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MYANMAR: BRING RIGHTS TO PRISONS

AMNESTY INTERNATIONAL'S RECOMMENDATIONS ON THE DRAFT PRISONS LAW

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INTRODUCTION

“It is said that no one truly knows a nation until one has been inside its jails.”

Nelson Rolihlahla Mandela.¹

In July 2015 a draft Prisons Law was introduced in Myanmar’s Parliament, with the objective to “safeguard peace in the community and the rule of law”; prevent “repeat offending”; and provide for the rehabilitation of prisoners with a view to their release. The draft Prisons Law is set to replace Myanmar’s outdated legal framework on prison conditions by repealing the 1894 Prisons Act, the 1900 Prisoners Act and the 1920 Identification of Prisoners Act.

Amnesty International welcomes this legislative initiative. A prisons law which is comprehensive, detailed, and fully in line with international human rights law and standards will be an important tool to improve conditions of detention in Myanmar. However, the latest draft made available to the public falls far short of international standards. It fails to include a number of provisions necessary to protect the rights of people deprived of their liberty. In this detailed legal analysis, Amnesty International makes specific recommendations as to how the draft Prisons Law should be amended to bring it in line with international human rights law and standards. We hope that this analysis will prove to be useful to parliamentarians, other government officials, civil society actors, and others working on the reform of Myanmar’s prison system.

PAST AND PRESENT CONCERNS ABOUT CONDITIONS IN DETENTION

“Prisons in Burma [Myanmar] are like hell. Crowding, lack of proper medication and prison doctors, corruption, torture, lack of quality food, are common. They are dehumanizing.”

Bo Gyi, Joint-Secretary of the Assistance Association for Political Prisoners – Burma (AAPP-B).²

¹ Nelson Rolihlahla Mandela, *Long walk to freedom*, Little Brown & Co, 1995.

² Amnesty International interview with Bo Gyi, August 2016.

Myanmar's prisons are well known for their very poor conditions and harsh treatment of prisoners, including torture.³ Over the last 30 years, reports have been consistent in their description of overcrowded prisons where prisoners had little or no access to nutritious food, clean drinking water, and proper sanitation. Access to adequate medical care and treatment was also severely limited, and prisoners' health problems were often further exacerbated by the conditions in which they were held.

In 2007, the then UN Special Rapporteur on the situation of human rights in Myanmar, Paulo Sérgio Pinheiro, said in his report to the UN Human Rights Council:

*"Reports have confirmed appalling detention conditions which fail to meet international standards on the treatment of prisoners and in fact constitute cruel, inhuman and degrading treatment prohibited under international law."*⁴

Acts of torture and cruel, inhuman or degrading treatment or punishment (hereafter referred to as other ill-treatment) against prisoners were institutionalized in both detention centres and prisons, yet such acts were rarely if ever investigated. Prisoners, in particular prisoners of conscience,⁵ were often held incommunicado and/or in solitary confinement.⁶ One particularly egregious form of prolonged solitary confinement was being placed in "dog cells" as a form of punishment. These cells were designed and used for guard dogs and were very small, greatly restricting prisoners' movement. Moreover, Military Intelligence, Special Branch, and prison officials frequently transferred these prisoners to remote prisons where their families could not visit them and provide them with additional food and medicine, which some of them desperately needed.⁷

Forced labour was widely reported, with prisoners often made to work in harsh and dangerous conditions in labour camps. In these camps, they were frequently subjected to beatings and deprived of adequate food and sleep. Another form of ill-treatment was the practice of forced portering. The Myanmar Army routinely forced convicted criminals to carry heavy loads of ammunition and other supplies during military operations, especially in counter-insurgency activities against ethnic armed groups. Porters did not receive adequate food, rest, or medical care, leading in some cases to permanent injuries, chronic ill-health, or even death.⁸

The situation appears to have improved in recent years, reports of torture are less frequent, and the International Committee of the Red Cross (ICRC) has been able to undertake independent monitoring of prisons and labour camps across the country since 2013.⁹ According to the ICRC, confidential discussions on the findings of these visits and on issues such as overcrowding and vocational training for detainees, contributed to improvements in detention conditions and basic services.¹⁰ However, concerns about prison conditions persist. For example, the Myanmar National Human Rights Commission (MNHRC), has visited prisons in Kayah State, Tanintharyi and, Mandalay Regions, Shan and Rakhine State, and Yangon in 2015

³ See for example Amnesty International, *Myanmar: Prisoners of conscience: a chronicle of developments since September 1988*, (Index: ASA 16/23/89), November 1989; *Myanmar: "In the national interest": Prisoners of conscience, torture, summary trials under martial law* (Index: ASA 16/010/1990), 7 November 1990; *Myanmar: Conditions in prisons and labour camps* (Index: ASA 16/022/1995), 21 September 1995; *Myanmar: A challenge for the international community* (Index: ASA 16/028/1997), November 1997; *The institution of torture* (Index: ASA 16/24/00), December 2000; and the Assistance Association for Political Prisoners – Burma (AAPP-B), *The situation of prisons in Burma*, 2007.

⁴ Paulo Sérgio Pinheiro, former UN Special Rapporteur on the situation of human rights in Myanmar, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, Human Rights Council 66th session, A/HRC/6/14, 7 December 2007.

⁵ A prisoner of conscience is any person imprisoned or otherwise physically restricted solely because of his/her political, religious or other conscientiously held beliefs, ethnic origin, sex, colour, language, national or social origin, economic status, birth, sexual orientation or other status, or for exercising his or her right to freedom of expression or other human rights, and who has not used violence or advocated violence or hatred.

⁶ Incommunicado detention is the detention in which a detainee is denied access to people outside the place of detention, such as lawyers, doctors, family or friends, who could help them or find out what is happening to them and protect them from or publicize violations of their rights. It is different from solitary confinement since a detainee denied access to the outside world may share a cell with, or have contact with, other detainees.

⁷ See for example AAPP-B, *"After release I had to restart my life from the beginning": The Experiences of Ex-political Prisoners in Burma and Challenges to Reintegration*, May 2016.

⁸ See for example Amnesty International, *Myanmar: The Kayin State in the Union of Myanmar: allegations of ill-treatment and unlawful killings of suspected political opponents and porter seized since 18 September 1988*, (Index: ASA 16/16/89), August 1989; *Myanmar: Conditions in prisons and labour camps* (Index: ASA 16/22/95), September 1995; AAPP-B, *Forced labour of prisoners in Burma*, May 2002; AAPP-B, *Burma's prisons and labour camps: Silent killing fields*, May 2009; Human Rights Watch, *Dead men walking: Convict porters on the front lines in Eastern Burma*, 12 July 2011; and Karen Human Rights Group (KHRG), *From Prison to the Frontlines: Analysis of Convict Porter Testimony 2009 – 2011*, July 2011.

⁹ In 2013 the ICRC resumed prison visits after almost eight years following authorization by the government of Myanmar. See ICRC, *Myanmar: ICRC ready to resume detention visits*, available at: <https://www.icrc.org/eng/resources/documents/interview/2012/12-11-myanmar-detention-visits.htm>.

¹⁰ ICRC Annual Report 2015, Myanmar, available at: <https://app.icrc.org/files/2015-annual-report/>.

and 2016 and reported concerns about overcrowding, poor hygiene, and an ongoing lack of access to adequate medical services, clean water and proper sanitation.¹¹

Poor prison conditions throughout the country are partly rooted in the fact that the legal framework regulating prisons in Myanmar remains inadequate to protect and safeguard the rights of detainees. While discussions about adopting a new prisons law have been ongoing since at least 2012, progress has been slow.¹²

AN OPPORTUNITY FOR REFORM

In July 2015, the previous government shared a draft Prisons Law (hereafter referred to as the draft law) with some civil society members for comments. Amnesty International obtained a copy of the draft law and commissioned an unofficial English translation, which forms the basis of the analysis below.¹³ To the best of our knowledge there have not been any amendments to the draft law since that time. Additionally, the analysis below does not include an exhaustive list of Amnesty International concerns about the draft law, but identifies key provisions missing in the law with regard to human rights protection and includes our main recommendations for amendments.

Amnesty International notes that the draft law represents a major improvement to existing legislation, and clearly demonstrates attempts to incorporate international standards relating to the treatment of prisoners into Myanmar's domestic legal framework. It contains a number of welcome provisions, such as the emphasis on preventing repeat offending and on the reintegration of prisoners into society.¹⁴ In this regard, we commend the inclusion of provisions requiring that prisoners have access to books and recreational and educational activities. The draft law also provides for the separation of different categories of prisoners, such as youth¹⁵ and adults and men and women. The draft law grants prisoners a number of rights, including the right to have contacts with the outside world and a lawyer.

However, the draft law still falls far below international human rights standards, mainly by failing to include a number of important provisions. For instance, the draft law lacks legal safeguards against torture, ill-treatment, unlawful detention, and forced labour and contains almost no provisions relating to minimum standards of health, food, potable water, accommodation, sanitation, and hygiene. There are also no provisions relating to the special needs of juveniles and women; mandating independent monitoring of prison conditions; regulating the use of force by prison officials; or establishing an independent complaints mechanism for prisoners. In addition, the draft law retains problematic provisions such as the possibility of using means of restraint and prolonged solitary confinement as disciplinary measures.



KEY INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS RELATING TO PRISON CONDITIONS

A number of international human rights treaties include provisions relating to the rights of persons deprived of their liberty. In addition, the UN General Assembly has adopted numerous instruments containing rules and principles which set the minimum standards that apply to the treatment of prisoners.

The International Covenant on Civil and Political Rights (ICCPR).¹⁶ Article 10.1 provides: “all persons deprived of their liberty shall be treated with humanity” and Article 10.3 that “the essential aim” of penitentiary system must be the

¹¹ Myanmar National Human Rights Commission (MNHRC), Statements issued in 2016 and 2015 available at:

<http://www.mnhrc.org.mm/en/statements-2/>. See also, United States Department of State, Burma 2015 Human Rights Report, p4.

¹² Report of the Special Rapporteur on the situation of human rights in Myanmar, UN Doc: A/67/383, 25 September 2012, para 18.

¹³ On file with Amnesty International.

¹⁴ *UN Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules), adopted by UN General Assembly resolution 70/175, 17 December 2015, Annex, Rule 4.1.

¹⁵ In the draft law “youth prisoners” are defined as “a convicted prisoner who has completed sixteen years of age but who has not yet reached the age of 18.”

¹⁶ International Covenant on Civil and Political Rights, Adopted by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

reformation and social rehabilitation of prisoners. Other relevant provisions include an absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment (Article 7).

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁷ Among other things, this Convention prohibits torture and other cruel, inhuman or degrading treatment or punishment (Articles 1, 2 and 16) and provides for the investigation of complaints (Articles 12 and 13), prosecution and punishment of perpetrators (Articles 4-9) and redress for victims (Article 14).

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁸ This Protocol provides for the establishment of an international body (the Sub-Committee on the Prevention of Torture) and national bodies (National Preventive Mechanisms) to visit places of detention, meet prisoners and officials, provide detailed observations and recommendations for ending torture and other ill-treatment and conduct dialogue with the authorities.

The UN Convention on the Rights of the Child,¹⁹ to which Myanmar is a state party. Among other provisions, Article 37 of this Convention provides that the arrest, detention or imprisonment of a child may be used only as a measure of last resort and for the shortest appropriate period of time.

The UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules),²⁰ set out in detail minimum standards for the humane treatment of prisoners.²¹ The Rules cover all aspects of prisoners' lives and instruct the prison administration on ways to ensure safety and order in prisons and detention centres, while respecting prisoners' rights.

The UN Basic Principles for the Treatment of Prisoners²² and **The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,**²³ emphasize among other things that all prisoners should be treated with dignity; and that except where the state of incarceration makes it necessary and unavoidable, all prisoners should retain their human rights.

In order to take into consideration the specific situation and needs of children, juveniles²⁴, and women in the administration of justice, the UN also adopted, among other instruments:

The Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules);²⁵

¹⁷ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by UN General Assembly Resolution 39/46, 10 December 1984, entered into force 26 June 1987.

¹⁸ Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by UN General Assembly Resolution 57/199, 18 December, 2002, entered into force 22 June 2006.

¹⁹ UN Convention on the Rights of the Child, Adopted by UN General Assembly Resolution 44/25, 20 November 1989, entered into force 2 September 1990. Myanmar ratified the Convention in 1991.

²⁰ UN General Assembly, *UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, adopted by UN General Assembly Resolution A/RES/70/175, 17 December 2015 (hereafter referred to as 'Nelson Mandela Rules').

²¹ The UN Standard Minimum Rules for the Treatment of Prisoners were initially adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and approved by the UN Economic and Social Council in 1957. In 2015 a revised version of the Rules was adopted unanimously by the UN General Assembly.

²² UN, *Basic Principles of the Treatment of Prisoners*, General Assembly Resolution 45/111, 14 December 1990 (hereafter referred to as 'UN Basic Principles').

²³ UN, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, General Assembly Resolution A/RES/43/173, 9 December 1988.

²⁴ According to the UN Standard Minimum Rules for the Administration of Juvenile Justice, "A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult"; the UN Rules for the Protection of Juveniles Deprived of their Liberty further explain that, "a juvenile is every person under the age of 18."

²⁵ UN, *Standard Minimum Rules for the Administration of Juvenile Justice*, General Assembly Resolution 40/33, 29 November 1985.

The UN Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules);²⁶

The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules).²⁷

The drafting of a new Prisons Law offers a critical opportunity for Myanmar to bring its legal framework regulating detention into line with international human rights law and standards. To this end the government – in particular Myanmar’s Parliament – should ensure adequate time for the general public, persons with expertise on prison administration, legal experts on both domestic legislation and in international human rights law, and other civil society members to make their comments and recommendations. This input could help contribute to ensuring that Myanmar adopts a new Prisons Law that fully accords with international human rights law and standards.

Beyond the adoption of the Prisons Law, the government should ensure that in practice prisoners are always held in humane and dignified conditions with full protection and respect of their human rights.

²⁶ UN, *Rules for the Protection of Juveniles Deprived of their Liberty*, General Assembly Resolution 45/113, 14 December 1990 (hereafter referred to as ‘the Havana Rules’).

²⁷ UN, *The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*, General Assembly Resolution 65/229, 21 December 2010. (Hereafter referred to as ‘the Bangkok Rules’).

THE DRAFT PRISONS LAW

The draft law is divided into six chapters. The following analysis follows the structure of the draft law and provides Amnesty International's detailed comments and recommendations on additions, deletions and amendments required to bring the current draft law into line with international human rights law and standards.

Particular emphasis was placed on compliance with the Nelson Mandela Rules, an instrument adopted in its revised form during December 2015, thus providing an up-to-date, authoritative, internationally recognised standard on the administration of prisons and treatment of prisoners.

BASIC PRINCIPLES

The beginning of the draft law is a single paragraph setting out the aim of the proposed law. In this regard Amnesty International strongly believes that the law should first elaborate the basic principles that will guide and underpin the administration of prisons and the treatment of detainees. One short paragraph is not sufficient to comprehensively cover these aims.

For instance, the draft law contains no explicit prohibition of torture. The right to freedom from torture and other cruel, inhuman or degrading treatment or punishment is absolute. It is a rule of customary international law that binds all states and applies to all people in all circumstances. The prohibition may never be restricted, including during times of war or any other states of emergency.²⁸

In Myanmar, torture in places of detention and prison was institutionalized under successive military governments.²⁹ More recently, Amnesty International has documented cases of torture and other ill-treatment by police in places of detention during the reform process period, in particular of individuals from poor and otherwise marginalized communities and members of the transgender and sex worker communities.³⁰

RECOMMENDATIONS:

At the beginning of the draft law, add a short list of basic principles which reflect international human rights standards, including the following human rights protections:³¹

- all prisoners must be treated with humanity and respect to their inherent dignity;
- no prisoner will be tortured or ill-treated;
- no prisoner will be subjected to any forms of discrimination;³²
- individuals and groups' specific needs – in particular of the most vulnerable ones – will be addressed;

²⁸ Universal Declaration of Human Rights (UDHR), adopted by UN General Assembly Resolution. 217 A(III), 10 December 1948, Article 5. Nelson Mandela Rules, Rule 1.

²⁹ See Amnesty International, *Myanmar: The institution of torture*, (Index: ASA 16/024/2000), 13 December 2000.

³⁰ See Amnesty International, *Myanmar: Take immediate steps to safeguard against torture*, (Index: ASA 16/011/2014), 26 June 2014, in addition to unpublished research, on file with Amnesty International.

³¹ See Mandela Rules, Rules 1-5.

³² Non-discriminatory grounds should include race, colour, sex, language, religion or conviction, political or other opinion or belief, membership of a particular social group, status, activities, descent, national, ethnic, indigenous or social origin, nationality, age, economic

- no measures that would aggravate the suffering inherent in deprivation of liberty will be taken;
- the period of imprisonment will be used, so far as possible, for the reintegration of prisoners into society upon release;
- education, vocational training and work, as well as other forms of assistance will be offered to prisoners to help them reintegrate.

In addition, **add** a section establishing the state's duty to investigate all allegations of torture and other ill-treatment or other human rights violations within prisons as well as establishing the victims' rights to an effective remedy and reparation. Such a section must:

- provide that all allegations of torture and other ill-treatment of prisoners are dealt with immediately, including through a prompt, impartial, independent and thorough investigation by an independent national authority;
- provide that anyone implicated in acts of torture or other ill-treatment be removed from any position of control or power over complainants or witnesses;
- require that the investigation includes a prompt and independent medical examination;
- provide that the victims right to reparation should include compensation, rehabilitation, including medical and psychological care and social and legal services, satisfaction, and guarantees of non-repetition.

MANAGEMENT AND ADMINISTRATION OF PRISONS (CHAPTER 2)

RESPONSIBILITY AND AUTHORITY (SECTIONS 3-10)

The first sub-chapter of Chapter 2 establishes the authority and responsibility of prison personnel for the administration and security of prisons. Overall oversight of the prison system is maintained by the Director General of the Prisons Directorate, operating under the Ministry of Home Affairs. The Director General's responsibilities include organizing the prison directorate and the financial administration of prisons, responding to situations which threaten the security of prisoners (for example natural disasters and the spread of infectious diseases), issuing orders and sanctions relating to prisoner grievances, and appointing prison officials. According to the draft law, the role of prison management – referred to as “responsible officials”³³ – is to organize, plan and manage security, maintain discipline and prison records, monitor the health of prisoners and restrain prisoners who commit offences.

While it is important that the draft law clarifies the roles, responsibilities and levels of authority of the different officials and staff within the prison system, a number of key provisions are missing, in particular in relation to prison employees' qualifications and training requirements; the supervision of women prisoners; and the use of force by prison officials.

QUALIFICATIONS AND TRAINING OF PRISON STAFF

The orderly and safe administration of prisons and the protection of the rights of prisoners relies heavily on the competence and integrity of prison personnel. To this end, international standards require that prison officials are carefully selected on the basis of high standards of integrity, humanity, suitability and professional capacity for the work.³⁴ To attract and retain suitable staff, prisons employees should be made part of the civil service and offered security of tenure and adequate salaries, in addition to other favourable

position, property, disability, marital status, sexual orientation, gender identity, birth or other status. Particular attention should be given to aggravated forms of discrimination. See recommendations relating to Section 42(c), p24-25.

³³ A “responsible official” is defined in section 2(x) as “a prison official who is charged with the responsibility for organising, managing, supervising and administering a prison.”

³⁴ Nelson Mandela Rules, Rule 74.1.

conditions of work.³⁵ Prison personnel should also include both men and women, as well as a sufficient number of specialists such as psychiatrists and teachers.³⁶

Adequate levels of knowledge and professional skills and expertise are also crucial to the administration of prisons, and employees should be provided with relevant training courses, including on international human rights standards; the prohibition of torture and other ill-treatment; conflict prevention and de-escalation on the use of force and physical restraint. Prison employees should also be specially trained to address the needs of specific categories of people such as women, youth³⁷ or persons with disabilities or mental illness.³⁸

RECOMMENDATIONS:

Add a provision requiring all prison personnel, including the Director General, have the qualifications and level of training needed to carry out their duties to high professional standards.

Add a provision requiring the prison administration to provide training to prison personnel including on national and international human rights law and standards; the prohibition of torture and other ill-treatment; on conflict prevention; and de-escalation on the use of force and instruments of restraint.

Add a provision explicitly stating that all prison employees are members of the civil service, and that they will enjoy favourable conditions of work.

WOMEN PRISONERS

Women in detention have specific needs which are different to those of men, including physical, security, legal and psychological needs. Failure to take into account these specific needs and provide adequate protection to women may result in discrimination, in violation of Myanmar's obligations as a state party to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

International human rights standards, in particular the Bangkok Rules, provide detailed instructions on all aspects of the treatment of women prisoners. Among many others, they include ensuring separation from men;³⁹ care for pregnant and breastfeeding women and women with small or other dependent children; protection from torture and other ill-treatment, including rape and sexual violence; providing for personal hygiene and, gender-specific healthcare; and searches to be carried out humanely by women staff only.⁴⁰ The Nelson Mandela Rules also address the specific needs and rights of women prisoners. Among other things, they provide that women must be placed under the authority of, and be supervised and attended by, woman staff members. They further provide that no male member of the staff may enter the part of the prison for women unless accompanied by a woman officer.⁴¹

Yet, the draft law contains no provisions on women prisoners, which is particularly concerning given reports of rape and other forms of sexual violence in places of detention and sexual threats by male law enforcement officials against female detainees.⁴²

RECOMMENDATION:

Add a chapter on women's prisons or prison wings and the treatment of women prisoners, in accordance with the Bangkok Rules and the Nelson Mandela Rules as set out above.

³⁵ Nelson Mandela Rules, Rule 74.3.

³⁶ Nelson Mandela Rules 75 to 80.

³⁷ Nelson Mandela Rules, Preliminary Observation 4: "The category of young prisoners should include at least all young persons who come within the jurisdiction of juvenile courts."

³⁸ Nelson Mandela Rules 75 and 76.

³⁹ Covered in Sections 7(b) and 24(a) of the draft. The latter is excessive, unnecessarily prohibiting all meeting, speaking or contact between male and female prisoners "absolutely".

⁴⁰ Covered by partly by Section 22(d) of the draft. However, this may cover only searches during "admissions of prisoners" and there are no specific provisions for searches to be carried out humanely.

⁴¹ Nelson Mandela Rules, Rule 81.

⁴² See Burmese Women's Union & Assistance Association for Political Prisoners (Burma), *Women political prisoners in Burma, Joint Report*, September 2004; and Asia Justice and Rights (AJAR), *Opening the Box: Women's Experiences of War, Peace, and Impunity in Myanmar*, September 2015.

USE OF FORCE BY PRISON OFFICIALS

Section 7 of the draft law outlines the powers and responsibilities of “responsible officials”. Sub-section (7(j)) is particularly concerning, as it authorizes prison staff to use a “weapon or gun” to detain a prisoner who has engaged in violence or destruction of prison property if the prisoner has not obeyed an order to stop, and prison authorities have attempted to take other action, for example restraining the prisoner, and failed. Prison authorities are also required to warn the prisoner before shooting a firearm. We note that the draft law provides that only “necessary force” should be used in the circumstances outlined in Section 7(j), but that the term “necessary force” is not clearly defined.

While prison officials must be able to maintain security and order within the prison, international standards are clear that, except in extreme circumstances, prison staff whose duties bring them into direct contact with prisoners should not be armed; and that they must be trained both in the safe use of force and in techniques to avoid the use of force.⁴³ Moreover, international standards clearly state that resort to intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.⁴⁴

Amnesty International is concerned that no other provision in the draft law refers to, or regulates, the use of force by prison officials against prisoners. There is no section that clearly establishes key principles governing the use of force by prison officers, as required by international human rights law and standards.⁴⁵ This should be remedied in an amended draft law.

RECOMMENDATIONS:

Remove Section 7(j) and **replace** it by including a sub-chapter regulating the use of force by prison officers, with the following provisions:

- that prison officials may not use force except in self-defence or when strictly necessary to maintain security and order within the prison, such as in cases of attempted escape, when there is resistance to a lawful order, or when personal safety is threatened;
- that force may only be used as a last resort and only if non-violent means have proved ineffective; and that any amount of force used must be the minimum necessary;
- that prison officials must not use lethal firearms intentionally, except when strictly unavoidable in order to protect life;
- that prison officials must immediately report any incident of the use of force to the Director General;
- that in general, prison officials should not carry firearms or other lethal weapons except in an operational emergencies.

Sections 6 and 7 of the draft law also refer to methods of restraint and confinement. Amnesty International's concerns and recommendations relating to these provisions are detailed in the chapter on prison offences and punishment below (p. 25).

PROVISION OF REFORM OF “MORAL BEHAVIOUR” AND VOCATIONAL TRAINING (SECTIONS 11-18)

International standards as well as good practice in prison management and the treatment of prisoners emphasise the rehabilitative mission of prisons.⁴⁶ The treatment of prisoners should provide for their social rehabilitation, with a view towards ensuring they can successfully reintegrate into society upon their release. To this end, prison administrators and other competent authorities should offer all prisoners access to education, vocational training and work opportunities.⁴⁷ In this regard, we welcome Sections 11-18 which

⁴³ Nelson Mandela Rule, 76 (c).

⁴⁴ UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9.

⁴⁵ Nelson Mandela Rule 82, *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, the UN Code of Conduct for Law and Enforcement Officials, General Assembly Resolution 34/169, 17 December 1979.

⁴⁶ Nelson Mandela Rules 87 to 92 and 104.

⁴⁷ Nelson Mandela Rules, Rule 4.

specifically provide for the rehabilitation of prisoners through access to education, vocational training, religious activities, written materials, and recreational activities.

However, Amnesty International is concerned that sections 11 and 12 state “psychological reform” of prisoners as one of their stated aims. This term is vague and it is unclear what it entails in practice. We are concerned that the aim of “reforming” prisoners could lead to abusive treatment if this term is not precisely defined.

Also of concern is Section 12, which envisages religious activities at the discretion of the Prisons Directorate, without the prisoners having a say on whether or not they are willing to participate. Imposing religious activities on prisoners would be in violation of their human right to freedom of thought, conscience and religion, enshrined in Article 18 of the Universal Declaration of Human Rights (UDHR).

In addition, while we welcome the fact that Section 16 requires the Prisons Directorate to provide recreational activities for prisoners, it fails to specify that prisoners be granted enough time in the open air every day in line with international standards.⁴⁸

RECOMMENDATIONS:

Amend Sections 11 and 12 by replacing the term “psychological reform” with the term “rehabilitation”; and by ensuring that prisoners only participate in religious activities if they so wish, and without adverse consequences if they do not.

Amend Section 16 to include a requirement for every prisoner to have at least one hour of exercise in the open air daily.

Amnesty International’s recommendations relating to the work of prisoners are detailed in the analysis of the sub-chapter: Allocation of work to sentenced prisoners (p. 22).

HEALTH CARE (SECTIONS 19-21)

PRINCIPLES GOVERNING ACCESS TO HEALTH CARE

Amnesty International’s ongoing research, and reports by other organizations and institutions, confirm that access to adequate medical care in prisons and other places of detention remains a major concern in Myanmar.⁴⁹ For example visits to prisons in six states and regions by the MNHRC in 2015-16 raised concerns about lack of access to adequate medical services.⁵⁰ In some prisons, the MNHRC found that there were no medical personnel whatsoever. Poor standards of health care deny prisoners their right to enjoy the highest attainable standard of physical and mental health, and put them at risk of the uncontrolled spread of infectious diseases and poses other threats to public health such as unclean water and food.⁵¹ According to the US Department of State 2015 Human Rights Report, “detainees were unable to access quality and timely medical care. Prisoners suffered from health problems, including malaria, heart disease, high blood pressure, tuberculosis, skin diseases, and stomach problems, resulting from unhygienic conditions and spoiled food”.⁵²

Amnesty International welcomes the general principle reflected in the draft law which states that the authorities are obliged to provide adequate healthcare in prisons, be it within prisons or in hospitals or other specialized institutions (Sections 19-22). However we are concerned that the draft law contains very little

⁴⁸ Nelson Mandela Rules, Rule 23.

⁴⁹ See for example, Amnesty International Myanmar: 15 protesters charged and still detained (Index: ASA 16/4476/2016), 18 July 2016; Amnesty International Myanmar: Further information health fears for detained Kachin peace activist Patrick Kum Jaa Lee, (Index: ASA 16/3105/2016), 18 December 2015; and All Burma Federation of Student Unions (ABFSU), Letpadan Justice Committee, Justice Trust: Medical crisis for political prisoners of Letpadan case, December 2015.

⁵⁰ Myanmar National Human Rights Commission (MNHRC), Statements issued in 2016 and 2015 available at: <http://www.mnhrc.org.mm/en/statements-2/>.

⁵¹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, Resolution 2200A (XXI), 16 December 1966, Article 12.

⁵² US Department of State, Burma 2015 Human Rights Report, p.4.

detail relating to health services in places of detention, and omits key principles and rules of international human rights law and standards.

In order to comply fully with relevant international human rights law and standards, the draft law should provide detailed provisions governing access to health care in prisons. Such provisions should, for instance, include an explicit assertion that prisoners are entitled to the same standards of health care that are available in the community, free of charge and without discrimination; that prisoners have the right to confidentiality of medical records; and not to be given medical treatment without their informed consent.⁵³

Such provisions should also establish the role and mission of health care providers and the principles of medical ethics. These include – but are not limited to – requirements that health personnel do not participate in or are in any way complicit in torture or other ill-treatment and do not participate in certifying people as fit for any treatment or punishment that may adversely affect their health.⁵⁴ Healthcare staff should also play a role in identifying signs or responding to complaints about torture and other ill-treatment.⁵⁵

The section of the draft law on health services should also provide for the specific health services required for women, children in prison with their parents, persons with disabilities and other specific categories.⁵⁶

Because prisoners are under the exclusive care of the prison administration, it is imperative that these standards be established and provided for by law. Leaving them unregulated could lead to human rights violations.

RECOMMENDATIONS:

Add a provision:

- guaranteeing that prisoners be granted access to free health care services, in line with the same professional standards available to people in the community without discrimination;
- requiring that there be at least one qualified medical professional in each prison;
- guaranteeing prisoners' rights to the confidentiality of their medical records and the necessity of informed consent as a condition for any treatment they may receive;
- guaranteeing the right of women to be examined or treated by a female practitioner if they so request;
- guaranteeing the availability in prisons of all necessary aspects of women's sexual and reproductive healthcare, including obstetrics and gynaecological care;
- requiring that prisoners with physical, mental or other disabilities are provided the health services they specifically need, including suitably therapeutic, rehabilitative or psychiatric treatment.

Amend Section 10 in order to establish that the role of medical employees in prison is to:

- provide care for both the mental and physical health of prisoners, subject to the same ethics as those applied to people outside the prison;
- advise the authorities in all matters pertaining to conditions and treatment – excluding the imposition of disciplinary sanctions – which may impact on the health of the prisoners and staff, for example quality of food, sanitation, personal hygiene, general cleanliness and ventilation, work and exercise;
- document and report to the competent medical, administrative or judicial authority any signs of torture or other ill-treatment.

EARLY RELEASE OF PRISONERS ON HUMANITARIAN GROUNDS

Humanitarian releases, also known as “compassionate releases”, allow for terminally-ill prisoners or prisoners who are seriously ill to be released, upon their request – providing that their release cannot lead to any security risk to society. Leaving a terminally-ill individual to die in prison is of little retributive, let alone

⁵³ Nelson Mandela Rules, Rule 24; Rules 26 and 31; Rule 32(1)(b), UDHR, Article 12 and Bangkok Rules, Rule 9.

⁵⁴ See Nelson Mandela Rule 35 and UN General Assembly, *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Resolution 37/194, 18 December 1982, Principles 2 and 4.

⁵⁵ Nelson Mandela Rules, Rule 30(b).

⁵⁶ For a detailed list of recommendations please see UN Office on Drugs and Crime, *Handbook on prisoners with special needs*, Criminal Justice Handbook Series, New York 2009.

rehabilitative value. Such releases would allow prisoners to die among their loved ones, thus respecting the human right of both prisoners and family members to a family life.

RECOMMENDATION:

Add a provision allowing for the early release on humanitarian grounds of terminally-ill prisoners upon their request, subject to considerations of security.

NOTIFICATION OF SERIOUS ILLNESS

International human rights law and standards provide that the prison administration should keep family members informed of important developments relating to prisoners such as serious illnesses⁵⁷. Families should also be informed if their relative is transferred to another prison (for more information on this issue see Movement/ transfer of prisoners p. 20). Prisoners should also be notified about important family news such as serious illnesses, births and deaths. As it stands, the draft law contains no such provisions.

RECOMMENDATIONS:

Add a provision requiring prisons to notify prisoners' families or any other contact person about serious illnesses or injuries.

Add a provision requiring the prison administration to inform a prisoner of the serious illness or death of a near relative.

ADMINISTRATION AND MANAGEMENT OF PRISONERS (CHAPTER 3)

Chapter 3 of the draft law regulates a wide range of issues, from the admission of prisoners, their accommodation, movements, release, and appearance in court, contact with the outside world, work, and the rights allocated to different categories of prisoners. Amnesty International is concerned that this Chapter leaves significant gaps, with a number of relevant provisions in international human rights law and standards missing.

ADMISSION OF PRISONERS (SECTIONS 22-23)

Sections 22-23 of the draft law deal with the admission of prisoners and require prison authorities to conduct searches, inspections, and make a record of any medical conditions at the time of admission. However the draft law does not sufficiently regulate the searches and record keeping beyond initial admission to the prison. To be fully comprehensive, the draft law should include a section regulating both searches of prisoners and the storage of prisoners' records more generally, beyond their admission, in accordance with international human rights law and standards.

SEARCHES OF PRISONERS

Section 22(a) provides that a responsible official should search and inspect a prisoner on arrival in prison. The authority to search is one of the special powers granted to prison officials; however, the draft law does not include sufficient safeguards to ensure these powers are not used to harass, intimidate or unnecessarily intrude upon a prisoner's privacy.⁵⁸ This should be remedied.

⁵⁷ Nelson Mandela Rules, Rule 70.

⁵⁸ Nelson Mandela Rules, Rule 50. And see also Rules 51-2.

RECOMMENDATIONS:

Add a specific sub-Chapter to the draft law which includes:

- a provision establishing that searches must be conducted in a manner that respect the human dignity of the person being searched, and in lines with the principles of proportionality, legality and necessity;
- a provision establishing that body cavity searches must be undertaken only if absolutely necessary and conducted only by qualified health-care professionals other than those primarily responsible for the care of the prisoner⁵⁹ or, at a minimum, by staff appropriately trained by a medical professional in standards of hygiene;
- a provision requiring the prison administration to keep appropriate records of searches.

PRISONERS' RECORDS

Section 22(c) of the draft law provides that every prisoner should be examined by health care personnel after being admitted and registered and that the information relating to his/her health must be put into a record book at the time of admission.⁶⁰ Section 7(f) in Chapter 2 also provides that a "responsible official" should systematically collect and maintain "prison records, the personal records of prisoners and the criminal records of prisoners".

The authorities must maintain up-to-date official records of all detainees held at each place of detention. Up-to-date records serve many purposes including the maintenance of statistics on the size, and profile of the prison population, which can help in making evidence-based decisions for the management of the prisons such as staffing and planning. Such records are also useful for both internal and external prison inspectors. Subject to considerations such as security and the prisoner's right to privacy, this information must be made available to prisoner concerned, his/her lawyer, and relevant national or international monitoring bodies.

As such, Amnesty International welcomes the fact that the draft law provides for the establishment of personal records of prisoners.⁶¹ However, the draft law should give more details⁶² as to what needs to be included in the personal record of a prisoner.

RECOMMENDATION:

Add a provision to the effect that the prisoners' records are to be kept confidential, be accessible to the prisoner it concerns, and include:

- the identity of the prisoner;
- where and when they were deprived of liberty;
- the authority that ordered the deprivation of liberty and on what grounds;
- where the prisoner is being held;
- the date and time the prisoner was admitted;
- the authority responsible for the detention facility;
- when the family was notified of the arrest;
- requests and complaints, including allegations of torture or other ill-treatment, unless they are of a confidential nature;
- the detainee's state of health (to be subject to medical confidentiality);
- an inventory of the prisoners' personal property;
- emergency contact details and information on the prisoners' next of kin;
- the dates and times when the prisoner was brought before a court;

⁵⁹ See European Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT), *CPT 3rd General Report*, CPT/Inf (93) 12, para.73: "A prison doctor acts as a patient's personal doctor. Consequently, in the interests of safeguarding the doctor/patient relationship, he should not be asked to certify that a prisoner is fit to undergo punishment. Nor should he carry out any body searches or examinations requested by an authority, except in an emergency when no other doctor can be called in." and World Medical Association, *Statement on body searches of prisoners*, adopted by the 45th World Medical Assembly, Budapest, Hungary, October 1993: "If the search is conducted by a physician, it should not be done by the physician who will also subsequently provide medical care to the prisoner. The physician's obligation to provide medical care to the prisoner should not be compromised by an obligation to participate in the prison's security system."

⁶⁰ Section 22 (c): *Each prisoner should be inspected by a health employee after being admitted and registered. A prisoner's state of health, and wounds or injuries or marks of wounds or injuries on a prisoners' body should be recorded. The record book documenting the prisoner's health inspection should be placed in safe keeping by the appropriate prison official.*

⁶¹ See Amnesty International recommendations on inspection of prisons, p. 30.

⁶² The Nelson Mandela Rules, Rules 7-9.

- the date and time of the release or transfer to another detention facility; the new place of detention, and the authority responsible for the transfer;
- information relating to a prisoner's behaviour, and discipline and disciplinary sanctions applied to him/her;
- information on the circumstances and causes of any injuries or death in custody. In the case of the latter, the destination of the remains.

Prisoners' records should be maintained on a regular basis and kept up to date. A copy of the records should be handed over to the prisoners when he or she is released from prison.

INFORMATION FOR PRISONERS OF THEIR OBLIGATIONS AND RIGHTS

The draft law is silent on whether and how prisoners are to be informed of their rights and obligations under the law and any other applicable rules and regulations. The draft law contains no requirements that prison officials inform prisoners of these rights and obligations. For prisoners to comply with the rules of the prison, they must be aware of what those rules are and where they can find further information about them, in a language they can understand.⁶³ Moreover, if prisoners are to be able to complain about, and seek remedy for violations of their rights while in detention, they must be aware of what their rights are and what the state's duties towards them are.

RECOMMENDATION:

Add a provision requiring prison officials to inform newly admitted prisoners, in writing and/or orally in a language and format they understand about:

- the prison law and applicable prison regulations and disciplinary sanctions;
- their rights including to access to legal advice; as well as their obligations;
- procedures for making complaints about violations of prisoners' rights or any other aspect of their incarceration;
- all other matters necessary to enable the prisoner to adapt to life in prison.

NOTIFICATION OF FAMILIES IN CASE OF DEATH

Amnesty International welcomes Section 23 of the draft law providing that when a prisoner dies, the "responsible official" should keep record of it and provide for funeral. However, for the reasons stated above, prison authorities should also be required to inform families and relatives of the death in custody.⁶⁴

In addition, all deaths in custody must be independently investigated to establish the cause of death. In Myanmar, prisoners have died in custody due to torture or cruel, inhuman or degrading treatment or punishment they suffered, including forced labour; lack of adequate medical care; and poor prison conditions.⁶⁵ Ensuring that independent investigations take place is an important safeguard against torture and other ill-treatment. The investigation also provides family members with an important avenue to establish the truth about what happened to their loved one, and seek justice when necessary.

RECOMMENDATION:

Add to Section 23:

- an obligation for prison authorities to inform the family, other relatives, or any other person previously designated by the prisoner, of his or her death in custody;
- an obligation for the Directorate of Prisons to report without delay the death to a judicial or other authority independent of the prison administration and mandated to conduct a prompt, impartial and effective investigation.

⁶³ Nelson Mandela Rules, Rule 54.

⁶⁴ Nelson Mandela Rules, Rule 69.

⁶⁵ Assistance Association for Political Prisoners – Burma, "After release I had to restart my life from the beginning": *The Experiences of Ex-political Prisoners in Burma and Challenges to Reintegration*, 25 May 2016, p44.48.

SEPARATION OF PRISONERS (SECTIONS 24-26)

Section 24 of the draft law correctly requires that different categories of prisoners – women, young prisoners, and remand prisoners – are kept in separate institutions. Prisoners should be kept separately so that prison personnel can take into consideration their specific situation and needs, including based on their criminal records, sex, age, and the specific requirements for their treatment.⁶⁶ The draft law also establishes the separation of prisoners sentenced to death from other prisoners.

PRISONERS SENTENCED TO DEATH

Section 24(f) of the draft law requires that prisoners sentenced to death be separated from other prisoners and kept in separate rooms. Amnesty International opposes the death penalty in all circumstances without exception. The death penalty violates the right to life as proclaimed in Article 3 of the UDHR, and is the ultimate cruel, inhuman or degrading punishment. We therefore encourage Myanmar's Parliament to revise all laws with provisions allowing for the death penalty with the aim to bring about its total abolition for all crimes and all perpetrators.⁶⁷

Pending such abolition, holding any prisoners, including death row prisoners, in prolonged solitary confinement contradicts the absolute prohibition of torture or other ill-treatment.⁶⁸ Prisoners on death row should enjoy the same rights as other prisoners in terms of accommodation, as detailed below;⁶⁹ access to outdoor exercise; access to the outside world; and legal assistance.

RECOMMENDATION:

Amend Section 24(f) to the following: "Prisoners sentenced to death should be separated from other prisoners and kept in separate rooms."

ACCOMMODATION, HYGIENE, CLOTHING, BEDDING AND FOOD

Standards of accommodation, including hygiene, clothing, bedding and food are crucial to prisoners' right to health and well-being. Overcrowding, cramped and unhygienic accommodation and lack of privacy in custody can amount to inhuman or degrading treatment.⁷⁰ In light of this – and of Myanmar's extremely poor prison conditions in general – minimum standards must be established by the Prisons Law. Conditions in most prisons are harsh due to lack of adequate food, potable drinking water, sanitation, and medical care. Prisoners often rely on their families to provide them with essential food and medication. During its prison visits the MNHRC reported finding overcrowding, unclean water, and poor sanitation, and in some cases only buckets provided for urinals, insufficient food allowances, and lack of adequate ventilation in prison cells.⁷¹ In 2015 the US Department of State also reported harsh prisons conditions due to inadequate access to basic needs, including food, shelter, and hygiene. According to the report "bedding sometimes consisted of a single mat, wooden platform, or laminated plastic sheet on a concrete floor".⁷²

Despite these concerns, the only reference to the accommodation of prisoners is found in Sections 24 to 26 of the draft law, which deal with the separation of prisoners. The current draft law contains no provisions

⁶⁶ Nelson Mandela Rules, Rule 11.

⁶⁷ See for example Myanmar Penal Code Section 122 (Treason), Section 132 (Abetting a mutiny), and Section 305 (Abetting suicide of an incapacitated person/ child).

⁶⁸ Nelson Mandela Rules, Rule 43(1)(b).

⁶⁹ Nelson Mandela Rules, Rule 42 provides that "General living conditions addressed in these rules, including those related to light, ventilation, temperature, sanitation, nutrition, drinking water, access to open air and physical exercise, personal hygiene, health care and adequate personal space, *shall apply to all prisoners without exception.*" (Emphasis added).

⁷⁰ Concluding Observations of CAT: Spain, UN Doc. CAT/C/CR/29/3 (2002), para. 11(d), Human Rights Committee, *Weerawansa v. Sri Lanka*, HRC, UN Doc. CCPR/C/95/D/1406/2005 (2009) paras. 2.5 and 7.4.

⁷¹ Myanmar National Human Rights Commission (MNHRC), Statements issued in 2015 and 2016, available at: <http://www.mnhrc.org.mm/en/statements-2/>.

⁷² US Department of State, *Burma 2015 Human Rights Report*, p.4.

setting out the required standards of adequate accommodation, hygiene, clothing, bedding, food etc., all of which are serious cause for concern.

The draft law also lacks measures to ensure that people with physical or mental disabilities have access to facilities and services to the same extent as other individuals. Ensuring this access often requires prison authorities to take specific measures (“reasonable accommodation”),⁷³ and failure to do so can amount to discriminatory treatment.⁷⁴ As a state party to the Convention on the Rights of Persons with Disabilities, Myanmar is obligated to “take all appropriate steps to ensure that reasonable accommodation is provided” to ensure that persons with physical, mental or other disabilities are treated equally.⁷⁵ This provision also extends to prisons.⁷⁶

RECOMMENDATIONS:

Add a new chapter on required minimum standards of accommodation, hygiene, clothing, bedding and food which includes the following provisions:

- Accommodation must ensure prisoners’ health and well-being, in particular with regard to the amount of space for each prisoner, light, temperature and ventilation;⁷⁷
- the sanitary installations must be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner;
- adequate bathing and shower installations must be provided and prisoners must be able to wash often;
- all areas of the prison regularly used by prisoners must be properly maintained and kept clean at all times;
- clean clothing suitable for the climate should be provided to prisoners ;
- at regular intervals every prisoner should be provided with food of adequate nutritional value for health and strength, of wholesome quality and well prepared; potable drinking water;
- provisions for women prisoners to have facilities and materials required to meet women’s specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of any children held with their mothers.

Add a provision that requires prison administrations to take all appropriate steps to ensure that reasonable accommodation and adjustments are provided, so that prisoners with physical, mental or other disabilities are treated on an equitable basis.

MOVEMENT/TRANSFER OF PRISONERS (SECTION 27)

Amnesty International welcomes the requirement in Section 27 of the draft law that the state of health of a prisoner be taken into consideration when moving a prisoner from one prison to another. However we are concerned that the draft law does not require authorities to take into consideration the location of a prisoner’s home when deciding where s/he could best be placed, or in some cases, transferred to another facility. Such a provision would not only help with family visits to their imprisoned relatives, it would also play an important role in enabling prisoners and their families to exercise their human right to a family life.⁷⁸

⁷³ Convention on Rights of Persons with Disabilities (ICRPD), adopted by UN General Assembly, Resolution A/61/611, 6 December 2006, Article 2.

⁷⁴ For instance, due to the architecture of some prisons, prisoners with mobility disabilities may be unable to access dining areas, libraries, sanitary facilities, work, recreation and visiting rooms. Prisoners with disabilities may also require specific protection or healthcare due to their conditions.

⁷⁵ ICRPD, Article 5(3).

⁷⁶ Nelson Mandela Rules, Rule 5.

⁷⁷ While there is no UN international norm on the minimum floor space per person, the International Committee of the Red Cross (ICRC) recommends the space for sleeping on a bed to be 1.6 m² and toilet and shower space as 1.2 m². International Committee of the Red Cross (ICRC), *Water, Sanitation, Hygiene and Habitat in Prisons*, p.22.

⁷⁸ Nelson Mandela Rules, Rule 59.

Myanmar has a record of transferring prisoners of conscience to prisons far away from their relatives as a second punitive measure which isolates them even more than the original incarceration.⁷⁹ While this practice has stopped in recent years, safeguards against this abusive practice are very much encouraged. Prisoners should also be granted the possibility of informing their family of both the transfer and their new location.⁸⁰

RECOMMENDATION:

Add to Section 27:

- a requirement for a prisoner to be placed, to the extent possible, in prisons close to his/her home in order to facilitate visits from his/her family;
- a requirement that prisoners be granted the possibility and the means to inform their family of their transfer and new place of detention.

APPEARANCE IN COURT (SECTION 29)

Section 29 of the draft law details the arrangements to be made for a prisoner to be presented in court. Appearing before a court or a judicial authority while wearing a prisoners clothing or instruments of restraint could give the impression of guilt and influence the judicial authority.⁸¹ In that regard and to respect the principle of the presumption of innocence the draft law should include the following guarantee.

RECOMMENDATION:

Add a provision that allows prisoners who are removed outside the prison to appear in court or any other judicial authority to wear his/her own or other inconspicuous clothing; and that requires that any instruments of restraint such as handcuffs he/she is wearing are removed.

MEETING WITH PRISONERS (SECTIONS 30-35)

MINIMUM VISITING TIMES BY FAMILY INCLUDING EXTENDED AND OPEN CONTACT WITH CHILDREN

Amnesty International welcomes the fact that Section 30 of the draft law provides for prisoners to receive visitors. In order to guarantee the human right of prisoners to a family life in as normal as manner as possible and contact with the outside world, the draft law should also guarantee regular visits by the family. In addition, the prison administration should create an environment that is conducive to a positive visiting experience during family, and particularly children's, visits. Open contact between mother and child should also be permitted.⁸² The Nelson Mandela Rules also recommend that the decision to allow a child to stay with his/her parent in prison should be based on the best interests of the child.⁸³

RECOMMENDATIONS:

Add a provision that ensures that all prisoners without exception have a right to receive regular visits from family members and other persons close to them.

⁷⁹ Amnesty International, *Myanmar: A challenge for the international community* (Index: ASA 16/ 028/1997), November 1997; and Tomás Ojea Quintana, UN Special Rapporteur on the situation of human rights in Myanmar, Situation of human rights in Myanmar, report to the UN General Assembly, A/64/318, 24 August 2009, para. 25.

⁸⁰ Nelson Mandela Rules, Rule 68.

⁸¹ See Nelson Mandela Rules, Rules 19 (3) and 47(2)(a).

⁸² Bangkok Rules, Rule 28.

⁸³ Nelson Mandela Rules, Rule 29. A Where children are allowed to remain in prison with a parent, provision shall be made for: (a) Internal or external childcare facilities staffed by qualified persons, where the children shall be placed when they are not in the care of their parent; (b) Child-specific health-care services, including health screenings upon admission and ongoing monitoring of their development by specialists.

Add a provision requiring the prison administration to create an environment that is conducive to a positive visiting experience for families, in particular children.

CONFIDENTIALITY OF LAWYERS' CONSULTATIONS

While Section 34 of the draft law grants prisoners the right to meet his/her lawyer and have discussions freely in a designated area, it makes this right conditional by stating that it must not contravene laws, rules and regulations. While Amnesty International welcomes this provision in general, international law and standards provide that communication with lawyers is an absolute right that prisoners should be provided with adequate opportunity, time and facilities to communicate with a lawyer without delay, interception, or censorship, and in full confidentiality.⁸⁴

RECOMMENDATION:

Amend Section 34 to guarantee prisoners the right to communicate with lawyers on any legal matter without delay, interception or censorship and in full confidentiality.

ALLOCATION OF WORK TO SENTENCED PRISONERS (SECTIONS 36-37)

Sections 36 and 37 of the draft law regulate the allocation of work to prisoners. Among other things it states that prisoners should not work for more than eight hours per day; that health personnel should visit such work places; that prisoners should be paid for their work ("on projects which generate an income"); and that prisoners, who are injured due to work activities, should be compensated.

Forced labour in Myanmar's prisons has been reported widely by credible human rights organizations and media.⁸⁵ Prisoners have been routinely forced to work in prisons or in labour camps under extremely harsh conditions. These labour camps have been established throughout the country to construct roads, buildings, and other infrastructure projects. Prisoners forced to work were reportedly subjected to beatings and did not receive adequate food or sleep. Scores of prisoners died in these camps.⁸⁶ Convicted criminals were also routinely forced to act as porters during military operations by the Myanmar army in counter-insurgency activities against armed ethnic groups.

In view of the above, Amnesty International welcomes the draft law's attempt to regulate prisoners' work. However, the draft law does not contain sufficient safeguards against abuse and exploitation. These should include a general guarantee that prison labour must never be of an afflictive nature and that prisoners may not be held in slavery or servitude, or perform any tasks which may put their life or physical integrity at risk.⁸⁷ The draft law also does not prescribe a weekly day of rest or a maximum number of weekly working hours, nor sufficient time for education and other activities related to rehabilitation.⁸⁸ This must be remedied in a revised draft law.

⁸⁴ Nelson Mandela Rules, Rule 61.

⁸⁵ See most recently, an in-depth investigation by Swe Win of *Myanmar Now*, "Abuses, exploitation rife in Myanmar's forgotten prison labour camps", 1 September 2016. See also Amnesty International, *Myanmar: Conditions in prisons and labour camps* (Index: ASA 16/22/95), September 1995; Assistance Association for Political Prisoners – Burma, *Forced labour of prisoners in Burma*, May 2002 and 'Burma's prisons and labour camps: Silent killing fields', 2009 and See for example Human Rights Watch, *Dead men walking: Convict porters on the front lines in Eastern Burma*, 12 July 2011.

⁸⁶ Thanoe Wai, "Over one thousand die in labour camps over last decade", *Democratic Voice of Burma*, 13 October 2014, <http://www.dvb.no/news/over-one-thousand-die-in-labour-camps-over-decade-burma-myanmar/44996>.

⁸⁷ Nelson Mandela Rules, Rule 97.

⁸⁸ Nelson Mandela Rules, Rule 102.

RECOMMENDATIONS:

Add a provision prohibiting prison labour of an afflictive nature, slavery and servitude, and tasks which may put the life or physical integrity of prisoners at risk.

Add a provision ensuring at least one rest day per week and sufficient time for education and other activities required as part of the treatment and rehabilitation of prisoners.

CIVIL PRISONERS AND REMAND PRISONERS (SECTIONS 39-41)

This sub-chapter of the draft law details the additional rights and rules that apply to remand prisoners and civil prisoners due to their specific status. According to the draft law a remand prisoner is a person who has not been convicted by a judicial authority but who is being held under pre-trial detention. A civil prisoner is a person sentenced to serve a term of imprisonment after being found guilty of committing a civil offence (as opposed to a criminal offence).

PRESUMPTION OF INNOCENCE OF NON-CONVICTED PRISONERS

International human rights law is clear that detention pending trial should be the exception rather than the rule.⁸⁹ Because non-convicted prisoners are individuals who have been deprived of their human right to liberty without yet having been convicted of an offence, they are legally presumed innocent and should be provided with additional guarantees and protections. The presumption of innocence is the principle that guides the specific treatments they are entitled to (discussed below),⁹⁰ yet the draft law makes no reference to this.

RECOMMENDATION:

Add a provision at the beginning of the sub-chapter asserting presumption of innocence of non-convicted prisoners.

SPECIFIC RIGHTS OF PRE-TRIAL DETAINEES

Section 39 of the draft law provides that civil prisoners and remand prisoners can bring and buy food and clothing from the outside. However, the draft law does not provide for additional specific rights which they are entitled to as a result of their specific condition, and which are established by international human rights standards.⁹¹

RECOMMENDATION:

Add to Section 39 provisions that grants to remand prisoners the rights to:

- facilitated confidential communication with their lawyer to prepare their defence;
- visits from their own doctors and dentists, at their own expense, and continuation of necessary treatment;
- ability to obtain at their own expense books, newspapers and writing materials;
- additional visits and phone calls;
- to have the opportunity to work but not be required to do so;
- to be accommodated in single separate rooms.

⁸⁹ ICCPR, Article 9.

⁹⁰ Nelson Mandela Rules, Rule 111.2.

⁹¹ Nelson Mandela Rules 112 to 120.

PRISONERS PRIVILEGES (SECTION 42)

Section 42 of the draft law lists the four “privileges” of prisoners. These include the right to report grievances to a “responsible official”; to practice their religion freely; not to be discriminated against on a number of grounds; and to be “allowed remission of sentences”. Amnesty International welcomes the four guarantees of these rights in the draft law; however, the list does not include all of the rights that prisoners should have.

The draft law should include at its beginning a chapter on general principles regulating the treatment of prisoners, as described above.⁹² In addition, the draft law should establish a comprehensive complaint mechanism for prisoners and include additional grounds of prohibited discrimination, so that it is in line with international human rights law.

COMPLAINTS BY PRISONERS

Every individual must have the ability to make complaints about violations of his or her human rights or other issues related to his/her conditions, treatment, and imprisonment in general. The draft law should provide for an independent complaints mechanism, which is necessary to the full enjoyment of rights and as a guarantee against further abuse.

However, Section 42(a) of the draft law only states that a prisoner can “report” any infringement of his or her rights to the “responsible official”, in accordance with the bylaws. Section 6(f)⁹³ in Chapter 2 also provides that the Director General of the Prisons Directorate must issue a sanction based on a report made by a prisoner through the “responsible official”. The draft law only provides prisoners with one internal mechanism to only ‘report’ alleged issues or abuses. International human rights law and standards require that prisoners be able to submit complaints about their treatment in prison; about disciplinary measures taken against them, and about violations of their rights through different avenues and to accessible and independent mechanisms established by law.⁹⁴

RECOMMENDATION:

Add a full chapter or sub-chapter on prisoners’ complaints including the following:

- the right for every prisoner to make a complaint – in a confidential manner if required by the prisoner – to the prison directorate or a prison staff member on any day of the week;
- the right of every prisoner to make a complaint to the inspector of prisons during his or her visit;
- the right for every prisoner to make a complaint regarding his or her treatment, without censorship, to the central prison administration and to the judiciary;
- the requirement that every complaint must be dealt with and replied to without delay. If the complaint is rejected the prisoner should have the right to appeal such rejection before a judicial authority;
- the right to be free from reprisal, retaliation, intimidation or other negative consequences as a result of having submitted a complaint;
- the requirement that every prisoner who is victim of sexual abuse be fully informed of her or his right to seek recourse from judicial and other competent authorities and for prison authorities to help her or him obtain legal assistance;
- the requirement to inform prisoners of their right to complain and of the available means of making complaints.

International standards relating to investigation of allegations of torture are outlined below.

⁹² See Amnesty International’s recommendation to include a chapter on basic principles p. 10-11. See for instance Principle 5 of the UN Basic Principles, Nelson Mandela Rules, Rules 1-5; *Hirst v United Kingdom (No. 2)*, Application no. 74025/01, European Court of Human Rights, Grand Chamber judgment of 6 October 2005, para. 44.

⁹³ Section 6(f): *The Director General should issue the appropriate sanction on the subject of a report made through a responsible officer that a prisoner has a grievance relating to some legal right or other.*

⁹⁴ Nelson Mandela Rules 56 and 57.

BASIC PRINCIPLE OF NON-DISCRIMINATION

Amnesty International calls for the principle of non-discrimination in Section 42(c) to be moved to the recommended additional new Chapter on General Principles at the beginning of the draft law.⁹⁵

In addition, according to Section 42(c) of the draft law, prisoners must not be discriminated against on grounds of “race, place of origin, religious practice, culture, seniority or rank, class, husband, wife, poverty or wealth”. These non-discriminatory grounds – while welcomed – are narrower than those provided for in international law, including in the UDHR and international treaties which Myanmar is a state party to.⁹⁶ Under the current draft law, prisoners are not protected from discrimination on the basis of their colour, sex, language, political opinion or belief, disability, national, ethnic, indigenous, nationality, age, sexual orientation, gender identity or other protected status.

RECOMMENDATION:

Move Section x to the recommended additional General Principles Chapter and **amend** it so that non-discriminatory grounds include race, colour, sex, language, religion or conviction, political or other opinion or belief, membership of a particular social group, status, activities, descent, national, ethnic, indigenous or social origin, nationality, age, economic position, property, disability, marital status, sexual orientation, gender identity, birth or other status.

PRISON OFFENCES AND PUNISHMENTS (CHAPTERS 4 AND 5)

Chapters 4 and 5 of the draft law list the behaviour of prisoners and prison employees,⁹⁷ which constitute prison offences and provide for punishment for each offence. Both chapters contain a number of provisions that do not comply with international law and standards. Some offences are very broadly worded. The draft law also includes prohibited punishment methods such as the use of instruments of restraint and prolonged solitary confinement. Finally, the draft law has no provisions for due process before punishment is imposed on prisoners, in violation to the right to fair proceedings.

DEFINITION OF PRISON OFFENCES

The draft law provides for a wide range of offences. Sections 43 and 49 specifically list what constitutes offences by prisoners. Sections 45, 46, and 47 list offences that can be committed by “anyone” meaning both prisoners and prison employees. Sections 48, 50, 51 and 52 list what constitute offences by prison employees.

Some of the offences are very broadly defined. For instance, Section 43 includes offences such as “saying things which cause injury or harm to, or which threaten another person”, which is very vaguely worded; Section 43(e) defines self-injury to avoid work punishable, ignoring the possibility of such acts being related to mental health problems; Section 43(l) creates the offence of “making false spoken allegations against either an employee or a prisoner”, without ensuring that this does not deter prisoners from complaining about what they believe to be true violations or abuse; and Section 43(n) makes failure to report conspiracy or crime punishable, without taking into account that prisoners may put themselves at serious risk – from fellow prisoners, staff or both - if they do report. Section 50 makes it an offence for a prison employee to “show cowardice in carrying out his or her duties”, which does not account for the possibility that the employee may face a real threat from prisoners or colleagues.

Broadly defined offences create greater space and possibilities for the Director General or anyone else with such powers to arbitrarily and abusively punish both prisoners and prison employees.

⁹⁵ See p. 10-11.

⁹⁶ UDHR, Article 2.

RECOMMENDATION:

Amend Sections 43 and 50 to ensure that prisons offences are narrowly defined, for both prisoners and prison employees, leaving no space for abusive interpretation.

FAIR PROCEEDINGS

To ensure respect for prisoner's right to fair proceedings,⁹⁷ and to ensure punitive measures are not used arbitrarily or in an abusive way, the imposition of punishment must follow "principles of fairness and due process".⁹⁸ These principles include a broad range of rights such as: the right to be presumed innocent until proved guilty according to law; to be able to present a legal defence and to be assisted by legal counsel of your own choice; to be able to cross-examine any witness; and to be tried before an independent and impartial tribunal.⁹⁹

No detainee or prisoner should be subjected to disciplinary punishment except in accordance with clear rules and procedures established by law or regulation. The law or regulation must also set out the conduct constituting a disciplinary offence, the types and duration of punishment permissible, and the authority competent to impose it.¹⁰⁰

The draft law states in Section 7(a) and (d) that the "responsible official" is in charge of matters relating to maintenance of discipline and punishment of people who commit crimes in the prison. Section 44 also provides a "responsible official" with the power to impose punishments such as being handcuffed, placed in leg-irons, or held in solitary confinement. Section 44(b) provides the possibility for a prisoner to appeal the decision to the Director General; however, the decision of the Director General is final.

These are the only provisions relating to the imposition of disciplinary measures. There are no provisions about how hearings, or other proceedings determining whether an offence has been committed, should be conducted and how a prisoner's right to defend him/herself is to be guaranteed. As a result, "responsible officials" are given almost total discretionary and unchecked powers to impose punishment. This falls far short of international human rights law and standards, which provide for prisoners to be informed of any charges against them; to be able to defend themselves in person and through a legal adviser; to seek judicial review; and to enjoy full fair trial rights where a disciplinary offence is prosecuted as a crime.¹⁰¹ These rights should also apply to prison employees accused of committing an offence under this law.

RECOMMENDATION:

Add a provision establishing a clear due process of law in the imposition of disciplinary measures including that:

- prisoners must be informed, without delay and in a language that they understand, of the nature of the accusations against them and be given adequate time and facilities for the preparation of their defence;
- prisoners must be allowed to defend themselves in person, or through legal assistance when the interests of justice so require, particularly in cases involving serious disciplinary charges;
- if the prisoners do not understand or speak the language used at a disciplinary hearing, they must be assisted by a competent interpreter free of charge;
- prisoners must have an opportunity to seek judicial review of disciplinary sanctions imposed against them;

⁹⁷ See for instance UDHR, Articles 10-11, ICCPR, Article 14. While these provisions largely relate to criminal proceedings, the principled right to fair proceedings which they establish extends beyond strictly criminal ones, as reflected by the Nelson Mandela Rules (see immediately below).

⁹⁸ Nelson Mandela Rules, Rule 39(1).

⁹⁹ See Amnesty International, *Fair trial manual second edition*, (Index: POL 30/002/2014).

¹⁰⁰ Nelson Mandela Rules, Rule 37.

¹⁰¹ Nelson Mandela Rules, Rule 41.

- in the event that a breach of discipline is prosecuted as a crime, prisoners must be entitled to all due process guarantees applicable to criminal proceedings, including unimpeded access to a legal adviser.

LACK OF CLARITY ON WHAT PUNISHMENTS APPLY TO WHAT OFFENCES

The current draft law provides lists of offences and punishments, but fails to assign specific punishment to specific offences. In addition, it fails to establish a general rule that punishments should be proportionate in their severity to the seriousness of the offence. This means that in the current draft law the most severe punishments may be meted out for the least serious offences, at the “responsible officials” total discretion, leaving the door to arbitrary discretionary powers, abuse and corruption wide open.

RECOMMENDATIONS:

Add a provision guaranteeing the principle of proportionality in punishment for offences.

Distinguish matters which are disciplinary in nature which should normally be dealt with under the Director General’s authority; and offences which are criminal, to be dealt with by the judicial authorities.

DISCIPLINARY MEASURES

While disciplinary measures are sometimes necessary to maintain law and order in prisons, the draft law should include both general guiding principles on the imposition of punishment to ensure punitive measures do not ever amount to torture and other ill-treatment and specific rules to implement such principles.¹⁰²

Amnesty International finds it disturbing that the current draft law provides for at least two forms of punishment that may amount to torture or other ill-treatment. These must be removed.

(i) Use of restraints as a form of punishment: Section 44a(v) of the draft law provides for “punishments such as being secured in handcuffs or leg-irons for a certain period of time”. In addition, Section 7(g) provides that a “responsible official” can put a prisoner in leg irons if it is “considered necessary in order to keep them safely” and Section 6(e) allows the Director General of the prison to approve prisoners being kept in leg irons for longer than three months.

According to the Nelson Mandela Rules, the use of chains, irons or other instruments of restraint which are inherently degrading or painful is prohibited.¹⁰³ Leg irons are likely to cause physical pain, discomfort and infection caused by the metal bumping or rubbing against the ankles and causing abrasions.¹⁰⁴ Therefore, under no circumstances may any prisoners be put in leg irons, let alone for three months or longer.

While other instruments of restraint such as handcuffs can be used, they can only be used under certain defined circumstances (for example as a prevention against escape during a transfer, to prevent a prisoner from injuring himself or herself or others or from damaging property) but never be applied as punishment.¹⁰⁵

(ii) Prolonged solitary confinement: Section 7(g) and (f) of the draft law provide that a responsible official may, if necessary, place a prisoner in a ‘separate room’ for more than 24 hours.¹⁰⁶ Section 44 includes a list of punishments which could all amount to solitary confinement. It refers to a prisoner “being secured in a separate room for a period of no more than 14 days” (Section 44 vi.); “being held separately for a period of no more than three months” (Section 44 vii.); and “being shut in a separate room for a period of no more than 14 days” (Section 44 viii.). The distinction between these different forms of punishment is not clarified in the draft law.

According to international standards, solitary confinement is the confinement of a prisoner for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement is solitary confinement for a

¹⁰² Nelson Mandela Rules 36-43.

¹⁰³ Nelson Mandela Rules, Rule 47(1).

¹⁰⁴ See for instance *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* (SA 3/98), Namibia Supreme Court (1999).

¹⁰⁵ Nelson Mandela Rules, Rule 47.2 and Rule 43.2.

¹⁰⁶ Section 26 provides that prisoners placed in separate confinement in a separate room for more than 24 hours should be seen once a day by a health employee.

period longer than 15 consecutive days.¹⁰⁷ Prolonged solitary confinement amounts to torture or other ill-treatment and is therefore prohibited in all circumstances.¹⁰⁸ Amnesty International is concerned that “being held separately” as provided in Section 44 vii amounts to solitary confinement in all but name, and as such its imposition for any period beyond 15 days violates the absolute prohibition on torture and other ill-treatment.

Solitary confinement is also prohibited in the case of children,¹⁰⁹ as well as prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures;¹¹⁰ and for pregnant women, women with children and breastfeeding mothers in prison.¹¹¹

In other cases, solitary confinement can be used but only as an exceptional measure of last resort, for as short a time as possible, with adequate review mechanisms including the possibility of judicial review.

In addition, the draft law provides for **employment as a disciplinary measure**: Section 44 (a)(ii) provides that as form of punishment a prisoner can be “transferred for a designated period of time from the original labour to more arduous form of labour”. This is in contravention with international standards which consider work is offered to prisoners in order “to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life”,¹¹² not as punishment. Myanmar’s history of forced labour against convicted prisoners further highlights the need to ensure that the draft law does not provide for ‘arduous labour’ or any other form of labour as a form of punishment.

RECOMMENDATIONS:

Add a provision that requires that prison officials, to the extent possible, use conflict prevention, mediation or any other alternative dispute resolution mechanisms to prevent disciplinary offences or to resolve conflict.

Add a provision that establishes a general prohibition on all forms of punishment that amount to torture or other ill-treatment and are therefore prohibited. The provision should also include a non-exhaustive list of such prohibited forms of punishment including collective punishment, corporal punishment, prolonged or indefinite solitary confinement, confinement in a dark cell, the use of any instruments of restraint, restrictions on food and drinking water, prohibition of family contacts, and close confinement of pregnant women or new mothers.

Remove Sections 6(e), 7(g) and 44 (a)(v) which refer to the use of restraint as a punishment including the use of leg irons.

Add a provision prohibiting the use of chains and leg irons at all times and regulating that others instruments of restraint can only be used when authorized by law; if other methods of control fail; as a precaution against escape during a transfer; or by order of the prison director to prevent a prisoner from injuring himself or herself or others or from damaging property.

Add a provision prohibiting the use of instruments of restraint on women during labour, during birth and immediately after birth.

Remove Section 44(vii) which refers to prolonged solitary confinement.

Add a provision prohibiting solitary confinement in the case of children; prisoners with mental or physical disabilities and for pregnant women; women with children and breastfeeding mothers in prison.

Add a provision establishing that solitary confinement may be used only as an exceptional measure of last resort, for as short a time as possible, with adequate review mechanisms including by providing the possibility of judicial review.

Remove Section 44 (a)(ii) which refers to the use of arduous labour as a form of punishment.

¹⁰⁷ Nelson Mandela Rules, Rule 44.

¹⁰⁸ Nelson Mandela Rules 43(1).

¹⁰⁹ UN Rules for the Protection of Juveniles Deprived of their Liberty, General Assembly Resolution 45/113 (1990), Rule 67.

¹¹⁰ Nelson Mandela Rules, Rule 45.2.

¹¹¹ Bangkok Rules, Rule 22.

¹¹² Nelson Mandela Rules, Rule 4.

LOSS OF REMISSION AS PUNISHMENT

Section 44 (a)(iv) provides that prisoners could be sentenced to loss of the rights of remission for an undefined “certain period of time”. Loss of remission means loss of a chance to be released early, thus directly affecting the prisoner’s right to liberty. It is therefore essential that any measure resulting in loss of the right of remission is subject to due process guarantees. The draft law must also be clear about the circumstances under which any such measure is imposed, its duration, and ways by which the prisoner may try to regain the right.

RECOMMENDATIONS:

Ensure that remission is not denied without proceedings guaranteeing fully the right of the prisoner to a fair hearing.

Amend Section 44(a)(iv) to narrowly define the period of time for which the punishment can be imposed in Section 44(a)(iv); and provide the possibility for the prisoner to regain lost remission through improved behaviour.

GENERAL (CHAPTER 6)

The last Chapter of the draft law deals with a range of very diverse issues.

USE OF PRISONERS TO MAINTAIN DISCIPLINE

Section 61 of the draft law provides that some convicted prisoners might be required to help in maintaining discipline in the prison. This directly contradicts international standards, according to which “no prisoner shall be employed, in the service of the prison, in any disciplinary capacity”.¹¹³

RECOMMENDATION:

Remove Section 61.

IMMUNITY FOR PRISON EMPLOYEES ACTING IN GOOD FAITH

Section 62 appears to provide immunity from criminal and civil prosecution to any prison employee as long as they have acted in good faith while carrying out their duties.

Unless this Section assumes that human rights violations cannot be perpetrated in good faith, which is not explicit in the text, it is in clear violation of international human rights standards, according to which public officials or state agents who have committed human rights violations – such as acts of torture – may not be relieved from personal responsibility or granted prior legal immunities. Such immunities only contribute to the recurrence of human rights violations and abuses.¹¹⁴

RECOMMENDATION:

Remove Section 62.

¹¹³ Nelson Mandela Rules, Rule 40(1).

¹¹⁴ Human Rights Committee *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004), para. 18.

PRISON INSPECTIONS

All places where people are deprived of their liberty must be monitored, including by bodies that are independent of the detaining authority.¹¹⁵ Internal inspection and external monitoring are crucial to ensuring human rights compliance in prisons and to maintaining good management of prisons.

External monitoring may be carried out by official visitors, including prosecutors, judges, parliamentarians, National Preventive Mechanisms according to the Optional Protocol to the Convention against Torture, or members of National Human Rights Commission. Such visits are already possible to some extent in Myanmar. The MNHRC has the power to inspect prisons, jails, detention centres, and places of confinement “in order to ensure that persons imprisoned, detained or confined are treated humanely and in accordance with international and national human rights laws”.¹¹⁶ Yet, the MNHRC must notify the relevant authorities of the time of its intended visit. In 2013, the ICRC also resumed its visits to detainees after being suspended for almost eight years.¹¹⁷

However, there are no provisions for inspection and monitoring of prisons in the draft law.¹¹⁸

RECOMMENDATION:

Add a provision for regular and unrestricted visits and inspections of prisons by independent monitors with the power to interview all prisoners privately and confidentially, and to examine records.

¹¹⁵ Human Rights Council, *Enforced or involuntary disappearance*, Resolution 21/4 2012, 9 October 2012, para 18.

¹¹⁶ The Myanmar National Human Rights Commission Law, Law No. 21/2014, 28 March 2014, Section 43.

¹¹⁷ ICRC Annual Report 2013 Volume 1, p 291.

¹¹⁸ Nelson Mandela Rules 83-85.

RECOMMENDATIONS

Chapter	Sub-chapter	Subject	Recommendation
Chapter 1 General Principles		Principles guiding the administration of prisons and the treatment of detainees	At the beginning of the draft, add a short list of basic principles which reflect international human rights standards, including the following human rights protections: • all prisoners must be treated with humanity and respect to their inherent dignity; • no prisoner will be tortured or ill-treated; • no prisoner will be subjected to any forms of discrimination; • individuals and groups' specific needs - in particular of the most vulnerable ones - will be addressed; • no measures that would aggravate the suffering inherent in deprivation of liberty will be taken; • the period of imprisonment will be used, so far as possible, for the reintegration of prisoners into society upon release; • education, vocational training and work, as well as other forms of assistance will be offered to prisoners to help them reintegrate; • provide that the victim's right to reparation should include compensation, rehabilitation, including medical and psychological care and social and legal services, satisfaction, and guarantees of non-repetition.
		Investigation of allegations of torture and other ill-treatment	Add a section establishing the state's duty to investigate all allegations of torture and other ill-treatment or other human rights violations within prisons as well as establishing the victims' rights to an effective remedy and reparation. Such a section must: • provide that all allegations of torture and other ill-treatment of prisoners are dealt with immediately, including through a prompt, impartial, independent and thorough investigation by an independent national authority; • provide that anyone implicated in acts of torture or other ill-treatment be removed from any position of control or power over complainants or witnesses; • require that the investigation includes a prompt and independent medical examination.
Chapter 2 Management and administration of prisons	Responsibility and authority (Sections 3-10)	Qualification and training of prison staff	Add a provision requiring all prison personnel, including the Director General, have the qualifications and level of training needed to carry out their duties to high professional standards.
			Add a provision requiring the prison administration to provide training to prison personnel including on national and international human rights law and standards; the prohibition of torture and other ill-treatment; on conflict prevention; and de-escalation on the use of force and instruments of restraint.
		Qualification and training of prison staff (cont)	Add a provision explicitly stating that all prison employees are members of the civil service, and that they will enjoy favourable conditions of work.
		Women prisoners	Add a chapter on women's prisons or prison wings and the treatment of women prisoners, in accordance with the Bangkok Rules and the Nelson Mandela Rules.

Chapter 2 (cont)	Sections 3-10 (cont)	The use of force by prison officials	Remove Section 7(j) and replace it by including a sub-chapter regulating the use of force by prison officers, with the following provisions: • that prison officials may not use force except in self-defence or when strictly necessary to maintain security and order within the prison, such as in cases of attempted escape, when there is resistance to a lawful order, or when personal safety is threatened; • that force may only be used as a last resort and only if non-violent means have proved ineffective; and that any amount of force used must be the minimum necessary; • that prison officials must not use lethal firearms intentionally, except when strictly unavoidable in order to protect life; • that prison officials must immediately report any incident of the use of force to the Director General; • that in general, prison officials should not carry firearms or other lethal weapons except in an operational emergencies.
	Provision of reform of moral behaviour and vocational training (Sections 11-18)		Amend Sections 11 and 12 by replacing the term “psychological reform” with the term “rehabilitation”; and by ensuring that prisoners only participate in religious activities if they so wish, and without adverse consequences if they do not.
			Amend Section 16 to include a requirement for every prisoner to have at least one hour of exercise in the open air daily.
	Health care (Sections 19-21)	Principles governing access to health care	Add a provision: • guaranteeing that prisoners be granted access to free health care services, in line with the same professional standards available to people in the community without discrimination; • requiring that there be at least one qualified medical professional in each prison; • guaranteeing prisoners’ rights to the confidentiality of their medical records and the necessity of informed consent as a condition for any treatment they may receive; • guaranteeing the right of women to be examined or treated by a female practitioner if they so request; • guaranteeing the availability in prisons of all necessary aspects of women’s sexual and reproductive healthcare, including obstetrics and gynaecologic care; • requiring that prisoners with physical, mental or other disabilities are provided the health services they specifically need, including suitable therapeutic, rehabilitative and psychiatric treatment.
		Principles governing access to health care (cont)	Amend Section 10 in order to establish that the role of medical employees in prison is to: • provide care for both the mental and physical health of prisoners, subject to the same ethics as those applied to people outside the prison; and • advise the authorities in all matters pertaining to conditions and treatment – excluding the imposition of disciplinary sanctions – which may impact on the health of the prisoners and staff, for example quality of food, sanitation, personal hygiene, general cleanliness and ventilation, work and exercise; • document and report to the competent medical, administrative or judicial authority any signs of torture or other ill-treatment.
		Early release of prisoners on humanitarian grounds	Add a provision allowing for the early release on humanitarian grounds of terminally-ill prisoners upon their request, subject to considerations of security.
		Notification of serious illness	Add a provision requiring prisons to notify prisoners’ families or any other contact person about serious illnesses or injuries.

Chapter 2 (cont)	Sections 19-21 (cont)	Notification of serious illness	Add a provision requiring the prison administration to inform a prisoner of the serious illness or death of a near relative.
Chapter 3 Administration and management of prisoners	Admission of prisoners (Sections 22-23)	Searches of prisoners	Add a specific sub-Chapter to the draft law which includes: • a provision establishing that searches must be conducted in a manner that respect the human dignity of the person being searched, and in lines with the principles of proportionality, legality and necessity; • a provision establishing that body cavity searches must be undertaken only if absolutely necessary and conducted only by qualified health-care professionals other than those primarily responsible for the care of the prisoner or, at a minimum, by staff appropriately trained by a medical professional in standards of hygiene; • a provision requiring the prison administration to keep appropriate records of searches.
		Prisoners records	Add a provision to the effect that the prisoners' records are to be kept confidential, be accessible to the prisoner it concerns, and include: • the identity of the prisoner; • where and when they were deprived of liberty; • the authority that ordered the deprivation of liberty and on what grounds; • where the prisoner is being held; • the date and time the prisoner was admitted; • the authority responsible for the detention facility; • when the family was notified of the arrest; • requests and complaints, including allegations of torture or other ill-treatment, unless they are of a confidential nature; • the detainee's state of health (to be subject to medical confidentiality); • an inventory of the prisoners' personal property; • emergency contact details and information on the prisoners' next of kin; • the dates and times when the prisoner was brought before a court; • the date and time of the release or transfer to another detention facility; the new place of detention, and the authority responsible for the transfer; • information relating to a prisoner's behaviour, and discipline and disciplinary sanctions applied to him/her; • information on the circumstances and causes of any injuries or death in custody. In the case of the latter, the destination of the remains.
		Information for prisoners of their obligations and rights	Add a provision requiring prison officials to inform newly admitted prisoners, in writing and/or orally in a language and format they understand about: • the prison law and applicable prison regulations and disciplinary sanctions; • their rights including to access to legal advice; as well as their obligations; • procedures for making complaints about violations of prisoners' rights or any other aspect of their incarceration; • all other matters necessary to enable the prisoner to adapt to life in prison.
		Notification of families in case of death	Add to Section 23: • an obligation for prison authorities to inform the family, other relatives, or any other person previously designated by the prisoner, of his or her death in custody; and

Chapter 3 (cont)	Sections 22-23 (cont)	Notification of families in case of death	an obligation for the Directorate of Prisons to report without delay the death to a judicial or other authority independent of the prison administration and mandated to conduct a prompt, impartial and effective investigation.
	Separation of prisoners (Sections 24-26)	Prisoners sentenced to death	Amend Section 24(f) to the following: “Prisoners sentenced to death should be separated from other prisoners and kept in separate rooms.”
		Accommodation, hygiene, clothing, bedding and food	Add a new chapter on required minimum standards of accommodation, hygiene, clothing, bedding and food which includes the following provisions: - Accommodation must ensure prisoners’ health and well-being, in particular with regard to the amount of space for each prisoner, light, temperature and ventilation; - the sanitary installations must be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner; - adequate bathing and shower installations must be provided and prisoners must be able to wash often; - all areas of the prison regularly used by prisoners must be properly maintained and kept clean at all times; - clean clothing suitable for the climate should be provided to prisoners ; - at regular intervals every prisoner should be provided with food of adequate nutritional value for health and strength, of wholesome quality and well prepared; potable drinking water; - provisions for women prisoners to have facilities and materials required to meet women’s specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of any children held with their mothers.
	Sections 24-26 (cont)	Accommodation, hygiene, clothing, bedding and food (cont)	Add a provision that requires prison administrations to take all appropriate steps to ensure that reasonable accommodation and adjustments are provided, so that prisoners with physical, mental or other disabilities are treated on an equitable basis.
	Movement/transfer of prisoners (Section 27)		Add to Section 27: - a requirement for a prisoner to be placed, to the extent possible, in prisons close to his/her home in order to facilitate visits from his/her family; - a requirement that prisoners be granted the possibility and the means to inform their family of their transfer and new place of detention.
	Appearance in court (Section 29)		Add a provision that allows prisoners who are removed outside the prison to appear in court or any other judicial authority to wear his/her own or other inconspicuous clothing; and that requires that any instruments of restraint such as handcuffs he/she is wearing are removed.
	Meeting with prisoners (Sections 30-35)	Minimum visiting times by family including extended and open contact with children	Add a provision that ensures that all prisoners without exception have a right to receive regular visits from family members and other persons close to them.
		Confidentiality of lawyers’ consultation	Amend Section 34 to guarantee prisoners the right to communicate with lawyers on any legal matter without delay, interception or censorship and in full confidentiality.

Chapter 3 (cont)	Allocation of work to sentenced prisoners (Section 36 – 37)		Add a provision prohibiting prison labour of an afflictive nature, slavery and servitude, and tasks which may put the life or physical integrity of prisoners at risk.
			Add a provision ensuring at least one rest day per week and sufficient time for education and other activities required as part of the treatment and rehabilitation of prisoners.
	Civil prisoners and remand prisoners (Sections 39-41)	Presumption of innocence of non-convicted prisoners	Add a provision at the beginning of the sub-chapter asserting presumption of innocence of non-convicted prisoners.
		Specific rights of pre-trial detainees	Add to Section 39 provisions that grants to remand prisoners the rights to: • facilitated confidential communication with their lawyer to prepare their defence; • visits from their own doctors and dentists, at their own expense, and continuation of necessary treatment; • ability to obtain at their own expense books, newspapers and writing materials; • additional visits and phone calls; • to have the opportunity to work but not be required to do so; and • to be accommodated in single separate rooms.
	Prisoners privileges (Section 42)	Complaints by prisoners	Add a full chapter or sub-chapter on prisoners' complaints including the following: • the right for every prisoner to make a complaint – in a confidential manner if required by the prisoner – to the prison directorate or a prison staff member on any day of the week; • the right of every prisoner to make a complaint to the inspector of prisons during his or her visit; • the right for every prisoner to make a complaint regarding his or her treatment, without censorship, to the central prison administration and to the judiciary; • the requirement that every complaint must be dealt with and replied to without delay. If the complaint is rejected the prisoner should have the right to appeal such rejection before a judicial authority; • the right to be free from reprisal, retaliation, intimidation or other negative consequences as a result of having submitted a complaint; • the requirement that every prisoner who is victim of sexual abuse be fully informed of her or his right to seek recourse from judicial and other competent authorities and for prison authorities to help her or him obtain legal assistance; and • the requirement to inform prisoners of their right to complain and of the available means of making complaints.
		Basic principle of non-discrimination	Move Section 42(c) to the recommended additional General Principles Chapter and amend it so that non-discriminatory grounds include race, colour, sex, language, religion or conviction, political or other opinion or belief, membership of a particular social group, status, activities, descent, national, ethnic, indigenous or social origin, nationality, age, economic position, property, disability, marital status, sexual orientation, gender identity, birth or other status.
Chapters 4 and 5 Prison offences and punishments	Definition of prison offences		Amend Sections 43 and 50 to ensure that prisons offences for both prisoners and prisons employees are narrowly defined, leaving no space for abusive interpretation.
	Fair proceedings		Add a provision establishing a clear due process of law in the imposition of disciplinary measures including that: • prisoners must be informed, without delay and in a language that they understand, of the nature of the accusations against them and be given adequate time and facilities for the preparation of their defence;

Chapters 4 and 5 Prison offences and punishments (cont)	Fair proceedings	- prisoners must be allowed to defend themselves in person, or through legal assistance when the interests of justice so require, particularly in cases involving serious disciplinary charges. If the prisoners do not understand or speak the language used at a disciplinary hearing, they must be assisted by a competent interpreter free of charge; - prisoners must have an opportunity to seek judicial review of disciplinary sanctions imposed against them; - in the event that a breach of discipline is prosecuted as a crime, prisoners must be entitled to all due process guarantees applicable to criminal proceedings, including unimpeded access to a legal adviser.
	Lack of clarity on what punishments apply to what offences	Add a provision guaranteeing the principle of proportionality in punishment for offences.
		Distinguish matters which are disciplinary in nature which should normally be dealt with under the Director General's authority; and offences which are criminal, to be dealt with by the judicial authorities.
	Disciplinary measures	Add a provision that requires that prison officials, to the extent possible, use conflict prevention, mediation or any other alternative dispute resolution mechanisms to prevent disciplinary offences or to resolve conflict.
		Add a provision that establishes a general prohibition on all forms of punishment that amount to torture or other ill-treatment and are therefore prohibited. The provision should also include a non-exhaustive list of such prohibited forms of punishment including collective punishment, corporal punishment, prolonged or indefinite solitary confinement, confinement in a dark cell, the use of any instruments of restraint, restrictions on food and drinking water, prohibition of family contacts, and close confinement of pregnant women or new mothers.
		Remove Sections 6(e), 7(g) and 44(a)(v).
		Add a provision prohibiting the use of chains and leg irons at all times and regulating that others instruments of restraint can only be used when authorized by law; if other methods of control fail; as a precaution against escape during a transfer; or by order of the prison director to prevent a prisoner from injuring himself or herself or others or from damaging property.
		Add a provision prohibiting the use of instruments of restraint on women during labour, during birth and immediately after birth.
		Remove Section 44(vii).
		Add a provision prohibiting solitary confinement in the case of children; prisoners with mental or physical disabilities and for pregnant women; women with children and breastfeeding mothers in prison.
		Add a provision establishing that solitary confinement may be used only as an exceptional measure of last resort, for as short a time as possible, with adequate review mechanisms including by providing the possibility of judicial review.
		Remove Section 44(a)(ii).
	Loss of remission as a punishment	Amend Section 44(a)(iv) to narrowly define the period of time for which the punishment can be imposed in Section 44(a)(iv); and provide the possibility for the prisoner to regain lost remission through improved behaviour.
Chapter 6 General	Use of prisoners to maintain discipline	Remove Section 61.
	Immunity for prison employees acting in good faith	Remove Section 62.
	Prison inspections	Add a provision for regular and unrestricted visits and inspections of prisons by independent monitors with the power to interview all prisoners privately and confidentially, and to examine records.

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