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To: Ms Saule Mektepbayeva
Regional Director
Penal Reform International office in Central Asia
19, Imanov str., office 405, Astana, Kazakhstan, 010000

Re: Draft Law on the Amendments and Additions to certain legislative acts of the Republic of Kazakhstan on the matter of the establishment of national preventive mechanisms aimed at the prevention of torture and other inhuman or degrading treatment or punishment.

03 March, 2011

Dear Ms Mektepbayeva,

Thank you very much for the request to review the latest draft Law on the Amendments and Additions to certain legislative acts of the Republic of Kazakhstan on the matter of the establishment national preventive mechanisms aimed at the prevention of torture and other inhuman or degrading treatment or punishment (Draft Law). We are grateful for the opportunity to continue the work on the matter. After careful review of the Draft Law in the light of the obligations undertaken by Kazakhstan upon its ratification of the Optional Protocol to the UN Convention against Torture (OPCAT) we would like to offer the following observations.

The present Draft Law maintains the same approach as the draft we had the opportunity to review in September 2010: instead of being a new piece of draft legislation on the establishment of NPM, it is in fact a compilation of amendments in a number of legislative acts of the Republic of Kazakhstan. In September 2010 when we reviewed the previous draft on the subject matter, we commented that such an approach is rather complex and does not contribute to

the effective implementation of OPCAT and in fact runs against the principle of legal certainty. The core obligation under OPCAT is the establishment of a national preventive mechanism (NPM) by every state party and the current approach of Kazakhstan scatters this appointment across a number of legislative acts, making it very difficult to ascertain the precise legal nature, status, mandate, powers and functions of the NPM. We therefore would like to repeat our earlier recommendation to reconsider this approach.

Furthermore, we would like to make the following observations on the substance of the proposed Draft Law.

1. Article 19-3

According to para 1 of this Article, the functions of the NPM are to be carried out by the Commission which operates under the auspices of the Ombudsman of the Republic of Kazakhstan. However it also defines NPM in a manner that departs from the definition of NPM provided for in OPCAT. The current wording refers to ‘the NPM of criminal justice system’ which suggests that there could be an NPM for other areas. Such an understanding is further strengthened by the narrow definition of the visiting mandate of the NPM proposed: it is to visit ‘correctional places and investigation isolators’. This is considerably narrower understanding of the notion of ‘deprivation of liberty’ than one provided for in Article 4 of OPCAT. So does this mean there will be NPMs for other ‘types’ of deprivation of liberty?

We would also like to draw your attention that the Subcommittee on Prevention of Torture (SPT) has recently adopted its revised Guidelines on National Preventive Mechanisms¹ (Guidelines on NPMs) and in para 10 makes it clear that the mandate of NPMs must ‘extend to all places of deprivation of liberty, as set out in Article 4 of the Optional Protocol’. It should be also noted here that Article 4 of OPCAT extends not only to a whole variety of types of places of deprivation of liberty, like prisons and psychiatric institutions; but also to any places of deprivation of liberty where persons *may be* deprived of their liberty (emphasis added). The SPT has reiterated this also in its Guidelines on NPMs (see para 24).

Further, this provision defines the NPM as an institution that carries out a system of regular visits to the above mentioned places of deprivation of liberty. This is a much narrower approach than that adopted in the Preamble to OPCAT and Article 19 of OPCAT, where other preventive activities, such as making recommendations aimed at improving the treatment and conditions of persons deprived of their liberty, and submitting proposals and observations on existing and draft legislation, are listed among the key functions of an NPM.

Turning to the structure of the NPM proposed in the Draft Law, para 2 of Article 19-3, we note the possibility for the Commission which carries out the duties of the NPM, to create sub-commissions in the regions if it deems such necessary. Noting the vastness of the territory of the Republic of Kazakhstan and remoteness of some of the places of deprivation of liberty, coupled with the obligation of the NPM to carry out visits to such places regularly, we would suggest that such sub-commissions in the regions are created on a compulsory basis.

Para 4 of the Draft Law notes that the Commission is responsible for the preparation of yearly reports and their publication in the national and regional mass media. This provision fails to meet the requirements of Article 23 of OPCAT which places an obligation upon states parties

¹ See CAT/OP/12/5 of 09 December 2010

to publish and disseminate the annual reports of the NPM. Furthermore, in its Guidelines on NPMs the SPT advises that states should ensure that the annual reports of NPMs are presented to, and discussed in, by the national legislative assembly, or Parliament as well as transmitted to the SPT who will publish them on its website (para 29).

Finally, para 5 of Article 19-3 charges the Ombudsman with the duty of approving the Statute on the operation of the Commission. It is however unclear (i) what is the relationship between the Ombudsman and the Commission; (ii) who drafts the Statute; and (iii) what is the role of the Commission itself in formulating its own Statute. The SPT in its Guidelines on NPMs clearly requires that the NPMs enjoy the operational independence (para 8) and formulating their own Statute certainly falls within the scope of this provision.

2. Article 19-4

This provision lists the duties of the Commission as the NPM of the Republic of Kazakhstan. This list however does not include the obligation of the NPM to produce reports following its visits to places of deprivation of liberty. Para 2 of this draft provision does require making recommendations to the respective authorities, but not producing reports, which is one of the key elements of the NPM work according to the SPT (see para 36 of the Guidelines on NPMs).

Moreover, while para 3 of this draft Article allows the NPM to submit proposals on existing and draft legislation as required by Article 19 (c) of OPCAT, the SPT in its Guidelines on NPMs has further clarified the content of this. Thus the SPT obliges states to ‘inform the NPM of any draft legislation that may be under consideration which is relevant to its mandate and allow the NPM to make proposals or observations on any existing or draft policy or legislation’ and moreover, the ‘State should take into consideration any proposals or observations on such legislation received from the NPM’ (para 28).

3. Article 19-6

This provision sets out the rights and duties of the members of the NPM and in fact mirrors Article 20 of OPCAT with the exception of para 1(6) which provides the NPM members with the right ‘to assist the administration’ of the place of deprivation of liberty ‘in efforts to prevent torture’ and other ill-treatment. This is a departure from the text of OPCAT and it is unclear what is meant by this stipulation.

Moreover, para 2 of this draft Article states that the visit of an NPM may be refused in cases of state emergency, threats to national security, natural disaster or other in other similar situations. This goes against the provisions of OPCAT which does not contain any possibility for refusing a visit by an NPM.

It is also advised that the provision would explicitly specify that the NPM members have the right of unannounced visits at any time of the day, including week-ends as well as ad-hoc visits, if the NPM deems such necessary.

4. Article 19-7

This provision sets out the requirements for becoming a member of the NPM and largely repeats the similar provision of the previous draft. We would like to make the same two key observations as we made for the earlier draft. Firstly, it is unclear why only citizens of the Republic of Kazakhstan may become members of the NPM (as OPCAT does not contain such a

restriction); also the stipulation at para 2 of this provision that those who are suspected or are accused of having committed a crime may not be members of the NPM is too limiting and may even undermine the independence of the NPM.

Secondly, para 5 of this draft Article states that an individual cannot be an NPM member if he/she fails to participate in the work of the Commission for more than 3 months without a 'proper excuse'. There is however no definition of what constitutes such an excuse or a procedure that must be followed in such a case. It is therefore recommended that this provision is revised so as not to undermine the independence of the NPM.

5. Article 19-8

This sets out the instances when a membership in the NPM can be terminated. It must be first of all observed that neither in this draft Article nor elsewhere in the Draft Law the procedure for the appointment of NPM members is set out. It is therefore unclear what the process of selection is or what is the duration of the term of a member of the NPM. The SPT in its Guidelines on NPMs has been very clear by stating that 'the NPM should be identified by an open, transparent and inclusive process which involves a wide range of stakeholders, including civil society' and furthermore that 'this should also apply to the process for the selection and appointment of members of the NPM, which should be in accordance with published criteria' (para 16). Moreover, the SPT has also requires that the relevant legislation 'specify the period of office of the member/s of the NPM and any grounds for their dismissal' (para 9).

6. Article 19-10

This provision sets out the duties of the NPM members. As in the earlier draft, the list of duties provided for in this provision appear to limit the freedom of operation of the NPM considerably in that the NPM members are to 'obey legitimate requests' of the administration of a place of deprivation of liberty and that NPM members during their regular visits 'are prohibited from interfering' with the running of the place of deprivation of liberty. We would like to suggest that this is a very broad wording which may prevent the NPM members from, for example, intervening in a situation that could lead to ill-treatment or preventing the NPM member from accessing certain parts of the establishment. It is thus recommended that the wording of this provision is reconsidered.

7. Article 19-13

This provision sets out the mode of cooperation with the SPT; however in its Guidelines on NPMs the SPT has recommended that the NPMs also maintain contact with other NPMs (see para 39), a point that we raised in our comments on the earlier draft.

We also note that there are no provisions in the Draft Law that would deal with the immunities and privileges of the NPM members as required by Article 35 of OPCAT, an aspect upon which we commented in respect to the earlier draft law.

Taking this opportunity we would like to commend that the current Draft Law abandons earlier proposal of utilising the mechanism of public social procurement (государственный социальный заказ) for the operation and financing of the system of regular visits. The current draft however fails to meet the obligations undertaken by the Republic of Kazakhstan when

ratifying OPCAT on other aspects, as outlined above and it is thus recommended that it is thoroughly reviewed.

We very much hope that you will find these comments and suggestions of assistance in your work on furthering the compliance of the Republic of Kazakhstan with the requirements of OPCAT and of course remain at your disposal should you require any further assistance.

Sincerely yours,

Dr Elina Steinerte