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# UNITED KINGDOM

## Strengthening proposals for the Northern Ireland Bill of Rights

The following are Amnesty International's comments on some of the provisions proposed for inclusion in the Bill of Rights for Northern Ireland, contained in the consultation paper, "Making a Bill of Rights for Northern Ireland", which was issued by the Northern Ireland Human Rights Commission in September 2001.

Amnesty International is grateful for the assistance, in the preparation of this document, of Gilbert Marcus, BA.LLB (Wits), LLB (Cantab); Senior Counsel, Advocate of the High Court of South Africa and England, Member of Grays Inn.

### I. INTRODUCTION

Amnesty International welcomes a number of aspects of the Consultation Document and makes recommendations for the strengthening of particular provisions of the proposed Bill of Rights in order to ensure that it guarantees the highest level of protection for all people in Northern Ireland.

In keeping with the fact that all human rights are universal and indivisible, Amnesty International welcomes the fact that the Northern Ireland Human Rights Commission's proposed Bill of Rights contains provisions guaranteeing some economic, social and cultural rights, as well as civil and political rights.

As Amnesty International had recommended that the Northern Ireland Bill of Rights should enshrine guarantees of the highest protection of human rights,<sup>1</sup> the organization welcomes that some of the provisions proposed by the Northern Ireland Human Rights Commission take account of developments in international law in the 50 years since the adoption of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

The organization urges that the elaboration of all of the rights within the Northern Ireland Bill of Rights incorporate and reflect a gendered perspective. Doing so will enhance the protection and promotion of the rights of all people in Northern Ireland. In addition, Amnesty International urges that gender-neutral language be used throughout the text of the Northern Ireland Bill of Rights. To that end, the organization notes that some

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<sup>1</sup> See, *Northern Ireland: An Inclusive Bill of Rights for all*, February 2001, AI Index: EUR 45/006/2001.

provisions set out in the Consultation Document use only masculine pronouns rather than including both masculine and feminine pronouns or gender-neutral words.

Amnesty International also urges that reference be made to the “Multi-Party Agreement” of April 1998, as set out in the Agreement between the Governments of the United Kingdom and Ireland rather than the “Belfast (Good Friday) Agreement”.

The organization welcomes the inclusion of equality rights, guaranteeing the right of all people to be equal before and under the law and to equal protection of the law and equal access to and enjoyment of all rights and freedoms.

Amnesty International also welcomes the proposed inclusion of several other provisions including the duty of the state to prevent and eliminate all forms of violence against women and the right of all persons suspected or charged with a criminal offence to silence in the face of questioning by law enforcement officials and at trial and not to have adverse inferences drawn from such silence. The organization also welcomes the broad definition of victims, which includes not only direct victims of human rights abuses, but also, where appropriate, the family and dependents of the victim or those with whom they have a close personal relationship and those persons who have suffered harm in intervening to assist the victim or to prevent victimization.

Amnesty International urges that some of the provisions be strengthened and that additional provisions be added in order to ensure that the Northern Ireland Bill of Rights guarantees the highest level of protection of fundamental human rights.

Among other things, Amnesty International urges that a specific provision be added which makes clear the duty of State authorities and agents to not only respect the rights set out, but also to take positive measures to ensure, protect and fulfill the rights.

Amnesty International urges the inclusion in the Northern Ireland Bill of Rights of the Right to Dignity of all persons and the Right to Seek Asylum.

The organization urges amendments to the provisions guaranteeing the Right to Life to ensure the highest protection of this fundamental right. The provisions should safeguard against the arbitrary deprivation of the right to life; set out standards relating to the use of force by law enforcement officials; prohibit the use of the death penalty at all times and its re-introduction; and require the prompt initiation of independent, impartial and thorough investigations into allegations of all deaths in custody, deaths following the use of force by law enforcement and prison officials, and deaths in disputed circumstances.

Amnesty International urges amendments aimed at strengthening the prohibition of torture and ill-treatment. In particular, the provisions should: prohibit cruel treatment or

punishment; expressly set out that no circumstances whatsoever may be invoked to justify torture; prohibit corporal punishment and incommunicado detention; and prohibit the expulsion, return or extradition of any person to a place where there are substantial grounds for believing that they would be at risk of being subjected to torture. A provision should be added requiring the prompt initiation of an independent, impartial and thorough investigation when allegations of torture and ill-treatment are received and there are reasonable grounds to believe that such acts have occurred.

Rights to Liberty and Security should be amended to ensure that the guarantees apply to all people deprived of their liberty, rather than limiting the protection of many of the provisions to people deprived of their liberty in connection with criminal offences. Searches of people, seizures of property and surveillance of communications should be made only upon reasonable suspicion that a criminal offence has been or is about to be committed and, in all but exigent circumstances, with prior authorization of a court. Communications between a lawyer and client within the scope of the professional relationship should be excluded from surveillance, search and seizure.

The right to access to legal assistance, including consultation with and assistance of a lawyer, should be granted without delay and apply during all questioning by law enforcement officials. In addition to the right to counsel, a provision should be added which guarantees the right of all foreign nationals deprived of their liberty to contact and consult with consular officials of their country of origin or an appropriate international organization.

The Chapter guaranteeing the rights to fair trial should expressly guarantee the right to full disclosure of evidence to the defence, including evidence which may be exculpatory; the right of the accused to be present at trial; and protection against double jeopardy.

While welcoming the inclusion of provisions aimed at protection of lawyers, the organization recommends that these be strengthened by including the prohibition of identifying lawyers with their clients' causes and requiring that lawyers who have been threatened as a result of discharging their professional functions be protected.

Amnesty International urges that provisions of the Right to Administrative Justice include the rights to written reasons for administrative action or inaction and to review of administrative decisions by an independent and impartial tribunal.

Amnesty International recommends amendments to the Chapter on the Rights of Victims. It urges that the definition of victims should include victims of the conflict in Northern Ireland, which would obviate the need for separate provisions for victims of the conflict and other victims. The organization also urges that the definition be expanded to include

victims of human rights abuses, enshrined in international standards, whether or not the acts have been proscribed by the criminal law.

Amnesty International calls on the authorities in all countries to promptly initiate independent, impartial and thorough investigations of human rights abuses and to bring to justice, in the course of fair proceedings, those reasonably suspected of involvement in such acts. The organization considers that the right of victims to redress and reparation is an essential component of respect for and protection of human rights, including the rule of law. The organization believes that reference to any form of a truth commission, which may be decided on in the future, should not be included in the Northern Ireland Bill of Rights.

The organization calls on the Northern Ireland Human Rights Commission to amend provisions relating to the Rights of Children, so as to ensure that they guarantee the highest standards of protection. Express provisions should require that: contacts between law enforcement officials and children be conducted in a manner which respects the legal status of the child, avoids harm, promotes the child's well-being, and guarantees the right to assistance and presence of a lawyer and an appropriate adult when a child is being questioned. Provisions should be added prohibiting corporal punishment; life sentences without the possibility of release, if the person was under the age of 18 at the time an offence was committed; and disciplinary punishments constituting cruel, inhuman or degrading treatment. In addition, the Bill of Rights should expressly prohibit the recruitment to the armed forces or deployment to situations of armed conflict of children under the age of 18.

Rights to Freedom of Expression and Information should be strengthened. Express provisions should protect the right of journalists not to disclose their sources and guarantee the right of all people, including current and former employees or agents of the state, to make public information which concerns allegations of violations of human rights by state agents. Amnesty International also urges inclusion of express provisions incorporating Article 12 of the Human Rights Act and the duty of state officials and agents to release information to enable people to monitor and assess the respect for human rights in Northern Ireland.

Amnesty International considers that there should be a single limitations clause which applies only to rights which may be limited under international human rights treaties. The extent criteria for such limitations should be expressly set out, as it is in the Constitution of the Republic of South Africa.

Amnesty International considers that none of the provisions of the Bill of Rights should be subject to suspension. If, however, a derogation clause is included, then Amnesty International urges that the list of non-derogable rights include those rights which are

non-derogable under the European Convention on Human Rights, the International Covenant on Civil and Political Rights, customary international law and Human Rights Committee General Comment 29, and only to the *extent* that they are permissible.

The organization reiterates its call for the establishment of a Human Rights Court to enforce and protect the rights guaranteed in the Bill of Rights. Such a court should have jurisdiction to consider petitions alleging that rights have been or may be violated, brought by individuals, groups, bodies and classes, including those acting in the public interest. The court should be granted sufficient resources to carry out its duties and wide enough jurisdiction to ensure it may grant appropriate effective remedies, including declaratory and injunctive relief and the full range of reparation. Its decisions should be guided not only by the judgments of the European Court of Human Rights, but also by other international and regional human right bodies and mechanisms.

Repeal or amendment of the Northern Ireland Bill of Rights should require the considered consensus of the people of Northern Ireland, in order to ensure its status as a forward-looking and living instrument which will withstand the test of time and political tides.

### **Amnesty International's Comments on Text**

Amnesty International's comments on the specific clauses as set out in "Making a Bill of Rights for Northern Ireland", the Consultation document issued by the Northern Ireland Human Rights Commission, are not exhaustive. Rather, this document focuses on those Clauses which fall within the scope of Amnesty International's mandate.

## **II. POSITIVE DUTIES**

Amnesty International recommends the addition of a provision which sets out the duty of the state to take positive action to ensure, fulfill, promote, protect and respect all of the rights in the Bill of Rights. Such a provision could follow the Preamble.

## **III. EQUALITY AND NON-DISCRIMINATION: Clause 4**

Amnesty International welcomes the inclusion of equality provisions in the draft Bill of Rights.

*Non-discrimination (Clause 4(4))*

The organization recommends the deletion of “possession of a criminal conviction” from the list of prohibited grounds of discrimination, in view of the fact that there are some situations in which taking into consideration whether a person has been convicted of a particular offence is relevant.

*Positive Action (Clause 4(8))*

Amnesty International urges that such provision specifically set out that legislative and other measures -- designed to protect or advance persons, or categories of persons, disadvantaged by discrimination in the past -- *may* be taken, and are not for that reason discriminatory. [NIHRC Question 13]

**IV. RIGHTS OF WOMEN: Clause 5**

Amnesty International considers that the elaboration of all rights within the Bill of Rights should incorporate and reflect a gendered perspective. Doing this will, in itself, enhance the protection and promotion of the rights of all people, including women.

In addition, Amnesty International considers that there should be specific provisions dealing with rights particular to women and female children. [NIHRC Question 14] Consistent with the view that a gender perspective should be mainstreamed throughout the Bill of Rights, Amnesty International also supports placing provisions guaranteeing women’s human rights within relevant chapters.

It is Amnesty International’s view that the provision prohibiting violence against women and girls, a provision which the organization welcomes, should be amended to apply to all people and moved from the chapter on Victims’ rights to the chapter on Freedom from Torture, Slavery and Forced Labour under the Right to Dignity and should read:

The state shall take all appropriate measures to protect, prevent and eliminate all forms of violence against all people, including women and children, whether physical, mental or emotional, and whether from private or state sources.

In addition, Amnesty International urges that express provisions about rights of women deprived of their liberty, which among other things, incorporate the Guidelines on women deprived of their liberty set out in the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in its 10<sup>th</sup> General Report of its Activities (CPT/Inf (2000)13), be added to the Section on the Right to Liberty and Security in Clause 7.

## **V. RIGHT TO LIFE. FREEDOM FROM TORTURE, SLAVERY AND FORCED LABOUR: Clause 6**

### **Right to Life**

As the right to life is the most fundamental of human rights, Amnesty International believes that it should be formulated in the Bill of Rights in a manner which aims to provide maximum protection. The right to life as set out in Article 2 of the European Convention on Human Rights provides in part that “no one shall be deprived of his life intentionally”. This article also specifies that the right to life shall not be deemed to have been violated when the deprivation of life:

“results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

These limitations on the right to life are not set out in the International Covenant on Civil and Political Rights (ICCPR), which, in contrast, provides that “no one shall be arbitrarily deprived of his life”. The concept of arbitrariness contains elements of disproportional and unreasonable use of force, unlawfulness and injustice, as well as capricious abuse of power.

Thus, Amnesty International believes that the provision on the right to life in the Bill of Rights should state that no one shall be arbitrarily deprived of their life, because this formulation includes both intentional and unintentional killings, and the use of this term obviates undertaking the difficult task of listing all instances of deprivation of life which are not prohibited under international law and standards. Adopting wording similar to Article 2 of the ECHR would risk being deemed to exclude from protection unintentional killings and elements of unlawfulness, injustice, capriciousness and unreasonableness.

If, however, the provision in the Bill of Rights is based on Article 2 of the ECHR, then Amnesty International considers that the provision should be re-drafted in a manner that expressly sets out the additional guarantees set out in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. To this end Amnesty International notes with concern that Clause 6(a) 3(a) of the proposal misstates the first sentence of Principle 9 of the UN Basic Principles.

Clause 6(a)3(a) in the Consultation document reads:

“(a) when the official is acting in self-defence or defence of others *or* when there is an imminent threat of death or serious injury;”

In contrast, the first sentence of Principle 9 of the UN Basic Principles reads:

“Law enforcement officials shall not use firearms against persons except in self-defence or defence of others *against* the imminent threat of death or serious injury...”.

Amnesty International also urges that the proposed Clause include that, in any event, law enforcement officials may only intentionally use lethal force as a last resort in carefully prescribed circumstances, and only when strictly unavoidable in order to protect life. [NIHRC Question 15]

Amnesty International believes that the Bill of Rights should include the express abolition of the death penalty in all circumstances. Therefore, the organization recommends the deletion of Clause 6(5) and the second sentence of proposed Clause 6(a)(1). In making these recommendations, Amnesty International draws the Northern Ireland Human Rights Commission’s attention to Resolution II (B) of the Ministerial Conference of the Council of Europe of November 2000 and the imminent adoption and opening for signature of Protocol 13 to the European Convention on Human Rights, by the Committee of Ministers of the Council of Europe, which would abolish the death penalty in all circumstances, including in respect of acts committed in time of war or imminent threat of war. The inclusion of a provision in the Bill of Rights abolishing the death penalty at all times, would therefore, be in keeping with the developing international trend towards abolition of the death penalty at all times and the view that the Bill of Rights should provide the highest protection of human rights and be a forward-looking instrument.

In view of Amnesty International’s longstanding concerns about the failure of the authorities to initiate prompt, thorough, impartial and independent investigations into allegation of human rights violations, including the right to life, and in view of the recent judgment of the European Court of Human Rights in the cases of *Jordan v. United Kingdom*, *Kelly and others v United Kingdom*, *McKerr v. United Kingdom* and *Shanaghan v. the United Kingdom*, Amnesty International regrets that the proposed Bill of Rights does not set out such a right. Amnesty International urges the Northern Ireland Human Rights Commission to add an express provision within the Right to Life Clauses which incorporates:

- a) the right to prompt, independent, impartial, and thorough investigation into all deaths in custody, deaths following the use of force by law enforcement officials and prison officers, and killings in disputed circumstances;

- b) the requirement that families of victims of all deaths in custody, deaths following the use of force by law enforcement officials and prison officers, and killings in disputed circumstances are kept fully and regularly informed about the progress of the investigation;
- c) the requirement that all deaths in custody, deaths following the use of force by law enforcement officials and prison officers, and killings in disputed circumstances must be subject to a public form of inquiry which can determine the full circumstances of a death and the legality of state agents' actions;
- d) the requirement that families of victims be afforded full and equal participation in any such public form of inquiry, including full access to legal aid and equality of arms, including disclosure of information;
- e) the right of relatives and dependents to reparation.

In sum, Amnesty International recommends that the Clause on the Right to Life be redrafted as follows:

#### 6. Right to Life

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of their right to life.
2. No one shall be deprived of life by a law enforcement or prison official except:
  - (a) when the official is acting in self-defence or defence of others against the imminent threat of death or serious injury;
  - (b) to prevent the perpetration of a particularly serious crime involving grave threat to life; or
  - (c) to arrest a person who is presenting such a danger as in (b) and who is resisting the arrest;but only as a last resort, when less extreme means are insufficient to achieve these objectives.
3. In any event intentional lethal use of firearms may only be made as a last resort and when strictly unavoidable in order to protect life.
4. The death penalty shall be abolished at all times.
5. In the event of deprivation of life:

- a) there shall be a prompt, independent, impartial, and thorough investigation;
- b) families of the deceased shall be kept fully and regularly informed about the progress of the investigation;
- c) all cases of death in custody, death as a result of use of force by law enforcement or prison officials and death in disputed circumstances must be subject to a public form of inquiry to determine the full circumstances of a death and the legality of state agents' actions;
- d) the families of the deceased shall be afforded full and equal participation in any such public form of inquiry, including full access to legal aid and equality of arms, including disclosure of information;
- e) relatives and dependents of unlawful killings shall be entitled to reparation.

### **Prohibition of Torture**

Amnesty International continues to urge the Northern Ireland Human Rights Commission to adopt the strongest formulation of the fundamental right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. To this end, the organization recommends the following addition to this draft provision:

the express prohibition of cruel treatment;

the express provision that no exceptional circumstances whatsoever may be invoked as a justification of torture;

a prohibition of corporal punishment;

the express prohibition of expelling, returning (*refoulement*) or extraditing a person to any State where there are substantial grounds for believing that they would be at risk of being subjected to torture;

a prohibition of incommunicado detention.

In addition, Amnesty International urges that the Clause on the Prohibition of Torture include the duty of the authorities to initiate a prompt, thorough, independent and impartial investigation into all allegations of torture and other cruel, inhuman or degrading treatment or punishment or when they have reasonable grounds to believe that such an act has occurred.

Amnesty International urges the Human Rights Commission to add a provision, consistent with Article 5(2) of the Convention against Torture and Other Cruel, Inhuman

or Degrading Treatment or Punishment, which would require measures to be taken to establish jurisdiction over all offences of torture, where the alleged offender is present in the territory and is not being extradited.

### **Right to Dignity**

Amnesty International urges the Northern Ireland Human Rights Commission to add a provision which protects the right of all people, including those deprived of their liberty, to be treated with humanity and with respect for and protection of the inherent dignity of the human person including the right to physical and mental integrity. This right is reflected in the preamble to the ICCPR, and with respect to people deprived of their liberty in Article 10(1) of the ICCPR. The guarantee of the right should include the duty of the state to ensure, respect, promote, protect and fulfill the right of all persons, including women and children, to be free from all forms of unlawful violence, whether physical, mental or emotional, from either public or private sources.

While Amnesty International notes that the Consultation document published by the Northern Ireland Human Rights Commission includes a right of people deprived of their liberty to be treated with dignity in Clause 7(a)(11), Amnesty International considers that this right applies to all people equally.

## **VI. CRIMINAL AND ADMINISTRATIVE JUSTICE: Clause 7**

### **Right to Liberty**

#### *Judicial Scrutiny (Clause 7(a)3)*

Amnesty International urges that the Bill of Rights provide that *all* people deprived of their liberty are brought promptly before a judge or judicial authority, as provided in Principle 11(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, particularly in view of the increasing propensity to detain people administratively in the United Kingdom, including asylum-seekers, and proposals in the Anti-Terrorism, Crimes and Security Bill for indefinite detention of those non-nationals who are certified by the Secretary of State as national security risks and “suspected international terrorists”.

#### *Search and seizure (Clause 7(a)7)*

Amnesty International welcomes the inclusion of the restriction on searches and seizures, but urges the addition of the requirement that search and seizure be based on reasonable suspicion that a crime has been or is about to be committed, and, in all but exigent

circumstances, on prior judicial authorization. This would ensure the protection of the fundamental right of privacy in a manner consistent with rights to due process.

*Notice of reason for arrest and prompt notice of charge (Clause 7(a)2)*

In keeping with Article 9(2) of the ICCPR and Principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Amnesty urges amendment to the wording of Clause 7(a)(2) to read:

Everyone who is deprived of their liberty shall be informed immediately of the reasons for their arrest or detention and shall be informed promptly of any charges against them. Such information shall be provided in a language which the detained person understands.

*Notice of Rights (Clause 7(a)17)*

Amnesty International believes that all persons detained, arrested, or charged with a criminal offence should be informed of their rights. (See Principle 13 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.) The organization therefore urges the amendment of this provision and suggests that it be placed immediately after the right to immediate notice of reasons for deprivation of liberty.

*Consultation with lawyer (Clause 7(a)8)*

Amnesty International urges the amendment of the provisions regarding the right to consult with a lawyer. It urges that the provision expressly guarantee

that the right should apply to all people deprived of their liberty (not just to those arrested or detained on a criminal charge) (Principle 17(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment);

access to a lawyer should be granted without delay (as opposed to without unreasonable delay);

the right to assistance of and access to a lawyer of the person's choice (Principle 1 of the Basic Principles on the Role of Lawyers; Rule 93 of the European Prison Rules); [NIHRC Question 17]

the rights to access to and assistance of counsel should apply not only before interrogation, but also should include the right to the presence and assistance of counsel during questioning;

the right to confidential communications with a lawyer (rather than private, in order to maintain consistency with the guarantee set out in Principle 22 of the Basic Principles on the Role of Lawyers; Principle 18(4) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;)

the right of all children to access to and assistance of a lawyer at all times when questioned by law enforcement officials, regardless of whether the child is suspected or charged with having infringed the penal law or whether the child is being interviewed as a witness.

*Notice and Access to Family (Clause 7(a) 9 and 10)*

Amnesty International considers that the right to notify or have notified family members and the right to access to them should apply to all persons arrested, detained or imprisoned. In addition, Amnesty International considers that the provision should expressly set out the right to notify or have notified family members when a detained or imprisoned person is transferred to another place of detention.

Amnesty International urges that the right of foreign nationals to contact and consult with the consular officials of their country of origin or an appropriate international organization be expressly included in the Bill of Rights. This right is set out in Article 36 of the Vienna Convention on Consular Relations and Principle 16(2) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

*Conditions of Detention (Clause 7(a)11)*

Amnesty International urges that this provision be worded so as to make it applicable also to people who are imprisoned, as well as detained. Therefore the organization suggests amending the wording to cover *all* people deprived of their liberty.

*Right to Interpreter (Clause 7(a)13)*

Amnesty International urges that the right to interpreter apply to all people deprived of their liberty, including but not limited to those under arrest and during questioning.

*Right to Silence during questioning and Presumption of innocence (Clause 7(a)14)*

Amnesty International welcomes the guarantee of the right to remain silent while being questioned under arrest.

Amnesty International urges the Northern Ireland Human Rights Commission to add a provision which expressly guarantees the right of all people detained to be presumed innocent and to be treated in accordance with this presumption. (See Rule 84(2) of the UN Standard Minimum Rules for the Treatment of Prisoners and Rule 91 of the European Prison Rules.)

Amnesty International also urges that the Northern Ireland Human Rights Commission add a provision to the Bill of Rights which expressly protects the rights of all people deprived of their liberty, including those held in administrative detention, to be held separately from those persons convicted of crimes. The organization notes that this guarantee is afforded to children in Clause 10(e)(6)(a) of the Consultation Document.

*Right to Dignity (Clause 7(a)11)*

In addition to the proposal made by Amnesty International, under the chapter on the Right to Freedom from Torture, Slavery and Forced Labour, that all people, including those deprived of their liberty, shall have the right to be treated with humanity and with respect for and protection of the inherent dignity of the human person including the right to physical and mental integrity, Amnesty International urges that the right as set out in Clause 7(a)11 in relation to conditions of detention be amended so as to apply to all people deprived of their liberty for any reason and be expanded. Specifically Amnesty International suggests that the paragraph should be amended as follows:

Everyone who is deprived of their liberty shall have the right to: conditions of detention which are consistent with human dignity, including the rights to exercise and association, to protection, to regular visits, and the provision, at state expense, of clean, healthy and safe accommodation; nutrition consistent with their dietary, religious and cultural needs; reading material; effective medical, including psychological, care and treatment; and to practice their religion and to spiritual counselling.

No detained or imprisoned person shall be subjected to any medical or scientific research unless: they provide informed consent and the research offers potential benefit to the population from which the subject comes; the research protocol is approved by an independent and reputable ethics committee; the study is not entered into as a result of the use of illegitimate inducements; the participant has the right to withdraw from the research program; and the research will be terminated if harm to participants can be demonstrated.

Everyone who is deprived of their liberty shall be treated with the aim of enabling them to re-enter society safely and effectively.

*Bail (Clause 7(a)16)*

Amnesty International urges the strengthening of the provision which aims to incorporate Article 9(3) of the ICCPR and Article 5(3) of the European Convention on Human Rights. The organization considers that the provision should incorporate the jurisprudence of the European Court of Human Rights and the recommendation of the Working Group on Criminal Justice that a person should not be detained pending trial unless the prosecution produces admissible evidence to show that there is a real risk of flight or to public safety.

**Fair Trial**

*Right to a Fair Trial (Clause 7(b)3)*

Amnesty International reiterates our recommendation that the fair trial provisions in the Bill of Rights should also expressly guarantee the right to full disclosure of evidence to the defence, including all exculpatory evidence. This right is guaranteed in Articles 56(1)(c) and 67(2) of the Rome Statute of the International Criminal Court; AND Rule 66 of Rules of Procedure and Evidence for the International Tribunal for the Former Yugoslavia (as amended on 13 December 2000 and published January 2001).

Amnesty International also urges that a provision be added to the fair trial rights which expressly guarantees the right of the accused to be present at trial.

In making this recommendation, the organization notes that a literal reading of Article 14(3)(d) of the ICCPR would not seem to permit trials to proceed *in absentia*.

This interpretation is backed by the UN Secretary General's Report with recommendations on the establishment of the International Criminal Tribunal for Former Yugoslavia. This states that: "[a] trial should not commence until the accused is physically present before the international tribunal. There is a widespread perception that trial *in absentia* should not be provided for in the statute [of the international Tribunal for the Former Yugoslavia] as this would not be consistent with Article 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be tried in his presence." The Yugoslavia and Rwanda Statutes and the ICC Statute exclude trials *in absentia*.

In such exceptional circumstances, extra vigilance is required. The Human Rights Committee has stated that “[w]hen exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary”. These rights include the right to counsel, even if the accused has chosen not to attend the trial.

An accused has the right to remedy if he or she has been convicted *in absentia* without being aware of the proceedings.

Amnesty International believes that the accused should be present in court during a trial to hear the full prosecution case, to put forward a defence or assist their counsel in doing so, to refute or provide information to enable their counsel to refute evidence, and to examine witnesses or advise their counsel in the examination of witnesses. The organization believes that the sole exceptions to this should be if the accused has deliberately absented themselves from the proceedings after they have begun, or if the accused has been so disruptive that they have had to be removed temporarily. In such cases video or audio links should be employed to allow the accused to follow proceedings.

Amnesty International believes that if an accused is apprehended following a trial in which he or she was convicted *in absentia* for other than these reasons, the verdict rendered *in absentia* should be quashed and a completely new trial held before a different trial court.

#### *Right of Silence during trial (Clause 7(b)5)*

Amnesty International welcomes the express inclusion in the Fair Trial guarantees of the right of every person charged with a criminal offence to remain silent at trial and to have no adverse inferences drawn if this right is exercised. This provision is consistent with the recommendation by the Human Rights Committee that the UK should “reconsider, with a view to repeal, this aspect of criminal procedure, in order to ensure compliance with the rights guaranteed under Article 14 of the Covenant” (see Concluding Observations of the Human Rights Committee, CCPR/CO/73/UK, November 2001).

#### *Right not to be compelled to testify against oneself or confess guilt*

Amnesty International urges that, in addition to this provision, the right of all people charged with a criminal offence not to be compelled to testify against themselves or confess guilt be incorporated into the Bill of Rights.

#### *Right to Appeal (Clause 7(b)8)*

Amnesty International welcomes that the wording of the right to appeal is consistent with Article 14(5) of ICCPR.

*Prohibition of Double Jeopardy*

Amnesty International urges the inclusion in the Bill of Rights of the prohibition of double jeopardy. This right is guaranteed in Article 14(7) of the ICCPR and in Article 4 of Protocol 7 to the European Convention on Human Rights, which has not been incorporated in the Human Rights Act. [NIHRC Question 19]

*Protection of Lawyers (Clause 7(b)10)*

Amnesty International welcomes the inclusion of Clause 7(b)10 in the Bill of Rights, and urges that this provision be strengthened by the express inclusion of the following additional provisions:

the prohibition of lawyers being identified with their clients or their clients' causes as a result of discharging their functions;

the requirement that lawyers be adequately safeguarded if they have been threatened as a result of discharging their functions; and

the right to confidential communications between lawyers and their clients within their professional relationship.

*Right to Dignity (Clause 7(b)13)*

Please note Amnesty International's comments on the right of all people to be treated in a manner consistent with the inherent dignity of the human person (under Right to Freedom from Torture) and the right of all people deprived of their liberty to humane conditions of detention (under 7(a)11, above).

### **Administrative Proceedings (Clause 7(d))**

Amnesty International urges that Clause 7(d)2 be amended as follows:

2) Everyone, including those persons whose rights have been adversely affected by administrative action, has the right to be given written reasons for the administrative decision.

(3) National legislation must be enacted to give effect to these rights and must:

- a) provide for the review of administrative action or decisions by a court or, where appropriate, an independent and impartial tribunal;
- b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- c) promote an efficient administration.

### **VII. RIGHTS OF VICTIMS: Clause 8**

#### *Victims of the Conflict (Clause 8(a))*

In all countries, Amnesty International calls on the authorities to initiate prompt, thorough, independent and impartial investigations of human rights abuses and to bring to justice, in the course of proceedings which meet international fair trial standards, those reasonably suspected of responsibility for such acts. The organization considers that rights to redress and reparation for victims of human rights abuses are an essential component of re-establishing respect for and protection of human rights and the rule of law, including in post-conflict situations.

Amnesty International considers that the rights of victims of human rights abuses, whether the abuses occurred in the course of the conflict or thereafter, do not differ. In order to ensure application of these provisions to victims of the conflict, Amnesty International recommends that the Victims Chapter include a specific provision which makes it clear that the rights of victims set out are applicable also to victims of the conflict.

If, however, the Northern Ireland Human Rights Commission decides to retain separate provisions relating to victims of the conflict, Amnesty International notes the following:

The organization is concerned that the formulation of Clause 8(a)(1) could infer that prosecutions may not take place. Amnesty International urges that Clause 8(a)(1) be removed and replaced with a provision that expressly sets out the right of victims of human rights abuses relating to the conflict to:

be treated with compassion and respect for their dignity;

obtain redress through judicial and administrative mechanisms which are fair, inexpensive for the victim, and accessible;

have the allegation of human rights abuse in question promptly, independently, impartially and thoroughly investigated, and, with their consent, to have the scope, manner and findings of the investigation made public;

be informed of the progress of any relevant investigation and to have their concerns taken into account, without prejudice to the accused and in a manner which is consistent with the right of the accused to a fair trial, at appropriate stages of any relevant legal or administrative proceedings;

reasonable assistance during any relevant administrative or judicial proceedings in relation to the alleged abuse in question and to protection of their privacy and their safety and the safety of their families and witnesses on their behalf from intimidation, harassment and retaliation;

reparation, in the form of restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.

*The rights of victims for the future (Clause 8(b))*

In keeping with the comments made above, Amnesty International urges the Northern Ireland Human Rights Commission to amend the title of this sub-section to “Victims Rights”.

*Definition of Victims (Clause 8(b)1)*

Amnesty International urges that the formulation of the definition of “victims” includes those who are victims of rights guaranteed in international human rights treaties and standards, whether or not they have been proscribed by the criminal law. Such formulation is consistent with Principle 21 of the UN Basic Principles of Justice for Victims of Crime and Abuse of Power. [NIHRC Question 21].

In addition, as recommended above, Amnesty International urges that the Northern Ireland Human Rights Commission expressly include a provision in the definition of victims which makes clear that it also applies to victims of the conflict.

*Victims' rights (Clause 8(b)2)*

Amnesty International urges the reformulation of Clause 8(b)2, in a manner which is more consistent with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Draft Basic Principles and Guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law.

As redress and restitution are two separate concepts, and restitution is only one element of reparation; investigations into human rights abuses should not only be prompt, thorough and impartial, they must be conducted by an independent body; the rights of victims to have their concerns taken into account in judicial or administrative proceedings must be undertaken in appropriate stages of the proceedings and in a manner which is consistent with the rights of the accused to fair proceedings; victims, their families and witnesses must be protected from intimidation and reprisal; and victims should be afforded the right to all elements of reparation; Amnesty International urges the reformulation of this sub-section to read:

2. Legislation shall be introduced to give effect to the following rights:

- (a) the right of every victim to be treated with compassion and respect for their dignity;
- b) the right of every victim to obtain redress through judicial and administrative mechanisms which are fair, inexpensive for the victim and accessible;
- c) the right of every victim to have the allegation of human rights abuse in question promptly, independently, impartially and thoroughly investigated, and, with their consent, to have the scope, manner and findings of the investigation made public;
- d) the right of every victim to be informed of the progress of any relevant investigation and to have their concerns taken into account, without prejudice to the accused and in a manner which is consistent with the right of the accused to a fair trial, at appropriate stages of any relevant legal or administrative proceedings;
- e) the right of every victim to reasonable assistance during any relevant administrative or judicial proceedings in relation to the alleged violation in

question and to protection of their privacy and safety and the safety of their families and witnesses on their behalf from intimidation and retaliation;

f) the right of every victim to reparation, in the form of restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.

*Violence against Women (Clause 8(c))*

As mentioned above under the Section entitled Freedom from Torture, while Amnesty International welcomes the inclusion of a provision which requires the state to ensure, respect and protect women and children from all forms of physical violence, we urge that this Clause be reformulated and moved from the Section “Rights of Victims” to the Section on Freedom from Torture, under a sub-heading, Right to Dignity.

**VIII. RIGHTS TO FAMILY AND PRIVATE LIFE: Clause 9**

As set out in its document entitled “UK: The Regulation of Investigatory Powers Bill, An Open Letter by Amnesty International” (June 2000), Amnesty International is concerned that the law in the United Kingdom violates the right to privacy.

Among other things, the organization considers that the Bill of Rights should specifically:

provide that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour and reputation, as set out in Article 17 of the ICCPR;

require that searches, seizures, and electronic interceptions and surveillance be based on reasonable suspicion of criminal activity and be properly limited in scope and, except in exigent circumstances, be made only after prior judicial authorization;

safeguard the confidentiality of communications and consultations between lawyers and their clients within their professional relationship, as guaranteed by Principle 22 of the UN Basic Principles on the Role of Lawyers; and

protect the right of journalists not to disclose the sources of their information, as set out in the Council of Europe’s Committee of Ministers’ Recommendation No. R (2000) 7.

**IX. RIGHTS OF CHILDREN: Clause 10**

Amnesty International urges that the Bill of Rights ensure the highest protection of the rights of children, which includes rights set out in the UN Convention on the Rights of the Child and other international standards. [NIHRC Questions 22 and 23].

Amnesty International urges that there be express provisions which require that:

contacts between law enforcement officials and children shall be conducted in a manner which respects the legal status of the child, avoids harm and promotes the well-being of the child (Rule 10(3) of the UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules));

any child deprived of their liberty, including by arrest, shall be informed immediately of the reasons, and shall have their parents or guardian notified immediately, unless it would be detrimental to the interests of the child;

every child has the right to assistance and presence of a lawyer as well as an appropriate adult when questioned by law enforcement officials;

no child shall be subjected to corporal punishment;

no person shall be sentenced to a term of life imprisonment without the possibility of release, if the person was under the age of 18 at the time the offence was committed;

no child shall be subjected to disciplinary measures constituting cruel, inhuman or degrading treatment or punishment including corporal punishment, placement in a dark cell, closed or solitary confinement, reduction of diet, restriction or denial of contact with family members, collective sanctions or any other punishment that may compromise the physical or mental health of the child.

Amnesty International also believes that the Bill of Rights should specifically provide that children under the age of 18 should not be recruited to the armed forces and deployed to situations of armed conflict and must be specially protected during times of armed conflict.

## **X. RIGHTS TO FREEDOM OF THOUGHT, EXPRESSION, INFORMATION AND ASSOCIATION: Clause 12**

Amnesty International believes that the provision in the Northern Ireland Bill of Rights guaranteeing the right to freedom of expression should expressly include:

the right of journalists not to disclose their sources of information, as set out in the Council of Europe's Committee of Ministers' Recommendation No. R (2000) 7;

the right of all people, including public officials and agents of the state, to make public information when it concerns violations of human rights by state agents.

Amnesty International also urges inclusion of Article 12 of the Human Rights Act in the Bill of Rights, as it affords significant protection which may supplement the protection afforded by Article 10 of the European Convention on Human Rights.

Amnesty International also recommends that the Bill of Rights an express provision on the right to Access to Information in order to enhance accountability. This right should also include the duty of authorities and agents of the state to release information to enable people to monitor and assess how well (or how poorly) rights are respected in Northern Ireland. [NIHRC Question 8].

#### *The Right to Seek Asylum*

Amnesty International reiterates its recommendation for the inclusion of the right to seek asylum in the Bill of Rights. The organization believes that this right should include the asylum-seekers' rights to:

liberty and freedom from arbitrary detention;

An asylum-seeker should only be detained if they have been charged with a recognizably criminal offence, or the authorities can demonstrate in the individual case that the detention is necessary, that it is on grounds prescribed by law, and that it is for one of the specified reasons which international standards recognize may be legitimate grounds for detaining asylum-seekers.

Each asylum-seeker who is detained must be brought promptly before a judicial or similar authority to determine whether their detention is lawful and in accordance with international standards.

full and fair determination of each individual's asylum claim which affords an effective judicial review;

legal assistance, which includes access to legal assistance, interpreters and translation of documents, at all stages of the procedure;

treatment which respects the inherent dignity of a human person;

prohibition of return to a country where they can reasonably be expected to experience human rights violations, such as torture, extrajudicial execution, "disappearance", unfair trial, the death penalty; abuses by political armed groups; or abuses by private individuals, where the state is unable or unwilling to provide protection, including female genital mutilation, "honour" killings, in the context of the trafficking of women, slavery, and domestic violence;

prohibition of return or expulsion to any third country where a person would not be afforded effective and durable protection;

dignity, including the right to access to and provision of, among other things, adequate support, food, appropriate and safe housing, education, health care.

#### **XI. LIMITATIONS: Clause 16**

Amnesty International believes that there should be one limitations clause which applies only to rights which may be limited in international human rights treaties. [NIHRC Question 35] The organization considers that the inclusion of different standards for limitation within the same instrument is undesirable and, among other things, would create the potential of creating a hierarchy of rights, with limitations being more stringent for certain rights.

Amnesty International considers that the limitations clause should expressly provide that the following rights enshrined in the Bill of Rights are not subject to limitation: the rights to life, freedom from torture, liberty and security, and fair trial.

The organization therefore urges that the first sentence in Clause 16(1) be amended to read as follows:

1. The rights in the Bill of Rights may be limited only to the extent that the limitation is permissible under international human rights treaties, and the limitation is prescribed by law, reasonable and justifiable in an open and democratic society based on human rights, dignity, equality and freedom taking into account all relevant factors including:

(Remaining sub-paragraphs (a) to (e) to remain unchanged)

## **XII. DEALING WITH EMERGENCIES: Clause 17**

Amnesty International considers that there should be no derogations of rights set out in the Bill of Rights.

If, however, a derogation clause is included, then Amnesty International urges that the list of non-derogable rights include those rights which are non-derogable under the European Convention on Human Rights, the ICCPR, customary international law and Human Rights Committee General Comment 29, and only to the *extent* that they are permissible.

Amnesty International urges that, at a minimum, the following rights be added to the list of non-derogable rights: the right to freedom from arbitrary detention; the presumption of innocence; the right to a trial before an independent, competent and impartial court; the right to *habeas corpus*; children's rights; the right to dignity; the right to freedom of thought, conscience and religion; and, the judicial guarantees essential for the protection of these rights.

In addition, Amnesty International urges the express inclusion of a provision which provides that the extent of any permissible derogation must be:

strictly required by the emergency;

and the measures taken must be:

proscribed by law;

consistent with the government's obligations under international law;

in conformity with the rights to equality and prohibition of discrimination within the Bill of Rights. (The prohibition of discriminatory measures is set out in Article 4(1) of the ICCPR.)

Amnesty International considers that the scope of judicial review should include the right to review of whether the measures, taken as a consequence of the emergency, are strictly required and proportionate in extent.

## **XIII. ENFORCEMENT: Clause 18**

Amnesty International considers that the enforcement of the Bill of Rights should be a function of all courts, which should be encouraged to exercise broad powers of judicial review.

Given the particular circumstances of Northern Ireland, Amnesty International also recommends that the Human Rights Commission draft provisions which establish a human rights court as a mechanism to enforce and protect the rights enshrined in the Bill of Rights. [NIHRC Question 37]

It is essential that such a court not only administer justice independently and impartially but also is perceived to do so, and enjoy the confidence of all. In order to do so, Amnesty International believes that such a court must be composed of judges who are human rights experts, including some with expertise on issues of gender, minorities, economic and social rights, and who are representative of the whole population of Northern Ireland, in contrast with the under-representation of women, Catholics, and minorities which currently exists in the judiciary.

Amnesty International urges that such a court have jurisdiction to consider petitions alleging that rights have been or may be violated.

The Court should have jurisdiction to consider petitions brought by individuals, including anyone acting on behalf of a person who cannot act for themselves; any individual or organization acting in the public interest; any group or organization acting in the interest of its members; groups or classes of persons; and the Human Rights Commission and other public bodies such as the Equality Commission. Amnesty International notes that this would go beyond the powers set out in Section 7 of the Human Rights Act which restrict petitioners to the individual who claims to have been the victim of unlawful actions by the authorities. In order to ensure that the right of petition is equally available to all persons, legal aid must be made available for such actions. [NIHRC Question 40]

The rules of the Court should provide for the Court to invite and accept written submissions, such as *amicus curiae* briefs and oral submissions.

Such a court must also be granted sufficient resources to carry out its duties and wide enough jurisdiction to ensure it may grant appropriate effective remedies. The Court must have power to order such relief or remedy as it considers just and appropriate, including declaratory relief and reparation, including but not limited to compensation. In its issuing of decisions, the Court should be guided not only by the judgments of the European Court of Human Rights but also by the work of other international and regional human rights bodies and mechanisms, including United Nations (UN) treaty bodies, (such as, the Human Rights Committee, the Committee against Torture, the Committee on the Rights of the Child, etc.); UN special mechanisms, including Special Rapporteurs and Special Representatives and Working Groups; and other international human rights courts (including, for example, the Inter-American Court of Human Rights). [NIHRC Question 38]

**XIV. ENTRENCHMENT: Clause 19**

Amnesty International reiterates its view that it is important that the Bill of Rights enjoy a special status in law which underscores its fundamental nature.

The Bill of Rights is an instrument which should withstand the test of time and political tides; it is a forward-looking instrument and must be interpreted as a living instrument. It is intended to act as a protection of rights and a restraint upon the abuse of power irrespective of the political make-up of the government of the day. The Bill of Rights should act as a safeguard against the whims of transient political majorities. This would require the entrenchment of its provisions to protect its amendment or repeal by a simple majority. Amnesty International therefore recommends that the Human Rights Commission consider, for example, that no proposal for amendment be passed without considered consensus of the people in Northern Ireland.