

2017 CHURCHILL FELLOW | STEVEN CARUANA



**Enhancing best practice inspection
methodologies for oversight bodies with an
Optional Protocol to the Convention against
Torture focus**

**Report to the Winston Churchill Memorial Trust of Australia -
showcasing learning from Greece, Switzerland, Norway, Denmark, UK,
Malta and New Zealand**



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THE WINSTON CHURCHILL MEMORIAL TRUST OF AUSTRALIA

Report by - Steven Caruana - 2017 Churchill Fellow

To enhance best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention Against Torture focus.

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Signed



Dated 09/07/2018



Acknowledgement

I would like to acknowledge and extend my appreciation to the Winston Churchill Memorial Trust of Australia for providing me the honour and privilege of being a Fellowship recipient. My Fellowship travels not only enabled me to access some of the best detention monitoring practitioners, academics, UN experts and reputable civil society organisations; but also provided me with a once in a lifetime opportunity for personal growth and has ignited a passionate desire to become an expert in the field of safeguarding human rights in detention.

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Finally, and most importantly I would like to thank my family for your unceasing support and belief in me, especially when I doubted I deserved such an honour. To my wife Elizabeth and my children Cohen, Jayden, Sofia and Sienna, this is dedicated to you with the hope that you never cease to chase your dreams and always remember that everyone deserves dignity and humanity wherever they may be.

Abbreviations

UNCAT – United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

OPCAT – Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment

CRPD – Convention on the Rights of Persons with Disabilities

SPT – Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

NPM – National Preventive Mechanism

NHRI – National Human Rights Institutions

APT – Association for the Prevention of Torture

CPT – Committee for the Prevention of Torture (European Committee)

NCPT – The National Commission for the Prevention of Torture

IDA – International Disability Alliance

DIGNITY – Danish Institute against Torture

HMIP – Her Majesty’s Inspectorate of Prisons

CQC – Care Quality Commission

IMB – Independent Monitoring Board

HMIPS – Her Majesty’s Inspectorate of Prisons Scotland

HMICS – Her Majesty’s Inspectorate of Constabulary in Scotland

SHRC – Scottish Human Rights Commission

RQIA – Regulation and Quality Improvement Authority

AHRC – Australian Human Rights Commission

JCOS – Joint Standing Committee on Treaties of the Parliament of Australia



Meeting Eoin Carroll (Jesuit Centre for Faith and Justice), Maeve O'Rourke (Irish Council for Civil Liberties), Jane Mulcahy (University College Cork) and Lucky Khambule (Movement of Asylum Seekers in Ireland) at the Bar of Ireland, Dublin. All of whom, like me, are eager to see Ireland ratify the OPCAT.

Keywords: OPCAT, Ill-Treatment, Torture, Prevention, Human Rights, Detention, Prison, Custody, NPM, Inspection, Oversight, Monitoring

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Executive Summary

“OPCAT is an unusual treaty in that it creates no new substantive rights. Yet it could be the single most positive development this decade in improving conditions in all Australian places of detention.”¹

When the words ‘Don Dale Youth Detention Centre’ are mentioned it is difficult for most people to disassociate it from the image of a young Dylan Voller, hooded and strapped into a mechanical restraint chair. This powerful image shocked all of Australia and in response the Prime Minister launched a Royal Commission to expose the cultural and administrative problems that allowed this mistreatment to occur.

The Royal Commission found evidence of widespread mistreatment, verbal abuse, humiliation and isolation and recommended that Don Dale be shut down in what could be said was an affirmation that this should never have happened and should never happen again.

The recent ratification of the OPCAT is yet another powerful affirmation that mistreatment within detention should never occur. It is a practical mechanism for preventing another Don Dale by providing Australia with a national system of regular, independent, preventive visits to all places of detention. Its aim is to foster a collaborative approach to safeguarding human rights with detaining agencies that combines the safety and dignity of detainees and staff alike.

OPCAT’s effective implementation depends in great part on decisive political will and action. NPM’s necessarily require the assurance of functional independence, unabridged access to all detention settings, the right to all information it deems relevant, an ability to conduct private interviews with detainees and staff free from the threat of reprisal and an empowerment to comment on legislation, policy and other issues pertinent to its mandate.

This Churchill Report presents the findings of my nine weeks of travel abroad to gather knowledge from other implementation experiences, visiting methodologies and relevant experts. The report provides an exploration of the ‘preventive visiting’ concept and highlights several examples of well-developed practice. The report also examines the essential framework for an effective NPM drawing on experiences and advice from abroad and supporting these findings with academic literature and authoritative guidance.

The recommendations made within the report are relevant at the Federal, State and Territory Government levels and to the NPM Coordinator, the Office of the Commonwealth Ombudsman. Seventeen recommendations are made. These recommendations relate to the creation of appropriate legislation, the assurance of adequate resources, the inclusion of the Australian Human Rights Commission in the NPM and the development of comprehensive strategies for education, collaboration and the promotion of best practice within the Australian NPM.

¹ Santow, E (September 19, 2017). *Making detention safe and humane: can we grasp a once-in-a-generation opportunity? Austin Asche Oration*. Sourced on the 19 May 2018 from <https://www.humanrights.gov.au/news/speeches/making-detention-safe-and-humane-can-we-grasp-once-generation-opportunity>

In making these recommendations the report echoes sentiments made by numerous domestic commentators on the OPCAT including the Victorian Ombudsman who previously said ‘the ratification of OPCAT is an important symbol of Australia’s commitment to human rights. Its implementation, through setting up, resourcing or empowering independent agencies, is equally important in ensuring that commitment is not merely symbolic.’²

To support the recommendations of this report, it will be distributed through the Australia OPCAT Network and to other interested tertiary and civil society institutions. Additionally, it will be provided to potential NPM bodies, the Commonwealth Ombudsman, the Australian Human Rights Commission, the Australian Attorney-General’s Department and the Department of Foreign Affairs and Trade. It is intended that the report has relevance to other international NPM’s and will also be shared through the APT.



Following in Churchill’s footsteps: I had the opportunity to visit HMP Pentonville with the Independent Monitoring Board. HMP Pentonville opened in 1842 and was visited by Sir Winston Churchill as Home Secretary where he reduced the sentences of seven juvenile offenders.

² Victorian Ombudsman (November 2017). *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre*, p5. Sourced on the 18 June 2018 from <https://www.ombudsman.vic.gov.au/getattachment/432871e4-5653-4830-99be-8bb96c09b348>

Introduction

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)

‘The idea at the heart of the OPCAT is that torture is a terrible attack on human dignity and everything must be done to prevent it. The understanding of torture prevention has evolved over the years, from one initially focusing on visits to places of detention to a more holistic endeavour.’³

In the face of increasing human rights violations, the international community in 1984 adopted the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). UNCAT imposed specific obligations to enforce the prevention of torture and ill treatment and enshrined into international law its absolute prohibition. This prohibition being ‘so strong and universally accepted that it is now a fundamental principle of customary international law.’⁴ The meaning of which being, that the prohibition of torture and ill treatment is considered so fundamental to the values of the international community that it is binding on all States, irrespective of consent and with no exception or derogation, no matter how extreme or grave the circumstances.

Despite torture prohibitions *jus cogens* status, The United Nations General Assembly acknowledged that further practical measures were necessary to assist States in achieving the purposes of the UNCAT; recognising that torture and ill treatment remained a systematic practice in some States whilst in others its prevalence was more isolated. It therefore adopted the OPCAT on the 18th December 2002.

At its inception the OPCAT was characterised as a ‘ground breaking instrument’⁵ in that it was the first action-based treaty of its kind. Whilst ‘the Convention against Torture already contains a clear obligation to take measures to prevent torture. OPCAT gives life to this obligation in the most tangible of fashions.’⁶ The OPCAT does this by introducing a two-tiered

³ Association for the Prevention of Torture (2012). *The Global Forum on the OPCAT: Preventing Torture, Upholding Dignity: From Pledges to Actions Outcome Report*, p39. Sourced on the 21 May 2018 from http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/803_aptglobalforum_/803_aptglobalforum_en.pdf

⁴ Association for the Prevention of Torture & Center for Justice and International Law (2008). *Torture in International Law, a guide to jurisprudence*. p2.

⁵ Evans, M & Haenni-Dale, C. (2004). Preventing Torture? The Development of the Optional Protocol to the United Nations Convention against Torture, *Human Rights Law Review*, p19-20

⁶ Evans, M. (October 13, 2017). *Statement by Malcolm Evans, Chairperson, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 3rd Comm, 72nd sess,

system of regular, independent, preventive visits to all places where people are deprived of their liberty.

Firstly, at an international level, OPCAT necessitates the acceptance of periodic visits by the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT). The SPT is comprised of 25 independent multi-disciplinary expert members elected for a four-year term (with the possibility of renewal for an additional four years) from countries that have ratified or acceded to the OPCAT. The SPT's mandate is three-fold: to visit places of detention; to advise and assist States and National Preventive Mechanism's (NPM) concerning their establishment and functioning; and to co-operate with other organisations and institutions working to strengthen protections against torture and ill-treatment.

Secondly, and arguably more importantly, the OPCAT requires States to establish and maintain a similar domestic visiting body termed the NPM. The NPM can be established through the creation of a new organisation(s) or be designated to pre-existing organisation(s). The OPCAT sets out fundamental principles for States which are essential to the creation or designation of an NPM but with enough flexibility to consider each States contextual circumstances. 'National Mechanisms are the 'front line' of torture prevention'⁷ in that they visit places of detention in a State with significantly much more frequency than the SPT ever can.

'OPCAT is premised on the belief that preventing torture and ill-treatment can be facilitated by a collaborative process between national authorities and national and international mechanisms working together in a constructive and forward-looking fashion.'⁸ NPM's and the SPT therefore seek to work with detaining agencies and other government authorities in a non-adversarial manner recognising that cooperation is pivotal to safeguarding human rights and creating a culture of human rights.

What clearly distinguishes OPCAT from other forms of external oversight however is it's 'preventive' focus and nature. The work of NPM's is not merely limited to undertaking visits and making recommendations, but as articulated by the SPT:

'there is more to the prevention of torture and ill-treatment than compliance with legal commitments. In this sense, the prevention of torture and ill-treatment embraces – or

Agenda Item 69(a). Sourced on the 18 May 2018 from

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22277&LangID=E>

⁷ Evans, M. (October 20, 2015). *Statement by Malcolm Evans, Chairperson Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 3rd Comm, 70th sess, Agenda Item 69(a). Sourced on the 18 May 2018 at

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16717&LangID=E>

⁸ Evans, M. (October 23, 2012). *Statement by Malcolm Evans, Chairperson, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 3rd Comm, 67th sess, Agenda Item 69(a). Sourced on the 18 May 2018 at

www2.ohchr.org/english/bodies/cat/opcat/.../StatementSPT_Chair_to_UNGA67.doc

should embrace – as many as possible of those things which in a given situation can contribute towards the lessening of the likelihood or risk of torture or ill-treatment occurring. Such an approach requires not only that there be compliance with relevant international obligations and standards in both form and substance but that attention also be paid to the whole range of other factors relevant to the experience and treatment of persons deprived of their liberty and which by their very nature will be context specific.’⁹ This ‘preventive’ component of the NPM’s mandate and visits will be explored in greater depth in later sections of this report.

Whilst being adopted in 2002 the OPCAT came into force on the 22nd of June 2006 and as of 31st December 2017, 87 States were party to it and 14 States were signatories.¹⁰

OPCAT Ratification in the Australian Context

“Australia could have a lot of influence and impact, not just in the region, but also because it is a Federal State and it’s really important to get it right and show other Federal States that it’s perfectly achievable” – Mark Thomson, Secretary General of the APT

In March 2004, two years after the adoption of the OPCAT by the United Nations General Assembly; The Joint Standing Committee on Treaties of the Parliament of Australia (JSCOT) issued a report on the appropriateness of Australia ratifying the OPCAT. Despite most submissions showing support for ratification, the JSCOT concluded that it was ‘not convinced that there is an immediate need for Australia to ratify the Optional Protocol.’¹¹ The JSCOT noted substantive and procedural reasons for its decision, namely, that the final draft of the OPCAT had not been adopted by consensus but by majority vote and that ratification would constitute a standing invitation by the SPT to visit any place of detention at any time.

⁹ UN Subcommittee on Prevention of Torture (December 30, 2010). *The approach of the Subcommittee on Prevention of Torture to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/OP/12/6, p2 Sourced on the 19 May 2018 from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/6&Lang=en

¹⁰ UN Committee Against Torture (March 26, 2018). *Eleventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. p3. Sourced on 15 May 2018 from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2F63%2F4&Lang=en

¹¹ Joint Standing Committee on Treaties of the Parliament of Australia (March 2004). *Report 58: Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, p34. Sourced on the 19 May 2018 from https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jct/opcat/report.htm#fullreport

Following a change of Government in 2007, Australia showed renewed interest in the OPCAT advising the United Nations Committee Against Torture in its Third Periodic Review in 2008 that ‘there were plans to accede to the Optional Protocol to the Convention against Torture and to consider the enactment of a specific offence of torture in Australian law.’¹²

Subsequently, a ‘National Interest Analysis’ was initiated in 2008 and in response to this the Australian Human Rights Commission (AHRC) commissioned a report by Professors Richard Harding and Neil Morgan (Centre for Law and Public Policy, The University of Western Australia) into implementation options for OPCAT in Australia¹³. The report made several recommendations including and most significant to the present-day situation, the establishment of a ‘mixed model’ NPM with a Federal Coordinating NPM. Additionally, they argued that the NPM should for practical reasons focus its efforts on ‘primary’ places of detention and gradually ‘secondary’ places of detention; whilst concurrently not excluding any place of detention being open to visits where the need occurred.¹⁴

On the 19th May 2009, Australia signed the OPCAT but did not then ratify it. Following the conclusion of the ‘National Interest Analysis’ a report was tabled on 28th February 2012 which supported ratification:

‘Ratification and implementation of the Optional Protocol will improve outcomes in the detention of people in Australia by providing a more integrated and internationally recognised mechanism for oversight. It will provide an opportunity for organisations involved in detention management and oversight to share information, guidelines, practices and problem solving measures with regard to the conditions and treatment of people in detention.’¹⁵

The momentum for ratification was echoed in the sentiment of the then Australian Attorney-General Nicola Roxon who stated that ‘Ratifying OPCAT will send a strong message both within Australia and internationally that Australia takes its human rights obligations seriously.’¹⁶

¹² UN Committee Against Torture (April 30, 2008). *Fortieth session Summary Record (Partial) of the 815th Meeting*, CAT/C/SR.815, p8. Sourced on the 19 May 2018 from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fSR.815&Lang=en

¹³ Harding R, & Morgan, N (October 2008). *Implementing the Optional Protocol to the Convention against Torture: Options for Australia*. Sourced on the 19 May 2018 from <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-optional-protocol-convention-against-torture>

¹⁴ *Ibid*, p9-12, 25-32

¹⁵ Australian Treaty National Interest Analysis (2012). *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ATNIA 6, paragraph 7. Sourced on the 19 May 2018 from https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/28february2012/treaties/torture_nia.pdf

¹⁶ Emerson, C & Roxon, N (28 February 2012). *Gillard Government moves to ratify OPCAT: Joint media release*. Sourced on the 19 May 2018 from

OPCAT ratification was again considered by the JSCOT and on the 21st June 2012 they unanimously concluded that 'notwithstanding its recommendation in 2003 that Australia should not ratify the Optional Protocol, the Committee believes that it is now appropriate for Australia to ratify the Optional Protocol.'¹⁷ Despite the significant progress made towards ratification at that time it again did not occur.

The United Nations Committee Against Torture yet again called for the ratification of OPCAT in 2014¹⁸ and at the Universal Periodic Review in 2015 Australia reiterated that it was 'considering whether it will ratify the Optional Protocol to the Convention against Torture.'¹⁹ Around the same time, efforts from civil society groups to progress ratification were strengthened by the formation of the Australia OPCAT Network.

On the 25th July 2016 the Australian Broadcasting Corporation aired a Four Corners report disclosing the abuse of youth in the Don Dale Youth Detention Centre in Northern Territory. The report caused the Federal Government to establish a Royal Commission into the mistreatment and systemic failures at the institution and more widely.²⁰ Following this event the National Children's Commissioner launched her annual Children's Rights Report which, in the light of the events at Don Dale, reiterated the call for the ratification of OPCAT:

'What the OPCAT brings to these issues is a different conversation from the one that exists now. It is about a more open, transparent conversation within and among governments about what we need to improve, and how we are best to achieve it.'²¹

On the 9th February 2017 the then Australian Attorney-General George Brandis and Minister for Foreign Affairs, Julia Bishop, announced the Government intended to ratify the OPCAT by

https://foreignminister.gov.au/releases/Pages/2012/kr_mr_120228.aspx?w=GyLX0mNSz4nLQKYuPOsgLQ%3D%3D

¹⁷ Joint Standing Committee on Treaties of the Parliament of Australia (June 2012). *Report 125: Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, p51. Sourced on the 19 May 2018 from

http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/28february2012/report/chapter6.pdf

¹⁸ UN Committee Against Torture (April 30, 2008). *Concluding observations on the combined fourth and fifth periodic reports of Australia*, CAT/C/AUS/CO/4-5. Sourced on the 19 May 2018 from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/AUS/CO/4-5&Lang=En

¹⁹ UN Human Rights Council (2015). *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Australia*, A/HRC/WG.6/23/AUS/1, p15. Sourced on the 20 May 2018 from

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/175/09/PDF/G1517509.pdf?OpenElement>

²⁰ Turnbull, M & Brandis, G (July 26, 2016). *Royal Commission to be Established into the Don Dale Youth Detention Centre in the Northern Territory: Media Release*. Sourced on the 20th May 2018 from <https://www.pm.gov.au/media/royal-commission-be-established-don-dale-youth-detention-centre-northern-territory>

²¹ Mitchell, M (October 17, 2016). *Children's Rights Report*, Chapter 3: Oversight of youth justice in Australia: Implementing OPCAT, p75. Sourced on the 20 May 2018 from https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_CRR_2016.pdf

December 2017. The Attorney-General speculated that the events of Don Dale may have been prevented had OPCAT been in place earlier stating, 'it may well be that either they wouldn't have happened at all or they would have been arrested at a much earlier time.'²²

In addition to reacting to the public outcry following the Don Dale incident, the Attorney-General and Minister for Foreign Affairs also indicated that OPCAT ratification was demonstrative that 'Australia is committed to the international human rights system, as demonstrated by its candidacy for a seat on the Human Rights Council for the 2018-20 term.'²³

Whilst the public announcement did not provide comprehensive detail on the establishment of the NPM it was made clear that the Office of the Commonwealth Ombudsman would be appointed the Coordinating NPM as part of a mixed model NPM with a focus on 'primary' places of detention such as prisons, juvenile detention, police cells, closed psychiatric institutions and immigration facilities.

On the 15th December 2017, the Attorney-General George Brandis and Minister for Foreign Affairs, Julia Bishop, announced that the Government had ratified the OPCAT and that formal documentation was to be lodged to the United Nations (formal ratification occurred on the 21st December 2017). As part of ratification Australia made a declaration under Article 24 of the OPCAT to postpone the establishment of the Australian NPM for three years.

The postponement has been in place to '...allow time to implement the obligations specifically with respect to arrangements with states and territories... to negotiate with them and to receive their agreement and cooperation to implement the obligations.'²⁴

At the time of writing this report the Federal Government is actively working towards 'a proposal to have an intergovernmental agreement between the Commonwealth and the states and territories.'²⁵ The creation of new oversight bodies or the designation of existing ones within the State and Territory Governments that will comprise the mixed model NPM remains an ongoing topic of discussion.

²² SBS News (February 9, 2017). *Oversight may have prevented Don Dale: AG*. Sourced on the 20 May 2018 from <https://www.sbs.com.au/news/oversight-may-have-prevented-don-dale-ag>

²³ Bishop J, & Brandis, G (February 9, 2017). *Improving oversight and conditions in detention: Joint media release*. Sourced on the 20 May 2018 from https://foreignminister.gov.au/releases/Pages/2017/jb_mr_170209.aspx?w=tb1CaGpkPX%2FIS0K%2Bg9ZKEg%3D%3D

²⁴ Australian Senate Legal and Constitutional Affairs Legislation Committee (May 23, 2018). *Estimates*, p82. Sourced on 9 June 2018 from <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22committees%2Festimate%2F3cae4e3c-b6d4-4b18-b464-b5e055c40682%2F0007%22>

²⁵ Ibid p83

My Churchill Fellowship Program

Greece	<p>Meetings</p> <ul style="list-style-type: none"> ➤ The Greek Ombudsman (NPM) ➤ Hellenic Ministry of Justice, Transparency and Human Rights <p>Visits</p> <ul style="list-style-type: none"> ➤ Eleonas Prison Complex ➤ Amygdaleza Pre-Removal Detention Centre
Switzerland	<p>Meetings</p> <ul style="list-style-type: none"> ➤ The Association for the Prevention of Torture ➤ The National Commission for the Prevention of Torture (NPM) ➤ International Disability Alliance ➤ Office of the Special Rapporteur on the Rights of Persons with Disabilities ➤ The International Committee of the Red Cross ➤ Australian Permanent Mission to the Office of the United Nations
Norway	<p>Meetings</p> <ul style="list-style-type: none"> ➤ The Norwegian Parliamentary Ombudsman (NPM) ➤ Norwegian Red Cross
Denmark	<p>Meetings</p> <ul style="list-style-type: none"> ➤ The Danish Parliamentary Ombudsman (NPM) ➤ The Danish Human Rights Institute (NPM) ➤ DIGNITY – Danish Institute Against Torture (NPM)
England	<p>Meetings</p> <ul style="list-style-type: none"> ➤ Professor Sir Malcolm Evans (Chair of the SPT) ➤ John Wadham (Independent Chair UK NPM) and NPM Secretariat staff ➤ Professor Nicholas Hardwick (Former Chief Inspector of HMIP) ➤ Dame Anne Owers (Chair of the IMB and Former Chief Inspector of HMIP) ➤ Her Majesty’s Inspectorate of Prisons (NPM) ➤ Independent Monitoring Board (NPM) ➤ Independent Custody Visiting Scheme (NPM) ➤ Care Quality Commission (NPM) ➤ Equality and Human Rights Commission

	<ul style="list-style-type: none"> ➤ Marie Steinbrecher (Royal Holloway – University of London) <p>Visits</p> <ul style="list-style-type: none"> ➤ Her Majesty’s Prison Pentonville ➤ British Transport Police Suite – Brewery Road
Scotland	<p>Meetings</p> <ul style="list-style-type: none"> ➤ Her Majesty’s Inspectorate of Prisons Scotland (NPM) ➤ Her Majesty’s Inspectorate of Constabulary in Scotland (NPM)
Northern Ireland	<p>Meetings</p> <ul style="list-style-type: none"> ➤ Regulation and Quality Improvement Authority (NPM) ➤ Criminal Justice Inspection Northern Ireland (NPM)
Ireland	<ul style="list-style-type: none"> ➤ Victims’ Directive Conference <p>Interview</p> <ul style="list-style-type: none"> ➤ Jane Mulcahy (University College Cork)
Malta	<p>Meetings</p> <ul style="list-style-type: none"> ➤ The Corradino Correctional Facility Monitoring Board (NPM) ➤ Monitoring Board for Detained Persons (NPM) ➤ The Maltese Parliamentary Ombudsman ➤ Dr John Pace (Former Secretary UN Commission on Human Rights)
New Zealand	<p>Meetings</p> <ul style="list-style-type: none"> ➤ Office of the Ombudsman New Zealand (NPM) ➤ New Zealand Human Rights Commission (NPM) ➤ Office of the Children’s Commissioner (NPM) ➤ Office of the Inspectorate ➤ JustSpeak ➤ Dame Lowell Goddard (Former Justice of the High Court, Former Chair of the Independent Police Conduct Authority and former SPT member) ➤ Natalie Pierce (Former Legal Adviser to the Chair, Independent Police Conduct Authority)
Online	<ul style="list-style-type: none"> ➤ Penal Reform International ➤ Human Rights Implementation Centre, University of Bristol ➤ Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment

If you had told me just a few years ago that I would be working on the practical implementation of a UN treaty or in cooperation with some of Australia and the world's foremost experts on human rights in detention I would have laughed and said you were dreaming. My OPCAT and subsequent Fellowship journey formally began in 2017 after I was employed by the Office of the Commonwealth Ombudsman as a detention inspector for Australia's onshore immigration detention network. My interest in human rights and detention however began long before this.

Prior to becoming a detention inspector, I had been working for the then Department of Immigration and Border Protection for close to eight years predominantly in its onshore and regional processing facilities including the Villawood Immigration Detention Centre, Curtin Immigration Detention Centre, Yongah Hill Immigration Detention Centre, Christmas Island Immigration Detention Centre and the Nauru Regional Processing Centre.

During this time, I was fortunate to interact with hundreds of detainees and staff. For the most part, I witnessed people dedicated to providing good service and doing their job well. I also witnessed courageous and hope filled men and women making the best of their uncertain circumstances. Inevitably I was also exposed to the visible results of despair, desperation and anger in the form of self-harm, suicides and riots and at times the frustrations of burnt out staff resulting in indifference.

A detention environment is by its nature a challenging environment both to be placed in as well as to work in. Yet it is within this environment that I found purpose in trying to make a difference for the individuals who had been placed in my care and to my staff by treating them with dignity and treating them decently.

During the time I worked in immigration detention I saw firsthand the interaction of detention staff with oversight bodies such as the Commonwealth Ombudsman, AHRC, the Australian Red Cross and the Office of the United Nations High Commissioner for Refugees. At times I would be responsible for drafting responses to their various enquiries. Time and time again in my experience when an oversight body visited it was not uncommon for me to hear someone remark 'here we go again, telling us how to do our job when they don't even know what we deal with day to day.'

Sometime after making the transition from working in detention to a detention inspector I was asked to make sense of the OPCAT. As soon as I started to read about its cooperative, dialogue-based approach I became fixated with wanting to know everything I possibly could about it. Having experienced both sides of the relationship I knew this was exactly what was lacking in the Australian context.

I see OPCAT as an important and unprecedented opportunity not only to further safeguard the human rights of detainees but to make detention environments safer places to work in and more attuned to the everyday experience of being detained and working in them. OPCAT's non-adversarial nature promotes discussions around problems and finding pragmatic solutions to those problems. OPCAT's preventive focus recognises that creating a safer work environment assists in creating a better working culture, reducing the likelihood of ill-treatment to those deprived of their liberty.

In planning for my Churchill journey, I consulted with experts both domestically and internationally to ensure that I gained access to experienced NPM's, relevant academics and leading non-government agencies. I also wanted to ensure that I was exposed to an array of NPM experiences to gain lessons for Australia's implementation journey. Where possible I wanted to see prevention in practice by witnessing NPM's undertaking visits and talk to civil society groups to discuss ideas about collaboration.

A smaller focus of my Churchill journey was to look at how to best make visit methodologies compatible with and informed by principles espoused in the Convention on the Rights of Persons with Disabilities (CRPD). Whilst recognising there are many particularly vulnerable groups in detention settings, disability is one particularly important to me. Whilst not exploring this topic in great depth it was positive for me to see how others are turning their attention to it more recently.



Receiving my Churchill Fellowship from His Excellency General The Honourable David Hurley AC DSC (Ret'd) Governor of New South Wales

The Concept of ‘Preventive’ Visits

“Preventive visiting is not the same as monitoring and it’s not the same as inspection, it’s a different conceptual technique.” – Professor Sir Malcolm Evans, Chair of the SPT

Part way through the Fellowship journey I found myself increasingly thinking about what it was that differentiated an OPCAT visit from other types of monitoring or inspection. Some NPM staff had indicated that for them OPCAT was just business as usual, a continuation of the practices they already had in place before ratification and hadn’t really noticed any changes. On the other hand, others described OPCAT visiting as having required a comprehensive shift away from what they had been doing previously.

The APT in offering up a definition to the approach suggests ‘the NPM’s preventive approach revolves around identifying and analysing factors that may directly or indirectly increase or decrease the risk of torture and other ill-treatment. It seeks to systematically mitigate or eliminate risk factors and to reinforce protective factors and safeguards.’²⁶

Whilst this and everything else that I had read pronounced OPCAT to be different in its ‘preventive’ approach, I could not quite tell what in practice that difference was. Had it been revolutionary to some because they had been so limited in their previous inspection scope and powers? Was it business as usual to others because they had already engaged in progressive models of monitoring?

It was clear to me to effectively promote the OPCAT model in Australia I had to obtain a stronger understanding of what preventive visiting meant in practice and why there was such a disparity in views about what it meant in practice to other oversight bodies.



Meeting with Professor Sir Malcolm Evans
KCMG, OBE, Chair of the SPT

²⁶ The Association for the Prevention of Torture and Inter-American Institute for Human Rights (2010). *Optional Protocol to the Convention against Torture Implementation Manual* Chapter V Operational Functioning of NPM; 3. Working Methods, p231

The most logical place to seek an explanation was with Professor Sir Malcolm Evans, Chair of the SPT. Professor Evans presented a view of preventive visiting as being experiential and interpersonal in focus rather than merely framed around compliance:

“Inspectorates should be picking up on systemic issues where systems are failing, what the preventative approach should be is picking up on what the experience is of those who are living within that system, because the system could be working perfectly and still letting people down. It’s only by actually understanding what the lived experience within the place is that you actually work out what actually is generating the potential for ill treatment and therefore what needs to be done about it”

Preventive visits therefore, in ascertaining the ‘lived experience’ of an institution, are by their nature predominantly based on human engagement:

“Really the main focus should be as far as possible on interviewing detainees rather than, shall we say, more mechanical checks. I think sometimes too much time is just checking documentation blind. Obviously, you want to look at systems and structures around documentation but pouring forever over files without context really tells you little.”

“That’s what is unique about the NPM mandate, because others don’t have that mandate to be able to do that... In many countries you wouldn’t be able to have the right to have a completely confidential interview with a detainee, you just don’t. So why not take advantage of the one thing that this gives you rather than just do the sort of things everybody else can do and are doing.”

In addition to detainees there is an equally strong focus on engagement with staff but done so in a cooperative rather than authoritative manner:

“Staff are often a far better source of information than detainees because they actually will explain the cultures of the place far better and a lot of it is about cultures and about what actually makes the thing work, often why the rules can’t work in the way they should. What are the inhibitors to doing it by the book and those are the sort of things that really can only come out in a more discursive type of conversation which does involve gaining the trust of the people, which is a problem, and so it’s important to present yourself in a way that doesn’t look as if you are a manifestation of authority with a tick box, more the sort of person who just comes to sit along side and just have a talk...”

Preventive visiting also necessarily entails NPM staff broaden their thinking from compliance with standards and legislation to incorporating creative and practical means to understand an institutional environment and to prevent ill-treatment from occurring:

“When I’m in say a high security unit I’ll say lock me in it for five minutes... This is cheap tricks in a way but it’s sometimes necessary to be able to understand it from a detainee’s point of view, which is something that often the people detaining never understand and why

would they because their seeing it from their point of view and that's not an illegitimate perspective. It's also this business of not always seeing in 'us' and 'them' terms because the people working in these places, actually it's their workplace too and I think we sometimes forget that if it's awful for the detainees it pretty horrible for them."

"It's thinking constructively, as we say in our concept of prevention paper, there is no limit to the number of things that may have a preventative capacity."

"You've got to look at the culture, talk to people, understand what the drivers are and then come up with something sensible that might help if not solve the problem at least start the process of unpacking it and unpicking it and that to me is what thinking preventive is."

This understanding was also confirmed by NPM's on the ground for instance Jacki Jones, Chief Inspector OPCAT for the New Zealand Ombudsman stated: *'you're not coming in to check that they've ticked boxes... It's about what is happening for prisoners on a day to day basis... it's really about what's it like for that person on a day to day basis'* and *'our role is to try and assist the agents that we monitor... not just for the residence or the prisoners but for the staff as well. It's about staff because if you can't get staff to engage nothing's ever going to change is it?'* Adding to this, Dame Lowell Goddard, Former SPT member also emphasised that *"a checklist, tick box approach... doesn't actually tell you anything about the atmosphere, the culture within the prison, how people are actually being treated psychologically and physically."*

The question that came to mind at this point was how then do you relate this experiential learning into credible and practical recommendations?

"It's a question of aggregating up those experiences and often then you can relate them back to the more formal compliance matters."

"It's the business of just trying to understand what the experience of the people in the places is like and then translating that back to what you understand should be the case and then finding the language in which to reflect that in a way which is most effective."

"You need to be able to translate it back into the proper speak of course but it is the ability of those doing the job to step beyond their own professional persona."

Dr Silvia Casale, former chair of the SPT and CPT offers the following insight in support of Professor Evans perspective: *'For oversight to be accepted, it is important to demonstrate that we are neutral observers with no hidden agenda, that we do have relevant expertise, experience and knowledge, that we have studied carefully the legislative and internal regulatory framework within which prisons in a particular jurisdiction operate and, perhaps*

most importantly, that we have empirical experience of custodial settings—that the sounds and the sights and the smells of a prison have meaning for us.²⁷ (emphasis my own).

As far as I am concerned preventive visiting is a simple yet not at all a simplistic endeavour. Preventive visiting requires the expertise and knowledge associated with traditional compliance-based inspections (perhaps even more expertise regarding the multidisciplinary approach) but its focus is more on engagement where typically, at least in my experience, engagement with detainees had been left to the end of an inspection.

Preventive visiting also requires in some instances a radical change in the relationship between the oversight body and the detaining authority. It is the means of course by which this change occurs. It requires a breaking down of the traditionally held view of oversight as being about criticism and judgement and an embracing of it as a solution-based partnership for detainees and staff alike. Of course, this doesn't negate the need for criticism where it is due, but criticism framed in constructive and forward-looking dialogue.

The idea of improved engagement with staff is indeed fundamental in both my experience of having worked for a detaining authority and as an inspector. So often staff are not encouraged to engage with oversight bodies because they're worried about their supervisors and managers. Equally oversight bodies find it difficult to obtain truly candid comment from staff because of the pre-conception that they are there to condemn. Preventive visiting has the definitive capacity to generate real cultural change, at the very least in the relationship between detaining authorities and oversight bodies. It requires buy-in however and as Professor Evans so frankly explained:

“Let's face it the problems have been known forever, the sort of problems that you and I know operate in most prisons in most countries in the world are not new. So why go in and tell people what they already know? One of things that never ceases to surprise me is you go around these prisons, you spend all this time, you go to tell people and you expect them to go ‘Oh really!’ and most of them go ‘Yeah, we know all that, is that all you've got to say?’ and then you go away and say ‘Well go and comply with known international standards’. No, give them something practical.”

“It is not a question of saying you will fulfil this expectation, that may be fine in Place A but that may not be working in Place B where something else needs to be done, it's as simple and as complex as that.”

Preventive visiting requires not merely the reiteration of standards or the request that violations do not occur. Preventive visiting requires practical suggestions that can be implemented. Taking this one step further and linking preventive visits to the wider preventive mandate of NPM's, Mark Thomson, Secretary General for the APT, states that

²⁷ Casale, S (2010). The Importance of Dialogue and Cooperation in Prison Oversight, *Pace Law Review*, Volume 30, Iss 5 1490-1502, p1495

NPM's need to *"think through, rather than just raise what the problems are, what the process of change ought to be and help the people that are involved to bring about that change."* This view was also highlighted by Dame Lowell Goddard, *"you have to report... setting out the issues, not in a hypercritical way... but emphasising the good practice and also highlighting...where there are deficiencies... and suggesting how those should be remedied."*

'Helping to bring about that change' and 'suggesting remedies' will vary from place to place and from institution to institution. It may simply mean producing a report to bring awareness of an issue, it may mean undertaking cross-sectional thematic research to generate needed national data, it may mean advocating for legislative changes, meeting with Ministers and Departments or facilitating public debate, capacity building or education. (the preventive package will be discussed in more detail in a later section)

In this regard Professor Evans concludes *"it's that sort of dynamic to get going, where you're not seen as an outsider, but you become to use the old adage, part of the solution, part of the people with whom people are talking in order to try and work out what can be done about an issue that's mutually recognised."*

Veronica Filippeshi, OPCAT Advisor with the APT stated in relation to 'business as usual comments' that *"NPM's have different ways of undertaking their work and they are all valid. There is not a single way of working, NPM's need to look at their own reality."* It could very well be that for some organisations OPCAT is a continuation of the same because in their view what they were doing was preventive work. It equally could be that for the same NPM's the idea of 'preventive visiting' was still very much an abstract concept that has not been understood to its potential. In my personal view, preventive visiting is distinct and has a depth that differentiates it from current practices. The depth of preventive visiting is in its holistic approach in assessing both the perspectives of detainees and staff. The distinction of preventive visiting is in the opportunities to foster real cultural and pragmatic change.

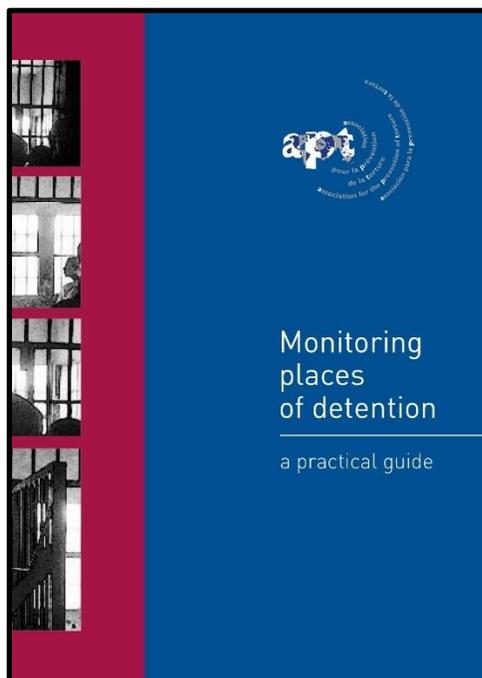
The Visit Methodology

“The contexts are so different, but the methodology is really very common and the issues around methodology that NPM’s face during visits are quite the same. We see it when we invite NPM’s from say Indonesia and from Norway [to the APT], the context is so different but there are core issues around methodology.” – Veronica Filippeschi, OPCAT Advisor for APT

Whilst my Fellowship was premised on looking at best practice in terms of visiting methodologies for OPCAT it became apparent very early on that the mechanics of how various NPM’s undertook their visits were generally the same.

As articulated by Professor Evans, *“there are certain basic principles... what you want to be doing when you go into a place of detention is to be able to gain as rapidly as possible an overview of the general... culture surrounding which is derived from a variety of different sources, it’s not just the official documentation. An orientation around the building itself, meeting with those responsible is normally an excellent indicator of what you are about to find. Rarely after having met with the person responsible for twenty minutes have I been surprised at what I have seen thereafter, either because they have told you or because you’ve worked it out from what they have or haven’t.”*

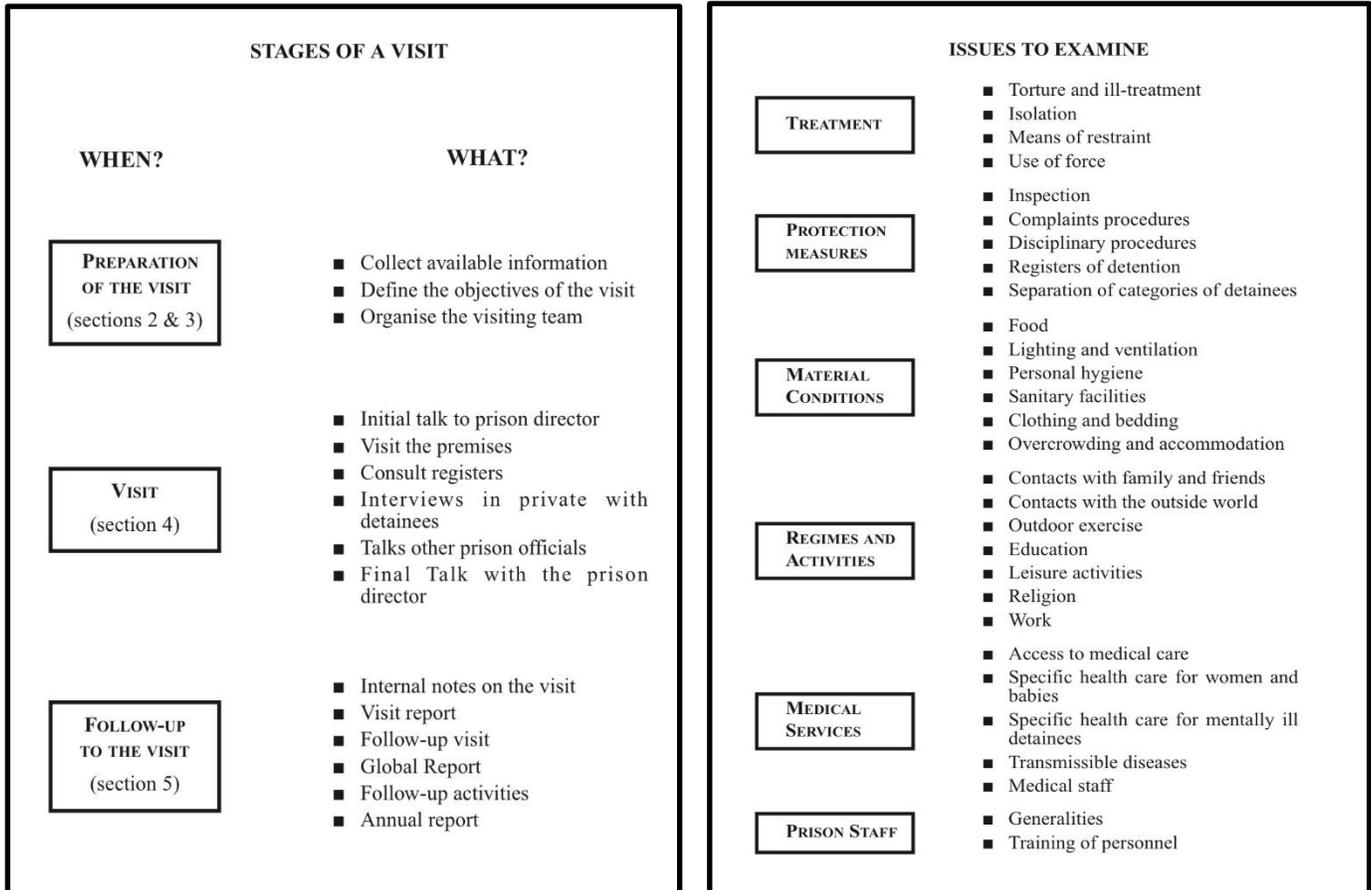
The work of the CPT and more often the APT’s ‘Monitoring Places of Detention: A Practical Guide’ and accompanying thematic guides are the general basis upon which most NPM’s establish their inspection methodology.



The APT is arguably the single most influential and significant civil society group to NPM’s around the globe. Mark Thomson suggested the *“APT is set up like a resource centre for people to undertake prevention of torture work on the ground.”* As an organisation that pushes for the importance of opening up places of detention the APT felt it was important to have or to create practical tool for monitor’s.

The backbone of the APT’s work is ‘peer to peer review and exchange’, thus the manual and the subsequent thematic manuals were not created in a vacuum. The manuals were developed with on the ground practitioners to ensure the content was indeed practical and relevant to the work of monitors. The manuals were also built off the APT’s experiential observations of monitors undertaking their work and APT staff’s personal experience of working in monitoring. The manuals are assessable, easy to

understand and show clear steps for programming a visit which is why they are widely used and still relevant to NPM's and monitor's alike.



Whilst the guidance provided by the APT and other bodies provides an architecture for most NPM's as they start out, more progressive and contextualised practices have emerged over the years and were noted in the places I visited. It is important to realise that established practices are but a starting point in preventive visiting as Professor Evans explains:

“the methodology has in my view little to do with law, law provides a framework in which it operates, but that is not the modus operandi of how you play it out. It’s not a court room, you don’t have rules and procedures which you follow, you do what’s necessary bearing in mind obviously that you must not be doing any harm and bearing in mind these are functional places that have a job to do. The people running them... are doing a very difficult job under very difficult circumstances that society requires of them and needs to be done. Everyone has to be properly respectful of that.”

Recognising that methodologies must remain fluid and responsive to the detention environment the SPT has suggested that they are regularly reviewed.²⁸ The importance of

²⁸ UN Subcommittee for the Prevention of Torture (2010). *Guidelines of National Preventive Mechanisms*, CAT/OP/12/5, Article III, B, (31) p5. Sourced on the 3 June 2018 from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CAT/OP/12/5&Lang=en

such being stated by Helga Fastrup Ervik, Head of NPM Unit for the Norwegian Parliamentary Ombudsman: *“The ability to continuously develop how you work and change how you work and adapt to new needs or new ideas, goes within the preventive focus... it’s important to take advantage of that and use that to work in different ways.*

The following section will elaborate on some of the more well-developed practices that I encountered in my travels, in relation to the concept of preventive visits.



Pictured at the Amygdaleza Pre-Removal Detention Centre in Greece
With facility management and NPM staff from the Greek Ombudsman.
The visiting methodology was based on a combination of elements from
the work of the CPT/APT and interchange with other NPM’s

Good Practice Identified

Pre-Visit Research (The Norwegian Parliamentary Ombudsman; Norway)

‘For a visit to take place in the best possible conditions it must be well prepared beforehand.’²⁹

Approaches to visit preparation by NPM’s will vary, however the Norwegian Parliamentary Ombudsman preparatory work is exemplary. The Ombudsman starts planning for a visit almost a year in advance when meeting to set its annual strategic plan. The NPM staff map out thematic topics for each of its detention sectors (prisons, mental health care institutions, child welfare institutions and immigration detention) and chooses the institutions to be visited. These decisions are informed by consideration of complaints received by the Ombudsman, media reports, other third-party information and to a degree geographical coverage of Norway.

The Ombudsman takes a predominantly semi-announced approach to its visits, notifying institutions that they will be visited within a certain period but not advising of the exact date (usually advising the institution they will be visited within a two-month period). The Ombudsman then requests and obtains all necessary information it needs from the institution.

As noted in the Ombudsman’s most recent Annual Report: ‘Obtaining information from a number of sources is the first step when planning all visits; from the place to be visited; the supervisory authorities, official authorities and other relevant bodies. The Ombudsman has right of access to information that is relevant to the conditions in places where people are deprived of their liberty. In some cases, the Ombudsman may have already received information from various sources.’³⁰

This collation of information from the institution before the visit is undertaken by the NPM staff member with overall responsibility for the visit. The staff member also sources information from a variety of other sources including the NPM’s Advisory Committee, media, internal audit documents and past reports. The staff member then uses the information gathered to create a preparatory operational document and logistical plan (which is often as sizable as the Ombudsman’s final report to the institution). The preparatory document is designed to provide the visiting team with a thorough understanding of the institution and contains information including but not limited to: an overview and map of the institution, organisational chart, ward by ward or section by section breakdown, detainee statistics,

²⁹ Association for the Prevention of Torture (2004). *Monitoring Places of Detention: A Practical Guide*, Chapter 3: How to monitor places of detention, 3. Preparing the visit, p73

³⁰ Norwegian Parliamentary Ombudsman (2018). *The Parliamentary Ombudsman’s Annual Report for 2017 as National Preventive Mechanism against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, p11

vulnerable groups (addiction problems, psychiatric illnesses, LGBTI), staff numbers, detainee activities, health services, problem areas from the research, media stories, safety considerations, administrative decisions relating to use of force, mechanical restraints and use of isolation. In addition to the operational document, the information obtained is also used to draft an institution specific questionnaire based on each of the groups to be interviewed (staff, detainees, health staff etc.).

The Ombudsman's ability to undertake this thorough preparatory work is, as explained by NPM staff member Christian Ranheim, attributable to a *"conscious choice to focus on quality before quantity"*. The Ombudsman undertakes less visits than some of its neighbouring NPM's (42 visits conducted from 2014-2017³¹) but is cognisant to the fact that its recommendation implementation and credibility hinges on the thoroughness of its methodology and the accuracy of its public reports (Public reporting will be discussed in more detail later in the report).

Speaking on the issue of accuracy and credibility in connection with the pre-visit preparation, Christian stated: *"One of the advantages of having all this information beforehand is that we can cross check the information... So, we have the written information, the staff interviews and we have the interviews from the inmates or patients or youth... we make a triangular check on it. It's very seldom where we publish findings based on one interviewees response, so it's mostly if we hear it from several people and/or if you find it in the written material."*



Meeting with members of the Norwegian Parliamentary Ombudsman's NPM Department.

'During its visits, the NPM will endeavour to identify risk factors for violations by making its own observations and through interviews with the people involved. Interviews with people deprived of their liberty are given special priority.'³² Practically and much in line with the ethos of preventive visiting, the Ombudsman's pre-visit research methodology ensures that

³¹ Ibid, p66

³² Ibid, p7

most of the visit is spent on human engagement rather than exploring documents and systems. Christian further elaborates:

“I would say usually we talk to two thirds or more of the inmates or patients or youth in the institutions that we visit. So, during a three day visit it can easily be 50-60 interviews... The interviews are usually quite long in the beginning, they can be 30-40 minutes per inmate but after a while there are issues we can tick off where we can see we have enough information... Then it gets shorter and more focused towards the end... In the beginning we didn't talk that much to staff but that has changed a lot and now we try to focus a lot on that. One issue that I personally have experienced is that quite often the younger staff... who come in with a fresh view are more open or look at things differently than others. One other thing that we found very important... is to try to talk to those that work at night time to make sure there are not institutional cultures that part of the day when the oversight it less”

Dialogue-Based Monitoring (The Danish Parliamentary Ombudsman, DIGNITY – Danish Institute Against Torture, Danish Institute of Human Rights; Denmark)

“Denmark is different from most countries, most countries... make fairly extensive reports so it's always met with a bit of mistrust when we tell others that we do this so much in the oral fashion.” - Erik Dorph Sorensen, Head of Division

The Danish NPM is led by the Danish Parliamentary Ombudsman in conjunction with the Danish Institute of Human Rights and the non-government organisation, DIGNITY. (This NPM collaboration will be discussed in greater detail in a later section). The NPM organises its visits thematically choosing overarching topics for consideration then choosing institutions within these themes. The themes can be cross-cutting (across different types of institutions) or specific to one type of detention. The choice of themes is based on a variety of sources including parliamentary debate, media, statistics and the NPM's own experience.

On average the NPM conducts 40-45 visits to adult institutions and an additional 10-15 visits to children's institutions annually. Visits are predominantly announced with about 5-10 partly announced or unannounced visits occurring throughout the year. In this regard the Danish NPM is cognisant of the disadvantages associated with announced visits as opposed to unannounced visits but argues:

‘The particular advantage of announced visits is that the visiting team can obtain information from the institution prior to the visit and that the relevant persons are present in the institution on the day of the visit. To vulnerable users and users needing predictability and structure, it may be beneficial that they are prepared for the visit to the institution.’³³

³³ The Danish Parliamentary Ombudsman (2016). *Manual for Monitoring Activities* Doc.No.15/05108-57, p22

Institutions are generally advised about 6-8 weeks prior to the visit and in similar fashion to the Norwegian NPM, the Danish NPM request substantial information from the institution two-three months prior to the visit. This information relates to the focal areas relevant to every visit by the Danish NPM: Use of force and other restrictive measures and limitations, relationships, fundamental rights and release provisions and support.

Whilst up until this point there is very little deviation from the Norwegian model there is a distinct difference in the how the Danish NPM undertakes its visits and more so in its recommendations and follow up. As explained by Erik Sorensen, Head of Division for the NPM, *"We don't write reports as they do in Norway. When we have executed a visit, we go back and write an internal report, but we don't share the report with the institution we just write a short letter giving our recommendations and the visit is finished. So, we don't have this dialogue in writing with the institutions, we have the dialogue surplus."*

'Dialogue-based monitoring which is predominantly based on a verbal dialogue between the Ombudsman and those he visits, including managements and users of institutions. Overall and slightly simplified, the assessment is that the use of quiet diplomacy based on dialogue, cooperation, openness and trust has in practice proved to be effective and has thus led to results and improvements for the users.'³⁴

Beginning with a meeting with the institutions management, the NPM spends about 2-3 hours asking questions from a pre-prepared guide (20-30 pages) based on the information received beforehand and the focus areas. 'The preparation of the questions is intended to help ensure that the visiting teams ask the relevant questions and thereby as far as possible gets a full and accurate picture of the conditions in the place they are visiting.'³⁵

The Danish NPM then spends most of the visit in human engagement with a wide remit of sources. 'Apart from the management, staff and users, the visiting teams will speak with any clergymen and/or imams, health care staff and any elected representatives for the users, such as spokespersons. In addition, the visiting teams speak with legal guardians, social security guardians and patient advisers. In connection with monitoring visits in the children's social care sector, the visiting teams will normally speak with the relatives, typically parents.'³⁶

The visit is concluded with a meeting with management where recommendations and ideas are put forward. As stated previously, the institution is provided a brief letter with the recommendations and the visit is concluded. Follow up on the implementation of these recommendations does not generally occur. As articulated by Erik, *"When we have given recommendations... we do not do explicit follow up visits in order to see they have followed our recommendations... When we have indications that something might be wrong then we do a follow up visit."*

The justification for not undertaking written reports and follow up is summed up by Erick as follows, *"you could argue that they [other NPM's] spend a lot of resources doing that*

³⁴ Ibid, p4

³⁵ Ibid, p30

³⁶ Ibid, p8

[written reports and follow up] whilst we spend our resources in preventive monitoring, in being there.” Whilst it is of course desirable to be able to undertake so many visits, it would not be unreasonable to be sceptical of the effectiveness of this model. In fact, it has been argued that ‘quality reporting and effective recommendations are an essential component of each NPM’s monitoring function. Moreover, the way reports and recommendations are written will be instrumental for the success of the follow-up process as they are the basis for constructive dialogue with the relevant authorities.’³⁷ It is consequently important to understand the authority and reputation of the Ombudsman within Denmark to understand why it has been so effective in this context.

As Erik explained to me, *“In Denmark many things are based on trust and we can rely on the reputation of the Ombudsman that the institutions will follow our recommendations.”* This view was also strongly reiterated by Jens Modvig, Director of Health Department- DIGNITY and Chair of the UN Committee against Torture; *“This very unique, extremely strong mandate and reputation of the Ombudsman is terribly beneficial for us and the Institute for Human Rights. If this wasn’t the case and like in many other countries it was an Ombudsman for Human Rights which is maybe not particularly highly regarded it would be uphill and now it’s not... It is very important for the way the Danish NPM works...”* and *“Recommendations from the Ombudsman, they are simply implemented.”*

The Danish model whilst arguably very context specific is relevant to Australia’s current consideration of NPM bodies. Whilst there are many pre-existing oversight bodies in Australia, consideration of their perceived reputation among detaining authorities and with the wider public audience should be noted. The respect to which the Ombudsman enjoys in Danish society may not be replicable in the Australian context, but it certainly should be aspired to by the Australian NPM.

Surveys (Her Majesty’s Inspectorate of Prisons; UK)

“We do get a really good response rate compared to academia for example, we will get typically 85-90% response rate back and probably 2-5% of that will be people who declined to participate.” – Research Officer – HMIP

If you look at the last three annual reports for HMIP you will note that the word ‘survey’ features approximately 204 times. One of the distinguishing features of HMIP’s visit methodology is the use of random sampling surveys (except for Young Offender Institutions or Secure Training Centres where all children are sampled when visiting), representative of the total population in any establishment. HMIP employs a research team which focuses on the development of both quantitative and qualitative methods of looking into treatment and conditions of people being held in prisons, immigration facilities, secure training centres and young offender’s institutions.

³⁷ Birk M et al (2015). Enhancing impact of National Preventive Mechanisms Strengthening the follow-up on NPM recommendations in the EU: strategic development, current practices and the way forward, p10. Sourced on 2 June 2018 from http://www.univie.ac.at/bimtor/dateien/NPM_Study_final.pdf

HMIP's prisoner surveys cover all aspects of the Healthy Prisons framework (safety, respect, purposeful activity and rehabilitation and release planning) and the questions attempt to cover the overall experience of detainees from reception to release. As explained by a Research Officer at HMIP, the surveys are *"much like a journey, we start off with how was their first night induction, escorts, all the way through the rehabilitation and resettlement services so we can get an idea of exactly what 's going on throughout the prison. Obviously, we use demographic breakdowns as well, so we can look into differences between people with a disability, without a disability, we can look at over 50's, under 21's, this kind of thing, just to see if there is any differences going on across the establishment. We also look into wing comparisons as well, so for example, if you have a vulnerable prisoner wing you can compare that to the general population wings and see if their experiences are different at all."*

In the week prior to main inspection week, the research team (usually 4 staff) accompanied by an inspector will visit a place of detention and distribute several surveys according to a formula which provides the team the number of responses needed for a representative sample based on the overall number of detainees.

The team provides detainees with a brief on confidentiality and specifically accounts for difficulties some detainees may have with completing the surveys through physical assistance or interpreter services. As explained by a Research Officer: *"We do get quite a few people who can't read or write so we'll go through and discuss it with them, so they have an equal opportunity to do it as well. We also have translated questionnaires... We have a set of 10-12 different languages and we have a database that we monitor each time we go to a prison about what languages were requested... If we don't have the language there we offer a language line."*

Survey responses are typically collected the same day or the following day. Once the surveys are collected the Research Officer explained that *"within one to two days we'll produce an analysis, demographic breakdowns and send over what we call comparators which is added to the back of the inspection report as well... Often they will present this to the Governor for example... which is quite helpful for them."*

The comparators mentioned above are a comparison of survey results to other prisons of the same function, for example local prisons, and also comparing the survey results from the results from the previous inspection.

"It's not always a positive picture, often we get blue [results are colour coded] which means its worst [then last time] and it just gives the inspectors an idea of where the priority is... Obviously it's just one of the piece of the evidence they use to formulate the whole inspection."

Whilst the surveys are predominantly quantitatively question-based, space is provided for comments not covering any of the aspects already asked. The research team also provides a comments analysis to inspectors for internal use, listing issues such as food quality and standards and insufficient contact with the offender management unit for example.

In a more recent development, HMIP's surveys have been extended to staff. As explained by Jade Glenister, UK NPM Assistant Coordinator, *"on the immigration side we've recently trialled surveying staff... this has proved successful and informative."*

The survey results provide inspectors a valuable source of evidence which combined with other sources (observation, discussions with prisoners/detainees, discussions with staff and relevant third parties and documentation³⁸) provides a comprehensive overview of the institution and the basis for discussion and recommendations. Attesting to this, Dame Anne Owers, Former Chief Inspector for HMIP said *"...they [prisoners] are very experienced consumers of detention, so they are remarkably honest and remarkably percipient about what's going on. The surveys for us were the starting point which would give you the questions you wanted to ask and more often than not those would be the right questions to be asking..."*

Disability Informed/Inclusive Practice (Care Quality Commission; UK and The Office of the Ombudsman; New Zealand)



Meeting with Ms. Catalina Devandas Aguilar
UN Special Rapporteur on the rights of persons
with disabilities

*'...the NPM must not treat disability as an 'add-on' feature, but instead recognise that people with disability have an overt representation within many sites of detention, and therefore represent a core feature of all monitoring activity.'*³⁹

People with disability are a particularly vulnerable group positioned across all areas where deprivation of liberty occurs. As noted by a recent Human Rights Watch report into the experience of persons with disabilities in the Australian criminal justice system:

*'People with disabilities, particularly a cognitive or psychosocial disability, are overrepresented in the criminal justice system in Australia—comprising around 18 percent of the country's population, but almost 50 percent of people entering prison.'*⁴⁰

³⁸ Her Majesty's Chief Inspector of Prisons for England and Wales (2017). *Annual Report 2016-2017*, p5

³⁹ Lea, M et al (2018). A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability, *Australian Journal of Human Rights*, p18

⁴⁰ Human Rights Watch (2018). *"I Needed Help, Instead I Was Punished" Abuse and Neglect of Prisoners with Disabilities in Australia*, p1

The high level of representation within the criminal justice system of people with disability and considering their representation in other places of detention, it is imperative to ensure that the Australian NPM adequately accounts for their experiences as part of its visiting methodology.

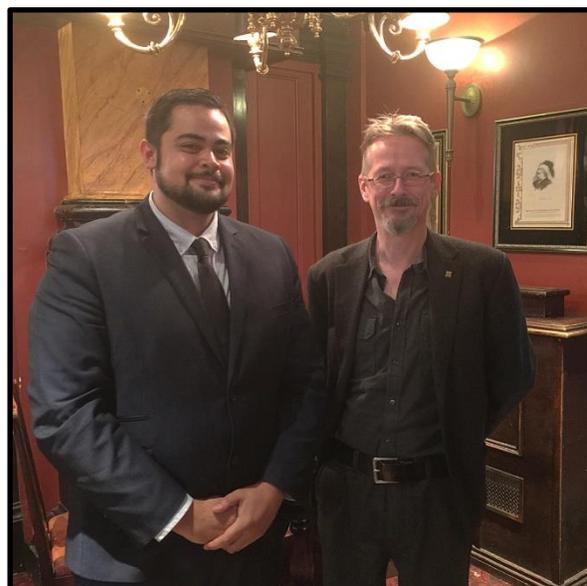
This section of the report will look at the experience of two of the NPM's that are developing practices that honour the following CRPD principles: Article 4 (3), the active involvement of people with disability and their representative organisations in decision making processes, Article 33 (3), inclusion and participation in the monitoring process. It will also briefly discuss how and why NPM staff should undertake training to become more disability aware and informed: Article 4 (1) (i), the promotion of training for professionals and staff working with people with disability.

The involvement of people with disability in monitoring work among the visited NPM's is an area in early development, it is however not a new phenomenon for monitoring in general as explained by Silvia Quan, Senior Human Rights Advisor for IDA and former CRPD Committee Vice-Chairperson:

“We have known of experiences in other countries where equality commissions or human rights commissions include persons with disabilities who've had the lived experience of being in an institution and it's a very good experience to have somebody who knows how things function and can maybe have another way of seeing things.”

The SPT also promotes the use of 'experts by experience' (not limited to persons with disabilities) in NPM visiting. However, as noted by Professor Sir Malcolm Evans, *“I wouldn't be doctrinal about it [one way or another], it all comes down to the person... One of the problems with using former detainees within the system is some of them do find it difficult to stop reliving their own experience and projecting their experience onto others. Of course, others are brilliant at it because they can immediately identify what the issues are... It basically comes down to the person.”*

The Care Quality Commission (CQC) of England, responsible for inspecting health and adult social care institutions has long used 'experts by experience' in its visits. Their main role is to talk to people who use services as well as carers and staff and can observe the care being delivered. In the mental health setting, Mat Kinton from CQC expressed that *“our best visitors do tend to be people who are not strangers to psychiatry but they're not clinicians... we've had some very good people whose only experience is as users.”*



Meeting with Mat Kinton, National Mental Health Act Policy Advisor, CQC

Mat indicated that experts by experience “*play a role in the team and it’s quite explicit that they’re here as an expert by experience. In many cases, they will take a lead in some of the patient interviews or carer interviews. It’s really good to walk around the ward with an expert by experience because they spot stuff.*”

In relation to the concern about traumatisation that Professor Sir Malcolm Evans noted, Mat indicated that whilst it is a very valid concern, in his experience he found that “*if it’s a very defined role then you can take people who are still struggling, who may still have issues... if it’s put within a framework then that’s manageable.*” Mat jokingly indicated that he’s had to pull clinician’s away from discussions with other clinicians more than he’s had to with experts by experience.

In addition to utilising former users, CQC as part of its Service User Reference Panel, also engages current users. Mat stated that “*people who have current experience of severe mental illness, very few of those actually come on visits, but some people do, some people can do.*” Current service users are however incorporated more so in an advisory context:

“We also use them as a sounding group, so as an expert group... One of the great things is, over the last couple of decades, email and things like that makes it easy to have a network of people, even those that are in hospital at the time, who you can have virtual meetings and contact with... Whenever we have a thematic review I have to take it through a group of current and recent patients who will either say yes that’s great or tell me what’s missing and its very helpful.”

The New Zealand Ombudsman is another NPM that is currently trialling the use of experts by experience within its visits to mental health facilities. As noted by Jacki Jones, Chief OPCAT Inspector, “*they can engage so much better with a client than we can at their level because they’re quite happy to say I’ve been a patient, this is my experience. So, for us their role is to speak to as many of the service users and staff.*”

Another howbeit unintentional benefit that has also arisen from the New Zealand Ombudsman’s employment of experts by experience is an opening up of relationships with civil society. “*I find with the experts, they do a lot of work with non-government organisations... So, actually they are opening doors for us [in-roads with civil society].*”

Jacki indicated that to guard against the risk of traumatisation a conscious choice was made to not allow experts to be part of the visiting team to facilities that they themselves had been patients of. Additionally, regular debrief was an important element not only for the experts but all members of the team.

Perhaps summarising best, the benefit of experts by experience in ‘preventive visiting’, Jacki has previously stated that ‘as Inspectors, we can see how things look; the Experts by Experience can tell us how things feel... An example is the impact of noise levels. The background sound of jangling keys and shutting doors might seem subtle to us, but to a person with high sensory awareness they can be very distressing’.⁴¹

⁴¹ Office of the Ombudsman New Zealand (2017). *Ombudsman Quarterly Review*, Iss 21, Spring 2017, OPCAT An equal voice, p9. Sourced on the 2 June 2018 from

Both CQC and the New Zealand Ombudsman have in their experience ‘found many people find it easier to talk to an Expert by Experience rather than an inspector.’⁴² A view anecdotally supported as well by the experience of the Greek Ombudsman in its visits to psychiatric institutions. Aimilia Panagou of the Greek Ombudsman’s psychiatric institutions team, relating her experience, described one visit where an external psychiatrist was engaged to interview the service users. To their surprise the team found that service users refused to engage.

In offering up a possible explanation, Silvia Quan of IDA explained to me that “*some people relate a psychiatrist to the restraints that they have been subjected to. A psychiatrist could provide good information when the monitoring activities are being planned but conducting the inspection may not be a good idea unless of course the psychiatrist doesn’t involve him or herself directly in interviewing persons.*”

If NPM’s are to be effective in engaging with people with disability, there is a need to raise inclusivity awareness among staff as the example above illustrates. In an APT led symposium in 2016 on monitoring psychiatric institutions, the views of approximately twelve NPM’s were discussed and it was apparent that the lack of awareness and training of NPM members on the rights and needs of people with disability presented a significant internal obstacle to effective monitoring in this environment.

The subsequent outcome report produced by the APT concluded that ‘it is essential that everyone within each NPM is aware of the standards that govern the deprivation of liberty of persons with mental disabilities, including the principles enshrined in the CRPD.’⁴³ Whilst the recommendation was specific to people with psychosocial disability as are much of the examples I have highlighted, it is not at all unimaginable to consider this equally important to all forms of disability as well as for other groups of vulnerability.

Supporting this conclusion, Alberto Vásquez, Research Coordinator with the Office of the UN Special Rapporteur on the rights of persons with disabilities highlighted to me the importance of not only ensuring there are disability experts in an NPM but emphasising that disability issue awareness and training in general should be mainstreamed in the NPM team: “*Everyone who is monitoring should understand this... otherwise you will have a team that works only on disability issues [as opposed to teams that can work cross-institutionally and lend a disability perspective to all types of detention].*”

This same view was supported and elaborated on in the personal view of Carla Garnelas, Treaty Monitoring Principal at the Equality and Human Rights Commission of Great Britain who said:

http://www.ombudsman.parliament.nz/ckeditor_assets/attachments/560/Ombudsman-OQR-Issue-21-Spring-2017.pdf

⁴² Care Quality Commission (2018). *Monitoring the Mental Health Act in 2016/17*, Appendix A: Involving People, p46. Sourced on the 2 June 2018 from

http://www.cqc.org.uk/sites/default/files/20180227_mhareport_web.pdf

⁴³ Association for the Prevention of Torture (2016). *Jean Jacques Gautier NPM Symposium: 2016 Monitoring psychiatric institutions Outcome Report*, p31. Sourced on the 31 May 2018 from https://apt.ch/content/files_res/report-jjg-symposium-2016-en.pdf

“There’s real challenges there about... how you get the voices of disabled people out in inspections and the constituent members of NPM being really attuned to what you need to do in order to ensure those voices are being heard. My hunch is there are probably voices that aren’t adequately heard because its seen as very complicated or they don’t have the skills or resources or confidence to do that or there’s an assumption that these people don’t have valid things to say or just because they’re not verbal that they can’t tell you how they’re feeling about being locked up.”

Whilst none of the NPM’s I visited spoke about having undertaken specific disability awareness training (though noting I did not ask all of them specifically about the issue of disability) there is evidence of its incorporation in other NPM’s such as in Serbia:

‘...initial capacity building of this new mechanism would not have been possible without civil society organisations with years of experience in human rights monitoring. This was particularly important for people belonging to various vulnerable groups, including persons with disabilities. A series of training events were organised on specific topics, including disability rights and torture as well as the ‘paradigm shift’ that the Convention on the Rights of Persons with Disabilities has brought.’⁴⁴

There is clearly a benefit to training NPM staff but also in considering how training could potentially be an in-road to deeper engagement with people with disability and their representative bodies, such as disabled persons organisations.

⁴⁴ Association for the Prevention of Torture (2016). *Putting prevention into practice 10 years on: the Optional Protocol to the UN Convention against Torture, ‘Ombudsman Plus’*: The value of civil society experiences, p12-20. Sourced on the 2 June 2018 from https://www.apr.ch/content/files_res/putting-prevention-into-practice-opcat10.pdf

Building a Framework for Good Practice (Enabling the ‘Preventive Package’)

‘OPCAT acknowledges that truly effective prevention work requires more than just monitoring. Its broad preventive mandate recognises that work to promote and protect the human rights of detainees is also essential. A proactive, collaborative and constructive approach to OPCAT compliance is encouraged by the protocol itself and this is the way it is being implemented in New Zealand.’⁴⁵

Within the preamble of the OPCAT is a recognition that prevention is a multifaceted endeavour that includes, but is not limited to, detention visiting. ‘...the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures.’⁴⁶

This multifaceted approach to torture prevention has more recently been proven essential in the evidence-based research by Richard Carver and Lisa Handley.⁴⁷ They confirmed monitoring had a direct effect in reducing torture but was not the only measure nor the most effective in and of itself. The application of detention safeguards (such as abstaining from unofficial detention and the implementation of safeguards in the first hours and days after arrest) for example, reported a higher correlation in reducing torture. In assessing the overall findings of the study, the APT concluded that the reality is ‘no single measure alone is sufficient to prevent torture. To bring concrete changes, an array of measures need to be implemented in combination with one another.’⁴⁸

The need to adopt a more holistic approach to preventive work has unsurprisingly been recognised by NPM’s and is gaining momentum, especially among the more developed and established NPM’s. Further the SPT has actively encouraged its incorporation:

‘The Subcommittee is of the view that a national preventive mechanism should also be empowered and able to deliver the whole “preventive package”, including examining patterns of practices from which risks of torture may arise; advocacy, such as commenting

⁴⁵ New Zealand Human Rights Commission (2013). *OPCAT in New Zealand 2007-2012, A review of OPCAT implementation by New Zealand’s National Preventive Mechanisms*, p5. Sourced on the 5 June 2018 from https://www.hrc.co.nz/files/2214/2398/7100/Opcat-2013_web.pdf

⁴⁶ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (2006). Sourced on 28 May 2018 from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>

⁴⁷ Carver, R & Handley, L (2016). *Does Torture Prevention Work?* Liverpool University Press.

⁴⁸ Association for the Prevention of Torture (2016). *“Yes, Torture Prevention Works” Insights from a global research study on 30 years of torture prevention*, Final Remarks: A holistic Approach to Torture Prevention, p29

on draft and implementing legislation; providing public education; undertaking capacity-building; and actively engaging with State authorities.⁴⁹

This emerging body of work was observed in many of the countries I visited. In Denmark for instance Jens Modvig commented that “...*It has emerged over the time we [the Danish NPM] have been working together that while we thought initially that focus should be on the single institution more and more focus is on systemic and structural issues.*” In Norway too, there is evidence of expansive preventive work beyond just detention visiting as evidenced in its latest submission to the UN Committee on Torture:

‘Many different factors can have a bearing on the risk of torture and ill-treatment. Effective preventive work therefore requires a broad approach. In addition to visiting places where people have been deprived of their liberty, the NPM’s working methods also include thematic examination of systemic challenges, meetings with responsible ministries, directorates, other control bodies and civil society organisations, public outreach and teaching on torture prevention, written submissions regarding the legislative framework and dialogue with international human rights bodies. The NPM also receives regular input to its work from an advisory committee composed of representatives of the National Human Rights Institution of Norway, the Equality and Anti-Discrimination Ombud, the Ombudsman for Children, trade unions and civil society organisations.’⁵⁰

The same is true of HMIP in the UK: ‘In addition to inspections of individual establishments, we produce thematic reports on cross-cutting issues, singly or with other inspectorates as part of the Criminal Justice Joint Inspection process. We also use our inspection findings to make observations and recommendations relating to proposed legislative and policy changes.’⁵¹

The understanding of the preventive visiting concept and the incorporation of expanded ‘preventive package’ work was during my travels far more developed in some countries and less so in others (the same too could be said between NPM bodies within a country). This of course can in part be attributable to how long the OPCAT mandate has been in place in a country and the time an NPM has had to move beyond its implementation stage to a full program of work.

I would argue however based on my observations, interviews and reading of the literature that the effectiveness of an NPM in terms of being able to develop its own contextualised methodologies and demonstrate a more holistic preventive-based approach; is centred

⁴⁹ Subcommittee of the Prevention of Torture (2018). *Eleventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/63/4, V. Reflections on the year under review, A. Capacity of national preventive mechanisms to work effectively in a preventive manner and the “preventive package”, Article 54, p10. Sourced on the 5 June 2018 from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f63%2f4&Lang=en

⁵⁰ The Norwegian Parliamentary Ombudsman (2018). *The Norwegian NPM's submission to the UN Committee Against Torture's 63rd session – Information regarding the Norwegian Government's implementation of the Convention*, 2017/1555, p5. Sourced on 5 June 2018 from http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/NOR/INT_CAT_INP_NOR_30711_E.pdf

⁵¹ Her Majesty’s Chief Inspector of Prisons for England and Wales (2017). *Annual Report 2016-2017*, p5

principally on whether that NPM's framework is adequately instilled with the principles, powers and guarantees that are contained within the OPCAT.

Taking this to its logical conclusion, it is apparent that 'best practice' cannot be divorced from examining the framework in which an NPM operates. The following subsections will discuss the guarantees an NPM should have in light of the experiences of the NPM's that I visited and the advice they offered for Australia's implementation.

'...the Subcommittee considers it appropriate to reiterate the importance of national preventive mechanisms having true functional independence and being able to work with a preventive spirit, identifying potential risks of torture and ill-treatment, highlighting gaps in human rights protection and making recommendations of a practical nature to address matters of concern.

The Subcommittee is increasingly aware that even if they have a legal mandate to do so, not all national preventive mechanisms feel able to gain access to all places where people are being or may be deprived of liberty; to all persons deprived of liberty and to all information relevant to the mandate; and to have the right to interview detainees confidentially. Not only must they have the legal mandate to do so, they need the independence to be able to decide to do so, the means to do so and the confidence that they will in practice be capable of doing so.

The Subcommittee is of the view that a national preventive mechanism should also be empowered and able to deliver the whole "preventive package" ... emphasizes that this requires sufficient resourcing; appropriate privileges and immunities; and access to the Subcommittee for advice and assistance.'⁵²

Independence: Scope and Legal Mandate

'...should an existing body be charged with the NPM mandate, its powers to visit places of deprivation of liberty must reflect the wide definition provided for in the OPCAT.'⁵³

The OPCAT obligates State parties to establish a national system of preventive visits to all places where people are deprived of their liberty, but it does not explicitly list what those places of deprivation are. The SPT in elaborating on this point indicates 'the preventive

⁵² Subcommittee of the Prevention of Torture (2018). *Eleventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/63/4, V. Reflections on the year under review, A. Capacity of national preventive mechanisms to work effectively in a preventive manner and the "preventive package", Article 54, p10. Sourced on the 5 June 2018 from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f63%2f4&Lang=en

⁵³ Stienerte, E & Murray, R (2009). Same but Different? National human rights commissions and ombudsman institutions as national preventive mechanisms under the Optional Protocol to the UN Convention Against Torture, *Essex Human Rights Review*, vol Special Issue, p59

approach underpinning the Optional Protocol means that as extensive an interpretation as possible should be made in order to maximize the preventive impact of the work of the national preventive mechanism' and 'therefore takes the view that any place in which persons are deprived of their liberty, in the sense of not being free to leave, or in which the Subcommittee considers that persons might be being deprived of their liberty, should fall within the scope of the Optional Protocol, if the deprivation of liberty relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function.'⁵⁴

It is consequently important that NPMs are given the relevant powers of access within what could be termed an expansive definition of places of detention. This is particularly relevant to the Australian context in that it has been already been decided that NPM's will focus on traditional places of detention. As stated by the then Attorney-General, George Brandis at the 2017 Department of Foreign Affairs Non-Government Organisation Forum address: 'in implementing OPCAT, our focus will be on what might be termed 'primary' places of detention, such as prisons, juvenile detention, police cells and immigration facilities. Any environment in which the state deprives a person of his or her liberty poses unique challenges; such challenges are perhaps at their most acute in such places.'⁵⁵

Choosing to take an incremental approach in an NPM's early establishment is not of itself contentious. The SPT in fact states 'in all situations, the national preventive mechanism should also be mindful of the principle of proportionality when determining its priorities and the focus of its work.'⁵⁶ Limiting an NPM's mandate to 'primary places' of detention however would be an entirely different situation all together.

The SPT evidently advises that 'the State should allow the NPM to visit all, and any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within its jurisdiction... should ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides.'⁵⁷

⁵⁴ Subcommittee on the Prevention of Torture (2016). *Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/57/4, p19.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f57%2f4%2fCorr.1&Lang=en

⁵⁵ Human Rights Law Centre (2017). *Torture Convention - the Australian Government OPCAT announcement* (edited extract from Senator the Hon George Brandis QC's announcement the Australian Government will ratify the Optional Protocol to the Convention against Torture). Sourced on the 05 June 2018 from <https://www.hrlc.org.au/bulletin-content/2017/2/22/torture-convention-the-australian-government-opcat-announcement>

⁵⁶ Subcommittee on the Prevention of Torture (2016). *Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/57/4, p19. Sourced on the 9 June 2018 from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f57%2f4%2fCorr.1&Lang=en

⁵⁷ Subcommittee on the Prevention of Torture (2010). *Guidelines on national preventive mechanisms*, CAT/OP/12/5, p10. Sourced on the 3 June 2018 from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en

NPM's should be provided the right of access to any place of detention and this should be guaranteed within a legislative basis. The consistent position of countries I visited was to start with an expansive view yet work incrementally and with proportionality in mind to prevent exhaustion of human and financial resources whilst maintaining impact.

The benefit of commencing with such an expansive approach is educative as much as it is about the functioning of the NPM. Speaking of non-traditional places of detention Professor Evans mentioned *"...you need it simply to let people realise that in fact they are places of detention. Many countries have been discovering all sorts of places that they now appreciate are places of detention that they never actually conceived of in that way before... You try telling people running a hospital or medical staff that they are involved in torture and ill treatment or even detention full stop, they just don't get it and there is a learning curb to be gone through there that in fact they are."*

Mat Kinton, speaking of his work with CQC also remarked, *"for many years we didn't really see care homes as places of deprivation of liberty we saw them as places where the poor vulnerable folk go who can't look after themselves. I think there's a much sharper idea that these are part of the role more than ten years ago."*



Meeting with Professor Nick Hardwick
Former Chief Inspector of HMIP

The UK NPM stands as a prime example for the need to establish an NPM's powers and right of access to all places of detention in legislation. The UK NPM was not explicitly established through a single piece of legislation but through a written ministerial statement in which the UK Government designated multiple, existing bodies to form the NPM, noting that their existing powers were compatible with OPCAT (See appendix for detailed explanation of UK NPM model).

Despite this notion of existing powers being OPCAT compliant, HMIP's inspections of military detention for example are not guaranteed but are on an invitational basis only. In 2014 'HM Inspectorate of Prisons actively sought the inclusion of powers to inspect military detention into the five-yearly Armed Forces Bill 2015–16, in order to put existing arrangements on a statutory footing. HM Inspectorate of Prisons was informed by the UK Government that Ministers no longer intended to put the inspection of military detention onto a statutory footing'⁵⁸

⁵⁸ Equality and Human Rights Commission (2016). *Torture in the UK review Equality and Human Rights Commission Submission to the UN Committee Against Torture 57th session on the sixth periodic report of the UK on compliance with the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, p15. Sourced on the 11 June 2018 from <https://www.equalityhumanrights.com/en/file/10651/download?token=WfJ922Fe>

The lack of a legislative basis for the NPM is an issue that is readily acknowledged by John Wadham, Independent Chair of the UK NPM. *“The other error that the Government made is that they didn’t create any legislation. So, the only kind of official status of the NPM is a Ministerial Statement saying we have designated the following organisations.”* A sentiment echoed by Professor Nick Hardwick, Former Chief Inspector of HMIP. *“I think the other fault with the UK NPM which again is a risk for the Australian one is there was no specific legislation setting out the powers and duties of the NPM and I think that even if it was done in broad terms or even at the very least before someone was designated the body had to agree at a senior level this was what they were going to do, there is nothing like that.”*

The Maltese NPM also provides an example of the issues of not starting with the expansive view of detention and the corresponding right of access. Despite its two NPM bodies having a legislative right of access to their respective areas of focus, immigration detention and prisons (in addition the specific circumstances where detainees in either are placed in hospital or psychiatric care) they have no right of access to any places outside of these areas.

In responding to concerns raised by the CPT in 2015 about the deficiency of the legal mandate in establishing independent visiting to all places of deprivation; the Maltese authorities stated among other things that ‘Malta is of the opinion that Social Care Homes should not be considered as places of detention and fails to understand why such Homes are being linked in any way to the Convention on the Prevention of Torture.’⁵⁹

By not starting with an expansive view of detention and the corresponding legal right of access to all places (howbeit with due consideration to proportionality), the Australian NPM may face a similar predicament whereby its scope is limited to the dictates of political will which in turn endangers any premise of genuine independence. A point which has been highlighted previously in the Australian context by Dr Adam Fletcher:

‘...implementing legislation which creates the NPM (and sets the parameters for SPT visits) may limit the scope to institutions deemed to present the highest risk of ill-treatment, but this should not necessarily exclude the less obvious candidates such as aged care homes. This is inadvisable not only because it interprets the OPCAT too narrowly, but because of the documented human rights abuses occurring across a broad range of closed environments.’⁶⁰

Whilst the Federal Government has already indicated the NPM will be established by an Intergovernmental Agreement these negotiations are ongoing and undecided. Considering the UK, Malta and many other countries experiences, it is preferable that the Australian NPM, its powers, scope, rights and guarantees are established through Federal legislation with corresponding State and Territory legislation. This view is not only consistent with my

⁵⁹ Maltese Government (2016). *Response of the Maltese 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 Malta from 3 to 10 September 2015*, p4. Sourced on the 5 June 2018 from <https://rm.coe.int/16806b2747>

⁶⁰ Fletcher, A (2012). Australia and the OPCAT, *Alternative Law Journal*, Vol 37, Iss 4, p236

observations and the advice of the various visited actors but has been advocated for domestically by others such as Professors Harding and Morgan.⁶¹

Perhaps adding even more weight to the argument for legislation, the respective Australian Governments should also consider the recent Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory which offers comprehensive principles for establishing an oversight body.⁶² These principles could be adapted for setting up the Australian NPM and are consistent with the principles of the OPCAT and advice of the SPT.

Principles of oversight

The design of any oversight body has to be informed by the functions assigned to it and the context in which it is to operate. To be as effective as possible, an oversight body should be:

- established in legislation
- given clear functions and jurisdiction, so the limits of what it is able to do are known to all participants in the system
- legally and functionally independent of government and the entities that it is overseeing
- equipped with an adequate range of powers to undertake those functions
- empowered to obtain information
- empowered to undertake investigations, including investigations on its own initiative
- expert in the subject matter it is reviewing, so that its views are respected and it has the capacity to recommend specific solutions to problems
- well known, accessible, responsive to and trusted by the community whose interests it is charged with protecting
- competent to receive and manage complaints and handle them efficiently and effectively, and
- adequately resourced and staffed.

A key element in the effectiveness of an oversight body is its independence. It must be independent structurally and be seen to be independent by the community. It must be transparent in all its activities and must report directly to parliament.

Oversight is most effective where agencies have a culture that welcomes oversight and monitoring and see external oversight as an opportunity to improve operations and reduce risk.

⁶¹ Harding R, & Morgan, N (October 2008). *Implementing the Optional Protocol to the Convention against Torture: Options for Australia*, p44-45. Sourced on the 19 May 2018 from <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications>

⁶² White, M & Gooda, M (2017). *The Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Vol 4, Chapter 40 – A Commission for Children and Young People, p7

Independence: Financial Resourcing and Operational Autonomy

“The level of autonomy when you are part of an existing institution where they have a certain way of doing things has been very important for us and how we approach the work as opposed to the other types of work the institution is doing.” - Johannes Flisnes Nilsen, Senior Advisor, NPM Unit for the Norwegian Parliamentary Ombudsman

Whilst operational autonomy and financial resourcing could be discussed as separate issues my Fellowship travels demonstrated that they are almost always interdependent issues. Where an NPM was not sufficiently funded for its role, particularly when it was a pre-existing body, creative means of working were often employed. Whilst most admirable those means often meant the amalgamation of multiple functions, limitations on preventive work or operating in a ‘business as usual’ manner for NPM staff.

In the Greek context the Greek Ombudsman’s OPCAT function is embedded within its Department of Human Rights. The NPM is led by the Deputy Ombudsman responsible for the Department of Human Rights and the inspection team is comprised of cross-departmental staff, each with specialist expertise including, but not limited to, criminology, law, psychology, child rights and general medicine.

The NPM views the scope of its mandate according to the extensive interpretation and NPM staff are subsequently divided into inspection subgroups according to the categorisation of places of detention in which they currently inspect. There is a team responsible for psychiatric institutions; social welfare institutions; penal institutions (including police holding cells and transportation) and migrant and asylum seeker institutions. Despite taking the expansive definition approach to its mandate, the NPM in practice does not currently inspect all privately run institutions but is looking to do so.

Despite an observed commitment of its staff, the positive rapport it has built with some of the detaining agencies and the changes it has made to the lives of those detained in Greece; the NPM is not without its challenges and limitations. In its report⁶³ to the Greek Government in 2016 the CPT brought to the attention of authorities’ the SPT’s Guidelines on NPMs which states where an existing body is chosen the ‘...NPM function should be located within a separate unit or department, with its own staff and budget’⁶⁴

NPM staff however hold dual or multiple roles in addition to their visiting work. An inspector carries a caseload under the general mandate of complaint handling and some staff may additionally be required to undertake monitoring work under the 'removal of third-country

⁶³ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2016). *Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 14 to 23 April 2015*. p12-13.

⁶⁴ UN Subcommittee for the Prevention of Torture (2010). *Guidelines of National Preventive Mechanisms*, CAT/OP/12/5, Article III, B, (32) p5. Sourced on the 3 June 2018 from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/OP/12/5&Lang=en

nationals' competency⁶⁵. Whilst NPM staff are incredibly committed to their inspection work, there is a recognition that this model is not the most ideal.

When viewed in the context of the ongoing '...difficult conditions of the extended financial crisis'⁶⁶ in Greece, this pragmatic approach is best understood as the result of under-resourcing. Until very recently the Greek Ombudsman's Office has relied primarily on its existing budgetary means to finance the bulk of the NPM's work in lieu of the having its own budget.

Under-resourcing is not an isolated issue to the Greek NPM, as noted by Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights it is widespread, '...many national preventive mechanisms are under-resourced and not empowered to deliver real results.'⁶⁷

In Switzerland, the National Commission for the Prevention of Torture (NCPT) is composed of 12 expert members from various fields and a small Secretariat that commenced with one member at ratification and has grown. Commission members carry out their visits with one or two members of the Secretariat who write the draft reports. Visiting preparatory work, the overall planning and organisational work is also undertaken by the Secretariat with the head of the Commission. Despite the importance of the work of the Secretariat all its staff are funded in a part time capacity. As demonstrated in its 2016 Activity Report:

'Up until the end of July 2016, the secretariat employed four part-time employees for a total of 260%. The secretariat also benefits from the assistance of a trainee. As part of current cost-saving measures, in August 2016 a 50% post was not renewed. This loss forced the Commission to adjust its monitoring activities during the course of the year, as a result of which a number of visits to facilities where persons are deprived of their liberty had to be postponed or cancelled.'⁶⁸

The NCPT's budget is completely funded by the Federal Government and not the Canton Governments (Equivalent to State and Territories in Australia). Despite its difficulties the NCPT has been able to acquire additional but time specific project funding (Medical access to health in prisons funded by the Department of Health and problematic treatment in asylum detention facilities funded by the Department of Migration.) Of this funding Professor Walter Kälin and Professor Novak Manfred recently stated:

⁶⁵ The Greek Ombudsman (2017). *Return of Third-Country Nationals Special Report 2016*. p10.

"The Greek Ombudsman has special competence to monitor all stages of the forced return process of third-country nationals, from the issuing of the return decision until the implementation of removal by land, sea or air transport to their country of origin."

⁶⁶ The Greek Ombudsman (2016). *Annual Report*, p5

⁶⁷ Zeid Ra'ad Al Hussein (26 June 2017). *Is International Human Rights Law Under Threat? Grotius Lecture at the Law Society, London*. Sourced on the 16 March 2018 from <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21803&LangID=E>

⁶⁸ National Commission for the Prevention of Torture (2016) *Activity Report*, p9. Sourced on the 11 June 2018 from <https://www.nkvf.admin.ch/dam/data/nkvf/Berichte/taetigkeitsberichte/2016/taetigkeitsbericht-2016-e.pdf>

'It is true that the Commission was granted additional resources in recent years for the performance of additional monitoring tasks in connection with forced removals by air and the federal asylum centres. Its capacities nevertheless remain extremely limited with only 3.3 full-time positions, for 1.3 of which the funding is subject to a temporal limit. In view of the fact that there exist an estimated 700 detention facilities that would, in principle, fall within the scope of the NCPT's mandate, the resources available to the Commission are quite simply insufficient if it is to perform all of the tasks assigned to it by law.'⁶⁹

The part time nature of the Secretariat also has direct implications for the time in which visits are undertaken. Under-resourcing has also led to reductions in the NCPT's ability to systematically follow up on visits.

In addition to the external risks associated with finances there are equally internal risks in that the NPM's designated from existing bodies may chose to function in a 'business as usual' approach (as mentioned in a previous section) either because the agency doesn't understand the preventive concept or are unwilling to devote or advocate for the necessary resources to work in ways that differ from their traditional approach.

As emphasised by Helga Fastrup Ervik in Norway, "*you have to be fairly independent and more autonomous from more traditional bodies.*" This statement being supported by the experience of others in the findings of an APT Global Forum in 2012 '...so far, the designation of most NPMs has involved the addition of their torture prevention mandate to the responsibility of a general purpose human rights institution or ombudsperson's office. This creates a risk of "business as usual" unless changes are made to their working methods to emphasise preventive rather than reactive work, and the budget of these bodies is properly expanded to allow for NPM work.'⁷⁰

Dame Lowell Goddard expressed the same sentiment stating, "*it is cost effective and convenient to graft the NPM function onto an existing... autonomous organisation... [however those] Organisations and those running those organisations need to understand that they are two completely different approaches involved [compliance vs preventive] and until you understand and accept that you're not really fulfilling the preventive mandate.*"

Adding again the importance of adequate resourcing in connection with a thorough understanding of the preventive mandate and how an NPM functions, Dame Anne Owers, Former Chief Inspector for HMIP provided the following cautionary statement:

"If you've established your principles and you've established your understanding of what prevention means, you're going to have to get people up to speed on what that means for them. Of course, that may involve additional resource which the States won't be keen to put that resource in. It will be a question of what do we stop doing in order to do this or how can

⁶⁹ National Commission for the Prevention of Torture (2017) *Activity Report*, p44. Sourced on the 27 June 2018 from <https://www.nkvf.admin.ch/dam/data/nkvf/Berichte/taetigkeitsberichte/2017/taetigkeitsbericht-2017-e.pdf>

⁷⁰ Association for the Prevention of Torture (2012). *The Global Forum on the OPCAT: Preventing Torture, Upholding Dignity: From Pledges to Actions Outcome Report*, p17. Sourced on the 21 May 2018 from <http://www.europarl.europa.eu/meetdocs>

we lever in addition resource, so we can do it. Because it would not add value or meet the need to have something that was... everyone doing what they were always doing and calling it an NPM.”

Multidisciplinary Composition

‘NPMs should be multidisciplinary and include independent experts drawn from fields relevant to deprivation of liberty (such as human rights, healthcare and the administration of justice); at least some members should have prior experience in monitoring places of detention. In practice, few NPMs achieve this pluralistic composition; therefore, they rely on external experts to complement their members and staff.’⁷¹

The requirement to have various expertise in preventive visiting arises from the need for NPMs to understand and appreciate the subtleties of the different places and circumstances of detention including those things that might reduce the occurrence of torture or other ill-treatment. Bodies such as the APT and SPT have long suggested that NPMs take a multi-disciplinary approach and include people with the following specialties or expertise: medical, psychology, disability, legal, children, gender or military.

It was apparent in my Fellowship journey that the multidisciplinary approach was embraced by every NPM visited regardless of their understanding of the preventive approach. NPM’s either had a team of multidisciplinary staff or where expertise lacked, and resourcing was limited, sought external contractors when needed. ‘In any event, it is always preferable that the members of the NPM themselves have a range of relevant expertise, rather than relying on expert staff or periodically hiring outside experts, as this tends to improve the quality and impact of recommendations.’⁷²

It was interesting for me to see in practice the benefits of the multidisciplinary approach when accompanying a team from the Greek Ombudsman to the Eleonas Prison Complex. When discussing an issue in the mother-child unit, three members of the team provided input from their respective professional perspectives (legal, criminology, child rights). Whilst perspectives differed according to profession, views expressed were collaborative and added depth to their conversation with the authorities.

There is a great deal of consensus in the literature available on taking a multidisciplinary approach, a more interesting and perhaps less emphasised point that seemed to reoccur in my discussions with NPM’s was on ensuring NPM staff had the right personality as well as the right expertise.

Professor Evans stated that it was more important to have *“the ability to build rapport and the ability to relate to a very broad variety of people, some of whom, lets face it, are not very*

⁷¹ The Association for the Prevention of Torture and Inter-American Institute for Human Rights (2010). *Optional Protocol to the Convention against Torture Implementation Manual* Chapter IV OPCAT Ratification and NPM Designation: Domestic Challenges; 5. Prerequisites for NPM selection, p195

⁷² Association for the Prevention of Torture (2010). *The Optional Protocol Implementation Manual*. p83

nice people... You have to feel comfortable dealing with them because if it's obvious you're not comfortable then that comes across very quickly and you might as well not bother and might as well get back out the tick box." Professor Evans later emphasised its importance because "...seventy percent, possibility ninety percent [of NPM work] is common sense and human empathy."

Mette Jansen Wannerstedt, Senior Advisor with the Norwegian NPM, looking at it from a different perspective also stated, *"It's just as important to have the right personalities... because you work very closely together under very tense situations."*

Stakeholder Education

Awareness and acceptance of OPCAT monitoring has grown through efforts to raise awareness of the role and function of NPMs, and after institutions have had the opportunity to see how it works in practice.⁷³

As previously mentioned part of the success of OPCAT is to obtain buy-in from detaining authorities. OPCAT needs to be something different from the compliance-based approach and embraced as a means of partnering to promote solutions for all involved. How NPM's interact with detaining authorities in the initial set up years is important for setting the tone to this relationship. Although Australia has three years to establish the NPM, adequate investment in developing these relationships and in the promotion of the OPCAT mandate should be undertaken as a priority. This should be done in primary places of detention and more so in secondary places. This is to ensure development of the understand that secondary places of detention are in fact places where people are deprived of their liberty and will eventually be visited as well.

Professor Evans stressed that an NPM can succeed *"when people [detaining agencies] see that you can see it from all sides and that you're not just there to criticise but saying this has got to be a safer place for everybody, if it's safer for the detainees, it's safer for you."* Therefore *"It's a question of how you get that mentality over to people... how you design that into the establishment of the system."*

APT Secretary General, Mark Thompson also stressed the importance of this work with detaining authorities:

"Doing publicity about why the NPM is different and can be different would be worth investing in. The experience we have seen with other organisations is they have gone in too quickly into doing the work without investing more in promoting why the NPM is a new approach... I would think with the detaining authorities it would be worth investing in promotional activities about how you intend to engage with them, so you have a receptive audience. You have an audience that realises that they have something that they can gain

⁷³ New Zealand Human Rights Commission (2013). OPCAT in New Zealand 2007-2012, A review of OPCAT implementation by New Zealand's National Preventive Mechanisms, p3. Sourced on the 5 June 2018 from https://www.hrc.co.nz/files/2214/2398/7100/Opcat-2013_web.pdf

out of it. This is not another agency that is going to give them a hard time and they have to worry about it but more this is an agency that is going to help them through some of the challenges and issues that they face... So that they themselves are communicating through their hierarchies that this is something new and it's a new approach and not business as usual. It's an opportunity to solve problems."

Adding to this, Dame Anne Owers, Former Chief Inspector for HMIP stressed the importance of identifying good practices in detaining institutions as a means of demonstrating that an NPM's work was not merely to criticise. Anne emphasised that you need to be *"pulling in good practice [within institutions] because what organisations like prisons and detention fear when a new body hits the scene is here's somebody else going to complain about us, somebody else who's going to criticise us, haven't we got enough people sitting on our shoulder already and here's another body that's going to sit on our shoulder and don't they realise this is a really difficult job etc."*

In relation to the UK's initial engagement with detaining authorities, Anne suggested that it was *"not enough [awareness raising of the NPM] and I still don't think it's well known... I think that's one lesson you might learn is that you probably need some big event or some activity that's going to catch... interest."*

The NCPT also expressed difficulties in engagement with detaining authorities in Switzerland partly because of the word 'torture' in their title which met resistance particularly in the psychiatric institution visits. The NCPT subsequently invested in promoting the OPCAT mandate and their work throughout the different Cantons and have encountered less difficulties in recent years.

The Greek Ombudsman also invested resources into establishing good relationships with detaining authorities. The strength of this cooperation is demonstrated by a formal Memorandum of Cooperation⁷⁴ between the Greek Ombudsman and the Hellenic Ministry of Justice, Transparency and Human Rights.

⁷⁴ Hellenic Republic Ministry of Justice, Transparency and Human Rights and The Greek Ombudsman (2016). *Memorandum of Cooperation between the Ministry of Justice, Transparency and Human Rights and the Greek Ombudsman*. Sourced on the 16 March 2018 from <https://www.synigoros.gr/resources/memorandum-of-cooperation.pdf>



Discussing the importance of early stakeholder education with Mark Thomson Secretary General of the APT and Veronica Filippeschi OPCAT Advisor in Geneva, Switzerland.

Transparency - The Question of Public Reporting

“One advantage of making it public [reports] is for example that during one of our first reports we recommended in prisons that isolation cells... have a clock so that the prisoners could realise what time of day it was also they should have rip proof clothing in case of suicide risks and now all prisons now have it... I think especially in the prison sector, the prisons themselves want it to be public because a lot of the issues raised are because of cuts in budget, so they see us as their friends and use us in getting their views out.” - Christian Ranheim, Senior Advisor, NPM Unit, Norwegian Parliamentary Ombudsman

The OPCAT requires NPM’s to produce a public Annual Report but it does not explicitly require NPM’s to produce public reports on its individual visits to places of detention. In the Australian context some preliminary discussion around public reporting has already been made with the National Children’s Commissioner suggesting that ‘...given the importance of transparency to the preventative focus of the OPCAT, public reporting of substantive information on treatment and conditions is important.’⁷⁵ Professors Richard Harding and Neil Morgan have also previously stated that ‘there is much to be said for including a power... of public reporting, even though the OPCAT concept of constructive dialogue with

⁷⁵ Mitchell, M (October 17, 2016). *Children’s Rights Report, Chapter 3: Oversight of youth justice in Australia: Implementing OPCAT*, p126. Sourced on the 20 May 2018 from https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_CRR_2016.pdf

the agencies responsible for detention should be the normal practice.’⁷⁶

In my Fellowship travels I found that the majority of the NPM’s I visited produced public reports on the individual visits they conducted. All those NPM’s highlighted public reporting as being an important tool for transparency, credibility and having a generalised preventive effect. In Norway, the NPM stressed the importance of public reporting in their model as specifically enhancing their credibility with detaining agencies and central authorities. In the Danish NPM publication of its visit letters inform ‘...the public of key aspects regarding the Ombudsman’s monitoring visits, the purpose of this practice is also to share knowledge of for instance which recommendations the Ombudsman has given in connection with a specific monitoring visit. Such sharing of knowledge can be valuable for other institutions than just for the institution in question because other institutions may gain insight into what issues they should pay attention to in their own institution, including any best practice in a particular field.’⁷⁷

In the New Zealand context public reporting has become a norm only in more recent years. David Rutherford, Chief Commissioner for the New Zealand Human Rights Commission explained that *“The Commission and then the APT and the working group and then the SPT all were in one way or another critical that the Children’s Commissioner and the Ombudsman were not publishing their reports.”* Since beginning to publish its prison reports, the New Zealand Ombudsman’s Chief Inspector Jacki Jones remarked that *“in the last twelve to eighteen months... we’ve seen this tide of change with Corrections.”* A change in the sense that recommendations and dialogue are being taken more seriously.

In addition to publishing visit reports others have argued that it is just as important to publish NPM standards and guidance documents. Professor Nicholas Hardwick for instance stated:

“I think the way NPM’s have their impact is the publication of its standards, so you know if you’re running a prison this is the criteria that we’re looking at and we’re going to write a report about what we’re going to find, and you know it’s going to be published. So, if you want to avoid a critical report just do what we want before we go, and you know at some point we’re going to come but you don’t know when, so the sensible thing is to get those things in place on a consistent basis. I think that’s more significant for NPM’s in driving improvement... if you were to talk to prison management about what’s the impact the NPM has I think they would talk more about the public expectations than they would about the recommendations.”

Speaking on the UK NPM’s Isolation in Detention guidance document⁷⁸ Carla Garnelas, Treaty Monitoring Principle at the Equality and Human Rights Commission of Great Britain,

⁷⁶ Harding, R & Morgan, R (2010). OPCAT in the Asia-Pacific and Australasia, *Essex Human Rights Review*, 6:2 pp99-123, p122. Sourced on the 16 June 2018 from <http://projects.essex.ac.uk/ehrr/V6N2/Harding%20and%20Morgan%20FINAL%20A4.pdf>

⁷⁷ The Danish Parliamentary Ombudsman (2016) *Manual for Monitoring Activities* Doc.No.15/05108-57, p35

⁷⁸ UK National Preventive Mechanism (2017). *Guidance: Isolation in detention*. Sourced on 16 June 2018 from <https://s3-eu-west-2.amazonaws.com/npm-prod-storage-19n0nag2nk8xk/uploads/2017/02/NPM-Isolation-Guidance-FINAL.pdf>

commenting in a personal capacity stated that “one of the things where I think they’ve done a fantastic job on is the guidance on isolation that they produced which has a common set of core standards and then in different settings further standards as well... personally speaking I think it’s a gold standard.”

‘It is argued that publishing visit reports can increase the effectiveness of the NPMs: the deterrence created by OPCAT is enhanced by creating a societal culture against illtreatment; and dialogue is extended by increasing the number of actors who monitor the detention agencies in society. Further, by better engaging the public in scrutiny of the NPMs, publishing visit reports increases NPM accountability.’⁷⁹

Despite there being sufficient evidence to suggest this observation is accurate it is important to present the opposing view. Dame Lowell Goddard for instance indicated: “I would not advocate publicly reporting on every visit... you can run the risk of a naming and shaming situation when working with the organisation to improve or rectify what is wrong is the most important thing, not a policing exercise.”

To this concern Amy Dixon argues that ‘publication is consistent with the purpose of OPCAT, so long as it does not undermine the ability to have a constructive dialogue with the state. If necessary, it is more consistent with OPCAT to compromise on publication in order to achieve more gains for torture prevention through constructive dialogue. The appropriate compromise will vary according to the context, ranging from no publication at all to merely giving the state an opportunity to check the report for factual accuracy.’⁸⁰

With respect to this argument Professors Harding and Morgan however argue that ‘in the Australian context of relative transparency of the deliberations of numerous accountability agencies, it would seem sensible for NPMs to publish individual, not merely annual, reports after appropriate discussions with Departments and with the usual safeguards as to privacy.’⁸¹

⁷⁹ Dixon, A (2013). The case for publishing OPCAT visit reports in New Zealand, *New Zealand Journal of Public and International Law*, Volume 11 Issue 3, p1. Sourced on the 16 June 2018 from https://www.hrc.co.nz/files/7814/2550/8296/Dixon_A._year_-_THE_CASE_FOR_PUBLISHING_OPCAT_VISIT_REPORTS_IN_NZ.pdf

⁸⁰ Ibid, p13

⁸¹ Harding R, & Morgan, N (October 2008). *Implementing the Optional Protocol to the Convention against Torture: Options for Australia*, p21. Sourced on the 19 May 2018 from <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications>

Involvement of Civil Society and National Human Rights Institutions

Civil Society

‘The relationship with civil society is key for the NPM’s legitimacy and for enhancing the impact of its preventive work’⁸²

The OPCAT envisions a role for civil society in the implementation and designation of the NPM. In the Australian context it has been very promising to see wide and robust consultations undertaken at the direction of the Federal Government. In announcing the intention to ratify OPCAT in February 2017, the Attorney-General George Brandis ‘invited the Human Rights Commissioner to continue this work and to help facilitate the effective implementation of OPCAT in Australia.’⁸³ This consultation process is at the time of writing this report now entering its second and final phase.

‘In order to ensure that the ratification of the OPCAT is not an empty formality, it should not be the state alone that determines its implementation, but that this process should also include other national actors, particularly the human rights movement. States Parties should therefore consult widely as to the design of their NPM to ensure the adoption of an effective monitoring mechanism. In turn, genuine consultation with civil society will add legitimacy and credibility to both the process of determining the NPM and the institution itself, both of which are essential for an effective system of monitoring of places of detention.’⁸⁴

In my Fellowship travels the involvement of civil society with NPM’s varied remarkably. In the UK and Denmark civil society groups were directly involved in the NPM’s monitoring work either as designated NPM bodies or official partners. In countries such as Norway and Switzerland, advisory bodies comprised in part or full of civil society groups were designed to assist in building NPM capability and in discussion about relevant detention issues. In Malta, Greece and New Zealand there were less formalised arrangements with civil society or arrangements in their infancy.

The value of civil society groups to the NPM have in part already been identified in this report (the APT in developing methodologies for visits and people with disability or disabled people’s organisations in training NPM staff to be more disability inclusive) but it is needful to elaborate more on how valuable they have been to the NPM’s I visited.

⁸² Association for the Prevention of Torture (2016). *Putting prevention into practice 10 years on: the Optional Protocol to the UN Convention against Torture*, Enhanced protection of children deprived of liberty, p38. Sourced on the 2 June 2018 from https://www.apr.ch/content/files_res/putting-prevention-into-practice-opcat10.pdf

⁸³ Human Rights Law Centre (2017). *Torture Convention - the Australian Government OPCAT announcement* (edited extract from Senator the Hon George Brandis QC’s announcement the Australian Government will ratify the Optional Protocol to the Convention against Torture). Sourced on the 05 June 2018 from <https://www.hrlc.org.au/bulletin-content/2017/2/22/torture-convention-the-australian-government-opcat-announcement>

⁸⁴ Association for the Prevention of Torture (2008). *Civil Society and National Preventive Mechanisms under the Optional Protocol to the Convention against Torture*, p23 Sourced on the 16 June 2018 from https://www.files.ethz.ch/isn/57291/CivilSocietyNPM_En.pdf

In relation to the APT for instance all NPM's outlined how useful it was to consult with them. This was most profound in the New Zealand context with David Rutherford indicating that having the APT visit was an opportunity for staff of the mechanisms to get together and form a more strategic approach to the work of the New Zealand NPM.



Tania Sawicki Mead, Director of JustSpeak sees opportunities for stronger collaborative relationships between civil society and NPM's in facilitating public conversation.

NPM activities. Additionally, a thematic topic (such as isolation) is chosen for the meetings by the NPM where organisations are given the opportunity to present on the topic. As the NPM explained often topics are chosen to improve competence, knowledge or input for the NPM. The advisory group also provides information to the NPM (hot spots etc). In relation to involvement in visits the NPM indicated that they do not allow groups to participate as this may impinge on the NPM's independence or perceived independence.

Perhaps the most interesting civil society/NPM arrangement in my travels was that of the Danish NPM. Whilst the Danish Parliamentary Ombudsman was designated the NPM in 2007, in 2009 it entered into formal partnership with DIGNITY and the Human Rights Institute. Of this arrangement Morten Engberg, Head of Division at the Danish Parliamentary Ombudsman explained that:

“One of the specific issues of the OPCAT mandate is you have to have a broader approach, not only a legal approach like the Ombudsman traditionally has, so if you choose the Ombudsman alone then you might not fulfil the OPCAT mandate in full. So, there was

In Northern Ireland, Theresa Nixon, Director of Assurance for the Regulation and Quality Improvement Authority spoke about the benefit of NPM's collaborating with universities saying *“working with one of the universities who has an interest in human rights has been very helpful for us. When you bring some issues to them that they can explore, and you can work jointly with a university I think it helps in terms of having an evidence base for what we do”*

In Switzerland, the NCPT Commission includes members of civil society including a former director of the Swiss section of Amnesty International.

In the Norwegian experience the law which constitutes the NPM mandates the establishment of a civil society advisory committee consisting of 15 organisations. The organisations which comprise the advisory committee are chosen by the NPM. The advisory committee meets four times a year with the NPM, where they are briefed on

discussion about how to implement the OPCAT mandate where you don't have anybody which could fit the size immediately. Then the arrangement was made, the Ombudsman yes but he should cooperate with these two institutes [DIGNITY and the Human Rights Institute]. To the Ombudsman it must have been a very new experience, that was the first time the Ombudsman was expected to cooperate in a manner like this with anybody outside. It was new to DIGNITY I am sure as also to the Institute of Human Rights."

Speaking about what that 'cooperation' entailed from DIGNITY's point of view, Jens Modvig stated that:

"There were discussions about... cooperation... because cooperation could also take many forms. It could be that the Ombudsman chose to make individual contracts with the doctors from DIGNITY working as consultants. We argued against that solution because if we went for an institutional collaboration, which was the outcome, DIGNITY would deliver a professional environment as well as the renewal of medical staff expertise which would not be the case if the Ombudsman had engaged individuals."

Having this arrangement in place for many years now Jens Modvig continued to highlight the benefit of having persisted with the model saying:

"We have been in this collaboration now for ten years now and it has been a process because DIGNITY and the Ombudsman institution are two very different institutions with very different scope, tradition etc. We have more and more found through discussions and themes, seminars even, we have developed a common approach, sometimes compromises, that works well and both parts benefit from this. For us the benefit is that we also have a lot of development projects in developing countries where we work for the prevention of torture and sometimes this is building capacity in preventive monitoring and of course it gives us a wealth of examples and legitimacy as well, that we are part of the Danish NPM."

Whilst civil society involvement in the work of an NPM can take many forms the essential point that all NPM's demonstrated is that there is a place for civil society. Not only in implementation but as part of maintaining an effective NPM, whether directly in adding expertise to monitoring, acting in an advisory role, supporting thematic research aims or in adding voice to the concerns raised by the NPM.

'...it is important to recall that no matter how complete and robust the independence, powers and privileges of an institution may appear in its empowering legislation, it will never be effective as an NPM unless it enjoys credibility in the eyes of detainees, public officials, and the general public. In this regard, a means of reinforcing the credibility of an NPM is to explicitly provide for civil society to be involved in its work.'⁸⁵

National Human Rights Institutions

⁸⁵ Association for the Prevention of Torture (January 2008). *National Human Rights Commissions and Ombudspersons' Offices / Ombudsmen as National Preventive Mechanisms under the Optional Protocol to the Convention against Torture*, p20. Sourced on the 17 June 2018 from https://www.ap.t.ch/content/files_res/opcat-nhris-ombudspersons-as-npms-en.pdf

‘OPCAT practice clearly indicates that NHRI’s, irrespective of whether these are designated as NPMs or no, are important partners to the SPT and may play an important role in facilitating the effective implementation of the OPCAT and support the work of both the SPT and NPMs.’⁸⁶

A great deal of OPCAT literature discusses NHRI’s and Ombudsman Institutes as preferable existing organisations for NPM designation and highlights the strengths and weaknesses of either as an NPM. For most of the countries that have ratified OPCAT indeed the NPM has predominantly been either the NHRI or Ombudsman institute. Much less of the literature has discussed the benefits of an NPM model that incorporates both the NHRI and Ombudsman Institute nor of the role of NHRI’s in complementing the NPM.

In the case of Denmark, the Institute of Human Rights works as an official partner with the Parliamentary Ombudsman. As mentioned in the previous section, this decision was made noting that Ombudsman institutes traditionally operate from a legal approach and may not necessarily have the relevant experience and expertise in human rights.

‘Given the OPCAT’s focus on prevention, and the requirements (in Articles 19(b) and (c) in particular) to go beyond simply visiting places of detention, an NPM should have human rights expertise, rather than just visiting expertise.’⁸⁷

On this point Morten Engberg, Head of Division at the Danish Parliamentary Ombudsman provided the following comment on how the Danish NPM approaches commenting on existing and new legislation, a core function of an NPM:

“This is not something the Ombudsman usually does, we would never make recommendations about any bills in parliament or any existing laws except for technical comments like there might be discrepancy between one act or another... The NPM mandate goes beyond that and the arrangement that’s been made is that this is something which falls to the Institution of Human Rights because they have an obligation already to do these things. When they do it they also put on that hat which belongs to the NPM mandate. So, it’s not the Ombudsman, it’s the Institute of Human Rights who carries out that part of the NPM mandate which concerns comments on bills in parliament or other legislative matters.”

Morten Engberg further noted:

“It’s an untraditional arrangement because the Ombudsman when he is seen as the NPM should carry out this function but nevertheless the arrangement as it is it works just as well as if it was the Ombudsman and probably better because these issues we are talking about are actually issues of Human Rights.”

⁸⁶ University of Bristol OPCAT Research Team (2009). *The Optional Protocol to the UN Torture Convention and the UN Convention on the Rights of People with Disabilities: some common issues*, p9. Sourced on the 16 June 2018 from <http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/opcatcrpd.pdf>

⁸⁷ Stienerte, E & Murray, R (2009). Same but Different? National human rights commissions and ombudsman institutions as national preventive mechanisms under the Optional Protocol to the UN Convention Against Torture, *Essex Human Rights Review*, vol Special Issue, p63

In the UK context it is interesting to note that the Scottish Human Rights Commission (SHRC) is an NPM body whereas the other NHRI's in England, Wales and Northern Ireland are not. When speaking to some members of the Scottish Sub-Group about what they saw as the tangible benefits of having the SHRC in their subgroup, the following comments were made:

“It’s certainly made my life incredibly much easier in terms of training, in terms of second opinions about standards and guidance, they are a massive resource for us and indeed at the inspection level SHRC are involved in supporting inspections... That’s been incredibly useful for us and it would have been very difficult on the monitoring side to deliver the training [to lay observers] that we did without them.” – Beth Macmaster, Prison Monitoring Coordinator for HMIPS

“I think it’s been really useful just having that persistent human rights voice at our meetings and reminding people that OPCAT is a human rights treaty so if you’re not sure about something that’s where you go back to... Not all of the organisations [in the NPM] have a human rights expert on their staff so having the human rights commission available to help with that has been useful... I am a human rights lawyer... but I know that if I need help I come here [to the SHRC].” – Laura Paton, Lead Inspector HMICS

Whilst the other NHRI's are not part of the UK NPM there is certainly still evidence of their active involvement in the work of the UK NPM. Speaking to Carla Garnelas, Treaty Monitoring Principle at the Equality and Human Rights Commission of Great Britain (England, Wales and non-devolved matters in Scotland) she said:

“We have a good working relationship with the NPM... We attend their business meetings and give updates on our work... We have pre-existing relationships with a lot of their members already such as CQC and we work together on issues... We regularly stay in touch with the NPM and we’ve talked about bits of work we might do together, for example we’ve talked about joint statements on our reporting on UNCAT where the NPM might do a submission and we do a submission and where they may be some commonalities we can put them together along with the other UK’s NHRI.”

Both the Danish and UK models demonstrate the benefits of having an NHRI either directly or indirectly involved in the NPM. NHRI's provide valuable human rights expertise, are experienced in making comment on existing or proposed legislation and have significant experience with the United Nation treaty systems. When thinking about the broader obligations of the NPM they are an essential partner in delivering the preventive package.

In the New Zealand context, the New Zealand Human Rights Commission acts as the NPM Coordinator but is not allocated an inspection function. In my visit to the New Zealand NPM I attended an operational meeting and experienced the benefits that the other NPM's had described above. In the meeting the New Zealand Human Rights Commission outlined submissions for upcoming bills and amendments as well as discussed coordinating submissions for upcoming UN reviews. There was a consensus in the meeting that this sort of work was the norm and that the other NPMs were generally happy to contribute to these submissions under the NPM badge.

When speaking to David Rutherford, Chief Commissioner for the New Zealand Human Rights Commission about this arrangement he simply said, *“that’s the beauty of the mechanism, the work we are doing is an addition to the work we’re already doing.”* In discussing the other benefits of having the Human Rights Commission as part of the New Zealand NPM, David said *“we now do reports to other UN mechanism’s together, we did the UNCAT and are talking about a submission on the Universal Periodic Review.”*

David additionally mentioned the impact the New Zealand Human Rights Commission had on individual members of the NPM such as the Office of the Children’s Commissioner. David spoke about having the Children’s Commissioner head a delegation to the UN in his place on the Convention on the Rights of the Child and the resulting publication *Getting it Right: Building Blocks*⁸⁸ produced from the recommendations. David indicated that *“the Children’s Commissioner has never historically used the UN system but now its core to the way he’s operating.”*

Speaking of the Australian NPM David suggested *“you are going to have to work closely with the Australian Human Rights Commission, in some senses go with their delegation in the same way we did with the Children’s Commissioner because the influence of an A status in the UN system has grown significantly.”*

Noting the benefits of the inclusion of NHRI’s in NPM’s abroad, particularly in addition to the separate but equally important benefits of an Ombudsman Institute; there is certainly a sound argument for including the Australian Human Rights Commission in a formal NPM capacity. To do so would strengthen the capability and credibility of Australia’s NPM and would recognise the valuable ground work already undertaken by the Commission which was echoed in the words of the Former Attorney-General George Brandis, ‘the Human Rights Commission’s work over many years has helped to inform the Government’s considerations, and as I say, our dialogue has brought us to this decision point.’⁸⁹



David Rutherford, Chief Commissioner of the New Zealand Human Rights Commission

⁸⁸ Office of the Children’s Commissioner (April 2018). *Getting It Right Building Blocks: Building the foundations for implementing the Children’s Convention in Aotearoa The Children’s Convention Monitoring Group.*

⁸⁹ Human Rights Law Centre (2017). *Torture Convention - the Australian Government OPCAT announcement* (edited extract from Senator the Hon George Brandis QC’s announcement the Australian Government will ratify the Optional Protocol to the Convention against Torture). Sourced on the 05 June 2018 from <https://www.hrlc.org.au/bulletin-content/2017/2/22/torture-convention-the-australian-government-opcat-announcement>

Principle vs Pragmatism: The Maltese NPM Case Study

The ability of an institution to function independently necessarily entails two essential components: adequate powers and adequate resources to fulfil its mandate.⁹⁰

I shared my findings with the various NPM's highlighting how I had seen the importance of an NPM's framework in connection with establishing best practice. One NPM staff member challenged my conclusions stating she did not think the principles mattered that much. Taking a rather pragmatic standpoint, she argued that NPM's could function effectively despite inadequate resources and powers so long as they were undertaking preventive visits.

To test her assertion, I decided to look more closely at the NPM situation in Malta being well aware that in 2014 the SPT had stated 'significant work needs to be done to make these bodies fully independent and effective in line with OPCAT and other relevant international standards'⁹¹ Additionally, in its 2015 visit to Malta the CPT had argued 'care should be taken to ensure that all elements of the NPM's structure and all the personnel concerned comply with the requirements laid down by the Optional Protocol to the United Nations Convention against Torture (OPCAT) and the Guidelines established by the United Nations Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).'⁹²

Malta was the first State to ratify the OPCAT in September 2003 however its NPM was only established in 2007. The Maltese NPM is comprised of two bodies: The Monitoring Board for Detained Persons which monitors places of immigration detention (including immigration detainees held in Mount Carmel Hospital and the three Police Lock-Ups) and the Corradino Correctional Facility Monitoring Board which monitors prison establishments (including the Young Persons Offenders Unit (YOURS) and prisoners held in Mount Carmel Hospital). Psychiatric facilities are monitored by the Mental Health Commissioner; however, this body does not form part of the NPM.

⁹⁰ Stienerte, E & Murray, R (2009). Same but Different? National human rights commissions and ombudsman institutions as national preventive mechanisms under the Optional Protocol to the UN Convention Against Torture, *Essex Human Rights Review*, vol Special Issue, p61

⁹¹ UN Office of the High Commissioner for Human Rights (2014). *Malta torture prevention: UN experts welcome progress, urge more work*. Sourced on the 17 June 2018 from <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15150&LangID=E>

⁹² European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2016). Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 3 to 10 September 2015, p12. Sourced on the 17 June 2018 from <https://rm.coe.int/16806b26e8>

There are eight members on the Corradino Correctional Facility Monitoring Board, chosen by the President of Malta from different disciplinary and experiential backgrounds. Board members are chosen for a two-year period and can be extended at the Presidents discretion.



Meeting with members of the Corradino Correctional Facility Monitoring Board

As a Board the facilities are visited once a month with individual members visit on a weekly or daily basis. Dr Maria Cardona, the Chairperson, expressed “we

meet with inmates, we tour the divisions, we see what the complaints are and refer them to the Ministry... We give recommendations to the Ministry where works are needed to be done.” Additionally, *“When possible, each member tries to attend disciplinary hearings but it’s difficult for members who are working.”* Dr Cardona also indicated the Board has *“...introduced a system where each inmate can contact us as a board. There is a box where they can put their name and the division and if there is any urgent matters we are contacted directly by the administration.”*

The Board does not make individual reports after each visit but rather speaks directly with the administration. *“We try and focus on the relationship the Board has with the inmates and the administration because if you have a good relationship you are more able to fix issues and improve the facilities.”* In terms of an Annual Report, Dr Cardona explained *“we present our yearly report to the Ministry, but this is confidential unless the Ministry decides to publish it.”*

There is a recognition on the Boards part that they do not meet all the principles of the OPCAT. Dr Cardona indicated that *“It is less than a part time position for us [Board members] and carries with it remuneration and experience... We don’t do it for the remuneration we do it because we want to.”* She also stated, *“We are not full timers, we don’t have our own offices, staff or infrastructure so with the little time we have we feel that our time should be dedicated to interacting with the inmates.”*

In this regard the Corradino Correctional Facility Monitoring Board certainly takes a pragmatic approach to its work and is frequent in its visiting. Determining however whether its visits are preventive or effective is difficult to establish on discussion alone. In relation to mistreatment or torture, Dr Cardona simply stated *“We haven’t had any complaints in regard to mistreatment or torture.”* This could very well be the case (which I genuinely believe it is) but how would an everyday citizen be reassured of this without there being any level of

transparency in the way the Board worked? It has been argued after all that ‘external monitoring should act as the community’s ‘eyes’ into these otherwise closed environments.’⁹³ There is a necessity then for information to be provided to the community.

Without the ability to visit the prison myself I decided to see if I could confirm what the Board had said through other means. I met with a current and former magistrate and both confirmed there had not been any cases of mistreatment in prison brought before the courts. Additionally, I met with Brian Said, Senior Investigation Officer with the Office of the Parliamentary Ombudsman. Brian indicated that regarding treatment “*We do not receive many complaints from inmates.*” Brian did however mention that a very small number of complaints did in part focus on the inability to the Board to influence desired outcomes but nothing that required investigation.

Brian outlined that the Ombudsman had the power to visit prisons as well and did from time to time. He also mentioned that he did engage with the Board to determine whether complaints could be resolved by the Board rather than by the Ombudsman.

It would appear in my investigation although short that the Corradino Correctional Facility Monitoring Board could be said to be effective due to a lack of complaints. However, a lack of complaints does not necessarily equate to an absence of mistreatment. Whilst I believe the Board is sincere in its work I remain unconvinced of the argument that pragmatism is sufficient where OPCAT principles are not in place. My ability to gather supplementary evidence would not necessarily be available to the everyday citizen. Without even a public annual report the community is reliant on ‘good will’ alone to be assured that the OPCAT mandate is being fulfilled.

The Monitoring Board for Detained Persons operates similarly to the other Board and is composed of five members chosen by the Minister. The Board visits the detention centre every week and additionally monitors forced returns. In relation to reporting Michael Buttigieg, Secretary of the Board indicated that “*we [the Board] do a report after every visit and its signed by who ever attended and every month or quarter all reports are discussed regarding what progress has been made over the quarter.*”

The Board of visitors for detained persons publishes its annual reports. As Michael explained “*Every year we make an annual report and it is public... We insist that it is made public as its part of the OPCAT.*” Given both Boards have almost identical reporting requirements in their legislation I asked Michal why there was a divergence in practice to which he responded, “*their legislation and ours is almost the same. It says that we have to submit a report to the Minister, that’s all. But Malta was criticised because we signed the convention, but we are not publishing the report. We brought this up with the Minister and said can we publish it and he said I have no problem publishing it so for the last three years it’s been published.*”

⁹³ Naylor, B (2016). Protecting Human Rights in Detention: Rights, monitoring and OPCAT. *Alternative Law Journal*, Vol 41, Iss 3, p152

In another departure from the other Board, Michael explained that the detained visitors board regularly undertook interactions with other NPM's and attended forums and training on a six-monthly basis. Additionally, the Board had published a document outlining its standard procedures.

When asked to explain why the Board seemed to be more receptive to the criticisms made by the SPT and CPT, Michael stated, *"it's all about self-motivation"* and continued to say *"We had a proactive Chair, when I collected details from all possible sources [For the operating procedures] I passed the information to the Chairman who was a lawyer and together we reduced the information to the things which are important."*

Both Boards operate similarly to the work of the lay monitors in my visit to HMP Pentonville with the Independent Monitoring Board. It is understandable that this approach would be taken given the work of the Boards is part time and receives low remuneration. As Michael stated, *"we have the time we don't do it for money."*



The Monitoring Board for Detained Persons is receptive to the recommendations of the CPT/SPT and is making efforts to improve its practices.

The Mixed Model NPM: Lessons from UK and New Zealand

*“The advantage of coming in a bit late to the party is that you can learn from other people.”
– Dame Anne Owers, Former Chief Inspector for HMIP and Chair of the IMB*

The final section of the report is a short analysis of advice received predominantly from various UK and New Zealand NPM body staff relating to the establishment and functioning of a Mixed Model NPM in Australia (This advice has been moved to the appendix). The compiled advice cuts across four key areas for Australia’s consideration:

- **Implementation – The importance of getting it right**

Drawing predominately from the UK experience, individual staff from the various bodies described how the set up of the NPM by written statement and without sufficient lead in time has had lasting damaging effects that are still being rectified ten years on. The advice discusses the previously mentioned problem of not having overarching legislation and touches on the problem of having so many NPM bodies.

- **NPM Buy-in – Establishing a shared identity and purpose**

Drawing again on the UK experience, individual NPM member staff discuss the important issue of buy-in from the various NPM bodies. Individuals highlight an absence of buy-in in general particularly due to a lack of coordinated effort in the early years and a lack of buy-in from organisational leaders. The advice highlights efforts to draw the NPM’s together through cross cutting thematic work, steering committees and subgroups but still notes that many individual NPM bodies speak as their institution and not as a unified NPM.

- **The NPM Coordinator – Adequate resourcing to support the NPM**

Drawing on both individual UK and New Zealand NPM experiences the advice highlights the essential need for the NPM Coordinator to be well resourced financially and in staffing to undertake the important work of supporting the bodies who are championing the NPM work. There is a need for the NPM Coordinator to show courageous leadership and model best practice.

- **Proactive Leadership – The role of the head of the Coordinating NPM.**

Drawing on the New Zealand experience there is a need for the head of the coordinating NPM to be proactive and demonstrate visible leadership on the NPM. The head of the NPM must work very closely with the heads of the respective NPM’s and develop a close relationship that can withstand disagreement.

Recommendations

‘The effectiveness of the NPMs can be judged by whether the process of visits to detention facilities has effected positive change as a deterrent to poor behaviour and to encourage the state to improve facilities, systems, policies, processes and practices. Equally as important, though, is whether OPCAT encourages legislative, administrative, and judicial change, and impacts on political will and public attitudes to detention.’⁹⁴

‘The risk of not discharging the preventive obligation extends beyond the possibility of criticism by international bodies such as the SPT: It strikes at the heart of what is required to protect and maintain a legal system based on ‘transparency, accountability and the rule of law’. OPCAT demands that states consider the deeper legal and philosophical issues surrounding the role of the state in the detention of its citizens and to give practical meaning to the rights and principles which have been developed and accepted by the international community.’⁹⁵

To the Federal Government:

- 1) It is recommended that the Federal Government consider enacting specific OPCAT legislation to establish the NPM. This legislation should afford the NPM the rights (including right of access to all places of detention without limitation), powers and guarantees contained in the OPCAT mandate, expanded on in the SPT Guidance and encompassed in the Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory.
- 2) It is recommended that the Australian Human Rights Commission be designated an NPM body noting both the benefits of the inclusion of NHRI’s elsewhere and in recognition of the significant work it has done to promote OPCAT ratification.
- 3) It is recommended that the Federal Government ensure the provision of ample human and financial resources be provided to the Office of the Commonwealth Ombudsman in its role as National NPM Coordinator. Acknowledging the experience of both the New Zealand and UK NPM Coordinators, resourcing must be consummate to its responsibility to drive thematic research, organise cross-

⁹⁴ McGregor, J (2017) The challenges and limitations of OPCAT national preventive mechanisms: lessons from New Zealand, *Australian Journal of Human Rights*, 23:3, 351-367, p363.

⁹⁵ Pierce, N (2014). Implementing human rights in closed environments: The OPCAT framework and the New Zealand experience, *Law in Context*, Volume 31, 154-208, p205.

institutional training and collaboration, engage with civil society, provide support to the NPM network in the development of its identity and ongoing functionality.

- 4) It is recommended that the Federal Government ensure the provision of ample human and financial resources be provided to the Office of the Commonwealth Ombudsman in its role as the Federal NPM. Resourcing should be consummate to its responsibility to visit all Federal places of detention and must encompass activities envisioned in the wider 'preventive package.'
- 5) It is recommended that the Federal Government take due consideration of the views of civil society as will be outlined in the Australian Human Rights Commissions Final Consultation Report when this is made available.

To the State and Territory Governments:

- 6) It is recommended that the State and Territory Governments consider enacting complimentary specific OPCAT legislation to establish their NPM(s). This legislation should afford the NPM(s) the rights (including right of access to all places of detention without limitation), powers and guarantees contained in the OPCAT mandate, expanded on in the SPT Guidance and encompassed in the Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory.
- 7) It is recommended that the State and Territory Governments designate their NPM(s) as a matter of priority. State and Territory Governments should take due consideration to the experience of the UK and New Zealand NPMs being mindful not to designate too many bodies and hinder the opportunity for a strong collective Australian NPM.
- 8) It is recommended that the State and Territory Governments ensure the provision of ample human and financial resources be provided to their designated NPM's in their role as the State or Territory NPM(s). Resourcing should be consummate to the responsibility to visit all State or Territory places of detention and must encompass activities envisioned in the wider 'preventive package.'
- 9) It is recommended that the State and Territory Government(s) take due consideration of the views of civil society as will be outlined in the Australian Human Rights Commissions Final Consultation Report when this is made available.

To the NPM Coordinator:

- 10) It is recommended that the Office of the Commonwealth Ombudsman utilise the three-year implementation period to develop a comprehensive strategy for fostering and promoting a collective NPM identity with the aim of preventing a 'business as usual' mentality from developing.
- 11) It is recommended that the Office of the Commonwealth Ombudsman utilise the three-year implementation period to actively promote a collective NPM understanding of the principles of 'preventive visiting' and ensure as a priority that its own visiting methodologies comply with these principles.
- 12) It is recommended that the Office of the Commonwealth Ombudsman utilise the three-year implementation period to develop a comprehensive stakeholder education strategy that can be adjusted for the State and Territory NPM's and that the Office is proactive in promoting OPCAT's collaborative approach with detaining agencies, detainees, Government authorities and civil society.
- 13) It is recommended that the Office of the Commonwealth Ombudsman publish its visiting reports and engage in constructive dialogue with the detaining agencies it will monitor to inform them of this. The Office of the Commonwealth Ombudsman should do so noting its role to promote best practice within the NPM network.
- 14) It is recommended that the Office of the Commonwealth Ombudsman develops and promotes disability aware and inclusive visiting methodologies and practices both internally and with the wider NPM network in collaboration with people with disability and their representative organisations.
- 15) The Commonwealth Ombudsman is encouraged to be proactive in his involvement and leadership of the NPM network. It is evident elsewhere that when an Ombudsman is actively engaged with the NPM function and participates in some of the visits, the NPM is empowered to develop good preventive practices and its work is more widely recognised across Government and civil society.
- 16) The Commonwealth Ombudsman is encouraged to acknowledge that the NPM function is fundamentally different to the traditional functions of his Office and requires cultural and structural changes to provide it with an appropriate level of functional autonomy.
- 17) In undertaking its role as the National NPM Coordinator it is recommended that Office of the Commonwealth Ombudsman consult with the SPT, APT and other relevant actors in developing its NPM strategies.



Above: Attending an operational meeting with members of the New Zealand NPM

Right: Meeting with Dame Lowell Goddard former SPT Member and Former High Court Judge

Below: Meeting with Dr Lourda Geoghegan and Theresa Nixon of the RQIA in Belfast, Northern Ireland



Appendix: OPCAT Country Profiles (Adapted from the APT)



DENMARK

OPCAT RATIFICATION	June 25, 2004
UNCAT RATIFICATION	May 27, 1987
NPM DESIGNATED	Danish Parliamentary Ombudsman, in collaboration with DIGNITY (NGO) and the Danish Institute for Human Rights (National Human Rights Institution)
NPM TYPE	Ombuds Plus Institution



GREECE

OPCAT RATIFICATION	February 11, 2014
UNCAT RATIFICATION	October 6, 1988

NPM DESIGNATED	The Greek Ombudsman
NPM TYPE	Ombuds Institution



IRELAND

OPCAT RATIFICATION	
UNCAT RATIFICATION	April 11, 2002
<p>Ireland signed the OPCAT in 2007. It made clear that ratification will only take place once the National Preventive Mechanism has been established. A draft NPM legislation is currently being prepared by the Department of Justice and Equality. Ireland accepted all the recommendations received during its Universal Periodic Review in May 2016 that concerned ratification and implementation of the OPCAT.</p>	



MALTA

OPCAT RATIFICATION	September 24, 2003
UNCAT RATIFICATION	September 13, 1990
NPM DESIGNATED	Two Boards: <ul style="list-style-type: none"> - Monitoring Board for Detained Persons - The Corradino Correctional Facility Monitoring Board
NPM TYPE	Multiple Institutions



NEW ZEALAND

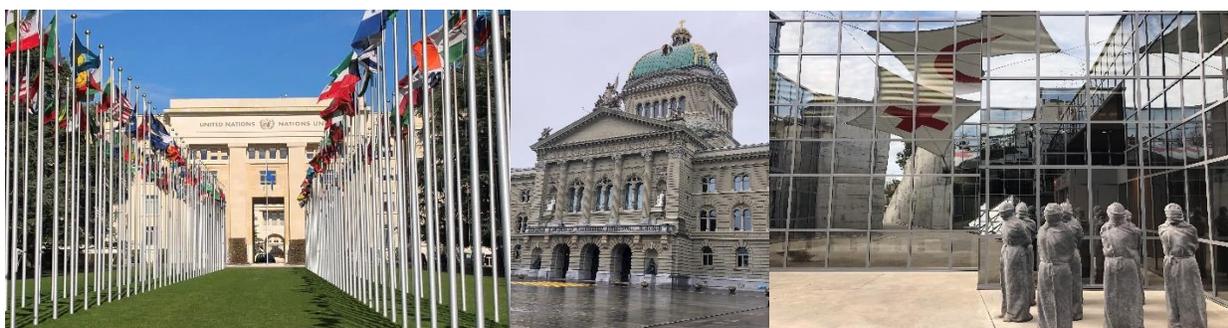
OPCAT RATIFICATION	March 14, 2007
UNCAT RATIFICATION	December 10, 1989
NPM DESIGNATED	5 different bodies coordinated by the Human Rights Commission (central NPM), and including the Office of the Ombudsman, the Independent Police Conduct Authority, the Office of the Children's Commissioner and the Inspector of Service Penal Establishments.

NPM TYPE	Multiple Institutions
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NORWAY

OPCAT RATIFICATION	June 27, 2013
UNCAT RATIFICATION	July 9, 1986
NPM DESIGNATED	Parliamentary Ombudsman
NPM TYPE	Ombuds Institution



SWITZERLAND

OPCAT RATIFICATION	September 24, 2009
UNCAT RATIFICATION	December 2, 1986
NPM DESIGNATED	National Commission for the Prevention of Torture

NPM TYPE	New Specialised Institution
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UNITED KINGDOM

OPCAT RATIFICATION	December 10, 2003
UNCAT RATIFICATION	December 8, 1988
NPM DESIGNATED	21 bodies were designated as part of the UK NPM, coordinated by Her Majesty's Inspectorate of Prisons
NPM TYPE	Multiple Institutions

Appendix: Compilation of Advice for the Australian NPM

Implementation – The importance of getting it right

“There were eighteen organisations that existed when the UK signed OPCAT, so they took a sensible, well I would say British approach to this which was we’re not going to necessarily adjust the rules of OPCAT, we’re not going to ensure there is one organisation that is connected and structured and properly resourced. We’re going to glue them together and hope it works.” – John Wadham, Independent Chair of the UK NPM

“The other error that the Government made is that they didn’t create any legislation. So, the only kind of official status of the NPM is a Ministerial Statement saying we have designated the following organisations, so there’s no guarantee of our independence as an NPM. There may be guarantees of the independence of the particular parts but that varies from body to body. Some of those organisations have something in their legislation about the NPM but most don’t. So, if I was setting up a multibody NPM it would be resources, a role for those resources and legislation, those are the key things which we are still pushing for which would help us to do a better job. One more thing, you have to put the mandate in the legislation of each of those organisations with an NPM function.” – John Wadham, Independent Chair of the UK NPM

“Keep it as tight as you can, make sure all the places of detention are covered, but keep it as tight as you can... or it will be more difficult to get people to focus on the key thing which is to what extent are we making a difference in getting ahead of anything that goes wrong.” – Dame Anne Owers, Former HMIP Chief Inspector

“The way they decided to develop the NPM in the UK was simply to designate existing bodies as the NPM. The advantage of that was you didn’t lose resources, you didn’t lose expertise, you didn’t lose capacity. The problem with that is you have this very mixed methodology and level of credibility. I think though if what you had done was scraped all existing bodies and created a new one I think you would have inevitably lost resource through that process of actualisation, so you would have had less visits; and actually, I think you’d have a new body that wouldn’t have been as effective as the best of the existing bodies. So, I think on balance the right thing for them to do was to designate the existing bodies but that created a set of problem... I think the other fault with the UK NPM which again is a risk for the Australian one is there was no specific legislation setting out the powers and duties of the NPM and I think that even if it was done in broad terms or even at the very least before someone was designated the body had to agree at a senior level this was what they were going to do, there is nothing like that.” – Nick Hardwick, Former HMIP Chief Inspector

“It’s a process, it’s incremental not just in terms of places of visit but in developing the NPM. So, you need to be adaptive and able to change over times. No NPM started perfectly but

there is a need to build a collective identity and understanding of what the NPM is. This should be done through commonly agreed principles.” – APT

NPM Buy-in – Establishing a shared identity and purpose

“The main problem of course with inheriting all these bodies that are already existing... is getting them to take any notice of it [NPM] at all and stop thinking that all they do is what they do. That was our struggle in the initial years of the NPM... [Getting organisations to] actually take note that being part of the NPM meant anything because we were told you don't have to do anything new, it's business as usual. If it's business as usual then somebody toddled off to the annual NPM coordination meeting and never told anybody else much about it, kind of came back, was quiet about the whole thing and it was as if it didn't exist. Because of that there was no buy-in in upper levels of the organisation.” - Mat Kinton, CQC

“Once you have a dormant partner you're not getting the UK position because you can't do that comparability” – Theresa Nixon, RQIA

“There's a huge benefit in information sharing and when you get that whole group of bodies together you can see issues, you can see threads and if you're looking with an improvement trajectory you should be able to probably better do than we do, pick out key areas where there's coalescence and if we're really looking to improve a situation we need to gather data, analyse it, research and do something with it.” – Theresa Nixon, RQIA

“One of things we did find was useful was having some sort of themed focus early on that everybody can contribute to and one of the obvious ones was isolation which happens in all sorts of detention... Cross-cutting issues like mental health, race or ethnicity, where there is real energy and you can do something of value and focus on an important issue for everyone, rather than just sharing experiences. So actually, putting some purpose behind it and producing some product that is different to the product that's there at the moment.” – Dame Anne Owers, Former HMIP Chief Inspector

“Where we are now we have moved to twice yearly meetings at Chair level and more regular meetings at operational level. Initially we had a lot of meetings at Chair level and few operational meetings and that meant that stuff that needed to get done didn't get done. We've also made the process more structured and formal, we don't want to have verbal reports and that's deliberately designed to force the various parts of the operations to only bring matter that are real governance levels that they want change that the chairs can do. Other than that, the individual chairs are actually driving their own organisations to do OPCAT stuff. – David Rutherford, New Zealand Human Rights Commission

“I would have got a better buy-in from my organisation of what NPM meant... What could have changed that was a lead in type period where a central coordination of the NPM made a bit more fuss, instead we just started on day one and so did the administration and everyone just sat around saying well how are we going to make this work... By the time we'd been around as an NPM for a year or so and you hadn't apparently made much difference,

you've lost the momentum with them upstairs in my organisation to make them take it seriously." – Mat Kinton, CQC

"It should be the case when the NPM speaks, government thinks because there's an awful amount of data behind that ... I don't think we've been as strong as we could be yet on doing that because we still talk as our own organisations more." – Mat Kinton, CQC

"...The challenge of having eighteen, now twenty-one, members is that with scant resources for the coordination side, how do you put members work into, or shift focus to, an OPCAT framework? That's the real challenge - to bring it together, to learn from that existing best practice and apply that..."

One of things that has helped is having a steering group whose membership is drawn from the different member organisations across the different jurisdictions to give a representative spread and enable decisions to be taken; this allows us to focus on issues in between our bi-annual business meetings with all members.

The other thing that we've done that has helped is the development of subgroups, there's police custody, mental health, children, there's a special Scottish subgroup, where members from across the NPM who've got an interest in those issues can come together and look at specific issues. That's quite useful for generating NPM focused work. So that helps to get all of our twenty-one members to have a shared NPM focus." – Jade Glenister, UK NPM Coordination

"When establishing a new framework there is inevitably pressure to 'get up and running' very quickly. Without suggesting that implementation planning should be excessively theoretical, it must be well thought out. On that basis, I would generally warn against getting into the field prematurely, before having established clear systems and frameworks. Those who have carriage of an OPCAT implementation process need to think carefully (with breadth and depth) in those early stages, particularly in a jurisdiction such as you own [Australia] which may have additional complexities due to the federal framework. In all cases, but especially in large or complex jurisdictions, it is worth carefully thinking about: the layers of relationships (both interstate and intrastate) and how you will operate at both levels; when policies or procedures require consistency and when they do not; how best practice is shared and, equally, how conflict is resolved; and what your long-term vision is. It is very easy to get on the implementation 'conveyor belt', as it were, and suddenly find yourself one, three, five (or more) years down the track, needing to take stock and step back again." – Natalie Pierce, NZ NPM

"...The challenges of having eighteen, now twenty-one members is that with scant resources for the coordination side, you've got these bodies who've been doing this work for a while, but it's how do you put that or get them to focus on it in an OPCAT framework and that's the real challenge to bring it together, to learn from best practice and apply that... that coordination is really difficult.

One of things that happened to try and deal with that initially was setting up a steering group whose membership was drawn from the different member organisations across the different jurisdictions to give a representative spread and enable decisions to be taken; because the way we operate is we have business meetings twice yearly where all members come but obviously things are happening and you've got that one day in our case, when people come together and it's really difficult to really put that OPCAT stamp on it. So, the steering group really helps with that.

The other thing that we've done structurally that helps with that is the development of subgroups, there's also special interest areas, there's police custody, mental health, children, there's a special Scottish subgroup, where members from across the NPM who've got an interest in those issues can come together and look at specific issues. That's quite useful for generating NPM focused work. So that helps to deal with this fact that there's twenty-one members and how do you get them to have an NPM shared focus." – Jade Glenister, UK NPM Coordination

"A lot of organisations after all have three-year, five year plans and when you start to say well we'd like you to also fit in this [thematic NPM work] they're thinking no we haven't got the space or why should we it doesn't interest us, the feeling of being dragged slightly off course can be quite disruptive. I think the way we have got around that in the UK to some degree is making sure that the coordination has got buy-in from the organisations. For instance, we have a mental health subgroup and so everybody has one person in that subgroup and in theory we don't decide something from central coordination that would impose something that is a surprise or disliked by another body. So, although that can create a bit of bureaucracy it's probably a necessary one because nobody is being told to do anything they haven't signed up to." – Mat Kinton, CQC

The NPM Coordinator – Adequate resourcing to support the NPM

"Anna and Jade work for the NPM but they're employed by HMIP and that works well because HMIP have been incredibly helpful in giving us the resources that we need but we only have two half time people and that's not enough and we think the Government should give us more... - John Wadham, Independent Chair of the UK NPM

"It's very hard in a three-hour meeting or even in an all-day meeting to actually do very constructive work and I think a lot of the good work has been undertaken has been outside those meetings. If you look at the mapping in detention you need time to do that and you need networks across the UK and lead people to do that. People are busy and it's hard to get people to do that and I think there's something about additional resourcing to allow that good work to be undertaken because HMIP only have a set budget to do that, they're depending on our good will to progress some of those issues." – Theresa Nixon, RQIA

"We're [the NZ NPM Coordinator] the mechanism for when the advocacy of the NPM has failed with the agency. By undertaking joint reports, by putting it into our annual report to government we can leverage their [other NPMs] concerns and we work with them to do that." – David Rutherford, New Zealand Human Rights Commission

“You have to get somebody inside each organisation who is enthused. You have to build someone who is going to keep making a noise about it... and I guess that’s why the coordination is so helpful because you can actually support people in that.” – Mat Kinton, CQC

“Where I think we need to strengthen is additional resources in the coordination role in allowing people to work with the current bodies to enable them to do better work and in different ways.”- Theresa Nixon, RQIA

“The really big challenge is the resources because to do that kind of guiding, supporting so that the subgroups can do that work so the NPM centrally can look at thematic issues that cut across all areas you need resources.” – Jade Glenister, UK NPM Coordination

“If you’re going to have a coordination process you have to have advocates within the central part of the NPM to persuade people and to work with them because although the isolation guidance was written by our members in practice the NPM coordination was crucially involved in making sure it happened.” – John Wadham, Independent Chair of the UK NPM

“The ability of agencies (NPMs) to be effective is linked, at least in part, to who is at the centre (the Central NPM) and their capacity to support OPCAT coordination. The challenge of a multiagency model is creating and sustaining cohesion and connectedness. These challenges can be overcome when you have a very strong Central NPM. In the Australian context, it would be useful to carefully consider what sort of funding and support is provided to the Central NPM, to ensure it is not merely a facilitator (even though that is its formal role), but that it also has the ability to serve as a centre of excellence – a ‘hub’, if you will. It should have, among other things, the ability to: identify and track changes in practice across agencies and between states; the capacity to undertake relationship management activities with the heads of NPMs and other key actors; and appropriately deal with differences in practice (particularly where such differences are leading to, or may lead to, varying levels of quality on the ground).” – Natalie Pierce, NZ NPM

“The Central NPM has significant responsibility, not only to coordinate, but to show courageous leadership and to identify what best practice looks like. It is challenging because each agency has its own mandate and they stand alone (that is, they are each individually responsible for their monitoring work). If they can’t operate together as one force in appropriate circumstances, then it can lead to fragmentation or gaps in practice. The planning undertaken by the Central NPM will need to be just as (if not more) extensive than the planning undertaken by NPMs whose focus is usually one particular detention context. The challenge for the Central NPM is, therefore, to have both operational understanding as well as strategic foresight.” – Natalie Pierce, NZ NPM

“There needs to be an appropriate level of investment in the work of both NPMs and the Central NPM. For a Central NPM, if it is simply not possible to invest significant financial

resources, then you need a sufficient level of human resources, to discharge the mandate effectively.

You need, in my view, portfolio holders who can oversee a longer-term programme of work which covers, among other things: communications; stakeholder engagement (cultural and ethnic communities, those with lived experience); and expert analysis. As for analysis, you need technical, legal and practical experts who can look at the development of the monitoring methodology over time, who can track the changes in domestic and international jurisprudence, and related work. You also need strong governance and leadership to oversee these various work-streams.

To my mind, if you were to develop a model in which one or more portfolio holders were responsible for clearly-defined work-streams, you could be highly effective – without necessarily incurring great cost.” – Natalie Pierce, NZ NPM

Meetings need to be organised so far in advance, particularly the Chairs meetings. As the central chair you need to be clear that you coming to these meetings is very important and we need you here and we need everyone to take this seriously. Get the by in and get that by in when you get a new chair – Anneliese Boston, Legal Officer, New Zealand Human Rights Commission

Proactive Leadership – The role of the head of the Coordinating NPM

“Relationships matter, there was not a good relationship when I arrived, but it was easy to solve partly because I had past relationships with the various Chairs. One thing I do now with the other Chairs is immediately reach out to new Chairs. The new IPCA Chair for instance commented that he was press ganged by the Ombudsman and Human Rights Commissioner. The other important thing is you need to know each other well enough to pick up the phone and talk to each other... because you don't want disagreements if you can avoid them.” – David Rutherford, New Zealand Human Rights Commission

“It is really important whether the person (Ombudsman) supports the work of the NPM. That makes a huge difference to making the work of the NPM visible and to making the best of it.” - APT

Appendix: The NPM in the UK

The UK ratified OPCAT in December 2003 and designated its NPM on 31 March 2009. NPM members monitor places of detention across the four nations of the UK, including prisons, police, court and customs custody, secure accommodation for children, and immigration, mental health and military detention. The NPM in the UK is currently made up of the following 21 bodies operating in England, Wales, Scotland and Northern Ireland:

- Care Inspectorate Wales
- Care Inspectorate (Scotland)
- Care Quality Commission
- Criminal Justice Inspection Northern Ireland
- Healthcare Inspectorate Wales
- Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services
- Her Majesty's Inspectorate of Constabulary for Scotland
- Her Majesty's Inspectorate of Prisons
- Her Majesty's Inspectorate of Prisons for Scotland
- Independent Custody Visiting Association
- Independent Custody Visitors Scotland
- Independent Monitoring Boards
- Independent Monitoring Boards (Northern Ireland)
- Independent Reviewer of Terrorism Legislation
- Lay Observers (England and Wales)
- Mental Welfare Commission for Scotland
- Northern Ireland Policing Board Independent Custody Visiting Scheme
- Office for Standards in Education, Children's Services and Skills
- Children's Commissioner for England
- Regulation and Quality Improvement Authority
- Scottish Human Rights Commission

NPM mission statement and strategic goals

The NPM's mission is to prevent ill treatment through independent inspection, monitoring and visiting every place of detention in the UK. The NPM's strategic goals are to prevent the ill-treatment of those detained by:

- I. Working together as members of the NPM to strengthen the protection of those in detention in the UK
- II. Ensuring every NPM member delivers its own responsibilities under OPCAT
- III. Building an NPM that is effective in delivering all the requirements of OPCAT
- IV. Increasing the visibility and awareness of the NPM's role in prevention, OPCAT, the prohibition of ill-treatment in detention and the Convention Against Torture

NPM Secretariat

Day-to-day coordination of the NPM is performed by the NPM Secretariat, consisting of the NPM Coordinator with support from an Assistant NPM Coordinator. While based at HMIP, the

Secretariat represents the interests of all members. The NPM Secretariat works to ensure the effective implementation of OPCAT in the UK, to promote and develop cohesion and shared understanding of OPCAT among NPM members, to encourage collaboration and the sharing of information and good practice, and to facilitate joint activities. At the same time, however, the independence of individual members is respected, as is their ability to set their own priorities for detention monitoring.

The Secretariat:

- liaises with all members and forums of the NPM to support delivery of the business plan
- shares information across the NPM
- provides input on policy and human rights issues for NPM work
- acts as a first contact point with the government on NPM matters
- liaises with the Subcommittee on Prevention of Torture, other NPMs and external stakeholders
- prepares the annual report
- organises meetings and workshops.

NPM Chair

NPM members agreed to appoint the chair from outside the NPM membership to advise and support the NPM in fulfilling its mandate. John Wadham took up the role as NPM Chair in 2016 and was re-appointed in October 2017 for a term of four years. Reporting to the NPM Steering Group and NPM members, the NPM Chair works closely with the NPM Secretariat to fulfil the following functions:

- Chair NPM Steering Group meetings three to four times a year and NPM business meetings twice a year
- Support NPM members in developing and implementing NPM work and in fulfilling their NPM responsibilities
- Speak publicly on behalf of the NPM and represent the NPM at meetings with external stakeholders

NPM Steering Group

The NPM Steering Group facilitates decision-making within the NPM, oversees the development and implementation of the NPM business plan and monitors joint NPM work. The Steering Group is made up of five members including HMIP (as the coordinating body) and one member from each of the four nations. The current membership is:

- Peter Clarke (HM Chief Inspector of Prisons)
- Rachel Lindsay (Criminal Justice Inspection Northern Ireland)
- Colin McKay (Mental Welfare Commission for Scotland)
- Katie Kempen (Independent Custody Visiting Association)
- John Powell (Healthcare Inspectorate Wales)

NPM sub-groups

The UK NPM has four sub-groups.

The Scottish sub-group coordinates NPM activities in Scotland, provides support to NPM members, raises the profile of the work of the NPM and improves liaison with the Scottish Government. It is chaired by the Scottish member of the Steering Group, currently HM Chief Inspector of Prisons for Scotland.

The mental health network brings together the different members who have a specialist interest in areas relevant to mental health detention in the UK. This sub-group provides an opportunity for organisations with responsibilities for the monitoring and protection of people in health and social care detention settings to work collaboratively on issues with specific mental health impacts. The group is chaired by the Regulation and Quality Improvement Authority.

The NPM sub-group focused on children and young people in detention continued to serve as a mechanism for NPM members to exchange information and intelligence, and to consider joint work on issues affecting detained children. The group is chaired by staff from the Children's Commissioner for England.

Recognising that the issues faced by those people detained in police custody will differ from those held in longer term detention, NPM members considered that a dedicated sub-group in which to discuss detention in police custody would be beneficial. The police custody sub-group will promote information sharing between independent custody visitors and inspection bodies and among all those monitoring police custody across the UK.

“The use of instruments of torture can never be regarded by any decent person as synonymous with justice.”

Sir Winston Churchill, 1938
(responding to a constituent who urged him to help end the use of the cat o’ nine tails in prisons)

