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Analysis of the 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.

On 2 July 2013 the *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*¹ was finally adopted. This law brings Kazakhstan a step closer to fulfilling one of its core obligations which it undertook when it became a party to the Optional Protocol to the UN Convention against Torture (OPCAT). Kazakhstan signed OPCAT on 25 September 2007 and ratified the instrument on 22 October 2008.² Thus the country was to designate its National Preventive Mechanism (NPM) by the 22 October 2009, as prescribed by Article 17 of OPCAT. Kazakhstan however entered a declaration under Article 24 which allowed postponement of the NPM designation for three years thus making the final deadline as 22 October 2012. Since the requisite NPM legislation was adopted in July 2013 it means that Kazakhstan is in *de facto* breach of its obligations under OPCAT in relation to the establishment of NPM. Moreover, it must also be noted that the adoption of the requisite

¹ 2 2013 111-V О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам создания национального превентивного механизма, направленного на предупреждение пыток и других жестоких, бесчеловечных или унижающих достоинство видов обращения и наказания.

² See: United Nations Treaty Series.

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en (last accessed on 12 August 2013).

NPM legislation does not mean that the NPM has been established in real life which means further delay on behalf of Kazakhstan with the implementation of its obligations under OPCAT in relation to NPM establishment. Nevertheless the adoption of the NPM legislation is a positive development and the Kazakh authorities must also be commended for the wide consultation process which accompanied the drafting and adoption process of the NPM legislation.

The NPM model. The new law proposes the two-tier NPM model. The Coordinating Council is in charge of the overall functioning of the NPM and maintains contacts with the UN Subcommittee on Prevention of Torture (SPT). The Coordinating Council is to be established under the auspices of the Ombudsman Office who also is a part of both the Coordinating Council and the NPM. One of the key responsibilities of the Council is to select the members of NPM; the NPM is the body which is to carry out the actual preventive visits to places of deprivation of liberty. The NPM is to be composed of the Ombudsman and other members selected by the Coordinating Council representing Public Monitoring Commissions, NGOs working on the protection of human rights, lawyers, social workers and doctors.

There are however some points which must be carefully implemented so as to ensure that the basic remit of the NPMs mandate correspond to the requirements of OPCAT.

1. **The scope of ‘deprivation of liberty’.** One of the key problems with the NPM legislation is that despite numerous recommendations³ the Kazakh authorities did not adopt a new, separate law on NPM but rather opted for a number of legislative amendments to be carried out in the existing legislation of Kazakhstan. This means that the current law approves amendments in 16 various legislative acts which makes it very difficult to ascertain of the precise remit of the NPM mandate.⁴

This also means that there is no single, overarching definition of ‘deprivation of liberty’ rather the mandate of the NPM to visit concrete places of deprivation of liberty is scattered across the variety of laws. Such an approach however can lead to potential disagreement with one of the key provisions of OPCAT namely Article 4 which sets out the scope of the term ‘deprivation of liberty’ This provisions encapsulates a rather wide understanding of ‘deprivation of liberty’⁵ which means that NPM visits must be allowed not only to ‘traditional’ places like prisons and police cells, but also to ‘untraditional’ ones like psychiatric institutions and social care homes for elderly, for example. The legislative changes carried out in the 16 existing Kazakh laws indicated that the NPM will have access to prisons, army detention places, SIZOs, juvenile institutions and variety of health care institutions such as psychiatric institutions and centres for treatment of drug addiction etc. It does however appear that amendments have not been carried out in relation to, for example, centres where asylum seekers and refugees are processed/held (albeit there

³ See, for example, Human Rights Implementation Centre. Expert Advice letter to the Members of the Working Group on 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 of 23 May 2012; Available at <http://www.bristol.ac.uk/law/research/centres-themes/hric/expertadvicebyhric/kazakhstan.html> (last accessed on 12 August 2013).

⁴ Miller, A. ‘Expert Review of the Implementation of the National Human Rights Plan of the Republic of Kazakhstan for years 2009-2012 by the State Organs’ at p. 7.

⁵ For detailed discussion on the scope of Article 4 of OPCAT see: Human Rights Implementation Centre ‘Deprivation of liberty’ as per Article 4 of OPCAT: the scope. Policy Paper (October 2011). Available at: <http://www.bristol.ac.uk/law/research/centres-themes/hric/policypapers.html> (last accessed on 12 August 2013).

are no such separate places in Kazakhstan currently) and social care homes for elderly (an issue which was raised with the legislature but was rejected as it was deemed that those in such settings are not deprived of liberty in the sense of Article 4 of OPCAT).

Additionally, Article 4 of OPCAT states that visits must be allowed to all places where persons are or *may be* deprived of their liberty (emphasis added). This means that not only existing places are to be subjected to the NPM scrutiny but also potential places of deprivation of liberty. This is especially important in the context of Kazakhstan given that the country is about to embark upon the complex task of reforming its colony-type prisons and move to cell-type accommodation prisons⁶ which may involve both the reorganisation of existing places as well as construction of new facilities. The advice of the NPM in this process would be key to ensure that this transition is carried out in the manner that would ensure prevention of any ill-treatment.

Overall the current approach is confusing. While the Kazakh authorities can be commended for the departure from earlier drafts of the law which made an explicit list of places of deprivation of liberty, the current approach is not markedly different.

2. **The mode of financing NPM.** The newly adopted NPM legislation has moved away from the mode of financing the work of NPM which was proposed by earlier drafts, namely, the use of social procurement procedure, criticised by both national⁷ and international⁸ experts. However the current law only states that the compensation of the expenses borne by the NPM members shall be reimbursed according to the order established by the government. It is essential that this order is such as to allow the requisite degree of financial independence of the NPM as per Article 18 of OPCAT and the Paris Principles.⁹

Moreover, there are no provisions regarding the financing of the NPM work and thus it is currently unclear how the NPM will be able to, for example, ensure transport to various places of deprivation of liberty or whether it will have any funding for administrative support. It is therefore crucial that direct provisions regarding the financing of NPM are adopted which would correspond to the requirements of Article 18(1) of OPCAT.

3. **Composition of NPM.** The new contains a number of restrictions towards the members of the NPM and there are some restrictions which give rise to concerns. For example, those suspected of a crime cannot be members of the NPM. This seems to be very strict requirement as the person does not need to be charged or even be convicted of having committed a crime, a mere suspicion of having committed a crime is sufficient to refuse membership in the NPM. This not only stands at odds with the presumption of innocence but also holds great potential for abuse.

⁶ . . . *Экспертное заключение на Концепцию проекта Уголовно-исполнительного кодекса Республики Казахстан (новая редакция)* at p. 7; Rahimberdin. K., *Expert review of the implementation of the National Human Rights Plan in the Republic of Kazakhstan in 2009-2011* (June, 2012); Recommendation No 12.

⁷ Supra note 3.

⁸ Supra note 4.

⁹ UNGA Res 1992/54, Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (The Paris Principles), endorsed by the UN General Assembly Resolution 48/134, 20 December 1993.

Equally, those on the psychiatric and/or narcological register¹⁰ cannot be NPM members. Again, this seems overly restrictive and even potentially contradictory to the provisions of the UN Convention on the Rights of Persons with Disabilities (CRPD).¹¹

Judges, advocates,¹² civil servants and those in army as well as those working in the criminal justice and specialised state institutions are equally prevented from being members of the NPM. While the restriction in relation to judges is understandable¹³ the restriction in relation to all advocates and all civil servants appears too wide. It must be kept in mind that the new law contains a provision which obliges any individual NPM member to abstain from carrying out its work in cases where there can be actual or potential conflict of interest. This should be sufficient to ensure the actual and perceived independence of the NPM and therefore the blanket ban on such a wide array of professions is unnecessarily restrictive.

Finally, also those who have been dismissed from the state service, service at the penitentiary institutions and even those who have been struck off the register of advocates for negative reasons () are prevented from becoming members of the NPM. Once again, this appears to be overly restrictive.

4. **Preventive visits by NPM.** The new law provides for periodic preventive visits, follow-up visits and special visits to be carried out by the NPM. It also notes that the NPM members have the right to freely choose and visit the place of deprivation of liberty they wish to. There is no however an explicit mention of the right to carry out unannounced visits. This does not mean that these are necessarily prohibited and it is therefore essential to see the practical work of the new NPM in order to ascertain that unannounced visits are practically possible.

Slight concern must be expressed over the provision which prevents the NPM members to interfere in the work/running of the institution they are visiting¹⁴ The wording of this provision is rather vague and therefore it is crucial to observe its implementation in practice as there is a potential for this provision to be used to interfere with the NPM preventive visits.

As the above analysis suggests, the newly adopted NPM legislation appears to be incomplete in relation to some of the key OPCAT provisions in relation to the basic remit of the NPM mandate. The Ombudsman Office is currently elaborating upon variety of regulations regarding the NPM which include the inventory of places of deprivation of liberty which the NPM will be able to visit as well as financial provisions for the NPM and the right of the NPM to carry out unannounced visits. It is however regrettable that these key elements of the NPM mandate were not stipulated in the legislation.

¹⁰ Please note the Russian terms here: ÷ () ø

¹¹ CRPD prohibits discrimination of the basis of disability which includes mental disability- see Article 5 of the CRPD.

¹² Please note the Russian term ÷ øn this context as lawyers () are expressly permitted to be part of the NPM.

¹³ On the issue of magistrates as part of the NPM see: Human Rights Implementation Centre. Expert Advice Letter on the Independent Monitoring Boards as part of the National Preventive Mechanism for the United Kingdom (28 May, 2010). Available at: <http://www.bristol.ac.uk/law/research/centres-themes/hric/expertadvicebyhric/unitedkingdom.html> (last viewed on 13 August 2013).

¹⁴ Please note the Russian formulation: ÷