Annex 1

Our detailed comments from Fair Trial Perspectives

DRAFT CRIMINAL CODE

s3 - Definition of "Court" and "Judge"

In accordance with the principle of 'separation of powers', the third preamble of the Interim Constitution[1] asserts the importance of an independent judiciary. Further, Articles 33 and 100 of the Interim Constitution require the Nepali judiciary to be independent and the government to adopt a political system respecting that independence.

The currently proposed definitions do not comply with the principle of the separation of powers and thereby undermines the rule of law in Nepal. As per AF's Public Interest Litigation petition of 26 April 2010 to the Supreme Court, we recommend that the definition of "court" and "judge" comply with the above principle and specifically limit the exercise of judicial powers to judicial officers and tribunals only; expressly stating both are independent of the executive and legislative branches of government.This definition will also ensure the Nepali definition is in accordance with the meaning of 'tribunal' as defined by the Human Rights Committee.[2]

<u>Chief District Officers & Judicial Power</u>

This amendment is particularly important as Nepali law currently provides for Chief District Officers (CDOs) to adjudicate criminal cases as well as take responsibility for the District Police Office.[3] As the CDO plays the leading role in administering each district we submit that it is impossible for them to be seen to be impartial. In the first place criminal cases are brought in the name of the Government of Nepal. To have a representative of that government as a judge in such case is clearly problematic. We rely on the common law principle that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[4]Further, it is likely that each case over which a CDO presides will incorporate a substantial quantity of police evidence. To have the local head of the police evaluating such evidence places him or her in an impossible situation. It also makes the CDO concerned partial; s/he has an interest in upholding the values of the force. For these reasons we contend that CDOs are neither independent, nor appear to be so, and therefore our proposed limitation of the definition of 'judge' and 'court' are necessary to ensure Nepal conducts a fair trial for each citizen.

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[1] *Ibid*.

[2] The Human Rights Committee, 'General Comment 32: Right to equality before courts and tribunals and to a fair trial' 23 August 2007 [18]: "The notion of a 'tribunal' in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature."

[3] CDOs chair the District Security Committee; CDOs have the duty to administer the jail in their jurisdiction and Section 16 of *Jail Act 2019*. Each CDO is therefore the head of their district's jail and CDOs are the local officers responsible for issuing detention orders as provided by *The Public Security Act 2046*.

[4] *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256 per Hewart CJ (United Kingdom).

Undivided Attention of the Judge
Further, the practice of a single judge hearing more than one case at the same time erodes the guarantees of a fair trial contained in the ICCPR and the draft Criminal Procedure Code. In order for a tribunal to be considered "competent" the judge must give his/her personal and undivided attention to the proceedings at hand. Therefore we recommend that an additional section be added to the definition of judge to ensure that wherever the laws of Nepal require that a procedure takes place "in court" or "before a judge" it means that the matter should enjoy the full, undivided and uninterrupted attention of the court.

General Principles of Criminal Justice

s8 - No Person Shall be Prevented from a Fair Trial

The Government of Nepal (GoN), by enacting Section 9 of the Treaty Act 2047BS,[5]has guaranteed that treaty provisions will take precedence over domestic law in case of conflict.

The current drafting of s8 incorporates only the element of competency as required by Article 14(1) of the ICCPR.[6]Article 14(1) provides that a fair trial must be '…by a *competent, independent and impartial* tribunal established by law.' To ensure that the new Criminal Code complies fully with Nepal's international obligations and human rights norms, we recommend incorporating the complete ICCPR definition of what constitutes a fair hearing; this is particularly pertinent currently in Nepal where CDOs, as an important part of the Executive, also have judicial power in criminal cases, which is a clear breach of Article 14 (1) as submitted above.

Additional Section: s10A - Presumption of Innocence
Article 14(2) of the ICCPR enshrines the principle that everyone has the right to be presumed innocent (and treated as such) until they are convicted, following a fair hearing by an independent, competent, and impartial tribunal.[7] As a fundamental corollary to presumption of innocence, we recommend the addition of an explicit section clarifying that the burden of proof in relation to each element of an offence shall lie with the prosecution.

Whilst there are provisions of Nepali law that make coerced confessions inadmissible, these place the burden of proof (of proving torture) on the defendant.[8] In line with international practice,[9]we

[5]*Treaty Act 2047*:S9(1) In case of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification accession, acceptance or approval by the Parliament, inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws.
[6] ICCPR (n 6) Article 14(1).
[7] ICCPR (n 6) Article 14(2).
[8] See *Sachin Shresta v The Nepal Government* NKP 2063, Case: Drugs, Vol. 2, Pg 183 and Advocacy Forum and others, 'Review of the implementation of recommendations made by the Special Rapporteur, Manfred Nowak, after his mission to Nepal in 2005', (Kathmandu 2009), available at http://www.advocacyforum.org/SubmissiontoNowak_28_August_Final.pdf, accessed 28 June 2010.
[9]Australian Common Law Provision: "Confessions are inadmissible unless the prosecution satisfied the judge on the balance of probabilities that the confession was made voluntarily by the accused: 'Confessional Evidence' Peter Zahra, SC, last updated 2 November 2010 available at

recommend that the legal burden of proof in relation to admissibility of evidence should lie with the prosecution. We submit that once the defendant has raised the issue of evidence being obtained through coercion or torture (the evidentiary burden), that the prosecution shall have to prove on the balance of probabilities (that it is more likely than not) that such evidence *was not* obtained by torture or coercion. For example, the Australian *Evidence Act1995*provides that:

s84 (I): Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, was not influenced by:

> *(a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or*
> *(b) a threat of conduct of that kind.*

(2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.[10]

If the Parliament enacts a law in which the defendant is clearly obliged to carry the legal burden, we submit that it must be discharged on a lesser burden; the balance of probabilities. This lower standard of proof is necessary to balance the power and resources of the State compared to the individual.

Presumption of Innocence to be Evident in Drafting

s94 - Prohibition to harbor accused or offender

The definition of "offender" in this section clearly breaches the presumption of innocence by including suspected/accused persons as "offenders:"

Current draft: S94 (1) No one shall harbor any accused or offender with intention to save from being arrested or punishment pursuant to law.

Explanation: For the purpose of this section "offender" shall mean suspect, accused or convicted person of the court to an offence.

We do not take issue with the creation of this crime. We do; however, request that the 'Explanation' section be amended to remove the term 'accused' from the definition of "offender". Firstly, sub-section 1 clearly identifies harboring 'accused' persons as an offence. Therefore, including 'accused' persons as a type of "offender" by definition is unnecessary as the crime of harboring an accused has already been created. The Explanation further offends the accused's right to a presumption of innocence by including accused persons in the definition of offender; we consequently make our recommendation to amend the Explanation section.

<http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_confessionalevidence> accessed on 23 February 2011.

[10] s84(I)Australian *Evidence Act1995*available at <http://www.comlaw.gov.au/Series/C2004A04858> accessed on 24 February 2011.

DRAFT CRIMINAL PROCEDURE CODE

s3 Definitions of "Judge" and "Court"

As per our comment in relation to this section of the draft Criminal Code above, we recommend the definition of the terms 'court' and 'judge' be restricted to judicial bodies only.

s9 - Investigating Authority Power to Arrest

Right to Liberty
In accordance with Article 9(1) of the ICCPR on the right to liberty and protection from arbitrary arrest, a person should only be arrested if necessary and in accordance with the law. The Human Rights Committee has interpreted this right so that the only pre-trial detention consistent with Article 9 is that 'to prevent flight, interference with evidence or the recurrence of crime'. We therefore recommend amending grounds for arresting a person pursuant to sub-section (1) as follows:

If an investigating official making investigation into an offence enlisted under Schedule 1 or 2 suspects on reasonable grounds that a person is involved in such offence, he/she may, if it is necessary to prevent flight, interference with evidence or the recurrence of crime, apprehend and take him/her into custody.

Maximum Investigation Time
Currently, the maximum time to bring a detained person before the court is 24 hours plus travel time.[11] This time limit is routinely ignored and arrest records falsified.[12] We submit that deterrent measures such as individual penalties for the arresting officers who fail to comply, in addition to making any evidence gathered after the time limit inadmissible, will promote a change in the law-enforcement culture.
We propose an additional section be inserted after sub-section (2):

In the event that a person arrested and held in custody is not produced in court within 24 hours of arrest (without reasonable excuse), the court shall:

a) Hold the relevant police officials in contempt of court; and

b) Decline to admit any statements alleged to have been made by the accused during his time in custody as evidence.

Onus on Authorities to Contact Lawyer
The way this section is currently drafted gives great potential for Police to disregard their obligations. We recommend a more onerous provision to ensure that a positive obligation lies on the arresting officer to facilitate access to a lawyer:

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[11]The State Cases Act 2042 BS (1992 AD) s 15(2).

[12]see *Inter Alia* Advocacy Forum and others 'Review of the implementation of recommendations made by the Special Rapporteur on Torture, Manfred Nowak, after his mission to Nepal in 2005' (Kathmandu 2009) available at < http://www.advocacyforum.org/publications/index.php> accessed 28 June 2010.

Amended s9(15): Upon arrest, the arresting official ***shall contact*** *the detainee's nominated legal representative and permit a confidential communication to take place,* ***prior to any interrogation*** *of the accused. If the detainee's legal representative is* uncontactable or the detainee has no nominated legal representative, within 24 hours of the arrest, **the official shall contact** the **court-appointed lawyer or lawyer provided by legal aid committee by telephone** and permit a confidential communication to take place.

To achieve this goal, legislations such as legal aid Act, District, Appellate and Supreme Court Regulations need to be amended, further funding would be required to ensure this protection against torture and protection of the right to silence is made available.

s14 -Taking of Statement and Interrogation

Safeguards for Interrogation Procedure

In his addendum to his 2010 Report to the Human Rights Council the Special Rapporteur on Torture, Manfred Nowak, expressed concern that, "the judicial process is not very functional or respected, since for example some suspects ...*have to confess in the absence of their lawyer*.'[13] We therefore recommend that during an interrogation a defence lawyer or support person (if a defence lawyer is unavailable, impractical or unwanted) should be present. Further, an audio and/or visual recording should be made of the interrogation, where resources are available to make such a recording. Both of these strategies would be practical and appropriate safeguards against any possible coercion and/or torture; in addition to protecting the accused's right to silence as guaranteed at section 9 of the draft Criminal Code and art 24(7) of the Interim Constitution.

The audiovisual recording will also ensure that where an accused makes a contradictory statement in court, the judge can more easily and fairly assess the truth of the statement by being able to view the initial statement to police.

Coerced Evidence

In order to strengthen the current provisions in the *Evidence Act* we submit that this additional section is necessary to give effect to the Supreme Court decision in *Netra Bahadur Karki v His Majesty's Government,*[14] in which it was held that an uncorroborated confession is inadmissible at trial:

(1) Any statement or evidence obtained from an accused by coercion of any kind shall be inadmissible as evidence in court.

Explanation: If the defendant raises the issue of evidence being obtained by coercion, the onus to prove such evidence was not obtained by coercion lies on the prosecution.

The proposed sub-section is necessary to be consistent with the presumption of innocence and our proposed additional provision s10A, by explicitly placing the onus of proof on the prosecution, in contrast to the current position in Nepali law.

s22 - Examination of Wound

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[13] UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (26 February 2010) UN Doc A/HRC/13/39/Add.6, Para 55.

[14] NKP. 2062, Case: Murder, Decision No. 7555 Pg 742.

The issue of torture in detention is closely linked to that of fair trial, as coerced confessions are not admissible as evidence.[15]

Further, it our experience that deterrent effect of departmental action under the *Police Act 1955*[16] as a penalty is not strong. Without clear and serious punishments set out in law, the police have no fear of repercussions and continue to inflict torture.[17] We recommend introducing a compulsory mechanism whereby evidence of torture must be provided to the Government Attorney and/ or special investigative team. Further, prosecution must be possible. These potential repercussions will be a much greater protection for victims of torture, while at the same time protect an accused's fundamental right to silence.

<u>Grounds for Detention Pending Trial: Bail</u>

s67- The Accused Person to be Detained

Article 12(2) of the Interim Constitution guarantees that, 'No person shall be deprived of his/her personal liberty unless in accordance with law'.[18] This is in compliance with international law also; Article 9(1) of the ICCPR states: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'. The Human Rights Committee in *Van Alphen v The Netherlands* has concluded that the only pre-trial detention consistent with Article 9 is that 'to prevent flight, interference with evidence or the recurrence of crime'(the *Van Alphen* reasons').[19]

As currently drafted, the Code does not *prima facie* provide for the granting of bail. We are also concerned that the draft Procedure Code follows the provisions of the *Muluki Ain* by making pre-trial detention automatic for some offences. In our opinion there is no ICCPR compliant reason for this. We therefore recommend amending this section to include a presumption in favor of granting bail, as follows:

<u>S67- Presumption in Favor of Bail:</u>

(1) A person accused of any offence shall be released on bail or ordinary court date, unless the court is satisfied that there are reasonable grounds to believe that:

(a) the accused may flee from the geographical jurisdiction of the court if released; or

(b) the accused may interfere with evidence or intimidate witnesses; or

(c) there is an appreciable risk that the accused may continue to offend if released on bail.

s68, s70 & s71 Bail Amounts & Additional Bail Amounts May be Ordered

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[15] s9 of the *Evidence Act 1974.*

[16] Chapter 3 of the *Police Act 1955.*

[17] The 2008 addendum report of the Special Rapporteur on Torture found that 'the torture and arbitrary detention of criminal suspects by police has persisted': UNHRC 'Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to Nepal' (9 January 2006) UN Doc E/CN.4/2006/6/Add.5 Para. 20 available at <http://www2.ohchr.org/english/issues/torture/rapporteur/visits.htm>. More recently, in an AF survey of 4,328 detainees interviewed in 65 places of detention in 18 districts over the course of one year, 19.5% of all detainees suffered torture while in custody: 'Coalition against Torture, *Criminalize Torture*, 1st Edition, Kathmandu, 2009.

[18] The Constitution (n **Error! Bookmark not defined.**) Article 12(2)

[19] *Van Alphen v The Netherlands,* No 305/1988 (1990) UN Doc. CCPR/C/39/D/305/1988.

S68 permits the court to grant bail even "if there is reasonable ground for proving the accusation against such accused." As discussed above, we submit that the only reason a person should *not* be released on bail is for one or more of the *Van Alphen* reasons mentioned above. The strength of the evidence is only relevant to whether the accused may have a stronger incentive to flee (as he/she may be facing imprisonment, which may make the desire to flee stronger); as suggested above, we recommend a presumption on favor of bail be enacted, which would render this section unnecessary.

Sections 70 and 71 grant the court power to order the defendant to pay additional bail at any time during the proceedings. Again, we submit that the only grounds for detaining a person are *Van Alphen* grounds. The sections as currently drafted do not provide any permissible reasons for ordering additional bail and thus the section grants the court an unfettered discretion to detain a person. This detention would therefore be arbitrary in the Article 14 of the ICCPR sense. We submit that a person released on bail should only be remanded in custody at a later stage in cases where new information (i.e. information that was not discoverable at the time of the initial jail-bail hearing) is provided by the Prosecution that may persuade the court that due to a newly discovered risk of flight, interference with evidence or risk of re-offending that the person should now be detained.

We are pleased with the inclusion of s71(2) that permits the court to release a remanded person if it becomes clear that he/she is not the offender; however we would submit that for consistency that *any* release should be clearly based on the aforementioned *Van Alphen* grounds, ie that the evidence indicates the defendant is likely to be acquitted and he/she has little reason to flee the country, interfere with witnesses or commit further crime; therefore his/her release is warranted.

s81 - Fixation of Due Date With Reason

<u>Notification of Court Date to All Parties</u>
In terms of case management, the fixing of a date for the next hearing in the presence of all parties is welcomed. We recommend amending s81(3) to ensure the defendant and his/her representative must be informed of changes in court date. This amendment protects the defendant's right to meaningful legal representation, which we submit must be read into the interpretation of the right to legal counsel. Further, written notice to all parties will ensure that parties are notified and cannot claim otherwise. We are also encouraged that this section includes an implicit guarantee that defendants should be brought to every hearing, which is reinforced by the following section.

s85 - Presence of the Parties in the Fixed Due Date

<u>Defendant's Presence in Court</u>
We welcome s85(1) explicitly requiring the defendant's presence at all dates fixed for hearing in his/her case, as a necessary provision to fully implement the accused's right to know the case against him/her, particularly in the context of detained defendants. We do, however, recognize that defendant's who are released on bail or ordinary court date may live 1 or more days walk from the court. We recommend inserting a discretion permitting the judge to excuse the defendant from attending court, with reasonable cause.

<u>Witness Non-Attendance</u>

The right to a speedy trial is a fundamental aspect of fair trial, closely linked to the right to liberty. The Human Rights Committee has interpreted Article 9 to provide that unnecessarily prolonged detention can be considered arbitrary, even if it complies with domestic law.[20]

Subsection (1) of this provision permits a witness to fail to attend court on 4 occasions, which could delay a person's trial by up to 4 months, (as subsection (1) permits a 30 day delay on each occasion). We recommend reducing the number of times a witness can fail to attend to ensure a defendant's detention does not become arbitrary in an Article 9 sense.

Vulnerable Defendants

Persons who are unable to mount a meaningful defence, due to disability, particularly vulnerability (such as children) or illiteracy shall be provided with a lawyer and no case should proceed without a legal representative. We recommend the insertion of an additional section:

(5) The Court shall not entertain or decide a criminal charge brought against a Child or other vulnerable person unless there is a legal practitioner to defend him/her.
(a) In circumstances referred to in sub-section (5), the concerned Court shall make available the service of a legal practitioner appointed on behalf of Government of Nepal or of any other legal practitioner willing to provide such service.
(b) 'Vulnerable person' in this section includes, but is not limited to, disabled persons, mentally ill persons, illiterate persons and persons who do not speak Nepali as a first language.

This provision complements s19 of the *Children's Act 1992* and would place Nepal in line with best practices in anti-discrimination legislation.

A Language He Understands: Right to an Interpreter

Lastly, a fundamental right of fair trial is to be able to understand the proceedings that shall determine a person's liberty. We submit that Nepal has an obligation to incorporate Article 14(3) (f) of the ICCPR: "To have the free assistance of an interpreter if he cannot understand or speak the language used in court," and thus we recommend a section placing an onus on the court to ascertain whether a defendant requires and interpreter and to provide an interpreter for each hearing. This ensures Nepal is again at the forefront of inclusive legislation, and further, more fully compliant with its obligations pursuant to the *Treaty Act.*

s99 Production of Evidence

Read together, the accused's right to silence and presumption of innocence provide that the prosecution shall bear the burden of proof in any criminal matter.

The current practice in Nepal is for the defendant to make a statement at the time of the jail-bail hearing, which is prior to oral evidence being given by witnesses, as per the adversarial process. Asking the accused to defend himself/herself before a case has been established is a clear breach of an accused's right to a fair trial.

[20] The Human Rights Committee has confirmed that 'arbitrariness is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law': *Mukong v Cameroon* No 458/1991 (1994) UN Doc CCPR/C/51/D/458/1991.

The drafting of this section continues this systematic breach of the accused's right to fair trial by requiring him/her to not only forego his/her right to silence and make a statement in court, but further asks for the defendant to identify and produce any evidence, including witnesses, at the time of making his/her statement.

To ensure that Nepal not only codifies the right to a fair trial, but also complies fully with all that a fair trial includes, this section must be amended. We recommend as follows:

Insert after sub-section 2:
(a) Only after all evidence has been submitted to the court by the prosecution, may the court invite an accused person to respond with a statement or any other evidence.
(b) An adjudicating body shall not draw any negative inferences from the fact that an accused does not choose to make a statement or to call evidence.

Finally, the right to a legal representation and the right to know the case against you encompass the right to mount a meaningful defence. We are pleased that the draft includes an onus on persons producing evidence to provide a copy to their opponent and the court; however, we recommend inserting sub-section mandating that the Prosecutor provide to the Defendant, or his authorized representative, all the documents relied upon by the prosecution for at least 7 working days prior to any hearing. This will ensure that not only are documents provided, but they can be examined properly by the defence before a hearing takes place.

Accused's Right to Know the Case Against Him/Her and to Cross Examine Witnesses

s109 - Witness May Examine through Video-Conference
The provision as it is currently drafted only provides a discretion for parties to be present at a witness examination, which does not safeguard the accused's rights protected in Article14(3)(e) of the ICCPR.[21]

We therefore recommend amending sub-section (3) to provide that an accused person and their representative must be present for the video-conference and permitted to cross examine the witness as per the law. The right to cross examine witnesses, as provided for in Article 14(3)(e) of the ICCPR, an accused and their representative must know the case against him/her in order to be able to mount a meaningful defence.

s122 - The Statement of the Accused Shall be Made
As per our recommendation regarding s99 above, we submit that by only giving the accused the opportunity to make a statement before the prosecution evidence has been presented and tested, is an abuse of the accused's right to silence and presumption of innocence.

As it is currently common practice for a defendant to make a statement at the jail bail hearing, we recommend an onus be placed on the presiding judicial officer to make the accused aware of his/her rights in the proceedings, including the right to hear all prosecution evidence before deciding to waive his/her right to silence by giving a statement to the court, as follows:

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[21] Article 14(3)(e) of the ICCPR: To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

(1) After stating all the particulars of offence of which the accused is charged pursuant to section 118, the court may permit the accused to record his statement regarding the accusation or any answer given by him regarding the questions put before him by the court:

…

(4) The judge shall inform the accused that he/she shall have the opportunity to make a statement and call any evidence at the close of the prosecution case.

Finally, in light of the common practice of police personnel being present in court when the defendant makes a statement, we recommend giving legislative effect to General Order no 222 of the Nepali Supreme Court, by adding a section to prohibit police involved in the case from being present during the defendant's court hearings, particularly when a defendant is giving evidence. This section would not apply if any Police Officer is summoned to the court as a witness.

Presence at Appeal

s142 - Not necessary to follow date:
The defendant has a right to follow his/her appeal, as part of the right to a fair trial. Whilst in custody a defendant must rely on the Prison Service for his/her information about court dates and travel to court.
If the Prison Service perceives it is not necessary to take the detained person to an appeal hearing, it is unlikely they will be advised or brought. We recommend an additional provision to ensure that where an appellant or respondent is detained in custody, he/she must be brought from the detention centre for each hearing of his/her appeal.

Competent Tribunal: Tasks of the Judge

s180 - Tasks to be Performed by Judge himself:
The justice system must share duties if the court is to function. AF encourages the smoothest and fastest case management system possible, within the limits of providing a fair hearing to accused persons. As discussed in relation to s8 of the draft Criminal Code above, a competent tribunal is a prerequisite for a fair trial. The practice of court clerks recording crucial evidence, without the judge giving his or her undivided attention to evidence at hand, is unacceptable if Nepal is to guarantee its citizens a fair trial by an impartial, independent and competent tribunal. We therefore recommend deleting s180(2), and amending sub-section (3) to ensure that it does not offend the competency of the court. We are particularly concerned by the significant responsibility given to non-judicial officers to make orders in relation to a person's liberty as provided for in s180(2)(a-b); we submit that these sections particularly must be revoked.

DRAFT SENTENCING BILL

s2 - Definitions
As per our comment above, we recommend the definition of the terms 'court' and 'judge' be restricted to judicial bodies only.

Sentencing Guidelines
Removed Chapter: Chapter 3 - Circumstances in which seriousness of offence increase and decrease

We recommend the re-insertion of Chapter 3 from the previous draft of the Sentencing Bill (2066) to ensure that victims have a transparent sentencing procedure, as well as convicted persons being sentenced consistently in accordance with established principles. Inconsistency in sentencing has long been an issue in Nepal; this has partially been due to the lack of guidance in sentencing and partly due to the fact that District Court decisions are not generally published. Our recommendation addresses the consequences of these issues.

s15 - Bases to determine the punishment
We recommend specifically providing for imprisonment as a penalty of last resort, only to be imposed in appropriate cases as decided by the policies of GoN, in line with the right to liberty enshrined in Article 14 of the ICCPR. The current sub-section 2 offends this principle in that it provides for imprisonment without first considering whether alternative penalties (e.g. fine, community service, suspended sentence) would suffice to achieve the objectives of imposing the penalty. We therefore recommend amending s15(2):

(2) Imprisonment shall only be imposed where:
(a) any other sentence would be inappropriate, having regard to the gravity or circumstances of the offence; or
(b)if a sentence of imprisonment is necessary to give proper effect to the policies of the criminal law elsewhere stated in this section.

s23 - Fine to be paid immediately
It costs the Nepali justice system to house people in jails; the cost of security, resources and food. Requiring people to pay fines immediately or go to jail, increases the stress on the penal system, which has been used as a reason for providing sub standard care for prisoners.

A long-term fine payment system would allow convicted persons to go back to work, to earn an income which would then allow them to pay a fine. This option would be cheaper for the GoN and would reduce the stress on the prison system. We submit that an amendment permitting the offender to deposit the fine in installments within a reasonable stipulated time, if they are unable to pay the fine immediately, is a viable practical option.

s31 - Imprisonment may be suspended
The purpose of suspended sentencing is to provide an opportunity for the offender to prove he/she can rehabilitate into law-abiding society, and also, to save money and resources by limiting the number of people the State must support in jail.

The limiting circumstances in which suspension of a prison sentence can be ordered in the current draft remove this opportunity for many persons. We submit that in each case leaving the decision of whether to suspend a sentence to the judge's discretion (in accordance with legislative guidelines) in terms of its appropriate application would be of more benefit to the justice system and society in general.

General recommendations

- We recommend the inclusion of **a positive obligation on the Nepal Police,** or other relevant authority, **to register *any* complaint made pursuant to section 4**. If an official refuses to register a complaint as a First Information Report ("FIR"), the official must provide the reasons for such decision to the complainant *in writing*; a failure to do so shall result in departmental action.
- The **Government Attorney should hold the decision-making power** and political responsibility in relation to **non-investigation of all complaints**.
- A **special investigative team should be established** and utilized wherever there is an apparent **conflict of interest** between the perpetrator and the investigating authority.
- **Guidelines** for **witness protection measures** should be **included** in the legislation**.**
- The **Victim Relief Compensation Fund should be established as a matter of priority** to ensure that victims are not re-traumatized by having to pursue compensation through the courts.