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To: Ms Natalya Seitmuratova

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CC: Ms Saule Mektepbayeva

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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.

14 September, 2010

Dear Ms Seitmuratova,

Thank you very much for your request to review the 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 at the Human Rights

Implementation Centre of the University of Bristol (HRIC) have carefully studied 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) and would like to offer the following observations.

The Draft Law in effect is a compilation of proposed amendments in some ten different existing legislative acts of the Republic of Kazakhstan. With minor variations, most of them repeat the same 11 new provisions that are to be inserted in various legislative acts that deal with different types of deprivation of liberty in Kazakhstan. It is understood that these are aimed at bringing the Republic of Kazakhstan in to compliance with its obligations under OPCAT.

We however would like to note that firstly the approach adopted is extremely complex and does not contribute to the effective implementation of OPCAT or to the principle of legal certainty. The core obligation under OPCAT is the establishment by every state party of a national preventive mechanism (NPM) and the approach adopted by this Draft Law scatters this appointment across a large number of legislative acts, making it very difficult to ascertain the precise legal nature, status, mandate, powers and functions of the NPM. Secondly and moreover, the proposed amendments fall short of the OPCAT requirements on a number of crucial issues. The following comments examine the 11 provisions that the Draft Law proposes to insert in a number of legislative acts and outlines some areas of concern in more detail.

1. National Preventive Mechanism

It is understood that this is an attempt to provide a definition of the NPM and its mandate. Thus there is a variation among this provision between the various legislative acts that the Draft Law proposes to amend, depending on what type of deprivation of liberty the legislative act is dealing with. We would like to note that such an approach does not correspond to the definition of deprivation of liberty as per Article 4 of OPCAT and thus limits the mandate of the NPM. Article 4 of OPCAT makes it clear that NPMs are to be allowed to visit any places of deprivation of liberty where persons are *or may be* deprived of their liberty (emphasis added). The current approach in the Draft Law limits the mandate of the NPM to only those places of deprivation of liberty that are covered by the legislative acts that the Draft Law proposes to amend, which is incompatible with Article 4 of OPCAT.

Moreover, this provision defines the NPM as an institution that carries out a system of regular visits to the 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.

Furthermore, this provision fails to meet the requirements of Article 23 of OPCAT which places an obligation upon states parties to publish and disseminate the annual reports of the NPM.

In addition, the provision on using the mechanism of public social procurement (государственный социальный заказ) for the operation and financing of the system of regular visits is particularly concerning due to the following three reasons:

1. The use of a public social procurement procedure (государственный социальный заказ) suggests an ad-hoc approach to the creation of an NPM: a tender is announced and interested parties are free to submit their proposals. What would happen in a hypothetical, but

possible, situation where no organisation applies or no organisation with the necessary expertise applies? It should be recalled that Article 17 of the OPCAT places an obligation upon states parties in the strictest terms to create an NPM. While States are free to choose the mode for such creation (Article 17: ‘maintain, designate or establish’), but the obligation to have an NPM in place is expressed in the strictest terms. Thus the use of the public social procurement procedure (государственный социальный заказ) has the potential to undermine Article 17 of OPCAT.

2. In a sense, the whole work of the NPM with the use of a public social procurement procedure (государственный социальный заказ) is thus contracted-out to independent bodies that have the necessary expertise in monitoring places of deprivation of liberty. However the use of public social procurement procedure (государственный социальный заказ) traditionally suggests that the eventual success of a proposal is most often determined on the basis of cost rather than expertise, in other words, the one who can provide the service at the cheapest rates will be successful. Therefore, it is by no means certain that the successful organisations will have the necessary expertise to carry out the NPM mandate. This is incompatible with Article 18(2) of the OPCAT.

3. Finally, the use of the public social procurement procedure (государственный социальный заказ) also means that some sort of contractual relationship will exist between the State and the organisations that perform the tasks of the NPM. This raises some concerns as to the status of the NPM’s recommendations. Article 19 (b) of OPCAT makes it clear that NPMs are to make recommendations to the relevant authorities who, in turn, in accordance with Article 22 of OPCAT, are to examine these recommendations and enter into a dialogue with the NPM on possible implementation measures. How would the use of public social procurement procedure (государственный социальный заказ) affect the status of these recommendations when in fact the body making them has a contractual relationship with the State? It is possible that this contractual relationship may place a strain on the independence, and perceived independence of the NPM.

Due to the aforementioned reasons the use of public social procurement procedure (государственный социальный заказ) for ensuring the work of the NPM in Kazakhstan runs a serious risk of undermining provisions of OPCAT and therefore should be reconsidered.

2. Duties of the Commission

While the list of duties of the various Commissions, which together form the NPM under the auspices of the Ombudsman office, provided for in this provision do reflect the basic requirements of Article 19 of OPCAT, the corresponding obligation of the respective state authorities to engage in dialogue with the NPM with the view of implementation of its recommendations (as per Article 22 of OPCAT) is not reflected at all.

3. Rights of the Members of the Commission

This provision mirrors Article 20 of OPCAT; however it does not specify that the NPM members ought to have the right of unannounced visits at any time of the day, including weekends as well as ad-hoc visits, if the NPM deems such necessary.

4. Cooperation with the UN Subcommittee on Prevention of Torture

Even though this provision reflects Article 20 (f) of OPCAT, it is advisable that the NPM would have equal rights to maintain direct contact with NPMs of other countries with the view of exchange of experience.

5. Immunities

While this provision duly reflects Article 21 of OPCAT, 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.

6. Confidentiality of the information

This provision reflects Article 21 (2) of OPCAT.

7. Term of appointment of the Commission

This provision once again refers to the system of public social procurement procedure (государственный социальный заказ). Therefore please kindly note the comment on the matter above explaining the potential conflict of such an approach with the rationale of OPCAT.

8. Duties of the members of the NPM

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.

9. Principles regulating the establishment and operation of the Commission

This provision is very complex and presents a mix of principles contained in Article 2 (2) and 2(3) of OPCAT as well some of the requirements for the composition of the NPM as per Article 18 of OPCAT. It is therefore recommended that a clear distinction between the guiding principles of NPM work and requirements for the composition of the NPM is made.

10. Requirements of the members of the Commission

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. The final para of this provision also provides that an individual cannot be an NPM member of 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.

11. Dismissal and substitution of a member of the Commission

This provision does not contain any requirements of the procedure that the Commission must follow in order to dismiss a member. This may hamper the independence of the NPM and therefore would need to be addressed in order to meet the requirements of OPCAT.

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