

URGENT OPINION ON THE DRAFT CONSTITUTIONAL LAW OF KAZAKHSTAN ON THE COMMISSIONER FOR HUMAN RIGHTS

KAZAKHSTAN

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Based on an unofficial English translation of the Draft Constitutional Law provided by the Office of the Commissioner for Human Rights of the Republic of Kazakhstan.



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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

ODIHR welcomes the legislative initiative of the Republic of Kazakhstan as it seeks to reform its National Human Rights Institution (NHRI) in compliance with United Nations Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (hereinafter “the Paris Principles”). This is a positive step in addressing the recommendations made to Kazakhstan by the Global Alliance of National Human Rights Institutions’ (GANHRI) Sub-Committee on Accreditation (SCA) in March 2012, as well as those of UN Treaty Bodies.

At the outset, ODIHR notes positively that the institution of the Commissioner for Human Rights (hereinafter, “the Commissioner”) acquired constitutional basis in a new Article 83-1. This provision further provides that the legal status and organization of the Commissioner’s activities will be further detailed in a constitutional law, which is the subject of this legal review (hereinafter “the Draft Constitutional Law”).

There are some positive provisions in the Draft Constitutional Law, specifically the explicit reference to the Commissioner’s independence, which is also reflected in the Constitution, the high standing of the Commissioner in the country, and mention of the institution’s function to promote and protect human rights. At the same time, the Draft Constitutional Law would benefit from amendments to address important aspects pertaining to the core of the institution’s basic guarantees of independence, as well as to ensure full compliance with the Paris Principles.

In particular, the Draft Constitutional Law should provide for clear, transparent and participatory merit-based selection and appointment procedures of the NHRI senior leadership (Head and Deputy Head of the National Centre for Human Rights), since they are essential to ensure the independence of, and public confidence in the institution. Moreover, broad and unclear provisions on the dismissal process may undermine the security of tenure of the Commissioner and thereby put into question his/her independence and should therefore be substantially revised. The Draft Constitutional Law should also include additional safeguards to strengthen the provisions for financial independence and autonomy of the institution. Furthermore, in particular, the Commissioner, the institution’s staff and Representatives should be protected from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacities (“functional immunity”).

More specifically, ODIHR makes the following recommendations to improve the Draft Constitutional Law’s compliance with OSCE commitments and international human rights standards, including the Paris Principles:

- A. to address in a single enabling law the overall mandate and all the functions of the NHRI, including its NPM role, primarily to avoid having two different sets of standards, including on independence; [para. 26]
- B. to amend Article 3(4) to remove limitations on the Commissioner’s mandate that may be introduced through other legislation; [para. 29]
- C. to provide for the functional immunity for the Commissioner, the Representatives and all staff of the Commissioner’s Office (National Center for Human Rights), specifying that:

- they shall not incur civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacity; [paras. 30-32]
 - such functional immunity applies even after the end of the mandate or after a staff member ceases their employment; [para. 32]
 - clarifying the grounds, and establishing a clear and transparent process, by which the functional immunity may be lifted; [para. 38]
 - guaranteeing in the Draft Constitutional Law or other legislation the inviolability of the NHRI's premises, property, means of communication and all documents, including internal notes and correspondence, as well as of baggage, correspondence and means of communication belonging to the members of the NHRI's leadership body and professional staff; [para. 33]
- D. to include detailed provisions on the application, screening, selection and appointment procedure for the Commissioner reflecting a broad, transparent and participatory process throughout, including the involvement of civil society, while including specific provisions setting out clear and objective criteria for the identification and evaluation of candidates at all stages of the process; [para. 56]
- E. to consider establishing longer, non-renewable term of office for the Commissioner or clarify whether the Commissioner's mandate is renewable, and if yes, specify that it can only be renewed once (for a 5-year term), while providing for the process by which an incumbent Commissioner may receive a second term and whether they can ever be re-elected in the future, bearing in mind the requirements for the selection and appointment process; [paras. 62-63]
- F. to revise the dismissal grounds, provide clear and detailed provisions to ensure publicity and transparency of the dismissal process of a Commissioner that require, *inter alia*, a qualified majority of the Senate as well as the right of appeal to an independent tribunal, possibly to the Constitutional or Supreme Courts [para. 68]; and to provide for an interim mechanism to ensure the Commissioner's Office continuous functioning pending the appointment of the new office-holder; [para. 71]
- G. to provide for pluralism in the composition of the Commissioner's Office at all levels and include reference to various kinds of diversity, including ethnic and linguistic minorities, persons with disabilities, while ensuring the equitable representation of women in the NHRI, including in leadership positions, and the development of gender- and diversity-sensitive human resources policies; [paras. 73-74]
- H. to amend Article 13(2) to more clearly circumscribe the limitations on the competence of the Commissioner relating to President's actions/inactions and decisions; [para. 76]
- I. to supplement the Draft Constitutional Law to specifically provide for regular and consistent engagement of the NHRI with civil society; [para. 85] and
- J. to expand Article 21 to specify that the state will provide the Commissioner's Office with adequate funding to cover the costs of human, financial, material and technical capacity to guarantee the proper implementation of its (broad) mandate both as NHRI and as National Preventive Mechanism, while providing for the NHRI's financial autonomy, full control over its budget and safeguards against unwarranted budgetary cutbacks. [paras. 87-89]

These and additional Recommendations, are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing OSCE human dimension commitments, ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE human dimension commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

- 1 On 23 July 2022, the Commissioner for Human Rights in the Republic of Kazakhstan (hereinafter “the Commissioner”) sent a request for a legal review of the Draft Constitutional Law on the Commissioner for Human Rights in the Republic of Kazakhstan (hereinafter “Draft Constitutional Law”) to the OSCE Office for Democratic Institutions and Human Rights (ODIHR).
- 2 On 2 August 2022, ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Draft Constitutional Law with international human rights standards and OSCE human dimension commitments.
- 3 Given the short timeline to prepare this legal review which was requested by end-August 2022, ODIHR decided to prepare an Urgent Opinion on the Draft Constitutional Law, which does not provide a detailed analysis of all the provisions of the Draft Law but primarily focuses on the most concerning issues relating to the compliance with the UN Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights, also known as the “Paris Principles”.
- 4 This Urgent Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE human dimension commitments.¹

II. SCOPE OF THE OPINION

- 5 The scope of this Urgent Opinion covers only the most concerning issues in the Draft Constitutional Law submitted for review. Thus, the Urgent Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the Office of the Commissioner and human rights protection mechanisms in Kazakhstan.
- 6 It raises key issues and provides indications of areas of concern relating to the Office of the Commissioner. In the interest of conciseness, it focuses on those provisions that require amendments or improvements rather than on positive aspects of the Draft Law. The following legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments.
- 7 Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*² (CEDAW) and the *2004 OSCE Action Plan for the Promotion of Gender Equality*³ and commitments to mainstream gender into OSCE

1 See especially 1990 OSCE Copenhagen Document, para. 27, which states that participating States will “*facilitate the establishment and strengthening of independent national institutions in the area of human rights and the rule of law*”; Bucharest Plan of Action for Combating Terrorism (2001), Annex to OSCE Ministerial Council Decision on Combating Terrorism, MC(9).DEC/1, 4 December 2001, para. 10, which tasks ODIHR with continuing and increasing “efforts to promote and assist in building democratic institutions at the request of States, inter alia by helping to strengthen [...] ombudsman institutions”; and OSCE Ministerial Council, Madrid 2007, Decision No. 10/07 on Tolerance and Non-Discrimination: Promoting Mutual Respect and Understanding, para. 10, which “[e]ncourages the establishment of national institutions or specialized bodies by the participating States which have not yet done so, to combat intolerance and discrimination (...), drawing on the expertise and assistance of the relevant OSCE institutions, based on existing commitments, and the relevant international agencies, as appropriate”.

2 *UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), adopted by General Assembly resolution 34/180 on 18 December 1979. The Republic of Kazakhstan acceded to this Convention on 26 August 1998.

3 See *OSCE Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

- activities, programmes and projects, this Urgent Opinion integrates, as appropriate, a gender and diversity perspective.
- 8 This Urgent Opinion is based on an unofficial English translation of the Draft Constitutional Law provided by the Commissioner, which is attached to this document as an annex. Errors from translation may result. The Urgent Opinion is also available in Russian. However, the English version remains the only official version of the Urgent Opinion.
- 9 In view of the above, ODIHR would like to stress that this Urgent Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Kazakhstan in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

- 10 National Human Rights Institutions (NHRIs) hold a crucial position among the range of institutions that form the infrastructure of a democratic system based on the rule of law and human rights. As independent bodies with a constitutional and/or legislative mandate to protect and promote human rights, they are considered a “*key component of effective national human rights protection systems and indispensable actors for the sustainable promotion and protection of human rights at the country level*”.⁴ Thus, NHRIs link the responsibilities of the State stemming from international human rights obligations to the rights of individuals in the country and constitute “*a bridge between government and civil society, as well as between the national and international systems*”.⁵ Although part of the state apparatus, NHRIs are independent from the executive, legislative and judicial branches to ensure that they are able to fulfil their mandate.
- 11 However, whether an NHRI can play its role within the state to the full extent depends on many political, social and legal factors. Such an institution must occupy a proper place within the national institutional framework, while having a sufficiently broad scope of competence, as well as a range of powers and financial resources allowing it to effectively carry out its mandate and advance the legal sphere and practice in the human rights field. An important characteristic of an effectively operating institution of this type must be its independence, including financial independence, from other branches of government, especially the executive. Therefore, special statutory safeguards need to protect such independence, including those involving the institution’s budget. The success of an NHRI also very much depends on its integrity, professionalism and authority within the structures of the state and of society in general. Thus, it is of the utmost importance to establish, *inter alia*, appropriate criteria and an adequately transparent procedure for selecting or appointing individuals to serve in the NHRI’s decision-making body and to recruit staff with professional qualifications of the highest possible level.

⁴ UN High Commissioner for Human Rights, Report to the UN General Assembly (2007), A/62/36, para. 15.

⁵ Joint Statement from the Expert Meeting on Strengthening Independence of National Human Rights Institutions in the OSCE Region, 28- 29 November 2016, Warsaw, <<http://www.osce.org/odihr/289941?download=true>>, which states that “*a strong and independent NHRI is a necessary feature of any state that underpins good governance and justice, as well as human rights*”.

- 12 The UN Paris Principles contain internationally recognized rules on the status, mandates and competencies of NHRIs.⁶ They set out minimum standards on the establishment and functioning of NHRIs, and promote key principles of pluralism, transparency, guarantees of functional and institutional independence and effectiveness of NHRIs. The implementation of the Paris Principles and evaluation of NHRIs against these principles is undertaken by the Global Alliance of National Human Rights Institutions (GANHRI) Sub-Committee on Accreditation (SCA).⁷ The SCA publishes reports on the accreditation applications of NHRIs, reviews their status and provides them with status accreditation every five years.⁸ The status of NHRIs may also be reviewed if the legislation regulating them is amended, among other circumstances. The SCA additionally develops “General Observations”, which clarify and further explain the Paris Principles.⁹
- 13 The UN General Assembly and the UN Human Rights Council have also issued various resolutions on NHRIs.¹⁰ Additionally, the United Nations Development Programme (UNDP) and the Office of the United Nations High Commissioner for Human Rights (OHCHR) have published a Toolkit for Collaboration with National Human Rights Institutions.¹¹ The toolkit explains the various models of NHRIs and provides guidance on how to support NHRIs in the different phases of their existence, from their establishment to supporting their development into more mature NHRIs.¹²
- 14 Furthermore, the UN General Assembly Resolution A/RES/75/186 on the role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law,¹³ in paragraph 2, strongly encourages Member States to create and strengthen Ombudsman institutions “*consistent with the principles on the protection and promotion of the Ombudsman institution (the Venice Principles)*”; in paragraph 8 it “[e]ncourages Ombudsman and mediator institutions, where they exist, (a) To operate, as appropriate, in accordance with all relevant international instruments, including the Paris Principles and the Venice Principles”.
- 15 In the 1990 Copenhagen Document, OSCE participating States have committed to facilitate “*the establishment and strengthening of independent national institutions in the area of human rights and the rule of law*”.¹⁴ Other OSCE commitments have further emphasized the important role that NHRIs play in the protection and promotion of human

6 The UN Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights ([Paris Principles](#)) were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris (7-9 October 1991), and adopted by UN General Assembly Resolution 48/134 of 20 December 1993.

7 The GANHRI, formerly known as the International Coordinating Committee for National Human Rights Institutions (ICC), was established in 1993 and is the international association of national human rights institutions from all parts of the globe. The GANHRI promotes and strengthens NHRIs in accordance with the Paris Principles, and provides leadership in the promotion and protection of human rights; see <<https://ganhri.org/>>.

8 Article 15 of the GANHRI Statute (version adopted on 5 March 2019). Accreditation is the recognition that a NHRI meets the requirements of or continues to comply with the Paris Principles. The SCA awards A or B status to NHRIs. Status A means that an NHRI is in compliance with the Paris Principles and a voting member as regards the work and meetings on NHRIs internationally; status B means that the NHRI does not yet fully comply with the Paris Principles or has not yet submitted sufficient documentation in this respect.

9 See GANHRI SCA, [General Observations](#), adopted on 21 February 2018.

10 See e.g., the latest UN General Assembly, [Resolution 74/156 on National Human Rights Institutions, A/RES/74/156, adopted on 18 December 2019](#). See also [Resolution 70/163 on National Institutions for the Promotion and Protection of Human Rights, A/RES/70/163](#), adopted on 17 December 2015; resolutions 75/186, 63/169 and 65/207 on the Role of the Ombudsman, Mediator (and Other National Human Rights Institutions) in the Promotion and Protection of Human Rights, [A/RES/75/186](#), A/RES/63/169 and A/RES/65/207, adopted on 16 December 2020, 18 December 2008 and on 21 December 2010 respectively; resolution 63/172 and resolution 64/161 on National Institutions for the Promotion and Protection of Human Rights, A/RES/63/172 and A/RES/64/161, adopted on 18 December 2008 and 18 December 2009 respectively; and resolution 48/134 on National Institutions for the Promotion and Protection of Human Rights, A/RES/48/134, adopted on 4 March 1994. See also UN Human Rights Council, resolutions 39/17 on National Human Rights Institutions and 27/18 on National Institutions for the Promotion and Protection of Human Rights, A/HRC/RES/39/17 and A/HRC/RES/27/18, adopted on 28 September 2018 and 7 October 2014, respectively.

11 UNDP-OHCHR, *Toolkit for Collaboration with National Human Rights Institutions*, December 2010.

12 *Ibid.* p. 241.

13 Adopted by the UN General Assembly on 16 December 2020 (75th session).

14 1990 OSCE Copenhagen Document, para. 27.

rights, in particular, the Bucharest Plan of Action for Combatting Terrorism, which tasks ODIHR with continuing and increasing “*efforts to promote and assist in building democratic institutions at the request of States, inter alia by helping to strengthen [...] ombudsman institutions*”.¹⁵

- 16 Although the Republic of Kazakhstan is not a Member State of the Council of Europe (CoE), the Urgent Opinion will refer to a number of CoE documents, which may serve as important and useful sources for reference to policy- and law-makers. In particular, the CoE Parliamentary Assembly Recommendation 1615(2003) lists certain characteristics that are essential for the effective functioning of ombudsperson institutions specifically.¹⁶ In addition, CoE Committee of Ministers Recommendation CM/Rec(2021)1, on the Development and strengthening of effective, pluralist and independent national human rights institutions (CoE Recommendation (2021)1) aims to ensure that NHRIs are established and governed in accordance with the minimum standards set out in the Paris Principles, in particular as regards their terms of reference and competence to promote and protect all human rights and their autonomy from government.¹⁷ The European Commission for Democracy through Law (Venice Commission), of which Kazakhstan is a member, in addition to numerous opinions on NHRI legislation, published Principles on the Protection and Promotion of the Ombudsman Institution (“the Venice Principles”) in 2019.¹⁸
- 17 Other useful reference documents of a non-binding nature are also relevant in this context, as they contain a higher level of practical details including, among others:
- the *ODIHR National Human Rights Institutions in a Public Emergency: A Reference Tool* (2020),¹⁹ which aims to assist NHRIs in the exercise of their functions during times of public emergency and post-emergency; and
 - the *ODIHR Handbook for National Human Rights Institutions on Women’s Rights and Gender Equality* (2012), which provides useful guidance regarding measures and initiatives to strengthen NHRIs’ capacity and practical work on women’s rights and gender equality;²⁰
 - the *Compilation of Venice Commission Opinions concerning the Ombudsman Institution* (as last updated in May 2022).²¹

2. BACKGROUND

- 18 The Commissioner was established by Presidential Decree on 19 September 2002. The adoption of the Law on the Office of the Commissioner followed in 2007. The Commissioner was accredited with B-status in March 2012 by the SCA.²² On 2 July 2013, the Commissioner was assigned the role of National Preventative Mechanism (NPM)

15 OSCE, *Bucharest Plan of Action for Combating Terrorism* (2001), Annex to OSCE Ministerial Council Decision on Combating Terrorism, MC(9).DEC/1, 4 December 2001, para. 10.

16 Parliamentary Assembly of the Council of Europe (PACE), *Recommendation 1615 (2003) on the Institution of Ombudsman*, 8 September 2003; see also other CoE documents of relevance, e.g., CoE Committee of Ministers, *Recommendation Rec(97)14E on the Establishment of Independent National Institutions for the Promotion and Protection of Human Rights*, 30 September 1997; PACE, *Recommendation 1959 (2013) on the Strengthening of the Institution of Ombudsman in Europe*, adopted on 4 October 2013.

17 CoE Committee of Ministers, *Recommendation CM/Rec(2021)1 on the Development and strengthening of effective, pluralist and independent national human rights institutions*, 31 March 2021.

18 European Commission for Democracy through Law (Venice Commission), *Principles on the Protection and Promotion of the Ombudsman Institution* (“the Venice Principles”), 3 May 2019.

19 ODIHR, *National Human Rights Institutions in a Public Emergency: A Reference Tool* (6 October 2020).

20 ODIHR, *Handbook for National Human Rights Institutions on Women’s Rights and Gender Equality*, 4 December 2012, pages 9 and 78.

21 Available at: <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2022\)022-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2022)022-e)>.

22 SCA Report (March 2012), pp. 7-10.

under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.²³ The mandate and functions of the NPM are further detailed in separate legislation.

- 19 In 2017, a first mention of the institution of the Commissioner was introduced in the Constitution but only in relation to the competence of the Parliament to elect the Commissioner and release her/him from office. The most recent constitutional amendments approved by referendum conducted on 5 June 2022, introduce a new Article 83-1 specifically on the institution of the Commissioner for Human Rights.
- 20 Article 83-1(1) of the Constitution refers to the Commissioner's role in terms of reparation of human rights violations and promotion of human rights and fundamental freedoms. Article 83-1(2) specifies that "[w]hen exercising his powers, the Commissioner is independent and not accountable to state bodies and officials". Its paragraph 3 introduces a special procedural safeguard (sometimes referred to as "procedural immunity"), i.e., obtaining the consent of the Senate, if the Commissioner is accused of breaking the law, except in case of offences committed *in flagrante delicto* or of serious crimes. Finally, Article 83-1 provides that the "*legal status and organization of the activities of the Commissioner for Human Rights are determined by constitutional law*". The Draft Constitutional Law under review, together with the Constitution, form the basis for and regulates the mandate of the Commissioner.
- 21 A number of UN Treaty Bodies have expressed concerns about the lack of independence and the functioning of the Commissioner's Office and recommended further reform to fully comply with the Paris Principles, including by allocating sufficient human, technical and financial resources, and to ensure that the Commissioner can perform its mandate as the NPM in full compliance with international standards.²⁴
- 22 Regarding the NPM's mandate in particular, the UN Committee Against Torture ("CAT") and the UN Committee on Enforced Disappearances ("CED") recommended broadening and strengthening the mandate of the Commissioner and the NPM, including by ensuring its ability (in law and in practice) to carry out urgent, unplanned and unannounced visits to all places of deprivation of liberty, irrespective of the nature of the place of deprivation of liberty, without obstacles of any kind; authorising the NPM to publish its finding and recommendations shortly after visits; and that the annual and other reports should not be subject to review and approval by the President prior to publication.²⁵ The relevant UN Committees also made specific recommendations to strengthen the Commissioner's mandate and activities in relation to racial discrimination,

23 The Republic of Kazakhstan ratified the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* on 22 October 2008.

24 See UN Human Rights Committee (CCPR), *Concluding observations on the second periodic report of Kazakhstan*, [CCPR/C/KAZ/CO/52](#), adopted on 9 August 2016, para. 8, where the CCPR specifically recommended that Kazakhstan take further measures to bring the institution into full compliance with the Paris Principles, including by strengthening its independence and providing adequate human and financial resources "commensurate with its expanded role as also a national preventative mechanism"; UN Committee Against Torture (CAT), *Concluding observations on the third periodic report of Kazakhstan*, [CAT/C/KAZ/CO/3](#), adopted on 12 December 2014, para. 13; UN Committee on the Elimination of Racial Discrimination (ComERD), *Concluding observations on the combined eighth to tenth reports of Kazakhstan*, [CED/C/KAZ/CO/8-10](#), adopted on 4 July 2022, paras. 13-14; UN Committee on the Elimination of all forms of Discrimination Against Women (ComEDAW), *Concluding observations on the fifth periodic report of Kazakhstan*, [CEDAW/C/KAZ/CO/5](#), adopted on 12 November 2019, paras. 19-20, where the Committee recommended to "[e]nsure that the [Commissioner] effectively and independently, in compliance with the [Paris Principles], including by allocating adequate human, technical and financial resources to the Office of the [Commissioner]" and to "[s]trengthen the presence of the Office of the [Commissioner] outside the capital, including in rural areas"; UN Committee on the Economic, Social and Cultural Rights (ComESCR), *Concluding observations on the second periodic report of Kazakhstan*, [E/C.12/KAZ/CO/2](#), adopted on 29 March 2019, paras. 6-7; UN Committee on the Enforced Disappearances (ComED), *Concluding observations on the report submitted by Kazakhstan under Article 29(1) of the Convention*, [CED/C/KAZ/CO/1](#), adopted on 26 May 2016, paras. 9-10 and 23-24.

25 See CAT, *Concluding observations on the third periodic report of Kazakhstan*, [CAT/C/KAZ/CO/3](#), para. 13; and ComED, *Concluding observations*, [CED/C/KAZ/CO/1](#), paras. 23-24.

to provide effective remedies to address violations of economic, social and cultural rights and to strengthen the Office's presence at the local level, including in rural areas.²⁶

- 23 The SCA expressed concern about a number of issues, including restrictions on the Commissioner's mandate in relation to actions of the President and other public bodies/institutions, the lack of a Paris Principles-compliant selection and appointment process, the failure to provide for pluralism in staffing and absence of immunity, and concerns over funding.²⁷ Of note, in 2021, the Venice Commission published an Opinion on a Draft Law "On the Commissioner for Human Rights", which contained some provisions that were similar to the ones included in the Draft Constitutional Law under review.²⁸ In its Opinion, the Venice Commission expressed some concerns regarding the proposed provisions on the Commissioner's jurisdiction, election, selection and appointment, functional immunity, term of office, investigation powers, budget, staffing and annual reporting. When appropriate and relevant, the Urgent Opinion will refer back to the Venice Commission's findings and recommendations contained therein.

3. GENERAL REMARKS ON THE APPLICABLE LEGAL FRAMEWORK

- 24 It is welcome that the recently adopted constitutional amendments introduced a specific provision in the Constitution regarding the overall human rights protection and promotion mandate of the Commissioner, explicitly mentioning his/her independence and providing for a special procedural safeguard to lift the Commissioner's immunity. This is overall in line with the Paris Principles that require that a NHRI be established in a constitutional or legal text and address some of the recommendations made by several international and regional bodies.²⁹
- 25 The newly introduced Article 83-1 of the Constitution further provides that the organization of the Office of the Commissioner and its activities are to be further detailed in a constitutional law. It is positive that such issues will be provided for in a constitutional law and no longer in a presidential decree as was the case before. However, as emphasized below, the Draft Constitutional Law should be enhanced on a number of aspects to fully guarantee the Commissioner's institutional independence, legitimacy, credibility, efficacy and pluralism and fully comply with the Paris Principles.
- 26 Furthermore, the Draft Constitutional Law is almost completely silent on the NPM role, which is regulated under separate legislation. **Generally, it is recommended that the overall mandate and all the functions of the NHRI, including its NPM role, are addressed in a single enabling law,³⁰ primarily to avoid having two different sets of standards, including on independence.** It is understood from the CED's Concluding Observations that the authorities were discussing the possibility to adopt a single law to strengthen the status of the Commissioner's Office but this option does not seem to have been retained under the Draft Constitutional Law.

26 *Ibid.* ComERD, *Concluding observations on the combined eighth to tenth reports of Kazakhstan*, [CERD/C/KAZ/CO/8-10](#), paras. 13-14; and ComESCR, *Concluding observations on the second periodic report of Kazakhstan*, [E/C.12/KAZ/CO/2](#), paras. 6-7; and ComEDAW, *Concluding observations on the fifth periodic report of Kazakhstan*, [CEDAW/C/KAZ/CO/5](#), paras. 19-20.

27 GANHRI Sub-Committee on Accreditation Report, (March 2012), pp. 7-10.

28 Venice Commission, *Opinion on the Draft Law "On The Commissioner For Human Rights" of Kazakhstan*, [CDL-AD\(2021\)049](#), 13 December 2021.

29 See e.g., GANHRI Sub-Committee on Accreditation Report, (March 2012), pp. 7-10; UN Committee against Torture, *Concluding observations on the third periodic report of Kazakhstan*, [CAT/C/KAZ/CO/3](#), 12 December 2014, para. 13; and European Commission for Democracy through Law of the Council of Europe (Venice Commission), *Opinion on the draft law "On the Commissioner for Human Rights" of Kazakhstan*, [CDL-AD\(2021\)049](#), paras. 18-21.

30 See Paris Principle A.2, which provides: "A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence"; and SCA General Observation 1.1, which states: "An NHRI must be established in a constitutional or legislative text with sufficient detail to ensure the NHRI has a clear mandate and independence. In particular, it should specify the NHRI's role, functions, powers, funding and lines of accountability, as well as the appointment mechanism for, and terms of office of, its members".

RECOMMENDATION A.

To address in a single enabling law the overall mandate and all the functions of the NHRI, including its NPM role, primarily to avoid having two different sets of standards, including on independence.

4. THE INDEPENDENCE OF THE COMMISSIONER'S OFFICE

4.1. Safeguards and Guarantees of Independence

- 27 The Paris Principles require that an NHRI is, and is perceived to be, independent of the government. The Draft Constitutional Law would benefit from additional safeguards that could further protect and guarantee such independence. These include and are not limited to provisions providing guarantees ensuring its operational and financial independence and autonomy (see Section 8 *infra*), on the terms and conditions governing the selection, appointment and dismissal of the Ombudsperson (see Section 6 *infra*), as well as their functional immunity³¹ (see Sub-Section 4.2 *infra*).
- 28 The explicit statement of independence of the Commissioner in the exercise of his/her powers (Article 3(1)) is positive. Further, it is welcome that the basic principles of operation are stated in Article 2 as covering important principles including “*legality, fairness, impartiality, objectivity, publicity, openness, transparency*”. However, in recognition of the status of the Commissioner as Kazakhstan’s NHRI, **the Draft Constitutional Law may consider including specific reference to the Paris Principles, and to the promotion and protection of human rights, as also provided under Article 83-1(1) of the Constitution.** This would help setting more clearly the purpose for the law and the Commissioner’s Office as a Paris Principles-compliant institution. Further, the provisions on independence, and principles of activity should explicitly reference the Commissioner’s Representatives and the National Center for Human Rights.
- 29 Article 3 provides the “guarantees” for the activities of the Commissioner. While the reference to independence is welcome, as noted above, some of the provisions of this Article raise questions as to whether they actually support this independence. Article 3(2) and (3) raise immunity concerns, and are dealt further in para. 37 *infra*. Article 3(4) appears to allow for limitation of the rights of the Commissioner by way of other pieces of legislation. Modifications to the mandate of the Commissioner are required to follow the correct procedures, including consultation with the Commissioner (see Section 10 *infra*), and any changes should remain in compliance with the Paris Principles. The broad wording of Article 3(4) risks seriously undermining the mandate of the Commissioner. **Article 3(4) should be amended to remove limitations on the Commissioner’s mandate that may be introduced through other legislation.**

RECOMMENDATION B.

To amend Article 3(4) to remove limitations on the Commissioner’s mandate that may be introduced through other legislation.

31 i.e., the protection from liability for the words spoken and written and the actions and decisions undertaken in good faith in one’s official capacity (“functional immunity” or “non-liability”).

4.2. Functional Immunity to Protect Institutional Independence

- 30 The functional immunity of members of NHRIs' leadership exists as an essential corollary of their institutional independence.³² Because NHRIs' tasks require special examinations/investigations of frequently politically sensitive issues and reporting on actions of the Government often resulting in strong criticism of authorities, such institutions may be a likely target of actions motivated by political or other interests. The functional immunity of NHRI leadership is therefore essential to guarantee institutional independence, which may be impacted by fear of malicious criminal proceedings or civil action by an allegedly aggrieved individual or entity, including public authorities.³³ The SCA has recommended that "*members and staff of NHRI should be protected from both criminal and civil liability for acts undertaken in good faith in their official capacity*" by enabling legislation that clearly establish the functional immunity of an NHRI's leadership and staff.³⁴ The Venice Principles also provide for the immunity for the Ombudsperson, deputies and decision-making staff.³⁵ To be effective, functional immunity should continue to apply even after the end of the leadership body's mandate or after a staff member ceases his/her employment with the NHRI.³⁶
- 31 Since the Commissioner also serves as the NPM mechanism, the legislation pertaining to the Commissioner should comply with the relevant provisions of the OPCAT, particularly Article 35, which states that "[m]embers [...] of the national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions".³⁷
- 32 The functional immunity of the Commissioner, Representatives and staff is not explicitly stated in the Constitution nor in the Draft Constitutional Law. It is recommended to supplement the Draft Constitutional Law in this respect, by explicitly **providing that the Commissioner, Representatives and the Commissioner's staff at the Center for Human Rights shall not incur civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacity.**³⁸ The relevant provision should also specify that functional immunity

32 See SCA General Observation 1.1 and Justification to General Observation 2.3, which considers functional immunity as being an "essential hallmark of institutional independence".

33 See e.g., ODIHR, [Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland](#), 31 October 2017, para. 82. As a comparison, regarding the immunity of judges, see the case of *Ernst v. Belgium*, ECtHR Judgment of 15 July 2003 (Application no. 33400/96, only in French), para. 85, holding that immunity ('*privilège de juridiction*') pursues the legitimate aim of ensuring that judges are protected against undue lawsuits and enabling them to exercise their judicial function peacefully and independently.

34 SCA General Observation 2.3 and its Justification. See also GANHRI, SCA Report and Recommendations of the Session (May 2016), p. 37.

35 Venice Commission, Venice Principle 23. The CoE European Commission against Racism and Intolerance (ECRI) has similarly stated that: "*persons holding leadership positions should benefit from functional immunity, be protected against threats and coercion and have appropriate safeguards against arbitrary dismissal or the arbitrary non-renewal of an appointment where renewal would be the norm*"; see ECRI, [General Policy Recommendation No. 2: Equality Bodies to Combat Racism and Intolerance at National Level](#), CRI(2018)06, adopted on 7 December 2017.

36 See e.g., ODIHR, [Final Opinion on the Draft Act Amending the Act on the Commissioner for Human Rights of Poland](#), 16 February 2016, Sub-Section 3.2 on the Personal and Temporal Scope of the Functional Immunity; ODIHR-Venice Commission, [Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro](#), adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011), para. 23. See also Venice Commission, Venice Principle 23; and [Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina](#), adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), [CDL-AD\(2015\)034](#), para. 69.

37 Venice Commission, [Opinion on The Draft Law "On The Commissioner For Human Rights" of Kazakhstan](#), [CDL-AD\(2021\)049](#), 13 December 2021, para 48.

38 See SCA General Observation 2.3, which refers to the protection from criminal or civil liability for "acts undertaken in good faith in their official capacity". See also Venice Commission, [Opinion on Amendments to the Law on the Human Rights Defender of Armenia](#), [CDL-AD\(2006\)038](#), paras. 74 and 76.

should apply even after the end of the leadership body's mandate or after a staff member ceases his/her employment with the NHRI.³⁹

- 33 An additional safeguard to protect functional immunity is also to **guarantee in legislation the inviolability of the NHRI's premises, property, means of communication and all documents, including internal notes and correspondence,⁴⁰ as well as of baggage, correspondence and means of communication belonging to the members of the NHRI's leadership body and professional staff.⁴¹ It is recommended to supplement the Draft Constitutional Law accordingly.**
- 34 Overall, there needs to be a proper balance between immunity as a means to protect an NHRI against pressure and abuse from state powers or individuals (including, in particular abusive prosecution, false, frivolous, vexatious or manifestly ill-founded complaints, or harassment) and the general concept that nobody, including an NHRI leadership, should be above the law.⁴² This concept derives from the principle of equality before the law, which is also an element of the rule of law.⁴³ Indeed, the Sub-Committee on Accreditation has recognized this and recommends that the law should clearly establish the grounds, and a clear and transparent process, by which the functional immunity of NHRI leadership or members of the decision-making body may be lifted.⁴⁴
- 35 Article 83-1(3) of the Constitution provides that “[d]uring the term of his powers, the Commissioner for Human Rights may not be arrested, brought to justice, subjected to administrative penalties imposed in court, brought to criminal responsibility without the consent of the Senate, except for cases of detention at the scene of a crime or serious crimes”. Article 3(3) of the Draft Constitutional Law similarly allows for charges against the Commissioner with the consent of the Senate, except in cases of “grave crimes”. As such, these provisions introduce a special procedural safeguard, i.e., obtaining the consent of the Senate to lift the immunity if the Commissioner is accused of breaking the law, except in case of detention at the scene of a crime or when s/he is suspected of a so-called “serious crime” where the Senate’s consent is not needed. Such a procedural safeguard should help protect the mandate-holder against arrest, detention and prosecution, and thereby prevent potentially abusive prosecution, or similar manifestly ill-founded complaints, as well as criminal charges that would be covered by the functional immunity, to proceed further.
- 36 However, the Venice Commission previously raised concern regarding the circumstances when such a safeguard will not apply, in case of alleged “serious crime”. It considered such terminology to be very unclear, recommending specifying minimum sentences to clarify the definition⁴⁵ and thereby avoid potential arbitrariness in the application of this exception. Alternatively, the Senate could also be required to review all instances of alleged commission of a “serious crime”.

39 See Venice Commission, *Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina*, [CDL-AD\(2015\)034](#), para. 69; and ODIHR-Venice Commission, *Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro* (2011), para. 23.

40 See ODIHR and Venice Commission, *Joint Opinion on the Law No. 2008-37 of 16 June 2008 relating to the Higher Committee for Human Rights and Fundamental Freedoms of the Republic of Tunisia*, 17 June 2013, para. 52.

41 See e.g., ODIHR, *Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland*, 31 October 2017, para. 44. See also Venice Commission, *Opinion on The Draft Law “On The Commissioner For Human Rights” of Kazakhstan*, [CDL-AD\(2021\)049](#), 13 December 2021, paras. 50-52, which recommended express provision for protection extending “the scope of the protection [...] to all documents of the Institution, including correspondence and internal notes, as well as to the baggage and means of communication belonging to the Commissioner”. See also ODIHR-Venice Commission, *Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro* (2011), para. 23.

42 SCA General Observation 2.3 which states that “[i]t is acknowledged that no office holder should be beyond the reach of the law and thus, in certain exceptional circumstances it may be necessary to lift immunity”.

43 See Venice Commission, *Rule of Law Checklist*, [CDL-AD\(2016\)007](#), 18 March 2016, pages 18-19.

44 See e.g., *SCA Report and Recommendations* (May 2016), page 37.

45 Venice Commission, *Opinion on The Draft Law “On The Commissioner For Human Rights” of Kazakhstan*, [CDL-AD\(2021\)049](#), 13 December 2021, paras. 44-46.

- 37 Certain other aspects of immunity are provided for by Article 3 paragraphs 1 – 3 and 5. However, the wording of these provisions requires clarification. Article 3(2) provides that “[t]he conditions and procedure for proceedings in cases of administrative offenses or pre-trial investigation against the Commissioner are determined by the relevant laws of the Republic of Kazakhstan”. This appears to, firstly, leave open the possibility of charging the Commissioner with administrative offences, and secondly, to leave the detail of those possible restrictions on immunity to undefined legislation. Such broad and vague provisions raise serious concerns as to whether the Commissioner enjoys the necessary protections to carry out his/her mandate in full independence. Moreover, secondary legislation should not be used to regulate the procedure for removal of immunity.
- 38 In light of the foregoing, **the Draft Constitutional Law should clarify the grounds, and establish a clear and transparent process, by which the immunity of the Commissioner, the Representatives and NHRI staff may be lifted.** At the same time, a proper mechanism is needed to prevent or stop such investigations or proceedings where there is no proper evidence to suggest criminal liability on the part of the NHRI members, or where functional immunity considerations apply. In particular, **the request to lift immunity should be submitted by a body independent from the executive, and clear, transparent and impartial criteria and procedures shall determine whether immunity should be lifted or not in a given case.**⁴⁶

RECOMMENDATION C.

To explicitly provide, in the Draft Constitutional Law, functional immunity for the Commissioner, the Representatives and all staff of the Commissioner’s Office (National Center for Human Rights), specifying that they shall not incur civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacity;

To provide that such functional immunity also applies after the end of the mandate or after a staff member ceases their employment;

To clarify the grounds, and establish a clear and transparent process, by which the functional immunity may be lifted; and

To guarantee in legislation the inviolability of the NHRI’s premises, property, means of communication and all documents, including internal notes and correspondence, as well as of baggage, correspondence and means of communication belonging to the members of the NHRI’s leadership body and professional staff.

5. THE COMMISSIONER’S MANDATE

5.1. Human Rights Promotion and Protection Mandate

- 39 The main tasks and functions of the Commissioner are set out in Articles 7 to 12, with complaints handling functions further detailed in Articles 13 to 17 of the Draft Constitutional Law. The SCA requires that NHRIs have both promotion and protection functions. According to the SCA’s General Observation, promotion functions include

⁴⁶ See e.g., ODIHR, [Final Opinion on the Draft Act Amending the Act on the Commissioner for Human Rights of Poland](#), 16 February 2016, Sub-Section 4 on the Procedure for Lifting the Commissioner’s Immunity from Criminal Proceedings.

education, training, advising, outreach and advocacy while protection functions include monitoring, inquiring, investigating, reporting, as well as complaint handling.⁴⁷ The Commissioner's given functions cover most of these areas. It is also welcomed that the Commissioner appears to be given high standing in the country, with high-level access to the courts, parliament and government (Article 7). Various aspects of the Commissioner's mandate, however, would benefit from clarification to strengthen the Office's role to effectively promote and protect a range of human rights.

- 40 Article 10 provides that the Commissioner promotes "legal education". This is a narrow view of human rights education within the legal sphere, which is not in keeping with the broad and cross-cutting nature of human rights, nor international understandings of human rights education. **Article 10 should be amended to clarify that human rights education is not solely confined to the legal field.**
- 41 Article 11 provides for the powers of the Commissioner to make proposals for the improvement of legislation or concluding of international treaties. This is to be done in the manner prescribed by two other pieces of legislation mentioned in the Article. The competence to recommend legislative improvements in line with international human rights standards is an important one which should be clearly provided for in the NHRI enabling law. **The present wording of Article 11 would benefit from clarification to ensure that this power of the Commissioner is not limited by other legislation.**
- 42 There is no explicit reference to the mandate of the Commissioner covering private entities. SCA General Observation 1.2 requires that an NHRI mandate should extend to **acts and omissions of both the public and private sectors**.⁴⁸ Venice Principle 13.2 provides that "[t]he mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities." Accordingly, **the Draft Law should explicitly provide that the Commissioner's mandate also covers the private sector.**
- 43 The Draft Constitutional Law does not mention the scope of the "human rights" covered by the Commissioner's Office. The SCA requires that NHRIs have a broad human rights mandate, applied to all functions that should at a minimum cover – but not be limited to – human rights in conventions ratified by the state.⁴⁹ Noting further the concerns of the CERD Committee in paragraph 22 *supra*, explicit reference to the anti-discrimination role of the Commissioner's Office could be helpful in ensuring that this issue forms a clear part of the institution's mandate. **The Draft Law should specify the human rights covered by the Commissioner's Office, including that its mandate covers all rights and freedoms in the core UN human rights conventions with an explicit reference to anti-discrimination.**

5.2. The Commissioner as the National Preventive Mechanism

- 44 Pursuant to Article 9 of the Draft Constitutional Law, the Commissioner performs the function of a NPM under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).⁵⁰ As such, the

47 SCA [General Observation](#) 1.2.

48 See SCA [General Observation](#) 1.2. See also for example, GANHRI SCA, [Accreditation Report October 2019](#), p. 29 and p. 11.

49 See also ODIHR, [Opinion on the draft Law on the National Commission for the Promotion and the Protection of Fundamental Human Rights and the Fight against Discrimination in Italy](#) (19 November 2021); and [Opinion on the Draft Law Amending and Supplementing the Ombudsman Act of Bulgaria](#) (29 March 2017).

50 *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT), adopted by General Assembly resolution A/RES/57/199 of 18 December 2002. The Republic of Kazakhstan submitted its instruments of ratification of the OPCAT on 22 October 2008.

legislation should comply with the relevant provisions of the OPCAT, particularly Article 18, which states that State Parties “*shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel*” and “*shall give due consideration to the [Paris] Principles*” when establishing national preventive mechanisms.⁵¹ The requirements for NPM legislation deriving from OPCAT have been elaborated upon by the Sub-Committee for the Prevention of Torture (“SPT”). The SPT requires that as a minimum, enabling legislation grants the NPM the power to freely select the places of deprivation of liberty, as well as timing of such visits, and mandates them to make recommendations to the relevant authorities.⁵²

- 45 It is understood that the NPM role of the Commissioner is set out in separate legislation. This Urgent Opinion only addresses aspects of the NPM where they may be impacted by the content of this Draft Constitutional Law. **In particular, the Draft Constitutional Law provisions on immunity, security of tenure, representatives, staffing, and funding should be amended in light of the requirements for an NPM.**

6. SELECTION, APPOINTMENT AND TENURE

6.1. General Remarks

- 46 The criteria and modalities/procedure for the selection and appointment of NHRI leadership is critical for its independence. The SCA emphasises that the selection and appointment process for the NHRI should be detailed in enabling laws, with particular emphasis on transparency, broad consultation and participation of diverse societal forces.⁵³ It further notes that a selection and appointment process requires competent authorities to: a) publicize vacancies broadly; b) maximize the number of potential candidates from a wide range of societal groups; c) promote broad consultation and/or participation in the application, screening, selection and appointment process; d) assess applicants on the basis of pre-determined, objective and publicly available criteria; and e) select members to serve in their own individual capacity rather than on behalf of the organization they represent.⁵⁴
- 47 The SCA’s position is supported by a range of regional and international standards. The Venice Commission has noted in this respect that “*the way according to which an Ombuds[person] is appointed is of the utmost importance as far as the independence of the institution is concerned and the independence of the Ombudsman is a crucial corner stone of this institution*”.⁵⁵ Venice Principle 6 specifies that “[t]he Ombuds[person] shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution”. To best protect the institutional independence, the Venice Commission recommended that the basic procedure for election and dismissal of the Commissioner be included at the constitutional level.⁵⁶
- 48 Pursuant to Article 55 (1-1) of the Constitution, the Senate has the exclusive responsibility to elect the Commissioner for a five-year term and release her/him from office upon the recommendation of the President of the Republic of Kazakhstan.

51 See also the OHCHR, [Practical Guide on The Role of National Preventive Mechanisms](#) (2018).

52 For details, see the SPT, *Analytical Assessment Tool for National Preventative Mechanisms* (2016), CAT/OP/1/Rev.1.

53 SCA General Observations 1.7-1.8.

54 SCA General Observation 1.8.

55 Venice Commission, *Opinion on the draft law on prevention and protection against discrimination in North Macedonia*, [CDL-AD\(2018\)001](#), para. 69.

56 See e.g., Venice Commission, *Opinion on the draft law “On the Commissioner for Human Rights” of Kazakhstan*, [CDL-AD\(2021\)049](#), para. 19.

6.2. Eligibility Criteria

- 49 In order to qualify for the post of Commissioner, Article 4(2) of the Draft Constitutional Law provides that a person must be a citizen of Kazakhstan, at least 30 years old, with higher education and at least 5 years' experience in "protecting human and civil rights and freedoms". The Draft Constitutional Law also requires a ten-year permanent residency in Kazakhstan prior to election. While there are some positive aspects to the eligibility criteria for the Commissioner listed in this Article, particularly the requirement that the person has the necessary human rights experience, the absence of reference to the individual being of high moral standing and the ten-year permanent residency requirement are of concern.
- 50 The SCA considers that eligibility criteria for NHRI positions should not be too narrowly drawn. This is to ensure pluralism and encourage applications from a broad range of individuals. The Venice Principles similarly provide that criteria for ombudspersons "*shall be sufficiently broad as to encourage a wide range of suitable candidates*".⁵⁷ Importantly, they note that "*the essential criteria are high moral character, integrity and appropriate professional expertise and experience, including in the field of human rights and fundamental freedoms*".⁵⁸ In the present case, a restrictive provision of ten-year residency prior to the election would appear to unreasonably limit the pool of candidates, for example, by excluding those who were working as academics abroad or in international organisations prior to the date of the election. **The ten-year permanent residency requirement to be eligible for the position of Commissioner appears overly restrictive and should be reconsidered. Specific reference to the individual being of high moral standing should be included,** which could be determined on the basis of elements such as the absence of conviction for a serious criminal offence, personal history of integrity and independence, etc.⁵⁹
- 51 At the same time, the Draft Constitutional Law is silent on the eligibility criteria for the Representatives. **For clarity, the eligibility and selection criteria for Representatives should also be explicitly stated in the Draft Constitutional Law.**

6.3. Selection and Appointment Process

- 52 In its March 2012 review of the NHRI of Kazakhstan, the SCA expressed concern about the selection and appointment process for the Commissioner. Particularly, the SCA noted that vacancies were not advertised publicly and the selection process did not involve broad consultation with civil society.⁶⁰ In its 2021 Opinion, the Venice Commission recommended to provide for "*a public and transparent selection procedure, comprising public call, testing and shortlisting*" to respond to the requirements of "merit based" and "objective and transparent" selection procedure, while ensuring the Commissioner's election by a qualified majority of the Senate to strengthen the Commissioner's independence, impartiality and legitimacy.⁶¹
- 53 The provisions on the Commissioner's selection and appointment contained in Article 4 of the Draft Constitutional Law fail to meet the relevant international standards and do

57 Venice Commission, Venice Principle 8.

58 *Ibid.* (Venice Principle 8).

59 See 2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions, pages 123 and 152. See also Sub-Sections 2.1 and 3 of the [2022 Venice Commission's Compilation of Venice Commission Opinions concerning the Ombudsman Institution](#); and Principle 8 of the Venice Principles, which states that "[t]he essential criteria are high moral character, integrity and appropriate professional expertise and experience, including in the field of human rights and fundamental freedoms".

60 See SCA Report of March 2012, p. 8.

61 Venice Commission, *Opinion on The Draft Law "On The Commissioner For Human Rights" of Kazakhstan*, [CDL-AD\(2021\)049](#), 13 December 2021, paras. 58-62 and 67.

not address the concerns expressed by the SCA and the Venice Commission. In particular, the Draft Constitutional Law is entirely silent on the application process for filling the position of Commissioner.⁶² There are no requirements for wide advertisement of vacancies. The SCA emphasises that the selection process should aim at “[m]aximizing the number of potential candidates from a wide range of societal groups”. The Venice Principles similarly provide that “[t]he procedure for selection of candidates shall include a public call and be public, transparent, merit based, objective, and provided for by the law”.⁶³

54 In light of the above, **specific provision for the publication of vacancies, in a timely and accessible manner aiming at reaching potential candidates with a wide variety of backgrounds and expertise, should be included in the Draft Constitutional Law.**

55 As regards the nomination and selection procedure, the Draft Constitutional Law is unclear about how the process will be undertaken. It only states that the Commissioner is “elected [...] by the Senate [...] on the proposal of the President of the Republic of Kazakhstan” (Article 4(1)), which mirrors the wording of Article 55(1-1) of the Constitution). In addition, there is no further detail on how such a candidate is selected and assessed, including the composition of the selection panel, if there is any.⁶⁴ Moreover, there are no provisions in the Draft Constitutional Law for any public consultation process as part of the selection and appointment procedure.⁶⁵ Thus, it appears that the President would have the sole power to nominate the candidates, who are then voted by the Senate. The SCA has previously found similar provisions problematic.⁶⁶ Reference to the President as the sole nominating authority in Article 4 without any form of public consultation and/or involvement of civil society in the nomination/selection process raises concern and should be reconsidered as this may severely reduce the perceived and/or actual independence of the Commissioner.

56 **In light of the above, it is recommended to include detailed provisions on the application, screening, selection and appointment procedure for the Commissioner reflecting a broad, transparent and participatory process throughout, including the involvement of civil society.**⁶⁷ This can be done, for instance, through directly soliciting proposals from civil society and/or allowing civil society to directly participate in the evaluation of candidates as mentioned above. Specific provisions should also set out the criteria for identification, screening and evaluation of candidates and modalities for the nomination by the President, for instance by providing for the establishment of an independent pre-selection commission, whose composition reflects diverse societal groups (e.g., non-governmental organizations, universities, trade unions, concerned social and professional organizations, human rights groups).⁶⁸ Indeed, the SCA has generally found overly political panels or selection panels comprised entirely of political, governmental or administrative representatives to be problematic, and undermining the Paris Principles.⁶⁹ This commission would then select a limited pool of candidates who would then be proposed for appointment.⁷⁰ Of note, nominations by political entities, such as the President, are a common cause of concern for the SCA.⁷¹ At the same time,

62 See for example, [SCA Report on Montenegro](#) (May 2016), p. 17.

63 See Venice Commission, Venice Principle 7.

64 SCA Report on Iraq (March 2015), p. 7.

65 See for example, SCA Report on Bulgaria (March 2019) p. 16–17.

66 See e.g., SCA Report – Uzbekistan (December 2020).

67 See SCA General Observation 1.8.

68 The SCA considers that the requirement for pluralism extends to the selection process, see e.g., SCA, ‘[Accreditation Report— Great Britain \(EHRC\)](#)’ (November 2008), pp. 4-5.

69 See for example, SCA Report on Sri Lanka (May 2018) p. 36. See also Langtry & Roberts Lyer, *National Human Rights Institutions: Rules, Requirements, and Practice* (2021), p. 129.

70 See e.g., ODIHR, [Opinion on the Draft Law Amending and Supplementing the Ombudsman Act of Bulgaria](#) (29 March 2017), para. 25.

71 See e.g., Langtry & Roberts Lyer, *National Human Rights Institutions: Rules, Requirements, and Practice* (2021), p. 133.

changing the nominating authority in Kazakhstan would require new amendments to the Constitution.

- 57 **In any case, it is essential to include specific provisions setting out clear, predetermined and objective criteria for the identification and evaluation of candidates at all stages of the process.** To ensure an inclusive process, the legal drafters should also consult with various stakeholders, including civil society, when determining the most appropriate criteria and procedures for this purpose.⁷²
- 58 These concerns are also relevant for the selection and appointment processes for Representatives. The Draft Constitutional Law requires elaboration in this regard. Specifically, the Draft Constitutional Law only provides that the Representatives are appointed by the Commissioner (Article 19). The SCA requires that appointment procedures are in line with the Paris Principles.⁷³ Such requirements would also apply to Representatives. **The Draft Constitutional Law should detail the appointment process for Representatives in line with the Paris Principles. This should be merit-based, ensuring pluralism (see also Sub-section 6.6. *infra*) and transparency of the process.**

RECOMMENDATION D.

To include detailed provisions on the application, screening, selection and appointment procedure for the Commissioner reflecting a broad, transparent and participatory process throughout, including the involvement of civil society, while including specific provisions setting out clear and objective criteria for the identification and evaluation of candidates at all stages of the process.

6.4. Security of Tenure

- 59 The Paris Principles address general questions of independence and functionality of NHRIs. In terms of mandates for members of NHRIs, Principle B.3 on the “Composition and guarantees of independence and pluralism” emphasizes the importance of stable mandates, noting that without such stability, there can be no real independence. In its General Observations, the SCA also emphasizes the importance of “*ensur[ing] the continuity of [the NHRI’s] programs and services*”.⁷⁴ Principle B.3 further states that members of NHRIs shall be appointed via a special act that shall establish the specific duration of their mandate.
- 60 As already mentioned, whether an NHRI can play its role within the state to the full extent depends on various factors, including political and legal guarantees of independence. One such guarantee is the security of tenure of NHRI members or of the Ombudsperson. The SCA recommends fixed terms of office (from 3 to 7 years, renewable once) clearly defined in the legislation.⁷⁵ The Venice Principles recommend a term of office of not less than 7 years for Ombudspersons, preferably non-renewable.⁷⁶
- 61 The establishment of term limits allows Ombudspersons to act without any interference from the executive or the legislative branches, and to act without fear of dismissal for making decisions that are unpopular or contrary to the will of an executive or prevailing

72 See e.g., ODIHR, [Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland](#), 6 February 2017, paras. 46-47; and Venice Commission, [Opinion on the draft Constitutional Law on the Human Rights Defender](#), adopted by the Venice Commission at its 109th Session (Venice, 9-10 December 2016), paras. 32-33.

73 SCA Report on Bolivia (March 2017), p. 19.

74 SCA General Observation 2.2.

75 SCA General Observation 2.2.

76 Venice Commission, [Venice Principle](#) 10.

political powers. The security of tenure of an Ombudsperson also ensures stability of the office and reduces the risk of political influence.⁷⁷

- 62 Article 4 of the Draft Constitutional Law provides for a five-year term for the Commissioner, which also reflects what is stated under Article 55(1-1) of the Constitution. There is no provision in the Constitution or in the Draft Constitutional Law regulating reappointment and clarifying whether the mandate is renewable. The Venice Commission previously recommended reconsideration of the 5-year term in favour of a (non-renewable) 7-year term, which would not then be shorter than the appointing body (Senate).⁷⁸ SCA General Observation 2.2 refers to the possibility of the mandate being renewed only once. **ODIHR recommends to consider establishing an extended non-renewable term, even though this would require amending the Constitution.**
- 63 **In any case, the Draft Constitutional Law should clarify whether the Commissioner's mandate is renewable, and if yes, specify that it can only be renewed once, while providing for the process by which an incumbent Commissioner may undertake a second term and whether they can ever be re-elected in the future, bearing in mind the requirements for the selection and appointment process.**
- 64 The Draft Law is also largely silent as regards the tenure provisions for the Representatives. **The Draft Law should include clear provisions on the security of tenure of Representatives, including length of appointment and renewability.**

RECOMMENDATION E.

To consider establishing a longer, non-renewable term of office or clarify whether the Commissioner's mandate is renewable, and if yes, specify that it can only be renewed once (for a 5-year term), while providing for the process by which an incumbent Commissioner may receive a second term and whether they can ever be re-elected in the future, bearing in mind the requirements for the selection and appointment process.

6.5. Dismissal and Transition Period

- 65 NHRI legislation should contain an independent and objective dismissal process following predefined criteria, similar to that accorded to members of other independent state agencies.⁷⁹ The grounds for dismissal must be clearly defined and appropriately confined to those actions or circumstances which impact adversely on the capacity of the NHRIs to fulfil their mandates. As emphasized in SCA General Observation 2.1, where appropriate, the legislation should specify that the application of a particular ground for dismissal must be supported by the decision of a court or other independent body with appropriate jurisdiction. In any case, dismissal should not be based solely on the discretion of appointing authorities.⁸⁰

77 ODIHR, *Urgent Note focuses on the issue of the continuation of ombudspersons in the transition period following the end of their terms of office until the appointment of a new office-holder in Poland* (2020).

78 Venice Commission, *Opinion on The Draft Law "On The Commissioner For Human Rights" of Kazakhstan*, [CDL-AD\(2021\)049](#), 13 December 2021, para 64-66.

79 SCA General Observation 2.1. See also SCA Report on Bosnia and Herzegovina (November 2016), where the SCA specifically noted that "the enabling law of an NHRI must contain an independent and objective dismissal process similar to that accorded to members of other independent State agencies."

80 *Ibid.* SCA General Observation 2.1. See also CoE Committee of Ministers Recommendation CM/Rec(2021)1 on NHRIs, which similarly provides for the need for a clear dismissal process: "To ensure independence, the enabling legislation of a NHRI should contain an objective dismissal process for the NHRI leadership, with clearly defined terms in a constitutional or legislative text. The dismissal process should be fair and ensure objectivity and impartiality and should be confined to only those actions which impact adversely on the capacity of the leaders of NHRIs to fulfil their mandate" (para. 5).

- 66 Article 55(1-1) of the Constitution provides that the Senate has the exclusive responsibility to release the Commissioner from office, upon the recommendation of the President of the Republic. Article 5(3) of the Draft Constitutional Law lists a number of grounds for the dismissal of the Commissioner by the Senate. Some of these raise concern as they are vague and open to broad interpretation. For example, the Commissioner can be dismissed for so-called “*non-compliance with the requirements and restrictions established by this Constitutional Law and other laws of the Republic of Kazakhstan*”. The Venice Commission highlighted this as a problematically vague provision **to be deleted or narrowed down to be limited to the most serious violations.**⁸¹ **ODIHR concurs with such a recommendation.**
- 67 Moreover, there appears to be repetition between Article 5(1) and Article 5(2) and the difference between these two provisions, if any, should be clarified. Article 5(2) refers to “early dismissal”, the provisions for which are set out in Article 5(3). However, Article 5(1) only refers to “dismissal”. Unless this is an issue of interpretation, in order to avoid any ambiguity that can potentially undermine the security of tenure of the Commissioner, and ultimately, their independence, it is suggested to use uniform terminology throughout the Draft Law, excluding any possibility of situations where the Commissioner could be arbitrarily dismissed. The Venice Principles emphasize the importance of clear provisions: “[t]he Ombudsman shall be removed from office only according to an exhaustive list of clear and reasonable conditions established by law”. These shall relate solely to the essential criteria of “incapacity” or “inability to perform the functions of office”, serious “misbehaviour” or “misconduct”, which shall be narrowly interpreted.⁸² **The Draft Law should provide for clear and objective grounds for all cases of dismissal, while ensuring that they are limited to only serious grounds of misconduct or incompetence or to those actions which impact adversely on the capacity of the Commissioner’s ability to fulfil her/his mandate.**
- 68 In addition, Article 5 lacks details on the dismissal procedure. In this respect, the SCA has stated that the dismissal process should not be based solely on the discretion of the appointing body. It is unclear how and on which basis the President will recommend to the Senate the Commissioner’s early release from office. Moreover, the dismissal decision will be in the hands of the Senate, but with no mention of special voting requirements, which is highly problematic. Where a process for removal involves the parliament, care must be taken to ensure that removal cannot be for political reasons and must be by a qualified majority vote.⁸³ The Venice Principles also emphasize that the parliamentary majority required for removal – by Parliament itself or by a court on request of Parliament – shall be equal to, and preferably higher than, the one required for election. The procedure for removal shall be public, transparent and provided for by law.⁸⁴ When reviewing the 2021 Draft Law, the Venice Commission noted the need for a public and transparent procedure, including a procedure for challenging the dismissal before the courts.⁸⁵ **The Draft Constitutional Law should be amended to revise the dismissal grounds, provide clear and detailed provisions to ensure publicity and transparency of a dismissal process of a Commissioner that require, inter alia, a**

81 Venice Commission, *Opinion on The Draft Law “On The Commissioner For Human Rights” of Kazakhstan*, [CDL-AD\(2021\)049](#), 13 December 2021, para. 73.

82 See SCA General Observation 2.1 and its Justification. See also Venice Commission, Venice Principle 11 and CoE Committee of Ministers Recommendation CM/Rec(2021)1 on NHRIs, para. 5.

83 See Venice Commission, *Opinion on The Draft Law “On The Commissioner For Human Rights” of Kazakhstan*, [CDL-AD\(2021\)049](#), 13 December 2021, para. 77, which specifies that such a qualified majority “should be at least equal to (and preferably higher than) the qualified majority required for election” in order to “protect the legal status of Commissioner, particularly his or her independence, and for preventing the politicisation of his or her possible dismissal”. See also ICC SCA Report on Latvia (March 2015).

84 Venice Commission, Venice Principle 11.

85 Venice Commission, *Opinion on The Draft Law “On The Commissioner For Human Rights” of Kazakhstan*, [CDL-AD\(2021\)049](#), 13 December 2021, paras. 76-79.

qualified majority of the Senate as well as the right of appeal to an independent tribunal, possibly to the Constitutional or Supreme Courts.

- 69 Similarly, there are no provisions for the dismissal of the Representatives. The SCA has held that “[t]he head of an institution should also not be able to remove a deputy without an independent and objective dismissal procedure, backed by transparent and objective criteria. These provisions may be contained in legislation, regulation, or another binding administrative guideline, but ideally should be in the enabling law.”⁸⁶ **The Draft Constitutional Law should be supplemented to provide clear and detailed provisions for the dismissal process of Representatives, including the right to appeal.**
- 70 Transitional provisions for leadership are also important for the stability of NHRIs, either in case of early dismissals or when the mandate of the NHRI leadership comes to its end. CoE Committee of Minister’s Recommendation (2019)6 states that “*arrangements should be in place so that the post of the head of any NHRI does not stay vacant for any significant period of time*”.⁸⁷ Moreover, as expressly recommended in Principle 13 of the Belgrade Principles, a vacancy in the composition of the membership of a NHRI “*must be filled within a reasonable time*” and “[a]fter expiration of the tenure of office of a member of a NHRI, such member should continue in office until the successor takes office”.⁸⁸ ODIHR specifically recommended that legislation should establish procedures to ensure NHRIs’ continuous functioning without interruption when an Ombudsperson’s term of office comes to an end, either through provisions allowing ombudspersons to continue their mandate until their successor is appointed or through the introduction of clearly defined rules, which would allow NHRIs to continue effectively performing their functions, for instance by having the Deputy Ombudsperson perform the Ombudsperson’s functions in the interim.⁸⁹
- 71 As there is no provision for a Deputy Commissioner in the Draft Constitutional Law, including clear transitional provisions in the Draft Constitutional Law is particularly important. **In cases of early end of the term of Commissioner, the Draft Constitutional Law should ensure sufficient time for the selection and appointment process to ensure that the process for a replacement Commissioner is Paris Principles-compliant. Also, when the Commissioner’s terms of office comes to an end prior to the election of a new Commissioner, the Draft Constitutional Law should provide for an interim mechanism to ensure the Commissioner’s Office continuous functioning pending the appointment of the new office-holder.** This can be by allowing the incumbent Commissioner to continue his/her mandate until the election of the new Commissioner (which should be required within a set period, e.g. 3 months), or – where this is not possible due to the situation of the incumbent Commissioner - by having a Deputy Commissioner, Representative, or head of the Centre for Human Rights being able – through a specific provision in the Draft Constitutional Law - to perform all the Commissioner’s functions in the interim.

86 SCA Report on Timor-Leste (November 2013) p. 31– 32; SCA Report on Mauritius (October 2014) p. 22.

87 CoE Recommendation CM/Rec(2019)6 of the Committee of Ministers to member States on the development of the Ombudsman institution, 16 October 2019, par. 3.

88 Human Rights Council Report on National institutions for the promotion and protection of human rights, 1 May 2012.

89 See e.g., ODIHR, [Urgent Note on International Standards and Comparative Practices Regarding the Continuation of Ombudspersons’ Terms of Office until the Appointment of a New Office-Holder](#), 14 October 2020.

RECOMMENDATION F.

To revise the dismissal grounds, provide clear and detailed provisions to ensure publicity and transparency of the dismissal process of a Commissioner that require, inter alia, a qualified majority of the Senate as well as the right of appeal to an independent tribunal, possibly to the Constitutional or Supreme Courts, while removing unclear dismissal grounds; .

To provide for an interim mechanism to ensure the Commissioner's Office continuous functioning pending the appointment of the new office-holder.

6.6. Pluralism

- 72 The Draft Law appears to be silent on pluralism within the Commissioner's Office at all levels. This is contrary to the requirement of Paris Principle B.1, which refers to the need to ensure "*the pluralistic representation of social forces (of the civilian society) involved in the promotion and protection of human rights*". It is important to note that pluralism refers to various kinds of diversity, including ethnic and linguistic minorities, persons with disabilities, and ensuring the equitable representation of women and men in the NHRI, including in leadership positions.
- 73 While there are diverse models for ensuring pluralism in the composition of NHRIs, the SCA has particularly noted that when both the leadership and the staff are representative of "*a society's social, ethnic, religious and geographic diversity the public are more likely to have confidence that the NHRI will understand and be more responsive to its specific needs. Additionally, the meaningful participation of women at all levels is important to ensure an understanding of, and access for, a significant proportion of the population. [...] The diversity of the membership and staff of an NHRI, when understood in this way, is an important element in ensuring the effectiveness of an NHRI and its real and perceived independence and accessibility.*"⁹⁰ General Observation 1.7 further notes that a "*diverse decision-making and staff body facilitates the NHRI's appreciation of, and capacity to engage on, all human rights issues affecting the society in which it operates, and promotes the accessibility of the NHRIs for all citizens.*"⁹¹ The absence of a requirement for pluralism in the enabling legislation was raised as a concern in the SCA's 2012 review of the NHRI of the Republic of Kazakhstan. **The Draft Constitutional Law should provide for pluralism in the composition of the Commissioner's Office at all levels and include reference to various kinds of diversity, including ethnic and linguistic minorities, persons with disabilities, and ensuring the equitable representation of women in the NHRI, including in leadership positions** (see also Sub-Section 9 *infra*).
- 74 It is also important to establish human resources policies, including a zero-tolerance policy towards harassment, sexual harassment, sexism and various forms of abuse, and other internal organizational features that enable women and men to participate and advance in the NHRI on an equal footing.⁹² Such aspects could also be specifically mentioned in the Draft Constitutional Law.

⁹⁰ SCA General Observation 1.7. See also ODIHR, [Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland](#), 6 February 2017; [ODIHR Opinion on the Draft Amendments to the Law on Civil Service of Ukraine](#) (10 May 2016); and ODIHR, [Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland](#), 31 October 2017.

⁹¹ SCA General Observation 1.7.

⁹² See e.g., ODIHR, *Handbook for National Human Rights Institutions on Women's Rights and Gender Equality*, 4 December 2012, p. 78.

RECOMMENDATION G.

To provide for pluralism in the composition of the Commissioner's Office at all levels and include reference to various kinds of diversity, including ethnic and linguistic minorities, persons with disabilities, while ensuring the equitable representation of women in the NHRI, including in leadership positions, and the development of gender- and diversity-sensitive human resources policies.

7. THE COMMISSIONER'S POWERS & FUNCTIONS

7.1. Restrictions and Limitations on Commissioner's Powers and Functions

- 75 A number of restrictions on the powers and functions of the Commissioner appear to be contained in the Draft Constitutional Law. These risk undermining the work of the Commissioner and raise questions about the independence of the NHRI.
- 76 Article 13(2) of the Draft Constitutional Law limits the competency of the Commissioner regarding complaints in respect of actions or inactions and decisions of the President. This is problematic. The rule of law requires that no person is above the law. Further, human rights violations can emanate from any part of the government. In its 2021 Opinion, the Venice Commission recommended that *“activities of the President and First President, unless they fall into the realm/area of sovereignty exercised by the Head of State should fall within the monitoring competence of the [Commissioner]”* and further that *“[e]xemptions of jurisdiction to the activities of the President should be limited to those of an exceptional nature or of a political nature.”*⁹³ **Article 13(2) should be revised to more clearly circumscribe the limitations on the competence of the Commissioner relating to President's actions/inactions and decisions.**
- 77 Article 14(1)(2) appears to be worded ambiguously, giving the Commissioner the right *“to receive access in accordance with the established procedure to documents of state organizations and public associations relating to issues of human and civil rights and freedoms”*. It is unclear from the text what the “established procedures” are. Similar language appears in Article 18(1) regarding the obligations of state bodies and others to provide the Commissioner with the necessary materials for their work. In principle, the Commissioner should have a legally enforceable right to unrestricted access to all relevant documents, databases and materials. At times, this may also include those materials, which might otherwise be legally privileged or confidential.⁹⁴ The law should provide for the grounds and the procedure for requesting and accessing such information. Any restriction, for instance on the ground of national security, should not be unreasonably or arbitrarily applied and it should be possible to challenge a refusal to communicate so-called “secret” information.⁹⁵ **In order to ensure that the Commissioner has full access to all materials they require for their work, the ambiguity in Articles 14 and 18 should be clarified in light of the foregoing.** Additionally, it may be beneficial to discuss further ways of strengthening the NHRI's mandate to compel authorities to provide requested information and above-mentioned access.⁹⁶ To ensure this, the power to request information, which is central to the proper

93 Venice Commission, *Opinion on The Draft Law “On The Commissioner For Human Rights” of Kazakhstan*, [CDL-AD\(2021\)049](#), 13 December 2021, para 30.

94 See e.g., Venice Commission Principles, [CDL-AD\(2019\)005](#), Principle 16.

95 See e.g., ODIHR, *Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland*, 6 February 2017, para. 39.

96 See 2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions, page 149.

execution of the NHRI's mandate, **should be supported by specific sanctions for non-compliance, which should be set out in the Draft Constitutional Law.**⁹⁷

- 78 Article 3(8) provides that “[i]n the event of the introduction of a state of emergency throughout the territory of the Republic of Kazakhstan or in its individual areas, the Commissioner shall carry out his activities in the manner established by the legislation of the Republic of Kazakhstan.” The SCA has issued specific guidance for NHRIs operating during states of emergency, emphasizing that they are expected to conduct themselves “with a heightened level of vigilance and independence, and in strict accordance with its mandate”.⁹⁸ Any restrictions on its mandate must not be unreasonably or arbitrarily applied and should only be exercised under due process.⁹⁹ **Article 3(8) should be amended to ensure that any limitations on the Commissioner’s mandate during a state of emergency are applied strictly in line with the Paris Principles.** ODIHR Report on NHRIs in a Public Emergency (2020) can serve as a useful reference tool for the Commissioner’s Office on the role of NHRIs and preconditions to continue and intensify the work during emergencies.

RECOMMENDATION H.

To amend Article 13(2) to more clearly circumscribe the limitations on the competence of the Commissioner relating to President’s actions/inactions and decisions.

7.2. Engagement with the International Human Rights System

- 79 The SCA considers that “the Paris Principles recognise that monitoring and engaging with the international human rights system, in particular the Human Rights Council and its mechanisms (Special Procedures and Universal Periodic Review (UPR)) and other treaty bodies, can be an effective tool for NHRIs in the promotion and protection of human rights domestically.”¹⁰⁰
- 80 Article 7(11) of the Draft Constitutional Law provides two roles for the Commissioner in relation to the international human rights system: “The Commissioner participates at the invitation of the authorized bodies in the preparation and discussion of national reports that are submitted to the bodies and committees of the United Nations [...]. The Commissioner expresses an independent opinion on these issues in accordance with the procedures for these bodies and committees.” As underlined by the SCA, “[w]hile it is appropriate for governments to consult with NHRIs in the preparation of a state’s reports to human rights mechanisms, NHRIs should neither prepare the country report nor should they report on behalf of the government”.¹⁰¹ The Draft Constitutional Law should be clarified to ensure that **the Commissioner has the power to submit his/her own reports to the UN Treaty Bodies and similar regional and international conventional mechanisms in a fully independent manner.** Also, Article 7(11) of the Draft Constitutional Law can be improved in order to ensure that the role of the Commissioner is Paris Principles-compliant, by specifying that “participates” in the preparation of state reports means consultation, in line with the SCA requirements.

97 See e.g., ODIHR, [Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland](#), 31 October 2017, para. 63. See also Venice Commission, [Opinion on the Draft Constitutional Law on the Human Rights Defender of Armenia](#), CDL-AD(2016)033, para. 29.

98 SCA General Observation 2.5 (2018).

99 SCA General Observation 2.6 (2018).

100 SCA General Observation 1.4 (2018).

101 SCA General Observation 1.4 (2018).

- 81 In light of the foregoing, **Article 7 should be amended to reflect that any participation in the preparation of State reports to treaty bodies is limited to consultation and is undertaken with due regard for the independence of the Commissioner’s Office, while clarifying that the Commissioner has the power to submit his/her own reports to international conventional mechanisms. Further, follow-up to recommendations of the United Nations treaty bodies and the UPR should be included as a specific function of the institution.**

7.3. Publicity of Reports

- 82 Article 8 of the Draft Constitutional Law obliges the Commissioner to prepare and submit annual and special reports. This Article would benefit from clarification. Article 8(1) provides that the annual reports of the Commissioner are submitted “for consideration by the President”. Article 8(4) provides that the Commissioner approves the procedure for “preparing and distributing” these reports. Article 8(5) states that reports are subject to publication “*in the manner prescribed by [...] legislation*”.
- 83 It is unclear if secondary legislation may be able to limit the right of the Commissioner to publish their reports. The SCA in its March 2012 review of the NHRI of Kazakhstan raised concerns regarding the lack of publicity of reports from the Commissioner’s Office.¹⁰² The SCA has placed considerable emphasis on the creation and submission of annual, special and thematic reports by NHRIs and allowing for public scrutiny of the effectiveness of an NHRI.¹⁰³ **The Draft Constitutional Law should be amended to explicitly provide for the publication of reports and recommendations by the Commissioner, without any form of involvement of the executive in the process. The reference to the consideration by the President under Article 8(1) should be removed.**
- 84 The SCA requires that annual reports of NHRIs be considered by parliament, and that this is explicitly provided for in enabling law.¹⁰⁴ State bodies should not have the authority to edit the NHRI’s annual report.¹⁰⁵ As previously recommended by the Venice Commission in its 2021 Opinion regarding provisions similar to the ones in the Draft Constitutional Law, “*to maintain that the CHR is appointed by, and primarily responsible to, the Parliament, reporting should be made to the Parliament.*”¹⁰⁶ **The Draft Constitutional Law should be amended to provide for direct submission of reports to and consideration by the parliament.**

7.4. Engagement with Civil Society

- 85 The Draft Constitutional Law is silent on engagement between the Commissioner and civil society. The SCA emphasizes the importance of this aspect of NHRIs’ role, requiring that it be provided for in enabling laws, and recommend formalising the relationship with civil society organisations.¹⁰⁷ Engagement with civil society must be regular, and demonstrated as part of the SCA accreditation process. A lack of engagement is a serious cause for concern for the SCA.¹⁰⁸ **The Draft Constitutional Law should be**

102 SCA Report, March 2012, p 9.

103 See also [ODIHR Opinion on the Draft Amendments to the Act on Establishment of the Slovak National Centre for Human Rights](#) (2019).

104 SCA Report, October 2014, p. 9.

105 SCA Report, November 2013, p. 15.

106 Venice Commission, Opinion on The Draft Law “On The Commissioner For Human Rights” of Kazakhstan, CDL-AD(2021)049, 13 December 2021, para 97.

107 SCA Report, May 2016, p. 10.

108 See GANHRI, The [Marrakech Declaration 2018: Expanding the civic space and promoting and protecting human rights defenders with a specific focus on women: The role of national human rights institutions](#) (adopted on 12 October 2018).

supplemented to specifically provide for regular and consistent engagement of the NHRI with civil society.

RECOMMENDATION I.

To supplement the Draft Constitutional Law to specifically provide for regular and consistent engagement of the NHRI with civil society.

8. ADEQUATE FUNDING OF THE COMMISSIONER'S OFFICE

- 86 Funding is vital to the independent functioning of NHRIs. The State is expected to provide the NHRI with an appropriate level of funding for all of its core operations and activities. The SCA considers that: “[t]o function effectively, an NHRI must be provided with an appropriate level of funding in order to guarantee its independence and its ability to freely determine its priorities and activities”.¹⁰⁹ It must also have the power to allocate funding according to its priorities. In particular, adequate funding should ensure the “gradual and progressive realisation of the improvement of the NHRI’s operations and the fulfilment of its mandate.” CoE Recommendation (2021)1 similarly emphasizes the importance of funding.¹¹⁰ According to the Recommendation, adequate funding includes allocation of funding for accessible premises, staff salaries, well-functioning communications systems and sufficient resources for mandated activities, including in times of financial constraint.¹¹¹
- 87 In its March 2012 report on the Commissioner’s Office, the SCA expressed concern regarding adequate funding. These concerns have been repeated more recently by several UN Treaty Bodies, including the ComESCR, the ComEDAW and the UN Human Rights Committee.¹¹² The budget of the Commissioner is mentioned in Article 21, which provides for a separate budget line for the NHRI,¹¹³ which is welcome and in line with good practice.¹¹⁴ However, this is the only article in the Draft Constitutional Law that regulates the budget. The absence of further detail raises concerns for the Draft Constitutional Law’s proper implementation and guarantees that the Commissioner’s Office will be provided with adequate financial, technical and human resources to carry in full its mandate, including its role as the NPM. This is particularly relevant as the NHRI requires considerable funding to guarantee its ability to fulfil its mandate, including its NPM functions, in its entirety. The addition of any mandate must be accompanied by adequate additional funding. **To ensure that Representatives/regional offices are also able to fulfil their mandates, adequate funding must also be explicitly provided to them. Article 21 should be expanded to specify that the Commissioner’s Office shall be provided with adequate financial, technical and human resources to ensure the full, independent and effective discharge of the responsibilities and**

109 SCA General Observation 1.10.

110 Article 6 of the CoE Recommendation CM/Rec(2021)1, Appendix, notes that “Member States should provide NHRIs with adequate, sufficient and sustainable resources to allow them to carry out their mandate, including to engage with all relevant stakeholders in a fully independent manner and freely determine their priorities and activities.”

111 SCA General Observation 1.10.

112 UN Committee on the Economic, Social and Cultural Rights (ComESCR), *Concluding observations on the second periodic report of Kazakhstan*, [CCPR/C/KAZ/CO/2](#), adopted on 29 March 2019, paras. 6-7; UN Human Rights Committee (CCPR), *Concluding observations on the second periodic report of Kazakhstan*, [CCPR/C/KAZ/CO/2](#), adopted on 9 August 2016, para. 8; UN Committee on the Elimination of all forms of Discrimination Against Women (ComEDAW), *Concluding observations on the fifth periodic report of Kazakhstan*, [CEDAW/C/KAZ/CO/5](#), adopted on 12 November 2019, paras. 19-20.

113 See the Commissioner for Human Rights in the Republic of Kazakhstan, *Capacity Assessment*, October 2018, p. 6.

114 See e.g., ODIHR, *Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland*, 6 February 2017, para. 76. See also e.g., Venice Commission, *Opinion on the Law on the People’s Advocate (Ombudsman) of the Republic of Moldova*, [CDL-AD\(2015\)017](#), para. 60.

functions of the institution, including its role as NPM. Explicit reference should be made to funding for the NPM.

- 88 In addition, there is no reference in the Draft Constitutional Law to the principle of financial autonomy of the Commissioner's Office. The SCA has clear recommendations on the importance of such autonomy, which notes that "[f]inancial systems should be such that the NHRI has complete financial autonomy as a guarantee of its overall freedom to determine its priorities and activities. National law should indicate from where the budget of the NHRI is allocated and should ensure the appropriate timing of release of funding, which is particularly important in ensuring an appropriate level of skilled staff."¹¹⁵ The SCA considers that there should not be any government interference, perceived or actual, in the financial autonomy of an NHRI. Decisions over and control of the budget of the Commissioner's Office must not be in the hands of the government, but in the control of the Commissioner, in line with their independence.¹¹⁶ The Commissioner should have the authority to submit its budget to parliament.¹¹⁷ Financial autonomy has also been emphasized as important for NPMs by the SPT. As previously suggested by the Venice Commission, it would be beneficial to explicitly refer to the role of the Commissioner in proposing their budget for the coming year, in line with the Venice Principles.¹¹⁸ **Article 21 should explicitly provide for the NHRI's financial autonomy and independent control over its budget.**
- 89 Additionally, to increase the NHRI's financial independence, some additional safeguards may also be contemplated. For instance, the Draft Constitutional Law may specify that the budgetary process should not be used to allocate/reduce funds from the budget in a manner that interferes with the NHRI's independence.¹¹⁹ The relevant legislation should also prescribe that the institution itself should submit its budget proposal to the parliament and that this proposal should be included in the national budget without changes.¹²⁰ In addition, legal provisions against unwarranted budgetary cutbacks could be introduced, including but not limited to the principle that compared to the previous year, any reductions in the NHRI's budget should not exceed the percentage of reduction of the budgets of the Parliament or the Government.¹²¹

RECOMMENDATION J.

Article 21 should be expanded to specify that the state will provide the Commissioner's Office with adequate funding to cover the costs of human, financial, material and technical capacity to guarantee the proper implementation of its (broad) mandate both as NHRI and as National Preventive Mechanism, while providing for the NHRI's financial autonomy, full control over its budget and safeguards against unwarranted budgetary cutbacks.

115 SCA General Observation 1.10.

116 *Ibid.* See also [ODIHR Opinion on the Draft Law Amending Article 8 of the Law on the Human Rights Defender in Armenia](#).

117 SCA Report on South Africa (November 2017), p. 33.

118 Venice Commission, *Opinion on The Draft Law "On The Commissioner For Human Rights" of Kazakhstan*, [CDL-AD\(2021\)049](#), 13 December 2021, para 103.

119 ODIHR, [Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland](#), 6 February 2017, para. 76.

120 *Ibid.* para. 76 (2017 ODIHR Opinion on NHRI of Iceland). See also e.g., Venice Commission, [Opinion on the possible reform of the Ombudsman Institution in Kazakhstan](#), adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007), CDL-AD(2007)020, paras. 8 and 30.VI.

121 *Ibid.* para. 76 (2017 ODIHR Opinion on NHRI of Iceland). See also Venice Commission, [Opinion on the Draft Constitutional Law on the Human Rights Defender of Armenia](#), CDL-AD(2016)033, para. 69.

9. STAFFING AND ADVISORY BODIES

9.1. National Center for Human Rights

- 90 Article 20 provides a legislative basis for the National Center for Human Rights, which effectively exercises the functions of secretariat for the Commissioner. Article 20(5) indicates that the staff of the National Center are to be civil servants “*carrying out their activities on the basis of the legislation of the Republic of Kazakhstan in the field of public service*”. The Draft Constitutional Law is otherwise silent on the selection and appointment of these staff. Article 19 on Representatives similarly provides that they are to be civil servants who “*manage the activities of the representative offices of the National Center for Human Rights*”.
- 91 The SCA has previously noted that NHRIs should be legislatively empowered to determine their staffing structure and the skills required to fulfil their mandates, to set other appropriate criteria (e.g. to increase diversity), and to select their staff in accordance with national law.¹²² Staff should be recruited according to an open, transparent and merit-based selection process that ensures pluralism (including in the context of gender, ethnicity, persons belonging to minority groups and persons with disabilities) and a staff composition that possesses the necessary skills required to fulfil the NHRI’s mandate, and that also ensures the equitable participation of women in the NHRI.¹²³ The Venice Principles similarly provide that the Ombudsperson “*shall be able to recruit his or her staff*” as does the Council of Europe Committee of Ministers 2021 Recommendation on NHRIs.¹²⁴ The Venice Commission has previously recommended that NHRI staff should not be civil servants, but have “distinct special status” regulated by the law.¹²⁵
- 92 At the same time, most countries have human resources policies pertaining to their public services that apply to all public agencies and entities, including NHRIs.¹²⁶ It is generally considered that in such cases, NHRIs should nevertheless benefit from a certain flexibility in applying public service rules on recruitment and career advancement.¹²⁷ More generally, an NHRI does not only need to be independent, but it must also be “seen” to be independent.¹²⁸ NHRI members and staff should not be too closely connected to the public service or considered or perceived as government employees.¹²⁹ In the past, ODIHR specifically recommended that if public service rules are applicable to NHRI staff, then the legal framework applicable to the Commissioner’s staff should exempt them, to a certain extent, from the general rules on civil service to ensure the Commissioner’s autonomy to recruit and manage his/her own staff – which constitutes an essential guarantee of this institution’s independence – and avoids the risk that the institution may be perceived as being under the executive’s control.¹³⁰
- 93 The independence of staff is critical to NHRIs. This is equally essential for Ombudspersons institutions.¹³¹ There should be specific mention in the Draft Constitutional Law of the autonomy and independence of National Centre staff

122 SCA General Observation 2.4.

123 *Ibid.* and SCA General Observation 1.7.

124 See Venice Commission, Venice Principle 22. See also the CoE Committee of Ministers’ *Recommendation CM/Rec(2021)1 on NHRIs*, Appendix, Article 7.

125 Venice Commission, *Armenia -Opinion on the legislation related to the Ombudsman's staff*, CDL-AD(2021)35, para. 26.

126 OHCHR, *Handbook on National Human Rights Institutions - History, Principles, Roles and Responsibilities* (2010), page 156.

127 *Ibid.* page 156 (2010 OHCHR Handbook on National Human Rights Institutions). See also UNDP-OHCHR, *Toolkit for Collaboration with National Human Rights Institutions* (December 2010), pages 173-174.

128 *Ibid.* page 39 (2010 OHCHR Handbook on NHRIs). See also, ODIHR- Venice Commission, *Joint Opinion on the Law on the Protector of Human Rights and Freedoms of Montenegro*, (Venice, 14-15 October 2011), paras. 12, 27 and 29.

129 International Council on Human Rights Policy and OHCHR, *Report on Assessing the Effectiveness of National Human Rights Institutions* (2005), page 8.

130 See e.g., ODIHR, *Opinion on the Draft Amendments to the Law on Civil Service of Ukraine* (10 May 2016), paras. 8 and 19-20.

131 Venice Commission, *Armenia -Opinion on the legislation related to the Ombudsman's staff*, CDL-AD(2021)35, paras. 16-19.

(including staff working with Representatives in regional offices) and to the terms and conditions for staff being equivalent and not lower than that of other public servants undertaking similar work and with similar qualifications and responsibilities, which is in keeping with the recommendations of the SCA.¹³² Further, it is for the NHRI to determine the required skills and selection criteria for its staff,¹³³ including with a view to ensure diversity and gender balance at all levels.

- 94 The SCA has made it clear that the majority of NHRI staff should not be secondees, nor redeployed from other branches of the public sector. Further, senior staff should never be secondees.¹³⁴ **The Draft Constitutional Law should specify that the Commissioner shall have the authority to determine the criteria, procedures and methods for recruiting all of their staff, including Representatives. In addition, the Draft Constitutional Law should provide for the autonomy and independence for the staff of the Commissioner’s Office and for Representatives.**

9.2. Advisory Bodies and Commission

- 95 Article 12 of the Draft Constitutional Law provides for an expert council “with advisory and analytical functions” and a coordinating council for the NPM. These bodies provide a potentially important opportunity to enhance the pluralism of the Commissioner’s Office and provide a forum for civil society. As noted above, the SCA strongly encourages NHRI co-operation with other human rights bodies, in particular with civil society.¹³⁵
- 96 However, the composition, purpose and role of these two councils are unclear, raising concerns as to their potential impact on the independence of the Commissioner’s Office. In particular, the powers and activities of these councils, membership, selection and appointment process, and regularity of meetings should be clearly set out in the Draft Constitutional Law, with due regard to the Paris Principles and particularly to the independence of the Commissioner. **Article 12 should be supplemented to include more detailed provisions on the composition of the expert council and coordinating council, taking into account plurality and gender parity, as well as criteria for selection and appointment of the members to ensure that they are free from political influence.**

10. RECOMMENDATIONS RELATED TO THE PROCESS OF PREPARING AND ADOPTING THE DRAFT CONSTITUTIONAL LAW

- 97 OSCE participating States have committed to ensure that legislation will be “*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*” (1990 Copenhagen Document, para. 5.8).¹³⁶ Moreover, key commitments specify that “*[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives*” (1991 Moscow Document, para. 18.1).¹³⁷ The Venice Commission’s

132 SCA, [Accreditation Report - Slovenia \(HRORS\)](#) (March/April 2010), p. 9.

133 SCA, [Accreditation Report - Belgium \(CEOOR\)](#) (March/April 2010), p. 11.

134 See Langtry & Roberts Lyer, *National Human Rights Institutions: Rules, Requirements, and Practice* (2021), chapter 4.8, citing SCA, ‘Accreditation Report - Thailand (NHRC)’ (November 2008) 11; SCA, ‘Accreditation Report - Mauritania (CNDH)’ (May 2011) 16; SCA, ‘Accreditation Report - Mali (CNDH)’ (March 2012) 13-14; SCA, ‘Accreditation Report - Bangladesh (NHRCB)’ (May 2011) 7; SCA, ‘Accreditation Report - Congo (CNDH)’ (October 2010) 4; SCA, ‘Accreditation Report - Tanzania (CHRAGG)’ (November 2016) 52.

135 See SCA General Observation 1.5.

136 See 1990 OSCE Copenhagen Document.

137 See 1991 OSCE Moscow Document.

- Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.¹³⁸
- 98 The SCA has emphasized that where NHRI laws are amended, an open, transparent and meaningful consultative process should be undertaken, including with the NHRI itself.¹³⁹ Similarly, concerning NPMs, the UN Sub-Committee on the Prevention of Torture requires that the NPM be consulted on changes to laws relevant to its mandate.¹⁴⁰ It is thus essential that the NHRI be meaningfully consulted at all stages of the law-making process, from the preparation of the initial draft by the government, during parliamentary debates and until the adoption, as well as future evaluation of the legislation.¹⁴¹
- 99 For consultations on draft legislation to be effective, they also need to be inclusive and involve consultations and comments by the public. To guarantee effective participation, consultation mechanisms must allow for input at an early stage and throughout the process,¹⁴² meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). Particularly legislation that may have an impact on human rights and fundamental freedoms, as is the case here, should undergo extensive consultation processes throughout the drafting and adoption process, to ensure that the NHRI, human rights organizations and the general public, including marginalized groups, are fully informed and able to submit their views prior to the adoption of the law.¹⁴³
- 100 Given the potential impact of the Draft Constitutional Law on the exercise of human rights and fundamental freedoms, an in-depth regulatory impact assessment, including on human rights compliance, is essential, which should contain a proper problem analysis, using evidence-based techniques to identify the most efficient and effective regulatory option.¹⁴⁴
- 101 In light of the above, **the public authorities are encouraged to ensure that the Draft Constitutional Law is subjected to inclusive, extensive and effective consultations, including with the NHRI, civil society, as well as representatives of under-represented communities, offering equal opportunities for women and men to participate. According to the principles stated above, such consultations should take place in a timely manner, at all stages of the law-making process, including at the time of developing the initial as well as before Parliament. As an important element of good law-making, a consistent monitoring and evaluation system of the implementation of the Law and its impact should also be put in place that would**

138 See Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, Part II.A.5.

139 For example, concerning the development of the NHRI in Norway, the SCA recommended that “[a]n inclusive and consultative process to ensure broad support for a new NHRI should be initiated by the Government without delay”, emphasizing that “[t]he process should include the [existing institution], civil society groups and other stakeholders”; see SCA, *2011 Report*, Norway, October 2011, pp. 15-16.

140 UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on National Preventive Mechanisms*, 9 December 2010, UN Doc CAT/OP/12/5, para. 28.

141 See also the *Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments* (2012), which the OHCHR recommends to use as guidelines to strengthen co-operation between NHRIs and parliaments for the promotion and protection of human rights at the national level, especially para. 4, which states that “Parliaments, during the consideration and adoption of possible amendments to the founding law of a NHRI, should scrutinize such proposed amendments with a view to ensuring the independence and effective functioning of such institution, and carry out consultation with the members of NHRIs and with other stakeholders such as civil society organizations”; and paras. 27-28, which provide that “NHRIs should be consulted by Parliaments on the content and applicability of a proposed new law with respect to ensuring human rights norms and principles are reflected therein” and “Parliaments should involve NHRIs in the legislative processes, including by inviting them to give evidence and advice about the human rights compatibility of proposed laws and policies”.

142 See e.g., ODIHR, *Guidelines on the Protection of Human Rights Defenders* (2014), Section II, Sub-Section G on the Right to participate in public affairs.

143 See e.g., ODIHR, *Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland, Warsaw*, 31 October 2017, para. 95.

144 See e.g., ODIHR, *Preliminary Assessment of the Legislative Process in the Republic of Uzbekistan* (11 December 2019), Recommendations L and M; and Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, Part II.A.5.

efficiently evaluate the operation and effectiveness of the Draft Constitutional Law, once adopted.¹⁴⁵

[END OF TEXT]

¹⁴⁵ See e.g., OECD, [International Practices on Ex Post Evaluation](#) (2010).