

A DRAFT CHARTER OF RIGHTS FOR ALL PRISONERS IN SOUTH AFRICA

Introduction

This draft document is directed at all those interested in the welfare of prisoners in South Africa. 5

The draft was prepared pursuant to a meeting, held on Sunday 17 May 1992, and arranged by the Johannesburg Branch of *The South African National Institute for Crime Prevention and Rehabilitation of Offenders* ("NICRO"), in which the *feasibility, aims and content* of a proposed *Charter of Rights for All Prisoners in South Africa* ("the Charter") were discussed by representatives of a number of interested groups. 10

The following represents a first effort to express the essence of the consensus of that meeting in the format of a draft proposal of a prisoners' charter of rights. The document also constitutes a sincere invitation to any groups or individuals interested in the welfare of prisoners to make recommendations (to the address provided below) on any aspects of the draft. 15

The meeting proposed the following:

1. A Prisoners' Charter of Fundamental Rights and Liberties 20

1.1 General Principles

1.1.1 Such a Charter ought to guarantee all rights and liberties contained therein, in either of two ways: (a) *directly*, by means of their entrenchment into a future South African Constitution, as a Charter separate to and distinct from a general Bill of Rights, or (b) by means of their *indirect* protection in a Charter with the status of Parliamentary legislation, but to which express reference is made in a clause of a Bill of Rights, with the effect of incorporating such a Charter into the Bill of Rights for the purposes of judicial interpretation; 25

1.1.2 The particular rights and liberties contained in the Charter ought not to derogate from the general application of the the provisions of a Bill of Rights referred to in paragraph 1.1.1; neither ought the rights and liberties contained in the Charter be interpreted to derogate from the protection afforded all citizens under our existing common law; 30

1.1.3 *Only* those rights and liberties contained in a Bill of Rights which are *necessarily* inconsistent with the circumstances and aims of imprisonment, and which are not otherwise guaranteed under the Charter, may be restricted by a Legislature, an order of court, or administrative organ acting in the interests of prisoners' health, safety, welfare and good discipline;

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1.1.4 A premise on which this draft has been prepared is that a *balance should be struck* between the *interests of society and those of prisoners*, whose interests we do not regard as necessarily in conflict with one another. We moreover see it to be in the common interest of society to cultivate and preserve respect for human rights and dignity on *the broadest possible basis* so that it must expressly -- and especially --include those "out of sight" and in most real need of protection and rehabilitation. The fact that we are often and instinctively hard-pressed to sympathise with offenders, provides all the more reason for us to make effective, structural and enduring provision for their protection against our own vengefulness;

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1.1.5 This draft has also been prepared with full regard (a) to the *changing circumstances of society* which includes a varying availability of the State's resources from time to time, changing social beliefs and philosophies of punishment and education at times; and (b) the *differing needs of individuals*, including the differing rights and needs of men and women, adults and children, the able and the handicapped (whether of a physical, mental or intellectual nature), or those convicted by a competent court of law and those not, at all times;

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1.1.6 In light of the caution referred to in paragraph 1.1.5, it is our view that a Charter not be drafted in language which is unnecessarily detailed or in a fashion that is incapable of meeting the demands of the changes referred to there. Instead, we believe the Charter must be a *flexible and "living" document* in terms of which our courts will be able to provide relief and protection in accordance with the spirit of the Charter as required by the exigencies of particular cases;

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1.1.7 Subject to the belief expressed in paragraph 1.1.6, we

nevertheless also believe that a *Charter ought to be expressed in the clearest possible terms*. This is essential, in our view since the success of the implementation of such a Charter depends to a large extent on the measure in which it performs an educative human rights function inside prisons, which in turn requires that its provisions be fully understood by *authority and prisoner alike*. This particular educative function of a Charter we trust will contribute to its *prophylactic function of pro-actively discouraging violations of its provisions*;

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1.1.8 We also believe that the *spirit and aims* as expressed in various international legal (and other) instruments (such as the *Standard Minimum Rules for the Treatment of Prisoners* adopted by the Congress of the United Nations on the Prevention of Crime and the Treatment of Offenders in its resolution of 30 August 1955, and such as a similar set of *Rules* adopted by the Council of Europe in its Committee of Ministers resolution (73) 5 and adopted in 1973) which aim at drawing up *common principles* regarding penal policy and at *setting standard and minimum rules* for the treatment of prisoners, ought to be considered as *persuasive authority* by courts in the interpretation given to the provisions of the Charter. We believe such an approach is consistent with present judicial practice, and the particular documents referred to above, moreover, are consistent with and supplementary to the aims and considerations as expressed in paragraphs 1.1.6 to 1.1.7;

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1.1.9 With the fullest possible regard to the difficulties contained in attaining the objectives referred to in paragraphs 1.1.4 to 1.1.7, we also believe that *these proposals ought to provide nothing more than a basis for future discussion and negotiation between various interests groups*, including those directly representing prisoners and prison authorities.

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1.2 Interpretation

We believe that the Charter ought to extend its protection to all "Prisoners", whether incarcerated in a *public or private* institution, including:

1.2.1 All arrested persons, whether such persons are serving sentence imposed by a competent court or are awaiting trial prior to or subsequent to being charged in a court of competent jurisdiction;

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1.2.2 All persons who are incarcerated as a consequence of a failure or inability to liquidate a civil debt;

1.2.3 All persons subject to "security measures" in so-called preventative detention or to corrective measures ordered by a judge, Minister or any other State official;

1.2.4 All persons imprisoned in terms of any Military Disciplinary Code, or other law or regulation pertaining to the Military establishment;

1.2.5 All persons, whether aliens or citizens, imprisoned in consequence of an act of war;

1.2.6 All other persons whose ordinary liberties and rights have been restricted by an order of a judge, Minister or any other State official.

1.3 The Provisions of the Proposed Charter

With the fullest regard to the aims of our task and difficulties in achieving them as expressed in the General Principles in paragraph 1.1 above, we believe the Charter ought at least to contain provisions of the following nature:

1.3.1 There shall be no discrimination on grounds of any prisoner's race, colour, sex, language, religion, sexual orientation, political or other opinion, national origin, birth or other status

1.3.2 No prisoner shall be subjected to any cruel, unusual or degrading punishment, nor shall the labour of any prisoner be leased, without reasonable remuneration payed to such prisoner, and without the proper consent of such prisoner (explicit reference to solitary confinement as "cruel punishment"?)

1.3.3 All prisoners shall, as a matter of right, be provided with an adequate, nutritional and appropriate diet, with full regard to health, religion or other particular needs of any particular prisoner

1.3.4 All prisoners shall, as a matter of right, be provided with adequate clothing and bedding, with full regard to prevailing climatic conditions

1.3.5 All prisoners shall, as a matter of right, be provided with adequate means by which to maintain their personal hygiene and dignity, with full recognition of the differing needs consequent upon a prisoner's gender or age

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1.3.6 All prisoners (and, if relevant, their natural infants) shall, as a matter of right, be provided with adequate professional medical, psychiatric and dental treatment and care, with full recognition of the differing needs consequent upon a prisoner's gender or age

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1.3.7 All prisoners shall, as a matter of right, be provided with adequate protection of their person, property and dignity

1.3.8 Children under the age of 18 years shall under all circumstances be separated from adult prisoners

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1.3.9 Women and men shall as far as is reasonably possible be detained in separate institutions, and women shall under all circumstances be separated from male prisoners, except with the consent of those involved and in the proper and duly authorised exercise of conjugal privileges that may be extended in particular cases

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1.3.10 All unsentenced prisoners awaiting trial shall as far as is reasonably possible be kept separate from convicted prisoners

1.3.11 All persons imprisoned for a debt, or other civil prisoners, shall as far as is reasonably possible be kept separate from persons convicted of a criminal offence

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1.3.12 All alien persons imprisoned by virtue of their unlawful immigration shall be treated in the same manner as persons not convicted of a criminal offence

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1.3.13 No prisoner who is a citizen and an adult shall be denied any franchise rights, and all such prisoners shall, as a matter of right, be entitled to receive adequate information on which to properly exercise their rights of franchise

1.3.14 All prisoners shall, as a matter of right, be provided with adequate means by which to write and read, and no prisoner shall be denied access to reading material

1.3.15 All prisoners shall be free to receive an education, and all persons who under normal circumstances of liberty would be entitled to be provided with an education, shall be entitled to be provided with an adequate education for the duration of their imprisonment

1.3.16 No prisoner shall be denied reasonable access to their immediate family or loved ones, which shall include reasonable physical contact

1.3.17 No prisoner shall be denied reasonable access to legal representation, which shall include the liberty to be represented by a lawyer or other assistant at any hearing in which the rights or liberties contained in this Charter may be affected by an order

1.3.18 No prisoner shall be punished without a fair hearing, which punishment may under no circumstances amount to a denial of any of the rights or liberties contained in this Charter

1.3.20 No prisoner shall be denied the right to communicate freely and without fear with an Ombudsman, a legal representative, a medical officer, a person of spiritual guidance, or any other person authorised to hear complaints from prisoners

2. The Implementation of an Office for a Prisoners' Ombudsman

We believe that it is of the utmost importance for the proper implementation of a Charter of this specialised nature, to create an office equal to the unique demands of prisoners and prison authorities alike. We propose that an Ombudsman be appointed with the sole responsibility to hear complaints from prisoners and to make recommendations in relation thereto, to whoever and in whatever manner such Ombudsman, in the proper exercise of his or her function, sees fit. We also believe that, in order for an Ombudsman and its functionaries to protect the rights of prisoners effectively and to mediate between prisoners and prison authorities in a suitable manner, the following requirements be secured by legislation:

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- (a) access to prisoners by an Ombudsman must be free;
- (b) prisons must accommodate such a person in an office solely for that purpose;
- (c) such an office must be occupied at frequent intervals on a regular or irregular basis.

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Note: All responses to the recommendations contained in this draft should be directed to: Martin Kriegler, Room 50, Oliver Schreiner School of Law, University of the Witwatersrand, Johannesburg, Tel. 716 5581; OR, to Private Bag 3, WITS 2050, South Africa

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Martin Kriegler, 8 June 1992

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