

Bristol, 3 March 2008

Dear Mohamed Zahid,

On behalf of the OPCAT project team at the University of Bristol we are very grateful for the opportunity to comment on your existing law in light of OPCAT requirements. We have some general comments below that we hope may be of help to you, but please forgive us as we are not experts on the Maldives! Our comments are based on our understanding of OPCAT requirements and our experiences considering NPMs in other countries and national human rights institutions more generally.

Generally, it makes sense in many jurisdictions for the existing bodies, including the national human rights commission, to undertake the NPM role so as not to duplicate, etc. Given that the OPCAT makes specific reference to the Paris Principles and OPCAT itself stresses the issue of independence, these principles are also likely to be an issue when considering a potential NPM. Many of these points, therefore may already have been raised by others regarding your already existing Commission, but I think would be likely to be raised again in relation to OPCAT.

In this context, therefore, is the requirement that Commissioners be Muslim. This may have more relevance to a human rights commission's mandate which, in order to obtain the legitimacy of the population it serves, may need to be perceived as representative of all sectors of society which such a clause may prohibit. Although a lot depends on the individuals appointed to the Commission and in the context of OPCAT, such considerations may also be seen as relevant. Similarly, s.34(b)(2).

There is no specific provision in the law that the body should be independent (perhaps s.13 would be the obvious place?). Neither is there a specific provision that this body should also have as one of its aims to 'prevent' violations. OPCAT is based on prevention and a broad consideration of what this means is necessary.

s.2(b): '...conventions and declarations', declarations is very broad but this should be welcomed in context of OPCAT given could refer to other standards.

4(b): appointment of members from among 'human rights organisations' does this mean NGOs? but it does broaden this out to other fields as well which is useful.

s.6: pre-requisites of members: None of these requirements concern the professional qualifications or knowledge of the candidates. OPCAT clearly requires that the necessary expertise and knowledge (i.e., human rights, medical, forensic, social workers, prison service, police etc) is present. This ought to be reflected in the law. These also do not reflect the OPCAT requirement for the equal representation in terms of both genders and also minorities.

s.6(if OPCAT, then does the requirement that not be employed in government or private sector (f) potentially restrict those with some places of detention background? Or is this saying the position is full time?

s.6(h) we could understand why someone who was a representative of a political party might not be suitable as a commissioner, but mere membership of a political party?

Reading across the legislation, it is difficult to see exactly what powers the Commission has in relation to OPCAT. It might be useful to spell out the powers of the Commission with respect to visits and prevention, namely:

1. obligation to carry out regular visits to all the places of deprivation of liberty (a wide definition of the place of deprivation of liberty necessary);
2. possibility to carry out unannounced visits;
3. preventive mandate;
4. to make recommendations to the relevant authorities and the corresponding obligation of the authorities to engage into dialogue with the NPM about the implementation of these recommendations;
5. annual reports and the obligation of a state to publish and disseminate these;
6. free interactions with the SPT and other international, regional and national bodies.

In addition, from what we can see of OPCAT because an NPM is a preventive body it will need to have proactive powers and a proactive attitude. At the moment, and this may be our ignorance of the situation in practice, the law looks like this provides a reactive mandate to the Commission, namely responding to complaints, rather than something more proactive. s.20(a) does provide for: 'should the Commission have reason to believe such an act was committed', and we were wondering whether this enables the Commission to act proactively without the need for a complaint? We think this is what is required by OPCAT.

- s.20(a) 'to check...such an infringement', what does this mean? Specific mention of requirement to 'prevent' in this same sentence also fits well with OPCAT.

Similarly, on this point, beyond this and its broader promotional and research functions, it does not seem to have a broad preventive function? It does, however, have the power to inspect 'premises where persons are detained',

s.21(c) but this is only restricted to those 'detained under a judicial decision or a court order', so this leaves considerable gaps.

S.21(c) gives powers for unannounced visits and for people beyond Commissioners to visit, which is positive, but only restricts to those detained under judicial decision or court order which is too narrow as regards OPACT, Art 4. OPCAT may also require broader provision to enable visits to places of detention by those who are not the NPM (e.g. NGOs and others) to ensure this legislation does not exclude them?

21(d): is this rather limited: OPCAT obliges the relevant authorities to provide all the relevant information (art 20) and also provides for guarantees of protection to those who communicate with NPM (art 21).

There is also a right to conduct interviews in private (art 20 (d)) and in the place of NPM's choosing (art 20 (e)). These are not reflected in the current law.

In addition, as regards infringements of human rights, well being of detainees, amenities and facilities: if the Commission is to be the NPM it should also be able to look beyond this to broader issues regarding prevention. Note also the recommendations to government only relate to amenities and facilities, not to infringements of rights, although (e) and (f) could cover this?

Should there not also be a specific power here for the Commission to engage with international bodies, such as the SPT?

Should the Commission not also have the power to publicise its findings?

s.21(d) There should be corresponding obligation upon authorities to engage into dialogue about fulfillment of these requirements: see art. 22 OPCAT

s.22: seems to be reactive only, rather than proactive? The powers otherwise seem to be quite broad. There are some concerns that other potential NPMs have raised who have this quasi judicial function that this may pose some problems when they have to take a preventive function as required under OPCAT which may require more of a dialogue and engagement with the government and authorities. How to avoid any tensions between this quasi judicial function and a preventive one this must be carefully thought over. Perhaps the NPM work would be carried out by a special Unit which forms part of the Commission? This Unit should liaise closely with the rest of the Commission but nevertheless maintain its independence, especially when it comes to quasi-judicial functions.

s.22(c): what about those who are detained contrary to the law or Shari'ah? Is 'authority' here, public authority, or can it be broader than this?

23(b): does this then prevent the Commission from acting as amicus curiae in relevant cases?

s.24(a) there may be a question as to whether an amicable resolution is an appropriate response to a human rights violation, particularly in the context of OPCAT.

s.26: How about the guarantees of protection to those who communicate with NPM? See Art 21 of OPCAT.

s.30.a: It would also be useful if NPM-related work would be financed from a separate line of budget thus ensuring that there are sufficient funds for the NPM work, which are not 'eaten-up' by other activities of the Commission.

s.32: annual report to be submitted to President and Majlis: is there is also a requirement that this be debated by the parliament? Often mere submission to parliament may be just lodging it in their library. Should the report also not include other activities the Commission has been undertaking including visits to places of detention and reports of its findings, for example, as well as the broader situation in the country, as is relevant for prevention?

Moreover, the obligation of the state to publish and disseminate NPM reports (Art. 23 of OPCAT) must be reflected.

s.36, It would be useful to include a definition of a place of deprivation of liberty here, reflecting Art 4 of OPACT.

I might also be useful to have a provision which requires review of the powers of the Commission within two or three years of them coming into operation to see how they are being used?

We hope that you might find these comments useful. Thank you once again for contacting us and please do let us know if we can be of assistance again.

Best wishes

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