

As discussed at the last meeting, below is the text of the equality provisions as taken from the previous working group paper, and then the provisions of the European Convention on Human Rights with any possible additions as tracked changes and some comments added in for your information.

## Proposed Equality Clauses for the Bill of Rights

### 1. Preamble paragraph on equality

*"To honour those who have gone before, we commit ourselves to a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance and mutual trust; to the protection and vindication of the human rights of all; and to partnership, equality and mutual respect as being the proper basis of all human relationships".*

### 2. General equality clause

*"All persons are equal before and under the law and have the right to equal protection and equal benefit of the law."*

### 3. Positive Action clause

*"Equality includes the full and equal enjoyment of all rights and freedoms. Laws, programmes or activities aimed at achieving and sustaining full and effective equality, in particular to reduce inequalities affecting disadvantaged groups, and which may include specific measures for individuals from such groups, shall be required in furtherance of these objectives. Such laws, programmes or activities shall not constitute discrimination".*

### 4. General non-discrimination clause

*"All persons have the right to be protected from any direct or indirect discrimination whatsoever on grounds of race or ethnic origin, colour, sex, gender, marital or family status, language, religion or belief, political or other opinion, possession of a criminal or political conviction, national or social or economic origin, birth, disability, age, sexual orientation or other status"*

Comment [RHM1]: 'political opinion', if you look at the ECHR and other definitions, eg. From refugee law, is supposed to have a broad interpretation. This is also suggested by the words 'or other'. In refugee law it would seem that the key thing is whether the individual holds views that are not tolerated by the authorities or society. In this sense, therefore, although broad, it may not necessarily cover persons who have been convicted of offences, whether they be political or not. If you do include the term 'possession of a criminal or political conviction' then this would always be balanced by the ability of the state to discriminate against someone on this basis if it were justifiable.

**5. Clause defining direct discrimination**

"Direct discrimination shall be taken to occur when a person has suffered, will or would suffer disadvantage on the basis of any of the grounds in clause (4 - see above), unless permitted by the provisions of this Bill of Rights as stated in clause 8 below.

**6. Clause defining harassment as a form of discrimination**

"Harassment shall be deemed to be a form of discrimination within the meaning of paragraph (see clause 4 above), when unwanted conduct related to any of the grounds referred to in clause (see clause 4 above) takes place with the purpose or effect of violating the physical integrity or dignity of a person, or of creating an intimidating, hostile, degrading, humiliating or offensive environment"

**7. Clause defining indirect discrimination**

"Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put any persons at a disadvantage by virtue of their status under clause (see 4 above), unless that provision, criterion or practice is objectively justified by a necessary aim, and the means of achieving that aim are appropriate and proportionate".

**8. Clause defining exceptions**

"A difference of treatment which is based on a characteristic related to any of the grounds referred to in clause (4 above) shall not constitute discrimination where, by reason of the nature of the particular activities concerned, or of the context in which they are carried out, such a characteristic constitutes a genuine and determining requirement, provided that the objective is legitimate and the requirement is proportionate".

- 1 Everyone's right to life shall be protected by law. The death penalty shall be abolished. No one shall be condemned to such penalty or executed.
- 2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it 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.

Deleted: No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Comment [RM2]: This wording is from Protocol 13 to the ECHR to which the UK is legally bound.

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, 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. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

Comment [RHM3]: This could be a alternative wording, it is taken from UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990, para 9.

Comment [RHM4]: You asked for other wording on these provisions on the use of force. This comes from UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ECOSOC Resolution 1989/65, 1989, para 1.

The state shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions.

Comment [RHM5]: You asked for other wording on these provisions on use of force. This wording comes from the UN Code of Conduct for Law Enforcement Officials, GA Resolution 34/169, 17 December 1979, Article 3. Note the term 'strictly' here may not be the same standard as 'absolutely' in Article 2(2).

Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.

Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms.

The state shall prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk.

Comment [RHM6]: Taken from UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990, para 4.

The obligation to protect the right to life requires that there should be some form of prompt, independent, public and effective official investigation.

Comment [RHM7]: Taken from UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990, para 11(c).

The state should not practice, permit or tolerate enforced disappearances and should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.

No one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country.

Comment [RHM8]: Wording taken from Human Rights Committee General Comment No. 6, para 4; and Declaration on the Protection of All Persons from Enforced Disappearances, GA Resolution 47/133, 18 December, Article 2.

Comment [RHM9]: Wording from UN Principles on Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ECOSOC Res.1989/65, 1989, para 5. You may want to broaden this to 'be deprived of their right to life' rather than 'become a victim of ...execution'. This could then cover the death penalty in other countries.

### Article 3 – Prohibition of torture

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The state must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.

The state must enact legislative provisions to prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.

States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act.

Comment [RM10]: Taken from General Comment No.20 of UN Human Rights Committee, para 9.

Comment [RM11]: Taken from General Comment No.20 of UN Human Rights Committee, para 12.

Comment [RHM12]: You asked me to find some provisions on domestic violence, when we were discussing Article 4 below. It seems better placed here. This wording is from the Committee on the Elimination of Discrimination Against Women, General Recommendation No.19, 11<sup>th</sup> Session, 1992, section 24(a).

### Article 4 – Prohibition of slavery and forced labour

- 1 No one shall be held in slavery or servitude.
- 2 No one shall be required to perform forced or compulsory labour.
- 3 For the purpose of this article the term “forced or compulsory labour” shall not include:
  - a any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
  - b any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
  - c any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
  - d any work or service which forms part of normal civic obligations.

Comment [RHM13]: You wanted me to check out whether this achieved the correct balance between prisoners being given incentives and rewards for working in prison and not being forced to do so. The interpretation of this provision by the European Court is that work that does not ‘go beyond what is “ordinary” in this context since it was calculated to assist him in reintegrating himself into society” will not violate this Article. It may be, on this basis, that you want to leave the wording as it is?

The UN Standard Minimum Rules for the Treatment of Prisoners provide that ‘all prisoners under sentence shall be required to work, subject to their physical and mental fitness as determined by a medical officer’ and ‘so far as possible the work provided shall be such as will maintain or increase the prisoners ability to earn an honest living after release’, rules 71(2) and (4). Do you want to include something like this?

Traffic in and exploitation of human beings and other similar forms of forced labour are prohibited and shall be offences punishable by law. The states shall protect and assist victims of such trafficking and exploitation with full respect for their human rights, taking into account in particular the age, gender and special needs of victims.

Comment [RHM14]: Taken from Indian Constitution, Article 23.

### Article 5 – Right to liberty and security

- 1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - a the lawful detention of a person after conviction by a competent court;
  - b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed

Comment [RHM15]: Taken from Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Res. 55/25, 15 November 2000; and Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of UNHCHR, E/2002/68/Add.1, 20 May 2002.

by law;

- c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of ~~unsound mind~~;
- f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Comment [RHM16]: I deleted the other words at your request. If you are unhappy with the term 'unsound mind' you could use the term 'mental disorder' which is found in European Court findings.

Deleted: , alcoholics or drug addicts or vagrants

- 2 Everyone who is arrested and detained shall be informed promptly, in a language which he understands, of the reasons for his detention or arrest and of any charge against him.

Every individual arrested or detained has the right to communicate promptly with, and to be visited by a medical practitioner, a legal representative of their choice, and, under appropriate supervision when the investigation so requires, by a family member.

Everyone who is arrested or detained has the right to remain silent.

Everyone arrested or detained shall have the right to have the validity of the arrest or detention determined promptly by way of habeas corpus and to be released if the arrest or detention is not lawful.

- 3 Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
- 4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
- 5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation and an effective remedy.

No one shall be deprived of their liberty on the ground of failure to pay maintenance or a debt, fine or tax, unless the court considers that the person has wilfully refused to pay despite having the means to do so.

A woman shall have the right to keep her child with her in prison until the child reaches the age of one.

The state has an obligation to recognise that custody for pregnant mothers and mothers of young children should only ever be used as a last resort for those women convicted of the most serious offences and who represent a danger to the community. The state has an obligation to develop and use community based penalties for mothers of young children and to avoid the use of prison custody.

Where the defendant has child caring responsibilities, the principle of the best interests of the child must be carefully and independently considered by competent professionals and taken into account in all decisions related to detention, including pre-trial detention and sentencing, and decisions concerning the placement of the child.

The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, mental health, the legal reason for their detention and the necessities of their treatment.

Where the courts are considering the seriousness of an offence, an offence will be considered to be aggravated by hostility if hostility was based on the victim's actual or perceived race, ethnic origin, colour, sex, gender, marital or family status, language, religion or belief, political or other opinion, possession of a criminal or political conviction, national or social or economic origin, birth, disability, age, sexual orientation.

Comment [RHM17]: From South African Constitution, s.35(2)(f), although contains more details of family members, Human Rights Committee, General Comment No.20, para 11.

Comment [RHM18]: We didn't discuss this but do you want to include it?

Comment [RHM19]: General provision wanted on habeas corpus. This takes most by the wording of the New Zealand Bill of Rights, s.23(1)(c).

Comment [RM20]: From Constitution of Fiji, section 23(2). Is the latter too restrictive

Comment [RHM21]: Wording taken from Consideration of the Reports Submitted by States Parties under Article 44 of the Convention on the Rights of the Child, Concluding observations: Thailand, CRC/C/THA/CO/2, paragraph 48.

Comment [RHM22]: You wanted some provision on different categories of prisoners and reasons for their detention. This is taken from the UN Standard Minimum Rules for the Treatment of Prisoners, s.8(1).

Comment [RHM23]: You also asked me to look at hate crimes. It would seem that this might be better placed in the equality sections? This wording is based on the Criminal Justice (No. 2) (NI) Order 2004.

Comment [RHM24]: See further discussion on possession of criminal or political conviction in equality provisions.

## Article 6 – Right to a fair trial

- 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- 3 Everyone charged with a criminal offence has the following minimum rights:
  - a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - b to have adequate time and facilities for the preparation of his defence;
  - c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

### Steven, issues to consider expressly mentioning :

- expand to include duty on state to give reasons for administrative decisions
- 6(1): 'without undue delay' rather than 'within a reasonable time', ICCPR General Comment, No.13, para 10
- Right to an appeal, ICCPR Article 14(5)
- Right to trial by jury, or same procedure apply to all, Human Rights Committee concluding observations on UK report, para 18.
- Not testify against self, ICCPR General Comment No.13, para 14.
- Provisions on lawyers, Basic Principles on Role of Lawyers, para 1, access
- Cross reference to juvenile group

#### **Article 7 – No punishment without law**

- 1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
- 2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

#### **Article 8– Right to respect for private and family life**

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

#### **Article 9 – Freedom of thought, conscience and religion**

- 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- 2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Steven, other issues to include :

-oaths contrary to belief, e.g. Article 35 Fiji Constitution

#### **Article 10 – Freedom of expression**

- 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining

the authority and impartiality of the judiciary.

Steven, other issues to consider :

- access to information, bolstering this : Council of Europe Recommendation 2002(2) on Access to Official Documents
- journalistic freedom ? South African Constitution, s.16, but balance with Article 8
- free speech in the context of elections, e.g Bowman v UK (or put under Protocol 1, Article 3 discussions)

### **Article 11<sup>1</sup> – Freedom of assembly and association**

- 1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- 2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

#### Steven, other things to consider :

- issues surrounding marches, parades, et c.
- express inclusion of political parties : right to join, form (although not necessarily with state funding)
- more reference to labour law here ?

### **Article 12 – Right to marry**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

#### Steven :

- civil partnerships
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### **Article 13 – Right to an effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

-not currently included in Human Rights Act but good reasons to have as separate right

### **Article 14 – Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Dealt with under equality provisions

### **Article 15 – Derogation in time of emergency**

- 1 In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this

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<sup>1</sup> Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

- 2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
- 3 Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Do you want to include a general derogation provision? I think there are some problems with doing so.

If do have one, then consider broadening rights that non-derogable, e.g. to fair trial, equality and dignity, religious belief (ICCPR General Comment, No.22, para 1), see South African Constitution s.37.

#### **Other provisions not included**

Property, Article 1, Protocol 1, but need to balance freedom of expression with this

Participation rights, Protocol 1, Article 3 reference to free elections, but feeling that want more than this: right to participation, right to vote, representation, etc. NIHR previous draft reference to democratic rights, but not quite hit the mark. Consider therefore:

- Human Rights Committee, concluding observations on UK report, para 10.
- ICCPR Article 25 and General comment No.25
- South African Constitution, s.19
- Papua New Guinea Constitution s.50

Freedom of movement: fourth protocol to ECHR, UK not party

- ICCPR, Article 12
- S.52 Papua New Guinea Constitution
- S.21, South Africa Constitution
- Human Rights Committee General Comment No.27 and refugees, General comment No.22 CERD
- New Zealand Bill of Rights, s.18

Right to nationality?

- CERD, Article 5(d)(iii)
- Council of Europe Recommendation on rights to nationality
- EC directive on rights to be treated as if an EC citizen

General right to dignity

- find in number of constitutions: Article 15 Ghana Constitution, s.10 South African Constitution, Article 10 ICCPR.
- Bolsters protection for other rights and potentially fills gaps?