strictly unavoidable” requirement should be interpreted as implicitly including this principle, the provision would be strengthened by making this explicit in the law.

Furthermore, the UN Basic Principles further provide guidance that firearms in particular may not be used except to protect the right to life, including instances of self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. They further provide that intentional lethal use of firearms may only be made when

strictly unavoidable in order to protect life. Again, while the “proportionality” requirement should be interpreted as implicitly including these restrictions, the provision would be strengthened by making this explicit in the law.

Recommendation (e)(i): It is recommended that this provision be amended to clarify that use of firearms in particular can only be legitimate where strictly unavoidable “*in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives*” and that “*intentional lethal use of firearms*” can only be legitimate “*when strictly unavoidable in order to protect life*”.

Furthermore, this provision should be amended to include the necessary safeguard that the use of force and/or firearms in “strictly unavoidable circumstances” should be only in a situation where a police officer has attempted “*as far as possible to apply non-violent means before resorting to the use of force and/or firearms*”.

Recommendation (e)(ii): This provision should be amended or a new provision added to extend the application of the above principles on the use of force and firearms to all law enforcement officials in relation to use of force and firearms against any person.⁹

We would like to urge your office to incorporate all our recommendations provided in this letter to strengthen the Draft Criminal Inquiry Act and the Draft National Police Act. We would further highlight that the consideration and amendment of both draft laws should, in whole, aim to comply with international human rights law and standards governing standards of investigations and inquiries and legitimate operations of law enforcement personnel. Such consideration of international law and standards should not only apply to the provisions we have highlighted above in this letter.

The ICJ remains committed to supporting the efforts of the Thai government to strengthen the criminal justice system in Thailand in a manner that protects the fundamental rights of persons in Thailand and ensures Thailand’s compliance with international law.

Please do not hesitate to contact us if you have any questions or require further information or advice.

Yours faithfully,

(signed)

Kingsley Abbott
Senior Legal Adviser
International Commission of Jurists

⁹ We are aware of provisions governing the use of force and firearms in training documents for law enforcement officers, for example, in the ‘Tactics Training Manual for Police Stations B.E. 2556 (2013)’. However, these safeguards should be explicitly provided in law. In this respect, even as sections 68 of the Criminal Code and section 83 of the Thai Criminal Procedure Code provide guidelines on the use of force and firearms in the context of arrest and self-defence, these provisions are insufficient in detailing the “strictly unavoidable” and “proportionality” requirements.