



## The Coalition's Opinion on the Initiative to Create a State Inspector's Office

The Coalition for an Independent and Transparent Judiciary assesses the draft law developed by the Ministry of Justice of Georgia that aims to introduce the State Inspector's Office. Under the draft law, this office will replace the Personal Data Protection Inspector and, in addition to performing the latter's functions, will have the authority to investigate specific crimes committed in the capacity of a law enforcement body's representative, employee or a person equalized to him.

First, the Coalition positively assesses the government bodies' initiative to revitalize work on this issue and hopes that the state will adequately and accurately assess the public's clear and persistent demand for the creation of an effective and independent investigative mechanism that addresses the problem of impunity among law enforcement representatives. The Coalition also hopes that there will be space for a discussion not only on the technical and formalistic aspects of the draft law, but also

on the principles of the law in order to decide the fundamental issues in the most reasonable and rational way.

This document draws attention to the fundamental issues that are key to the creation of an effective and independent investigative agency capable of adequately addressing the current challenges:

### **Competences of the Office:**

Under the draft law, a newly created office will be equipped with only investigative functions. In this kind of setup the mechanism of effectiveness becomes questionable. According to the Georgian investigation system and legislation, prosecutorial supervision implies the following: an investigation is fully managed by a prosecutor, and the investigators of all investigative bodies equally follow the prosecutor's instructions in the process of the investigation. Despite the institutional independence of the State Inspector's Office, its investigators will be fully dependent on prosecutors in the process of investigation.

Under the current law, a prosecutor can:

- Terminate an investigation or change a crime's qualification after an investigation starts (in the case of such a requalification, a case may fall outside of the investigative mechanism's jurisdiction);
- Instruct an investigator throughout an investigation. These instructions are mandatorily executed;
- Make a final decision on the appeal of an investigator's action/decision (investigators' actions are subject to appeal at the Prosecutors' Office);
- Decide on practically all important investigative actions, including: search and seizure, covert investigative actions, a person's interrogation in the court (Article 114 of the Criminal Code) and actions related to computer data;
- Address the court to order a preventive measure against a person, and also select and submit evidence at pre-trial hearings;

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- Appeal court decisions according to the appeal and cassation rules.

Currently the Prosecutor [ ] Office is authorized to investigate and prosecute the types of crimes that fall in the domain of the State Inspector [ ] Office. Accordingly, the Prosecutor [ ] Office is responsible for law enforcement representatives [ ] impunity and the ineffective investigation and prosecution of crimes committed by them. The reports of the Public Defender of Georgia confirm that in the majority of cases an investigation is launched by the Prosecutor [ ] Office but specific persons are only rarely prosecuted.[1]

The European Court of Human Rights says that the effectiveness of an investigation largely depends on its independence and impartiality.[2] The Court judges an investigation [ ] effectiveness not only by considering its institutional and hierarchical independence, but also by assessing the extent to which an investigation is independent in practice.[3] Accordingly, it is hard to imagine what impact can be expected from a new office equipped with only investigative functions when the investigations that it carries out are subordinated to the agency which until now has been responsible for such investigations and has been criticized the most. Under this reform the Prosecutor [ ] Office retains the authority to make final decisions on all critical issues throughout the process of investigation.

Also, under the draft law criminal prosecution is maintained as an exclusive competence of the Prosecutor [ ] Office. In the current investigatory system the Prosecutor [ ] Office, together with other law enforcement agencies and in cooperation with them, fights criminal activities. In this situation, conflict of interest risks arise in cases where law enforcement officers are prosecuted. The risks are exacerbated in cases where investigation concerns a crime allegedly committed by an employee of the Prosecutor's Office.

In view of the above considerations **the basic requirement for ensuring a newly created office [ ] effectiveness is to equip it with the authority to carry out investigative actions independently. The office should have, at the minimum, the degree of independence required for a full and comprehensive investigation. In the best case scenario, the office should have the functions of criminal prosecution and court representation.** The draft law developed by the Coalition envisioned creation of an investigative body

equipped with investigative and prosecutorial functions, which would guarantee the effectiveness of the investigation of crimes committed by representatives of law enforcement bodies and representation in the court.

### Crimes investigated by the Office

Under the draft law, the State Inspector [ ] Office is authorized to investigate the following crimes committed by representatives of law enforcement bodies:

- Torture, threat of torture, degrading or inhumane treatment;
- Abuse/exceeding of power through violence or use of guns, or humiliation of a victim;
- Forced interrogation;
- Any other crime allegedly committed by a representative of law enforcement that caused a person [ ] death in the period when a victim was under effective control of the police

Naturally, the effective investigation of each one of the above mentioned crimes is a matter of high public interest, and giving the investigation authority to an independent investigative body is a positive development. At the same time, it is essential to keep in mind the current context and the types of crimes that citizens report most often. In this regard, [ ] of drugs by law enforcement officers is most notably reported publicly and covering such crimes in the mandate of the new body is essential. At the same time, most of the above mentioned crimes fall under the mandate of the independent investigative mechanism only in specially defined circumstances (e.g., being under the effective control of the police, use of violence or weapons, degrading treatment of the victim), which is problematic given that such factual circumstances ought to be subject to investigation and that the investigation must determine whether a person was under the effective control of the police or whether the use of weapons or degrading treatment of a victim really took place.

Considering the existing challenges, the draft law on an independent investigative mechanism prepared by the civil society organizations specifically included such cases in the list of crimes to be covered when the unlawful and incriminating actions of the law enforcement officials resulted in termination of life, heavy, less heavy or

light injury, beating, violence, humiliation, violation of sexual liberty or inviolability.

For an investigation to be conducted effectively and enjoy high public trust, the circle of listed crimes must be widened, and at the same time the special reservations, without which cases cannot fall under the new body  investigative authority, must be removed from the draft law.

Under the proposed draft law the prosecutor makes the final decision on who is to conduct the investigation in cases when there is doubt that a crime falling under the mandate of the state inspector has been committed. The draft does not contain clear procedures for decision-making, the level of inspector  involvement in it, or the guarantees for not violating the new body  investigative mandate. It is important for the investigative agency to have legislative guarantees that its jurisdiction be guaranteed in cases where an investigation is started under a different article of the Criminal Code but the inspector believes there are indications of a crime that falls under his mandate.

## Institutional order

Under the draft law the independent investigative mechanism is created under the Personal Data Protection Inspector. Importantly, we cannot find any indication as to why it was decided to institutionally connect these two bodies. It is important that the state present adequate substantiation and vision regarding the institutional organization of the State Inspector's Office.

The Personal Data Protection Inspector is currently fulfilling its very important function. Proactive control of investigations and the legality of data processing are not consistent functions, and putting them under a single body may endanger the independence of the personal data protection mechanism, create conflict of interests within the body, or result in the loss of public trust in the body  work. The proposed model creates a real danger to the effectiveness of the Personal Data Protection Inspector.

The Personal Data Protection Inspector is currently an oversight body independent from the law enforcement processes, whereas crimes committed by law enforcement officers must be investigated by an institution of an investigative nature. For example,

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the Inspector would have to control the legality of the prosecution  data processing, and on the other hand cooperate and defer to it in the process of investigations. Further, it is not clear how the non-interference of the Inspector  staff in the right of privacy and unfounded processing of personal data is guaranteed. Bodies with such an unclear nature raise the risk that the public will not have high levels of trust towards them, which is critically important for their effective functioning.

Given all of the above, we consider it more prudent to create the investigative body as a separate entity with a flexible and small bureaucratic apparatus, and which will not be associated with large budgetary costs. The proposed draft also does not create budgetary economies, given that personal data protection and investigation are clearly inconsistent functions and the new inspector  office will have to hire investigators and technical personnel. An independent body  nature would be clearly investigative, and its head and staff would enjoy high levels of institutional and operation independence.

The Coalition for Independent and Transparent Judiciary is ready to actively engage in the process of substantive review of the proposal. We hope that the state  position on the crucial issues described above is not final and that discussions with the interested public can be of real substance. Given the sensitivity and importance of the issue, it is crucial that the newly created body be fully compatible with the existing needs and context in the country and simultaneously enjoys high professional reputation and public trust.

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[1]<http://www.ombudsman.ge/ge/about-us/struqtura/departamentebi/sixlis-samartlis-martlmsadjulebis-departamenti/siaxleebi/saxalxo-damcvelma-evropis-sabchos-ministrta-komitetis-winashe-morigi-komunikacia-waradgina1.page>

[2] Ramsahai and Others v. the Netherlands, Judgment of 15 May 2007, application no. 52391/99, paras. 62-63; İpek v. Turkey, Judgment of 17 February 2004, application no. 25760/94, para. 207; Altun v. Turkey, Judgment of 1 June 2004, application no. 24561/94, para. 74.

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[3] Barbu Anghelescu v. Romania, Judgment of 5 October 2004, application no. 46430/99, para. 67; . Gharibashvili v. Georgia, Judgment of 29 July 2008, application no. 11830/03, para. 73