



Human Rights Implementation Centre

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1. The Human Rights Implementation Centre (HRIC) is a research Centre at the Law School of the University of Bristol, established in 2009. It provides an international focus for developing expertise, advice and scholarship on the role of institutions, whether those are at the national, regional or international levels, in the implementation of human rights. These institutions include national governments and non-governmental organisations, but also statutory and constitutional bodies such as national human rights institutions, as well as regional bodies, such as the African Commission on Human and Peoples' Rights, the Council of Europe, the Organisation on Security and Co-operation in Europe, as well as those under the UN, both treaty bodies, the Special Procedures and the OHCHR. The Centre has developed particular expertise *inter alia* in torture prevention and the implementation of the Optional Protocol to the UN Convention against Torture (OPCAT) which is the focus of the present submission.
2. Since 2009 the HRIC has been closely following and advising on the adoption of the requisite legislation implementing OPCAT in Kazakhstan. The present document is the individual submission of the HRIC for the second cycle of the Universal Periodic Review (UPR) of Kazakhstan and concerns specifically the obligations of the country under OPCAT.

3. Kazakhstan signed OPCAT on 25 September 2007 and ratified the instrument on 22 October 2008.¹ Therefore the country was obliged to designate its National Preventive Mechanism (NPM) by the 22 October 2009 as prescribed by Article 17 of OPCAT. Kazakhstan made a declaration under Article 24 of OPCAT which allowed postponement of the NPM designation for three years thus making the 22 October 2012 the final deadline.
4. It was however only on 2 July 2013 that 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*² was finally passed by the legislature. This law sets out the parameters of the Kazakh NPM and thus brought Kazakhstan a step closer to fulfilling one of its core obligations which it undertook when it became a party to OPCAT. Regrettably, at the time of writing the present submission, the NPM is still in the process of being established which means that Kazakhstan is in *de facto* breach of its obligations under OPCAT as it has failed to establish an NPM within the prescribed period of time.
5. Moreover, the legislation of 2 July 2013 also falls short of the requirements set out in OPCAT:
 - a. **The scope of the term ‘deprivation of liberty’.** One of the key challenges with the Kazakh NPM legislation is that despite numerous recommendations³ the national authorities did not adopt a new, separate law on NPM but rather opted for a number of legislative amendments to be carried out to the existing legislation of Kazakhstan. This means that the current law approves amendments in 16 different 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 one of the central terms under OPCAT, the ‘deprivation of liberty’; rather the mandate of the NPM to visit places of deprivation of liberty is scattered across a variety of

¹ 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 28 February, 2014).

² Закон Республики Казахстан от 2 июля 2013 года № 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.*

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 28 February, 2014).

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.

laws. Such an approach can lead to potential confusion with one of the key provisions of OPCAT namely Article 4 which sets out the scope of the term ‘deprivation of liberty’. This provision encapsulates a rather wide understanding of the ‘deprivation of liberty’.⁵ It means that NPM visits must be allowed not only to ‘traditional’ places like prisons and police cells, but also to such ‘untraditional’ ones like psychiatric institutions and social care homes for elderly for example. The legislative changes carried out to the 16 existing Kazakh laws indicate 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 appear however that the amendments do not allow for visits to such places as centres where asylum seekers and refugees are processed/held (albeit there 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 by the body that those in such settings are not ‘deprived of liberty’ within the scope 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 has also been confirmed by the Subcommittee on Prevention of Torture (SPT) in its Guidelines on NPMs⁶ and means that not only existing places are to be subjected to NPM scrutiny but also potential places of deprivation of liberty. This is especially important in the context of Kazakhstan given that the country is embarking upon the complex task of reforming its colony-type prisons and move to cell-type accommodation prisons⁷ 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.

- b. **The mode of financing NPM.** In relation to the financing of the NPM, the Kazakh NPM legislation only states that the compensation of the expenses incurred by the members of the NPM shall be reimbursed according to the Order established by the government. It is essential that, when adopted, 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.⁸

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 28 February, 2014).

⁶ Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010), at para 24.

⁷ Саламатов Е.А. *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.

⁸ 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.

Moreover, there are no provisions regarding the financing of the work of the NPM 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.

- c. **Composition of NPM.** The new NPM legislation contains a number of restrictions towards the membership of the NPM and some of these give rise to concerns. For example, those suspected of a crime cannot be members of the NPM. This seems to be overly restrictive as the person does not need to be charged or be convicted of having committed a crime, a mere suspicion of having committed a crime is sufficient to refuse membership of the NPM. This not only stands at odds with the presumption of innocence, encapsulated in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) but also holds potential for abuse.

Equally, those on the psychiatric and/or narcological register⁹ cannot become members of the NPM. This once again seems overly restrictive and even potentially contradictory to the provisions of the UN Convention on the Rights of Persons with Disabilities (CRPD) and Article 5.

Judges, advocates,¹⁰ 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 understandable,¹¹ the restriction in relation to all advocates and most of the civil servants appears too wide.

Finally, also those who have been dismissed from the service, service at penitentiary institutions and those who have been struck off the register of advocates for ‘negative reasons’ (по отрицательным мотивам) are prevented from becoming members of the NPM. Once again, this appears to be overly restrictive and does not comply with the pluralistic composition of the NPM as required by OPCAT.

- d. **Unannounced visits by the NPM.** The new NPM law provides for periodic preventive visits, follow-up visits and special visits to be carried out by the NPM. It also notes that NPM members have the right to freely choose and visit the place of deprivation of liberty they wish to. There is however no explicit mention of the right to carry out unannounced visits which is implicit requirement of OPCAT under Article 19 and has been confirmed by the SPT as the requisite power that every NPM must possess.¹²

⁹ Please note the Russian terms here: ‘состоящие на учете у психиатра и (или) нарколога’.

¹⁰ Please note the Russian term ‘адвокат’ in this context as lawyers (юристы) are expressly permitted to be part of the NPM.

¹¹ 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 28 February, 2014).

¹² Supra note 6, at para 25.

6. As the above analysis suggests, the newly adopted Kazakh 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.
7. Moreover, it must be noted that during the first UPR cycle, Kazakhstan accepted recommendations to establish (i) independent NPM; (ii) establish NPM in accordance with the terms of OPCAT; and (iii) establish an NPM with adequate resources.¹³ The present submission indicates that Kazakhstan has failed to comply fully with these recommendations.

Consequently, the HRIC would like to raise the following four issues for consideration by the UPR:

1. The improper implementation of Article 4 of OPCAT in the Kazakh NPM legislation in relation to the meaning and scope of the term ‘deprivation of liberty’;
2. The failure to specify the mode of reimbursing the members of the NPM for the expenses incurred when undertaking NPM work and the absence of any financial provisions relating to the NPM functioning as such which gives rise to concerns over the financial independence of the NPM contrary to Article 18 of OPCAT;
3. The overly restrictive approach to the NPM membership;
4. Absence of the specified right of the NPM to carry out unannounced visits contrary to Article 19 of OPCAT and the recommendation of the SPT.

Sincerely yours,

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¹³ Human Rights Council. Report of the Working Group on the Universal Periodic Review. Kazakhstan. UN Doc A/HRC/14/10 (2010); para 95, subparas 65-68.