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Ms Nuriana Kartanbaeva

National Program Officer

Regional office of the UN High Commissioner for Human Rights for Central Asia

Re: Comments on the draft Law of the Kyrgyz Republic ‘On the National Mechanism for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’

Dear Ms Kartanbaeva,

Thank you very much for the opportunity to submit comments on the draft Law of the Kyrgyz Republic ‘On the National Mechanism for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (hereinafter: draft Law). The Human Rights Implementation Centre has examined the said law and we would like first of all to remark on the overall great quality of the draft Law in meeting the obligations set out in the provisions of OPCAT.

We also would like to make the following observations, comments and suggestions of detail which you may find useful in strengthening the compliance of the provisions of draft Law with those of OPCAT:

1. Prevention

The main aim of the Optional Protocol to the UN Convention Against Torture (OPCAT) is that of prevention and as such it is also reflected in the stipulations of OPCAT regarding the mandate of the National Preventive Mechanisms (NPMs). The current draft Law is seemingly putting less emphasis on this aspect of the NPM mandate and more concentrating on the core activity of the NPM, namely the visits to

the places of deprivation of liberty. Undeniably, the visiting mandate of the NPMs is essential, however NPMs are mandated to do more, as envisaged by the Preamble to the OPCAT and Article 19. We therefore would like to suggest that the purpose of the law should reflect the pro-active, preventive nature of the NPM mandate.

Similarly, Article 3 of the draft Law ought to reflect the pro-active approach by incorporating also such principles as cooperation and impartiality as well as prevention of torture and ill-treatment, alongside the prohibition of such acts.

2. Definition of the NPM

The definition of the NPM in Article 1 of the draft Law does not reflect the stipulations of the OPCAT and the current wording more reflects the aims of the Law as such.

3. Definition of deprivation of liberty

Article 1 of the draft Law provides a definition of ‘place of detention’ which appears a bit restrictive and thus not fully corresponding to Article 4 of the OPCAT. The definition seems to encompass only those that have been arrested or detained under administrative detention and thus seems to exclude instances when a person may just be apprehended but not yet formally charged or formally held under administrative detention. We would thus recommend that the definition is revised.

4. The applicable legislation

Article 2 of the draft Law stipulates the legislation applicable to the work of the NPM and while it refers to international treaties in general, it would seem appropriate that the OPCAT itself is specifically mentioned here.

5. Composition of the NPM: the Coordinating Council

Article 5 of the draft Law stipulates that three of the nine members shall be the deputies of Jogorku Kenesh of the Kyrgyz Republic. Article 18 of the OPCAT clearly stipulates that the composition of the NPM in its entirety must be independent. This means that the body must have not only functional, but also perceived independence which can be compromised with the involvement of members of legislator in the NPM. Moreover, it is questionable as to how much time the deputies will be able to devote to the work of the NPM, given the usual workload of the legislator.

Article 6 (7) of the draft Law stipulates that the principles of gender equality and ethnic equality are to be observed in the selection of the members of the Coordinating Council. However, pursuant to Article 18 (20) of the OPCAT, it is equally important that due attention is paid to the diversity of expertise of the members of the NPM.

6. Composition of the NPM: Centre for Monitoring and Evaluation

Article 13 stipulates the structure of the Centre but contains no provision which would reflect the diversity in terms of gender and ethnic minority representation as well as diversity of expertise as per Article 18 (2) of the OPCAT.

7. System of visits

Article 1 of the draft Law makes distinction between three types of visits; we would like to suggest that possibility of follow-up visits is included as well, perhaps in the definition of ‘intermediate visit’.

Articles 19-20 of the OPCAT make it clear that the NPMs are to have unimpeded access to all places of deprivation of liberty as defined in Article 4 of the OPCAT and

this includes also unannounced visits. This should be made clear in Article 1 of the draft Law when defining the terms as well as in Articles 9 and 14 of the draft Law.

Furthermore, Article 9 of the draft Law does not provide for the right to have interviews, also in private (as per Article 20 (d) of the OPCAT) and access to all the relevant information and documents (as per Article 20 (a) and (b) of the OPCAT) to the member of the Coordinating Council.

Moreover, Article 15 (3) para 1 of the draft Law provides for a personal liability of the employee of the Centre for Monitoring for disclosing state secret as well as ‘any other secretes of the Kyrgyz Republic which are protected by law, as well as confidential information’; we would recommend to revise this provision as the current wording is rather extensive; it should also be linked with the necessary guarantees for immunities as per Article 35 of OPCAT (see our comments on this aspect below).

Additionally, Article 17 (5) of the draft Law stipulates that the admission to places of deprivation of liberty is grated upon presentation of an ID card, but nowhere in the draft Law is it stipulated how theses ID cards are obtained. While it is a normal procedure that such system of ID cards is introduced, we would like to underline that the procedure for obtaining such cards must be reasonable, un-burdensome and transparent, clearly stipulated in a legislative act.

Further, Article 17 (7) of the draft Law provides for exceptions when the NPM can be refused entry into a place of detention or deprivation of liberty. We would like to comment that this stipulation stands in direct contradiction to the provisions of OPCAT which does not provide any grounds when access to the NPM can be denied (in marked contrast to the access of the SPT- see Article 14 (2) of the OPCAT).

We would also like to suggest that in Article 18 (2) of the draft Law, among the considerations that are to be taken into account by the NPM when choosing the places to be visits, such factors as findings of the previous visits and information received from or about the given place be stipulated so as to allow the NPM to select places not only on the basis of numerical data but also on the basis of reports from media and/or other sources.

We would also argue that the stipulation in Article 17 (11) para 2 of the draft Law that the Director of the place of deprivation of liberty is to ensure unrestricted access to NPM members to any information related to the treatment of persons detained or deprived of their liberty as well as on conditions of detention ‘and bear personal responsibility for the veracity, objectivity and completeness of such information’ appear to go to far and should be mitigated so as to provide for such responsibility only in case of deliberate misleading of the NPM.

Finally, Article 21 of the OPCAT also provides for guarantees against reprisals; this requirement is not duly reflected in the current draft Law.

8. Work with legislation

As noted earlier, the NPMs are not only to carry out a system of preventive visits, but also engage in other preventive activities. One of the most prominent such activities is the right to submit proposals and observations concerning the existing and draft legislation as stipulated in Article 19 (c) of the OPCAT. Articles 9 (4) and (5) and Article 14 (2) of the draft Law stipulate the remit of the Coordinating Council and the Centre for Monitoring to engage with the legislative framework; however these provisions appear somewhat restrictive as they refer to ‘conditions of detention or deprivation of liberty’ as opposed to much broader term of prevention of torture and ill treatment.

9. Involvement of experts

Article 17 (3) of the draft Law provides for the possibility to involve experts in the work of the NPM, but it is unclear as to what would be the selection process of such experts, how their involvement in the visits would be regulated etc. We would therefore suggest that the Coordinating Council adopts special regulations to this effect, similar to those stipulated in Article 9 (4) of the draft Law.

10. Budget

Article 16 (3) of the draft Law contains a very welcomed provision that the budget of the NPM, while located with the budget of the Ombudsman, is ring-fenced and accounted for separately from the budget of the Ombudsman. We commend such a provision as step towards ensuring the functional independence of the NPM as required by Article 18 of the OPCAT.

However, there seems to be a confusion of terms in the draft Law: Article 19 (1) refers to state budget as the source of the funding, while Articles 16 (3) and 22 (1) talk about the Republican budget; we would suggest that such confusion in terms is eliminated.

Furthermore, Article 9 (5) of the draft Law stipulates that the Coordinating Council must provide regular publicly available financial reports; we would recommend that such reports are produced on a yearly basis and are presented to the Jogorku Kenesh of the Kyrgyz Republic so as to ensure the transparency of the NPM work.

Finally Articles 9(9) and 22 (4) of the draft Law provide that the funding for the NPM work may come from other sources; we would strongly recommend that these provisions be linked with Article 22(3) of the draft Law so as to underline the Coordinating Council's sole power to decide how the NPM budget is used as well as include stipulations that such funding can only be accepted if it does not prejudice the independence of the NPM.

11. Reports

Article 11 of the draft Law provides for the submission of the Annual Reports to the Jogorku Kenesh of the Kyrgyz Republic. We would like to suggest that a stipulation is included requiring the legislator to hold a session to discuss these Reports in order to maximise the impact and publicity of the Reports.

Article 11(3) of the draft Law also provides that these Annual Reports are to be published in the official mass media while Article 19 (6) stipulates that it is the duty of the state to publish and disseminate the annual reports of the Coordinating Council. We suggest that this is made clear in Article 11 (3) of the draft Law.

Moreover, the NPMs are also to produce reports following their visits and the current draft law contains no stipulations on the publicity of these. It is essential for the effective work of the NPM and attainment of the goals of the OPCAT that reports following the visits of the NPMs are compiled and made public.

12. Immunities

Article 35 of the OPCAT clearly stipulates that the members of the NPM shall enjoy such privileges and immunities as necessary for the independent exercise of their functions. Article 20 of the draft Law does not reflect this provision sufficiently.

13. Contacts with the SPT and other relevant bodies.

Article 9 (7) of the draft Law provides the right of the Coordinating Council to have direct contacts with the SPT and other bodies; we would recommend that the right to

have direct contacts with other NPMs is included here and that such rights should also extend to the Centre for Monitoring and Evaluation.

We very much hope that these comments and observations will be of use to you in your work. We would like to once again reiterate that the draft Law constitutes an excellent starting point bringing the Republic of Kyrgyzstan in compliance with its obligations under the OPCAT. Of course, we remain at your disposal should you need any further assistance.

Sincerely yours,

Dr Elina Steinetre