

# INDIA

## Submission to the Advisory Committee established to review provisions of the Protection of Human Rights Act 1993

### INTRODUCTION: THE ADVISORY COMMITTEE

After five years of its operation, the National Human Rights Commission of India (NHRC) has identified the need to review the provisions of the Protection of Human Rights Act 1993 (PHRA) under which it was established<sup>1</sup>. To this end, the NHRC established a High-Level Advisory Committee in June 1998 to look into a number of issues and recommend changes to the Act. The Committee is chaired by Justice A M Ahmadi, a former Chief Justice of India, with members Justice Rajinder Sachar, Justice P C Balakrishna Menon, Dr Rajeev Dhavan, Professor N R Madhava Menon, Dr Ramaiah and with Mr Shankar Sen as Special Rapporteur and Member Secretary of the Committee.

In constituting the Committee, the NHRC set out a number of 'Points for Consideration' by the Committee. These are reproduced in Appendix I to this submission.

Amnesty International welcomes the establishment of this Committee. The organization considers it imperative that the PHRA is reviewed and amended to ensure that the NHRC can effectively perform its role of assisting in the promotion and protection of human rights in India and reflect concerns raised by national and international human rights organizations as well as the NHRC itself. Amnesty International also welcomes the efforts the Advisory Committee appears to have made to seek "the views and suggestions of human rights activists, non-governmental organizations and the general public<sup>2</sup>" in this process. To this end, Amnesty International is submitting its own analysis and recommendations to the Advisory Committee. Amnesty International is aware that several domestic human rights organizations have submitted their comments to the Advisory Committee and is pleased to contribute to this process, given the constructive working relationship the organization has enjoyed with the NHRC at the international level. Amnesty International hopes that this spirit of transparency and consultation will be reflected in the final recommendations of the Committee and the manner in which they are received and considered by the Government of India.

In the first section of this submission, Amnesty International makes some general observations about the PHRA, the NHRC, the Jammu and Kashmir Human Rights Commission, and State

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<sup>1</sup> The text of the Protection of Human Rights Act is given in Appendix II to this report.

<sup>2</sup> This was stated in the NHRC's 'Human Rights Newsletter' of June 1998 where the establishment of the Advisory Committee was announced and views sought.

Human Rights Commissions (SHRCs). The second section is a commentary on several of the 'Points for Consideration' while the third section raises additional concerns which Amnesty International believes should be addressed by the Advisory Committee although they were not raised in the 'Points for Consideration'.

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## **PART I: GENERAL OBSERVATIONS**

Amnesty International has on many occasions welcomed the role played by the NHRC during the five years of its functioning, in monitoring and investigating human rights violations, in advising the government on human rights issues and in furthering human rights awareness. The existence and functioning of the NHRC has had the effect of raising the profile of a broad range of human rights issues in India including custodial violence, conditions of prisons and psychiatric institutions, starvation deaths, working conditions, child labour, basic health, human rights education, environmental issues and the training of police and security forces. The NHRC has also played a positive role in international and regional fora, including the UN Commission on Human Rights and the Asia-Pacific Forum of National Human Rights Commissions.

From the outset, Amnesty International would like to stress that national human rights institutions like the NHRC in India should in no way operate in the absence of, or as a substitute for, other fundamental social, legal or judicial infrastructures. While the NHRC can and has served to enhance the promotion and protection of human rights, it should never replace, nor in any way diminish the safeguards inherent in comprehensive and effective legal structures enforced by an independent, impartial, easily accessible, adequately resourced and effective judiciary.

It is in this context that Amnesty International makes its suggestions to enhance the effectiveness of the NHRC, at the same time requiring from the Government of India and its law enforcement agencies, a clear and firm commitment to support the rule of law, including upholding, complying with and implementing international human rights standards, as well as recommendations and decisions issued by national and international bodies entrusted with the protection and promotion of human rights. It is also crucial that the government undertakes a determined policy to bring suspected perpetrators of human rights violations to justice, thus holding violators accountable and preventing impunity.

While Amnesty International therefore welcomes a review of the PHRA as a means of strengthening the NHRC's ability to promote and protect human rights in India, and in particular the suggestion that the powers of the NHRC should be strengthened to seek greater implementation of its recommendations, it is mindful of the fact that there is a parallel need for a strengthened commitment from the Government of India to ensure that safeguards to protect fundamental rights in India exist both in law and in practice.

Amnesty International would like to urge that a parallel review of the Jammu and Kashmir Protection of the Human Rights Act 1997 be carried out to ensure that steps towards strengthening the effectiveness of the NHRC and State Human Rights Commissions (SHRCs) mandated under the PHRA are reflected in steps to strengthen the effectiveness of the Jammu and Kashmir Human Rights Commission. The need for this is particularly acute in Jammu and

Kashmir where there are an extremely high level of human rights violations reported and where procedures to secure redress are severely restricted. In addition, in light of concerns about the full functioning of the Jammu and Kashmir Human Rights Commission and its effectiveness in carrying out its mandate, Amnesty International believes that the state government should take immediate steps to review the functioning of the Commission with a view to ensuring that it has the resources and powers to carry out its mandate fully.

The role of State Human Rights Commissions has only briefly been referred to in the 'Points for Consideration'. Amnesty International welcomes the decentralised structure provided by Chapter V of the PHRA, which provides for the establishment of SHRCs. These Commissions, structured along similar lines to the NHRC and with the same functions in theory, are necessary to fulfil the objects of the PHRA in a country the size of India. Given this, Amnesty International considers it essential that SHRCs are established in all states in India<sup>3</sup> and that the mandate and functioning of these commissions be strengthened in line with the recommendations made in this submission, from the provision of adequate resources to the mandate of operation.

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<sup>3</sup> To date (October 1998), state Human Rights Commissions have been established in only seven out of the 25 states and Union Territories of India: Assam, Himachal Pradesh, Jammu and Kashmir, Madhya Pradesh, Punjab, Tamil Nadu and West Bengal. Amnesty International understands that the governments of Manipur and Kerala have formally established Commissions but that their members have not yet been appointed. In addition, the governments of Gujarat and Nagaland have announced their intention to set up state commissions.

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<b>PART II: AMNESTY INTERNATIONAL'S COMMENTS ON THE POINTS FOR CONSIDERATION OF THE ADVISORY COMMITTEE</b>
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## **2.1 Philosophy of National Human Rights Institutions**

In March 1992 the United Nations Commission on Human Rights (UNCHR) adopted the *Principles relating to the status of national institutions* (known as the Paris Principles)<sup>4</sup>. These principles set out areas of competence and responsibilities for national institutions as well as guidelines for "composition and guarantees of independence and pluralism" and "methods of operation". The key functions of a national human rights institution have also been identified by the Office of the UN High Commissioner for Human Rights as: an advisory function, an educative function and an impartial investigatory function<sup>5</sup>. It is with these standards in mind that the NHRC must be assessed.

## **2.3 Section 1(2) of the PHRA: Role of NHRC in relation to Jammu and Kashmir**

Amnesty International notes the restriction of the powers of the NHRC with respect to matters relating to public order, police, prisons etc. (covered in List II of the Seventh Schedule of the Constitution) in Jammu and Kashmir provided for in Section 1(2) of the PHRA. The organization believes that given the special Constitutional status of Jammu and Kashmir, the state legislation establishing the Jammu and Kashmir Human Rights Commission should be reviewed to ensure that the powers of the state institution is at least on par with those which the NHRC exercises in the rest of India. On this basis, the Jammu and Kashmir Protection of Human Rights Act 1997 should be reviewed as a matter of urgency in line with the current review of the PHRA, to ensure that the State Commission is empowered to fulfill its role of protecting and promoting human rights in line with international standards.

***C The Jammu and Kashmir Protection of Human Rights Act 1997 should be reviewed in line with the review of the PHRA and amendments made accordingly to ensure consistency in promoting and protecting human rights in India.***

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<sup>4</sup> Resolution 1992/54, adopted by consensus.

<sup>5</sup> See the UN Handbook on National Human Rights Institutions, which is part of the UN Professional Training Services, published by the Office of the UN High Commissioner for Human Rights in 1995.

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## 2.4 Section 2(d) of the PHRA: Definition of Human Rights

Amnesty International believes that the definition of human rights should include the full range of human rights enshrined in international standards, including but not limited to those regional and international treaties to which India is a party and those rights guaranteed by the Constitution of India.

In its "Definitions" under Section 2, the PHRA states that "human rights" mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants<sup>6</sup> and enforceable by courts in India. In an amendment to the Act proposed in its 1993-4 Annual Report, the NHRC sought to amend the definition of human rights to mean "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants, Conventions and Treaties to which India is a party" thereby widening the definition still further. This proposal was ignored by the Government of India and has now been included in the 'Points for Consideration' by the Advisory Committee<sup>7</sup>.

While Amnesty International welcomes the thrust of this proposal, it believes the NHRC's advisory role should be widened still further to encompass the full body of international human rights law, given that India is not party to the full range of international instruments and that a broad body of international human rights law created since the adoption of the UDHR exists -- relating to both social, economic and cultural rights and civil and political rights. Among others, the NHRC's role should include: a) encouraging the Government of India to ratify those instruments that it has not already ratified<sup>8</sup>; b) assisting in the full entry into force of such instruments through advising on the enactment of legislation and on necessary amendments to existing legislation and pointing to the incompatibility of legislation with a view to its repeal or amendment; c) advising and assisting the Government of India in its cooperation with international mechanisms established for the promotion and protection of human rights established by the United Nations such as the UN Special Rapporteur on Torture, and the various treaty bodies such as the Human Rights Committee established under the ICCPR; d)

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<sup>6</sup> "International Covenants" is defined as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>7</sup> In its 'Points for Consideration' the Advisory Committee specifically refers to the need to ensure that international treaties subsequently ratified by India are included within this definition. Although they specifically refer to the Convention against Torture, the Government of India has signed the Convention (in October 1997) but has not yet ratified it.

<sup>8</sup> The NHRC has already played a key role in encouraging the Government of India to ratify the Convention against Torture.

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ensuring awareness of the full body of international human rights law through its human rights education and training programs.

**C** *The NHRC's mandate should not only incorporate the fundamental rights and legal safeguards guaranteed in the Indian Constitution, but also those laid down in the UDHR, the ICCPR, the ICESCR and the full body of international human rights law.*

## **2.5 Size of State Human Rights Commissions (SHRCs)**

Amnesty International is concerned to note the suggestion that in smaller states with less economic resources, there need be fewer members of SHRCs. Since it cannot be easily established that land area and the availability of economic resources are necessarily directly related to the number of human rights violations encountered, conclusions about the size and composition of the Commission should be arrived at only after careful consideration of the level of human rights violations and the effectiveness of a Commission in addressing human rights concerns and raising awareness of human rights in a given state or region.

**C** *Conclusions about the size and composition of the Commission should be arrived at only after careful consideration of the level of human rights violations and the effectiveness of a commission in addressing human rights concerns and raising awareness of human rights in a given state or region.*

## **2.6 Establishment of "Human Rights Complaints Authorities"**

Amnesty International notes the NHRC's concern at the increasing number of complaints being dealt with by the Commission and the need to address the problem of workload. It believes that this issue should be given careful consideration. Suggestions for establishing separate mechanisms under the PHRA to enquire into complaints of human rights violations should reflect the philosophy of the establishment of the NHRC itself. In particular, the need to ensure the full impartiality of such bodies would be paramount and those involved in investigations should be clearly identified as officials accountable to such bodies and not to police or other local authorities (see also point 2.11 below).

Amnesty International is aware that the NHRC has recommended to the Government of India the establishment of District Police Complaints Authorities<sup>9</sup>. Amnesty International believes that such an institutional mechanism for redress should be given consideration by the Government

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<sup>9</sup> See NHRC's Annual Report 1996-97, page 23.

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of India as a priority after full consultation with the police, judiciary, NHRC, representatives of non-governmental organizations and state authorities, and addressed at an institutional level rather than being addressed within the remit of the PHRA.

In referring to the problem of workload of the NHRC, Amnesty International is also mindful of the fact that the PHRA envisaged that SHRCs would share the burden of complaints with the NHRC. The priority should therefore be to establish SHRCs in all states where such commissions have not yet been established.

- C The establishment of separate mechanisms under the PHRA to enquire into complaints of human rights violations should ensure transparency, impartiality and necessary training in domestic and international human rights law, gender-sensitive investigation, and other specialist investigative techniques including forensic science.*
- C As a means of alleviating the burden of complaints received by the NHRC, steps should be taken to establish SHRCs in all states as a matter of urgency.*

## **2.7 Sections 12-16 of the PHRA: Powers of the NHRC and their enforcement**

Although the powers of the NHRC -- including the powers of members of the Commission to conduct inquiries and for the Commission to appoint individuals to undertake investigations in the course of inquiries -- are clearly set out under sections 12-16 of the Act, Amnesty International is aware that in many instances during the course of its work over the past few years the NHRC has encountered difficulties in carrying out its activities in promoting and protecting human rights. This has often been due to lack of cooperation from law enforcement, state or central government officials.

While in the course of inquiries the NHRC has the powers of a civil court (set out in Section 13 of the PHRA) including to summon attendance of witnesses, compel the provision of information and refer cases of contempt to a magistrate for initiation of contempt procedures under the Code of Criminal Procedure, such powers are not given to the NHRC or individuals undertaking investigations on its behalf in the course of its activities beyond the conduct of inquiries, including when undertaking investigations.

Amnesty International is aware of numerous occasions when the work of the NHRC has been hampered by delays in receiving reports from state authorities, often in cases which require the urgent attention of the Commission. Also, while the NHRC has received regular reports from some state authorities about deaths in custody under their jurisdiction in accordance with its

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directive<sup>10</sup>, it has pointed out that particular states (notably Jammu and Kashmir) have failed to implement this directive.

In light of these problems, Amnesty International fully supports moves to ensure that the NHRC has legal authority to demand cooperation from government agencies -- not just for the summoning of witnesses but to ensure that government agencies send prompt reports within the time-frame set down by the NHRC. One way to ensure this would be to give the NHRC the power to refer any person for prosecution who, without lawful excuse, obstructs the Commission in the performance of its functions.

*C The NHRC should be given legal authority to require cooperation from the government and state authorities including the power to compel people, including experts and representatives of government agencies, to attend hearings and provide information; power to compel production of documents and other evidence; free access to all documents, including public records, which the Commission believes are necessary for the investigation.*

*C The NHRC should be given powers to refer any person for prosecution who, without lawful excuse, obstructs the Commission in the performance of its functions.*

## **2.8 Section 18 of the PHRA: Enforcement of Recommendations**

The NHRC, both through successive Annual Reports and through the 'Points for Consideration' given to the Advisory Committee, has indicated that in many cases the government has failed to act on its recommendations and has pointed to delays and "insensitivity" by the authorities, thereby calling into question the government's real commitment to improving the human rights situation in India. An impressive body of investigative work and series of concrete recommendations by the NHRC in the past few years has nonetheless yielded few concrete results.

The situation is all the more serious in the light of concerns that have been prevalent over a number of years about the failure of the authorities in India to implement recommendations

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<sup>10</sup> One of the first directives of the NHRC after its establishment was to request all state governments to report incidents of death in custody or rape in custody to the Commission within 24 hours. Failure to provide prompt reports would "give rise to presumption that there was an attempt to suppress the incident". This was set out in a letter to all Chief Secretaries of States in a letter of 14 December 1993.

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designed to improve the human rights situation in India, made by successive statutory Commissions and investigative teams as well as the judiciary.

The NHRC has indicated that its powers to enforce its recommendations are not at all adequate. While reiterating the NHRC's long-held view that the recommendatory nature of the Commission should be retained, the 'Points for Consideration' suggest that there should be a "statutory ensurement" that the NHRC's recommendations receive "full and faithful consideration".

The NHRC has been active in recommending the granting of compensation in many cases in which it has found *prima facie* evidence of human rights violations. Amnesty International welcomes that the NHRC has actively pursued the granting of compensation with the authorities to ensure that victims or their relatives are provided with prompt financial redress.

The PHRA should enable the NHRC to pursue full redress with equal vigour. Full redress comprises of investigation (which must be independent and impartial), prosecution (through a fair judicial process) and the provision of reparation (including the provision of medical care, rehabilitation and monetary compensation).

In particular, it should be made explicit in Section 18 of the PHRA that the NHRC has powers to refer cases in which it has found sufficient evidence to merit prosecution for a human rights violation directly to the prosecuting authorities so that prompt and appropriate action can be taken against individuals concerned.

More generally, Amnesty International fully endorses the suggestion made in the 'Points for Consideration' that there should be built into the Act a procedure for referral to a judicial authority in cases where the government authorities fail to comply with recommendations of the NHRC. In addition, the NHRC should have the power to pursue its recommendations made to the government not only to ensure full redress for victims but also to ensure that any recommendations regarding institutional changes necessary to prevent similar human rights violations occurring in the future are acted on by the government.

Ⓒ ***The NHRC should be given explicit powers to refer cases in which it has found sufficient evidence to merit prosecution for a human rights violation directly to the prosecuting authorities so that appropriate action can be taken against individuals concerned.***

Ⓒ ***The NHRC should be given enforceable powers to ensure implementation of their decisions and recommendations. Implementation should also be time bound.***

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*C      Structural mechanisms should be established under the PHRA to secure follow-up on recommendations made by the NHRC to the government.*

## **2.10 Section 30 of the PHRA: Human Rights Courts**

The PHRA provides for the establishment of human rights courts to provide "speedy trial of offences arising out of violation of human rights". Several state governments -- including Uttar Pradesh, Andhra Pradesh and Tamil Nadu -- have announced the setting up of such courts by designating sessions courts to hear human rights cases. However, in Tamil Nadu, the process was challenged by officials of the courts themselves and human rights activists who pointed to the fact that there are no guidelines as to the mandate and powers of these courts or the procedures which the courts should follow. The Tamil Nadu High Court gave an order in this regard in June 1997.

Amnesty International believes that guidelines for the procedures to be followed in relation to human rights courts should be laid down in the PHRA to ensure consistency and transparency. The organization also believes that procedures for human rights courts should fully reflect international standards for fair trial, notably Article 14 of the ICCPR and in addition, Amnesty International believes that the following considerations should be taken into account with regard to the establishment of human rights courts:

- < The requirement for governmental sanction for the prosecution for public servants should be removed in cases brought before human rights courts<sup>11</sup>;
- < An effective system for the provision of legal aid should accompany the establishment of human rights courts;
- < The NHRC or SHRC should ensure the training and sensitisation in international human rights standards of judiciary and prosecutors engaged in hearing cases in human rights courts so as to ensure the application of and compliance with international human rights law;
- < Separate and adequate resources should be allocated to the functioning of human rights courts. Amnesty International is aware that the legal system in India is already overburdened and that sessions courts may be unable to cope with an increased work-load. Additional resources will be needed to fulfil the PHRA's promise that human rights courts will be established "for the purpose of providing **speedy** trial of offences".

*C      The PHRA should provide guidelines for the procedures to be followed in human rights courts. These procedures should safeguard the integrity of the judicial*

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<sup>11</sup> Amnesty International has repeated its concerns on many occasions about the existence of provisions in the ordinary criminal law as well as special legislation which includes the need for sanction for the prosecution of public servants. These provisions, in the view of Amnesty International, facilitate impunity.

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*process by adhering to rights such as those set out in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) on the right to fair trial, the rights not to be compelled to confess guilt, the right to legal assistance of one's own choice and the right to review by a higher court.*

- C Separate and adequate resources should be allocated for the establishment and functioning of human rights courts to ensure the "speedy" trial of offences.*

## **2.11 Distribution of the work of inquiring into complaints**

Once again (see point 2.6) this point refers to the inability of the NHRC with its current strength to deal with the huge and increasing number of complaints that it receives.

Amnesty International understands the huge volume of work that faces the NHRC in India and that there may be a need to provide a mechanism for investigation of complaints by staff of the Commission who are not members. In this regard, the organizations believes that the PHRA should set out procedures for the establishment of investigative mechanisms to carry out investigations and make recommendations which would be finally endorsed by the Commission.

These procedures should be made public to ensure transparency and public confidence. Those individuals carrying out such tasks under the PHRA should be men and women known for their impartiality and integrity and be chosen not just from the civil service but from NGOs, minority groups and relevant professional groups and academics. They should have a relevant knowledge of international human rights standards and domestic law and policy and be granted with the full powers of the Commission to demand cooperation from government agencies in the course of their work.

- C The PHRA should include provision for delegating the task of assessment of complaints, investigation and initial recommendations to mechanisms below that of members of the Commission. These mechanisms should ensure transparency, impartiality and necessary training in domestic and international human rights law, gender-sensitive investigation and other specialist investigative techniques including forensic science. Such mechanisms should also be given the powers necessary for effective investigation.*

## **2.12 Section 20(1) of the Act: Annual Reports**

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At present, under section 20 of the PHRA, Annual Reports are submitted to the central or state government which then lays them before parliament with a memorandum of action taken or proposed action to be taken. According to reports, there is virtually no debate in parliament of the issues contained in the Annual Reports submitted by the NHRC, or the government's memoranda of action, when these are tabled. The political apathy with which they are treated is clearly demonstrated by the fact that the 1996-97 Annual Report was not laid before parliament (and thereby made public) until 9 months after its submission to the central government. Moreover, Amnesty International is not aware of annual reports being regularly submitted to state governments by SHRCs, indicating that there is limited discussion of the work or recommendations of the SHRCs by state legislatures.

The 'Points for Consideration' suggest that the PHRA should include a time limit for Annual Reports to be tabled before parliament for debate to ensure their timely publication. The organization believes that a time limit should also be set for the government's memoranda of action to be tabled before parliament, which would, in turn, go some way towards ensuring that priority is given to the issue of human rights by the government.

*C Sections 20 and 28 of the PHRA should be amended to include a time limit for the tabling of the Annual Reports of the NHRC and SHRCs and the memorandum of action by the concerned government before parliament.*

### **2.13 Section 19 of the PHRA: Restrictions on jurisdiction over the armed forces**

Section 19 of the PHRA has long been criticised by national and international human rights organizations. This section restricts the mandate of the NHRC by specifying that it is not empowered to investigate allegations of human rights violations by the armed forces. Whenever human rights violations by members of the armed or paramilitary forces are reported to the NHRC, its mandate restricts its action to seeking a report from the Central Government. There are no powers of investigation. After receiving the report, the NHRC can either not proceed with the case (if it is satisfied with the report) or make recommendations. The central government is required to inform the Commission of the action taken on its recommendations within three months.

Amnesty International is concerned that the NHRC, established in response to domestic and international concern about human rights violations perpetrated by both police **and** armed forces, and regularly held up by the Government of India as a demonstration of the way in which India is addressing human rights concerns, is prevented from independently investigating a large number of violations. This has the effect of rendering the Commission incapable of combatting impunity provided for in special legislation in force in areas of armed conflict. While amendment

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of this section of the PHRA should be a priority, it is just one of many steps needed to ensure accountability for the armed forces in India<sup>12</sup>.

What the PHRA in its current form means in practice is that when the NHRC calls for a report from the government about a particular incident it is reliant on the government's version of events or more usually the version of events as given by the alleged perpetrator themselves. This has been the case on several occasions which Amnesty International is aware of in Jammu and Kashmir. In one particular instance, the NHRC called for a report from the government concerning allegations of the rape of several women in Jammu and Kashmir in April 1997. The response to the NHRC's query was received from the Human Rights Cell of the Army Headquarters in Jammu and Kashmir and stated that following investigation by executive and army officers it was found that there was no truth in the allegation. No independent judicial inquiry was carried out into the very serious allegation and the NHRC accepted the government's report and closed the case. In subsequent communications with Amnesty International on this incident, the NHRC stated that "the aggrieved parties are entitled to work out their rights before Courts". However Amnesty International's concerns about the failures of the legal process in Jammu and Kashmir are well documented<sup>13</sup>.

SHRCs have even less powers in relation to armed forces than the NHRC, making their position within states where the majority of allegations of human rights violations are against members of the armed forces almost untenable. This has led to the Chair of the Assam Human Rights Commission recommending that the PHRA be amended so that the State Commission can investigate allegations of human rights violations by members of the armed forces.

The Human Rights Committee, examining India's third periodic report on its implementation of the ICCPR stated in its concluding observations:

*The Committee regrets that the National Human Rights Commission is prevented by Clause 19 of the Protection of human rights Act from investigating directly complaints of human rights violations against the armed forces, but must request*

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<sup>12</sup> Amnesty International's concerns about legislation which facilitates impunity, particularly for members of the armed and paramilitary forces is well documented. See in particular Amnesty International's submission to the Human Rights Committee, July 1997, AI Index: ASA 20/27/97, pages 21-31.

<sup>13</sup> See Amnesty International's submission to the Human Rights Committee, July 1997, ASA 20/27/97, pages 21-22 and 27.

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*a report from the Central Government. ... The Committee recommends that these restrictions be removed.*<sup>14</sup>

During the course of the hearing in July 1997, the member from Canada commented that section 19 had the effect of "driving a huge hole in the jurisdiction of the NHRC", thereby underlining the Committee's grave concern over the restriction.

The NHRC itself has expressed concern about this limitation on several occasions, initially in its 1995-96 Annual Report. The 'Points for Consideration' also acknowledge that "this exclusion has rendered a large number of violations by such personnel to go uninvestigated and unpunished".

Amnesty International's concern about this issue is heightened by the Government of India's publicly stated position on the NHRC's powers in relation to the armed forces prior to the conclusion of the Advisory Committee's deliberations. In response to the recommendation made in its 1996-97 Annual Report (made public in July 1998) that armed and paramilitary forces should report deaths and rape in custody to the NHRC within 24 hours, the government indicated that it would not shift from the position laid down in the PHRA<sup>15</sup>. Amnesty International is concerned at such comments made at a time when the NHRC is encouraging transparent debate on all aspects of the PHRA.

**C** *The restriction placed on the powers and role of the NHRC in relation to complaints of human rights violations against members of the armed and paramilitary forces contained in Section 19 of the PHRA should be removed immediately.*

## **2.14 Section 36(2) of the PHRA: One year time limit**

Another restriction of concern to Amnesty International is the time-limit of one year, after which the NHRC cannot take cognizance of a complaint. Again, this provision has been overlooked in specific cases, but the general practice continues of disregarding cases filed more than one year after a violation is alleged to have been perpetrated. This is problematic, as many victims approach the NHRC as a last resort, after using other mechanisms such as the courts. Moreover lack of resources are often an obstacle to filing a complaint within the time-frame required.

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<sup>14</sup> *Concluding observations of the Human Rights Committee*, Sixtieth Session, Geneva, 14 July - 1 August 1997, CCPR/C/60/IND/3 at 7.

<sup>15</sup> "Govt. Rejects NHRC plea on Army", Hindu, 9 July 1998.

There are also instances in which a human rights violation might come to light over a year after the original incident occurred. In cases of rape for instance, a victim might have compelling reasons not to come forward immediately, including fear of retribution or social censure. However if the circumstances of the victim changed or perhaps the threat from the perpetrator was removed, the victim might wish to make a complaint several months or years later. This could be the case also for example in a situation where the population is tightly controlled by the police or armed forces for a given period, making it difficult to file complaints of human rights violations with the authorities for fear of reprisal.

The Human Rights Committee, again following the hearing of India's third periodic report on its compliance with the with the ICCPR stated in its concluding observations:

*The Committee further regrets that complaints to the Commission are subject to a one-year time-limit, thus preventing the investigation of many alleged past human rights violations.... The Committee recommends that these restrictions be removed.<sup>16</sup>*

**C** *Section 36(2) of the PHRA should be reviewed to ensure that allegations of human rights violations committed over one year before the complaint is filed can be considered by the NHRC on a consistent basis.*

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<sup>16</sup> *ibid.*

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<p style="text-align: center;"><b>PART III: ADDITIONAL ISSUES SUBMITTED BY AMNESTY INTERNATIONAL TO THE ADVISORY COMMITTEE</b></p>
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## **1. Appointment of Commission members**

Section 3(2) of the PHRA sets out the procedures for appointing the Chairperson and members of the Commission. Amnesty International believes that provision should be made within the Act to ensure that appointments to the Commission reflect the full diversity of Indian society. This should include ensuring that women are adequately represented. The organization notes that the judicial tradition has been taken as a basis for the appointment of the Chair and two members, thereby bringing respect for the rule of law and an in-depth understanding of judicial decision making. However, there are concerns that in practice this means that for the foreseeable future there cannot be a woman Chair of the Commission.

Section 3(2)(d) of the PHRA provides for two members of the NHRC to be appointed from "amongst persons having knowledge of, or practical experience in, matters relating to human rights". This provision is also reflected in the composition of SHRCs under section 21(2)(d). Amnesty International believes that this definition should go further to ensure that these members have **proven** expertise and competence in the field of protection and promotion of human rights. This would go further in ensuring that those chosen as members of commissions would have the required skills as well enjoying public confidence in the area of human rights.

*C The members of the Commissions should be men and women known for their impartiality and integrity; the composition of the members should reflect the pluralism and diversity of society, and ensure gender balance; members should be chosen from NGOs, minority groups, relevant professional groups and academics.*

*C The composition of the members of the Commissions should reflect the composition of society itself in order to enhance its credibility among all groups of society and impartiality in its functioning.*

## **2. Recruitment of staff**

The above recommendations are also true for staff employed to carry out the tasks of the NHRC and SHRCs. For example, investigative staff are gathered from amongst civil servants, judiciary and the police. They do not need to have a proven record in human rights and it is nowhere specified that they should have training in human rights documentation or international human rights law. In order to safeguard the independence and impartiality of the Commission,

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investigators should be representative of all sectors of society. The NHRC's practice in working on occasion with women's human rights activists and representatives of NGOs is welcome, but this *ad hoc* arrangement should be replaced by the systematic inclusion of a broader based staff from all sectors of civil society. There should be a non-discriminatory and open policy of recruitment and the staff of the NHRC should undertake regular training to improve their investigatory skills and knowledge of international human rights standards and domestic law and practice.

***C*** *The staff of the Commissions should be men and women known for their impartiality and integrity; the composition of staff should reflect the pluralism and diversity of society, and ensure gender balance. Staff should be chosen from NGOs, minority groups, relevant professional groups and academics in order to enhance its credibility among all groups of society and impartiality in its functioning.*

### **3. Resources**

The Annual Report of the NHRC for 1996-97 refers to some of the difficulties that the NHRC has been facing in conducting the research it considers necessary, using the expertise of organizations and institutions with which the Commission has contact. The Planning Commission of India offered a grant of Rs.25 lakhs (c.US\$58,000) to the Commission for specific areas of research on the basis that the Commission would not provide grants to other institutions to undertake any of this research. The NHRC therefore refused the grant indicating that it would find the funds elsewhere.

Amnesty International is aware that there have been problems in allocating funds to SHRCs on several occasions to establish offices. In several states it was several months before SHRCs were able to have access to office space or telephone and fax facilities. Amnesty International believes that funding for the work of SHRCs in particular should be allocated before their establishment and that all necessary funds made available to ensure their smooth functioning from the time that they are established to avoid generating unrealistic expectations amongst victims of human rights violations.

Inadequately resourced Commissions will not be able to carry out their mandated functions and therefore will not fulfil the "philosophy" of national institutions referred to in point 1.2 of the 'Points for Consideration'.

***C*** *The NHRC should be granted financial autonomy; the sources of funding should be specified in legislation, should be secured with a long-term perspective; the*

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*NHRC should have adequate resources, should draft its own budget; this budget should not be linked with any specific department of the government.*

#### **4. Section 12 (c) of the PHRA**

Section 12(c) of the PHRA provides for the officials of the NHRC and SHRCs to "visit, under intimation to the State Government, any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection to study the living conditions of the inmates and make recommendations thereon".

Amnesty International is concerned that in some cases this means that State Governments are given an opportunity to improve the conditions in a given institution before such a visit and that as a result a true picture might not be formed. Furthermore, if detainees are interviewed in the presence of guards or other officials this greatly decreases the utility of the interviews, making it less likely detainees would speak truthfully with the delegation about the conditions of detention. It would also increase the risk that detainees might face retribution for speaking frankly with officials of the Commissions. In a statement to the UN Human Rights Commission in 1992, the International Committee of the Red Cross (ICRC) stated "The ICRC wants to underline that visits to detainees, whether prisoners of war, "political" or "security" prisoners... must meet certain precise criteria... such as interviews without witnesses, repetition of visits and access to all places of detention where these detainees are found"<sup>17</sup>. Discussion of these issues is currently continuing at the UN in drafting an Optional Protocol to the UN Convention against Torture which aims to create a global inspection system for places of detention as a way of preventing torture and ill-treatment<sup>18</sup>. International guidelines for the inspection of places of detention should be taken into account by the NHRC in drawing up guidelines for such visits.

Amnesty International is also concerned that Section 12(c) of the PHRA does not allow the NHRC or SHRCs to investigate conditions in institutions under the control of the Central Government such as interrogation centres run by the armed forces (as these come within the jurisdiction of the Central Government). It is imperative that powers should be extended to ensure access to **all** places of detention.

**C** *Section 12(c) of the PHRA should be amended to allow the NHRC and SHRCs to conduct unannounced visits to all places of detention. Guidelines should be*

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<sup>17</sup> ICRC, Statement to the 48th Session of the Commission on Human Rights under Point 10 (detention); delivered 12 February 1992; translated from French by Amnesty International.

<sup>18</sup> See Amnesty International's report, "The Draft Optional Protocol to the Convention Against Torture: Developing an Effective Tool to Prevent Torture", July 1996, AI Index: IOR 51/01/96.

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*established to ensure that officials are able to conduct interviews without witnesses, that officials are able to undertake repeated visits and that the safety of those interviewed can be assured.*

- C International guidelines for the inspection of places of detention should be taken into account by the NHRC in drawing up guidelines for such visits.*

## **5. Witness protection**

Amnesty International is aware of several instances in which those who have filed complaints before the NHRC or SHRCs or those who have been called to testify before them have been subjected to harassment as a result. In light of this, Amnesty International makes the following recommendation:

- C The NHRC and SHRCs should have full and effective powers to ensure the protection of witnesses, complainants, or others providing evidence to the commission, including bringing about the suspension or transfer of officials allegedly involved in acts of harassment to other duties where they would have no power over witnesses or complainants -- without prejudice pending completion of investigations.*
- C The Commission should be able to provide financial assistance to witnesses enabling them to travel and be securely accommodated in order to present their evidence before the Commission.*

## **6. Section 12(d) and (f) of the PHRA: Review of laws**

In discharging its mandate to review safeguards provided under the Indian Constitution or legislation (Section 12(d)), and its concern for compliance with the provisions of the rights in the ICCPR and the ICESCR (Section 12(f)) (see 2.4 above), the NHRC has since its establishment recommended changes to existing legislation to ensure that human rights are protected. Amongst the most significant of these initiatives was the NHRC's role in calls for the abolition of the Terrorist and Disruptive Activities (Prevention) Act (TADA) which was allowed to lapse in 1995. Following a Supreme Court judgement which upheld the constitutional validity of TADA, the NHRC undertook a thorough review of the Act, concluding that it was "incompatible with [India's] cultural traditions, legal history and treaty obligations", writing to all members of parliament and publicising its concerns.

In a more recent submission to the Supreme Court of India during hearings to consider the constitutional validity of the Armed Forces (Special Powers) Act (AFSPA), the NHRC

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expressed its view that the Act is unconstitutional, stating that the Act does not "meet the requirements of anti-arbitrariness and reasonableness under Article 14 and 21 of the Indian Constitution read with the ICCPR"<sup>19</sup>.

While Amnesty International welcomes the NHRC's intervention in relation to these two Acts, about which there has been widespread concern expressed through national campaigns undertaken by NGOs and challenges in the Supreme Court, the organization believes that the NHRC should have as a more systematic and consistent approach in reviewing existing or proposed legislation. Amnesty International notes that there are several pieces of legislation about which, for example, the UN Human Rights Committee has expressed concern including the Jammu and Kashmir Public Safety Act and the National Security Act but which have not been given attention by the NHRC. In recent months, Amnesty International has raised concerns with the NHRC and relevant SHRCs about the Jammu and Kashmir Prevention and Suppression of Sabotages Act, 1965 and the proposed Tamil Nadu Prevention of Terrorist Activities Bill 1998. It is not aware of any steps being taken by the NHRC to review these legislations. In fact, the response of the Jammu and Kashmir Human Rights Commission when asked whether it would be taking steps to review the Jammu and Kashmir Prevention and Suppression of Sabotages Act, 1965 was to indicate that it did not have the power to do so under its statute. This is not the case as under Section 13(d) of the Jammu and Kashmir Protection of Human Rights Act, the Commission is empowered to "review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation".

In addition to the review of special legislation in force in areas of armed conflict, the NHRC has reviewed legislation and legal safeguards within the ordinary criminal law as part of its regular work. In 1996 the NHRC commenced work on the drafting of a Prisons Bill to replace existing legislation. However, the Bill has remained pending since it was proposed in 1996. The NHRC has also supported the work of others, such as the National Commission for Women's review of laws relating to sexual offences. In addition, the NHRC has sought to ensure that the causes of the high incidence of human rights violations are addressed by calling for: a) systematic reform of the police and prison system; b) implementation of Supreme Court directives elaborated to ensure the effective protection of human rights within the criminal justice system; c) implementation of the recommendations of the National Police Commission reports from 1979. The NHRC has also called for the early consideration of 113th report of the Law Commission of India which calls for the amendments to the Indian Evidence Act, 1987.

Amnesty International believes that the NHRC has an important role to play in reminding the government of its international obligations in proposing and reviewing legislation and ensuring that safeguards to prevent human rights violations are implemented in practice. However, unless

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<sup>19</sup> The Supreme Court nonetheless upheld the constitutionality of the Act in December 1997.

the authorities take steps to act on the recommendations of the NHRC, the authority of the Commission will continue to be undermined and the effectiveness of its work diminished.

- C The NHRC should be mandated to monitor the implementation of international human rights standards through domestic law and policy and the implementation of such laws in practice.***
  
- C The PHRA should be amended to ensure that all proposed legislation be referred to the NHRC by the Government of India and that the decision on whether to comment rest solely with the Commission.***
  
- C The PHRA should expressly set out the powers of the Commission to recommend enactment of legislation or regulations, to recommend that draft legislation or regulations be amended, and to recommend that existing legislation or regulations be repealed or amended in accordance with international human rights standards.***