

**SUPPORT TO CRIMINAL JUSTICE REFORMS
IN THE REPUBLIC OF MOLDOVA**



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NEEDS ASSESSMENT REPORT
OF THE HUMAN RIGHTS NATIONAL IMPLEMENTATION DIVISION
UNDER THE DIRECTORATE OF HUMAN RIGHTS OF THE
DIRECTORATE GENERAL HUMAN RIGHTS AND RULE OF LAW OF THE
COUNCIL OF EUROPE
ON
THE FUNCTIONING OF THE NATIONAL PREVENTIVE MECHANISM OF
THE REPUBLIC OF MOLDOVA

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Introduction

This Report is designed to assist the Office of the People's Advocate (Ombudsperson), for the implementation of its mandate as the National Preventive Mechanism (hereinafter – NPM). It consists of analytical information and recommendations on facilitating the creation of the NPM; and streamlining its functionality in accordance with international standards.

This Report is complementary to the Opinion of the Directorate of Human Rights, Directorate General Human Rights and Rule of Law of the Council of Europe on the Law no. 52 of 3 April 2014 on the People's Advocate (Ombudsperson) of the Republic of Moldova, Chapter V, The National Mechanism for the Prevention of Torture of 28 November, 2015, Ref. DGI(2015) 25 (hereinafter – the Opinion).

This Report was prepared on the basis of the contributions of the Council of Europe consultants Mr Jorgen Steen Sorensen, Parliamentary Ombudsperson of Denmark, and Mr George Tugushi, Member of the CPT, UN CAT, and former Ombudsperson of Georgia, under the auspices of the Council of Europe Project “Support to Criminal Justice Reforms in the Republic of Moldova”, financed by the Danish Government.

This Report is based on the English translation of the Law of the Republic of Moldova no. 52 of 3 April 2014 on the People's Advocate (Ombudsperson), English translation of the Regulation on the Organisation and Functioning of the Ombudsman's office, Opinion no.808/2015 of the Venice Commission on the Law on the People's Advocate (Ombudsperson of the Republic of Moldova), Concluding observations of 29 March 2010 of the Committee against Torture on the Republic of Moldova, Report of 9 January 2013 of the UN Subcommittee for the Prevention of Torture and Cruel, Inhuman, Degrading Treatment or Punishment for the National Preventive Mechanism, and other relevant documents provided by the Council of Europe secretariat and obtained through other public sources.

The Report is also based on the information obtained during a mission to Moldova on 1 and 2 October 2015. The consultants met with a number of stakeholders, including Parliamentary Committees, the PA's Office and various NGOs (see Annex). The consultants express their gratitude to the Council of Europe Office in Chisinau and the Council of Europe national short-term consultant, Ms Ana Racu, for a well organised visit and assistance in preparation of the Opinion.

General Overview

The Republic of Moldova ratified the Optional Protocol to the Convention against Torture (hereinafter – OPCAT) in 2006 and subsequently undertook an obligation to establish an NPM within a year after the ratification.

For the establishment of the NPM the Law on Parliamentary Advocates nr.1349 of 17 October 1997 (hereinafter – Law on Parliamentary Advocates)¹ was amended and the Parliament also adopted a Decision nr.57 on 20.03.2008 on approving the Regulation on the Center for Human Rights, also establishing a Consultative Council².

Amendments to the Law on Parliamentary Advocates and to the Regulation on the Center for Human Rights designated the Center for Human Rights (hereinafter – CHR)³ as the NPM. The law also established the Consultative Council, initially composed of ten members to be selected from civil society and chaired by one of the Parliamentary Advocates (hereinafter - PA/PAs). With this setting the NPM was established under the office of the Ombudsperson.

In 2008, the Consultative Council was composed of 10 members, including representatives of human rights NGOs, with relevant professional experience in different fields (e.g. lawyers, doctors, forensic specialists, psychiatrists etc.) As the members of the NPM, members of the Council were endowed with the same rights and competences as the PAs. They were granted unrestricted access to all places of detention, access to all relevant information, the right to conduct private interviews, right to request explanations from the authorities and report on human rights violations related to the persons in detention.

Soon after its establishment, it became clear that the Moldovan NPM faced serious obstacles preventing it from effectively exercising its mandate. The impediments were partly rooted in ambiguities in the legislation, but also related to a lack of clear working procedures and adequate capacities and resources, including the division of responsibilities among members and the Head of the NPM. While the Law nr. 1349 on Parliamentary Advocates designated (art.23¹ and art.23²) all four advocates as the NPM, it also endowed the Consultative Council with the right to undertake preventive visits.

The Regulation establishing the Consultative Council also declared the members of the Consultative Council competent to present recommendations to the authorities. At the

¹ Law No. 200 of 26.07.2007 on amending and supplementing the Law on Parliamentary Advocates No.1349 of 17 October 1997, Monitorul Oficial No..136-140/581 of 31.08.2007 (abrogated now)

² Decision of the Parliament no. 57 from 20.03.2008 on approving the Regulation on the Centre for Human Rights

³ Center for Human Rights(MCHR) is the former name of Moldovan Ombudsperson's Institution

same time, the Regulation (p.33)⁴ establishing the Center for Human Rights as National Human Rights Institution, mentioned that an advisory council, to be established, would constitute the NPM. In practice, the authorities argued that it was the PA, who chaired the Consultative Council and the CHR, that was the NPM.

In addition to the problems of legal nature, the NPM, during its activities in 2008 - 2012, experienced practical obstacles related to the access to police establishments and information related to the remand prisoners.

Another main problem was related to the lack of sufficient financial resources for the NPM, resulting in a situation where the members of the Consultative Council did not receive any remuneration for their work and even had to cover expenses for travel costs from their private means. The NPM lacked necessary resources, and the PA had difficulties filling the positions in the Consultative Council as the reputation of the mechanism was negatively affected and the representatives of civil society and human rights NGOs were reluctant to participate in it.

The reasons were not only related to the lack of financial remuneration but also to the tensions and growing mistrust between the PA and the members of the Consultative Council. As a result, monitoring visits were increasingly carried out separately by both entities. In 2010 several members of the Consultative Council resigned because of the lack of clear working procedures and uncertain division of competences between the Council and the PA, which even led to parallel reporting.

In 2011 the NPM still lacked sufficient resources, and the legal ambiguities remained in place. Even though 9 new members of the Consultative Council had been recruited, serious concerns were raised because of the lack of transparency in their appointment procedure. In addition, some questions were raised related to the personal independence and qualifications of several new members of the Consultative Council. Issues related to the internal decision-making procedure between the Consultative Council and the PA on the adoption of recommendations and the publication of reports, as well as weak capacities to conduct effective monitoring visits continued to impede the proper functioning of the NPM. As a response to the difficulties encountered, the PA was planning to establish a separate administrative unit within the CHR to more effectively coordinate the work of the NPM.

Legal and Structural issues

Although the new Law on Peoples' Advocate (hereinafter - the Law) was adopted in 2014⁵, a national mechanism to prevent torture has not been created yet. However, in 2014 the CHR continued its work to prevent and combat torture. Members of the staff

⁴ Regulation on CHR, approved by the Decision of the Parliament no. 57 from 20.03.2008

⁵ Law No 52 of 3 April 2015 on Peoples' Advocate (Ombudsperson) , Chapter V

continued visiting places of detention and handling individual complaints. The office had neither financial nor adequate human resources to conduct its work fully in line with the NPM mandate, but some activities were still implemented. Staff participated in a few training exercises and carried out a number of visits to the different institutions falling under the mandate of the NPM.

It appears impossible to calculate the exact amount of funds spent solely on NPM activities in the course of the last years, as the PA's budget has allocated funds from the general budget of the office. It is evident that most of the concerns raised by the SPT in its report on its 2012 visit to Moldova still remain valid⁶. This was confirmed in the course of the assessment mission of the Council of Europe Consultants to Moldova carried out in October 2015⁷.

Despite legal and practical impediments to the establishment of a functional NPM, there is still room for making significant progress. Adoption of new changes and amendments to the Law, which should remedy the shortcomings of legal nature⁸, might take some time and will largely depend on a political process. Selection of the members of the Council for the Prevention of Torture (hereinafter – the Council) might be a time consuming process as well. The Ombudsperson can launch the preparatory work, which should result in the establishment of the operational NPM, paving the way to a fully functional and effective mechanism.

As a matter of urgency the Ombudsperson should start developing new regulations of the Ombudsperson with a special emphasis on the NPM and its operation. He should also consider the announcement of the competition for the selection of the Council Members. The next step should be the approval of the NPM regulations, as prescribed by the Law⁹. The Ombudsperson can largely count on international assistance when working on the draft regulations of the NPM.

In the working process there are a few standards and requirements which have to be taken into account. More specifically, where the body designated as the NPM performs other functions in addition to those under the OPCAT, its NPM functions should be located within a separate unit or department, with its own staff and separated budget.¹⁰

⁶ Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Moldova CAT/OP/MDA/R1,

⁷ Assessment mission of the Council of Europe consultants, Mr George Tugushi and Jorgen Steen Sorensen to Chisinau, the Republic of Moldova, 1-2 October 2015. See in the Opinion of the Directorate of Human Rights, Directorate General Human Rights and Rule of Law of the Council of Europe on the Law no. 52 of 3 April 2014 on the People's Advocate (Ombudsperson) of the Republic of Moldova, Chapter V, The National Mechanism for the Prevention of Torture, Ref. DGI(2015) 25

⁸ Ibid para 97-100

⁹ Supra note 5, Art 31.1

¹⁰ SPT Guidelines on National Preventive Mechanism, 09.12.2010, p 32

The UN Subcommittee for the Prevention of Torture (SPT), in its 2012 report (p. 12), noted that: “The absence of a separate structure and a distinct budget line for the functions of the NPM within the Centre for Human Rights. In addition, the Subcommittee learned that the proposal to create a specialised subunit for torture prevention within the Centre for Human Rights was pending consideration in the Parliament since July 2011. In this connection, the Subcommittee recalls that structural problems of that nature undermine the functional independence of the NPM and, thus, place the State party in conflict with articles 18.1 and 18.3 of the Optional Protocol”¹¹.

Under Art 31(9) of the Law, in its activity, the Council is assisted by a special subdivision from the PA’s Office. In addition Art. 7.6 of Law nr.164 on approving the Regulation of Organisation and Functioning of the Ombudsperson’s Office¹² states that the Office, among other main functions, shall provide organisational, legal, information and technical assistance to the Ombudsperson, the Ombudsperson for Children’s rights and the Council for Prevention of Torture.

In accordance with the Law, the Ombudsperson should establish a special unit within the Office. At the outset, the Ombudsperson should consider the allocation of at least 5 permanent staff members to this unit. Their duties and responsibilities should be limited only to the NPM functions. Priority should be given to the staff members with professional experience in the area of the NPM mandate. In case of need, new staff members should be recruited through a transparent, public competition and provided sufficient training.

In 2012 the SPT also raised concerns that “The staff members of the Centre for Human Rights deal not only with NPM - related issues but also with a broad range of other activities under Ombudsperson’s Office mandate, such as individual complaints, which may undermine the preventive focus of the NPM work”.¹³

A strategy should be developed on regulating the individual complaints mechanism. Whenever an NPM is embedded in the office of the National Human Rights Institution there is always the risk that the NPM will be also responsible for implementing the core functions of the Ombudsperson mandate, such as handling individual complaints. Preferably, another unit of the Centre should handle individual complaints addressed to the NPM. Staff of the NPM unit should use all the available resources on preventive visits and report writing, as well as other activities falling under the mandate of the NPM.

¹¹ Supra note 6, Para 13, p.4

¹² The Law nr.164 on approving the Regulation of organisation and functioning of the Ombudsperson’s Office entered into force at 02.10.2015,
<http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=361146>

¹³ Supra note 6, Para 15, p.4

Financial sustainability

Financial sustainability and budgetary independence of the NPM remain as one of the main challenges for the mechanism in Moldova. State Parties should make available the necessary resources for the functioning of the national preventive mechanism¹⁴. The NPM should prioritise its own use of resources, on the basis of a regular analysis of its practice and experience, and in the light of its evaluation of its needs and the means necessary for it to exercise its mandate appropriately. The NPM should advocate for the provision of the resources necessary for the effective exercise of its mandate. In this process the NPM can largely benefit from the assistance of the SPT and other international and local actors supporting the operation of the NPM.

After its 2012 visit to Moldova the SPT reminded the Government of Moldova that: “the provision of adequate financial and human resources constitutes a legal obligation of the State party under article 18.3 of the OPCAT. Within Ombudsperson+ model freely chosen by the State party, a specialised subunit dedicated only and exclusively to the preventive mandate of the NPM shall be created. The Subcommittee recommends that the State party allocate to the NPM a separate and adequate budget to allow for its complete financial and operational autonomy Moreover, the Subcommittee recommends that the State party improve the working conditions by providing honorarium and administrative support team to the members of the Consultative Council, as well as by reviewing the salary scale of the employees of the subunit on prevention of the Centre for Human Rights.”¹⁵

Structural problems and the inability to properly plan the annual activities of the NPM have negatively affected the capacities of the NPM to attract a sufficient amount of external funding. The PA and newly formed NPM should rebuild trust with the donor community and mobilize funding for the development of the NPM and its capacities.

Considering that the State Budget for 2016 still has to be approved by the Parliament of Moldova, the Ombudsperson should use all available resources both at domestic and international levels to make sure that the PA receives a sufficient amount of additional funds for the NPM.

Planning and Implementation of visiting activities

One of the most important areas in the operation of any NPM is proper planning capacity. The NPM should ensure that it has criteria for the selection of places to be visited and also for deciding on thematic visits, which ensure that all places of detention and deprivation of liberty are visited regularly. The visits should be planned with the consideration of the type and size of institutions and their level and character of known

¹⁴ OPCAT article 18.3

¹⁵Supra note 6, Para 17.

human rights problems whilst leaving room for flexibility in the allocation of resources to ensure that follow-up and urgent visits can be undertaken. In addition, the NPM should be able to undertake resource planning, allocating sufficient financial and human resources for the annual plan of operations. The NPM should also make a tentative plan for the compositions of the delegations used for different types of visits and secure experts needed for such visits¹⁶.

The table below contains data of the last 8 years on the visits carried out by the PA's Office/NPM to different places falling under the mandate of the NPM. It is evident that the PA's office has acquired certain experience and the newly formed NPM will largely benefit from it. Nevertheless, the new NPM will have to adopt completely new working methods and better organise its work.

To achieve high standards in the work carried out, any NPM needs proper guidelines and methodology for its operation. Guidelines should be developed and updated continuously, and include all types of places that can be visited by the NPM. Guidelines should include the criteria for the selection of the places to be visited, topics to be covered during the visit, techniques to conduct private interviews, issues upon which to focus during the visit, information to be obtained and analysed, a guide on handling individual cases, a guide on handling issues related to possible reprisals, follow-up, etc¹⁷.

For the sake of coherent and transparent functioning, the NPM of Moldova should develop policies and rules of procedure to address the organisation of the office, its work and budget, employment policy, prevention of conflicts of interest, internal communication, communication with external actors, and a number of other issues¹⁸.

The work of the NPM should be understood to be an on-going, context-based process of development that is based not only on the experience of the NPM itself but also on information, advice and experience from other relevant and reliable sources. Members, staff, external experts and other possible contributors should receive on-going training on, inter alia, methodological, strategic, and ethical issues and they should participate in developing working methods¹⁹.

When the Council is formed the NPM should develop its own working methods and code of ethics, which should address the issues of working ethics, possible conflicts of interest, rules to be followed by the members of the NPM during and after the visits, etc.

Considering that the NPM is not yet fully formed as the members of the Council have not been selected and appointed, and also the legal provisions on visit planning are

¹⁶ Analytical assessment tool of National Preventive Mechanisms (NPM), A preliminary guide by the Subcommittee on Prevention of Torture regarding the functioning of an NPM, para 22-23, p.10.

¹⁷ Ibid, para 24

¹⁸ Ibid, para 16.

¹⁹ Ibid, para 20

rather uncertain (Para 67-70 of the Opinion), it is rather unlikely that the final annual plan of the NPM operation and other documents can be formulated. **Therefore the PA, after establishing the NPM Unit, can task this unit to start preparing an annual plan of operations, which will include general planning of visits to be carried out in the course of the year, resources to be allocated, trainings to be organised, matters to handled by the donors and external actors, plans to produce special reports, and topics for the visits to be a matter of priority. A draft plan should be prepared by the end of each year and approved for the next year. Later, when the Council is formed it should have the capacity to approve the plan and organise the work of the NPM accordingly. The plan should also assist the NPM in the planning of a budgetary year and the proper allocation of resources. The plan will also help to mobilise external support from the donors.**

Visits carried out by the PA's Office /NPM 2008-2015

Categories of institutions	2008	2009	2010	2011	2012	2013	2014	2015
Institutions subordinated to the Ministry of Internal Affairs (<i>temporary detention facilities</i>)	27	73	83	155	155	148	78	20
Institutions subordinated to the Ministry of Justice (<i>penitentiary institutions</i>)	13	44	39	70	60	53	40	23
Institutions subordinated to the Ministry of Health (<i>psychiatric hospitals</i>)	2	6	2	4	3	1	-	-
Institutions subordinated to Ministry of Labor and Social Protection and Family	1	3	1	-	6	10	6	2
Military units	-	2	2	9	27	15	4	
Total	44	128	127	238	251	227	128	45

Visit Reports and institutional visibility

Visit reports represent one of the main elements of the work of the NPM. Quality of the reports largely depends on the visits carried out and report-drafting skills of the NPM team. The reports should focus on the most important issues, i.e. reporting ill treatment, gaps in policies, regulations, and practices, as well as the appropriateness of conditions under which detainees are living, reflecting systematic problems related to the protection of the rights of detainees. Reports should include recommendations to the authorities for the improvement of the situation in the institutions visited. Recommendations should be

well founded, reflecting i.e. relevant international norms and practices. In general, recommendations should have a preventive focus, addressing systematic gaps and practices (root causes), and be feasible in practice. Recommendations should be adequately addressed, precise and non-complex so as to avoid confusion in the dialogue about their implementation²⁰.

After its visit to Moldova, the SPT acknowledged that: “the NPM was a relatively new institution in the Republic of Moldova. However, the SPT remained concerned that authorities in charge of places of detention, persons deprived of liberty and civil society did not perceive the Consultative Council together with the Centre for Human Rights as a single collegial body that constitutes the Moldovan NPM. The SPT also noted that there was no distinction when the Centre for Human Rights issued reports or transmitted its recommendations/views to the authorities as the Office of the Ombudsperson and when it was doing so in its capacity of the NPM”²¹.

In accordance with best practices, the members of the core working staff of the NPM should be responsible for the preparation of the reports following the visits to the places under the mandate of the NPM. Draft reports should be presented to the Council for approval and later made public. Each visit can be followed by a press release about the places visited, initial findings and preliminary recommendations to the authorities, if any. Final reports should be approved in the name of the NPM and recommendations addressed to the authorities on behalf of the NPM. The NPM reports should be discussed in the Parliament and be subject to wider debate in society, with the active involvement of the local civil society and international organisations. Public awareness campaigns should be organised to better inform the public and stakeholders about the role and the work of the mechanism. The NPM reports should be disseminated to all stakeholders and be available on the web.

Implementation of the NPM Recommendations and follow-up

The NPM should develop long term as well as short-term concrete strategies for its work in order to achieve the maximum impact on problems and challenges relevant to its mandate in the local context. The NPM should permanently monitor and assess the implementation of its own strategies and lessons learned should be used to reshape existing practices. Such an assessment could be based on a framework, starting with existing challenges, such as resourcing issues, and an assessment of activities currently undertaken²².

The NPM should maintain a dialogue with, first of all, addressees of the recommendations, i.e., governmental authorities and institution directors/managers of the places of detention regarding the implementation of recommendations; but also with the

²⁰ Ibid, para 31

²¹ Supra note 6, para 21, p.6

²² Ibid, para 33-34

supervising authorities of the addressees. The dialogue should involve both written and oral exchanges. Addressees of the recommendations should, on the request from the NPM, develop a concrete policy or plan of action to commence major reform where needed. In particular cases it may be appropriate to recommend that the authorities immediately put an end to certain practices and initiate a criminal investigation.

The SPT, following its 2012 visit to Moldova, noted that: “During meetings with the Subcommittee, the representatives of the authorities were unable to provide a concrete example of a recommendation addressed to them by the NPM and/or implemented. This implies that these authorities have not yet entered into a meaningful dialogue with the NPM to address systemic issues and root causes of torture and ill-treatment. That corroborates the views expressed by some members of the NPM that their recommendations to the authorities are “often listened to but rarely heard”, especially when financial resources are required for the implementation. Moreover, the Subcommittee expressed concerns about the absence of an established coordination mechanism between and among different State party’s entities working in the field of prevention of torture, such as the State apparatus of judicial oversight, the General Prosecutor Office, relevant Ministries, Local Commissions on one hand and the NPM on the other.”²³

The Ombudsperson can already launch the work on establishing the coordination mechanism for the implementation of the NPM recommendations. The Ombudsperson can remind the authorities about the recommendations issued by the SPT in its 2012 visit report and recommend that they start working on the creation of an inter-agency coordination mechanism to implement the recommendations of the NPM. More specifically the Government of Moldova should **establish coordination among relevant entities and institutions, in order to ensure the effective implementation of the national strategy to prevent torture and the proper functioning of the NPM. Furthermore, as it is called for in article 22 of the OPCAT, the competent authorities of the State party shall examine the recommendations of the NPM and enter into a meaningful dialogue with it on possible implementation measures. In this connection, a focal point could be named in each of or for all the relevant ministries to follow up on the implementation of the NPM’s recommendations and to report to the mechanism in that regard.**²⁴

²³ Ibid, para 24-26, p.6

²⁴ Ibid, para 27

List of main recommendations:

- **Prepare and approve the regulations for the National Preventive Mechanism**
- **Announce the competition for the selection of the members of the Torture Preventive Council and adopt clear criteria for the members of the Evaluation/Selection Board that will select the future members of the Torture Preventive Council.**
- **Remind the Government of Moldova the recommendations issued by the SPT following its visit in 2012, more specifically on the improvement of the legislation, provisions of sufficient funds and establishment of the coordination mechanism for the implementation of the NPM recommendations²⁵.**
- **Request the Government to provide sufficient funds from the 2016 Budget to the NPM in line with their Commitments under OPCAT Art 18.3**
- **Establish a special Unit for Torture Prevention in the Office of the Ombudsperson**
- **After forming the separate NPM Unit, start working on the annual plan of operations of the NPM**
- **Start working on preparation of proper guidelines and working methodology for the NPM and its members, taking into account the specificity of the work in Moldova and types of institutions to be visited.**
- **After forming the separate NPM Unit start working on the Code of Ethics for the NPM**
- **Provide specialised training to the members of the newly established NPM Unit as well as newly selected Council Members**
- **With a newly established unit, continue carrying out preventive visits to the places falling under the mandate of the NPM, aiming at increasing the number of visits, providing the visiting activities more coherence, based on the annual plan of operations.**

²⁵ Ibid, Para 12, 17, 27.

ANNEX

List of visited institutions and meetings during the Fact Findings Mission in Moldova 1-2 October 2015

1. **Meeting at the Council of Europe Office in Chisinau**, meeting with Deputy Head of Office and Project manager "Support to Criminal Justice Reforms in Moldova"
2. **Visit to United Nations Development Program Moldova and Office of High Commissioner of Human Rights**, meeting with representatives of Human rights and Justice team
3. **Visit to Parliament of Republic of Moldova: meetings with** former Ombudsperson, Head of Parliamentary Legal Committee and representatives of the Parliamentary Human Rights Committee
4. **Visit to Office of the People's Advocate**, meeting with PA's representatives, responsible for the NPM activity
5. Meeting with **Human Rights NGOs**: representatives of Amnesty International Moldova, RCTV "Memoria", "Promo-Lex"
6. Meeting with the former members of **NPM**