

**Dr Elina Steinerte**  
**Prof Rachel Murray**  
Human Rights Implementation Centre  
Law School, University of Bristol  
Wills Memorial Building  
Queens Road, Bristol BS8 1RJ  
United Kingdom

Tel: +44 (0) 117 954 5330

Fax: +44 (0) 117 925 1870

E-mail: [Elina.Steinerte@bristol.ac.uk](mailto:Elina.Steinerte@bristol.ac.uk)  
[Rachel.Murray@bristol.ac.uk](mailto:Rachel.Murray@bristol.ac.uk)

**To: Mr Berik Imashev**  
Minister of Justice  
Republic of Kazakhstan

**CC: Ms Elvira Azimova**  
Head of International Cooperation Department  
Ministry of Justice, Republic of Kazakhstan  
E-mail: [eazimova@gmail.com](mailto:eazimova@gmail.com)

**CC: Ms Saule Mektepbayeva**  
Regional Director  
Penal Reform International Office in Central Asia  
E-mail: [smektepbayeva@penalreform.org](mailto:smektepbayeva@penalreform.org)

*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.*

29 February, 2012

Dear Mr Minister,

The Human Rights Implementation Centre (HRIC) welcomes the continued opportunity to participate in the process of implementation of the provisions of the Optional Protocol to the

UN Convention against Torture (OPCAT) in the Republic of Kazakhstan. We have carefully reviewed the latest (February 2012) *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) and would like to offer the following observations.

The present Draft Law maintains the same approach as the drafts we had the opportunity to review in September 2010 and March 2011: 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. On these previous two occasions when we reviewed drafts, 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 recommendations to reconsider this approach.

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

### **1. The National Preventive Mechanism.**

According to para 1 of Article 19-1, the functions of the NPM are to be carried out by the Ombudsman of the Republic of Kazakhstan, public observation commissions (общественные наблюдательные комиссии) and public organisations (общественные объединения). These three entities together are called the NPM in the said Article. There is however no further details how these three entities are to work together and what would be the relationship between them. Moreover, nowhere in the Draft law it is specified how the public observation commissions (общественные наблюдательные комиссии) and public organisations (общественные объединения) are formed. Whilst Article 19-3 specifies the criteria for selecting the members of the public observation commissions (общественные наблюдательные комиссии), there is no information who selects these members and what are the applicable procedures. There are no specifications in relation to the public organisations (общественные объединения) who are to form part of the NPM whatsoever.

We would like to draw your attention that the Subcommittee on Prevention of Torture (SPT) has adopted its revised Guidelines on National Preventive Mechanisms<sup>1</sup> (Guidelines on NPMs) which require States parties to OPCAT make the establishment of NPM clear. 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’<sup>2</sup>. Moreover, the SPT also requires that the relevant legislation ‘specify the period of office of the member/s of the NPM and any grounds for their dismissal’<sup>3</sup> and set out its

---

<sup>1</sup> See CAT/OP/12/5 of 09 December 2010

<sup>2</sup> Ibid, Para 16

<sup>3</sup> Ibid, Para 9

mandate and powers in the legislative text<sup>4</sup>. The current Draft Law falls short of all these requirements.

## **2. Places of deprivation of liberty.**

The Draft Law proposes amendments and additions in relation to a number legislative acts that are applicable to various places of deprivation of liberty in the Republic of Kazakhstan: correctional places and investigation isolators; places of compulsory treatment for those who suffer from alcoholism and drug addiction; centres for minors and special education facilities with special regimes.

Firstly, as noted earlier, the approach of amending a number of legislative acts as opposed to having a single piece of legislation on NPM makes it very difficult to ascertain the exact type of places of deprivation of liberty that the mandate of NPM extends to.

Secondly, we would like to draw your attention to the fact that the places listed in the Draft Law considerably narrow the scope of Article 4 of OPCAT and does not encompass all the places of deprivation of liberty as specified in this provision of OPCAT. Article 4(1) of OPCAT obliges States parties to allow visits to any place under their jurisdiction and control where persons are or may be deprived of their liberty ‘either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence’. This is a very broad definition which means that visits must be allowed not only to such places as prisons and police cells where persons are deprived of their liberty by virtue of an order given by a public authority, but also to private custodial settings. This means that visits must be allowed also to institutions such as private hospitals, nursing homes and children homes as while persons in such places may be detained by non-state actors, this is done with the knowledge and acquiescence of a public authority.<sup>5</sup>

Moreover, Article 4 of OPCAT extends not only to a whole variety of types of places of deprivation of liberty, such as 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).

Therefore the current Draft Law does not adequately reflect the requirements of Article 4 of OPCAT.

## **3. Three-year social projects**

The Draft Law returns to utilising the system of social projects (социальный проект), a construct similar to that proposed by the draft proposed in September 2010 which sought to utilise the mechanism of public social procurement (государственный социальный заказ) for the operation and financing of the system of regular visits.

The current Draft Law does not specify the details of how the system of social projects (социальный проект) would be used which is a shortcoming in itself.

Moreover, the use of a system akin to the 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:

I. 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

---

<sup>4</sup> Ibid, Paras 6-7

<sup>5</sup> Ibid; Para 10. See also: M Nowak and E McArthur ‘The United Nations Convention against Torture. A Commentary’, Oxford University Press, 2008; p. 931

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’), 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.

II. 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.

III. 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) or a system akin to this for ensuring the work of the NPM in Kazakhstan runs a serious risk of undermining provisions of OPCAT and therefore should be reconsidered.

#### **4. Visits to places of deprivation of liberty.**

Para 5 of Article 19-1 of the Draft Law specifies that there should be no more than 4 members of the public observation commissions (общественные наблюдательные комиссии) and public organisations (общественные объединения) conducting a visit to a place of deprivation of liberty. However, OPCAT does not prescribe the number of NPM members that should carry out visits.

#### **5. Refusal to enter a place of deprivation of liberty.**

Article 19-2 of the Draft Law stipulates the possibility to refuse an entry to a place of deprivation of liberty to the NPM on the basis of a threat to national security. This runs contrary to the provision of OPCAT which in Article 14(2) allows a State party to object to a visit by the SPT to a particular place of detention and makes clear that such an objection can only be of temporary nature. There is no similar stipulation in relation to NPMs: the drafters of OPCAT

intended no permissible restrictions upon the visiting mandate of NPM. Consequently the Draft Law conflicts with the provisions of OPCAT on the matter.

## **6. Annual Report of NPM**

Article 19-3 of the Draft Law stipulates that the members of NPM must submit information on the results of their visits, including the recommendations and suggestions, to the Ombudsman of the Republic of Kazakhstan, who, in turn, includes these in his/her annual reports on reports on visits to places of deprivation of liberty. It further stipulates that the publication of these reports is financed from the budget of the Ombudsman.

This contradicts Article 23 of OPCAT as, firstly, NPMs must produce their own reports which, while could be a part of Ombudsman report, nevertheless must be clearly presented as annual reports of the NPM. Secondly, Article 23 of OPCAT specifically obliges States parties to publish and disseminate the annual reports of NPMs which may therefore require additional funding for this purpose. Thirdly and finally, the SPT has further specified that the annual reports of NPMs should be presented to and discussed by the national legislator as well as transmitted to the SPT who will publish them on its website.<sup>6</sup>

## **7. Powers of the NPM.**

Article 19-3 also lists the powers of NPM, but fails to set out the right to access to all places of detention *and their installations and facilities* (emphasis added) as required by Article 20 (c) of OPACT as well as *the liberty to choose* the places the NPM wants to visit (emphasis added) as stipulated in Article 20 (e) of OPCAT.

Moreover, while para 4 of draft Article 19-1 allows the NPM to submit proposals on improvement of the legislation of the Republic of Kazakhstan, this does not fully reflect the requirements of Article 19 (c) of OPCAT which clearly states that NPMs must have such a right in relation to both existing and draft legislation. Furthermore, the SPT in its Guidelines on NPMs 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’<sup>7</sup>.

The Draft Law also does not include the obligation of the NPM to produce reports following its visits to places of deprivation of liberty, which is one of the key elements of the NPM work according to the SPT<sup>8</sup>.

Equally, it is 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, as recommended by the SPT<sup>9</sup>.

Finally, while the draft Article 19-3 sets out the mode of cooperation with the SPT, in its Guidelines on NPMs the SPT has recommended that the NPMs also maintain contact with other NPMs<sup>10</sup>, an aspect not reflected in the Draft Law.

---

<sup>6</sup> See CAT/OP/12/5 of 09 December 2010 at Para 29

<sup>7</sup> Ibid, Para 28

<sup>8</sup> Ibid, Para 36

<sup>9</sup> Ibid, Para 25

<sup>10</sup> Ibid, Para 39

## **8. Members of the NPM**

Article 19-5 of the Draft Law sets out the requirements for becoming a member of the NPM and largely repeats the similar provisions of the earlier drafts. We would like to make the same key observation as we made for the earlier draft: 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(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, runs contrary to the presumption of innocence and may even undermine the independence of the NPM. Finally, para 2(4) of this draft provision prohibits civil servants from becoming members of the NPM which arguably excludes too wide a pool of potential NPM members.

## **9. Confidential Information**

Article 19-8 of the Draft Law stipulates that any information which does not concern torture and ill-treatment prevention issues is confidential. However it is not stipulated who and following what procedure makes such a determination.

## **10. Interaction with state organs**

Article 19-9 of the Draft Law stipulates that respective state authorities must inform the NPM on measures taken to implement the latter recommendations 'within established time limits'. The Draft Law however does not specify what are these time limits and also omits the stipulation of Article 22 of OPCAT which obliges the state authorities to enter into a dialogue with the NPM about the implementation of recommendations that have been issued.

## **11. Privileges and Immunities**

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, and reiterated specifically by the SPT in its Guidelines on NPMs<sup>11</sup>.

Overall we regret that the current Draft Law falls short of a number of key obligations contained in OPCAT and it is therefore 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  
Prof Rachel Murray

---

<sup>11</sup>Ibid, Para 26