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URGENT INTERIM OPINION ON THE DRAFT CONSTITUTIONAL LAW OF THE KYRGYZ REPUBLIC ON THE AKYIKATCHY (OMBUDSMAN)

KYRGYZ REPUBLIC

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Based on an unofficial English translation of the Draft Constitutional Law provided by the Office of the United Nations High Commissioner for Human Rights.

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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

ODIHR welcomes the initiative of the Kyrgyz Republic to reform its National Human Rights Institution (NHRI), the *Akyikatchy*, to bring it in full compliance with United Nations Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (hereinafter "the Paris Principles"). Since 2012, the Akyikatchy has been accredited B-status with the Global Alliance of National Human Rights Institutions' (GANHRI), meaning that it only partially complies with the Paris Principles.

At the outset, it is welcome that the role and appointment of the *Akyikatchy* is explicitly recognized at a constitutional level since the constitutional reform of 2021 and that constitutional legislation, rather than ordinary law as is currently the case, is intended to provide guarantees of independence and regulate the organization and operation of this institution. This demonstrates the state's willingness to strengthen the NHRI. However, the constitutional provisions could have further elaborated the overall competencies, guarantees of institutional independence, term of office and grounds for dismissal of the *Akyikatchy*, as recommended in the 2021 ODIHR-Venice Commission Joint Opinion on the Draft Constitution of the Kyrgyz Republic ("2021 Joint Opinion").

There are some positive provisions in the *Draft Constitutional Law on the Akyikatchy (Ombudsman) of the Kyrgyz Republic* (hereinafter "the Draft Constitutional Law"), specifically the explicit reference to the Ombudsperson's independence, the high standing of the Ombudsperson in the country and obligations to support the Ombudsperson's office, the broad human rights mandate, and the institution's human rights protection functions. At the same time, the Draft Constitutional Law would benefit from amendments and additions 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 for the NHRI's senior leadership (Ombudsperson and deputies), since these are essential to ensure the independence of, and public confidence in the institution. Moreover, the provisions on the grounds and process for dismissal may undermine the security of tenure of the Ombudsperson and deputies, putting into question their independence, and should be revised. Furthermore, in addition to the Ombudsperson and deputies, the Ombudsperson's staff should be protected from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed 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 specify the relationships between the NHRIs and other domestic bodies with a mandate for promotion and protection of human rights, the division of competences between them and modalities of their co-operation, and while details of such cooperation should be left to the independent bodies,

formalized powers for the establishment of a cooperative framework set out in the Draft Constitutional Law would support this engagement; [para 29]

B. To amend the provisions in the Draft Constitutional Law regarding immunity, in particular:
   1. To expand the functional immunity applicable to the Ombudsperson and deputies to cover all staff of the Ombudsperson's Office and to the leadership and staff of any regional offices of the Ombudsperson; [para. 43]
   2. To clarify the grounds, and establish a fair and transparent process by which immunity may be lifted; [para. 47]

C. With respect to the mandate:
   1. To include explicit reference to a promotional mandate and clear promotional functions, including development of a culture of human rights, human rights education and training, awareness raising, research and addressing public opinion; [para. 51]
   2. To amend Article 12 to remove the reference to the Ombudsperson's activities being part of government foreign policy, and to the Ombudsperson representing the state; [para. 54]

D. With respect to eligibility criteria:

   1. To include specific reference to the Ombudsperson and deputies as being of high moral standing and with experience and/or expertise in human rights; [para. 67]

   2. To include the eligibility criteria for deputy ombudspersons and regional institution leadership; [para. 69]

E. To include detailed provisions on the application, screening, selection and appointment procedure for the Ombudsperson and deputies, reflecting an open, public, broad, transparent, inclusive and participatory process throughout, particularly requiring wide dissemination of vacancy notice, including provisions on the involvement of civil society, and specific provisions setting out clear, public and objective criteria for the identification and evaluation of candidates at all stages of the process; [paras. 76-78]

F. With respect to dismissal:
   1. To include specific dismissal grounds, providing clear and detailed provisions to ensure publicity and transparency of the dismissal process of the ombudsperson or deputies, and include the right of appeal to a high-level independent tribunal; [para 90]
   2. To expressly provide that non-adoption of the annual report by parliament is not a reason for dismissal; [para. 91]

3. To increase the majority required for dismissal to be higher than the one required for election;
4. To ensure that the Ombudsperson and deputies are heard prior to the vote on the dismissal in Parliament;

G. To provide for a longer period for the selection and appointment process where an Ombudsperson's mandate has come to an end unexpectedly; [para. 93], and

H. To expressly provide for pluralism in the composition of the Ombudsperson'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. [para. 95]

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 commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 30 June 2023, the *Akyikatchy* (Ombudsman)[1] of the Kyrgyz Republic sent a request for an urgent legal opinion on the *Draft Constitutional Law on the Akyikatchy (Ombudsman) of the Kyrgyz Republic* (hereinafter "the Draft Constitutional Law"), to the OSCE Office for Democratic Institutions and Human Rights (ODIHR).
2. On 17 July 2023, ODIHR responded to this request, confirming the Office's readiness to prepare a legal analysis 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, ODIHR decided to prepare an Urgent Interim Opinion, which does not provide a detailed analysis of all the provisions of the Draft Constitutional 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". The absence of comments on certain provisions of the Draft Constitutional Law should not be interpreted as an endorsement of these provisions. Given that the Draft Constitutional Law may be subject to further amendments in the weeks or months to come before adoption, ODIHR decided to prepare an Interim legal analysis and reserves itself the possibility later on, in consultation with the requestor, of preparing a Final Opinion, possibly on a revised version of the Draft Constitutional Law. Thus, the content of this Urgent Interim Opinion is without prejudice to any future written analysis and recommendations that ODIHR may provide in the future.
4. This Urgent Interim 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.[2]

II. SCOPE OF THE OPINION

5. The scope of this Urgent Interim Opinion covers the most concerning issues in the Draft Constitutional Law submitted for review. Thus, the Urgent Interim Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the office of the *Akyikatchy* (Ombudsman) of the Kyrgyz Republic (also referred to as "the Ombudsperson") and human rights protection mechanisms in the Kyrgyz Republic.

1 For the purpose of this Urgent Interim Opinion, the term "Ombudsman" will be used as this is the qualification used by the institution. While acknowledging that the Scandinavian term "Ombudsman" is considered to be gender-neutral in origin, the term "ombudsperson" is generally preferred, in line with increasing international practice, to ensure the use of gender-sensitive language (see e.g., <https://www.unescwa.org/sites/default/files/services/doc/guidelines_gender-sensitive_language_e-a.pdf>, p. 12)

2 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".

6. It raises key issues and provides indications of areas of concern relating to the Ombudsperson. In the interest of conciseness, it focuses on those provisions that require amendments or improvements rather than on positive aspects of the Draft Constitutional 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*[3] (CEDAW) and the *2004 OSCE Action Plan for the Promotion of Gender Equality*[4] and commitments to mainstream gender into OSCE activities, programmes and projects, this Urgent Interim Opinion integrates, as appropriate, a gender and diversity perspective.

8. This Urgent Interim Opinion is based on an unofficial English translation of the Draft Constitutional Law, which is attached to this document as an annex. Errors from translation may result. A translation of the Urgent Interim Opinion into Russian has been commissioned, but in case of discrepancies, the English version shall prevail.

9. In view of the above, ODIHR would like to stress that this Urgent Interim Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in the Kyrgyz Republic 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*".[5] 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*".[6] 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 and other 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 NHRI must be its

3 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by General Assembly resolution 34/180 on 18 December 1979. Kyrgyzstan acceded to this Convention on 10 February 1997.
4 See OSCE Action Plan for the Promotion of Gender Equality, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.
5 UN High Commissioner for Human Rights, Report to the UN General Assembly (2007), A/62/36, para. 15.
6 Joint Statement from the Expert Meeting on Strengthening Independence of National Human Rights Institutions in the OSCE Region, 29 November 2016, Warsaw, 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".

independence, including from other branches of government, especially the executive and financial independence. 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, who are also representative of the diverse segments of society.

12. The UN Paris Principles contain internationally recognized rules on the status, mandates and competencies of NHRIs.[7] 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) [8] Sub-Committee on Accreditation (SCA)[9]. The SCA, which operates under the auspices of the Office of the United Nations High Commissioner for Human Rights (OHCHR) as its Secretariat, publishes reports on the accreditation applications of NHRIs, reviews their status and provides them with status accreditation.[10] The status of NHRIs may also be reviewed when, among other, it appears that the circumstances of the institution may have changed in a way that affects its compliance with the Paris Principles. The SCA additionally develops "General Observations", which clarify and further explain the Paris Principles.[11]

13. The UN General Assembly and the UN Human Rights Council have also issued various resolutions on NHRIs.[12] Among them, 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] strongly encourages Member States to create and strengthen Ombudsperson institutions "*consistent with the principles on the protection and promotion of the Ombudsman institution (the Venice Principles)*" and for such institutions, where they exist, *"[t]o operate, as appropriate, in accordance with all relevant international instruments, including the Paris Principles*

7 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.

8 The Global Alliance of National Human Rights Institutions (GANHRI), formerly 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/>.

9 GANHRI Sub-Committee on Accreditation (SCA) | OHCHR.

10 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. See also Articles 16.1 and 16.2 regarding reviews.

11 See GANHRI SCA, General Observations, adopted on 21 February 2018.

12 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. See also UN Secretary General, Report on National institutions for the promotion and protection of human rights, A/76/246, 29 July 2021.

13 UN General Assembly Resolution A/RES/75/186, adopted by the UN General Assembly on 16 December 2020 (75th session), paras. 2 and 8.

and the Venice Principles" (see para. 15 below). In addition, indicator 16.a.1. of the Sustainable Development Goal (SDG) 16 specifically requires the existence of independent national human rights institutions in compliance with the Paris Principles.

14. At the OSCE level, 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*" (1990 Copenhagen Document).[14] Other OSCE commitments have further emphasized the important role that NHRIs play in the protection and promotion of human 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]

15. Although the Kyrgyz Republic is not a Member State of the Council of Europe (CoE), the Kyrgyz Republic has been a member of the European Commission for Democracy through Law (Venice Commission) since 2004.[16] The Urgent Interim Opinion will therefore refer to a number of documents published by the Venice Commission, especially the Principles on the Protection and Promotion of the Ombudsman Institution ("the Venice Principles") adopted in 2019,[17] and endorsed by various CoE bodies and by the UN General Assembly.[18] In addition, other CoE documents on NHRIs and ombudspersons 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.[19] 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 mandate and competence to promote and protect all human rights and guarantees of independence.[20]

16. 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),[21] 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

14 See 1990 OSCE Copenhagen Document, para. 27.
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 Council of Europe Congress on Local and Regional Authorities, The Council of Europe and the Kyrgyz Republic, 11 March 2022, p. 5 <https://rm.coe.int/the-council-of-europe-and-the-kyrgyz-republic/1680a5d213>
17 European Commission for Democracy through Law (Venice Commission), Principles on the Protection and Promotion of the Ombudsman Institution ("the Venice Principles"), CDL-AD(2019)005, 3 May 2019.
18 The Venice Principles were endorsed by the Committee of Ministers of the Council of Europe at the 1345th Meeting of the Ministers' Deputies, on 2 May 2019; by the Parliamentary Assembly of the Council of Europe, in Resolution 2301(2019) adopted on 2 October 2019; by the Congress of Local and Regional Authorities of the Council of Europe; and by the UN General Assembly in Resolution A/RES/75/186, adopted by the UN General Assembly on 16 December 2020.
19 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.
20 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.
21 ODIHR, National Human Rights Institutions in a Public Emergency: A Reference Tool (6 October 2020).

and initiatives to strengthen NHRIs' capacity and practical work on women's rights and gender equality;[22]

- the Compilation of Venice Commission Opinions concerning the Ombudsman Institution (as last updated in May 2022);[23]
- the Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments (2012);[24]
- the United Nations Development Program (UNDP) and OHCHR Toolkit for Collaboration with National Human Rights Institutions,[25] which explains the various models of NHRIs and provides useful guidance on how to support NHRIs in the different phases of their existence, from their establishment to supporting their development into more mature NHRIs.[26]

2. BACKGROUND

17. The *Akyikatchy* (Ombudsperson) was established by ordinary law in 2002,[27] as amended most recently in 2014. The law was proposed for further amendments in 2017, with a view to improve the procedure for the election and dismissal of the Ombudsperson, and the legal status and competence of the office, but the amendments have not been adopted – a point noted with concern by the UN Committee Against Torture.[28] The Ombudsperson currently holds B-status accreditation with the SCA, since 2012.[29]

18. A number of UN Treaty Bodies have expressed concerns about the lack of independence and the functioning of the Ombudsperson's Office and recommended measures be taken to fully comply with the Paris Principles, including by allocating sufficient human, technical and financial resources.[30] The Kyrgyz Republic has also accepted a series of recommendations on the strengthening of the NHRI in compliance with the Paris Principles as part of the UN Human Rights Council's Universal Periodic Review (UPR) process.[31]

19. In its review of the Ombudsperson in 2012, the SCA expressed concern about several issues, including the lack of a Paris Principles-compliant selection and appointment process, the failure to provide for pluralism in staffing, lack of co-operation with civil

22 ODIHR, Handbook for National Human Rights Institutions on Women's Rights and Gender Equality, 4 December 2012, p. 9.
23 Available at: <https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2022)022-e>.
24 The Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments (2012),
25 UNDP-OHCHR, Toolkit for Collaboration with National Human Rights Institutions, December 2010.
26 Ibid. p. 241. See also the OHCHR, National Human Rights Institutions: History, Principles, Roles and Responsibilities, 2010 available at: https://www.ohchr.org/sites/default/files/Documents/Publications/PTS-4Rev1-NHRI_en.pdf.
27 See Law No. 31 of 2002 July 136 on the Ombudsman of the Kyrgyz Republic (minjust.gov.kg).
28 UN Committee against Torture, Concluding observations on the third periodic report of Kyrgyzstan, CAT/C/KGZ/CO/3, 21 December 2021, para. 10.
29 See the GANHRI Chart of the Status of National Institutions, Accreditation status as of 26 April 2023, at: StatusAccreditationChartNHRIs.pdf (ohchr.org). ENNHRI, Baseline - Introduction https://ennhri.org/wp-content/uploads/2023/06/ENNHRI-Baseline-Intro_Methodology_Cross-Regional-Overview.pdf, p. 16.
30 Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Kyrgyzstan, CRC/C/KGZ/CO/3-4, 7 July 2014; UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined eighth to tenth periodic reports of Kyrgyzstan, CERD/C/KGZ/CO/8-10, 30 May 2018, paras 6-7; UN Committee against Torture, Concluding observations on the third periodic report of Kyrgyzstan, CAT/C/KGZ/CO/3, 21 December 2021, para 10; UN CEDAW, Concluding Observations on the Fifth Periodic Report of Kyrgyzstan, November 2021, paras 15-16; UN Human Rights Committee, Concluding observations on the third periodic report of Kyrgyzstan, CCPR/C/KGZ/CO/3, 9 December 2022, paras 7-8.
31 See <https://www.ohchr.org/en/hr-bodies/upr/kg-index>

society, and the overly broad dismissal provisions relating to the adoption of the annual report by the Parliament.[32]

20. In May 2021, a new Constitution of the Kyrgyz Republic was adopted by referendum,[33] which explicitly, although rather succinctly, refers to the role of the Ombudsperson. In this respect, Article 109 of the new Constitution states that "*Parliamentary control over the observance of human and civil rights and freedoms in the Kyrgyz Republic is carried out by Akyikatchy (Ombudsman)"*, while Article 110 provides that *"[t]he organization and operating procedures of the state bodies [which includes the Ombudsman] mentioned in this section, as well as the guarantees of their independence shall be determined by constitutional law*". Article 80 (3) (8)-(9) of the Constitution sets out the role of the Jogorku Kenesh (Parliament) in relation to the election and dismissal of the Ombudsperson, and her/his deputies, and Article 80 (5) (2) provides that the parliament hears the annual report of the Ombudsperson. It is overall welcome that the role and appointment of the Ombudsperson is now explicitly recognized at the constitutional level and that constitutional legislation, rather than ordinary law as is currently the case, is to further provide guarantees of independence and regulate the organization and operation of the institution. This, in principle, demonstrates a willingness to strengthen the status of the NHRI. However, the constitutional provisions could have further elaborated the overall competencies, guarantees of institutional independence, term of office and grounds for dismissal of the Ombudsperson, as recommended in the 2021 ODIHR-Venice Commission Joint Opinion on the Draft Constitution of the Kyrgyz Republic ("2021 Joint Opinion").[34] In that Joint Opinion, ODIHR and the Venice Commission also recommended that, in accordance with the Venice Principles, "*the requisite majority required to elect or dismiss him or her to or from office"* be specified at the constitutional level and that the functional immunity of the Ombudsperson and her/his staff be explicitly provided for in the Constitution.[35]

21. In May 2023, ODIHR also issued an *Opinion on the Rules of Procedure of the Jogorku Kenesh of the Kyrgyz Republic*, which addressed a number of parliament's prerogatives with respect to the appointment, suspension from office, dismissal and lifting of immunities of certain public office-holders, including the Ombudsperson and his/her deputies.[36] In particular, the Opinion recommended an increase in the parliamentary majority required for the purpose of dismissing the Ombudsperson, ensuring public hearings on dismissals, as well as the inclusion of a procedure for challenging the decision on dismissal before the courts (see Section 6.5 *infra*). It also recommended that for reasons of independence, parliament should not be required to formally adopt the Ombudsperson's annual report (see Section 7 *infra*).

32 SCA Report and Recommendations, (March 2012), pp. 7-10.
33 Law of the Kyrgyz Republic On the Constitution of the Kyrgyz Republic, 5 May 2021.
34 ODIHR and Venice Commission, Joint Opinion on the Draft Constitution of the Kyrgyz Republic, CDL-AD(2021)007, 19 March 2021, paras. 106-107. See also Venice Commission, Venice Principles, CDL-AD(2019)005, 3 May 2019, Principle 2.
35 Ibid. para. 107, which states that "crucially, as the Ombudsman is a body of oversight over state action or omission - the immunity of the Ombudsman and his or her staff from civil, administrative and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacities during and after their term of office94 should be explicitly provided for".
36 ODIHR, Opinion on the Rules of Procedure of the Jogorku Kenesh of the Kyrgyz Republic, GEN-KGZ/456/2023, 24 May 2023, paras. 91-96.

3. General Remarks on the Applicable Legal and Institutional Framework for the Promotion and Protection of Human Rights in the Kyrgyz Republic

22. It is welcome that Article 1 of the Draft Constitutional Law contemplates a rather broad mandate for the Ombudsperson in terms of human rights oversight, also referring to a range of international, regional and national human rights instruments. Article 4 explicitly provides for the independence of the Ombudsperson. However, as emphasized in the following sections of this Urgent Interim Opinion, the Draft Constitutional Law should be enhanced on a number of aspects to clearly and explicitly fully guarantee the Ombudsperson's institutional independence, legitimacy, credibility, efficacy and pluralism and to fully comply with the Paris Principles.

23. The Ombudsperson is given a broad range of powers primarily to protect human rights in the country and, to some extent, to promote them (see section 5 below). In particular, Articles 11 and 13 detail a welcome range of protection powers and functions for the office. The Draft Constitutional Law also contains significant detail on many critical aspects of the operation and functioning of the Ombudsperson's office. This is broadly in line with 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*".

24. It is also important to note that a number of domestic bodies exist in the Kyrgyz Republic have been entrusted with some functions that touch on the promotion and protection of human rights. Article 4 (3) recognizes this, and states that the Ombudsperson's activities "supplement" existing mechanisms for the promotion and protection of human rights. Some of these include the Human Rights Coordination Council under the Government established by the Government's resolution of 18 November 2013, with the aim of improving mechanisms for ensuring protection of human and civil rights and freedoms and implementing international human rights obligations.[37] The National Centre for the Prevention of Torture serves as the national preventive mechanism ("NPM") under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,[38] and is composed of two bodies. A coordination council, composed of 11 members, including the Ombudsman, 2 members of the parliament (1 nominated by the parliamentary majority, the other by the opposition) and 8 civil society representatives, is the superior administrative body. An executive body comprises 25 staff members, who are selected by the director of the mechanism upon recommendation by the coordination council. A Council for Persons with Disabilities, which reports to the Government of the Kyrgyz Republic, was also established in 2020. A Commissioner for Children's Rights, reporting to the President, was introduced pursuant to Presidential Decree No. 134 of 7 May 2021.

25. There are also several coordinating councils under the Cabinet of Ministers, such as the Coordinating Council on the Social Protection and Rights of Children, the Inter-Agency Coordinating Council on Juvenile Justice. As well as under specific ministries, such as the National Council on Gender Development, and under the parliament, such as the

37 The Human Rights Coordination Council is composed of representatives of ministries and agencies, as well as representatives of the Ombudsman, Prosecutor General, Supreme Court, State Commission for Religious Affairs, the National Centre for the Prevention of Torture (NCPT), etc.

38 UN Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), adopted on 18 December 2002 by resolution A/RES/57/199 of the UN General Assembly. The Kyrgyz Republic acceded to the OPCAT on 29 December 2008.

Council for the Protection of Women's Rights and the Prevention of Gender-based Violence of the Jogorku Kenesh, to cite a few.

26. Noting some of the concerns raised by international treaty bodies, such as the CEDAW Committee, regarding the lack of co-ordination and unclear mandates of the various parts of the national machinery for the advancement of women,[39] similar concerns may be applicable in the field of human rights protection and promotion in general. In this context, Paris Principles C(f) and C(g) require that NHRIs: "*maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions)*". General Observation 1.5 specifies that "*NHRIs should develop, formalize and maintain working relationships, as appropriate, with other domestic institutions established for the promotion and protection of human rights, including sub-national statutory human rights institutions, thematic institutions, as well as civil society and non-governmental organizations*". The SCA recommends that NHRIs establish and maintain systematic relationships with other domestic bodies concerned with human rights promotion and protection. These relationships, which may include sharing research, best practices, and other data, are necessary for the holistic realization of human rights, as the effectiveness of NHRIs largely depends on their collaboration with other domestic actors.[40] As also recommended by the SCA, there should be cooperation between the NHRI and other independent human rights bodies, such as specialist ombudspersons, "*to ensure coherence and effectiveness of the national human rights protection system*".[41] Such cooperation may include the transmission of individual petitions between the NHRI and an ombuds-type institution that possesses complaints-handling powers.[42]

27. This means that NHRIs should co-operate with and support the functions of other independent institutions that work on human rights issues, directly or indirectly. While it is positive that there are a range of national bodies, both state-affiliated and independent, working on human rights in the country as set out in para 25, above, it is important to emphasize that the NHRI serves as the primary human rights body in a state. Its mandate should not be limited by the presence of other bodies working on human rights. NHRIs are uniquely mandated overarching human rights bodies, and their independence requires that they can freely determine which human rights issues to work on.

28. Hence, it is important **to specify the relationships between the NHRIs and the other independent domestic institutions in charge of the promotion and protection of human rights, the division of competences between them and modalities of their co-operation**. **While details of such cooperation should be left to the independent institutions, formalized powers for the establishment of a cooperative framework set out in the Draft Constitutional Law would support this engagement.**

29. When international human rights instruments, such as OPCAT, require States Parties to create, or designate an existing domestic agency (or agencies) with responsibility for monitoring and promoting the objectives of that instrument,[43] states may implement this obligation in various ways, ranging from designating an existing NHRI or other existing

39 See UN CEDAW, Concluding Observations on the Fifth Periodic Report of Kyrgyzstan, November 2021, paras. 13-14.
40 SCA, General Observation 1.5, justification.
41 SCA Report and Recommendations (April 2008), p. 7.
42 SCA Report and Recommendations (May 2013), p. 12. See also, SCA Report and Recommendations (March 2019), p. 19.
43 For instance, a National Monitoring Mechanism (hereinafter "NMM") in line with Article 33 para. 2 of the CPRD; or the National Preventive Mechanism ("NPM") under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

national mechanism as the national preventive or monitoring mechanisms, or creating an entirely new mechanism and no model is universally inherently better than another.[44]

30. It is understood that there are some discussions in the Kyrgyz Republic to transfer the NPM functions from the existing National Centre for the Prevention of Torture to the Ombudsperson.[45] Before deciding whether to use an existing or create a new mechanism, or re-devising the institutional framework for the protection and promotion of human rights more generally, **it is essential that civil society be included in the process and meaningfully consulted**[46] (see also section 12 *infra*). **Any change must be based on a proper in-depth review and assessment of the proposed options, including a careful and exhaustive review of the respective mandate(s) of the said institutions, jurisdiction, independence, powers and guarantees, to ensure compliance with international human rights instruments' requirements, make any necessary legislative amendments and provide any increase in human, financial, technical and material resources required to guarantee the proper implementation of the new or expanded mandate**.[47]

31. It is important to emphasize that should the NHRI be designated as a national preventive or monitoring mechanism under the respective international instruments, the SCA will in particular review whether a formal legal mandate has been provided; whether the mandate has been appropriately defined to encompass the promotion and protection of all relevant rights contained in the international instrument; whether the staff of the NHRI possess the appropriate skills and expertise; whether the NHRI has been provided with additional and adequate human, financial, material and technical capacity and resources; whether there is evidence that the NHRI is effectively undertaking all relevant roles and functions as may be provided in the relevant international instrument.[48] In this case, additional resources and capacities should also be allocated to the NHRI, to ensure that its staff possesses the appropriate skills and expertise to fulfil this part of its mandate as well.

32. Of note, regardless of whether a NHRI is formally designated as a NPM or not, the NHRI should nonetheless use its general mandate to monitor, review and comment on the status of detention facilities[49] (see also para. 52 below). In that respect, General Observation 1.2 specifically states that an NHRI's mandate should allow for unannounced and free access to inspect and examine any public premises, documents, equipment and assets without prior written notice, including those belonging to military, police and security services.

RECOMMENDATION A.

To specify the relationships between the NHRIs and other independent domestic bodies with a mandate for the promotion and protection of human rights, the division of competences between them and modalities of their co-operation. While details of such cooperation should be left to the independent institutions, formalized powers for the establishment of a cooperative framework set out in the Draft Constitutional Law would support this engagement.

44 UNDP-OHCHR, Toolkit for Collaboration with National Human Rights Institutions, December 2010, p. 57.
45 See OHCHR Spokesperson, Press Statement *"Concern over steps to dissolve Kyrgyzstan's national torture prevention centre"*, 24 June 2022.
46 UNDP-OHCHR, Toolkit for Collaboration with National Human Rights Institutions, December 2010, p. 57.
47 UNDP-OHCHR, Toolkit for Collaboration with National Human Rights Institutions, December 2010, p. 57.
48 See GANHRI SCA, General Observation 2.8.
49 See e.g., UNDP-OHCHR, Toolkit for Collaboration with National Human Rights Institutions, December 2010, p. 57.

4. THE INDEPENDENCE OF THE OMBUDSPERSON

4.1. Safeguards and Guarantees of Independence

33. The Paris Principles require that an NHRI is, and is perceived to be, independent of the government. It is welcome that the Draft Constitutional Law explicitly states that the Ombudsperson is independent in Article 4. However, the Draft Constitutional Law would benefit from additional safeguards that could protect and guarantee such independence. These include provisions regarding the terms and conditions governing the selection, appointment and dismissal of the Ombudsperson, deputies and staff (see Sections 6 and 11 *infra*), as well as their functional immunity[50] (see Sub-Section 4.2 *infra*).

34. Some of the provisions of the Draft Constitutional Law may raise questions as to the *de facto* independence of the Ombudsperson. Article 12 raises concerns regarding the connection of the Ombudsperson to the Government's international engagement. Under this provision, the Ombudsperson's activities appear to be considered part of the foreign policy of the state and the Ombudsperson may be a representative of the state (see Sub-Section 5.1 *infra*).

35. Further, while it is welcome that there is broad reference to international human rights instruments in the mandate of the Ombudsperson in Article 1 (2) (1), **adding a specific reference to the Paris Principles** would help to set more clearly the purpose for the law and the Ombudsperson as a Paris Principles-compliant institution.

36. Article 4 (5) provides that the Ombudsperson must keep all information confidential including after the end of her/his term of office. The SCA General Observations call for NHRIs to operate in openness and transparency, with the aim to enhance public confidence in the institution (see also Sub-Sections 6 and 7). It is important that a clear and narrow definition of what constitutes confidential information is provided either in the law or in the regulations set by the Ombudsperson. The Ombudsperson must operate transparently, as per Article 4 (6), and rules regarding confidentiality should focus on sensitive personal information of complainants as already reflected in this provision, and not be overly restrictive so as to prevent the public from understanding the work and effectiveness of the institution. Confidentiality requirements should also not prevent the Ombudsperson from bringing to light human rights violations. Related to this, Article 19 appears to set limitations on the publication of the activities of the Ombudsperson by stating that activities are public to the extent that they do not contradict the law on classified information and confidentiality of personal data. **The Ombudsperson must operate on the basis of the principle of transparency, meaning that any restrictions on the ability of the Ombudsperson to publicly disseminate information should be narrowly construed and be in line with international standards on freedom of expression, and the requirement of publicity and transparency of NHRIs. Further, exceptions to confidentiality should be provided for, specifying situations where revealing information is justified in the interest of justice or to hold individuals or institutions accountable. Additionally, the responsibility of the Ombudsperson in Article 4, and in particular the potential consequences for breaching confidentiality under this provision, should be clearly stated.**

50 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

37. The functional immunity of members of NHRIs' leadership exists as an essential corollary of their institutional independence.[51] Because NHRIs' mandate to promote and protect human rights requires special examinations of frequently politically sensitive issues and reporting on actions of the State often resulting in strong criticism of respective state authorities. As a result, NHRIs 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.[52] This immunity should also extend to NHRI staff. The SCA has recommended that "*members and staff of an 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.[53] The Venice Principles also provide for the immunity from legal process for ombudspersons, deputies and decision-making staff in respect of activities and words, spoken or written, carried out in their official capacity for the Institution (functional immunity).[54] 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.[55]

38. Functional immunity of the Ombudsperson is set out in Article 17 of the Draft Constitutional Law, which according to Article 17 (7) should also apply to her/his deputies. It is welcome that their immunity is broadly framed, including that it shall extend after the term of office has expired.[56] Further, Article 17 (3) of the Draft Constitutional Law contains some of the recommended additional safeguards to protect functional immunity by guaranteeing the inviolability of the Ombudsperson's premises, property, means of communication and all documents, including internal notes and correspondence,[57] as well as of baggage, correspondence and means of communication belonging to the ombudsperson and deputies.[58]

39. Article 20 provides certain immunity protections for staff of the Ombudsperson. However, these are not as robust as the immunity provided for the Ombudsperson and deputies. In particular, staff are not protected from criminal and civil liability during their

51 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".

52 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.

53 SCA General Observation 2.3 and its Justification. See also SCA Report and Recommendations, (May 2016), p. 37.

54 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.

55 See e.g., Venice Commission, Venice Principle 23. See also 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, CDL-AD(2011)034-e, para. 23. See also Venice Commission, Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, CDL-AD(2015)034, para. 69.

56 See e.g., 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.

57 See e.g. 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.

58 See e.g., ODIHR, Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland, 31 October, 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.

term of service. They also do not benefit from the broad protection from personal or bodily searches, detention or arrest provided to the Ombudsperson in Article 17 (3), rather they are given a more limited protection while performing their official duties. There is no specification or protection provided to the staff regarding decisions on their prosecution, nor in the event of threats to their personal security. Finally, while the Ombudsperson and deputies are protected from being questioned regarding all communications, staff are only protected from being summoned or questioned regarding classified information, suggesting that they may be questioned about a wider range of information.

40. Functional immunity should cover words spoken or written, recommendations, decisions and other acts undertaken in good faith while performing these functions.[59] Indeed, the NHRI (including its staff) should be protected from civil, administrative or criminal claims when making a recommendation, adopting decisions, or voicing an opinion or views on a human rights matter. This should also extend to so-called strategic lawsuits against public participation. Such lawsuits may be brought against the Ombudsperson or the deputies or staff by powerful entities, including business persons or corporations. The Ombudsperson and his/her staff should be immune from such forms of pressure.

41. SCA General Observation 2.3 requires that such protection be given to members and staff of the NHRI as "*external parties may seek to influence the independent operation of an NHRI by initiating, or by threatening to initiate, legal proceedings against a member of the decision-making body or a staff member of the NHRI*". Such protections "*serve to enhance the NHRI's ability to engage in critical analysis and commentary on human rights issues, safeguard the independence of senior leadership of the NHRI, and promote public confidence in* the NHRI".[60]

42. **It is essential for the independence and proper functioning of the Ombudspersons office that staff are covered by the same broad immunity provisions that apply to the Ombudsperson and deputies.** Further, it should be clarified that **leadership and staff of the regional institution established pursuant to Article 16 benefit from the same protections**.

43. Article 17 (7) deals with the immunity of the deputies. This immunity is limited and does not apply in cases of disciplinary action by the Ombudsperson for "*a publicly expressed opinion, an action, or inaction committed by them during the fulfillment of their mandate."* There is no other detail in Article 17 regarding the scope of this provision and the grounds for disciplinary action appear overly broad and vague, the procedure for lifting immunity, or any right to appeal. **The limitation of the immunity of deputies in this manner may jeopardize their independence, and should be removed.**

44. Article 17 (4) elaborates the modalities for lifting the immunity of the Ombudsperson and her/his deputies, which is initiated by the Prosecutor General. 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.[61] This concept derives from the principle of equality before the law, which is also an element of

59 General Observation 2.3 (GANHRI General Observations). See also Venice Commission Opinion on Amendments to the Law on the Human Rights Defender of Armenia, CDL-AD(2006)038, adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), paragraphs 74 and 76, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2006)038-e; and op. cit. footnote 15, par 7.5 (PACE Recommendation 1615 (2003)).

60 SCA General Observation 2.3 and GANHRI SCA Report and Recommendations of the Session (May 2016), p. 37.

61 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".

the rule of law.[62] Indeed, the SCA has recognized this and recommends that the law should provide for well-defined circumstances in which these protections may be lifted by an appropriately-constituted body such as the superior court or by a special majority of parliament in accordance with fair and transparent procedures.[63]

45. Article 17 (4) does not specify the circumstances when the immunity may be lifted and refers to the requirement of a majority of the total number of the Jogorku Kenesh deputies, except in cases of particularly grave crime, suggesting that any crime whatever its gravity may lead to the lifting of immunity. In the *Opinion on the Rules of Procedure of the Jogorku Kenesh*, ODIHR recommended to introduce an even higher majority in parliament when lifting immunity in order to protect the independence of the office-holders.[64]

46. In light of the foregoing, **the Law should more clearly specify the grounds, and establish a fair and transparent process, by which the immunity of the Ombudsperson, deputies and staff may be lifted.** At the same time, a proper mechanism is needed to prevent or stop investigations or proceedings where there is no proper evidence to suggest criminal liability on the part of the leadership or staff 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**.[65]

RECOMMENDATION B.1

To expand the functional immunity applicable to the Ombudsperson and deputies to cover all staff of the Ombudsperson's Office and to the leadership and staff of any regional offices of the Ombudsperson;

RECOMMENDATION B.2

To clarify the grounds, and establish a fair and transparent process, by which immunity may be lifted.

5. THE OMBUDSPERSON'S MANDATE

5.1. Human Rights Promotion and Protection Mandate

47. The Draft Constitutional Law provides a welcome broad scope of the human rights mandate covered by the Ombudsperson in Article 1. This appears to align with the SCA requirements that NHRIs have a human rights mandate that is as broad as possible, applied to all functions that should at a minimum cover – but not be limited to – human

62 See Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, 18 March 2016, pp. 18-19.
63 See e.g., SCA Report and Recommendations (May 2016), p. 38.
64 See ODIHR, Opinion on the Rules of Procedure of the Jogorku Kenesh of the Kyrgyz Republic, GEN-KGZ/456/2023, 24 May 2023, para. 96.Opinion on the Rules of Procedure of the Jogorku Kenesh of the Kyrgyz Republic
65 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.

rights in conventions ratified by the state.[66] While Article 1 (7) refers to the promotion of human rights, it is somewhat narrowly defined in terms of legal awareness and protection of confidential personal information. **Article 1 should be amended to include an explicit promotion mandate for the Ombudsperson that includes development of a human rights culture, education and awareness raising, training, research and addressing public opinion.**

48. The main tasks and functions of the Ombudsperson are further set out in Article 11 of the Draft Constitutional Law. These include broad powers to monitor, investigate and report on human rights violations, including the power to review laws and submit proposals for change, engage with judicial proceedings and handle complaints. It is welcome in particular that the envisioned functions include in Article 11 (1) (10) to "*make proposals to conclude, ratify, or accede to international treaties in the field of human rights and freedoms*. In this respect, the SCA in 2012 specifically recommended to entrench "encourage[ing] ratification and implementation of international human rights standards" among the functions of the NHRI. Also, the CoE Committee of Ministers Recommendation CM/Rec(2021)1, the Ombudsperson may play an important role in promotion of international commitments concerning human rights. Specifically, the Appendix to the Recommendation provides that NHRIs should *"encourage the signature, ratification of and accession to international human rights treaties and contribute to the effective implementation of such treaties, as well as related judgments, decisions and recommendations as well as to monitor States' compliance with them."* **However, the reference to make "*…proposals to denounce or suspend such treaties*" should be reconsidered as the Ombudsperson should not have the power to request actions by the state that may decrease the level of protection of rights in a given country.**

49. While Article 11 provides a broad range of functions, the focus of the functions is primarily on protection and less so on promotion. The SCA requires that NHRIs have both promotion and protection functions. According to the SCA's General Observation, promotion functions include education, training, advising, outreach and advocacy while protection functions include monitoring, inquiring, investigating, reporting, as well as complaint handling.[67] A number of aspects of the Ombudsperson's mandate would benefit from clarification to strengthen its role to effectively promote and protect human rights.

50. Thus, in order to more closely align with the purpose of an NHRI, as well as the stated purpose of the Ombudsperson in Article 1, Article 11 may benefit from additional functions in the areas of human rights promotion, including with respect to education and awareness-raising. The SCA has made recommendations to multiple NHRIs regarding the explicit inclusion of a promotion mandate.[68] Promotion mandates should include powers to create awareness of human rights norms through teaching, research and addressing public opinion, even where such activities are undertaken in practice.[69] While Article 11 provides some means for the Ombudsperson to engage in human rights promotion, such as through the provision of advice, publication of reports and collaboration with civil society, it could be **supplemented with reference to specific promotional functions, especially education, public awareness-raising, research, and addressing public opinion**. Due to the length of Article 11, it would also benefit the legibility to introduce a division of competences between those concerning external

66 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).
67 SCA General Observation 1.2.
68 See for example, SCA Report and Recommendations (March 2019), p. 19.
69 SCA Report and Recommendations (March 2014), p. 8.

actions of the Ombudsperson (vis-à-vis other public bodies) and those concerning internal operation of the Ombudsperson office.

51. Article 11 (2) of the Draft Constitutional Law provides that the Ombudsperson has a right to "*attend meetings of the Jogorku Kenesh, the Cabinet of Ministers, the Supreme Court, the Constitutional Court, the Board of the General Prosecutor's Office and other collegiate bodies*". This provision may be questionable due to a number of reasons. The Ombudsperson is one of the "checks and balances" institutions. While it may control other state organs, this does not mean that s/he has the right to participate in their daily operation and attend any of their meetings. Especially when it comes to judicial bodies, it should be clear that the Ombudsperson may attend public hearings of relevant courts, but not internal meetings. In this context, it is also not clear why the Ombudsperson should receive legal drafts from different institutions (including the Supreme Court or the Prosecutor's Office). While the Ombudsperson should be able to take part in consultation processes on draft laws, the provision grants broad powers to the Ombudsperson that may endanger other constitutional principles, such as judicial independence.

52. Article 13 (1) (4) of the Draft Constitutional Law refers to the relationship between the Ombudsperson and the Prosecutor's Office. Numerous human rights violations may be a result of negligence or abuse of power by the state officials. Should the opening of an investigation be subject to prosecutorial discretion, it may be difficult to start any investigation pertaining to human rights violations. Therefore, the powers of the Ombudsperson could be strengthened in this regard. For example, upon notification of the Ombudsperson, the prosecutors' office could be obliged to start investigation and notify the Ombudsperson on a regular basis on subsequent stages. Alternatively, the decision not to start the investigation should be taken only at the highest level of the prosecution service (e.g., the Prosecutor General) and the reasons for such a decision should be communicated to the Ombudsperson.

53. Article 12 of the Draft Constitutional Law provides that the Ombudsperson may establish direct communication with international organizations as well as foreign NHRIs. NHRI's international engagement is an important part of their role. There are two points in Article 12 that would benefit from clarification to ensure that the independence, or perceived independence of the Ombudsperson in international engagement in the field of human rights is in line with the requirements of the SCA. In particular, the SCA has found that "*While 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*." 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*."[70] **Notwithstanding the functions the Ombudsperson may undertake in its own capacity in international fora, the reference to the activities of the Ombudsperson as "part of government foreign policy efforts" should be removed to avoid real or perceived interference in the independence of the NHRI. The reference to the Ombudsperson representing the state in Article 12 (2) should also be removed.**

54. Article 3 of the Draft Constitutional Law which sets out the scope of the legislation refers to "*public authorities, including those with special status, local self-government and their officials, and legal entities, including their management regardless of their ownership*".

70 SCA General Observation 1.4.

The term "legal entities" regardless of their form of ownership is then used several times throughout the Draft Constitutional Law. At the same time, it is not clear whether this would encompass private entities. SCA General Observation 1.2 requires that an NHRI's mandate should extend to **acts and omissions of both the public and private sectors**.[71] Venice Principle 13.2 similarly 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 Constitutional Law should explicitly provide that the Ombudsperson's mandate also covers the private sector.**

55. In addition to a general mandate covering all human rights (national, regional and international), the Draft Constitutional Law would additionally benefit from reference to **a specific mandate to protect and promote women's rights**, as recommended by the CEDAW Committee in its 2021 Concluding Observations.[72]

56. Finally, as noted above, even if a separate NPM exists, NHRIs should also have an explicit mandate to monitor places of detention even where they undertake this in practice.[73] Such visits should be unannounced,[74] and this should be specified in the enabling law.[75] While Article 11 provides the power to the Ombudsperson to undertake visits to places of detention, it should **be clarified that the Ombudsperson is mandated to undertake *unannounced* and unfettered visits to all places of detention**. Further, Article 11 (36) provides that audio and video equipment can be brought to detention facilities, though the provision also seems to require permission from the detention administration for "*interviews and video and photo recordings of the security officers of the detention and remand facilities…*". **The requirement for permission should be removed**.

RECOMMENDATION C.1

To include explicit reference to a promotional mandate and clear promotional functions, including development of a human rights culture, human rights education and training, awareness raising, research and addressing public opinion.

RECOMMENDATION C.2

To amend the Article 12 to remove the reference to the Ombudsperson's activities being part of government foreign policy, and to the Ombudsperson representing the state.

71 See SCA General Observation 1.2. See also for example, SCA Report and Recommendations (October 2019), p. 29 and p. 11.
72 UN CEDAW, Concluding Observations on the Fifth Periodic Report of Kyrgyzstan, November 2021, paras 15-16.
73 SCA Report and Recommendations (November 2015), p. 25.
74 SCA General Observation 1.2 specifically states NHRIs should have unannounced and free access to inspect and examine any public premises, documents, equipment and assets without prior written notice. See also SCA Report and Recommendations (November 2015), p. 13. See also, SCA Report and Recommendations (November 2015), p. 42; SCA Report and Recommendations (November 2015), p. 25.
75 SCA Report and Recommendations (May 2016), p. 48.

5.2. Complaints-Handling

57. Article 14 of the Draft Constitutional Law elaborates on the complaints-handling mandate. Article 14 (1) refers to "communications from Kyrgyz citizens, regardless of their location, and from foreign nationals and stateless persons residing in the Kyrgyz Republic or their representatives". Although there is an express reference to foreigners and stateless persons, it is unclear whether the provision refers only to those legally residing in the Kyrgyz Republic or also encompasses those simply being present there without necessarily having registered. Should only those formally/legally residing in the Kyrgyz Republic be able to submit complaints to the Ombudsperson, this would be unduly limiting and may exclude from the scope of the complaints-handling mechanism those who may be in a vulnerable situation, such as victims of trafficking in human beings, asylum-seekers, migrants, who may not have the required documentation or may be unwilling to seek to register their residence. Moreover, the rest of Article 14 tends to exclusively refer to "citizens", omitting the reference to foreign nationals and stateless persons. This would suggest the lack of an inclusive approach to the matter. Guarantees of fundamental rights and freedoms should apply to everyone under the jurisdiction of a state, and not just to citizens.[76] While acknowledging the intention of the drafters to extend access to the complaints-handling mechanism to foreign nationals and stateless persons residing in the Kyrgyz Republic, **it is recommended to refrain from referring exclusively to "citizens" in the text of the Draft Constitutional Law to avoid any ambiguity and make it clear that such guarantees of fundamental rights and freedoms apply to everyone**. **Furthermore, it is also recommended to ensure that methods of communication between the complainant and the Ombudsperson be accessible, including for instance the use of sign language or if via online tools or platforms, that they comply with web accessibility standards and recommendations.**[77]

58. Article 14 (1) further refers to a number of grounds that should not serve as obstacle for submitting complaints including "*citizenship, race, nationality, religious and political beliefs, place of residence, sex, minority status, legal capacity of the subject, internment or isolation, as well as place of work*", which lack some of the discriminatory grounds generally acknowledged at the international level. **It would be recommended to revise this provision to add that no discrimination is allowed in this regard on the basis of the grounds that are also reflected in international instruments, including the ICCPR.** In particular, the list of grounds should be supplemented by including reference to gender, gender identity, sexual orientation, colour, language, health status, and also adopt an open-ended formulation such as "or other status" in order not to risk excluding certain persons or groups that are marginalized.

59. Article 14 (16) of the Draft Constitutional Law provides that "*The Akyikatchy shall have the right not to consider cases subject to legal proceedings, and will discontinue his/her involvement if a person files a complaint or appeal to court or the Constitutional Court. Nonetheless, the Akyikatchy shall ensure that the competent authority reviews complaints and appeals received within a specified timeframe and according to requirements.*" However, according to Article 11 of the Draft Constitutional Law, the Ombudsperson has numerous powers regarding the relationship with the Constitutional Court, the Supreme Court and common courts. It seems that the powers listed in Article 11 concern general interventions, while those in Article 14 deal with individual interventions in court cases, although this is not clear. A clearer elaboration of the Ombudsperson's powers regarding

76 See e.g., ODIHR-Venice Commission, Joint Opinion on the Draft Constitution of the Kyrgyz Republic (2021), para. 127.
77 See <https://www.w3.org/WAI/>.

different courts should be provided. It may be also important for individuals to know how they may benefit from the Ombudsperson's involvement in court cases.

60. The wording of Article 14 (17) provides that "[t]he right to represent the interests of incapacitated citizens, persons without full legal capacity, or those declared as limited capable shall be assigned to their parents, regardless of the age of the latter, adoptive parents, guardians, or custodians". At the outset, this provision would appear to contradict Article 14 (1), which states that legal capacity should not be an obstacle for submitting a complaint. More generally, it is worth noting that concerns have been raised regarding the system of legal incapacitation in the Kyrgyz Republic and its impact on the exercise of human rights.[78] In addition, the Kyrgyz Republic is a state party to the UN Convention on the Rights of Persons with Disabilities (CRPD).[79] In this respect, Article 12 of the CRPD clearly states that persons with intellectual or psychosocial disabilities shall enjoy legal capacity and participate in political and public life on an equal basis with others.[80] General Comment No. 1 to Article 12 of the CPRD on equal recognition before the law states that legal capacity is the key to accessing full and effective participation in society and in decision-making processes and should be guaranteed to all persons with disabilities, including persons with intellectual disabilities, persons with autism and persons with actual or perceived psychosocial impairment, and children with disabilities, through their organizations.[81] In addition, legal capacity is recognized as "an inherent right accorded to all people, including persons with disabilities."[82] Instead of a system of legal incapacitation, states should seek to assist persons with disabilities to exercise their legal capacity, by providing them with access to different types of supported decision-making arrangements.[83] Hence, and although going beyond the scope of this Opinion, the process of depriving a person of legal capacity in the Kyrgyz Republic should be reviewed and reconsidered as such.

61. In addition, Article 14 (17) would tend to suggest that substituted decision-making modalities are followed rather than supported decision-making whereby a person with a disability makes their own choices, with support from people that they choose and trust. The provision should be amended to reflect a supported decision-making approach instead. Similarly, and although acknowledging that there is a separate Ombudsman for children, if children are contemplated by the said provision as being able to submit complaints to the Ombudsperson, it is also important to ensure that they are able to express their views in every decision that affects them, as stated in Article 12 of the UN CRC. This shall apply even in situations where a child is very young or in a particularly vulnerable situation (e.g., has a disability, belongs to a minority group, is a migrant, is homeless etc.).[84] **Hence, the child should be duly informed throughout the process and his/her views should be sought regarding the way forward at all stages.**

62. Moreover, Article 14 and the internal regulations of the Ombudsperson that are to be adopted could be further enhanced in line with SCA General Observation 2.9, especially with respect to the ability to protect complainants from retaliation for having filed a complaint. This should also apply to other witnesses than the employees of entities

78 See e.g., UNDP, Promoting the Rights of Persons with Disabilities in Central Asia: Institutional Experiences and the Way Forward, p. 34. See also e.g., UNICEF, Children and Adolescents with Disabilities in Kyrgyzstan (2021), pp. 47-49.
79 See the UN Convention on the Rights Of Persons With Disabilities (CRPD), 13 December 2006, entered into force 3 May 2008. The Kyrgyz Republic ratified the CRPD on 16 May 2019.
80 See the UN Convention on the Rights Of Persons With Disabilities (CRPD), 13 December 2006, entered into force 3 May 2008. The Kyrgyz Republic ratified the CRPD on 16 May 2019.
81 See paras. 8 and 9 of CRPD General Comment No. 1 (2014).
82 Ibid., para. 7 CRPD General Comment No. 1 (2014).
83 See ODIHR and OSCE RFoM, Joint Legal analysis of the draft law on mass media of the Republic of Uzbekistan, p. 23.
84 See UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, para. 54.

defined in Article 14 (13) for having provided evidence in relation to a complaint. The ability to seek an amicable and confidential settlement of the complaint through an alternative dispute resolution process, the ability to settle complaints through a binding determination and to seek enforcement through the court system of its decisions on the resolution of complaints, among others, could also be introduced.

6. SELECTION, APPOINTMENT AND TENURE

6.1. General Remarks

63. The criteria and modalities/procedure for the selection and appointment of NHRI leadership is critical for its independence. The SCA emphasizes that the selection and appointment process for the NHRI should be clearly set out and detailed in enabling laws, with particular emphasis on transparency, broad consultation and participation of diverse societal forces.[85] In this respect, in 2012, the SCA specifically recommended that the vacancies of the Ombudsperson be publicized widely, that eligibility requirements be clarified and experience in the field of human rights required, while ensuring civil society involvement in the selection process, to promote merit based selection and ensure pluralism.[86] 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.[87]

64. 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 Ombudsman 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*".[88] 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*".

6.2. Eligibility Criteria for the Ombudsperson

65. Pursuant to Article 5 of the Draft Constitutional Law, the Ombudsperson is appointed for a period of 5 years and cannot serve for more than two consecutive terms. In order to qualify for the position, Article 5 provides that the person must be proficient in the state language, be between 30 and 65 years old, and have a higher education degree. An individual is ineligible where they have a criminal record for serious or particularly serious crimes, even if cancelled or expunged, are declared "*legally incapable or incapacitated by a court decision*" or are a foreign national. There is no reference to the individual being qualified or experienced in the field of human rights. The absence of explicit reference to the individual being of high moral standing and the absence of any

85 SCA General Observation 1.8.
86 SCA Report and Recommendations (March 2012), p. 10. SCA Report and Recommendations (March 2012), p. 10.
87 SCA General Observation 1.8.
88 Venice Commission, Opinion on the draft law on prevention and protection against discrimination in North Macedonia, CDLAD(2018)001, para. 69.

specification of human rights experience are of concern, as already noted by the SCA in 2012.[89]

66. 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*".[90] 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*".[91] In its 2012 recommendations regarding the accreditation of the Ombudsperson, the SCA expressed concern that the eligibility criteria were vague and that experience in the field of human rights was not included in the law.[92] In the current Draft Constitutional Law, there is no reference to the character of the individual to be appointed, or of their possessing of relevant and appropriate human rights expertise and experience. There is also no reference to any eligibility requirements for deputy ombudspersons. **Specific reference to the Ombudsperson and deputies as being of high moral standing and with experience and/or expertise in human rights should be included in the Draft Constitutional Law.**

67. High moral standing can be determined on the basis of elements such as the absence of conviction for a serious criminal offence, and personal history of integrity and independence.[93] Article 5 (2) (1) refers to "serious or particularly serious crimes". These are further defined in Article 19 of the Criminal Code of the Kyrgyz Republic as "*intentional crimes for which the law provides for punishment in the form of imprisonment for a term of more than five years, but not more than ten years*" and "*for a term of more than ten years or life imprisonment*" respectively. However, the blanket provision regarding ineligibility due to a cancelled or expunged crime may be disproportionately broad, as it does not allow consideration of the time elapsed since the conviction. Where a person is excluded based on a decision by an "investigative body" rather than a court, this may also raise questions of due process and overly broad application. Rather than these specifications, the inclusion of a provision for the candidate to be of high moral standing would enable a more nuanced approach, allowing the selection and appointment panels to take into account individual circumstances including the nature and severity of any previous criminal convictions, time elapsed since cancellation or expungement or decision to terminate prosecution, and the individual's standing since.

68. Article 7 (13) provides that the Ombudsperson shall have no more than two deputies elected for a 5-year term, who are appointed and dismissed by the Jogorku Kenesh based on the Ombudsperson's recommendation. According to this provision, gender balance should be taken into account in the appointment of deputies, which is welcome in principle. At the same time, such a statement may not necessarily or automatically translate into more gender balance in the leadership of the institution if the legislation does not state the legal consequences in case of non-compliance with the said requirements nor contain any sanctions, or a monitoring mechanism.[94] To ensure the

89 SCA Report and Recommendations (March 2012), p. 10.
90 Venice Commission, Venice Principle 8.
91 Ibid. (Venice Principle 8).
92 SCA Report and Recommendations (March 2012), p. 10.
93 See 2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions, pp. 123 and 152. See also Sub-Sections 1 and 3 of the 2022 Venice Commission's Compilation of Venice Commission Opinions concerning the Ombudsman Institution.
94 See e.g., ODIHR, Comments on the Law on the Assembly and the Rules of Procedure of the Assembly from a Gender and Diversity Perspective (2019), para. 45. See also e.g., Report of the UN Working Group on the issue of discrimination against women in law and in practice, A/HRC/23/50, 19 April 2013, para. 39; and OSCE Gender Equality in Elected Office: A Six-Step Action Plan (2011), pp.

effectiveness of gender balance requirements, **the Draft Constitutional Law should specify the consequences in case of non-compliance with the minimum threshold**. Further, the Draft Constitutional Law is otherwise silent on the eligibility criteria for deputy ombudspersons and those leading the Regional Institution (Article 16). **For clarity, and to ensure the independence and merit-based nature of these roles, the eligibility criteria for deputy ombudspersons and regional institution leadership should be explicitly stated in the Draft Constitutional Law.**

RECOMMENDATION D.1

To include specific reference to the Ombudsperson and deputies as being of high moral standing and with experience and/or expertise in human rights.

RECOMMENDATION D.2

To include the eligibility criteria for deputy ombudspersons and regional institution leadership.

6.3. The Selection and Appointment Process

69. As noted above, the selection and appointment of NHRI leadership is critical for its independence. Selection and appointment should be merit-based, following a consultative, open, transparent and participatory process. As set out in the following sub-sections, the provisions on the Ombudsperson's selection and appointment contained in Articles 6 and 7 of the Draft Constitutional Law fail to meet the relevant international standards.

6.3.1. Advertisement of Vacancies

70. There are no clear requirements for wide advertisement of vacancies. The SCA emphasizes 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"*.[95] The Draft Constitutional Law provides only that a vacancy announcement will be published in the official print media *or* on the official website. **It is important that the vacancy announcement is always widely publicized in multiple locations throughout the country. Article 6 (1) should be revised accordingly.**

6.3.2. Timeframe for Selection and Appointment Process

71. There must be a sufficient period provided to enable a Paris Principles' compliant selection and appointment process to take place. Article 7 (7) provides that candidates will be elected at least 30 days before the expiry of the incumbent's term. Article 6 (1) provides that vacancies will be published 60 days before the end of the Ombudsperson's

33-34. For instance, where a clear requirement is made to reflect a gender balance or promote diversity in the relevant legislation, a proposed list that does not reflect a gender balance could be referred back for revision by the relevant parliamentary group; see ODIHR, Opinion on Draft Amendments to Ensure Equal Rights and Opportunities for Women and Men in Political Appointments in Ukraine (2013), paras. 32-35. See also the French Law n ° 2014-873 of 4 August 2014 for real equality between women and men, Articles 66 and 75, which provide that said appointments shall be annulled if gender balance is not respected (except for appointments of members from the under-represented gender), though this will not render null and void the decisions that may have already been adopted by said body in the meantime.

95 See Venice Commission, Venice Principle 7.

term. Taken together, this suggests that there could be just 30 days in which to undertake the entire selection and appointments process. **A longer period should be included for the selection and appointment process.** In the case of early termination of the Ombudsperson's tenure, the vacancy is published within 10 working days of termination, and new elections no later than 30 days from termination. This potentially leaves just 20 days for the selection and appointment process. Such a short process raises significant concerns over the availability of qualified candidates, proper candidate evaluation, public discourse, and careful decision making. **The timeframe for extraordinary appointments should be extended to allow for a Paris Principles compliant selection and appointment process.** (See further sub-Section 6.5 *infra*). Further of concern is that in the regular election process, if no candidate receives the required number of votes, new elections are to be held between 14 and 30 days from the voting day. It is unclear if a new nomination process is required or if this is a repetition of the previous process. This should be clarified in the law. If a new process is envisioned, sufficient time must be given for a Paris Principles compliant process.

6.3.3. Nomination Procedure

72. As regards the nomination and selection procedure, the Draft Constitutional Law is unclear about how the process will be undertaken. It states that there will be a vacancy announcement published, but also that parliamentary factions, deputy groups and deputies shall have the right to nominate up to three candidates using a procedure established by the parliament. There is no further detail in the Draft Constitutional Law on how candidates are identified or the basis on which nominations are made. The SCA previously raised concerns about the sufficiency of provision for the selection and appointment of the *Akyikatchy*[96] and the lack of civil society involvement in the process.[97] A process based on nominations by political entities have been a cause for concern for the SCA.[98] The SCA has previously recommended that involvement of civil society in a parliamentary selection process should be direct (rather than through members of parliament) and could include directly soliciting proposals from civil society and allowing civil society to directly participate in the evaluation process.[99]

73. It is recommended **to reconsider the contemplated nomination procedure to ensure greater involvement of civil society and diverse societal groups**. Groups such as non-governmental organizations, universities, trade unions, concerned social and professional organizations should be invited to suggest or recommend candidates. In any case, the rules and procedures should promote broad consultation and/or participation of these diverse societal groups throughout the application, screening, selection and appointment process.[100]

6.3.4. Selection and appointment panel

74. There are no specific provisions in the Draft Constitutional Law for any public consultation process as part of the nomination, selection and appointment procedure.[101] Specific provisions should set out the criteria for identification, screening and evaluation of candidates and modalities for nominations from external parties, for instance by providing for the establishment of an independent pre-selection commission, whose

96 SCA Report and Recommendations (March 2014).
97 SCA Report and Recommendations (March 2012), p. 10.
98 See Langtry & Roberts Lyer, National Human Rights Institutions: Rules, Requirements, and Practice (OUP, 2021), Ch. 4.4.4.
99 SCA Report and Recommendations (May 2018), p. 15. See also, SCA Report and Recommendations (March 2019), p. 18.
100 See e.g., SCA General Observation 1.8.
101 See for example, SCA Report and Recommendations (March 2019), pp. 16– 17.

composition should be gender-balanced and reflect diverse societal groups (e.g., non-governmental organizations, universities, trade unions, concerned social and professional organizations, human rights groups).[102] 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. This selection commission would then select a limited pool of candidates who would then be proposed for appointment.[103] In the Draft Constitutional Law, there is no detail on how the candidates are selected and assessed, including the composition of selection panels, if any.[104]

75. It is recommended **to reconsider the contemplated selection procedure to ensure greater involvement of civil society and diverse societal groups, throughout the nomination and selection process, including at the nomination and evaluation stages, to ensure a broad, transparent, public, merit-based and participatory process.**[105]

76. **In any case, it is essential to include specific provisions setting out clear, predetermined, and objective criteria for the identification and evaluation of candidates for Ombudsperson and deputy ombudspersons 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.[106] Pluralism, in addition to gender balance, should also be taken into account in the criteria for selection of the Ombudsperson as well as deputies.

77. Paris Principles compliant provisions are also required for the appointment of deputy ombudspersons.[107] These should be set out in NHRI enabling laws.[108] **The Draft Constitutional Law should specify the process for selection and appointment of deputy ombudspersons and requires elaboration in this regard.**

6.3.5. Election of Candidates

78. In accordance with Article 80 (2) (9) of the Constitution, the Jogorku Kenesh "elects, in cases provided for by law, dismisses from office on the proposal of the Akyikatchy (Ombudsman) his or her deputies, gives consent to bringing them to criminal liability." Article 7 details the election procedure in the parliament for the Ombudsperson and deputies. The relationship of the Ombudsperson with his/her deputies is one of the most fundamental issues for the effectiveness of the Ombudsperson operation. However, the article would benefit from clarifications.

79. The Constitution gives the power for the Ombudsperson to propose his/her deputies, but it is the matter for the Jogorku Kenesh to make a decision on this matter. Such division of powers may create different challenges. For example, the Jogorku Kenesh may block appointment of persons proposed by the Ombudsperson, delay the appointment, or condition appointment upon some concessions by the Ombudsperson. In order to avoid

102 See e.g., See 2010 UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions, p. 248. The SCA considers that the requirement for pluralism extends to the selection process, see e.g., SCA Report and Recommendations (November 2008), pp. 4-5.

103 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.

104 SCA Report and Recommendations (March 2015), p. 7.

105 SCA General Observation 1.8.

106 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.

107 SCA Report and Recommendations (October 2014), p. 16.

108 SCA Report and Recommendations (October 2018), p. 17.

such a situation, the Draft Constitutional Law should clearly stipulate the procedure for appointment (and dismissal as noted below) of deputies.

80. The specific number of deputies required, in the first, second and subsequent rounds are unclear. **This includes whether the required "majority" refers to just those present, or to the total number of deputies. Generally, an election by a higher majority (such as a two-thirds majority) in the Parliament would strengthen the Ombudsperson's impartiality, independence and legitimacy**[109] **and ensure wide political support for the NHRI - although a proper anti-deadlock mechanism should be put in place for situations where a candidate does not obtain the necessary qualified majority of votes in the Parliament. The Law would also benefit from clarification as to when an election is deemed invalid, and a new election held. The procedures for a new election where there is early termination of the Ombudsperson's mandate are also not clear. The Jogorku Kenesh should also have clear deadlines for making these decisions.**

RECOMMENDATION E.

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

6.4. Security of Tenure

81. The Paris Principles address general questions of independence and functioning 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*".[110] 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.

82. 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. The SCA recommends fixed terms of office (from 3 to 7 years, renewable once) clearly defined in the legislation.[111] The Venice Principles recommend a term of office of not less than 7 years for Ombudspersons, preferably non-renewable.[112]

83. The establishment of term limits allows NHRI leadership 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

109 See e.g., Venice Commission, Consolidated Opinion On the Law on Ombudsman in the Republic of Azerbaijan CDL(2001)083, para. 8.
110 SCA General Observation 2.2.
111 SCA General Observation 2.2.
112 Venice Commission, Venice Principle 10.

political powers. The security of tenure of NHRI leadership also ensures stability of the office and reduces the risk of political influence.[113]

84. Article 5 (3) provides for a five-year term for the Ombudsperson, renewable once. There is no detail as to the process for appointment for a second term. The Venice Commission has previously recommended reconsideration of a 5-year term in favour of a (non-renewable) 7-year term.[114] SCA General Observation 2.2 refers to the possibility of the mandate being renewed only once. Further, the Draft Constitutional Law is unclear as to whether the mandate of the deputies is non-renewable, and this should be clarified (Article 7 (13)).

85. **Overall, the Draft Constitutional Law should be clarified to clearly provide whether deputies' mandates are renewable, and if yes, specify that they can only be renewed once. The Law should also provide for the process by which an Ombudsperson may be appointed for a second term, bearing in mind the Paris Principles requirements for the selection and appointment process.**

6.5. Dismissal

86. NHRI legislation should contain an independent and objective dismissal process following predefined criteria, similar to that accorded to members of other independent state agencies.[115] 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 the appointing body.[116]

87. Article 80(3)(8) of the Constitution provides that the Jogorku Kenesh dismisses the Ombudsperson. Article 10 of the Draft Constitutional Law provides the grounds for early termination of powers of the Ombudsperson and deputies. These include resignation, death, conviction, incapacity determined by a court, termination of citizenship. The decision is to be made by a majority or no less than 45 deputies of the Jogorku Kenesh.

88. The Venice Principles emphasize the importance of clear dismissal 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.[117] ODIHR has previously commented on the dismissal provisions in relation to the Ombudsperson that "*Generally, where a process for removal of the Ombudsperson involves the parliament, care must be taken to ensure that removal cannot be for political reasons and must be by*

113 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).

114 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.

115 SCA General Observation 2.1. See also SCA Report and Recommendations (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."

116 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).

117 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.

a qualified majority vote that is preferably higher than the one required for election. This is fundamental for protecting the independence of the Ombudsperson and for preventing the politicization of his or her possible dismissal. It is therefore recommended to increase the majority required for the purpose of dismissing the Ombudsperson."[118] Venice Principle 11 similarly emphasizes that the parliamentary majority required for removal – by Parliament itself or by a court on request of the Parliament – shall be equal to, and preferably higher than, the one required for election.

89. Article 10 would benefit from the addition of specific details on the dismissal procedure. Further, the sole responsibility of the parliament to dismiss the Ombudsperson and deputies should be reconsidered to avoid the risk of politicization of the dismissal process. This could be done, for instance, by involving an independent body to examine the existence of grounds for dismissal prior to the vote of the Parliament as per Article 80(3)(8) of the Constitution. There is also no mention of a right to appeal the decision to an independent body such as a Constitutional Court. The Venice Commission has previously recommended the need for a public and transparent procedure, including a procedure for challenging the dismissal before the courts.[119] Further, the law allows for dismissal by less than a majority of the parliament. 45 deputies may make this decision, although it is unclear under what circumstances this will occur, this means that potentially just 37,5% (45 out of 120) of the deputies could dismiss the Ombudsperson or their deputies. As underlined above, the qualified majority vote of the parliament to dismiss the Ombudsman should be preferably higher than the one required for election. **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 the Ombudsperson and deputies that includes the right of appeal to a high-level independent tribunal such as a Constitutional Court. The Draft Constitutional Law should require the approval of a qualified majority of the parliament for a decision in favour of dismissal higher than the one required for election. It is also important that the Ombudsperson and the deputies are heard prior to the vote on the dismissal in Parliament, and that the views of the office-holder are made public**.[120]

90. The SCA,[121] ODIHR[122] and UN Treaty Bodies[123] have previously raised concerns that according to the existing legislation, the Ombudsperson could be dismissed from office on the basis of non-adoption of the annual report. Especially, in its report from March 2012, the SCA pointed out that this provision "*has the potential to affect the ability of the [Ombudsperson] to submit independent and unbiased reports on the human rights situation in the country*" and further "*expresse[d] its concern that this provision is so broad as to impact on the security of tenure […] and may adversely affect the independence of the [Ombudsperson]*", also noting that *"[d]ismissal should not be allowed based solely on the discretion of appointing authorities*".[124] It is indeed essential that the parliament should not be required to formally adopt such an annual report since such a vote would indirectly call into question the independence of the institution. While

118 See ODIHR, Opinion on the Rules of Procedure of the Jogorku Kenesh of the Kyrgyz Republic, GEN-KGZ/456/2023, 24 May 2023, para. 93.
119 See 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.
120 See ODIHR, Opinion on the Rules of Procedure of the Jogorku Kenesh of the Kyrgyz Republic, GEN-KGZ/456/2023, 24 May 2023, para. 95.
121 SCA Report and Recommendations (March 2012), p. 11.
122 See ODIHR, Opinion on the Rules of Procedure of the Jogorku Kenesh of the Kyrgyz Republic, GEN-KGZ/456/2023, 24 May 2023, para. 94.
123 UN Committee against Torture, Concluding observations on the third periodic report of Kyrgyzstan, CAT/C/KGZ/CO/3, 21 December 2021, para 10.
124 SCA Report and Recommendations (March 2012), p. 11.

it is welcome that this provision is no longer stated in Article 10 on dismissal nor in Article 15 on the annual and special reports, **the Law should expressly provide that non-adoption of the annual report by parliament is not a reason for dismissal, to ensure there is no ambiguity in the future** (see also, Section 7, *infra*). As underlined in previous ODIHR opinions, the main purpose of the parliamentary debate on the NHRI's annual report is to bring to the parliament's attention the issues raised by the report and for the parliament to take action to address them, as appropriate.[125]

RECOMMENDATION F.1
To include specific dismissal grounds, providing clear and detailed provisions to ensure publicity and transparency of the dismissal process of the ombudsperson or deputies that include the right of appeal to a high-level independent tribunal.

RECOMMENDATION F.2
To expressly provide that non-adoption of the annual report by parliament is not a reason for dismissal.

RECOMMENDATION F.3
To increase the majority required for dismissal to be higher than the one required for election.

RECOMMENDATION F.4
To ensure that the Ombudsperson and deputies are heard prior to the vote on the dismissal in Parliament

6.6. Transition Period

91. Article 7 sets out the transitional appointment procedure where the term of office of the Ombudsperson ends prematurely pursuant to Articles 9 and 10 of the Draft Constitutional Law. Transitional provisions for leadership are important for the stability of NHRIs, either in case of early dismissals or when the mandate of the NHRI leadership comes to its end. Such provisions should cover the different possible scenarios where an office can become vacant, that is, through end of regular term of office, extraordinary end of the term due to death or incapacity, or due to resignation, dismissal following a due process procedure, and temporary inability to perform functions.[126] 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"*.[127] 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*".[128] ODIHR has specifically recommended that legislation should establish procedures to ensure NHRIs' continuous functioning without interruption when an Ombudsperson's term of office

125 See e.g., ODIHR, Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland (2017), para. 80
126 K Roberts Lyer, Change at the Top: The Necessity of Transitional Leadership Provisions in the Laws of Independent State-Based Institutions, Journal of Human Rights Practice, 2023.
127 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. See also 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 (2020), para. 36.
128 Human Rights Council Report on National institutions for the promotion and protection of human rights, 1 May 2012.

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 a deputy perform the Ombudsperson's functions in the interim.[129]

92. Article 7 (11) provides for the Ombudsperson to remain in office pending a new appointment, and Article 7 (9) provides that one of the deputies shall perform as the acting Ombudsperson where the Ombudsperson's mandate has terminated under Articles 9 and 10. While this coverage is welcome to prevent a gap in leadership, as noted above, the timeframe for the new election provided for in Article 7 (9) is 30 days. **In cases of early end of the term of the Ombudsperson, the Draft Constitutional Law should ensure sufficient time for selection and appointment to take place to ensure that the process for a replacement is Paris Principles compliant.** A period of 90 days would appear more appropriate, particularly given the presence of deputies able to lead the institution until a new appointment is made.

RECOMMENDATION G.

To provide for a longer period for the selection and appointment process where an Ombudsperson's mandate has come to an end unexpectedly.

6.7. Pluralism

93. The Draft Constitutional Law is largely silent on pluralism within the Ombudsperson'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. The SCA previously called for the staff of the Ombudsperson's Office to be representative of Kyrgyz society, and for this to be reflected in the enabling law, as well as for the Ombudsperson to "*develop policies and procedures to ensure that staff representation is broad and pluralistic*".[130]

94. 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.*"[131] 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,*

129 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.
130 SCA Report and Recommendations (March 2012), pp. 10-11.
131 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.

and promotes the accessibility of the NHRIs for all citizens."[132] **The Draft Constitutional Law should provide for pluralism in the composition of the Ombudsperson'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 and men in the NHRI, including in leadership positions**.

95. 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 equitable footing.[133] Such aspects could also be specifically mentioned in the Draft Constitutional Law. The Ombudsperson's Office should also endeavour to ensure that it is directly and easily accessible to everyone, with particular attention to raising awareness among persons who may not be aware of the existence of NHRIs, who may have difficulties in accessing NHRIs or who may be in a vulnerable situation.[134]

RECOMMENDATION H.

To expressly provide for pluralism in the composition of the Ombudsperson'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. ANNUAL AND SPECIAL REPORTS

96. Article 15 requires the Ombudsperson to prepare and submit an annual report to the parliament. 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.[135] State bodies should not have the authority to edit the NHRI's annual report.[136] The Venice Commission has made similar recommendations.[137] The SCA requires that annual reports of NHRIs be considered by parliament, and that this is explicitly provided for in enabling law.[138] As noted above, the SCA has previously expressed concern regarding non-adoption of the Ombudsperson's annual report as a ground for dismissal of the ombudsperson (see Section 6.5, *supra*), as have ODIHR and the UN.[139] **It should be clarified in Article 15 that the adoption of any resolutions by parliament to implement the recommendations of an Ombudsperson's report are a separate act, and that the report itself does not need to be adopted by the parliament.**

132 SCA General Observation 1.7.
133 See e.g., ODIHR, Handbook for National Human Rights Institutions on Women's Rights and Gender Equality, 4 December 2012, p. 78.
134 See CoE Committee of Ministers Recommendation CM/Rec(2021)1 on NHRIs, para. 1.
135 See also ODIHR Opinion on the Draft Amendments to the Act on Establishment of the Slovak National Centre for Human Rights (2019).
136 SCA Report and Recommendations (November 2013), p. 15.
137 Venice Commission, Opinion on The Draft Law "On the Commissioner for Human Rights" of Kazakhstan, CDL-AD(2021)049, 13 December 2021, para 97.
138 SCA Report and Recommendations (October 2022), p. 12.
139 See e.g., ODIHR, Opinion on the Rules of Procedure of the Jogorku Kenesh of the Kyrgyz Republic, GEN-KGZ/456/2023, 24 May 2023, para. 94; and UN Committee against Torture, Concluding observations on the third periodic report of Kyrgyzstan, CAT/C/KGZ/CO/3, 21 December 2021, para 10.

8. ENGAGEMENT WITH CIVIL SOCIETY

97. It is welcome that engagement with civil society is explicitly mentioned in Articles 2 (6) and 11 (44). The SCA strongly encourages NHRI co-operation with other human rights bodies, in particular with civil society.[140] The SCA emphasizes the importance of this aspect of NHRIs' role, requiring that it be provided for in enabling laws, and recommends formalizing the NHRI's relationship with civil society organizations.[141] 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.[142] Further, the SCA previously raised this concern with respect to the Ombudsperson.[143] **The Draft Constitutional Law would benefit from the inclusion of an explicit requirement for close, consistent, regular, systematic and constructive engagement of the Ombudsperson's Office with both domestic and international civil society organizations**.[144]

9. ADEQUATE RESOURCES FOR THE OMBUDSPERSON

98. Adequate resources, including funding, are vital to the independent functioning of NHRIs. The State is expected to provide the NHRI with an appropriate level of funding for all 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".*[145] 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.[146] 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.[147]

99. It is welcome that the Draft Constitutional Law requires adequate and uninterrupted funding for the Ombudspersons office, as well as a dedicated funding line in the national budget. It is also welcome that the law clearly states that no delays or changes in the amount of funding are permitted (Article 26 (1)). It is essential that adequate funding be provided in practice to enable the Ombudsperson to undertake its mandate and functions effectively and independently.[148] This is particularly relevant as the NHRI requires considerable funding to guarantee its ability to fulfil its mandate. Further, as indicated above in Sub-Section 3 and with the caveats stated therein, depending on the scope of the mandate of the NHRI and whether it is designated to serve as national preventive or monitoring mechanisms under international instruments, additional funding and resources will be required. **The Law should be amended to specify that the**

140 See SCA General Observation 1.5.
141 SCA Report and Recommendations (May 2016), p. 10.
142 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).
143 SCA Report and Recommendations (March 2012), p. 11.
144 SCA Report and Recommendations (March/ April 2010), p. 5.
145 SCA General Observation 1.10.
146 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."
147 SCA General Observation 1.10.
148 UN Human Rights Committee, Concluding observations on the third periodic report of Kyrgyzstan, CCPR/C/KGZ/CO/3, 9 December 2022, paras 7-8.

Ombudsperson shall be provided with adequate financial, technical and human resources to ensure the full, independent and effective discharge of the responsibilities and functions of the institution. Explicit reference should be made to extra funding for any additional significant mandates given to the Ombudsperson in the future. Should the intention be for the Ombudsperson's Office to take on the role of the NPM, the Draft Constitutional Law should be reviewed on the basis of the requirements of that role and to adequately fulfil the requirements of this mandate.

100. The SCA has clear recommendations on the importance of financial 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.*"[149] A separate budget line within the State's budget should be provided for the NHRI.[150] 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 Ombudsperson must not be in the hands of the government, but in the control of the NHRI, in line with its independence.[151] An NHRI should have the authority to submit its budget to parliament.[152] The language in Article 26 (3) that the scope of funding is to be determined in accordance with 'procedure prescribed by law' should be clarified to ensure that future laws or regulations on the funding of the Ombudsperson are Paris Principles compliant and undertaken with the involvement and approval of the Ombudsperson.

101. 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.[153] The relevant legislation should also prescribe that the Ombudsperson shall submit its budget proposal to the parliament, and that this proposal should be included in the national budget without changes. Currently the language of Article 26 is unclear on this point.[154] 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.[155]

10. REGIONAL HUMAN RIGHTS INSTITUTION

102. Article 16 provides for the establishment of a regional human rights institution. This body would have specific functions including formulating proposals and developing recommendations, analysing human rights practices, developing tools, and assisting in producing reports. It would have a separate funding line. The Draft Constitutional Law is

149 SCA General Observation 1.10.
150 See e.g., ODIHR, Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland, 6 February 2017. See also e.g., Venice Commission, Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, CDLAD(2015)017, para. 60.
151 Ibid. See also ODIHR Opinion on the Draft Law Amending Article 8 of the Law on the Human Rights Defender in Armenia.
152 SCA Report and Recommendations (November 2017), p. 33.
153 ODIHR, Opinion on the Draft Act on the Independent National Human Rights Institution of Iceland, 6 February 2017, para. 76.
154 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), CDLAD(2007)020, paras. 8 and 30.VI.
155 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.

unclear as to the nature of the relationship between the Ombudsperson's office and the regional institution, how many of these regional bodies are foreseen and its competences, especially vis-à-vis local administration and self-government units. **It would seem more appropriate for the functions of the regional institution to be included directly within the mandate of the Ombudsperson's Office.** This is particularly the case taking into account the comments above regarding the promotional functions of the Ombudsperson. Should the regional institution remain separate, the law should specify the Paris Principles' based selection and merit-based appointment of expert staff and leadership of this regional institution, include provisions for their functional immunity, details on how the relationship with the Ombudsperson's Office will be mandated, clear statements of its independence and autonomy from the state, including autonomy in the use of funding, and reporting and accountability requirements. There should also be clarification regarding the circumstances under which the regional institution could be reorganized under Article 16 (4), including who has the authority to do this, taking into account the independence of the Ombudsperson.

103. Similar issues arise in relation to the possible establishment of 'representative offices abroad' in Article 25 (7) (2). Should the Ombudsperson determine such offices are required, the law or Ombudsperson's regulations should provide clarity on key operational and functional requirements, including staffing, funding, functions, and the relationship with the main office, in line with the Paris Principles.

11. STAFFING

104. It is welcome that the Draft Constitutional Law specifies that the structure, staffing, procedures and organization of the Ombudsperson's Office will be approved by the Ombudsperson. However, the law is unclear as to whether the Ombudsperson has the power to determine the staffing level to be provided to the Office, and how staff will be recruited and remunerated. Further, Article 25 (6) indicates that the employment procedure, appointment, dismissal and other terms of staff will be governed by other legislation. Additionally, consultation with the parliament is required in determining the maximum number of staff (Article 25 (8)) and the President sets the terms for renumeration of staff (Article 25 (9)). In addition, Article 21 (2) provides for certain benefits for the staff and their family members. This raises concerns about the autonomy of the Ombudsperson to manage their own staff. **NHRI enabling laws should include detailed provisions about staffing, in particular covering the right of the NHRI to determine its staffing structure and skills, recruitment, and independence.**

105. The SCA has previously held 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.[156] Where an NHRI takes on an additional role such as the National Preventative Mechanism (NPM) under OPCAT, the SCA will consider whether staff possess the appropriate skills and expertise for that role.[157]

106. Staff should be recruited according to an open, transparent and merit-based selection process that ensures pluralism (including in terms of gender, ethnic origin, 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

156 SCA General Observation 2.4.
157 SCA General Observation 2.8.

the equitable participation of women in the NHRI.[158] The SCA has previously raised concerns about pluralism in staffing at the Ombudsperson's Office. 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.[159] The Venice Commission has recommended that NHRI staff should not be civil servants, but have "*distinct special status*" regulated by the law.[160]

107. The independence of staff is critical to NHRIs. The Draft Constitutional Law should include a specific provision on the autonomy and independence of the Ombudsperson's staff as well as 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, in keeping with the recommendations of the SCA.[161] 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.[162] 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.[163] However, an NHRI does not only need to be independent, but it must also be seen to be independent.[164] NHRI members and staff should not be too closely connected to the public service or considered or perceived as government employees.[165] 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.[166]

108. **The Draft Constitutional Law should specify that the Ombudsperson:**

- **shall have the authority to determine the structure and skills of its staff;**
- **shall have the authority to determine the criteria, procedures and methods for recruiting all of its staff;**
- **in addition, the Draft Constitutional Law should provide for the pluralism, diversity, autonomy and independence for the staff of the Office.**

12. Recommendations Related to the Process of Preparing and Adopting the Draft Law

109. 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).[167] Moreover,

158 Ibid. and SCA General Observation 1.7.
159 See Venice Commission, Venice Principle 22. See also the CoE Committee of Ministers' Recommendation CM/Rec(2021)1 on NHRIs, Appendix, Article 7.
160 Venice Commission, Armenia -Opinion on the legislation related to the Ombudsman's staff, CDL-AD(2021)35, para. 26.
161 SCA Report and Recommendations (March/April 2010), p. 9.
162 See SCA General Observation 1.10 on the salaries and benefits of NHRIs staff providing that these are comparable to those of civil servants performing similar tasks in other independent institutions of the State. See also: OHCHR, Handbook on National Human Rights Institutions - History, Principles, Roles and Responsibilities (2010), page 156.
163 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), pp. 173-174.
164 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.
165 International Council on Human Rights Policy and OHCHR, Report on Assessing the Effectiveness of National Human Rights Institutions (2005), p. 8.
166 See Langtry & Roberts Lyer, National Human Rights Institutions: Rules, Requirements, and Practice (2021), chapter 4.8, citing SCA Report and Recommendations (November 2008), p.11; SCA Report and Recommendations (May 2011), p. 16; SCA Report and Recommendations (March 2012), pp. 13-14; SCA Report and Recommendations (May 2011), p. 7; SCA Report and Recommendations (October 2010), p. 4; SCA Report and Recommendations (November 2016), p. 52.
167 See 1990 OSCE Copenhagen Document.

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).[168] The Venice Commission's Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.[169]

110. 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.[170] 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. It particularly emphasizes the important role of the legislature in relation to NHRIs.[171]

111. For consultations on amendments to 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,[172] 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.[173] The UN Human Rights Committee also explicitly recommended that civil society be consulted on the development of the Ombudsperson into a Paris Principles compliant institution.[174]

112. 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.[175]

113. 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, other organizations involved in the promotion and protection of human rights, civil society, as well as representatives of**

168 See 1991 OSCE Moscow Document.
169 See Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, Part II.A.5.
170 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 Report and Recommendations (October 2011), pp. 15-16.
171 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".
172 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.
173 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.
174 UN Human Rights Committee, Concluding observations on the third periodic report of Kyrgyzstan, CCPR/C/KGZ/CO/3, 9 December 2022, paras 7-8.
175 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.

underrepresented 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. 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 efficiently evaluate the operation and effectiveness of the amended Law, once adopted.[176]

[END OF TEXT]

176 See e.g., OECD, International Practices on Ex Post Evaluation (2010).