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## **OPINION ON THE LEGISLATIVE AMENDMENTS ON THE STATE INSPECTOR'S SERVICE OF GEORGIA**

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### **Georgia**

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Based on an unofficial English translation of the Legislative amendments provided by the Public Defender's Office of Georgia.

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## EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The reorganization of independent institutions or oversight mechanisms is something which countries may need to enter into from time to time and is a legitimate subject for legislation. However, in view of the fundamental importance of these independent institutions to the rule of law, great care must be taken to ensure that any such reorganisation is compatible with well-established international standards.

ODIHR considers it highly problematic that, contrary to international standards, amendments to the law on the State Inspector's Service were rushed through the parliament of Georgia without consultation, resulting in the abolition of the institution of the State Inspector effectively on 1 March 2022. The process by which the amendments were undertaken risks undermining the rule of law and the functioning of independent institutions in Georgia, including as a result of the dismissal of the State Inspector outside of the process provided for in law. It is a potentially troubling precedent if a legislative amendment results in undermining the security of tenure for the head of an independent body and circumvents proper procedures for his/her dismissal.

Cumulatively, the process and the legislative changes may impact protection from serious human rights abuses by law enforcement officials, reducing the state's ability to effectively investigate allegations of torture, ill-treatment and deaths in custody, including through undermining the independence of the institution of the State Inspector's Service and the expansion of its mandate to cover a broad range of crimes outside of its originally envisaged purpose.

A number of features in the amended Laws raise concern, as well as missed opportunities for strengthening the institution that should be considered in any subsequent amendment process. These missed opportunities include the provisions for the selection and appointment of the head of the institution, and for functional immunity.

More specifically, and in addition to what is stated above, ODIHR makes the following recommendations to further enhance the compliance of the legislation with international human rights standards and OSCE commitments:

- A. suspending the implementation of the amended Laws and to address the deficiencies identified in the law-making process pertaining to these Laws; par. 45
- B. To ensure that, if the implementation of the amended laws is not suspended, the security of tenure is upheld by enabling the incumbent State Inspector and deputies to serve their full term of office, in the absence of any legal or other compelling reasons justifying the early termination of their mandates; par. 51
- C. To consider suspending the implementation of the amended Laws as they undermine the independence of the Special Investigation Service and the

Personal Data Protection Service and as such, could have a detrimental effect on their effectiveness in the protection of human rights; par. 55

- D. To reintroduce in the amended Laws the right of the parliament to request the attendance of the head of the new Services at their request; par. 56
- E. To remove the list of crimes covered in Article 19 par 1 (d) of the amended Law on the State Inspector's Service, or, alternatively, if they are retained, to clarify that they are covered by the institution solely when committed by representatives of law enforcement bodies, officials or persons equal to them and to allocate adequate resources, if the expanded mandate of the institution is maintained; par. 57
- F. With respect to the persons covered under the mandate:
  - 1. To revise Article 3 of the amended Law on the State Inspector's Service to remove the exclusion of the Minister of Internal Affairs and the Prosecutor General and other senior officials from the list of individuals who can be investigated by the service; par. 61
  - 2. To revise Article 19 par 1 (c) of the amended Law on the State Inspector's Service to remove the exclusion of prosecutors from the mandate of the institution in relation to the serious crimes set out therein; par. 62
- G. With respect to the appointment process and selection criteria:
  - 1. To revise Article 6 of the amended Law on the State Inspector's Service and Article 40 of the amended Law on Personal Data Protection to include provisions for a clear, transparent and participatory selection and appointment process for the heads of the institutions and to include that a that a parliamentary majority is required for election of the heads of the institutions; pars 62-67
  - 2. To revise Article 6 par 1 of the amended Law on the State Inspector's Service to exclude former or current state agents and those with extensive experience in the police and/or military from the position of head of the institution; par 68
- H. To revise Article 7 of the amended Law on the State Inspector's Service and Article 40 of the amended Law on Personal Data Protection to (1) include functional immunity for deputies and staff, (2) provide for functional immunity to apply even after leadership and staff leave the institution, (3) specify the reasons for which immunity may be lifted in accordance with a fair and transparent process; par. 71.

***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.*

## TABLE OF CONTENTS

<b>I. INTRODUCTION.....</b>	<b>5</b>
<b>II. SCOPE OF THE OPINION.....</b>	<b>5</b>
<b>III. LEGAL ANALYSIS AND RECOMMENDATIONS .....</b>	<b>6</b>
<b>1. Background.....</b>	<b>6</b>
2. Relevant International Human Rights Standards and OSCE Human Dimension Commitments .....	7
<b>3. Main Concerns.....</b>	<b>11</b>
4. Legislative Process .....	12
<b>5. Security of Tenure .....</b>	<b>15</b>
<b>6. Independence of the Special Investigation Service and the Personal Data Protection Service.....</b>	<b>16</b>
<b>7. Other Concerns.....</b>	<b>18</b>
7.1. <i>Change to the Role of Parliament.....</i>	<i>18</i>
7.2. <i>Changes in Mandate.....</i>	<i>18</i>
7.3. <i>Exclusion of Public Prosecutors in relation to Certain Crimes .....</i>	<i>19</i>
7.4. <i>Appointment Process for the Head of the Institution .....</i>	<i>20</i>
7.5. <i>Functional Immunity .....</i>	<i>22</i>
7.6. <i>State Inspector's Annual Report.....</i>	<i>23</i>
7.7. <i>Specific Issues pertaining to the Personal Data Protection Service.....</i>	<i>23</i>

**ANNEX:** Law of Georgia on Amending the Law on the State Inspector's Service and the Law of Georgia on Amending the Law on Personal Data Protection

## I. INTRODUCTION

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1. On 2 February 2022, the Public Defender of Georgia sent the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) a request for a legal review of the legislative amendments of 30 December 2021 consisting of the Law of Georgia on Amending the Law on the State Inspector’s Service and the Law of Georgia on Amending the Law on Personal Data Protection (hereinafter “the amended SIS Law” and “the amended Data Protection Law” respectively and jointly referred to as the “amended Laws” or “legislative amendments”).
2. On 8 February 2022, ODIHR responded to this request, confirming the Office’s readiness to prepare an Urgent Opinion on the compliance of these amended Laws with international human rights standards and OSCE human dimension commitments.
3. Given the short timeline to prepare this legal review, the present Urgent Opinion on the amended Laws does not provide a detailed analysis of all the provisions of the legislative amendments, but primarily focuses on the most concerning issues relating to the legislative process, the impact of the adoption of the amended Laws on an independent institution, and specific provisions in the amended Laws relating to the role of the new Special Investigation Service in investigating allegations of serious human rights abuses by law enforcement officials.
4. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments.<sup>1</sup>

## II. SCOPE OF THE OPINION

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5. The scope of this Opinion primarily covers the amended SIS Law submitted for review and the process surrounding its adoption. As relevant, though to a lesser extent, the Opinion will refer to the amended Law on Personal Data Protection. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework relating to the SIS in Georgia.
6. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on the legislative processes and provisions in the amended Laws that require improvements or amendments than on the positive aspects of the amended Laws. The ensuing 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<sup>2</sup> (“CEDAW”) and the 2004 OSCE Action Plan for the Promotion of Gender Equality<sup>3</sup> and commitments to mainstream gender into OSCE

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<sup>1</sup> See especially OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area (2008), point 4, where the Ministerial Council “[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention [...]”.

<sup>2</sup> UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Ukraine deposited its instrument of ratification of this Convention on 12 March 1981.

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

activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective.

8. This Opinion is based on unofficial English translations of the amended Laws provided by the Public Defender's Office of Georgia, which are attached to this document as an Annex. Errors from translation may result. Should the Opinion be translated in another language, the English version shall prevail.
9. In view of the above, ODIHR would like to emphasise that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Georgia in the future.

### **III. LEGAL ANALYSIS AND RECOMMENDATIONS**

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#### **1. BACKGROUND**

10. The SIS was established in July 2018, with the Inspector elected by the parliament of Georgia in 2019 for a fixed term of 6 years. The Service has been operational since 1 November 2019. The Service was the legal successor of the Personal Data Protection Inspector's Office.
11. The SIS was, until the introduction of the amended Laws, mandated to monitor the lawfulness of personal data processing, to monitor covert investigative actions and activities under relevant legislation, and to carry out impartial and effective investigation of certain alleged crimes committed by representatives of law-enforcement authorities, by an official or a person equal to an official (see Articles 2 and 19 of the Law on the State Inspector's Service prior to the recent amendments). In this regard, it is noted that Article 25 of the Constitution of Georgia prohibits unjustified dismissal of public servants. Article 9 of the Constitution requires an effective investigation into allegations of ill-treatment, and Article 15 provides constitutional guarantees for privacy.<sup>4</sup>
12. Prior to its establishment, international organizations, including the UN Office of the High Commissioner for Human Rights and the Council of Europe Committee for the Prevention of Torture, had recommended to Georgia the establishment of an independent investigative body for serious allegations of torture and ill treatment by law enforcement officials.<sup>5</sup> The establishment of the SIS also followed a number of decisions by the European Court of Human Rights on the ineffectiveness of investigations by Georgia into allegations of ill-treatment by law enforcement officials.<sup>6</sup> As recently as early 2021, when Georgia was reviewed as part of the UN Universal Periodic Review Process, it committed itself to strengthening the SIS, including strengthening its independence, resources and functioning.<sup>7</sup>
13. The parliament of Georgia began consideration of the legislative amendments on 27 December 2021, holding three readings and passing the amended Laws on 30 December 2021. The amended Laws were signed by the President of Georgia on 13 January 2022.<sup>8</sup>

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<sup>4</sup> <https://matsne.gov.ge/en/document/view/30346?publication=36>

<sup>5</sup> Georgia: Visit 2018, CPT/Inf (2019) 16, Section: 6/42, 23 March /2019 Combating impunity (independent investigation mechanism), para 13

<sup>6</sup> For example, Vazagashvili and Shanava v. Georgia (2019), Aghdgomelashvili and Japaridze v. Georgia (2020),

<sup>7</sup> Report of the Working Group on the Universal Periodic Review of Georgia, UN Doc. A/HRC/47/15 Recommendations 148.103-148.106, accepted in A/HRC/47/15/Add.1, p. 6

<sup>8</sup> See for example: <https://stateinspector.ge/en/article/statement-of-the-state-inspectors-service/142>

The principal effect of the amended SIS Law is the abolition of the SIS and the position of State Inspector as of 1 March 2022, and its replacement with two separate institutions: a Special Investigation Service and a Personal Data Protection Service.

14. The process for discussion and adoption of the amended Laws resulted in widespread criticism from local and international partners<sup>9</sup>, including the Council of Europe Commissioner for Human Rights,<sup>10</sup> the EU Delegation in Tbilisi,<sup>11</sup> the UN Office of the High Commissioner for Human Rights,<sup>12</sup> the U.S. Embassy in Tbilisi<sup>13</sup> as well as a number of embassies,<sup>14</sup> and NGOs.<sup>15</sup> The criticism centred on two main areas: firstly, a lack of openness, transparency, inclusiveness and debate in the expedited process, and, second, the effect the abolition of the SIS would have on the democratic development and protection of human rights in Georgia. Further, the Public Defender of Georgia<sup>16</sup> and the State Inspector have lodged a case against the amended Laws before the Constitutional Court.

## 2. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

15. Various mechanisms and bodies can be established to ensure accountability and to promote human rights in domestic legal systems. Independent (oversight, regulatory or investigative) bodies can provide an effective, additional check alongside the traditional three powers.<sup>17</sup> It is generally recognized that for an oversight system to be effective, there should be at least six interdependent pillars of oversight and control across the criminal justice system: internal oversight, executive control (policy control, financial control and horizontal oversight by government agencies), parliamentary oversight (members of parliament, parliamentary commissions of enquiry), judicial review, and independent bodies such as national human rights institutions and civil society oversight.<sup>18</sup> Such mechanisms should be able to effectively investigate allegations of wrongdoing, and as appropriate, recommend disciplinary sanctions or refer cases for criminal prosecution.<sup>19</sup> An external oversight mechanism would also improve public trust in police services. Internal and external oversight mechanisms should generally complement one another.<sup>20</sup>
16. Therefore, the revision of the Law on the State Inspector's Service of Georgia should be undertaken with due regard for international standards and OSCE commitments with a view to upholding human rights. In that respect, the SIS' mandate and functioning must be held to the same standards of good governance as any other public sector mechanism, to ensure that the institution is able to fulfil its mandate in an independent, accountable and effective way, within a framework of democratic civilian control, rule of law and respect for human rights.
17. The protection of human rights and freedoms is a cornerstone of democratic law-making. One of the most important rights in this context is the right to participate in the conduct of

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9 See <https://georgia.un.org/en/168152-united-nations-concerned-over-decision-georgian-authorities-abolish-state-inspectors-service>

10 Council of Europe Commissioner for Human Rights, The Georgian Parliament should reject draft legislation undermining the independent functioning of the State Inspector's Service

11 EU Delegation responds to expedited procedures in the Georgian Parliament relating to the State Inspector's Service and the Judiciary

12 Agenda.ge UN Human Rights office concerned by possible abolishment of State Inspector's Service in Georgia

13 U.S. Embassy Statement on the Ruling Party's Rushed, End-of-Year Legislation

14 <https://civil.ge/archives/464891>

15 Agenda.ge NGOs condemn possible replacement of State Inspector's Service by two other agencies

16 <https://ombudsman.ge/eng/akhali-ambebi/sakhalkho-damtsvelma-sakonstitutsio-sasamartlos-mimarta-sakhelmtsifo-inspektoris-samsakhurtan-dakavshirebit>

17 International IDEA, Independent Regulatory and Oversight (Fourth-Branch) Institutions, p. 10.

18 See OSCE Guidebook on Democratic Policing 2008, par 84

19 See UNODC Handbook on police accountability, oversight and integrity (2011), p iv

20 See OSCE Guidebook on Democratic Policing 2008, par 87

public affairs, as set out in Article 25 of the International Covenant on Civil and Political Rights (ICCPR).<sup>21</sup> Under paragraph 1 of this provision, all citizens have the right and the opportunity, without discrimination and without unreasonable restrictions, to participate in the conduct of public affairs directly, or via their chosen representatives.

18. At the OSCE level, OSCE participating States have underlined the importance of involving the public in law-making processes by committing to open and democratic law-making procedures, involving public procedures.<sup>22</sup> They have further committed to formulate and adopt legislation as the “result of an open process reflecting the will of the people either directly or through their elected representatives”.<sup>23</sup> Numerous other commitments on inclusiveness, in particular with respect to women,<sup>24</sup> national minorities,<sup>25</sup> and persons with disabilities,<sup>26</sup> give additional meaning to the “open” and “public” nature that the legislative process should have, “reflecting the will of the people”.
19. In addition to the above standards, obligations and commitments, a number of international documents have been published to reflect and provide guidance on standards and good practices of public participation and on other aspects of the policy and law-making process.
20. In its 2016 Rule of Law Checklist, the Council of Europe’s Commission for Democracy through Law (hereinafter “Venice Commission”) stressed the principle of legality, and the ensuing need to recognize the supremacy of the law.<sup>27</sup> The Checklist clarifies that this means ensuring the conformity of legislation with a country’s constitution, and the conformity of actions of the executive with the constitution and other laws.<sup>28</sup> With respect to the law-making process, the Checklist notes that such processes need to be “transparent, accountable, inclusive and democratic”.<sup>29</sup>

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21 International Covenant on Civil and Political Rights, adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966.

22 Paragraph 5.8, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990 (Copenhagen Document).

23 Paragraph 18.1, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991 (Moscow Document).

24 See, e.g., the Concluding Document of Madrid, Second Follow-up Meeting, Madrid, 6 September 1983, Questions Relating to Security in Europe, Principles, where participating States stressed the importance of ensuring equal rights for men and women and agreed to take all actions necessary to promote equally effective participation of men and women in, among others, political life. See also par 40.8 of the Moscow Document, where participating States committed to encourage and promote equal opportunity for full participation by women in all aspects of political and public life, including in decision-making processes, and par 5 of OSCE Ministerial Council Decision No. 7/09 on Women’s Participation in Political and Public Life, Athens, 2 December 2009, where participating States were called upon to “develop and introduce where necessary open and participatory processes that enhance participation of women and men in all phases of developing legislation, programmes and policies”.

25 See par 35 of the Copenhagen Document, where participating States committed to respect the rights of persons belonging to national minorities to effective participation in public affairs, and Section III of the Geneva Report of the CSCE Meeting of Experts on National Minorities, Geneva, 19 July 1991, specifying that when issues relating to the situation of national minorities are discussed within their countries, they themselves shall have the effective opportunity to be involved, in accordance with the decision-making procedures of each State. See also the OSCE High Commissioner on National Minorities: Ljubljana Guidelines on the Integration of Diverse Societies, November 2012, in particular p. 28.

26 See paragraphs 41.1 and 41.2 of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991 (Moscow Document); see also Guidelines on Promoting the Political Participation of Persons with Disabilities, page 27, available at: <https://www.osce.org/files/f/documents/b/6/414344.pdf>.

27 European Commission for Democracy through Law (Venice Commission) of the Council of Europe: Rule of Law Checklist, 18 March 2016, Benchmark A.5.

28 European Commission for Democracy through Law (Venice Commission) of the Council of Europe: Rule of Law Checklist, 18 March 2016, Benchmark A.5. ii. and iv.

29 European Commission for Democracy through Law (Venice Commission) of the Council of Europe: Rule of Law Checklist, 18 March 2016, Benchmark A.5. Law-making procedures. The relevant questions asked by the Checklist to determine whether lawmaking procedures are transparent, accountable, inclusive and democratic are:

- i. Are there clear constitutional rules on the legislative procedure?
- ii. Is Parliament supreme in deciding on the content of the law?
- iii. Is proposed legislation debated publicly by parliament and adequately justified (e.g. by explanatory reports)
- iv. Does the public have access to draft legislation, at least when it is submitted to Parliament? Does the public have a meaningful opportunity to provide input?



21. In its case law, the European Court of Human Rights has not addressed legislative processes in detail but has nevertheless considered pluralism and the freedom of political debate to be defining elements of democratic societies.<sup>30</sup> Furthermore, the Court has in certain cases also assessed the legislative choices underlying a general state measure in order to determine its proportionality, emphasizing the importance of the quality of the parliamentary review of the necessity of the measure.<sup>31</sup> Similarly, when applying the proportionality test, the Court has looked into the nature and extent of parliamentary debate on relevant human rights questions.<sup>32</sup>
22. The OSCE/ODIHR, in addition to numerous recommendations relating to improving national law-making processes, including public consultations, made in its reports and opinions, facilitated the development of recommendations on how to involve associations in decision-making processes in 2015.<sup>33</sup> These recommendations contain key principles of participation of associations in decision-making, and also touch on necessary state support mechanisms in terms of policy and legal frameworks, and different means of participation.
23. Additionally, the Organization for Economic Co-operation and Development (OECD) has been instrumental in promoting the use of key tools that enhance the quality and process of law-making, including in the field of public consultations and open and inclusive law-making.<sup>34</sup>
24. Relevant to the amended Laws are international standards on the functioning of independent state-based institutions. The standards established by the 1993 United Nations Paris Principles for National Human Rights Institutions,<sup>35</sup> and the Venice Commission's Venice Principles for Ombudspersons<sup>36</sup> are particularly relevant here, insofar as they provide guidance on areas such as selection and appointments, security of tenure, functional immunity, and adequate and autonomous funding.<sup>37</sup>
25. The creation of mechanisms such as the State Inspector's Service is, inter alia, rooted in and accompanied by the positive obligations on the right to life and the prohibition of torture. The amendments to the Law on the State Inspector's Service thus have consequences for the duty to carry out effective investigations of serious human rights violations alleged to have been committed by law enforcement officials, particularly

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v. Where appropriate, are impact assessments made before adopting legislation (e.g. on the human rights and budgetary impact of laws)?

vi. Does the Parliament participate in the process of drafting, approving, incorporating and implementing international treaties?

30 See ECtHR, *Handyside v the United Kingdom*, application no. 5493/72, judgment of 7 December 1976, par 49 and *Lingens v Austria*, application no. 9815/82, judgment of 8 July 1986, par 42.

31 See ECtHR, *Animal Defenders International v. the United Kingdom*, application no. 48876/08, judgment of 22 April 2013, par 108.

32 See ECtHR, *Hirst (No. 2) v. the United Kingdom*, application no. 74025/01, judgment of 6 October 2005, par 79.

33 Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes, developed by civil society experts during a Civil Society Forum organized and facilitated by OSCE/ODIHR on 15-16 April 2015. A final and consolidated version of the recommendations was then finalized on 22 September 2015 on the occasion of OSCE/ODIHR's annual Human Dimension Implementation Meeting.

34 Organization for Economic Development and Co-operation (OECD): *Citizens as Partners - Handbook on Information, Consultation and Public Participation* (2001). This Handbook was meant as a practitioner's guide for government officials, seeking to offer to them a sort of practical "road map" on how to establish frameworks for informing, consulting and engaging citizens during policymaking. The 2011 Declaration of the Open Government Partnership, a platform for government representatives and civil society aiming to enhance the transparency and inclusiveness of governance, also mentions support to citizens' participation as one of its main goals. See also, on a more general note, Recommendation of the Council on Regulatory Policy and Governance, 2012, Annex, 4.1.

35 The Paris Principles adopted by UN General Assembly Resolution 48/134 of 20 December 1993.

36 Venice Commission, *Principles on the Protection and Promotion of the Ombudsman Institution* ("the Venice Principles"), 3 May 2019.

37 See also the revised UN Manual on the Effective Prevention of Extra-legal, Arbitrary and Summary Executions of 2016 (also known as the Minnesota Protocol), where it addresses 'investigative mechanisms' and suggests in footnote 83 that "In designing such mechanisms, States should have regard to the principles relating to commissions of inquiry contained in the Set of Principles to Combat Impunity, the OHCHR's Commissions of Inquiry and Fact-Finding Missions Guidance and Practice and the Siracusa Guidelines for International, Regional and National Fact-Finding Bodies." <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf> See further regarding the importance of independence of investigative bodies the Factsheet Ed. 1 of Penal Reform International and Association for the Prevention of Torture, "Incident management and independent investigation", p. 8 available here: [https://cdn.penalreform.org/wp-content/uploads/2018/06/PRI\\_DMT\\_Incidents\\_Factsheet\\_WEB.pdf](https://cdn.penalreform.org/wp-content/uploads/2018/06/PRI_DMT_Incidents_Factsheet_WEB.pdf).

violations of the right to life and the prohibition of torture and ill-treatment<sup>38</sup>. These are set out below.

26. The prohibition of torture and ill-treatment is a fundamental part of international human rights law, and includes the duty of states to investigate allegations that have occurred. The prompt and effective investigation of allegations of breaches of human rights by law enforcement officials is an essential element of a democratic state,<sup>39</sup> and is critical to upholding human rights and combatting impunity.<sup>40</sup> The independence of such investigations is crucial to their effectiveness and to public confidence in their outcome.
27. At the international level, the duty to investigate human rights violations is set out in a range of international instruments, including the International Covenant on Civil Rights and Political Rights (“ICCPR”), pursuant to which states must investigate all killings perpetrated by state agents (Article 6, right to life).<sup>41</sup> The UN Convention against Torture (“CAT”) (Articles 12, 13 & 14) requires a prompt and impartial investigation into allegations of torture or other ill treatment in any territory under the state’s jurisdiction.<sup>42</sup> The European Court of Human Rights similarly has held that a right to adequate investigations of police killings is incorporated in Article 2 (the right to life) of the European Convention on Human Rights (“ECHR”), and that Article 3 ECHR (prohibition against torture) encompasses a duty on states to investigate allegations of torture,<sup>43</sup> and serious injury or serious ill-treatment by state actors.<sup>44</sup>
28. OSCE participating States have committed themselves to “prohibit torture and other cruel, inhuman or degrading treatment or punishment, to take effective legislative, administrative, judicial and other measures to prevent and punish such practices” (1990 Copenhagen Document), to “inquire into all alleged cases of torture and to prosecute offenders” (1994 Budapest Document) as well as to “ensure that law enforcement acts are subject to judicial control, that law enforcement personnel are held accountable” (1991 Moscow Document). These commitments have been recently reiterated in the 2020 OSCE Ministerial Council Decision on the prevention and eradication of torture and ill-treatment which called on the participating States to “Ensure that all allegations of torture or other cruel, inhuman or degrading treatment or punishment, as well as wherever there are reasonable grounds to believe that such an act has been committed, are investigated promptly, effectively, thoroughly, and impartially by competent and independent national authorities and ensure that complainants and witnesses are protected against ill-treatment and intimidation as a consequence of their complaint or evidence given.”<sup>45</sup>
29. The form which such investigations should take has also been set out in international standards. Under the ICCPR, investigations into allegations of violations of the right to life “must always be independent, impartial, prompt, thorough, effective, credible and transparent.”<sup>46</sup> The European Court of Human Rights has found that there is a duty to investigate allegations of torture, which requires states to ensure an efficient, effective and

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<sup>38</sup> The terms “torture” or “torture and ill-treatment” as used in this Opinion can be taken to include torture and other cruel, inhuman or degrading treatment or punishment as defined by the relevant international instruments and jurisprudence.

<sup>39</sup> UNODC Handbook on police accountability, oversight and integrity

<sup>40</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Combating impunity par 32

<sup>41</sup> Human Rights Committee General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life (2018) par 27

<sup>42</sup> See also, General Assembly resolution 55/89 of 4 December 2000, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

<sup>43</sup> European Court of Human Rights, *Aksoy v. Turkey*, no. 21987/93, 1996, par 98.

<sup>44</sup> European Court of Human Rights, *McCann v. United Kingdom and Others*, no. 18984, 1995.

<sup>45</sup> OSCE Ministerial Decision No. 7/20 Prevention and Eradication of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment par 14

<sup>46</sup> Human Rights Committee General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life (2018) par 28

impartial investigation,<sup>47</sup> that is sufficiently thorough<sup>48</sup> and prompt.<sup>49</sup> The Court has held that “for an investigation to be effective, the institutions and persons responsible for carrying it out must be independent from those targeted by it. This means not only a lack of any hierarchical or institutional connection but also practical independence.”<sup>50</sup> The Council of Europe Commissioner for Human Rights has recommended that a complaint system be independent, adequate, prompt, subject to public scrutiny (open and transparent), and that it should ensure the victim's/complainant's involvement in the process.<sup>51</sup> Similarly, the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment require that complaints and reports of torture or ill-treatment should be promptly and effectively investigated.<sup>52</sup>

30. Investigations into allegations of serious human rights violations by law enforcement officials should be undertaken by specialised bodies, which are an important component of overall national accountability structures, including in the context of the wider domestic mechanisms for combatting impunity such as ombudspersons and National Human Rights Institutions, National Preventive Mechanisms, human rights NGOs, victims' groups and other civil society actors.
31. With respect to data protection, it is noted that Article 17 ICCPR also protects against “unlawful or arbitrary interference” with the right to privacy. Article 8 par 2 of the ECHR likewise states that interferences with the right to private life are only permissible if they are based on law, follow a legitimate aim, and are necessary in a democratic society to meet this aim. Oversight bodies in the area of data protection, should, similar to other independent institutions, be guided by the principle of independence, which is strengthened by “transparent and objective procedures for the nomination of the members of oversight bodies,... no governmental interference with the activities and decisions of the institution performing the oversight,... effective powers, and... adequate resources and budgetary independence”.<sup>53</sup> The European Union's rules<sup>54</sup> on data protection are also relevant here, with the 2016 General Data Protection Regulation requiring in Article 52 that Data Protection Authorities “act with complete independence” and members of such authorities “remain free from external influence, whether direct or indirect, and shall neither seek nor take instructions from anybody”.

### **3. MAIN CONCERNS**

32. The amended Laws raise three main concerns. The first one pertains to the expedited way in which they were discussed and adopted, as the process lacked openness and transparency and failed to allow for a thorough and inclusive legislative process.<sup>7</sup> As a consequence, the amendments might be perceived as politically biased, and intended to undermine the independence and effective functioning of the institution. Second, the early termination of the State Inspector's position is outside of due process requirements and may create an unwelcome precedent in relation to the security of tenure of heads of other independent bodies in Georgia. . Third, the manner in which the amendments have been undertaken has

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47 European Court of Human Rights, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 182, ECHR 2012

48 European Court of Human Rights, *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 325, ECHR 2014 (extracts)

49 European Court of Human Rights, *Bouyid v. Belgium* [GC], no. 23380/09, § 120, ECHR 2015

50 European Court of Human Rights, *Bouyid v. Belgium* [GC], no. 23380/09, § 120, ECHR 2015

51 Opinion of the Council of Europe Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police, CommDH(2009)4, 12 March 2009.

52 General Assembly resolution 55/89 of 4 December 2000, Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment par 2

53 <https://oxford.universitypressscholarship.com/view/10.1093/oso/9780190685515.001.0001/oso-9780190685515-chapter-20>, p. 390.

54 Although the Republic of Georgia is not a member to the European Union, the documents referred to may serve as important and useful sources for reference.

broader implications for the rule of law and human rights in Georgia, as it undermines the concept of an independent institution in the state. The abolition of the State Inspector's Service is potentially detrimental to human rights protection in Georgia, in particular to the protection of the right to life and freedom from torture, and the right to privacy.

#### 4. LEGISLATIVE PROCESS

33. The amendments were adopted under the parliament of Georgia's accelerated law-making procedure.<sup>55</sup> Under this procedure a draft law may be considered and adopted during one week of plenary sittings rather than the several weeks, if not months, involved in the normal procedure. As noted in paragraph 13 above, the parliamentary stages of the legislative process, including committee hearings, were completed in the four days between 27 December and 30 December 2021 – three days if one excludes the parliamentary bureau's decision on 27 December that the amendments should be considered under the accelerated procedure.
34. The rationale for the introduction of the amendments is unclear. An accompanying Explanatory Note<sup>56</sup> to the amended Laws references a 2018 joint statement of NGOs raising concerns about a possible conflict of interest in having a single institution investigate allegations against law enforcement and data protection.<sup>57</sup> However, this statement was issued prior to the commencement of the operation of the Service. On 26 December 2021, the authors of that statement issued a further statement noting that "observations on the institution have clearly proven that no shortcomings have been identified in practice in terms of the compatibility of personal data protection and investigative functions."<sup>58</sup>
35. Also of relevance is that the SIS was only established in 2018 and has been operational for only little over two out of the six years of the first State Inspector's mandate. This raises doubts as to whether these legal changes can be considered to be based on a thorough assessment of the effectiveness of the SIS and an analysis of the comparative costs and benefits of all available policy solutions. Furthermore, a newly established institution such as the SIS should have the time to become fully operational and it is highly unlikely that an assessment as to its real and perceived impact can be made after such a short time as was done in the present case.
36. The Explanatory Note does not mention any research on or make reference to actual or proven conflicts of interest or malfunctioning of the Service. It adds that the purpose of the legislative package is to create a more effective institutional arrangement for the SIS. From the Note it can be discerned that no human rights impact assessment was carried out. On the relation of the amended SIS Law to international legal standards, the Explanatory Note simply asserts: "The draft law does not contradict the obligations related to Georgia's membership in international organizations."<sup>59</sup> This leaves insufficient opportunity to assess the implications on the protection of human rights, which raises the question if the parliament has had an opportunity to acquaint itself with the potential consequences of the amended Laws.
37. Ultimately, to create a culture of accountability, human rights should be integrated in all stages in the policy and law-making cycle, from initial planning, to budgeting,

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55 Rules of Procedure of the Parliament of Georgia (2019), Article 117.

56 See <https://info.parliament.ge/file/1/BillReviewContent/290470?>

57 <https://transparency.ge/en/post/coalitions-opinion-initiative-create-state-inspectors-office>

58 <https://socialjustice.org.ge/en/products/arasamtavrobo-organizatsiebis-gantskhadeba-sakhelmtsifo-inspektoris-samsakhuri-sheadzlogaukmebastian-dakavshirebit>

59 See <https://info.parliament.ge/file/1/BillReviewContent/290470?>

implementation, monitoring and evaluation.<sup>60</sup> Given the potential impact of the amended Laws 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.<sup>61</sup>

38. The concerns surrounding the law-making process are exacerbated by the use of an expedited law-making process. Resorting to such a process for the adoption of legislation must be strongly justified. In this instance, the Explanatory Note does not provide sufficient rationale. It states that “the next parliamentary session starts in February and due to the need for timely regulation, it is advisable not to delay the adoption of the proposed legislative changes.”<sup>62</sup> No justification is provided as to why these legislative amendments could not have been adopted after a longer, inclusive, and open legislative process in the course of which some, if not all, of the shortcomings that could be potentially identified might have been addressed.
39. The reorganization of independent institutions or oversight mechanisms is something which countries may need to enter into from time to time and is a legitimate subject for legislation. However, in view of the fundamental importance of these independent institutions to the rule of law and human rights, great care must be taken to ensure that any such reorganisation is compatible with well-established international standards. In practical terms, rushed legislation may contain errors and omissions. Further, resorting to an accelerated law-making process, in the absence of justified reasons, could make the legislation that is the subject of such a process vulnerable to arbitrariness or political or other motives.
40. In the case of the amended Laws, the parliament seems to have expedited the legislative process without having adequate grounds for it and without a link to the actual need for any reform that the State Inspector's Service might require. Without verifiable justification for the proposed reform, the manner in which the amended Laws were adopted raises questions as to the overall legitimacy of the law-making process. In addition, the adoption of a law of such importance in a short period of time, without meaningful discussions, is at odds with international standards pertaining to good law-making.
41. The process around the adoption of the amended Laws raises serious concerns as to the consultation undertaken by the Georgian authorities. In the process towards the introduction and adoption of the amended Laws by the parliament, there is no indication that the State Inspector was invited to provide feedback to the proposed amendments. It was reported that the State Inspector became aware of the amendments via the media.<sup>63</sup>
42. It appears further from the Explanatory Note to the legislative amendments that no consultation was held beforehand or throughout the process. Of relevance here is that in its response to the most recent report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter “CPT”), the State Inspector noted the process by which amendments to the Law on the SIS would take place if needed: *“As it is correctly mentioned in the CPT report, the practice will show the effectiveness of the investigative powers of the State Inspector's Service. Additionally, if the practice reveals that the mechanism does not meet the requirements for why it was established and cannot gain public trust, the State Inspector with the support of the*

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60 See [https://www.ohchr.org/Documents/Publications/WhoWillBeAccountable\\_summary\\_en.pdf](https://www.ohchr.org/Documents/Publications/WhoWillBeAccountable_summary_en.pdf), p. 11.

61 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.

62 See for the Explanatory Note, <https://info.parliament.ge/file/1/BillReviewContent/290470?>, p. 5.

63 <https://ge.usembassy.gov/u-s-embassy-statement-on-the-ruling-partys-rushed-end-of-year-legislation/>

*Parliament of Georgia will seek solutions and propose legislative amendments in order to ensure the effective functioning of the investigative mechanism.*"<sup>64</sup>

43. For consultations on draft legislation to be effective, they need to be inclusive and involve the public and civil society. They should provide sufficient time to stakeholders to prepare and submit recommendations on draft legislation, while the State should set up an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions, providing for clear justifications for including or not including certain comments/proposals.<sup>65</sup> To guarantee effective participation, consultation mechanisms must allow for input at an early stage *and throughout the process*<sup>66</sup> and also when it is discussed before parliament (e.g., through the organization of public hearings). Discussions held in this manner that allow for an open and inclusive debate will increase all stakeholders' understanding of the various factors involved and enhance confidence in the adopted legislation. Ultimately, this also tends to improve the implementation of laws once adopted.
44. Laws should be adopted in an accelerated procedure only when there are objective reasons to do so and following sound justification. A lack of public engagement, as seems to be the case in the drafting and adoption of the legislative amendments at hand, especially on legislation of this nature, renders the democratic law-making process deficient. The speed with which the legislative amendments were discussed and adopted, coupled with the bypassing of the SIS in the development of the amendments, the lack of objective rationale and justification for the amendments, and in the absence of any information suggesting that the very mechanism of SIS as designed through the 2018 Law was flawed or otherwise not performing to meet its institutional objectives, risk undermining good faith in these legislative amendments and raises questions as to the legitimacy of and justification for the approach taken.
45. **In view of the above, it is recommended to consider suspending the implementation of the adopted amended Laws and to address the deficiencies identified in the law-making process pertaining to these Laws. The authorities are strongly encouraged to conduct an impact assessment, by which the legal drafters are encouraged to undertake an in-depth review to identify existing problems, and adapt proposed solutions accordingly. Further, it is recommended to ensure that the amended Laws are subjected to inclusive, extensive and effective consultations, including with civil society and the incumbent State Inspector and other relevant independent institutions. According to the principles stated above, such consultations should take place in a timely manner, at all stages of the law-making process, including before parliament. Similar steps should be taken if the amended laws are further subjected to revisions in the future.**<sup>67</sup>

#### RECOMMENDATION A.

To consider suspending the implementation of the amended Laws and to address the deficiencies identified in the law-making process pertaining to these Laws

<sup>64</sup> Response of the Georgian Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Georgia, from 10 to 21 September 2018, available here: <https://rm.coe.int/168098e29c>, p.12.

<sup>65</sup> See e.g., Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.

<sup>66</sup> 2014 OSCE/ODIHR Guidelines on the Protection of Human Rights Defenders.

<sup>67</sup> See e.g., OECD, International Practices on Ex Post Evaluation (2010).

## 5. SECURITY OF TENURE

46. A further point of serious concern as regards the independent functioning of the institution is the manner in which the State Inspector and deputies will be removed from the position, just over two years into the six-year mandate, and outside of the process and conditions provided for in the Law on the State Inspector's Service.
47. Pursuant to Article 9 of the Law on the State Inspector's Service, the Inspector could only be removed from the position for specified reasons including loss of citizenship, conviction by a court, death, or resignation. The process was set out in Article 9 par 2, whereby "the powers of the State Inspector shall be considered as terminated from the moment of the establishment of relevant circumstances, on which the chairperson of the parliament of Georgia shall immediately report to the parliament of Georgia. In this case the parliament of Georgia shall terminate the powers of the State Inspector based on the receipt of the information of the chairperson of the parliament of Georgia as a notice." No such process was undertaken in the present case.
48. Therefore, the removal of the State Inspector by way of legislative amendments (Article 27 par 1 of the amended SIS Law) appears to amount to dismissal outside of the procedures provided for in the law. This seriously undermines the principle of security of tenure and the independence of the institution. Given that the new institution appears to be a continuation of the previous in terms of mandate and responsibilities, this raises additional concerns as to why dismissal has been undertaken outside of due process. This detracts further from the justifications put forward in the Explanatory Note to the amended Laws. More generally, it is a troubling precedent if it is the case that a legislative amendment results in the circumvention of proper procedures for dismissal of the head of an independent body.
49. The Paris Principles on NHRIs and the Venice Commission's Venice Principles provide important guidelines for the security of tenure of the leadership of independent state-based institutions. The Paris Principles emphasise that without a stable mandate "there can be no real independence." The Sub-Committee on Accreditation (hereinafter "SCA") of the Global Alliance of NHRIs has issued a General Observation on security of tenure. This provides that there must be an independent and objective dismissal process, undertaken in strict conformity with all procedural requirements as prescribed by law.<sup>68</sup> Grounds for dismissal should be clearly defined and appropriately confined to only those actions which may adversely impact on the capacity of the individual to fulfil their mandate.<sup>69</sup> Dismissal procedures should be set in law, and not solely on the basis of the discretion of the appointing authorities.<sup>70</sup> There must also be a right to appeal.<sup>71</sup> Where a process for removal involves parliament, care must be taken to ensure that removal cannot be for political reasons and must be by a majority in practice.<sup>72</sup> It must be clear who can initiate a process for dismissal.<sup>73</sup> These requirements "ensure the security of tenure of the members of the

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68 SCA, 'General Observations' (2018), GO 2.1. Council of Europe Committee of Ministers Recommendation on NHRIs 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. Recommendation CM/Rec(2021)1, Appendix, Article 5.

69 SCA, 'General Observations' (2018), GO 2.1.

70 SCA, 'General Observations' (2018), GO 2.1.

71 SCA, 'Accreditation Report - Paraguay (DPP)' (March 2019) 11; SCA, 'Accreditation Report - Namibia (Ombudsman)' (October 2018) 13-14.

72 SCA, 'Accreditation Report - Latvia (OORL)' (March 2015) 10.

73 SCA, 'Accreditation Report - Mexico (CNDH)' (November 2016) 37-38.

governing body and are essential to ensure the independence of, and public confidence in, the senior leadership of a National Institution.”<sup>74</sup>

50. The Venice Commission's Venice Principles on Ombudspersons also emphasise the importance of due process in dismissal: “The 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’, ‘misbehaviour’ or ‘misconduct’, which shall be narrowly interpreted. The parliamentary majority required for removal – by parliament itself or by a court on request of parliament - shall be equal to, and preferably higher than, the one required for election. The procedure for removal shall be public, transparent and provided for by law.”<sup>75</sup>
51. As an independent body (per Article 2 of the Law on the State Inspector's Service), the head of the institution should be provided with a stable mandate as an essential feature of the Institution's independence. The removal of the State Inspector by means of legislative reform of the institution raises serious concerns that this amounts to arbitrary dismissal, contrary to the domestic legislation and international standards. **If the implementation of the amended Laws is not suspended, and in the absence of any legal or other compelling reasons justifying the early termination of their mandates, the incumbent State Inspector and deputies should serve their full term of office, upholding the principle of security of tenure.**
52. It may also be noted that the situation for staff of the SIS amounts to a change of assignment mid-appointment and a fundamental change in their conditions of employment. In independent institutions, terms and conditions of employment should not be modified during the period of appointment.<sup>76</sup> Further, the amended SIS Law appears to circumvent the requirement in Article 5 of the Law on the State Inspector's Service that the State Inspector shall appoint and dismiss the employees of the office.

#### RECOMMENDATION B.

To ensure that, if the implementation of the amended Laws is not suspended, the security of tenure is upheld by enabling the incumbent State Inspector and deputies to serve their full term of office, in the absence of any legal or other compelling reasons justifying the early termination of their mandates

## 6. INDEPENDENCE OF THE SPECIAL INVESTIGATION SERVICE AND THE PERSONAL DATA PROTECTION SERVICE

53. The State Inspector's Service was established in Georgia in order to deal with accountability gaps for human rights abuses committed by law enforcement officials and monitoring the lawfulness of data processing. While the effect of the amended SIS Law is the abolition of the existing SIS, it does not eradicate the previous institution de facto, but rather separates it and modifies its mandate (see further below). It also gives the

<sup>74</sup> SCA, ‘General Observations’ (2018), GO 2.1.

<sup>75</sup> Venice Commission, Venice Principles, par 11. SCA, ‘General Observations’ (2018), GO 2.1. Council of Europe Committee of Ministers Recommendation on NHRIs 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. Recommendation CM/Rec(2021)1, Appendix, Article 5.

<sup>76</sup> SCA, ‘Accreditation Report— Slovenia (HRORS)’ (March/ April 2010) 8



investigative component a new name: the Special Investigation Service. This is evidenced by the definition of the legislative changes as “amendments” and the retention of near-identical provisions for the mandate and scope of the Special Investigation Service’s work. As discussed above (see Section III.4) there is an absence of rationale as to why these amendments have been undertaken, which raises concerns as to the actual – or perceived – motivation behind this change.

54. Independence for an investigative body should include operational independence and take into account perceptions of independence. As set out in section III.1, international standards on investigations of serious human rights violations stress the necessity of independence. This independence is essential to remove barriers to investigating serious crimes. For example, the Working Group on Arbitrary Detention and Enforced Disappearances notes that:

“The obligation to guarantee the autonomy and independence of the authorities charged with the criminal investigation and prosecution, including the judicial authorities, is the cornerstone that underpins any system that effectively guarantees victims’ rights. The Working Group’s experience has shown that institutional shortcomings and the absence of autonomy, impartiality and independence are among the greatest obstacles to investigating enforced disappearance.”<sup>77</sup>

55. By enacting the Law on the State Inspector’s Service, the Georgian Government committed itself to the State Inspector’s Service as an independent institution.<sup>78</sup> International standards, including the ICCPR, CAT, and ECHR, require that investigations into allegations of serious human rights violations by law enforcement must be independent. As noted above, the European Court of Human Rights has held that “for an investigation to be effective, the institutions and persons responsible for carrying it out must be independent from those targeted by it. This means not only a lack of any hierarchical or institutional connection but also practical independence.”<sup>79</sup> However, the process of introducing and adopting the amendments (section III.3), in particular the expedited manner and lack of consultations, seriously undermines the standing of the future Special Investigation Service and the Personal Data Protection Service as independent institutions. As such, the introduced amendments (see Section III.7) raise serious questions as to their effectiveness in protecting the right to life and freedom from torture, and the right to privacy respectively. **The implementation of the amended Laws should be revisited as they undermine the independence of the Special Investigation Service and the Personal Data Protection Service and, as such, could have a detrimental effect on their effectiveness in the protection of human rights.**

#### **RECOMMENDATION C.**

To consider suspending the implementation of the amended Laws as they undermine the independence of the Special Investigation Service and the Personal Data Protection Service and as such, could have a detrimental effect on their effectiveness in the protection of human rights.

<sup>77</sup> Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances (2020) par 35

<sup>78</sup> Georgia: Visit 2018, CPT/Inf (2019) 16, Section: 6/42, 23 March /2019 Combating impunity (independent investigation mechanism), “According to the Minister of Justice, the new institution is truly independent and ensures effective investigations into any cases of possible ill-treatment of persons deprived of their liberty by public authorities” par. 14.

<sup>79</sup> Bouyid v. Belgium 2009

## 7. OTHER CONCERNS

### 7.1. Change to the Role of Parliament

56. Article 12 par 4 of the Law on the State Inspector's Service has been amended to remove the right of parliament to request the attendance of the head of the SIS at their request. The importance of the invitation possibility was noted by the State Inspector's Service in a 2019 state response to the report of the CPT: "*The Parliament of Georgia may at any time invite by the majority of the total composition the State Inspector at the session and/or the Committee of the Parliament to present the information on the current activities of the State Inspector (Article 12.4). Such communication mechanism will be intensively used in order to ensure that the investigative powers vested on it are effectively used.*"<sup>80</sup> Presentation of reports to parliament, and the opportunity to appear before parliament are important features of independent institutions.<sup>81</sup> **It is recommended to reintroduce the right of parliament to request the attendance of the head of the SIS at its request.** A similar concern arises in relation to the amended Law on the Personal Data Protection Service.

#### RECOMMENDATION D.

To reintroduce in the amended Laws the right of the parliament to request the attendance of the head of the new Services at their request.

### 7.2. Changes in Mandate

57. The crimes which fell under the mandate of the State Inspector's Service prior to the amended Law focused on serious incidents including *inter alia* those related to torture, cruel, inhuman and degrading treatment, deaths caused by law enforcement officials (or persons equal to them) of detained individuals, and certain abuses of power using violence or a weapon. A range of new crimes have been added to the mandate of the Special Investigation Service. The new list of crimes in the amended Law covers a range of serious offences including murder and intentional killings, bodily injury, rape and sexual offenses, and trafficking. The inclusion of such crimes is in keeping with the intended purpose of the institution to deal with serious human rights abuses. However, additionally in Article 19 par 1 (d) of the amended SIS Law, there is reference to a range of crimes that appear to fall outside the originally intended mandate of the institution, including violations of freedom of speech, privacy violations, and electoral interference. It is questionable whether these offences should be included, given that this appears to move the institution away from one that is focussed on investigating the most serious human rights abuses. Further, there is no reference to the Special Investigation Service's jurisdiction over certain crimes being limited to law enforcement officials (Article 19 par 1 (d) of the amended SIS Law). This may be a drafting error, but it is one with significant potential implications for the mandate of the institution. It is recalled that international standards place a duty on states to ensure that allegations of serious human rights violations by state officials are investigated promptly, effectively, thoroughly, and impartially. Where the jurisdiction of an investigative authority is too broad, it may reduce the effectiveness of its investigations, particularly in the absence of additional resources, and/or lead to a focus on less serious

<sup>80</sup> Response of the Georgian Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Georgia from 10 to 21 September 2018 p. 11

<sup>81</sup> Venice Commission, 'Compilation on the Ombudsman Institution' (1 December 2011) CDL(2011)079

offences.<sup>82</sup> **It is recommended that consideration be given to removing the list of crimes covered in Article 19 par 1 (d). Should reference to these crimes in the mandate of the Service be retained, it should be specified in Article 19 par 1 (d) that they are covered by the institution solely when committed by representatives of law enforcement bodies, officials or persons equal to them.**

58. This expansion of mandate to a range of additional offenses and to potentially cover those committed by any individual risks seriously diluting the important focus of the institution in combatting the impunity of law enforcement officials. Concern about this expanded mandate is increased because of the lack of consultation in the process of adopting the amended Law, which therefore did not allow for input from the State Inspector, the Public Defender, civil society or international partners on the suitability and impact of such expansion.
59. Of additional concern is that no additional resources for this expansion appear to have been given to the institution. It is essential that an investigative body be sufficiently resourced. Further, in keeping with the Paris Principles, where an institution “has been designated with additional responsibilities by the State, additional financial resources should be provided to enable it to assume the responsibilities of discharging these functions.” Additionally, the new Investigation Service would need additional human resources—staff with specialized knowledge that is needed for the type of investigations its mandate is now extended to. **If the expanded mandate of the institution is maintained, specific allocation of adequate human and financial resources must be provided for by the state.**
60. As a general point, if the intention of the amended SIS Law is to expand the institution’s mandate, this could be done by amending specific provisions of the existing law on the State Inspector’s Service, without abolishing the post and institution altogether. This would be a less intrusive way to address any concerns as regards to its functioning.

#### **RECOMMENDATION E.**

To remove the list of crimes covered in Article 19 par 1 (d) of the amended Law on the State Inspector’s Service, or, alternatively, if they are retained, to clarify that they are covered by the institution solely when committed by representatives of law enforcement bodies, officials or persons equal to them and to allocate adequate resources, if the expanded mandate of the institution is maintained.

### **7.3. Exclusion of Public Prosecutors in relation to Certain Crimes**

61. Authorities tasked with the important role of investigating allegations of torture and ill-treatment by state officials should not be restricted in who they can include in their investigations. Article 3 of the Law on the SIS already exempted certain senior public officials from its remit (General Prosecutor, Prosecutors overseeing investigation at the State Inspectors Service, Minister of Internal Affairs, and the Head of the State Security Service of Georgia). The exclusion of senior political officials was criticised by the Committee for the Prevention of Torture in 2019.<sup>83</sup> The range of exclusions has now been expanded by the amended SIS Law with the addition of new crimes under the mandate of

<sup>82</sup> Open Society Justice Initiative, Who Polices The Police? The Role Of Independent Agencies In Criminal Investigations Of State Agents, p. 16

<sup>83</sup> Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 21 September 2018 par 14

the Special Investigation Service. Article 19 par1 (c) of the amended Law excludes ordinary prosecutors, from “crimes provided for in Articles 108, 109, 111, 113 – 118, 120 – 124, 126, 126<sup>1</sup>, 137 – 139, 143-144 and 150 – 151<sup>1</sup> of the Criminal Code of Georgia, if they are committed by representatives of law enforcement bodies .” It is notable that these crimes cover a range of the most serious crimes including intentional killing, murder, serious bodily harm, violence, rape, and trafficking. It is unclear why prosecutors should be excluded from the remit of the institution for such serious crimes. No one should be excluded *prima facie* from investigation into allegations of serious human rights violations. **The exclusion of prosecutors from the mandate of the institution in relation to the serious crimes set out in Article 19 par 1 (c) should be removed. Further, reference in Article 3 to the exclusion of the Minister of Internal Affairs and the Prosecutor General and other senior officials from the list of individuals who can be investigated by the service should be removed.**

#### **RECOMMENDATION F.1**

To revise Article 3 of the amended Law on the State Inspector's Service to remove the exclusion of the Minister of Internal Affairs and the Prosecutor General and other senior officials from the list of individuals who can be investigated by the service

#### **RECOMMENDATION F.2**

To revise Article 19 par 1 (c) of the amended Law on the State Inspector's Service to remove the exclusion of prosecutors from the mandate of the institution in relation to the serious crimes set out therein.

### **7.4. Appointment Process for the Head of the Institution**

62. The appointment process for the heads of independent state bodies is critical to their independence, as well as their perceived independence and thus, public trust in the institution. The Venice Principles on Ombudspersons note that “The Ombudsman shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution.”<sup>84</sup> Safeguards against political interference are further enhanced by introducing legally determined procedures for appointing the head. The amended SIS Law raises a number of points of concern as regards selection and appointment, including the timeframes, manner of operation of the “competition commission” (which is the selection panel), and the criteria for appointment. Similar concerns arise in relation to the amended Law on the Personal Data Protection Service (Article 40).

<sup>84</sup> Venice Commission, Venice Principles, para 6. In its 2021 Recommendation, the Council of Europe Committee of Ministers stated that: The process of selection and appointment of the leadership of a NHRI should be competence-based, transparent and participatory, in order to guarantee the independence and pluralist representation of these institutions. It should also be based on clear, predetermined, objective and publicly accessible criteria. The duration of the appointment should be clearly set out in the founding legislation, so that the leadership posts of the NHRI do not stay vacant for any significant period of time. Recommendation CM/Rec(2021)1, Appendix, Article 4. The Council of Europe European Commission against Racism and Intolerance (ECRI) has similarly recommended for equality bodies that ‘the persons holding leadership positions in equality bodies should be selected and appointed by transparent, competency-based and participatory procedures.’ European Commission against Racism and Intolerance (ECRI), ‘ECRI General Policy Recommendation No. 2: Equality Bodies to Combat Racism and Intolerance at National Level’ (7 December 2017) CRI(2018)06, para 23.

63. The appointment process for heads of independent institutions is critical to their effectiveness (see paragraph 24 above). The amended SIS Law (Article 6 par 6) appears to have changed the criteria for election of the Head of the Service by the apparent removal of the requirement of a majority of the total composition of the parliament.<sup>85</sup> This risks an unclear procedure and potentially a situation where an individual may be elected by a majority of *attending* members of parliament. **Article 6 par 6 of the amended SIS Law should provide that a parliamentary majority is required for election of the head of the institution.** A similar concern arises in relation to the amended Law on the Personal Data Protection Service (Article 40).
64. Further, the timeframes provided in Article 28 of the amended SIS Law are very short, and raise concern for the open, consultative and transparent nature of the selection and appointment process. This is particularly a concern given the rushed manner in which the legislation was adopted, and with view to the fact that within just 2 weeks of the adoption of the amended SIS Law, a competition commission was already envisaged to have been formed.
65. It is welcome that there is a representative of civil society selected by the Public Defender on the selection panel, who is to be selected by way of an “open competition.” At the same time, Article 6 par 3 of the amended SIS Law provides for extremely short timeframes in practical terms for the process of identifying the members of the competition commission (not earlier than 11 weeks and not later than 10 weeks before the expiration of the term of office of the Special Investigation Service, and where there is early termination, within a week in the case of early termination of the term of office. In practice this civil society representative may not be appointed in sufficient time. Further, it provides that the selection panel may operate with a majority of all members, which could ultimately result in a composition that is at odds with the principle of pluralism.
66. The composition of the selection panel is also weighted towards the State by the inclusion of a government representative, two parliamentarians and a prosecutor among its 7 members. As noted above, the competition commission does not require all members present in order to sit, but merely a majority, meaning that it is possible for decisions on the selection and appointment process to take place without the presence of important independent and external members. **In order to ensure external and independent representatives on the competition commission, Article 6 par 3 should be revised to require the competition commission meet only when all members are present. There should also be an explicit requirement in Article 6 par 3 of the amended SIS Law for gender balance in the selection panel.**
67. The time frame and procedures for the selection and appointment process is set by the competition commission on an ad hoc basis (Article 6 par 3 of the amended SIS Law). **To ensure the independence of the institution, a clear, transparent and participatory selection and appointment process should be set in the legislation, in regulations or in binding administrative guidelines. Applicants should be sought from as wide a pool as possible, with positions publicly advertised, and should be assessed on the basis of pre-determined, objective and publicly available criteria.**<sup>86</sup>
68. The criteria for appointment of the head of the service is broadly drawn and raises concerns. Article 6 par 1 of the amended SIS Law requires the Head of the Service to have “at least

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<sup>85</sup> Article 6 par 6 of the Law on the State Inspector's Service provides: “..... Voting for every candidate shall be conducted separately. The candidate who receives the most votes but not less than the number of votes of the majority of the total composition of the Parliament of Georgia, will be considered as elected.....”.

<sup>86</sup> SCA General Observation General Observation 1.8 (2018).

5 years of work experience in judicial or law enforcement system or in the field of human rights and enjoys a high professional and moral reputation”. **To ensure the impartiality, and perception of impartiality of the Special Investigation Service, consideration should be given to excluding former or current state agents and those with extensive experience in the police and/or military from the position of head of the institution.**

#### **RECOMMENDATION G.1**

To revise Article 6 of the amended Law on the State Inspector's Service and Article 40 of the amended Law on Personal Data Protection to include provisions for a clear, transparent and participatory selection and appointment process for the heads of the institutions and to include that a that a parliamentary majority is required for election of the heads of the institutions.

#### **RECOMMENDATION G.2**

To revise Article 6 par 1 of the amended Law on the State Inspector's Service to exclude former or current state agents and those with extensive experience in the police and/or military from the position of head of the institution.

### **7.5. Functional Immunity**

69. International standards on independent institutions recommend that both deputies and staff are provided with functional immunity (that is, immunity “from legal process in respect of words spoken or written and acts performed by them in their official capacity.”). The Sub-Committee on Accreditation General Observation 2.3 (2018) requires that such protection be given to members and staff of the NHRI as: “[e]xternal 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. For this reason, 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. 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, and promote public confidence in the NHRI”.<sup>87</sup>
70. In its justification, the SCA notes that “[i]t is now widely accepted that the entrenchment of these protections in law is necessary for the reason that this protection, being one that is similar to that which is granted to judges under most legal systems, is an essential hallmark of institutional independence.” The Venice Commission has similarly underscored the need for functional immunity for independent human rights bodies. In its Venice Principles, the Venice Commission provides: “The Ombudsman, the deputies and the decision-making staff shall be immune from legal process in respect of activities and words, spoken or written, carried out in their official capacity for the Institution (functional immunity). Such functional immunity shall apply also after the Ombudsman, the deputies or the decision-making staff-member leave the Institution.”<sup>88</sup>

<sup>87</sup> SCA, ‘General Observations’ (2018), GO 2.3.

<sup>88</sup> Venice Commission, Venice Principles, para 23

71. Article 7 the Law on the State Inspector's Service provides that the State Inspector is inviolable. Similarly the amended Laws appear to include no provision for immunity of deputies or staff, and insufficient protections for leadership after they leave the institution. Immunity for an institution such as the SIS that undertakes the investigation of such serious crimes against law enforcement officials is particularly critical to prevent retaliation and undue influence being exercised. As an independent institution, the SIS should be given functional immunity that covers leadership, staff and deputies. Further, the provisions for lifting of immunity should be well-defined and only lifted in accordance with fair and transparent procedures. These concerns also apply to the Personal Data Protection Service and its role as an independent institution. **Article 7 of the amended Law on the SIS and Article 40 of the amended Law on the Personal Data Protection Service should be expanded to (1) include functional immunity for deputies and staff, (2) provide for functional immunity to apply even after leadership and staff leave the institution, (3) specify the reasons for which immunity may be lifted in accordance with a fair and transparent process.**

#### **RECOMMENDATION H.**

To revise Article 7 of the amended Law on the State Inspector's Service and Article 40 of the amended Law on Personal Data Protection to (1) include functional immunity for deputies and staff, (2) provide for functional immunity to apply even after leadership and staff leave the institution, (3) specify the reasons for which immunity may be lifted in accordance with a fair and transparent process.

### **7.6. State Inspector's Annual Report**

72. Article 28 par 6 of the amended SIS Law provides that "The annual report of the Special Investigation Service provided for in Article 12 of this Law shall not be presented to the Parliament of Georgia in 2022." It is unclear if this also applies to the report of the State Inspector's Service, which was operational for the entire year of 2021. Annual reports of independent bodies provide an essential means of ensuring accountability, publicity and parliamentary scrutiny. Any prohibition on publication of the annual report of the State Inspector would effectively silence the institution as regards to its work over the past year and risk seriously undermining the independence of the institution. Such prohibition would also undermine the rule of law role of parliament as an oversight body for the actions of the executive and law enforcement. Further, blocking the publication of the 2021 report may weaken public trust in the Government's efforts to prevent torture and ill-treatment. **It should be clarified that the report of the State Inspector's Service for 2021 will be presented to parliament in the manner provided for in the Law on the Special Inspector's Service as it existed until 30 December 2021.**

### **7.7. Specific Issues pertaining to the Personal Data Protection Service**

73. The amended Law on Personal Data Protection largely follows the amended Law on State Inspector's Service in terms of regulating the Personal Data Protection Service's principles, functional immunity, incompatibility with other roles, selection process, the dismissal process of the head of the service, and the submission of the annual report. In this respect, the concerns expressed above pertaining to the Special Investigation Service apply

similarly to the Personal Data Protection Service. These include concerns regarding the right of parliament to request the attendance of the head of the institution (see paragraph 56); in relation to the apparent removal of a requirement for a parliamentary majority in the appointment process, risking an unclear procedure and potentially a situation where an individual may be elected by a majority of *attending* members of parliament (see paragraph 62); the selection and appointment process (see paragraphs 64-68); and regarding immunity provisions for deputies and staff of the service (see paragraph 71).

74. In the transposition of the Law on the State Inspector's Service to the amended Laws, some drafting errors may have occurred. For example, it is unclear why qualification for the head of the Personal Data Protection Service specifically references 5 years' work experience in the law enforcement system as a criterion for candidates. This appears to have been brought over from the SIS Law and does not appear to be as relevant to the requirements for the leadership of the Personal Data Protection Service.
75. From the Explanatory Note, no clear justification or immediate cause can be discerned for the separation of this mandate from the investigative mandate of the State Inspector's Service. While authorities may seek the re-institutionalisation of the State Inspector's Service by separation of its functions and powers prior to the end of the institution holder's mandated term, the manner in which the law-making process was conducted and the lack of objective and justified reasons for this reform of this independent institution give cause for questions as to the reform's necessity and objective. This concern is further strengthened by the lack of any reference to the State Inspector Service's inadequate functioning in the two years of its operation.

*[END OF TEXT]*