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## **Disability Responsive National Preventive Mechanism (NPM)**

This document provides a position on a disability inclusive National Preventive Mechanism (NPM) for consideration by the disability advocacy sector. It considers how the disability sector would approach Australian ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), and outlines some proposals on preferred NPM characteristics.

### Ratification of OPCAT

Despite ratifying the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1989, and signing the Optional Protocol in 2009, Australia is yet to ratify OPCAT. Ratifying OPCAT would strengthen oversight and monitoring of places of detention by designating or creating an NPM.

This preventive monitoring would provide an additional mechanism for Australia to meet obligations under the Convention on the Rights of Persons with Disabilities (CRPD), as well as the other relevant human rights instruments to which Australia is party. Note in particular that that Article 15 CRPD reinforces the right of persons with disability to freedom from torture or to cruel, inhuman or degrading treatment or punishment. This right is a crucial pillar in the range of obligations reinforced by CRPD including the rights to equal recognition before the law (Article 12), access to justice (Article 13), liberty and security of person (Article 14), freedom from exploitation and abuse (Article 16), bodily integrity (Article 17) and the right to live independently and be included in the community (Article 19).

### Inclusive monitoring mechanisms

As clearly outlined in the CRPD (articles 4 and 33), people with disability and their representative organisations should be consulted and actively involved in the development of policy and legislation that affects them. Therefore, decisions around the design, development and implementation of the NPM model must be made in consultation with people with disability.

Co-design by people with disability and their representative organisations throughout the NPM designation and establishment process would ensure that the NPM, its processes and mechanisms are not only disability aware, but disability responsive. The NPM must not view disability as a separate, specialist issue to be dealt with by

other stakeholders, rather it should approach its mandate with a disability lens across the entirety of its work.

People with disability are vastly over-represented in traditional sites of detention such as prisons.<sup>1</sup> In addition there are a large number of disability specific places of detention where persons with disability may not be permitted to leave at will, such forensic mental health detention or involuntary detention under civil mental health laws.<sup>2</sup> It should also be noted that there is evidence that some sites of detention, or practices within sites of detention, lead to impairment for some detainees.<sup>3</sup> Given these factors, it is vital that the voices, expertise and experiences of people with disability are incorporated in the NPM, its standards, mechanisms, teams and monitoring efforts.

Developing a disability lens to the NPMs work would include: a formal advisory panel of people with disability or their representative organisations; the development of a disability inclusion action plan to ensure that the body operates in a fully inclusive and accessible manner; the use of peer monitors with disability to conduct inspections; and engagement with people with disability to develop the monitoring criteria, the role and make-up of inspection teams, and decision making regarding which places of detention should be prioritised. Current high rates of violence in sites of disability detention suggests that existing oversight and monitoring mechanisms are failing to provide protection to people with disability. This means the design of the NPM must avoid reliance on status quo arrangements – additional legislated powers and expanded resources are likely to be necessary.

### Places of detention

As outlined in article 4 of the OPCAT, places of detention are those ‘where persons are or may be deprived of their liberty’, that may include commonly offered examples including prisons, police stations, prisoner and deportation transport, court security, juvenile detention centres, military detention facilities and immigration detention centres. People with disability are frequently over-represented in many of these places of detention.

In addition, disability specific institutions must be included within the scope of OPCAT monitoring. The OPCAT definition includes a range of settings which a person may not be permitted to leave at will. Consequently, this can refer to many types of disability specific institutions where people with disability are either formally detained or compelled to remain such as locked psychiatric wards or hospitals, compulsory care facilities, closed community-based residences for people with disability, aged care facilities, dementia units, nursing homes, child welfare institutions, emergency rooms, “time out” and seclusion rooms in educational settings, boarding schools, and rehabilitation facilities. These facilities exist despite Article 14(b) of the CRPD stating ‘that the existence of a disability shall in no case justify a deprivation of liberty,’ thereby

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<sup>1</sup> Baldry, E. 2014. *Disability at the Margins: Limits of the Law*. Griffith Law Review, Vol. 23, No. 3, 370-388; PWDA, 2014.

<sup>2</sup> ‘Consideration of the 4<sup>th</sup> and 5<sup>th</sup> Reports of Australia by the Committee to the Convention Against Torture’, *People with Disability Australia*.

<sup>3</sup> See Frawley, P. and Naylor, B. ‘Human Rights and People with Disabilities in Closed Environments.’ *Law in Context*, Vol. 31, 2014: 48-83.

<sup>3</sup> See for example Green J.P. and Eagar, K. ‘The health of people in Australian immigration detention centres.’ *Medical Journal of Australia*. 2010; 192 (2): 65-70.

prohibiting detention on the basis of a person's perceived or actual impairment and regardless of whether or not additional factors are also used to justify the deprivation of liberty.<sup>4</sup> Therefore, it is paramount that inspection of these disability specific institutions is prioritised by the NPM, not only to monitor conditions and practices but also as a step towards ending disability based detention.

### Key practices to be prioritised by the NPM

There is considerable evidence that the right of people with disability to be free from involuntary treatment, violence, torture and other forms of ill-treatment are frequently breached in places of detention.<sup>5</sup> NPM monitoring places of detention through a disability lens would assist in identifying individual and systemic issues, and also provide a framework to address them in an appropriate and disability responsive way. Thus Australia would be progressing fulfilment of its obligations under both CAT and the CRPD.

Specifically, the NPM must address the issue of various methods of restraints on people with disability in detention as a priority across its work, including physical, chemical and mechanical restraints. In 2013 the Special Rapporteur on Torture called for an "absolute ban on all coercive and non-consensual measures, including restraint and solitary confinement,"<sup>6</sup> and the NPM must seek to enforce this ban.

#### Summary of recommendations:

- The NPM must not view disability as a separate, specialist issue. The NPM should be disability neutral yet disability responsive.
- A disability inclusion action plan must be developed to ensure the NPM operates in a fully accessible and inclusive manner.
- The NPM must not rely solely on status quo monitoring provisions. Adequate monitoring of the treatment of people with disability in all places of detention will necessitate additional legislated powers, adequate resources and culture change within existing monitoring bodies.
- The NPM must engage persons with specific expertise in disability human rights and support needs, including people with disability.
- People with disability and their representative organisations should be consulted through the creation of a formal advisory panel. This advisory panel should be consulted for the development of the monitoring criteria, the role and constitution of inspection teams, and the NPM's decision making regarding the prioritisation of certain places of detention.
- The NPM must address and prioritise the issue of restraints, seclusion and forced treatment relating to people with disability in all forms of detention.
- People with disability must be included as peer monitors to conduct inspections and participate in making recommendations to relevant authorities and

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<sup>4</sup> See Committee on the Rights of Persons with Disabilities, *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities*, Adopted during the Committee's 14<sup>th</sup> session, held in September 2015, paras 6-7, available:

[http://www.ohchr.org/\\_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/HRBodies/CRPD/GC/GuidelinesArticle14.doc&action=default&DefaultItemOpen=1](http://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/HRBodies/CRPD/GC/GuidelinesArticle14.doc&action=default&DefaultItemOpen=1)

<sup>5</sup> Above n 1; see also Bevan, N. and Sands, T. 2016. *Submission to the Senate Inquiry into Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*, Australian Cross Disability Alliance; Sydney, Australia. Available:

[http://dpoa.org.au/wp-content/uploads/2016/04/ACDA\\_IndefiniteDetention\\_Submission\\_April2016.pdf](http://dpoa.org.au/wp-content/uploads/2016/04/ACDA_IndefiniteDetention_Submission_April2016.pdf) ;

<sup>6</sup> Mendez, J. E. 2013. A/HRC/22/53 para 63, available:

[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf)

submitting relevant reform proposals to improve conditions of people deprived of their liberty.

- The NPM must incorporate formal feedback mechanisms to allow people with disability in all forms of detention to provide information on their experiences, with strong provisions to ensure anonymity. These mechanisms must have adequate provisions to enable decision supports where appropriate, and must allow people to provide feedback in a range of communication forms.



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Economic and Social Council of the United Nations

## People with Disability Australia (PWDA)

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### National Preventive Mechanisms viewed through the lens of disability

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#### Submission

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## **About People with Disability Australia**

**People with Disability Australia (PWDA)** is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation - we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.

PWDA's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.

We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.

PWDA is also a founding member of Disabled People's Organisations Australia ([DPO Australia](#)) along with Women With Disabilities Australia, First Peoples Disability Network Australia, and National Ethnic Disability Alliance. DPO's are organisations that are led by, and constituted of, people with disability.

The key purpose of DPO Australia is to promote, protect and advance the human rights and freedoms of people with disability in Australia by working collaboratively on areas of shared interests, purposes, strategic priorities and opportunities. DPO Australia has been funded by the Australian Government to be the recognised coordinating point between Government/s and other stakeholders, for consultation and engagement with people with disability in Australia.

## **Executive Summary**

*Liberty is a fundamental human right. Depriving someone of their liberty carries with it a serious responsibility to ensure that the conditions of detention do not undermine the fundamental human dignity of the person who is detained".<sup>7</sup>*

This report is dedicated to producing a national preventive monitoring model for Australia. This is achieved through analysis of different National Preventive Mechanisms (NPMs) that have been introduced by countries after their ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). Australia intends to ratify OPCAT by the end of 2017 and will therefore be required to introduce an NPM body.

It is well reported that people with disability are affected by ill-treatment at odds with international torture obligations and therefore this report will be paying particular focus to people with disability. This focus will include both the involvement of people with disability within the monitoring process of other countries, and whether existing NPM bodies are effectively monitoring both specialist and mainstream facilities through a lens of disability.

This report has been divided into 3 sections. The first section will be based on defining and exploring the key terms and ideas within the Optional Protocol, including the role of the NPM and its international counter-part; the Subcommittee on the Prevention of Torture (SPT). This section will also discuss the OPCAT monitoring body's relationship with other international bodies; such as the Committee against Torture, and the Council of Europe.

### **NPMS: 6 Different Models**

When States ratify the OPCAT they are required to designate an NPM. However, there is no set mandate on what this mechanism should look like. The second section of this report is dedicated to analysing specific countries that have already established an NPM. Through these case studies - including Norway, Switzerland, Denmark, Serbia, New Zealand, and the United Kingdom of Great Britain - it quickly becomes clear that each country has a distinctively different NPM model, with some appearing to be more effective than others.

#### **Norway**

Norway ratified the Protocol in 2013, which makes it the newest OPCAT member that is discussed in this report. In Norway's case, a single pre-existing organisation was designated as the NPM body. A new department was created, originally only consisting of 4.5 full-time staff, making it difficult for the organisation to inspect a broad range of facilities. This meant that the NPM has tended to prioritise traditional places of detention, such as prisons; even though its definition is much broader. More recently, additional staff have been added to the department, and it will be interesting to monitor how this impacts the future inspection work of this NPM. What makes the

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<sup>7</sup> The Hon Catherine Branson QC. President Australian Human Rights Commission, *Applying Human Rights in closed Environments: Practical observations on monitoring and oversight*, Monash University, 2012.



Norwegian model of specific interest is the inclusion of an Advisory Committee that includes 15 human rights organisations that assist in providing expertise and resources to the NPM. This should be commended as good practice and should be considered by all other NPM bodies, as it addresses gaps and issues that a singular NPM body may not have identified.

### **Switzerland**

Switzerland ratified the Protocol in 2009 and decided against designating a pre-existing organisation as their NPM. They instead created an entirely new organisation dedicated to preventive monitoring. Whilst this may sound like a promising idea, it was quickly realised that the Switzerland Government had not provided enough resources or funding to allow the group to adequately perform their role as an NPM. This severe lack of resources has left the organisation largely inspecting 'high-risk' prisons and asylum seeker centres, placing little focus on psychiatric facilities or other settings in which people with disability may be detained. However, the NPM body has recently announced their intention to focus additional attention on settings in which people with disability and older people often reside. It will be interesting to monitor how this work is performed in coming years.

### **Denmark**

Denmark's NPM model is particularly different to any other bodies that are discussed in this report. They initially designated one pre-existing organisation as their NPM, however after 2 years this body joined forces with an NGO and a National Human rights institution. From this collaboration 2 bodies were created; the first was the OPCAT Council, which plays a co-ordinating role, the other was the OPCAT Working Group, which carries out the inspections. This two-tier system is an interesting NPM model and would be worth considering for other countries. Another interesting point for Denmark that separates it from other NPM Models, is that it performs its inspections with an annual thematic approach. For instance, their 2012 inspections were only focused on juveniles and the elderly within private facilities. This systematic monitoring has the potential to give a comprehensive insight into the thematic area, and as any NPM body will only be able to inspect so many facilities this should be seen as a sufficient, or even a preferred method for NPMs.

### **Serbia**

Serbia ratified the protocol in 2006, and designated the Serbian Ombudsman's office as their NPM body 5 years later. The Serbian model has similarities to Denmark's NPM model, as the Ombudsman's office has entered into a formal agreement to work collaboratively with a range of civil society organisations. These organisations perform inspection visits with the Ombudsman, provide information and advice and help write reports. Serbia's Ombuds Plus arrangement is of particular interest as three out of the nine civil society organisations have an interest in and specifically monitor people with disability in a range of settings. Furthermore, reports indicate that the NPM body clearly benefits from the human rights knowledge, thematic expertise and monitoring experience of these civil society actors.

### **New Zealand**

The New Zealand NPM model appears to be more comprehensive than any of the earlier discussed models. It consists of 5 pre-existing bodies that each has a different thematic focus. This system has allowed the NPM bodies to create constructive and

consistent relationships with facilities, which follow up visits being a focus of their preventative monitoring. New Zealand has recently been visited by a range of international bodies, which has given further insight into their NPM; including gaps within its monitoring and its relationship with these international groups. In addition, the New Zealand NPM partners have recently initiated a project around seclusion and restraint in sites of detention. Developments in this area will be very interesting to monitor. Overall, the New Zealand NPM system appears to be quite a successful model and should be considered for other countries to adopt.

### **United Kingdom of Great Britain (UK)**

The United Kingdom of Great Britain (UK) is the final case study that is included in this report. It was included to illustrate the difference between a comprehensive and a complicated system, with the UK NPM model being the latter. Like New Zealand, there have been NPM bodies designated for different thematic areas, as well as for the different nations that make up the UK. The different NPM bodies are all using different standards of inspections and many have remained complaints driven – in contrast to preventive monitoring. This is not to say that some of the NPM bodies do meet the OPCAT mandate, with the Central NPM body appearing to go beyond the requirements of an NPM, however this is not standard practice with the other organisations. Overall the UK model is not an appropriate NPM model and should not be recommended for other countries.

### **Moving Forward**

The third section of this report is based on Australia, and what an NPM might look like within this context. Such a monitoring system would ensure that people within places of detention are maintaining their human dignity and are not being subjected to any form of ill-treatment. This section concludes by offering a potential monitoring model for Australia, which has largely been informed by the included NPM case studies. The proposed disability responsive NPM would ensure that monitoring is not only inclusive of the varied practices and experiences common to places of detention, but also the wide range of places in which people may be deprived of their liberty.

## **Section One: Terms and Definitions**

The first section of this report is dedicated to defining key terms and establishing an understanding of the OPCAT; including its mandate, the bodies that are established through it, and their relationships with each other and other international bodies.

### **The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is an international human rights treaty that was adopted by the General Assembly in 2002.

This treaty offers preventative support to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) that came into force in 1987. OPCAT reaffirms that torture and ill-treatment are serious human right violations, and it advocates that prevention of such treatment can be achieved through independent monitoring of places of detention through a two-tier system. Unlike other UN treaties, OPCAT is based on prevention and cooperation with authorities, and “it is emphatically not a 'blaming and shaming' system”.<sup>8</sup>

Preventive monitoring is the foundation of OPCAT and is required at both a national and international level. At a national level, States are required to introduce a National Preventive Mechanism (NPM) when ratifying OPCAT. This body will perform preventive monitoring within the State. At an international level, the Subcommittee on Prevention of Torture (SPT) oversees the work of the individual NPM, assists States in establishing their NPM body, and performs country visits, during which they are able to inspect places of detention. Both of these monitoring bodies will be discussed in detail later in this section.

As of July 2017, 83 State parties have ratified the Optional Protocol, with an additional 16 State parties having signed the protocol but yet to ratify the convention.<sup>9</sup> Australia signed the convention in 2009, and has recently announced its intention to ratify.

The OPCAT should not be viewed in separation to other international treaties, including the Convention on the Rights of Persons with Disabilities, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the Declaration on the Rights of Indigenous Peoples. These human rights documents should be read alongside the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.

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<sup>8</sup> The Association for the Prevention of Torture (APT), n.d. *Detention Focus* 'Torture and ill-treatment'. Available: [http://www.apr.ch/detention-focus/en/detention\\_issues/24/?vg=-1](http://www.apr.ch/detention-focus/en/detention_issues/24/?vg=-1)

<sup>9</sup> The Association for the Prevention of Torture (APT), 2016. *OPCAT Database*. Available: <http://www.apr.ch/en/opcat-database/>

## Definition of Disability

This report is viewing existing NPMs through a lens of disability; to add clarity it is imperative to define the term ‘disability’.

Throughout this report, the term ‘disability’ is aligned with the UN Convention on the Rights of Persons with Disabilities, which includes all individuals who;

“Have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.<sup>10</sup>

Throughout the report the term ‘disability’ will also include ‘short term’ disability that may not have been visible prior to the individual’s liberty being deprived, but has become exacerbated during detention; specifically, mental illness.

## Definition of Torture, Inhuman and Degrading Treatment

The term torture is used in reference to the UN Convention against Torture (UNCAT), which states that torture means:

“Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind”.<sup>11</sup>

Unlike torture, inhuman and degrading treatment are not defined in an international treaty. However, the APT defines inhuman treatment as treatments that “cause mental or physical suffering of a serious nature, intentionally or negligently, and a public official must be implicated directly or indirectly.” Degrading treatment is different from inhuman treatment as it is not about the “severity of the pain but the aim to humiliate or debase the person”.<sup>12</sup> Throughout this report the term ‘ill-treatment’ will be used in reference to any form of cruel, inhuman or degrading treatment or punishment.

The forms of ill-treatment of specific interest when inspecting places of detention include:

- Restraints; including physical, mechanical, and chemical.
- The use of seclusion.
- Coerced, involuntary or forced medical treatment.
- Sexual violence, including sexual assault, and grooming.

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<sup>10</sup> *The United Nations Convention on the Rights of Persons with Disabilities*, 2006, article 1. Available: <http://www.un.org/disabilities/convention/conventionfull.shtml>

<sup>11</sup> *The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1987, article 1. Available: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

<sup>12</sup> APT, n.d. *Detention Focus*, op cit.

It is important to note that ill-treatment does not always correlate to intent and is often the result of undertrained, understaffed and under resourced facilities, which will become more evident throughout the report.

## Places of Detention

The places of detention that are to be monitored by the SPT and NPM bodies have been left intentionally broad in the OPCAT, with Article 4.2 stating:

“For the purpose of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave”.<sup>13</sup>

Oliver Lewis from the Mental Disability Advocacy Centre (MDAC) advises that the working definition of the Protocol needs to include ‘disability institutions’; such as,

“Psychiatric hospitals, psychiatric wings of general hospitals, as well as any institution/homes which constitute congregated settings for people with psycho-social disabilities, users and survivors of psychiatry, intellectual disabilities, brain injuries, people with degenerative disease of ageing and those with degenerative disease unrelated to ageing”.<sup>14</sup>

Throughout this report these disability specific institutions will be referred to as specialist facilities, or non-traditional places of detention; in contrast to mainstream/traditional places of detention such as prisons and immigration facilities.

MDAC also note that ‘deprivation of liberty’ should include short term facilities, including “psychiatric wards of general hospitals, emergency rooms, community service facilities, prayer camps and traditional healing centers [sic]”.<sup>15</sup> These short term facilities often have little to no oversight, meaning that ill-treatment can go unrecognised and unreported.

It quickly becomes apparent that the working definition of ‘places of detention’ used by NPMs often does not match their inspecting practice; with many NPMs including specialist facilities in their definition, but focusing primarily on traditional institutions in their practice.

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<sup>13</sup> *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT,) article 4, section 2. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>

<sup>14</sup> Lewis, Oliver. 2012. *Detention and disability*, Presentation to the “Preventing torture in closed environments” Conference at the Castan Centre for Human Rights Law, Faculty of Law, Monash University, Melbourne, Australia, 20-21 February 2012.

<sup>15</sup> Mental Disability Advocacy Centre, 2012. *Detention and disability*, Submission to the UN human rights committee on its General Comment on Article 9 (Liberty and security of person) of the International Covenant on Civil and Political Rights. 201, article 8.

## National Monitoring: National Preventive Mechanism (NPM)

When a State ratifies OPCAT they are required to implement a National Preventive Mechanism (NPM) to monitor places of detention.

In order to meet the OPCAT mandate, an NPM must:

- Be independent from government and the institutions it monitors;
- Have sufficient resources and funding from the State to perform its role;
- Have personnel with the necessary expertise and who are sufficiently diverse.<sup>16</sup>

The NPM should create co-operative and constructive relationships with places of detention. Their role is not to shame or criticise, but to identify issues and address gaps that are, or could in the future lead to ill-treatment.

### How NPMs are designated

The Optional Protocol does not provide a model on how an NPM should be established; with some NPMs consisting of a single body, such as Norway and Switzerland, while others consist of a group of bodies with specific judicial or thematic focuses; including New Zealand and the UK. Of the 83 countries that have ratified the OPCAT, 65 have designated an NPM, with 4 designating multiple institutions.<sup>17</sup>

Although there is no preference stated in the Optional Protocol, there are concerns when using pre-existing bodies that may have previously been complaint driven. This is because the OPCAT requires a proactive and preventative approach to ill-treatment rather than a reactive complaints driven process.<sup>18</sup> Another concern about designating pre-existing organisations is that NPMs are intended to “complement rather than replace existing systems of oversight”.<sup>19</sup> This is a clear issue in the UK system that has used multiple pre-existing organisations.

The SPT have noted that various Ombudsmen groups that have been designated as NPMs have successfully overcome this challenge by creating a separate body within their organisation that specifically deals with OPCAT.<sup>20</sup>

### NPM reports

After each inspection, NPMs typically produce a report of their observations and recommendations. This report remains confidential in most countries, however some countries such as Norway have chosen to make all reports publicly available.

All NPMs publish an annual report that is publicly available. These reports illustrate their work over the past 12 months. There is no set format for what this report should

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<sup>16</sup> OPCAT, article 19.

<sup>17</sup> APT, 2016 *OPCAT Database*, op cit.

<sup>18</sup> Murray, Rachel; Elina Steinerte; Malcolm Evans; and Antenor Hallo de Wolf. 2011. 'The Role of NPM' in *The Optional Protocol to the UN Convention against Torture*, Oxford University Press, Oxford 2011.

<sup>19</sup> The Subcommittee on Prevention of Torture and other cruel, inhuman or degrading treatment, 2010. *Guidelines for National Preventive mechanism (CAT/OP/12/5)*, Article 5.

<sup>20</sup> Murray et al. 2011 op cit., p13.

include, with some countries appearing to be more transparent about their findings than others.<sup>21</sup>

## **International Monitoring: Subcommittee on the Prevention of Torture (SPT)**

The Subcommittee on the Prevention of Torture (SPT) is the international monitoring body for OPCAT.<sup>22</sup> Their purpose is to oversee the work and to assist in the development of State NPMs. As part of this, the SPT performs 3 to 6 in-country visits each year.

SPT consists of 25 independent members, who are elected by the State parties of the OPCAT. These members meet 3 times a year to prepare for their in-country visits, as well as to discuss any information provided from OPCAT members or NPMs.

SPT in-country visits are conducted by at least 2 members, none of whom can identify with the nationality of the country they are visiting. These visits can be done without invitation; however they often receive invitations from countries - such as recently from Thailand and Iraq.

There are two types of in-country visits; shorter 4 day visits specifically focusing on NPM development, and longer 10 days visits focusing on inspecting detention facilities. After these visits the SPT provides recommendations to the State party and the relevant NPM on how the treatment of detainees could be improved. These reports remain strictly confidential, unless the State decides to release them. As explained by the APT; the SPT and NPM are “not about investigating allegations of torture but of working in a confidential and collaborative way to improve conditions in detention for detainees”.<sup>23</sup>

The SPT has stated that the term ‘places of detention’ should be given broad interpretation by NPMs to include more than the traditional places of detention. And although the SPT has the right to inspect any place where people are or may be deprived of their liberty, they themselves tend to focus towards traditional places of detention.<sup>24</sup> This has been criticised by Oliver Lewis, who states that it is crucial “that the SPT leads by example, practising what it preaches to NPMs at the domestic level. We can hardly expect NPMs to be inclusive if the SPT is not”.<sup>25</sup> The SPT has stated that their selection of facilities to inspect during in-country visits is usually based on the inspectors’ expertise. For instance, if members are lacking knowledge in the fields of disability and health, then they would not visit such institutions.<sup>26</sup>

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<sup>21</sup> Examples of annual reports received by the SPT can be found:

<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/AnnualreportsreceivedfromNPM.aspx>

<sup>22</sup> Additional information can be found: <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIntro.aspx>

<sup>23</sup> The Association for the Prevention of Torture (APT), 2012. *Taking action now to prevent torture: Australia’s ratification of the optional protocol to the convention against torture. A submission to the joint standing Committee on Treaties of the Parliament of Australia*. March 2012, p12. Available: <http://www.apr.ch/content/files/region/asiapacific/AustraliaSubmission300312.pdf>

<sup>24</sup> Murray et al. 2011 op cit., p9.

<sup>25</sup> Lewis 2012 op cit., p3.

<sup>26</sup> Murray et al. 2011 op cit., p10.

The SPT do visit immigration detention facilities, including a recent visit to the Nauru Immigration Detention Centre where they received full access to the Australian-run Regional Processing Centre for Asylum Seekers.<sup>27</sup> However, the extent to which these findings will be made public is entirely up to the Nauru government.

The SPT is funded by a UN special fund that has been specifically made to support the SPT. This fund is a combination of donations by voluntary government, as well as non-government organisations and other public or private organisations.<sup>28</sup> This means that the financial burden of the SPT does not fall upon the States that it visits, or the States that have ratified the OPCAT.

## **Role of the State**

Once the State ratifies the OPCAT, they have 12 months to establish a preventive monitoring body. However, they can delay this for up to 3 years.

When establishing an NPM system the State must:

- Guarantee that the involved body/bodies are completely independent of the State
- Ensure that the members of the NPM will have an appropriate level of expertise
- Grant the NPM unrestricted access to all places of detention, including non-traditional places of detention
- Make available the necessary resources and financial support for the NPM to complete their mandate as set out in the Optional Protocol

## **The Committee against Torture (CAT)**

The Committee against Torture (CAT) is aligned with the UN Convention against Torture (UNCAT) and pre-dates both OPCAT and the SPT. Members of the UNCAT are required to submit reports to the CAT one year after implementing the convention and then every 4 years after its implementation. These reports are discussed during the CATs bi-annual sessions in Geneva, after which the CAT draws conclusions and makes recommendations to the State parties.

The CAT and the SPT may appear to be similar bodies, but unlike the SPT, the CAT is not a proactive treaty body, with their process being based on reviews and responding to allegations of torture.

However, the two bodies do have a working relationship; with the SPT being able to forward their State report to the CAT to publish if the State is being uncooperative. Alternatively, the CAT also encourages its members to ratify OPCAT and to introduce an NPM system of monitoring.<sup>29</sup>

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<sup>27</sup> ABC news, 2015. *UN torture prevention team calls for greater transparency in Nauru immigration detention centre*. 8 May 2015. Available: <http://www.abc.net.au/news/2015-05-08/un-team-wants-greater-transparency-on-nauru/6456634>

<sup>28</sup> Joint Standing Committee on Torture (JSCOT), 2012. *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 18 December 2002*, article 6.40. Available: [http://www.apf.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jsct/28february2012/report.htm](http://www.apf.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/28february2012/report.htm)

<sup>29</sup> University of Bristol, 2012. *Relationship between the Optional Protocol to the UN Convention against*



## The Council of Europe

The Council of Europe (CoE) is a European human rights organisation that has created one of the most extensive monitoring bodies through their implementation of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (European Convention) in 1987.<sup>30</sup>

This Convention allows the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) the authority to visit States and issue recommendations – in much the same capacity as the SPT. The key difference between the European Convention and the OPCAT is the two-tier monitoring system that OPCAT established through the introduction of State NPMs.

The CoE does not have a convention to protect people with disability. However, they have recently launched their *Disability Strategy 2017-2023*, which aims “to achieve equality, dignity and equal opportunities for persons with disabilities in specific areas where the Council of Europe can make an input”.<sup>31</sup> In addition, this strategy outlines that CoE bodies and member states should endeavour to ‘mainstream the rights of persons with disabilities in the activities and work related to...[a range of] independent monitoring mechanisms... including the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)’.<sup>32</sup>

Although the CoE has no jurisdiction over Australia, they should be viewed as a leader in human rights protection and their experience and resources utilised. Of particular interest is a detailed inspection checklist that is used by the CPT when visiting social care institutions where people may be deprived of their liberty.<sup>33</sup> They note that this is not an exhaustive tool, but a base for CPT visits. The key points of this checklist are detailed below, with additional comments made in bold:

- General facility information: including who is responsible for the institution, its official capacity, whether the law allows involuntary placement orders, the number of staff and their level of training, any major incidents and deaths in recent years.
  - **This portion of the inspection list could be declared as ‘background information’ and is a good base to have prior to the inspection taking place. It is also key information to verify during the inspection to ensure that the practice of the facility is meeting the provided information; for instance, asking the staff about their level of training and seeing if the official capacity matches the actual capacity.**
- Ill-treatment: including physical and verbal treatment by staff and inter-resident violence.

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*Torture (OPCAT) and other international and regional visiting mechanisms*, p3. Available: <http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/relationshipbetweenopcatandregionalmechanisms.pdf>

<sup>30</sup> Ibid, p6.

<sup>31</sup> Council of Europe (CoE), 2017. *Human Rights: A Reality for All – Council of Europe Disability Strategy 2017-2023*, available: <https://rm.coe.int/16806fe7d4>

<sup>32</sup> Ibid, p28.

<sup>33</sup> Available: <https://rm.coe.int/16806fc22b> The full checklist is also provided in Appendix A.

- **This is reliant on the transparency of the facility. Depending on their record keeping, it may be difficult to determine whether the CPT get a full insight into the treatment of detainees on an average day. It may be beneficial to undertake an anonymous quantitative evaluation to generate more accurate statistics about ill-treatment within a facility.**
- Living conditions: including the allocation of different groups – are people with disability accommodated separately? Do minors share the same space as adults? Can spouses be accommodated together? Is the building accessible for people with disability? Are there adequate measures to ensure that the hygiene, privacy and dietary needs of the detainees are being met?
  - **This point is related to reasonable accommodation, which is a right protected by the CRPD. By not providing reasonable accommodation a facility could be seen as committing ill-treatment to its detainees.**
- Health Care: including whether there is an adequate supply of medical professionals and medicines within the facility, whether newly admitted patients are given a medical examination, whether there are medical follow-ups and treatment plans, who has access to this information (patient confidentiality) and whether forced medical treatment is performed on detainees.
  - **To add, it's important to check the qualifications of the persons making assessments on whether detainees have disability, for instance, is this being done by a trained professional, or by an administrator? This was seen to be an issue within the New Zealand prison system, as explored in section 2.**
- Means of Restraint: including looking at what types of restraints are used, whether there is a policy on this, whether staff are trained on the use and recording of all types of restraint, and who has the authorisation to decide on the use of restraint. The checklist outlines types of restraints as including seclusion, physical restraint, mechanical restraint (straps, straitjacket, bed sides, net bed, etc.), and chemical restraint.
  - **Again, this is a point that is reliant on the transparency and record keeping of the facility. In order to achieve relevant insight into the use of restraints, I would endorse using quantitative evaluation, which could possibly go out to any of the detainee's advocates as well. It's also important to see if the staff has training in de-escalation techniques that do not include restraint.**

The next three areas are more focused on the legislation and safeguards that affect residents. These could be largely completed before the inspection itself and would not need to be done for each of the same facilities within the same jurisdiction.

- Involuntary placement: Who authorises involuntary placement? When does this need to be approved by court? Can an involuntary placement order be reviewed? What is this process?

- Involuntary treatment: Are the requirements for involuntary treatment different to involuntary placement? When and how are involuntary treatment orders reviewed?
- Deprivation of legal capacity: Who/how is a legal guardian appointed? Can a person's legal capacity be restored? What are the safeguards for a person deprived of legal capacity?

Other areas that are raised in the checklist:

- The detainees' ability to contact people outside of the facility – such as phone calls and visits.
- Are the residents made aware of their rights; including the complaints procedure? Is legal counselling available within the facility?
  - **Additional considerations could be whether complaints are investigated internally, or externally, and at what point authorities are made aware of a complaint.**
- Are the facilities independently monitored?
  - **This final point is where the NPM system becomes so relevant. Although the CoE does not specifically mention the importance of NPMs, their existence covers the role of independent monitoring.**

This checklist should become the bar for all monitoring bodies, including State NPMs. Please see Appendix A for a copy of the full inspection checklist.

## **Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

Special Rapporteurs are investigatory bodies established by the United Nations Human Rights Council. Their role is to undertake fact-finding missions based on specific countries, or thematic issues.

In 1985, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was introduced and in 2013, Juan E. Méndez (the previous Special Rapporteur on Torture) presented an article about ill-treatment in health care settings. This was the first time the Special Rapporteur on Torture had focused on this area, and I believe it beneficial to spend a short time going over Méndez's findings. There are two key points that will be discussed in brief.

- Méndez noted the discrimination towards people with disability inside health care facilities, where serious violations are “defended as “well intended” on the part of health-care professionals”.<sup>34</sup> Méndez stated that “medical treatments of an intrusive and irreversible nature, when lacking a therapeutic purpose, may constitute torture”, which is particularly the case when intrusive and irreversible,

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<sup>34</sup> Méndez, Juan E., 2013. *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, p5. Available: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf)

non- consensual treatments are performed on patients from marginalized groups, such as persons with disabilities, notwithstanding claims of good intentions or medical necessity”.<sup>35</sup>

- In the report, Mendez recommended that national standards for people with disability must come in line with the CRPD, as this convention provides “authoritative guidance on the rights of persons with disabilities and prohibits involuntary treatment and involuntary confinement on the grounds of disability”.<sup>36</sup>

These are two areas that an NPM must cover in their inspections. If a country’s national standard does not meet the CRPD mandate, then the NPM should generate a monitoring standard that is in line with CRPD.

## **Section Two: Country Case Studies**

This portion of the report is dedicated to analysing the different NPM models that have been introduced by States after their ratification of the OPCAT. The analysis will have a particular focus on involvement of people with disability within the NPM body; including whether or not NPMs inspect non-traditional places of detention and if there is a focus on disability when visiting traditional places of detention.

Each case study varies in depth, which is largely due to the different NPM models ranging from simplistic, comprehensive, to confusing.

Areas of specific focus include:

- The NPM’s definition of ‘places of detention’; and whether or not their practice matches their definition.
- The transparency of the NPM inspections – specifically if the inspection reports are made publicly available, or if they stay confidential between relevant authorities.
- Who is involved within the NPM monitoring? What level of training and expertise do the inspectors have? Is their background diverse? Are people with disability included within the inspection process at any level?
- International bodies recommendations – where available.

From these points, the overall success of the NPM and NPM model will be determined. These conclusions will assist the recommendations made for Australia in section 3.

It is worth noting that increasing attention is being paid to the non-traditional settings in which torture and ill-treatment can occur, including psychiatric institutions. For instance, the third Jean-Jacques Gautier NPM Symposium in September 2016 explored the ways in which NPMs can monitor public and private psychiatric institutions.<sup>37</sup> This international forum aimed to look at the risk factors of psychiatric institutions and the standards to which these facilities are held, as well as strategizing around how NPMs can interact with these settings, and the key challenges they may face in doing so. It is thus interesting to consider the attention that the below countries

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<sup>35</sup> Ibid, p7.

<sup>36</sup> Ibid, p4.

<sup>37</sup> Jean-Jacques Gautier NPM Symposium and the Association for the Prevention of Torture, 2016. *Monitoring psychiatric institutions*, 6-7 September 2016, Geneva, Switzerland. Available: [http://www.apt.ch/content/files/JJG%20Symposium/Concept%20note\\_JJG%20Symposium%202016\\_EN.pdf](http://www.apt.ch/content/files/JJG%20Symposium/Concept%20note_JJG%20Symposium%202016_EN.pdf)

are placing on these settings, and on practices such as restraint and seclusion often used in such facilities.

## **Norway Case Study**

Norway became the 69<sup>th</sup> State party to ratify the Optional Protocol in 2013. They designated one NPM body, being the Parliamentary Ombudsman. The Ombudsman has since created a specific department for their role as an NPM.

### Norway's definition of 'places of detention'

The Norwegian authorities view 'places of detention' as including much more than traditional facilities (such as prisons, police custody facilities and psychiatric institutions). They believe that places such as "military camps, child welfare institutions, camps abroad which are under Norwegian control, nursing homes, housing for persons with developmental disability, and the immigration detention facility" should be included.<sup>38</sup> They also suggest that 'short term' places of detention such as 'accident and emergency units ... [and] means of transport used in connection with retention in police custody or deportation" should not be overlooked.<sup>39</sup>

### Where they inspect

2014 was Norway's NPMs first year of monitoring. During this time the Ombudsman only monitored prisons and police holding facilities. In 2016, the NPM visited 11 places of detention, including prisons, police custody, mental health care facilities and child welfare institutions.<sup>40</sup>

All of the post-inspection reports are publicly available on the Ombudsman's website – without needing the facilities, or governments consent.

### Who inspects

The NPM faction of the Ombudsman office consists of 6 permanent staff members. Two staff members are lawyers, and there is also a social scientist, a criminologist, a sociologist and a psychologist.<sup>41</sup> The NPM team may also call in external experts where necessary, to assist in the inspection and reporting processes.<sup>42</sup>

Norway's NPM system includes an 'Advisory Committee', which comprises of 15 organisations with expertise in specialist areas of human rights. The purpose of this committee is to ensure that a range of voices are being heard and also allows the NPM to have access to a range of resources.

These organisations include:

<sup>38</sup> The Parliamentary Ombudsman Norway, 2014. *National Preventive Mechanism against Torture and Ill-Treatment: Annual report 2014*, p14. Available: [http://www.apr.ch/content/files/npm/eca/Norway\\_NPM\\_Annual\\_Report\\_2014.pdf](http://www.apr.ch/content/files/npm/eca/Norway_NPM_Annual_Report_2014.pdf) See also: The Association for the Prevention of Torture (APT), 2016. *Norway Country report*. Available: [http://www.apr.ch/en/opcat\\_pages/opcat-situation-55/](http://www.apr.ch/en/opcat_pages/opcat-situation-55/)

<sup>39</sup> The Parliamentary Ombudsman, Norway 2014 op cit., p14.

<sup>40</sup> Norwegian Parliamentary Ombudsman, 2017. *The Parliamentary Ombudsman's Annual Report for 2016 as National Preventive Mechanism against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, p2. Available: [http://www.apr.ch/content/files/npm/eca/Norway\\_NPM%20Annual%20Report%202016.pdf](http://www.apr.ch/content/files/npm/eca/Norway_NPM%20Annual%20Report%202016.pdf)

<sup>41</sup> The Association for the Prevention of Torture (APT), 2017. *Norway OPCAT Status*. Available: [http://www.apr.ch/en/opcat\\_pages/opcat-situation-55/?pdf=info\\_country](http://www.apr.ch/en/opcat_pages/opcat-situation-55/?pdf=info_country)

<sup>42</sup> Norwegian Parliamentary Ombudsman 2017 op cit., p15.

- The National Institution for Human Rights
- The Equality and Anti-Discrimination Ombudsman
- The Ombudsman for Children
- The Norwegian Bar Association's Human Rights Committee
- The Norwegian Medical Association, represented by the Norwegian Psychiatric Association
- The Norwegian Psychological Association's Human Rights Committee
- The Norwegian Organisation for Asylum Seekers (NOAS)
- The Norwegian Association for Persons with Developmental Disabilities (NFU)
- Jussbuss (a free legal advice service)
- The Norwegian Association of Youth Mental Health
- We Shall Overcome
- The Norwegian Research Network on Coercion in Mental Health Care (TvangsForsk)
- The Norwegian Helsinki Committee (NHC)
- Retretten Foundation
- Amnesty International Norway

These organisations met with the Ombudsman 4 times in 2016 to offer expert advice and guidance. They plan to continue meeting 4 times a year in the future.<sup>43</sup>

This advisory relationship should be viewed as good practice and other NPM bodies should be encouraged to establish such a relationship with a range of human rights groups.

### How they inspect

The duration of the NPM body visits often depend on the size of the facility they are inspecting, and typically last between 1-4 days.<sup>44</sup> They perform a mix of both announced and unannounced visits, and in 2016, the NPM ceased announcing the date of a visit – rather providing places of detention notice that a visit would occur within 2-3 months.<sup>45</sup>

The Ombudsman predetermines key thematic areas to consider during visits each year. In 2014, the Ombudsman's focus areas were the use of force, incidents and control measures, health services, human relations, vulnerabilities in the initial phase of detention, vulnerable groups, activity programmes and measures to counteract the effects of isolation, and physical conditions. These areas were informed through CPT and CAT reports, the Ombudsman's prior inspecting experience, and recommendations from the Advisory Committee.

In 2015, the Ombudsman chose to look more closely at coercive measures used during deprivation of liberty, activity programmes and measures to combat isolation, the role of health personnel in treating people who are deprived of their liberty, and the execution of sentences in the Netherlands and Norway's commitments pursuant

<sup>43</sup> Norwegian Parliamentary Ombudsman 2017 op cit., p59.

<sup>44</sup> APT 2017 *Norway OPCAT Status* op cit., p6.

<sup>45</sup> Norwegian Parliamentary Ombudsman 2017 op cit., p11.

to the UN Convention against Torture.<sup>46</sup> In 2016, these selected topic areas included body searches, and how to balance security and dignity when performing them, the right to information, institutional culture and management, and women in prison.<sup>47</sup>

### Relationship to other international bodies

Norway ratified the European Convention in 1989 and has been visited by the CPT 5 times.

In their most recent visit (2011) the CPT inspected 4 police headquarters and holding cells, 7 prisons, and a forensic psychiatric clinic. The Committee reported after their inspections that there has been no allegation of ill-treatment in any of the facilities.<sup>48</sup>

### Commentary: Norway's NPM

The Norwegian NPM system is very much in the early stages of implementation and it will be interesting to see how it develops in the next few years. It has so far seemed to have developed an overall successful model for its state's needs.

Although specialist facilities have not been made a priority in Norway, the ombudsman appears to be moving towards a more comprehensive system, with their definition of 'places of detention' among the most inclusive. Of key interest is their inclusion of facilities outside of their territory, but still within their control – this is a key point that will be discussed during the Australian portion of this report.

The Norwegian NPM model is also transparent, with all reports made publicly available. This should be considered a good practice that should be expected within democratic societies.

Norway's NPM has included a focus on vulnerable groups; including people with disability within their inspection guide. This is a promising sign that the ombudsman is making people with disability a priority within mainstream facilities. There is also a disability advocacy group included in the NPMs advisory committee, which is another indicator of their commitment to protecting people with disability from ill-treatment.

## **Switzerland Case Study**

Switzerland ratified the OPCAT in 2009 and has established one NPM body, being the National Commission for the Prevention of Torture (NCPT).

Unlike other countries that have used pre-existing organisations, Switzerland created an entirely new body to perform the preventive monitoring. Whilst the clear advantage to this is that the organisation will be purely using the OPCAT as their mandate, there is an issue of resources and funding.

### Switzerland's definition of 'places of detention'

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<sup>46</sup> Norwegian Parliamentary Ombudsman, 2016. *National Preventive Mechanism against Torture and Ill-Treatment Annual Report 2015*, available: [http://www.apr.ch/content/files/npm/eca/Norway\\_NPM%20Annual%20Report%202015.pdf](http://www.apr.ch/content/files/npm/eca/Norway_NPM%20Annual%20Report%202015.pdf) pp17-29

<sup>47</sup> Norwegian Parliamentary Ombudsman 2017 op cit., pp17-29.

<sup>48</sup> This report can be found in full: <https://rm.coe.int/1680697887>



The NCPT acknowledges a range of facilities in their definition of ‘places of detention’, including “prisons, police stations, asylum-seeker detention centres, psychiatric establishments as well as homes for the elderly”.<sup>49</sup>

In practice they have only focused on the high-risk prisons and asylum seeker centres, which they believe are the most vulnerable groups.<sup>50</sup>

### Where they inspect

As they did in the previous year, in 2015 the NCPT focussed on the thematic priority of conditions of pre-trial detention, and also looked at the conditions for juveniles in settings of detention. In 2015, the NCPT visited 9 facilities in which people were deprived of their liberty (pre-trial detention facilities, prisons, remand prisons) in 2 Cantons<sup>51</sup>. They performed 4 follow up visits to track progress on recommendations, and also monitored 43 forced removal deportation flights and 46 transfers to the airport.

After each inspection the NCPT creates reports on their observations and findings. Once the authorities have had the opportunity to respond to these reports they are made publicly available.

The NCPT has recently appointed another member with particular expertise in the area of psychiatry. As such, the NCPT has announced plans to focus on psychiatric facilities and the use of restrictive measures in the future.<sup>52</sup> The NCPT has also recently announced that it would like to begin examining the experiences and circumstances of people with disability and older people living in social institutions.<sup>53</sup>

### Who inspects

The NCPT comprises of 12 members who have professional experience working as lawyers, judges, former police officers, psychologists, and psychiatrists. Other members also have expertise in penitentiary issues, human rights and medical treatment.

The NCPT also brings in outside specialists for certain monitoring processes, with these individuals typically having expertise in law, migration and correctional processes. In addition, there is a 4 person Secretariat that supports the NPM team, responsible for planning and organising the monitoring activities.<sup>54</sup>

The NCPT was initially intended to be ‘cost free’ and relied on professionals volunteering their time. This has since been amended with NCPT members now

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<sup>49</sup> The Association for the Prevention of Torture (APT), 2015. *Switzerland Country report*.p6. Available: [http://www.apr.ch/en/opcat\\_pages/npm-designation-66/?pdf=info\\_country](http://www.apr.ch/en/opcat_pages/npm-designation-66/?pdf=info_country)

<sup>50</sup> Ibid, p8.

<sup>51</sup> A Canton is a country sub-division.

<sup>52</sup> National Commission for the Prevention of Torture (NCPT), 2015. Activity Report: National Commission for the Prevention of Torture (NCPT) 2015. Available: <https://www.nkvf.admin.ch/dam/data/nkvf/Berichte/taetigkeitsberichte/2015/activity-report-2015.pdf> p10.

<sup>53</sup> Ibid, pp7-10.

<sup>54</sup> Ibid, p12.



receiving compensation for the work they provide.<sup>55</sup> The group currently has an annual budget of 955,500 AUD,<sup>56</sup> which is only enough to fund the NCPT to perform approximately 12 visits per year.<sup>57</sup>

### Relationship to other international bodies

CoE has visited Switzerland 7 times since 1991, with the most recent being in 2015. In their most recent visit the CoE inspected prisons, police cells and psychiatric establishments. This visit was primarily a follow up to review the actions that have been undertaken in response to their previous recommendations. Detention conditions were found to be quite good, with a few exceptions, and additional improvements were made.<sup>58</sup>

Closer to home, the NCPT organised a meeting in Geneva with the UK and Dutch NPM bodies, to share experiences, good practices and explore common problems.<sup>59</sup> The NCPT also accompanied an Austrian delegation, at their invitation, to a visit of three homes for older people.

### Commentary: Switzerland's NPM

The NCPT does not currently have enough resources or funding to perform its role of inspecting all facilities that fall within its mandate. In previous years, the NCPT's attempt to inspect as many facilities as possible meant that they were forced to be less rigorous in the manner they conducted their visits.<sup>60</sup> Such a compromise undermines the purpose of an NPM body.

In addition, the NCPT has only recently developed a follow-up procedure to encourage facilities to implement recommendations.<sup>61</sup> Thus far, follow-up visits have shown that concrete recommendations directly relating to the setting are typically being implemented quite well. However, the recommendations that rely on "political measures or legislative action [have] proved far more difficult".<sup>62</sup> This illustrates the lack of power NPM bodies have with uncooperative State authorities.

Overall the Switzerland NPM model has potential, but isn't extensive enough to fulfil the OPCAT mandate. This can be an issue with creating a new body, as they're unable to rely on additional resources and support from an existing body. In more recent visits based on thematic priorities, it appears that the NCPT is becoming more thorough, and plan to release in-depth reports detailing their findings in these thematic areas appears promising.

## **Denmark Case Study**

Denmark ratified the OPCAT in 2004 and designated one NPM body, the Danish Parliamentary Ombudsman, who created a specific department for their NPM duties.

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<sup>55</sup> APT 2015 *Switzerland country report* op cit., p6.

<sup>56</sup> As outlined on the NCPT website, available: <http://www.nkvf.admin.ch/nkvf/en/home/ueber-uns.html>

<sup>57</sup> NCPT 2015 op cit., p13.

<sup>58</sup> For additional information, see: <http://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-publishes-report-on-switzerland>

<sup>59</sup> Ibid, p30.

<sup>60</sup> NCPT 2015 op cit.

<sup>61</sup> The development of an efficient follow-up procedure was performed in 2013.

<sup>62</sup> NCPT 2015 op cit., p12.

Two years later the Ombudsman joined forces with DIGNITY (an NGO) and The Danish Institute for Human Rights (DIHR: a National Human Rights Institution).

### Denmark's definition of 'places of detention'

Denmark's NPM classifies facilities within their jurisdiction as State prisons, asylum centres, country jails, remand centres, prisons and probation service hostels, institutions of juvenile offenders, psychiatric hospitals, police waiting rooms and social care homes.<sup>63</sup>

### Where they inspect

The Danish NPM has a particularly unique monitoring model that is worth consideration for future NPM bodies. Rather than attempting to inspect all facilities, this NPM inspects facilities through an annual thematic approach; for instance, the CPT reports that in 2011 the NPM focused on children and juveniles deprived of their liberty, institutions for the elderly, and private institutions; in 2012 their focus was on prison establishments; 2013 was dedicated to drug abuse, continuity of care between prison and the community and prevention of violence; 2014 was focused on psychiatric problems and suicide prevention in prison; and 2015 was focused on individual support programmes and placement in security cells.<sup>64</sup>

The thematic report on individual support programmes was initiated after media coverage regarding neglect and the use of force against some individuals in such programmes. For this thematic focus, the Danish Ombudsman worked alongside the DIHR and DIGNITY to visit 14 social care institutions. These institutions were spread across Denmark and were a mix of privately owned (3), municipally owned (9) or regionally owned (2). During the visits, the Ombudsman looked at the use of force, the physical conditions of settings, the relationships between clients and staff, and the relationships between clients and their relatives or guardians.<sup>65</sup> The Ombudsman has stated that an area of concern within psychiatric institutions is that "various measures of coercion may be used towards patients, such as deprivation of liberty, compulsory treatment, forced physical restraint, and the use of physical force generally".<sup>66</sup> Psychiatry was one of the themes covered in 2014, in which the NPM explored conditions in psychiatric institutions, forced physical restraint and access to psychiatric wards.<sup>67</sup>

### Who inspects

Denmark's NPM body now consists of 3 organisations (the Ombudsman, DIGNITY and The Danish Institute for Human Rights (DIHR)) which each offer something unique

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<sup>63</sup> The Permanent Mission of Denmark, 2007. *A letter to the United National Office at Geneva*, p1. Available: <http://www2.ohchr.org/english/bodies/cat/opcat/docs/NPM/Denmark.pdf>

<sup>64</sup> Council of Europe, 2014. *Report to the Danish Government on the visit to Denmark carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, p12. Available: <http://www.cpt.coe.int/documents/dnk/2014-25-inf-eng.pdf>. Please note: this information, provided by the CPT, is different to the information provided in the NPM's annual report, which cited their 2012 focus as being on private institutions that may have children, juveniles or elderly people deprived of liberty within them. This information is available: [http://en.ombudsmanden.dk/publikationer/summary/opcat\\_annual\\_report\\_2012/](http://en.ombudsmanden.dk/publikationer/summary/opcat_annual_report_2012/) Additional information is available: [http://en.ombudsmanden.dk/publikationer/thematic\\_reports/](http://en.ombudsmanden.dk/publikationer/thematic_reports/)

<sup>65</sup> Danish Parliamentary Ombudsman, 2016. *Thematic report 2015 on individual support programmes ('enkelthandsprojekter')*, pp4-5. Available: [http://en.ombudsmanden.dk/publikationer/thematic\\_reports/individual\\_support\\_programmes/](http://en.ombudsmanden.dk/publikationer/thematic_reports/individual_support_programmes/)

<sup>66</sup> Danish Parliamentary Ombudsman, 2013. *OPCAT Annual Report 2012*, pp6-10. Available at: [http://en.ombudsmanden.dk/publikationer/summary/opcat\\_annual\\_report\\_2012/](http://en.ombudsmanden.dk/publikationer/summary/opcat_annual_report_2012/)

<sup>67</sup> Danish Parliamentary Ombudsman, 2015. *Thematic Report on Psychiatry*. Available: [https://en.ombudsmanden.dk/publikationer/thematic\\_reports/psychiatry/](https://en.ombudsmanden.dk/publikationer/thematic_reports/psychiatry/)

to the NPM process. DIGNITY provides medical experts, while DIHR provides international human right law experts.

From this collaboration two bodies were created:

1. OPCAT Council: This body manages the collaboration between the three organisations. Their tasks include designing an inspection manual and structure of inspections and reports; and generating the annual reports.
2. OPCAT Working Group: This body carries out the NPM function by monitoring places of detention and drafting reports to authorities.

In total, 9 individuals participate in the NPM groups, all of whom are supported by the Parliamentary Ombudsman who works as the Secretariat and has overall responsibility for upholding the OPCAT mandate.<sup>68</sup>

#### How they inspect

Denmark's NPM body no longer generates reports after each visit. They instead raise any concerns directly with the responsible authorities. The NPM body does, however, note each facility visited within their annual report, which includes their concerns and recommendations.

In addition, thematic reports are developed and made available on the website of the Danish Parliamentary Ombudsman.

#### Denmark's NPMs Findings

A major concern in their recent inspections was the use of force in a socio-educational residence. One such instance involved staff lying down on the stomach of a young person after he resisted staying in the timeout area. The Ombudsman asked the facility to consider ways to ensure that the staff were not using force in order to impose educational measures.<sup>69</sup>

Another key area outlined in recent inspections was the use of forced restraint to perform examinations, operations or take blood samples from residents of social care institutions.<sup>70</sup> While most of these restraints were reported to be for the shortest possible duration, the NPM received some reports of more severe incidents. The use of restraints when encountering people outside the institution, in relation to transport and personal safety considerations were also reported.

#### Relationship to other international bodies

The Special Rapporteur's visit to Denmark:

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<sup>68</sup> The Association for the Prevention of Torture (APT), 2015. *Denmark country Report*. Available: [http://www.apr.ch/en/opcat\\_pages/opcat-situation-20/?pdf=info\\_country](http://www.apr.ch/en/opcat_pages/opcat-situation-20/?pdf=info_country)

<sup>69</sup> Danish Parliamentary Ombudsman 2013 op cit., p18.

<sup>70</sup> Danish Parliamentary Ombudsman 2016 op cit., pp7-9.

The Special Rapporteur for Torture visited Denmark in 2009 and emphasised their satisfaction during their visit. They received no allegations of torture and very few complaints of ill-treatment, all of which appear to have been effectively addressed.<sup>71</sup>

The conditions of detention facilities within Denmark appear to be superior to most other countries, with their prison system based on the 'principle of normalisation'.<sup>72</sup> This principle is based on creating a life behind bars that reflects life outside the prison. This includes allowing children to live with their parent within the prison (although the requirements around this differ between each prison facility).<sup>73</sup>

The Rapporteur commended the excellent psychological treatment that is provided to detainees, but expressed concern at the use of medical castration for sexual offenders, in order to allow such individuals to lead a life outside of the facility. The Special Rapporteur questioned the detainee's motivations to having this procedure, which was often done to obtain permission for leave or parole. The Special Rapporteur "considers that such treatment should only be used as a last resort where other therapies have failed to help the detainee".<sup>74</sup>

Denmark has a long tradition of using solitary confinement, with it being imposed on prisoners as a punishment for disciplinary infractions. However, the government has stressed that the use of solitary confinement should not be used as coercion, or to extort a confession or information. The Special Rapporteur found instances where solitary confinement had been used to coerce individuals to participate with an investigation and noted, "If prolonged solitary confinement is used for the purpose of extracting a confession, it may amount to torture".<sup>75</sup> They further note "prisoners with known mental disorders are at increased risk of harm from solitary confinement and should never be held in these conditions".<sup>76</sup>

#### CPT's Periodical Review of Denmark:

In 2014 the CPT visited Denmark for their 5<sup>th</sup> periodic review. The facilities inspected during their review included several prison establishments, two secure institutions for juveniles and three psychiatric establishments.

They found that the statistic of 92% prison capacity ignored the fact that some facilities were operating at, or over full capacity. This flags the use of general statistics masking the issue of overcrowding. The CPT recommends "that the Danish authorities take the necessary steps to ensure that all prisons operate within their design capacity".<sup>77</sup>

During the inspections of prison facilities, there were no allegations of deliberate physical ill-treatment. However, the CPT did receive several allegations of excessive

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<sup>71</sup> Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, 2009. *Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development*, p11. Available: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.44.Add.2.pdf>

<sup>72</sup> Ibid.

<sup>73</sup> Ibid, p12.

<sup>74</sup> Ibid, pp12-13.

<sup>75</sup> Ibid, p15.

<sup>76</sup> Ibid, p17.

<sup>77</sup> Council of Europe 2014 op cit., p20.

force used by prison staff towards inmates.<sup>78</sup> They noted that there is no justification for “physically assaulting a prisoner who refuses to obey an order”.<sup>79</sup>

The CPT found that most prison detainees had access to adequate healthcare treatment, but recommended the regular psychiatric input should be added to prisons that do not already have such a service.<sup>80</sup>

During the CPT’s visits to psychiatric facilities, they were concerned with the use of ‘immobilisation’. One facility explained that “due to low staffing levels, patients could at times be immobilised when such a measure might have been avoided with higher staffing levels, and that for the same reason a patient who had been restrained for several months had not been released from the belts as often as his condition would have allowed”.<sup>81</sup> The CPT noted that such a state of affairs was “not acceptable” and “that applying instruments of physical restraint to psychiatric patients for days on end cannot have any medical justification and amounts to ill- treatment”.<sup>82</sup>

These reports illustrate that even a country that is considered a leader in anti-torture efforts worldwide<sup>83</sup> still needs to improve the treatment of people within places of detention. This should be used as a prominent example of why the OPCAT and the NPM monitoring are important to all countries, even those that may appear to be going above and beyond other countries standards.

### Commentary: Denmark’s NPM

Denmark’s NPM system is different to any other model in this report and aspects of it are worth considering for countries yet to implement an NPM body.

Their thematic approach is an interesting idea, with the NPMs focus each year being on a specific issue, group, or facility type. This would indicate that the focus area is being covered comprehensively. It is particularly interesting that they continued 2011’s theme in 2012, with their focus changing to privately run facilities. However, the disparity on the body’s themes in the CPT and NPM reports illustrates that there may be a lack of communication between the two groups. This is a concern, as it appears as though the CPT published misinformation about the work done by the NPM body.

There is no clear regime or standards around follow up inspections done by the NPM to see if the facilities are implementing their recommendations. This lack of regular dialogue between a facility and the NPM body hurts the cooperative and supportive nature of the NPM. It should be recommended that as well as performing inspections within the specific thematic areas, the Denmark NPM group should perform follow up visits to ensure that their previous recommendations are not being ignored.

The Denmark NPM body announce almost all of their inspections,<sup>84</sup> which limits their ability to receive true insight into the facilities’ treatment of detainees. It should be

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<sup>78</sup> Ibid, p20.

<sup>79</sup> Ibid, p20.

<sup>80</sup> Ibid, p32.

<sup>81</sup> Ibid, p65.

<sup>82</sup> Ibid, p65.

<sup>83</sup> Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment 2009 op cit., p11.

<sup>84</sup> APT 2015 *Denmark Country Report* op cit.

recommended that the NPM body attempt to perform more unannounced visits in future.

The introduction of an OPCAT Council and an OPCAT Working Group is a unique model, and has the potential to become an effective, or even a preferred NPM model. Importantly with this system, the responsibility is still held by one body, making a clear chain of command for visiting international bodies.

As we will see throughout this report, no NPM body is without limitations, and I believe Denmark's NPM model to be a valid interpretation of the NPM mandate and should be worth consideration for future NPM bodies.

## **Serbia Case Study**

Serbia ratified the Optional Protocol in September 2006. Five years after this, Serbia designated the 'Protector of Citizens', the Serbian Ombudsman's office, as their NPM body.<sup>85</sup>

### Serbia's definition of 'places of detention'

Serbia's definition of places of detention appears to be broadly defined, as set out by OPCAT, as places in which people are deprived of their liberty.

### Where they inspect

It has been reported that since 2011, the Serbian NPM has performed more than 300 visits to places where people are deprived of their liberty.<sup>86</sup> Visits have been performed at police stations, prisons, remand departments, psychiatric hospitals and units, residential social welfare homes and institutions, aged care homes and gerontology centres, regional border police centres, asylum-seeker camps, shelters, and other facilities in which foreign nationals are placed.<sup>87</sup>

The post-visit reports are submitted to the facility, as well as the ministry in charge of that facility after the inspection. Following this, all personal or identifiable data is redacted and the reports are published on the NPM website.<sup>88</sup>

### Who inspects

Serbia is one of 6 countries to have implemented an Ombuds Plus model, whereby a formal cooperative agreement exists with specialised non-governmental organisations, incorporating them into the NPM processes.

In Serbia, the Protector of Citizens works alongside the Ombudsman of the Autonomous Province of Vojvodina (Provincial Ombudsman) to visit places of detention in this territory. In addition, there are nine non-government organisations

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<sup>85</sup> The Association for the Prevention of Torture, 2016. Serbia – OPCAT Situation, Available: [http://www.apt.ch/en/opcat\\_pages/opcat-situation-64/?pdf=info\\_country](http://www.apt.ch/en/opcat_pages/opcat-situation-64/?pdf=info_country)

<sup>86</sup> Council of Europe, 2016. *Report to the Government of Serbia on the visit to Serbia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 May to 5 June 2015*. Available: <http://www.cpt.coe.int/documents/srb/2016-21-inf-eng.pdf> p14.

<sup>87</sup> The Republic of Serbia: Protector of Citizens, 2015. *National Preventive Mechanism, 2014 Report*, p25. Available: [http://www.apt.ch/content/files/npm/eca/Serbia\\_NPM%20Annual%20Report%202014.pdf](http://www.apt.ch/content/files/npm/eca/Serbia_NPM%20Annual%20Report%202014.pdf)

<sup>88</sup> Ibid, p21.



involved in joint visits with the Protector of Citizens, training and fulfilling the NPM mandate. One of these bodies is a disability-specific NGO: the Mental Disability Rights Initiative of Serbia (MDRI-S).<sup>89</sup>

The NGOs monitor the status of people being deprived of their liberty, with certain settings being designated to different groups. With regard to the organisations responsible for people with disability, for instance: MDRI-S is responsible for the systematic monitoring of the rights of people with disability in social security institutions; the Human Rights Centre of Nis is responsible for the rights of people with disability in the prison system and the International Assistance Network oversee rights protection of people with psychosocial disability in detention.<sup>90</sup>

After visiting Serbia, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment expressed concerns that there has been no exclusive NPM department created within the Ombudsman's office.<sup>91</sup> In addition, there are only three permanent staff members officially carrying out NPM-related activities.<sup>92</sup> Indeed, Serbia's latest NPM Annual Report also acknowledges this shortage of staff. This insufficient staffing level was highlighted in discussions regarding the creation of an exclusive area, the NPM Secretariat, within the Protector of Citizens to be dedicated to NPM activities.<sup>93</sup>

The NPM also hires experts in various fields, such as forensic medicine, psychology and medicine to support the writing of visit reports and recommendations.<sup>94</sup>

### How they inspect

The NPM performs regular visits, follow-up visits, thematic visits and ad hoc visits. These may be announced or unannounced, although the majority are announced. Serbia has, however, expressed a desire to perform more unannounced visits in the future.<sup>95</sup>

Visiting representatives are often divided into four thematic groups, tasked with duties including observing the accommodation conditions, the treatment of people, the legal protection of the facility, as well as the correctional work and health care afforded to those being deprived of their liberty.<sup>96</sup> As such, the teams visiting institutions are multi-disciplinary and include individuals with relevant experience in these areas (such as lawyers or psychiatrists).<sup>97</sup>

The inspection takes place in predetermined stages, although these can be subject to change in some types of visits. Typically, the first stage involves interviewing the management team of the institution.<sup>98</sup> This is then followed by a joint tour of the setting, as well as interviews (conducted by representatives of the four thematic groups) with

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<sup>89</sup> The Association for the Prevention of Torture, 2016. Ombuds Plus Institution (6), Available: <http://www.apr.ch/en/opcat-database/?kid=62>

<sup>90</sup> Ibid.

<sup>91</sup> Council of Europe, 2016. *Report to the Government of Serbia* op cit., p14.

<sup>92</sup> Ibid, p14; The Republic of Serbia: Protector of Citizens 2015 op cit., p22.

<sup>93</sup> The Republic of Serbia: Protector of Citizens, 2016. *National Preventive Mechanism, 2015 Report*, p26. Available: <http://www.npm.lis.rs/attachments/article/234/izvestaj%20za%202015%20-%20ENGLLESKI%20-%2028.02.2017.pdf>

<sup>94</sup> The Republic of Serbia: Protector of Citizens 2015 op cit., p23.

<sup>95</sup> Ibid, pp19-20.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> The Republic of Serbia: Protector of Citizens 2016 op cit., p24.

the heads of relevant services.<sup>99</sup> In the subsequent stage, the representatives of each of the groups perform interviews with individuals who are being deprived of their liberty. The final step is a closing interview with the management team, in which the NPM team outlines their initial impressions.<sup>100</sup>

### Relationship to other international bodies

The Serbian NPM is part of the South-East Europe NPM Network. This Network is comprised of NPMs from Albania, Austria, Bulgaria, Croatia, Macedonia, Montenegro, Slovenia and Serbia.<sup>101</sup> The Network aims to improve cooperation, share experiences and perform joint activities to fulfil the region's NPM mandate.<sup>102</sup> The South-East Europe NPM Network has subsequently created working groups regarding the legal and healthcare sectors. The Network cooperates with the Council of Europe (CoE).

In April 2016, the South-East Europe NPM Network held a meeting about accommodation and treatment in social welfare institutions, focusing on restrictions of freedom. At this event, the Acting Ombudsman Jankovic stated that police are not adequately trained to engage with people with 'mental disability', leading to these individuals being held in prisons in inappropriate conditions. Ultimately, the Acting Ombudsman said that a different approach is required for this cohort.

The CPT recently performed an ad hoc visit to Serbia, in May-June 2017, however reports from this visit are not yet available. The CPT report from their last periodic visit, in 2015, outlines that many of their previous recommendations regarding prisons have not yet been implemented. With regards to some psychiatric facilities and residential centres for people with disability, the CPT recommended increased levels of staffing, improvements to physical conditions, increases to the activities available for those being deprived of their liberty, and for facilities to abide by legal requirements regarding the maximum number of residents permitted at any one time.<sup>103</sup>

The CPT found that mechanical restraint was used differently across institutional settings. In some institutions, restraints were used infrequently, and staff generally complied with safeguards,<sup>104</sup> whereas in others, blanket authorisations of the use of restraint resulted in frequent restraints for prolonged periods.<sup>105</sup> In addition, the CPT was concerned by the practice of administering psychoactive medication in high quantities to individuals not requiring such medication, as a way of sedating residents.<sup>106</sup>

### Commentary: Serbia's NPM

The Association for the Prevention of Torture (APT) states that civil society organisations, and MDRI-S in particular, are playing a key role in ensuring the Serbian NPM is identifying and responding to the risks faced by people with disability in

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<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> South-East Europe NPM Network, 2016. South-East Europe NPM Network, Available: <http://www.varuh-rs.si/o-instituciji/podrocja-dela-varuha/varuh-kot-drzavni-preventivni-mehanizem/south-east-europe-npm-network/>

<sup>102</sup> Ibid.

<sup>103</sup> Council of Europe, 2016. *Report to the Government of Serbia* op cit., pp78-100.

<sup>104</sup> Ibid, p83.

<sup>105</sup> Ibid, pp84, 92.

<sup>106</sup> Ibid, pp84, 93.



institutional settings.<sup>107</sup> As such, the human rights knowledge and monitoring experience of these civil society organisations is vital to the success of this NPM.<sup>108</sup> MDRI-S was involved in a number of visits in 2016, accompanying representatives from the Ombudsman's office to facilities such as the Veternik Residential Centre for Children and Youth with Development Problems, institutions and 'homes' for adults and older people, and units for adults and older people with 'mental disabilities'. In addition, MDRI-S, has been running various training events on disability rights and torture, and providing monitoring insights during joint visits, strengthening the disability awareness of the NPM and monitoring staff.<sup>109</sup>

This model appears to be making progress for people with disability in a range of places of detention in Serbia, or at the very least, is bringing some abusive institutional practices to light. Recent NPM reports, for instance, highlight some key concerns regarding the facilities and/or conditions in which people with disability are deprived of their liberty. Recommendations regarding psychiatric hospitals and social welfare homes for people with disability have outlined that the treatment of people with disability in these settings must be improved.<sup>110</sup> The NPM has raised concerns, for instance, with the practice of some psychiatric hospitals placing restrained patients in the same rooms as other unrestrained patients,<sup>111</sup> placing children with adults, the over-crowding of such institutions and the lack of privacy afforded to individuals being deprived of their liberty in these settings.<sup>112</sup> Many of these recommendations echo those made by the CPT in 2015.

Reports have also highlighted that it is problematic that many people with disability are placed in facilities located far away from their communities and/or social networks.<sup>113</sup> Indeed, the NPM has made recommendations around 'decentralisation', and the importance of moving the care and treatment of people with disability (including those with psychosocial disability) into the community, and 'abandoning the practice of a long-term holding of persons with disabilities in a robust, dislocated social welfare homes.'<sup>114</sup> Another recommendation has been made regarding involving people with disability in decision-making processes, and providing sufficient and appropriate information to people to allow them to express their will and desire.<sup>115</sup>

Although many of these recommendations still require implementation, the NPM appears to be very promising in addressing both ill-treatment in facilities as well as addressing broader concerns relating to the institutional confinement of people with disability. Serbia's NPM has recently reported an improved status of those deprived of their liberty, and that this improved status has been evident during unannounced visits as well as unsupervised discussions with detainees.<sup>116</sup>

Although there are challenges to this model, such as coordinating a range of civil society organisations with diverse interests and expertise, there are also many

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<sup>107</sup> The Association for the Prevention of Torture, 2016. *Putting prevention into practice: 10 years on: the Optional Protocol to the UN Convention against Torture*, p17. Available: [http://www.ap.t.ch/content/files\\_res/putting-prevention-into-practice-opcat10.pdf](http://www.ap.t.ch/content/files_res/putting-prevention-into-practice-opcat10.pdf)

<sup>108</sup> Ibid, p19.

<sup>109</sup> Ibid, p20.

<sup>110</sup> The Republic of Serbia: Protector of Citizens 2016 op cit., p12.

<sup>111</sup> Ibid, p51.

<sup>112</sup> Ibid, pp55, 86-87.

<sup>113</sup> Ibid, p12.

<sup>114</sup> Ibid, pp52-55.

<sup>115</sup> Ibid, p87.

<sup>116</sup> The Republic of Serbia: Protector of Citizens 2016 op cit., pp36-37.

benefits. It will be interesting to see how it continues to function in the next few years, and what impact additional unannounced visits will have.

## **New Zealand Case Study**

New Zealand ratified OPCAT in 2007 and has designated five pre-existing organisations as NPMs. Each of the organisations has a specific thematic focus.

These bodies are:

**The Human Rights Commission:** This is the Central NPM for New Zealand. Its role includes:

- **Co-ordinating with the other NPMs to assist in identifying issues they may be facing;**
- **Co-ordinating and maintaining NPM procedures;**
- **Providing human rights advice for civil society groups;**
- **Liaising with the SPT, State government and any other national or international authorities; and**
- **Creating the NPM Annual Report for OPCAT.**

**The Human Rights Commission does not participate in the monitoring of facilities, but rather plays an organisational role.**

**The Ombudsman's Office:** The Ombudsman's Office is the broadest monitoring body in New Zealand and is responsible for inspecting prisons, immigration detention facilities, and health and disability places of detention. This body is the main point of interest for the New Zealand case study.

**The Children's Commissioner:** **This organisation monitors children and young people in residences under the *Children, young persons, and their families Act 1989 (CYPFA)*. The Children's Commissioner's work is aligned with the UN Convention on the Rights of the Child, which includes the protection of children with disability.**

**The Police Complaints Authority:** **This body is designated to monitor people who are being held in Police cells and other types of Police custody. Their review in 2013/2014 included a concern around the lack of alternatives to police custody for people with suspected mental impairments.**<sup>117</sup>

**The Judge Advocate Groups: (Also known as the Inspector of Penal Establishments) This body monitors Defence Force detention facilities.**

### New Zealand's definition of 'places of detention'

New Zealand states that the term 'places of detention' should include non-traditional facilities such as aged care centres, dementia units, compulsory care facilities, community-based homes, residences for people with disabilities and boarding schools. However, the New Zealand NPM system does not currently monitor the above facilities. The New Zealand Human Rights Commission has suggested that these 'forgotten places' should be prioritised, as "there is less oversight and potentially

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<sup>117</sup> New Zealand's Human Rights Commission, 2014. *2013/14 Annual report*, p11. Available: <https://www.hrc.co.nz/files/7014/2398/7092/2014-OPCAT-Annual-Report.pdf>

greater risk for those detained”.<sup>118</sup> They go on to express concern at the “sporadic and anecdotal evidence of ill-treatment in group homes and boarding schools, including indecent assault, sexual violation and solitary confinement”.<sup>119</sup>

The SPT has commented that an NPM body should inspect these facilities. However, if the Ombudsman office were to include aged care centres alone, then their total number of health care facilities would reach 200, which would require additional funding and a review of their current resource structure.

In 2015, the NPM decided to focus the second part of its 2014-2015 annual report on mental health in detention, and outlined the need for ongoing and collaborative work to improve conditions in these facilities.<sup>120</sup> The NPM has also outlined that this type of thematic focus will be implemented in its future work and reporting.

### The Ombudsman’s Office:

*Where the Ombudsman inspects:*

**The Ombudsman’s monitoring process involves visiting a range of detention facilities, both formally and informally. These places of detention include 18 prisons, 79 health and disability places of detention, 1 immigration detention facility, 4 childcare and protection residences, and 5 youth justice residences.**<sup>121</sup>

**Over the 2014/15 monitoring period the Ombudsman’s office carried out 40 visits to places of detention, with 29 visits being unannounced.**<sup>122</sup>

*Ombudsman staff:*

The Ombudsman’s office initially appointed two inspectors to assist them to fulfil their responsibilities as an NPM body. In 2015, this was increased to a total of four inspectors.<sup>123</sup>

The Ombudsman occasionally utilise mental health experts and social workers to assist in inspecting the health care facilities.<sup>124</sup> In previous years, the office has noted that unless the team is extended then the inspections will only focus on high-risk areas within facilities, as opposed to the full facility.<sup>125</sup> This raises the concern of truthful insight when only a minor portion of a facility is being visited – however it is hoped that the recent appointment of an additional two inspectors will allow the Ombudsman to visit a wider range of settings.

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<sup>118</sup> New Zealand’s Human Rights Commission, 2013. *OPCAT in New Zealand five year review*, p54. Available:

[http://www.apr.ch/content/files/npm/asiapacific/New%20Zealand\\_NPM%20review%202007-2012.pdf](http://www.apr.ch/content/files/npm/asiapacific/New%20Zealand_NPM%20review%202007-2012.pdf)

<sup>119</sup> New Zealand’s Human Rights Commission 2014 op cit., p30.

<sup>120</sup> New Zealand’s Human Rights Commission, 2015. *Monitoring Place of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture – 1 July 2014 to 30 June 2015*, p3. Available:

[http://www.ombudsman.parliament.nz/system/paperclip/document\\_files/document\\_files/1580/original/monitoring\\_places\\_of\\_detention\\_2015.pdf?1466558391](http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/1580/original/monitoring_places_of_detention_2015.pdf?1466558391)

<sup>121</sup> Ibid, p26.

<sup>122</sup> Ibid, p26.

<sup>123</sup> The Association for the Prevention of Torture (APT), 2016. *New Zealand OPCAT status*, Available:

[http://www.apr.ch/en/opcat\\_pages/opcat-situation-52/?pdf=info\\_country](http://www.apr.ch/en/opcat_pages/opcat-situation-52/?pdf=info_country)

<sup>124</sup> New Zealand’s Human Rights Commission 2013 op cit., p21.

<sup>125</sup> Ibid.

In 2014, all Ombudsman staff undertook a disability training workshop and the organisation have confirmed that people with disabilities are employed at the Ombudsman office. However, these employees are not involved within the inspecting process.

#### *How the Ombudsman inspects:*

Although the OPCAT sets out the purpose and authority of NPMs, it does not provide a framework of how the preventive monitoring should be carried out. The Ombudsman group has developed a procedure which they believe is applicable to all detention contexts.

Their approach involves:

- Preparation:
  - Before the visit the NPM collects and collates information about the specific facility to identify objectives and potential areas of interest.
  
- The visit:
  - Whilst visiting the facility the Ombudsman office focus on:
    - The treatment of people within the facility, including complaints of ill-treatment, the use of isolation, force or restraints;
    - Protection measures, including record keeping, complaint process, and access to information about detainee's rights;
    - Conditions, including available facilities, accommodation, hygiene, and food;
    - Activities, including education, exercise, contact to family and support networks;
    - Access, including to appropriate health care; and
    - Staffing, including staff ratio, conduct, and level of training.
  
- After the visits:
  - The NPM will discuss their findings with the relevant staff and provide an opportunity for an initial response.
  
- The report:
  - The reports that are created after each inspection are based on qualitative and observational data that was collected during the inspection. At no point does the Ombudsman discuss using statistical data. Depending on the institution, the generated report may be made available to the public. However, the Ombudsman typically does not make its reports available to the public, but rather share them confidentially with the facility and the Central NPM. Making the reports available to the public (and standardising this practice across NPM bodies) would increase the transparency of the NPMs as well as the facilities.<sup>126</sup>

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<sup>27</sup> Ibid, p45.

The Ombudsman's office is also one of the monitoring bodies for the CRPD, and have confirmed that this convention "informs all of [their] work including [their] NPM monitoring function" in both mainstream and specialist facilities.<sup>127</sup> This includes the concept of reasonable accommodation, which the Ombudsman has recently produced resources on, providing guidance on this topic for both people with disability and service providers.

#### *Health and disability places of detention:*

During the 2014/15 Ombudsman's inspections, they noted lots of positive findings and good practice in many health and disability centres. However, three key areas were noted for improvements, including bed occupancy rates, restraint training for staff and the use of seclusion.<sup>128</sup>

Evidently, work is still required in some areas. For example, during 2012/13 the Ombudsman noted that two facilities were using 'night safety procedures' to justify locking patients in their rooms overnight. When the Ombudsman returned to these facilities in 2013/14 it appeared that the blanket policy had been replaced with individual night safety plans.<sup>129</sup> However, in March 2015 it was discovered that all service users in one of the facilities were on a 'night safety plan', with no evidence of routine review or consideration of these arrangements.<sup>130</sup> This illustrates the importance of regular inspections for the NPM to assess the implementation of recommendations.

The use of seclusion has been identified as an issue in several facilities over the past few years, particularly the *Haumietikitiki* Unit. This facility is one of the two national secure facilities and often receives 'challenging' patients. Some of the patients in this facility may require spending time in a seclusion/de-escalation area, but during their inspection the Ombudsman met two patients who have been permanently sleeping in seclusion rooms for over twelve months.<sup>131</sup> The Ombudsman recommended that "immediate, alternative accommodation needs to be sourced for this client and others in a similar position".<sup>132</sup>

The Ombudsman's office noted in their 2012/13 report that one facility did not have doors that were lockable from the inside. They saw this as inadequate to maintain the patient's privacy and dignity. Other facilities had lockable doors, which could be overridden by staff in the case of an emergency. The Ombudsman's office recommended that the Ministry of Health introduce a dialogue in order to find an "appropriate balance between protecting rights and managing risk in such situations".<sup>133</sup> This issue was not referred to in their subsequent reports – indicating that not all facility concerns are monitored through a follow up visit.

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<sup>127</sup> Murphy, Sarah. Principal Advisor at the Office of the Ombudsman: personal correspondence.

<sup>128</sup> New Zealand's Human Rights Commission 2015 op cit., p31.

<sup>129</sup> New Zealand Ombudsman, 2014. *2013/14 Annual Report*, p46. Available: [http://www.ombudsman.parliament.nz/system/paperclip/document\\_files/document\\_files/871/original/annual\\_report\\_2013-2014.pdf?1413323386](http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/871/original/annual_report_2013-2014.pdf?1413323386)

<sup>130</sup> New Zealand's Human Rights Commission 2015 op cit., p31.

<sup>131</sup> New Zealand's Human Rights Commission 2014 op cit., p25.

<sup>132</sup> Ibid.

<sup>133</sup> New Zealand Human Rights Commission and the New Zealand Ombudsman, 2013. *Making disability rights real*, Available: [http://www.ombudsman.parliament.nz/system/paperclip/document\\_files/document\\_files/855/original/making\\_disability\\_rights\\_real\\_full\\_report\\_2012-2013.pdf?1407382487](http://www.ombudsman.parliament.nz/system/paperclip/document_files/document_files/855/original/making_disability_rights_real_full_report_2012-2013.pdf?1407382487)

In 2015, the NPM performed a thematic review of mental health in detention, and the experiences of people with psychosocial disability in places of detention. This review outlined that providing appropriate treatment for people with psychosocial disability being detained in places of detention was a key challenge.<sup>134</sup> Ultimately, the NPM recommended that the needs of these individuals be addressed comprehensively, that NPMs engage with places of detention regarding how to address mental health in detention, and that places of detention prioritise the implementation of NPM recommendations regarding mental health.<sup>135</sup> A key challenge identified by the Ombudsman was the disproportionate and often prolonged use of seclusion and restraint in health and disability places of detention.<sup>136</sup>

*The Ombudsman's recommendations for New Zealand:*

**All of the New Zealand NPMs make recommendations when remedial action is necessary. They also include good practices and housekeeping points for instances where action is “desirable but not essential”.<sup>137</sup> This practice endorses the positive and proactive relationship the NPM should have with the facilities it inspects.**

In 2014/15 the Ombudsman made 63 recommendations, 52 of which were accepted or partially accepted. 34 of these recommendations were for health and disability places of detention, all but 1 of which were accepted.<sup>138</sup>

### Relationship to other international bodies

*The SPT visit to New Zealand:*

In 2013, the SPT carried out their first visit to New Zealand, and with the permission of the New Zealand government, the SPT report has been made available to the public. During this visit the delegation visited 36 places of detention, including court cells, prisons, defence force facilities, immigration facilities and residences for children and young people. There were no specialised health or disability facilities visited.<sup>139</sup>

Many of their recommendations were based on the effectiveness of New Zealand's NPM bodies, as well as the need for improved national legislation, including withdrawing New Zealand's UNCAT reservations.<sup>140</sup> The SPT acknowledged that there needs to be a focus on health and mental health in detention facilities in New Zealand, as there was no national strategy on the provision of mental health care in places of detention.<sup>141</sup> The SPT noted that the majority of correction facilities they inspected had high rates of chronic and acute mental disorders and although there

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<sup>134</sup> New Zealand's Human Rights Commission 2015 op cit., p33.

<sup>135</sup> Ibid, p34.

<sup>136</sup> Ibid, p39.

<sup>137</sup> The Association for the Prevention of Torture (APT), 2016. *New Zealand country report*. Available at [http://www.apr.ch/en/opcat\\_pages/npm-internal-organisation-15/?pdf=info\\_country](http://www.apr.ch/en/opcat_pages/npm-internal-organisation-15/?pdf=info_country)

<sup>138</sup> New Zealand's Human Rights Commission 2015 op cit., p28.

<sup>139</sup> The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (SBT) 2014. *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand*. 3 article 7. Available: [http://tbinternet.ohchr.org/Treaties/CAT-OP/Shared%20Documents/NZL/CAT\\_OP\\_NZL\\_1\\_7242\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT-OP/Shared%20Documents/NZL/CAT_OP_NZL_1_7242_E.pdf)

<sup>140</sup> This reservation is on article 32 and 37. The latter involves placing children into the same prison as adults if juvenile facilities are unavailable. Ibid., pp5-6, article 19.

<sup>141</sup> Ibid, article 58.

appeared to be medication readily available, they questioned if there was adequate treatment and health care staff.<sup>142</sup> They concluded that the capacity to address mental health in places of detention does not match the needs of the detainees.<sup>143</sup> The SPT recommended that “a national policy be developed [to] ensure appropriate access to health care and mental health care services across the criminal justice system”.<sup>144</sup>

Both the SPT and facility officers acknowledged their concern with medical assessments being completed by unqualified staff in a range of facilities.<sup>145</sup> The SPT recommended that steps be taken by the State party to ensure that an adequate referral system is established and that officers are provided training in the field of mental health.<sup>146</sup>

Below is a summary of the SPT’s observations and recommendations that were made in relation to people with disability in different New Zealand detention facilities.

- **Correctional facilities:** The SPT saw conditions that could be classified as ill-treatment. In their inspections they noted that prisoners were often held in ‘at risk units’ for prolonged periods of time, rather than being transferred to an appropriate psychiatric facility.<sup>147</sup> The SPT recommended that, “the State party provide, as a matter of urgency, adequate and appropriate access to professional care services in order to meet the mental health needs of detainees”.<sup>148</sup>
- **Police facilities:** The SPT commended the practice of having a mental health nurse inside the Police station. They believe that this resulted in better monitoring and recommended that the State apply this practice nationally.<sup>149</sup>
- **Youth Justice facilities:** The SPT was informed that young people with mental health needs were not receiving appropriate treatment due to a shortage of adequate care facilities.<sup>150</sup> The SPT recommended that the State establish a youth mental health service to ensure the needs of children and young people are being met.<sup>151</sup>
- **Immigration facility:** The SPT only inspected one immigration facility, which they found to be inadequate with a lack of sanitary facilities. They believed that this would subject occupants to “undignified living conditions”.<sup>152</sup> Although the facility was currently undergoing refurbishment, the SPT suggested that the facility did not meet the requirements of reasonable accommodation and recommended that the refurbishment be done as a matter of urgency.<sup>153</sup>

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<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid, article 59.

<sup>145</sup> Ibid, article 60.

<sup>146</sup> Ibid, article 61.

<sup>147</sup> Ibid, article 64.

<sup>148</sup> Ibid, article 65.

<sup>149</sup> Ibid, article 62.

<sup>150</sup> Ibid, article 66.

<sup>151</sup> Ibid, article 67.

<sup>152</sup> Ibid, article 103.

<sup>153</sup> Ibid, article 105.



The SPT report stated a key issue was the funding and resources given to the NPM from the State. As the NPM bodies were pre-existing, the State had not provided any additional funding for them to complete the NPM tasks. The SPT remarked that “should the current lack of human and financial resources available to the NPM not be remedied without delay, the State party will inevitably find itself in the breach of its OPCAT obligations”.<sup>154</sup>

In the NPM’s 2013/14 Annual Report, the SPT’s concerns were acknowledged by the NPM, and they pledged to make progress in these areas.<sup>155</sup> This demonstrates the beneficial relationship that the two-tier monitoring system can have.

#### *CAT’s review of New Zealand:*

The Committee against Torture (CAT) undertook a periodic review of New Zealand in 2015. Many of its recommendations echoed the SPT report; however they did expand in some areas. They were particularly focused on the use of seclusion in mental health facilities, with seclusion reportedly being used on patients for purposes of punishment, discipline and protection, as well as for health-related reasons.<sup>156</sup> They recommended that the use of solitary confinement and seclusion only be used as a “measure of last resort, for as short a time as possible, under strict supervision and with the possibility of judicial review”.<sup>157</sup> They also recommended that the State “prohibit the use of solitary confinement and seclusion for juveniles, persons with intellectual or psychosocial disabilities, pregnant women, women with infants and breastfeeding mothers, in prison and in all health-care institutions, both public and private”.<sup>158</sup>

The Committee voiced their concern that up to 70% of people in detention facilities have either a learning disability or mental illness.<sup>159</sup> They also voiced their distress that nearly 200 allegations of torture at one facility had not been investigated.<sup>160</sup> The CAT noted that “investigations into all allegations of ill treatment in prisons and health-care institutions, both public and private [must be undertaken]”.<sup>161</sup>

Such recommendations illustrates that the role of the SPT and CAT are distinct and supportive, rather than one of the bodies being redundant to the other.

#### Commentary: New Zealand’s NPM

In 2012, the New Zealand Human Rights Commission noted that OPCAT had been valuable in “identifying issues and situations that are otherwise overlooked, and in providing authoritative assessments of whether new developments and specific initiatives will meet the international standards for safe and humane detention”.<sup>162</sup> They go on to state in 2014, that by implementing the OPCAT mandate there had been an improvement in the conditions of detention and in the way people within detention

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<sup>154</sup> Ibid, article 12.

<sup>155</sup> New Zealand’s Human Rights Commission 2014 op cit., pp4-5.

<sup>156</sup> The Committee against torture (CAT), 2015, *Concluding observations on the sixth periodic report of New Zealand*, Section 15. Available: [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/NZL/CAT\\_C\\_NZL\\_CO\\_6\\_20487\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/NZL/CAT_C_NZL_CO_6_20487_E.pdf)

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> JSCOT 2012 op cit., 6,9.



had been treated.<sup>163</sup> A key reason for these positive results is the constructive working relationship between the NPMs and the places of detention. These relationships enabled “constructive dialogue, which is fundamental to effective prevention. It also demonstrates an evolving culture of respect for the human rights of people who are detained”.<sup>164</sup>

The NPMs have found that ill-treatment in a detention facility is likely to be unintentional and is more likely a result of capability or resourcing issues, which can be identified and addressed through preventive monitoring.<sup>165</sup>

Unlike other States that have used existing bodies as their NPM, New Zealand NPMs have successfully managed to separate their NPM duties and their pre-existing responsibilities. However, it is worthwhile noting that the New Zealand NPM system is not without flaws and limitations, including a gap in mental health expertise.<sup>166</sup> Nonetheless, it is overall a successful NPM model that could be used as an example for future OPCAT members.

## United Kingdom of Great Britain Case Study

The United Kingdom of Great Britain (UK) ratified the OPCAT in 2003 and initially designated 18 pre-existing organisations as NPMs. Another three institutions have subsequently been appointed to the UK NPM. These bodies are coordinated by [Her Majesty's Inspectorate for Prisons \(HMIP\)](#) and include:

- Independent Reviewer of Terrorism Legislation

### England and Wales

- Her Majesty's Inspectorate of Prisons (HMIP)
- Independent Monitoring Board (IMB)
- Independent Custody Visiting Association (ICVA)
- Her Majesty's Inspectorate of Constabulary (HMIC)
- Care Quality Commission (CQC)
- Healthcare Inspectorate of Wales (HIW)
- Children's Commissioner for England (CCE)
- Care and Social Services Inspectorate Wales (CSSIW)
- Office for Standards in Education, Children's Services and Skills (OFSTED)
- Lay Observers

### Scotland

- Her Majesty's Inspectorate of Prisons for Scotland (HMIPS)
- Her Majesty's Inspectorate of Constabulary for Scotland (HMICS)
- Scottish Human Rights Commission (SHRC)
- Mental Welfare Commission for Scotland (MWCS)

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<sup>163</sup> New Zealand's Human Rights Commission 2013 op cit., p34.

<sup>164</sup> Ibid, p36.

<sup>165</sup> Ibid, p37.

<sup>166</sup> Ibid, p10.

- Independent Custody Visitors Scotland
- Social Care and Social Work Improvement Scotland, better known as Care Inspectorate (CI)

### Northern Ireland

- Independent Monitoring Boards (Northern Ireland)
- Criminal Justice Inspection Northern Ireland (CJINI)
- Regulation and Quality Improvement Authority (RQIA)
- Northern Ireland Policing Board Independent Custody Visiting Scheme (NIPBICVS)

### Isle of Man

- Her Majesty's Inspectorate of Prisons (HMIP)

This table shows the focus area of each UK NPM body.<sup>167</sup>

| DETENTION SETTING  | Jurisdiction   |                      |               |                                 |
|--|--|----------------------|---------------|---------------------------------|
|  | England  | Wales                | Scotland      | Northern Ireland                |
| Prisons  | HMI Prisons with CQC and Ofsted  | HMI Prisons with HIW | HMIPS with CI | CJINI and HMI Prisons with RQIA |
|  | IMB  |                      |               | IMBNI                           |
| Police custody   | HMIC and HMI Prisons   |                      | HMICS         | CJINI with RQIA                 |
|  | ICVA   |                      | ICVS          | NIPBICVS                        |
| Court custody  | HMI Prisons & Lay Observers  |                      | HMIPS         | CJINI                           |
| Children in secure accommodation   | Ofsted (jointly with HMI Prisons in relation to secure training centres) | CSSIW                | CI            | RQIA                            |
|  |  |                      |               | CJINI                           |
| Children (All settings)  | OCC  |                      |               |                                 |
| Detention under mental health law  | CQC  | HIW                  | MWCS          | RQIA                            |
| Deprivation of liberty <sup>2</sup> and other safeguards in health and social care | CQC  | HIW                  | CI and MWCS   | RQIA                            |
|  |  | CSSIW                |               |                                 |
| Immigration detention  | HMI Prisons  |                      |               |                                 |
|  | IMB  |                      |               |                                 |
| Military detention   | HMI Prisons and IMB  |                      |               |                                 |
| Customs custody facilities   | HMIC and HMI Prisons   |                      |               |                                 |

### The UK's definition of 'places of detention'

The UK system clearly covers more facilities than any other NPM, however whether or not all of their monitoring fulfils the OPCAT mandate is debateable, as each organisation has different powers, methods and mandates. Some of the specific organisations will be discussed below.

<sup>167</sup> A slightly updated version of this table is available in: Her Majesty's Prison Inspectorate (HMIP), 2015. *Monitoring places of detention: Sixth Annual Report of the United Kingdom's National Preventive Mechanism 1 April 2014-31 March 2015*. 2013/14 NPM Annual report, available: [http://www.apt.ch/content/files/npm/eca/UK\\_NPM%20Annual%20Report%202014-15.pdf](http://www.apt.ch/content/files/npm/eca/UK_NPM%20Annual%20Report%202014-15.pdf)

A key critique that has been levelled against all of the UK NPM bodies is that their inspections are based on different criteria, making it impossible to realistically compare the organisations inspections and inspected facilities to one another to achieve a genuine idea of ill-treatment within places of detention in the UK.

#### *Central Body: Her Majesty's Inspectorate of Prisons*

HMIP is the central NPM body and plays a key role in coordinating the other NPMs. They have confirmed that people with disability are employed at a range of UK NPM bodies, including HMIP.<sup>168</sup>

HMIP also plays an active inspecting role, which is in contrast to New Zealand's coordinating body. The HMIP body is designated for inspecting prisons, immigration facilities, military detention facilities, police custody cells and transport across all of the UK.

Out of all of the organisations, HMIP appears to have the most extensive monitoring criteria.

HMIP's Senior Policy Officer Louise Finer stated that "HMIP conducts all of its inspections in line with its 'Expectations', which are independent human rights based criteria used to assess the treatment and conditions for prisoners/detainees".<sup>169</sup> This criteria specifically involves people with disabilities within its 'respect' checklist – which is a quantitative survey and is specialised for male prisons, female prisons and immigration detention centres.<sup>170</sup> Finer states that from this survey they can compare the "responses of disabled prisoners with the responses of non-disabled prisoners in order to understand the experience of this prisoner group compared to the main population".<sup>171</sup> The level of experience for people with disability was often recorded as 'significantly worse'.<sup>172</sup>

When creating this 'Expectations' criteria, HMIP used a range of international human rights standards, including the CRPD. They also took into account national standards and legislation – however as this body inspects in all the included nations, this legislation is not attached to any one nation. This criteria was independently created, without guidance from the government, or monitored facilities.<sup>173</sup> This is a key point and confirms HMIP's independence as an NPM body and the universal standard that all UK prisons are inspected through.

#### *Health and disability focused NPM bodies*

Some of these monitoring organisations are focused on health and disability; however this focus pre-dates the ratification of OPCAT and their designation as NPM bodies. These bodies are split into two groups, although there is an apparent overlap. The two

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<sup>168</sup> Finer, Louise. Senior Policy Officer and National Preventive Mechanism Coordinator: personal correspondence.

<sup>169</sup> Ibid.

<sup>170</sup> Expectations for prisons for male prisons is available: <http://www.justiceinspectors.gov.uk/prisons/wp-content/uploads/sites/4/2014/02/adult-expectations-2012.pdf>

<sup>171</sup> Finer, Louise op cit.

<sup>172</sup> HMIP 2014 op cit.

<sup>173</sup> Finer, Louise op cit.

groups are 1) Detention under mental health law; and 2) Deprivation of liberty and other safeguards in health and social care.

The organisations that cover one or both of these thematic areas include:

- Care Quality Commission (CQC)
- Healthcare Inspectorate of Wales (HIW)
- Care and Social Services Inspectorate Wales (CSSIW)
- Mental Welfare Commission for Scotland (MWCS)
- Care Inspectorate (CI)
- Regulation and Quality Improvement Authority (RQIA)

### Care Quality Commission (CQC)

The CQC is the central body for both detention under Mental Health Law, and deprivation of liberty and other safeguards in health and social care, in England. In this role, they visited 1,292 healthcare facilities in 2013/14, including care homes, hospitals, in-home service, doctors' clinics, dentists, mental health services, and community services.<sup>174</sup>

The CQC plays a reactive role in monitoring facilities that have had complaints made about them, and works in accordance with the English *Mental Health Act*. As part of their role, they encourage members of the public to leave feedback on facilities. Based on this feedback, the organisation inspects the facilities. They have also introduced regulatory visits, however there is limited information about this.

[The CQC has confirmed that people with disability are employed within the organisation and assist with their inspection process.](#)<sup>175</sup>

In 2012, the CQC commissioned research with Bristol University into the monitoring of mental health in different countries, including Australia. This indicates that they are seeking to further improve their monitoring methods. This report will be discussed in a later section.

Besides their reactive methods, the CQC appears to be an adequate NPM body; however they must begin separating their NPM work from their normal inspecting duties. As this is not yet the case, I would question how many of their 1,292 inspections were actually NPM inspections.

### Healthcare Inspectorate of Wales (HIW)

This NPM body is the central body for both detention under mental health law, and deprivation of liberty and other safeguards in health and social care, in Wales. HIW inspects a range of health care facilities including hospitals, GP's, mental health services, and dental practices.

The HIW produces statistical data to illustrate the level of satisfaction within healthcare facilities across Wales. However, they acknowledge that this data has limitations and

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<sup>174</sup> Her Majesty's Prison Inspectorate (HMIP), 2014. *Monitoring places of detention: Fifth Annual Report of the United Kingdom's National Preventive Mechanism 2013-14*, available:

[http://www.apt.ch/content/files/npm/eca/UK\\_NPM%20Annual%20Report%202013-14.pdf](http://www.apt.ch/content/files/npm/eca/UK_NPM%20Annual%20Report%202013-14.pdf)

<sup>175</sup> Kinton, Mat. National Mental Health Act Policy Advisor: personal correspondence.

cannot be used to assess the overall treatment within facilities. To create a better understanding of the health care facilities, the HIW perform announced and unannounced inspections across Wales.

Over 2013/14 the HIW visited 24 mental health/learning disability facilities. Unfortunately, the rights of people with disability do not appear to be a central element to their broader inspections. Their view of disability rights is based on the *Mental Health Act of 1983*. Under this act, individuals can be detained in hospital, and “in some circumstances they can be given treatment to which they have not consented”.<sup>176</sup>

The inspectors of mental health facilities are experts who have been transferred from the Mental Health Act Commission. During their inspections members of the HIW talk to individuals who have been detained, or are subjected to restrictions due to the Act. The purpose of these discussions is to understand the patients’ views on their care and to ensure they understand why they have such restrictions placed upon them.

The HIW is also undertaking inspections on the welfare of vulnerable people within police custody, with individuals with mental health problems being a particular focus.<sup>177</sup>

Care and Social Services Inspectorate Wales (CSSIW)

**The CSSIW jurisdiction as an NPM body overlaps with HIW to some extent. Their role includes safeguarding access to mental health representatives for people within detention throughout Wales. They also have the ability to give enforcement notices to facilities that are not meeting the requirements for the Care Standards Act.**<sup>178</sup>

Mental Welfare Commission for Scotland (MWCS)

The MWCS is the designated body for detention under mental health law in Scotland. This organisation undertook a series of visits to women in prisons with mental health needs. They provided recommendations based on patient needs and staff training. The MWCS also published investigations into two cases of people, with mental health problems and a learning disability respectively, who were in the criminal justice system, when this might have been avoided with better support from the care system.<sup>179</sup>

This organisation focuses on protecting and promoting the rights of people with mental health problems, learning disabilities, dementia, and other related conditions. Each inspection is undertaken by health and social care professionals.

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<sup>176</sup> HMIP 2014 op cit., pp16-17.

<sup>177</sup> Ibid, p21.

<sup>178</sup> CSSIW website, available: <http://www.wherestand.org/index.php/adults/care-standards/inspectorate>

<sup>179</sup> HMIP 2014 op cit., p22.

The MWCS specifically monitor the application of the *Mental Health (Care & Treatment) (Scotland) Act 2003* and the welfare parts of the *Adults with Incapacity (Scotland) Act 2000*. The MWCS is informed when a person is detained under the Mental Health Act, if they have been detained without consent, and if they have been given a compulsory treatment order. Once the MWCS has been notified, they review the individual's paperwork and contact the individual and the person responsible for their treatment to discuss any concerns. If the MWCS believes that there is a serious issue, then they have the right to visit the individual and undertake an investigation.

### Care Inspectorate (CI)

The CI plays a key NPM role in monitoring detention facilities in Scotland. They are the central monitoring body for prisons, children in secure facilities, and the deprivation of liberty and other safeguards in health and social care.

All care facilities in Scotland must be registered with the CI before operating. Once registered, the CI inspects and grades the facility and has the ability to close down services if they do not meet the *National Care Standards*. These national standards were created by the Scottish Ministers, and are only used in Scotland, meaning that the majority of UK NPMs are not inspecting facilities with these criteria.

The CI are currently regulating 14,000 places of care throughout Scotland. In 2014, the CI inspected 8,000 facilities, processed 3,000 complaints, and served 59 enforcement notices. As the CI was set up by the Scottish government, questions should be raised about their level of independence – a requirement in the NPM mandate.

### Regulation and Quality Improvement Authority (RQIA)

**The RQIA is Northern Ireland's health and social care regulator. This independent body supports and recommends improvements to health and social care facilities through regular inspections and reviews.**

This NPM body monitors facilities in accordance to the *Health and Social Care (Reform) Act (NI) 2009*. Under this act, the RQIA has the responsibility and authority to protect people with mental illness and learning disabilities; including “preventing ill treatment; remedying any deficiency in care or treatment; terminating improper detention in a hospital or guardianship; and preventing or redressing loss or damage to a patient's property”.<sup>180</sup>

This body appears to be an adequate NPM body, however as their inspections are based on a national framework it is difficult to compare them to the findings of other UK NPM bodies.

### Immigration Facilities

Two designated bodies monitor detention facilities. However, there is limited information on their recommendations or observations. The CPT visited the UK in

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<sup>180</sup> RQIA website available: [http://www.rqia.org.uk/what\\_we\\_do/index.cfm](http://www.rqia.org.uk/what_we_do/index.cfm)



2012 where they expressed concerns about the “indefinite nature of detention”.<sup>181</sup> HMI Prisons have presented a proposal suggesting that minimum standards of immigration detention be set in order for NPMs to meet their monitoring mandates.<sup>182</sup>

### Relationship to other international bodies

Both the CAT and the SPT have expressed concerns with the UK NPM model. Although it is likely the most extensive monitoring model of all OPCAT signees, it is difficult to determine its effectiveness due to the individual NPM bodies having no universal standard across the UK. The SPT have noted that although there is a “clear advantage” to the UK NPM model, the multi-member system runs the risk of sending ‘mixed messages’ stating that all NPM members need to improve their understanding of OPCAT.<sup>183</sup>

The CAT noted that the UK model needs to introduce clear distinctions between the organisations work with NPM and their broader functions.<sup>184</sup>

The UK NPMs have also mentioned that the complexity of their system has been a challenge to coordinate,<sup>185</sup> raising the question of whether their multi-organisation is a better or even adequate method for OPCAT monitoring bodies.

In response to this internal and external scrutiny, the NPM has begun to strengthen its governance, activity and membership, in the hopes of improving information sharing and preventing ‘mixed messages’ between the NPM bodies.<sup>186</sup> They are also aiming to strengthen the capacity of all NPM members, building and sharing knowledge through the creation of new training materials.

### Commentary: UK’s NPM

Although the UK NPM body appears to be the most extensive, it is also the most complex. I question if any/many of the inspecting organisations have changed their inspection methods upon becoming an NPM body. This is not to suggest that all of the organisations are not meeting the NPM mandate, with the HMIP appearing to have extensive criteria that is used to inspect all prison facilities across the UK.

At the request of the SPT, the UK NPM completed a self-assessment in 2013.<sup>187</sup> The assessment showed that overall; the NPM bodies were “largely compliant with OPCAT”.<sup>188</sup> However, whilst this is promising, the issue lies in each organisation reviewing their own body.

There are clearly positive aspects of the UK system, particularly the breadth of facilities that it monitors. In their 2013/14 report, it was noted that the places that they monitor

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<sup>181</sup> HMIP 2014 op cit., p33.

<sup>182</sup> Ibid, p34.

<sup>183</sup> Ibid, p32.

<sup>184</sup> Ibid, p33.

<sup>185</sup> Ibid, p6.

<sup>186</sup> Ibid, p53.

<sup>187</sup> This self-assessment tool is available:

<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx>

<sup>188</sup> HMIP 2014 op cit., p38.

is reviewed every year to address gaps in their system and there is no doubt that their level of monitoring is extensive. The question is, rather, if it is adequate.

Proposed changes to strengthen the NPM, such as appointing a chair and creating specific legislation that outlines the responsibilities and powers of the NPM may make this model more coherent and successful in the future.<sup>189</sup>

### **Bristol University Research Report**

This report was commissioned by the CQC to understand mechanisms of monitoring mental health in other countries. This included countries such as Australia that had not ratified the OPCAT or are currently required to have a preventive monitoring system by international law.

In the case of Australia, the report illustrated confusion due to the different and diverse mechanisms in each state. It has been argued that a streamlined independent commission would be a better alternative. I believe that this recommendation of simplifying monitoring bodies could also be used for the UK NPMs, which have inconsistent standards across the different nations.

The report recommends that monitoring organisations need to “align their mental health monitoring objectives relating to the detention of patients more specifically with the NPM obligations under OPCAT”.<sup>190</sup> The report also noted the need to create visit protocols to guide the inspections and to ensure a uniformed approach across the different NPM bodies.

Many of the university’s recommendations have already been undertaken by the earlier discussed NPMs. This includes the need to use a combination of announced and unannounced visits, and to use a mixture of qualitative and quantitative monitoring. The report notes that monitoring bodies must have a proactive and reactive approach; I would add to this that a focus primarily on reactive monitoring isn’t fulfilling the NPM preventive mandate.

### **Section Three: Australia**

*“The measure of a decent society is how it treats its most vulnerable members, and Australia risks falling behind on this measure if it drags its feet”.<sup>191</sup>*

Australia signed the OPCAT in 2009, but is yet to ratify the protocol. In early 2017, the Australian government announced its intention to ratify OPCAT by December 2017.<sup>192</sup> The government announced its intention to fund the Office of the Commonwealth Ombudsman to coordinate the inspection bodies involved in monitoring places of detention.

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<sup>189</sup> HMIP 2015 op cit., p53.

<sup>190</sup> University of Bristol, 2013. *A comparative review of international monitoring mechanisms for mental health legislation*, p3. Available: [http://research-information.bristol.ac.uk/en/publications/a-comparative-review-of-international-monitoring-mechanisms-for-mental-health-legislation\(bd83355b4-b1d0-460d-8201-0918d07001cd\).html](http://research-information.bristol.ac.uk/en/publications/a-comparative-review-of-international-monitoring-mechanisms-for-mental-health-legislation(bd83355b4-b1d0-460d-8201-0918d07001cd).html)

<sup>191</sup> Fletcher, Adam. 2012. ‘Australia and the OPCAT’, *Alternative Law Journal*, 37(4): 233-237, p237.

<sup>192</sup> Media release available: <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.aspx>



Civil society groups have long lobbied the government to commit to adopting the protocol, and in 2012 there was a National Interest Assessment by the Joint Standing Committee on Treaties (JSCOT), that found that the benefits for ratifying the OPCAT outweighed the cost and resources that such a body would require.<sup>193</sup>

This section will explore the benefits of establishing an NPM, the need for preventive monitoring within Australia's places of detention, and will end in recommendations and a suggested NPM model that could be established in Australia, taking into consideration the likely coordinating role of the Commonwealth Ombudsman.

## **Benefits of Ratifying OPCAT and Establishing an NPM**

By introducing a comprehensive monitoring system through the establishment of an NPM system, the Australian government can ensure that they are meeting their international human right obligations.

As well as improving Australia's international reputation, there is also an economic benefit of implementing an NPM. The cost saving nature of preventive monitoring has been supported through New Zealand's experience, who has stated that "preventing ill-treatment of detainees contributes to a costs saving in the use of the legal and health care systems arising from incidents of ill-treatment".<sup>194</sup>

This is also supported by the fact that \$16 million in compensation has been granted to people who experience ill-treatment in immigration detention centres.<sup>195</sup> Such treatment (any therefore compensation) could have been avoided if preventive monitoring identified such treatments, and worked with the facility to implement change.

In saying this, there is a financial responsibility placed upon the State when ratifying the Protocol. To minimise this cost, pre-existing organisations should be designated as NPM bodies, as this involves fewer resources and less financial assistance than setting up an entirely new body. In their report, JSCOT recommends that "individual jurisdictions should bear their own costs because of their responsibility for the welfare of detainees".<sup>196</sup> This is placing the responsibility of funding the NPM on the State and Territory governments. This could cause further complication, as each State and Territory would have a different number of facilities that would require monitoring, with some facilities also requiring more regular follow up visits.

Whilst I believe that it is the responsibility of each State and Territory government to ensure that facilities within their jurisdiction are allowing the NPM bodies unrestricted access; the financial burden of the OPCAT should be the obligation of the Federal government. This is not to say that the Federal government is not able to arrange financial support from the State and Territory governments, but rather that the Federal government must take ultimate financial responsibility for a *national* monitoring body.

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<sup>193</sup> JSCOT 2012 op cit., 6.40 - 6.45.

<sup>194</sup> JSCOT 2012 op cit., 6.43.

<sup>195</sup> Australian Human Rights Commission, 2012. *Consideration of Australia's ratification of the Optional Protocol to the Convention against Torture*, Article 37. Available: <https://www.humanrights.gov.au/consideration-australia-s-ratification-optional-protocol-convention-against-torture>

<sup>196</sup> JSCOT 2012 op cit., 6.42.

## Insight into Australia's 'Places of Detention'

It has been discussed throughout this report that the definition of 'places of detention' must be broad and inclusive, and inspections must be more than just reactive to complaints.

The following section is dedicated to an analysis of some of Australia's current places of detention and the forms of ill-treatment that are being committed within these facilities.

### Prisons

Prisons are key facilities for any NPM. In Australia, the Commonwealth and State/Territory Ombudsmen already inspect these facilities, albeit in largely a reactive role.

According to the Australian Bureau of Statistics, the current prison population in Australia (as of June 2016) is continuing to rise, with the number of adults in the custody of corrective services increasing from 36,134 in June 2015 to 38,845 in June 2016 (a rise of 8% in a year).<sup>197</sup> From 30 June 2015 to 30 June 2016, the number of unsentenced adult prisoners in the custody of corrective services increased by 22 per cent. As of 30 June 2016, 12,111 prisoners (or 31% of the total prison population) were unsentenced: the highest proportion in over a decade.<sup>198</sup>

The number of adult prisoners who identify as Aboriginal or Torres Strait Islander varies greatly in each state, with the percentage being as low as 8% in Victoria and as high as 84% in the Northern Territory.<sup>199</sup> The rate of female incarceration has consistently risen in the past decade, with 3094 adult women currently detained within a prison facility.<sup>200</sup> Over half of this female prison population are reported to have a diagnosed psychosocial disability.<sup>201</sup>

In a 2014 submission to CAT, it was stated that "46 per cent of prisoners identify as having a mental health issue, and that mental health issues are 2.5 times higher in the prisoner population than in the general community".<sup>202</sup>

The statistics of juvenile detention show that in 2014-15, there were about 5,600 young people under the supervision of youth justice departments in Australia.<sup>203</sup> In June 2015, around 85% of these young people were being supervised in the community, while around 885 young people being held in detention (due to crime).<sup>204</sup> The

<sup>197</sup> Australian Bureau of Statistics, 4517.0 - Prisoners in Australia, 2016: Key Findings. Available: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>

<sup>198</sup> Ibid.

<sup>199</sup> Australian Bureau of Statistics, 4517.0 - Prisoners in Australia, 2016: Aboriginal and Torres Strait Islander Prisoner Characteristics. Available: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics-5>

<sup>200</sup> Australian Bureau of Statistics, 4517.0 - Prisoners in Australia, 2016: Sex. Available:

<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Sex-7>

<sup>201</sup> Human Rights Law Centre, 2014. 'Torture and cruel treatment in Australia: Joint NGO report to the United Nations Committee Against Torture, p2. Available: [http://hrlc.org.au/wp-content/uploads/2014/10/CAT\\_NGO\\_Report\\_Australia\\_2014.pdf](http://hrlc.org.au/wp-content/uploads/2014/10/CAT_NGO_Report_Australia_2014.pdf)

<sup>202</sup> Ibid, p21. See also: Australian Institute of Health and Welfare, 'The mental health of prison entrants in Australia 2010 (Bulletin No 104, Australian Institute of Health and Welfare, June 2012) 2.

<sup>203</sup> The Australian Institute of Health and Welfare, 2015. *Youth justice in Australia 2014-15*. Available: <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129554930>

<sup>204</sup> Ibid, p1.

Australian Institute of Health and Welfare note that this number of young people in detention in 2015 has decreased from 1,027 in June 2011. However, over this four year period, young Aboriginal and Torres Strait Islanders have been increasingly represented in these numbers, with 54% of young people in detention identifying as Aboriginal or Torres Strait Islander in June 2015.<sup>205</sup>

There are no formal statistics in regard to the level of juvenile detainees with disabilities within the Australian prison system. However, in New South Wales, nearly half of all detainees have an intellectual or 'borderline' intellectual disability,<sup>206</sup> and in one study, the majority of young people were found to have a 'psychological condition' (85 per cent), with two thirds (73 per cent) reporting two or more 'psychological conditions'.<sup>207</sup>

People with disabilities within prison facilities are often placed within isolation, or high security facilities due to the lack of appropriate accommodation and support.<sup>208</sup> This could be considered ill-treatment due to the failure to provide reasonable accommodation.<sup>209</sup>

Prisoners in Australia do not have access to free health care through Medicare during their time in custody.<sup>210</sup> This means that they do not have access to independent medical treatment, which should be seen as a cause for concern.

### Unfit to stand trial

In some States and Territories, individuals who are found to be unfit to plead to a criminal charge are imprisoned without charge and without a release date. In many instances these individuals are imprisoned for longer periods of time than if they were found guilty of the crime.

Martin Wayne, Western Australian Chief Justice, has said that in many instances lawyers do not invoke the unfit to plead legislation even in appropriate cases, because they realise that "their client might end up in detention, in custody, [or] in prison for a lot longer period than they would if they simply plead guilty to the charge".<sup>211</sup>

Individuals who are found unfit to plead in Queensland, Victoria and New South Wales may be detained in psychiatric facilities. In contrast, people found unfit to plead in Western Australia and the Northern Territory are detained in prisons, usually in maximum security settings.<sup>212</sup> In Western Australia, under the *Mentally Impaired Accused Act* an individual who is deemed unfit to stand trial is either released or

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<sup>205</sup> Australian institute of Health and Welfare, 2012. *Juvenile detention population in Australia*, pvii. Available: <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129542551>

<sup>206</sup> Horin, Adele 2010. *Report Finds Disability and Disadvantage Common in Young Offenders*, Sydney Morning Herald (Sydney), 27 February 2010. Available: [www.smh.com.au/nsw/report-finds-disability-and-disadvantage-common-in-young-offenders-20100226-p95r.html](http://www.smh.com.au/nsw/report-finds-disability-and-disadvantage-common-in-young-offenders-20100226-p95r.html)

<sup>207</sup> Human Rights Law Centre 2014 op cit., p24.

<sup>208</sup> Ibid, p84.

<sup>209</sup> This has been suggested by MDAC as a recommendation to the UN Human Rights Committee to include failure to provide reasonable accommodation as ill-treatment. MDAC 2012 op cit., recommendation 8.

<sup>210</sup> Human Rights Law Centre 2014 op cit., p17.

<sup>211</sup> Herbert, Bronwyn, 2015. *Urgent reform needed in how justice system treats people with mental impairment, says Chief Justice*, ABC 7.30 report. 10 July 2015. Available: <http://www.abc.net.au/7.30/content/2015/s4271739.htm>

<sup>212</sup> McSherry, Bernadette, 2013. 'Unfit to plead': why does the law jail those with intellectual disabilities indefinitely? The Conversation. Available: <http://theconversation.com/unfit-to-plead-why-does-the-law-jail-those-with-intellectual-disabilities-indefinitely-15504>

detained indefinitely – there is no middle ground or alternatives.<sup>213</sup> This is already violating Article 14 of the CRPD, in reference to the liberty and security of a person.<sup>214</sup>

#### CASE STUDY 1: MARLON NOBLE

Marlon Noble is an Aboriginal man with an intellectual disability. In 2002, Marlon was accused of sexual assault by two girls. He was found unfit to stand trial and was imprisoned without trial in Western Australia, without being tried or convicted. Marlon was conditionally released ten years later. The alleged victims have since said Marlon Noble did not assault them in 2002.<sup>215</sup>

#### CASE STUDY 2: JASON

Jason was 12 years old when he and 4 other minors stole a car in 2003. During the police pursuit that followed, Jason ran a red light causing a fatal crash that killed his 12-year-old cousin. Jason has an intellectual disability and was left brain damaged from substance abuse. He was charged with unlawful killing, but was found unfit to plea. He was jailed indefinitely and remains in a medium security prison.<sup>216</sup>

### Immigration facilities

Australia's immigration facilities and policies have continuously been scrutinised by both national and international human right organisations.

In 2013, APT published a press release stating:

“Where people are detained, it is essential that there is transparency through regular visits by independent oversight bodies to protect the basic rights of detainees. Oversight of detention is also a vital part of an open democracy. It is truly disturbing that there is no regular, independent monitoring of Australia's offshore processing regime”.<sup>217</sup>

Furthermore, the APT notes that contrary to the Australian government's assertion,<sup>218</sup>

“Australia does bear obligations under the UN Convention against Torture for asylum seekers detained in offshore processing centres in Papua New Guinea and Nauru, because this is areas within Australia's 'effective control’”.<sup>219</sup>

<sup>213</sup> Herbert 2015 op cit.

<sup>214</sup> Human Rights Law Centre 2014 op cit., p22.

<sup>215</sup> Clarke, Allan , 2013. *Marlon Noble Seeks Justice*, SBS News, 26 August 2013. Available: <http://www.sbs.com.au/news/article/2012/05/21/marlon-noble-seeks-justice>

<sup>216</sup> [Perpitch](#), Nicolas, 2014. *Indefinite jailing: Call for review as Indigenous driver involved in fatal crash remains in prison*, ABC news, 17 September 2014. Available: <http://www.abc.net.au/news/2014-09-16/call-for-review-of-incarceration-of-former-teen-fatal-driver/5748090>

<sup>217</sup> APT, *Urgent need for oversight of Australia's offshore detention*, Press Release April 2013. Available: [http://www.apr.ch/content/files\\_res/australia-urgent-need-for-oversight-apt-statement-30-april-2013.pdf](http://www.apr.ch/content/files_res/australia-urgent-need-for-oversight-apt-statement-30-april-2013.pdf)

<sup>218</sup> For more information about the Australian government's comments about responsibility of off-shore detention, see: Australian Human Rights Commission, 2013. 'Human rights issues raised by the third country processing regime', *Australian Human Rights Commission*, available: <https://www.humanrights.gov.au/sites/default/files/document/publication/third-country-processing-regime.pdf> See also: Keany, F. and Yaxley, L. 2016. 'Manus Island detention: PNG responsible for asylum seekers, Peter Dutton says', *ABC News*. Available: <http://www.abc.net.au/news/2016-04-28/png-responsible-for-manus-island-asylum-seeker-dutton-says/7369032>

<sup>219</sup> The Association for the Prevention of Torture (APT), 2014. *Detained asylum seekers within Australia's 'effective control'*, Available: [http://www.apr.ch/en/news\\_on\\_prevention/detained-asylum-seekers-within-australia-s-effective-control/#.VcGaJhx-9aQ](http://www.apr.ch/en/news_on_prevention/detained-asylum-seekers-within-australia-s-effective-control/#.VcGaJhx-9aQ)

Papua New Guinea have not signed or ratified the OPCAT, meaning that the SPT has no authority to visit and inspect the Australian-run facilities on Manus Island. Even if Australia did ratify the OPCAT, it would be debatable if this could be extended to facilities that are outside of Australian territory – even those facilities that are Australian-run. As Nauru has already ratified the OPCAT, any facilities within their territory are within their NPMs obligation to inspect. The SPT also has the authority to inspect any place of detention within Nauru and have used this opportunity to inspect the Australian-run Regional Processing Centre for asylum seekers, and have written a report based on their findings. However, the question must then be raised, whose responsibility is it to enact the recommendations and improve the conditions of the facilities?

Norway has included places outside of its territory within its definition of places of detention; at least in theory, if not in practice.<sup>220</sup>

As of April 30, 2017 there were 1392 people in detention facilities in Australia (including 284 on Christmas Island) and 1,194 people in offshore detention facilities.<sup>221</sup> This is a large number of individuals, whose situation makes them particularly vulnerable to intentional and neglectful ill-treatment.

### The Australian Border Force Act

The *Australian Border Force Act* took effect on July 2015, with support from the Australian Liberal Party. Under the Act, it is a criminal offence for anyone working within an immigration facility (including the facilities in Nauru and Manus Island) to speak publicly about what they have seen within the facilities without permission. Such an offence is punishable by two years imprisonment under the Act.

Due to the very recent implementation of this Act, it can only be speculated as to what the consequences may be. It will no doubt prevent some individuals from speaking publicly about any ill-treatment or abuse they witnessed within an immigration facility. However, Dr John-Paul Sanggaran, who previously worked for the Immigration Department's healthcare provider International Health and Medical Services on Christmas Island; has said that "the things that we've seen are too terrible...we're not going to respond to these threats from the Government."<sup>222</sup>

The government has said that there is federal legislation in place to protect whistleblowers who do speak out.<sup>223</sup>

### Healthcare Facilities

Treatment within healthcare settings that constitute ill-treatment include restrictive practices, such as the use of physical, medical or chemical restraints; non-consensual

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<sup>220</sup> Norway's Annual report includes "camps abroad which are under Norwegian control" in the definition of places of detention. See The Parliamentary Ombudsman, Norway, 2014 op cit., p14 for more information.

<sup>221</sup> Australian Border Force, 2017. 'Immigration Detention and Community Statistics Summary at 30 April 2017', Australian Government Department of Immigration and Border Protection. Available at: <https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-30-april-2017.pdf>

<sup>222</sup> Sedghi, Sarah. 2015. *Border Force Act could see immigration detention centre workers jailed for whistleblowing*, ABC news. 1 July 2015. Available: <http://www.abc.net.au/news/2015-06-30/detention-centre-workers-face-imprisonment-for-whistleblowing/6584392>

<sup>223</sup> Ibid.



medical treatment; forced sterilisation; isolation; and other practices that are against international human right obligations.

The Committee on the Rights of Persons with Disabilities has previously expressed concern that “under Australia law a person can be subjected to medical intervention against his or her will, if the person is deemed to be incapable of making or communicating a decision about treatment”.<sup>224</sup> This is a breach of the CRPD and illustrates further need for an independent monitoring body that can ensure individuals are receiving the support and services they need, and are not being arbitrarily detained due to out-dated laws based on the medical model of disability.

The practice of coerced or involuntary sterilisation predominately takes place in Australia in relation to women and girls with disability.<sup>225</sup> While this issue has not been a predominate focus of other countries NPM bodies, it must be a key focus in Australia’s case, as the Commonwealth government has refused to make national legislation banning the practice.<sup>226</sup>

It is recommended that an advisory committee or Ombuds Plus model be introduced to ensure that individuals and organisations with expert knowledge of international human rights standards are involved in choosing and monitoring traditional, as well as non-traditional places of detention (including health care facilities and other settings in which people with disability may be detained of their liberty).

## **The Australian Human Rights Commission Research Report**

In 2008, the Australian Human Rights Commission (AHRC) commissioned Professors Richard Harding and Neil Morgan to create a report on the implementation of OPCAT in Australia.<sup>227</sup>

As a part of this extensive report, Harding and Morgan suggested a range of NPM models that could be utilised within the Australian context. Many of their recommendations referred to the New Zealand system that has already been discussed in detail in this report. The report suggested that like New Zealand, Australia should designate the Human Rights Commission as the central coordinating NPM body.

In Australia’s context, they suggested that the AHRC would be the commonwealth NPM, whose role would include:

- Overseeing and directing an immediate stock-take of all places of detention within Australia;
- Exercising quality control over the activities of the State and Territory NPMs;
- Carrying out sample inspections of places of detention within the jurisdiction of State and Territory NPMs;

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<sup>224</sup> Committee on the Rights of Persons with Disabilities, 2013. *Concluding observations on the initial report of Australia, adopted by the committee at its tenth session*, p5.

<sup>225</sup> The Senate Inquiry into involuntary or coerced sterilisation of people with disabilities in Australia, July 2013. Available: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Involuntary\\_Sterilisation/~/\\_/media/Committees/Senate/committee/clac\\_cte/involuntary\\_sterilisation/first\\_report/report.ashx](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/~/_/media/Committees/Senate/committee/clac_cte/involuntary_sterilisation/first_report/report.ashx)

<sup>226</sup> Ibid.

<sup>227</sup> This report is available in full at: <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-optional-protocol-convention-against-torture>

- Carrying out inspections of places of detention falling within its direct jurisdiction; and
- Dealing with the SPT on all matters of OPCAT compliance for Australia.

In addition to the above, the report suggests that each State and Territory have a central NPM body that would be in direct communication with the central AHRC body. Some States and Territories may have pre-existing organisations that can meet the OPCAT NPM mandate, such as Western Australia, which has the Office of the Inspector of Custodial Service that is believed to meet the OPCAT mandate. Other States may find it easier to spread the various inspection responsibilities across multiple organisations. However, even if there were multiple bodies being used, there would still need to be a State/Territory representative body that would be accountable to the central NPM.

For this NPM structure to work, there must be appropriate funding and resources that would be the responsibility of the State, as outlined by the OPCAT mandate.

Although Harding and Morgan go into extensive detail about what the NPM system should look like, they spend no time discussing the methods by which these bodies should perform their roles. It should be recommended that inspection criteria, such as the CoE's, should be created to ensure all State and Territory bodies are inspecting facilities to the same depth.

In the model Harding and Morgan offer, they have split 'places of detention' into two categories. The primary category includes the traditional places of detention, such as prisons, juvenile detention institutions, police stations, locked psychiatric wards and immigration detention centres. They include prisoner transport, court security, military detention facilities in which people are detained by national intelligence services, and aged care hostels in which residents are detained involuntarily as secondary places of detention.

This list should be extended to include compulsory care facilities, rehabilitation facilities, community-based residences for people with disability, boarding schools, schools, prayer camps and emergency rooms in hospitals. The State and Territory NPM bodies would need to cover all of these facilities, and whilst the report suggested that primary facilities should be the priority, the vulnerability within the 'secondary' facilities should not be overlooked. This is because these types of facilities often have less oversight mechanisms, meaning that the level of treatment within them is largely unknown.

The need for the monitoring models to focus on particularly vulnerable groups is not included within this report, but must be taken into account when performing the role of an NPM organisation.

## **Recommendations for Australia**

The most successful NPM models have taken pre-existing organisations and created new focus areas within them to perform their preventive monitoring tasks. This should also be utilised in Australia. Below is a preferred disability responsive NPM model that could be established in Australia.



## Proposed Australian NPM Model

The following mixed model NPM is founded upon the assumption that the Central Coordinating NPM (the Commonwealth Ombudsman) should not only adhere to the powers and guarantees required by OPCAT, but should also provide strong leadership for all NPMs. Such leadership would involve collaborating with states and territories to develop shared inspection standards, processes and reporting templates, and demonstrating a robust commitment to work with civil society actors in all jurisdictions.

In addition, the NPM model should be disability neutral, yet disability responsive. All NPM bodies must see disability as part of their responsibilities, and must be inclusive of the experiences of people with disability in a range of places of detention. This should include the development of a disability inclusion action plan by each NPM to ensure they operate in a fully inclusive and accessible manner.

### Designation, roles and responsibilities

#### *Central Coordinating NPM: The Commonwealth Ombudsman*

The Commonwealth Ombudsman, as the Central Coordinating NPM, has many responsibilities. This role entails:

- Overseeing and directing an immediate stocktake of all places of detention in Australia
- Establishing clear expectations and standards for all inspecting NPM bodies, in collaboration with states and territories.
  - This would include the development of an inspection checklist, outlining the visit structure and process, as well as the development of a visit report template for all NPM bodies to use.
- Exercising quality control by ensuring all NPM bodies are meeting the OPCAT mandate and have adequate resources to perform their role.
- Exercising quality control by ensuring all NPM bodies have appropriate expertise and training to perform their role, including the use of 'experts of experience' during inspections.
- Coordinating with inspection bodies to avoid unnecessary overlap and encourage cooperation.
- Developing a quantitative survey to support the qualitative information gained during inspections. This should be undertaken by staff, governing bodies and detainees.
- Facilitating robust collaboration with civil society to ensure NPM standards, practices and processes are adequately informed by expert knowledge.
- Ensuring cooperation between NPMs, and the NPMs and other bodies, including State, Territory, and Federal governments.
- Writing the NPM annual report, with support from all NPM bodies.
- Liaising with the SPT on their visits and through correspondence.
- Carrying out inspections of places of detention falling within its jurisdiction (such as immigration detention and aged care).
- Where necessary, carrying out joint inspections of places of detention with State and Territory NPMs (to provide additional expertise, but also to perform quality control).

Importantly, the Commonwealth Ombudsman must ensure that it fulfils its mandate based on international human rights standards, rather than its current mandate of inspecting based on national legislation and standards. Furthermore, the Commonwealth Ombudsman must thoroughly focus on the preventive nature of its NPM responsibilities, as opposed to its current reactive role.

Due to the varied tasks required of the Central Coordinating NPM, the Commonwealth Ombudsman should create a new department to specifically deal with OPCAT processes. Within this department, one entity could be tasked with all coordination and report-writing activities, whereas another could be responsible for inspecting federal sites of detention. Consultation with civil society actors should be performed across both arms of this department.

Civil society must be thoroughly involved in OPCAT and NPM processes. The Central Coordinating NPM should establish a national expert advisory committee or panel to ensure that the expertise, advice and experience of a range of organisations are heard and incorporated into practice. This advisory panel should also be consulted for the development of the monitoring criteria, the role and constitution of inspection teams, and the NPM's decision making regarding the prioritisation of certain places of detention.

This advisory panel must include people with disability (including people with psychosocial disability arising from mental illness), Aboriginal and Torres Strait Islanders, people identifying as LGBTIQ+, people from culturally and linguistically diverse backgrounds, asylum seekers, refugees, women and young people. In addition to these individuals with lived experience of detention, the advisory panel should also include representative organisations for each of the aforementioned cohorts. The panel should also include the Human Rights Commissioner and the National Children's Commissioner.

This advisory panel should meet with the Central Coordinating NPM at least four times a year to offer advice and guidance, to identify any gaps in monitoring practices, and to offer assistance for upcoming inspection processes. Indeed, the expertise held by members of the national advisory panel could be drawn on by the Central Coordinating NPM during inspection processes.

In addition, the Central Coordinating NPM should support all Central NPMs (described below) to formalise relationships with state- and territory-based civil society members as well.

### *Central NPMs*

One entity in each state and territory should be designated as the coordinating NPM of each jurisdiction. These Central NPMs would be in direct communication with the Central Coordinating NPM. In collaboration with the Central Coordinating NPM, the Central NPMs would determine whether they needed to create a separate faction within their offices to be responsible for OPCAT processes. Regardless of whether a new department is established, the Central NPMs would need to work closely with the

Commonwealth Ombudsman to adapt their mandate to focus on international human rights standards.

The Central NPMs should work with the Commonwealth Ombudsman to ensure consistency, not only between states and territories, but also across all NPMs operating in each state and territory. This would include, for example, a clear and consistent approach in relation to people with disability, by articulating and enforcing consistent sites of detention and practices to be inspected. Adherence to these consistent definitions, approaches and monitoring techniques should be tracked and enforced through quality control checks performed by the Central NPM. States and territories should be encouraged to exceed and improve on such benchmarks, with the ultimate aim of improving the inclusivity, accessibility and efficacy of the NPM model across the board.

The Central NPMs would have the following responsibilities:

- Liaising with the Central Coordinating NPM and ensuring clear communication between the Central Coordinating NPM and the NPMs in their jurisdiction.
- Collaborating with the Central Coordinating NPM to develop standards for all inspecting NPM bodies.
  - This would include the development of an inspection checklist, outlining the visit structure and process, as well as the development of a visit report template for all NPM bodies to use.
- Exercising quality control by ensuring all NPM bodies in their jurisdiction are effectively fulfilling their OPCAT mandate.
- Coordinating with NPM bodies and other monitoring agencies in their jurisdiction to avoid unnecessary overlap.
- Writing visit reports from their own visits and assisting other NPMs in their jurisdiction to write visit reports.
- Carrying out inspections of places of detention falling within its jurisdiction.
- Where necessary, carrying out joint inspections of places of detention with State and Territory NPMs (to provide additional expertise, but also to perform quality control).
- Liaising with civil society through the creation of an expert advisory committee in each state and territory.

The Central NPMs would be responsible for overseeing the other NPMs in their jurisdiction, offering advice, resources and support where necessary. The Central NPMs would also be responsible for monitoring places of detention. They would also support the work of the Central Coordinating NPM by drafting reports to authorities and international actors.

An initial task for the Central NPMs would be working alongside the Central Coordinating NPM to perform an audit to ascertain whether any monitoring bodies in their state or territory are already OPCAT compliant. Many existing bodies would need to be adapted to varying degrees, with some requiring statutory amendments to be made to ensure their compliance.

In smaller states and territories, such as the ACT and Tasmania, one or two NPMs may be sufficient. In others, there may be a range of NPM bodies responsible for oversight of a range of places of detention – possibly allocated not only jurisdictionally, but also thematically.

The Central Coordinating NPM will support the Central NPMs to liaise with civil society actors. In addition to its work with the national advisory panel, the Central Coordinating NPM will assist the Central NPMs to establish an advisory committee in each state and territory. Such advisory committees should reflect the wide range of participants involved in the national advisory panel. Robust relationships with a range of knowledgeable actors, including representative bodies for people with disability (as seen, for example, in Serbia), will assist Central NPMs to ensure the monitoring occurring in their jurisdiction is inclusive, well-informed and disability responsive.

### Who should inspect

NPMs at each level require sufficient resources – both human and financial. With respect to staffing allocations of NPMs, these should be sufficient to allow the NPM to perform robust and (if required) lengthy inspections. Staffing resources should also allow for numerous unannounced and follow up visits.

In addition, all NPMs should be staffed by a diverse range of people with a range of professional and personal experiences. Inspection staff must include people with lived experience of detention and people with disability. People with disability could be included as peer monitors, to conduct inspections and participate in making recommendations to relevant authorities and submitting relevant reform proposals to improve conditions for people being deprived of their liberty.

If necessary, the NPMs should be able to call in external experts to assist with their inspections and/or visit reports. This may include, for example, doctors, lawyers, migration specialists, or people with experience working in correctional settings. In addition, NPMs must engage people with specific expertise in disability human rights and support needs – including, as previously mentioned, people with disability.

Finally, all staff involved with NPM processes (at federal, state and territory levels) must receive disability awareness and cultural competence training.

### Where they should inspect

Despite having broad definitions of ‘places of detention’, in practice a number of other countries have been unable to prioritise inspections of all such sites for at least the first few years after NPM designation. Nonetheless, it is vital that Australia defines ‘places of detention’ in a broad and inclusive manner.

Australia’s definition of ‘places of detention’ should thus include at a minimum: prisons, police stations, police custody facilities, juvenile detention centres, prisoner and deportation transport, court security, military detention facilities or camps, immigration detention centres (including offshore facilities under Australian control), psychiatric institutions, locked psychiatric wards or hospitals, compulsory care facilities, closed community-based residences for people with disability, aged care facilities, dementia units, nursing homes, child welfare institutions, emergency rooms, ‘time out’ and seclusion rooms in educational settings, boarding schools and rehabilitation facilities.

The Central Coordinating NPM must seek to learn from the downfalls of other countries, and research the best possible ways to inspect such a broad array of places

of detention in Australia. As a first step, a stocktake of all places of detention in Australia covered by the above definition must be performed.

One strategy for inspecting a wide range of places robustly is the use of thematic focuses. The Central Coordinating NPM could, for instance, ask all state and territory based NPMs to prioritise inspection of certain practices, such as the use of restraint, seclusion and forced treatment, of people in all forms of detention. This would likely provide a detailed image of the types of places using these practices, and the people being subject to them.

### How they should inspect

How various NPMs inspect will obviously depend on their jurisdiction and thematic focus. It will also depend on the size and type of facility they are inspecting. Some visits may be short, and only go for a day, whereas others may take the better part of a week to complete.

Inspections must be regular, and must include a mix of announced and unannounced visits. In addition, follow up visits must be prioritised by all NPMs, to assess the extent to which facilities have implemented the NPM's recommendations.

Post-inspection reports should be made publicly available on the Central NPM's website. This process should not require the consent of the federal, state or territory governments, nor the consent of the facility that has been inspected.

Inspections must be consistent across states and territories, performed according to a checklist co-designed by the Central Coordinating NPM and Central NPMs of each state and territory. This checklist should include quantitative and qualitative data, including anonymous surveys and interviews with detainees and facility employees/management.

Such surveys could be based on the UK central NPMs 'expectations criteria' that gives the inspecting body an insight into the treatment within the facility. This quantitative assessment would allow the NPM to determine if the number of detainees who identify as having disability is the same as the number of detainees classified as having disability by the facility. This survey would also allow the inspectors to see how the experiences of detainees with and without disability differ. Ideally this survey would be completed prior to scheduled visits; however this could not happen with unannounced visits.<sup>228</sup>

People being deprived of their liberty in all settings should be provided adequate opportunity to communicate directly with NPM bodies. This must include being regularly asked about their experiences, the practices used in the facility, their feelings of safety and/or security, and whether reasonable accommodations have been made to support them. In order to ensure everyone has the ability to communicate with NPMs, all people with disability in such sites of detention must be provided with all appropriate communication supports they may require, such as Auslan interpreters

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<sup>228</sup> Although there is no set quota for announced vs. unannounced visits, in order for NPMs to be as effective as possible, it is recommended that approximately 30-50% of all visits be unannounced, particularly for follow up visits.

(including community sign language interpreters, where necessary<sup>229</sup>), augmentative/alternative communication methods and/or devices, and where appropriate, decision-making supports to enable people to meaningfully convey their views.

Below is an example inspection checklist that has been generated based on the CoE's suggested checklist, and the experience of other countries. This list is a template and is not exhaustive, but could be used as a foundation for the Central Coordinating NPM to expand on in collaboration with Central NPMs. Additional checklist items may also need to be added to ensure it is responsive to all different places of detention.

For instance, it is well recorded that people with disabilities experience sexual assault at a much higher rate than people without disabilities.<sup>230</sup> This vulnerability to sexual violence is also prevalent in places of detention. This includes, but is not limited to, sexual assault, sexual misconduct and grooming behaviour. Although this area is not largely covered by NPMs in other countries, it remains an issue in Australian institutions and should be included in Australia's inspection checklist template.

| <b>Australian NPM checklist template</b> |  |
|--|--|
| <b>1</b>                                 | <b>Facility information - to be completed before inspection and confirmed during inspection process</b>  |
| 1.1                                      | Who is responsible for the organisation?   |
| 1.2                                      | How does the organisation define disability?   |
| 1.3                                      | Official capacity of the facility - does this match actual capacity? How is this determined?   |
| 1.4                                      | Gender and age of detainees - is the number of people with disabilities recorded?  |
| 1.5                                      | How many residents are involuntarily detained, or detained without charge?   |
| 1.6                                      | Are there seclusion units within the facility? Including solitary confinement? Is there a procedure of using this in this facility? How is the use of seclusion recorded? In what instances is seclusion used?                                 |
| 1.7                                      | Staffing - how many staff are there? What are their roles? What is the staff to resident ratio? What shifts do the staff do (including night-time)? What are the staff training levels? What is the staff turnover? Are casual staff employed? |
| 1.8                                      | Are people in the facility through involuntary placement orders?   |
| 1.9                                      | Background check - do all staff, volunteers and advocates have background checks, including criminal history check and working with children check (where applicable)?   |
| 1.10                                     | Deaths within the facility - how many people have died, and what was the cause of death? What is the investigation procedure for deaths within the facility?   |
| 1.11                                     | What is the average length of detention? How is this reviewed?   |

<sup>229</sup> For more information, see Transcript Wednesday 13<sup>th</sup> October 2016 of the Royal Commission into the Protection and Detention of Children in the Northern Territory. Available: <https://childdetentionnt.royalcommission.gov.au/NT-public-hearings/Documents/transcripts-2016/Transcript-13-October-2016.pdf>

<sup>230</sup> For more information, see: <http://stvp.org.au/stats.htm> or submissions made by People with Disability Australia, available: <http://pwd.org.au/issues/preventing-violence.html>

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| <b>2</b> | <b>Ill-treatment within the facility</b>  |
| 2.1      | Are there any cases of staff or carer violence towards detainees (including verbal and physical violence)? Are these incidents recorded? Who is responsible for recording the incidents? What is the breakdown of these incidents? – e.g. men, women, people with disabilities, first time detainees, and age.  |
| 2.2      | Inter-resident cases - are these incidents reported? What is the procedure in handling inter-resident violence? What is the number of reported cases? What happens to a resident who is seen as violent, or vulnerable to violence? What is the breakdown of these incidents? – e.g. men, women, people with disabilities, first time detainees, and age. |
| 2.3      | Restraint - what is the facility policy regarding the use of restraint? Does this policy include physical restraint, chemical restraint, and mechanical restraint?  |
| 2.4      | Does the facility use any form of restraint? How is this use monitored? Does it require authorisation by a medical professional?  |
| 2.5      | Is restraint used within the view of other detainees?   |
| 2.6      | Is seclusion used within the facility? What is the breakdown of its use? – e.g. men, women, people with disabilities, first time detainees, and age.  |
| 2.7      | What is the policy regarding the use of seclusion?  |
| 2.8      | Is there a maximum time that restraint/seclusion could be used on a resident? How is it monitored (through CCTV, or human contact)? Is this monitoring process strict?  |
| 2.9      | Are the staff trained in de-escalation techniques that do not involve restraint or seclusion?   |
| 2.10     | Can the detainee's room be locked from the inside? Can the residents be locked in their rooms from the outside?   |
| 2.11     | Can detainees leave their room at night? Is there a policy around this? If yes, is it a blanket or an individual policy?  |
| <b>3</b> | <b>Living conditions</b>  |
| 3.1      | Do the living conditions appear to offer reasonable accommodation?  |
| 3.2      | How are the residents separated? Are adults and minors placed within the same facility? Are people with disabilities accommodated separately? Can spouses live together?  |
| 3.3      | Do residents have an individual bed, room and personal space?   |
| 3.4      | Is there access to natural light? Is there adequate ventilation?  |
| 3.5      | Is there artificial heating and cooling within the facility?  |
| 3.6      | Is the building and its facilities accessible for people with disabilities? Including accessible showers, toilets, bedding and mattress.  |
| 3.7      | Do the residents have personal belongings in their room? Is there a lockable space available?   |
| 3.8      | Is outdoor activity available?  |
| 3.9      | Is the facility clean? Are there any hygiene or cleanliness concerns?   |



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| <b>4</b> | <b>Healthcare</b>  |
| 4.1      | Are health assessments made upon entering the facility? If so, who makes these assessments? I.e. medically trained staff, or administration/guards?  |
| 4.2      | Do detainees have access to sufficient medication?   |
| 4.3      | Access to sufficient medical care - how often does a resident meet with a doctor, nurse or mental health professional?   |
| 4.4      | Do residents have the ability to choose a specific health care provider?   |
| 4.5      | Do all residents meet with a health care professional? If so, on what basis?   |
| 4.6      | Are rehabilitation activities, including physiotherapy, offered to the resident?   |
| 4.7      | Do all residents have a specific care plan? Is this plan reviewed?   |
| 4.8      | Who has access to the patients' medical files?   |
| 4.9      | How many bedridden residents are currently in the facility?  |
| 4.10     | Do residents have to consent to all medical treatment? What is the organisation's policy on consent?   |
| 4.11     | Are medical procedures and/or treatment performed without the residents consent? What is the protocol when consent is not given? Are these cases specifically recorded? If so, what is the breakdown of these incidents? – e.g. men, women, people with disabilities, first time detainees, and age. |
| 4.12     | Does the facility have a different policy for treatment consent for people with disability, or young people?   |
| 4.13     | Does the facility have residents on involuntary treatment orders? How are these treatment orders reviewed?   |
| <b>5</b> | <b>Other areas</b>   |
| 5.1      | Are the residents aware of their rights whilst being detained?   |
| 5.2      | Are the staff aware of the detainee's rights?  |
| 5.3      | What is the complaints procedure? Are both staff and residents aware of the procedure? Do the complaints stay internal, or is it escalated to an independent body? When are the police informed of a complaint? How many complaints have there been in the last year?                                |
| 5.4      | Are the other residents in contact with people (including support networks) outside of the facility?   |
| 5.5      | Are there any education programs or activities offered by the facility?  |
| <b>6</b> | <b>Vulnerable groups</b>   |
| 6.1      | Are there specific policies regarding vulnerable groups within the facility? Including women, children, people with disabilities, people who identify as LGBTQ, newly admitted residents   |

#### Relationship to other international bodies

After ratifying, the Federal Government and/or the Central Coordinating NPM should be encouraged to discuss OPCAT with other States Parties that have already ratified and implemented the Optional Protocol. In particular, Australia should work closely with New Zealand, including their NPM bodies, to discuss various NPM models, roles,

responsibilities and standards. Robust discussion with a country that has already implemented OPCAT could only increase the knowledge and expertise involved in the Australian post-ratification environment. Indeed, down the track, Australia could establish a regional OPCAT working group with New Zealand and other OPCAT compliant States Parties, to share experiences, techniques, best practice and also interrogate common problems.

#### Commentary: Proposed Australian NPM Model

The Australian NPM model outlined above, if adequately resourced, would likely improve the monitoring of a wide range of places of detention. It is vital that all NPM bodies are on the same page – abiding by the same standards and using a common inspection checklist and report templates.

In order to be effective, rather than just OPCAT compliant, the federal, state and territory NPMs must not rely on status quo monitoring provisions. Existing monitoring bodies may require additional legislated powers and additional resources to be able to adequately monitor places of detention in which people with disability may be deprived of their liberty. Indeed, many of these existing monitoring mechanisms would require significant culture change to ensure that they sufficiently promote and protect the human rights of people being deprived of their liberty throughout their inspection and reporting processes.

With regards to the above NPM model, the federal government must be careful to designate appropriate NPM bodies in each jurisdiction, preferably in consultation with civil society. It must also negotiate how many NPMs to allocate to each jurisdiction, trying to toe the line between covering a broad range of places of detention and types of treatment, and implementing an unwieldy, complex and confusing model (in addition to the other issues of duplication and inconsistent standards initially encountered by, for instance, the UK).

Finally, even if all of the abovementioned elements are adequately addressed, there must still be formal feedback mechanisms for all people in all places of detention to provide information about their experiences, with strong provisions to ensure anonymity. These feedback mechanisms must allow people with disability to participate thoroughly, with adequate provisions to enable decision-making supports where appropriate, and with the scope for people to provide feedback in a range of communication forms.

#### Conclusion

After ratifying OPCAT, the Australian government should be encouraged to consult broadly with a range of civil society organisations and actors to determine the best possible NPM model. The NPM model that has been suggested in this report is not the only appropriate model for Australia, nor are the included case studies illustrative of all the different NPM models that have been created. Through collaboration and research, the federal government should challenge and adapt these models to create a fully developed NPM strategy for Australia.

## Appendix A.

Jari Pirjola and Vyautas Raškauskas, 2015. European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT), Strasbourg, 22 May 2015.

This list is not exhaustive, but rather a reviewable tool to be used during CPT visits to social care institutions.

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| <b>A. General information</b>   |
| • Which body is responsible for the institution (national, regional or local authority; church, charity association, private structure)?  |
| • Official capacity? Based on how many square-metres per person? Number of residents at the time of the visit (male, female, age groups)?   |
| • Categories of residents?  |
| • Does the law provide for an involuntary placement procedure? Who decides on the placement of persons who do not consent (court, social welfare authority, mayor)?   |
| • Number of residents who are formally deprived of their liberty?   |
| • How many residents are deprived of their legal capacity/under guardianship?   |
| • Is there a unit where residents are subjected to special protective measures (“closed regime”)?   |
| • What action is taken when residents leave the institution without permission? Is the police called to search for them and bring them back to the institution?   |
| • Staffing: breakdown of posts by category with an indication of full- and part-time employment and vacancies (including general practitioners/psychiatrists/psychologists/nurses/nursing assistants/caretakers)? Working hours of staff? Number of staff present on different shifts, including at night and during weekends? Training and supervision of staff? |
| • External support: Co-operation with external consultants/hospitals? Private security companies? Interventions by police after security incidents?   |
| • Major incidents in recent years?  |
| • Deaths in recent years (number and causes)?   |
| <b>B. Ill-treatment</b>   |
| • Ill-treatment by staff (physical and/or verbal)?  |
| • Inter-resident violence? Do members of staff react and intervene promptly in case of incidents? Are measures taken to protect particularly vulnerable residents?  |
| <b>C. Living conditions</b>   |
| • Allocation of different groups of residents: Placement policies? Are persons with mental disorders and those with a learning disability accommodated separately? Are minors and adult residents accommodated separately?  |
| • Possibilities for spouses to be accommodated together?  |
| • Material conditions in bed rooms/dormitories and communal rooms, sanitary facilities, etc.? Living space per person? Does every resident have his/her own bed? Access to natural light and artificial lighting? Ventilation? Heating?   |
| • Physical structure of buildings adapted to the special needs of the residents?  |
| • Hygiene: Availability of diapers/disposable pads for incontinent residents and sufficiently frequent diaper change? Special mattresses? Toilet and washing/shower facilities accessible and adapted for residents with physical impairments?  |
| • Leisure activities? Outdoor exercise every day? For how long? Assistance provided for residents suffering from physical/walking impairments to access outdoor areas?  |
| • Residents’ privacy: Individual wardrobes? Lockable space for personal belongings? Can residents keep personal belongings in their room? Any restrictions applied? Do residents have access to their rooms during the day?   |
| • Clothes and footwear adequate (also for cold season)? : Possibility to wear own clothes?  |
| • Food: Quality and quantity, provision for special diets (e.g. for diabetes)? Feeding assistance provided when necessary?  |
| <b>D. Health care</b>   |
| • Equivalence of somatic and psychiatric care compared to the care available in the outside community?  |
| • Dental care? Is conservative treatment available free of charge for indigent residents?   |
| • Sufficient supply of medicines?   |
| • Provision of psychological care (e.g. to address anxiety, grief, depression)?   |

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| • Management of acute psychiatric and somatic conditions? Transfer to a hospital when necessary?  |
| • Are all newly-admitted residents subjected to a medical examination upon admission (including check of weight)?   |
| • Periodic medical examination of residents?  |
| • Therapeutic, occupational and rehabilitative activities? Physiotherapy?   |
| • Care plan drawn up for each resident? Are residents personally involved in this process? Regular review?  |
| • Does a personal medical file exist for every resident?  |
| • Who has access to medical files (medical confidentiality)?  |
| • Use of contraceptives? Policy regarding abortions?  |
| • How many bedridden residents?   |
| • Arrangements for persons who are not able or refuse to take food themselves? Artificial feeding?  |
| • Suicide prevention measures in place?   |
| • Any biomedical research? If yes, examine procedures and safeguards (including consent)  |
| • Clear protocol for dealing with unexpected deaths? Autopsy carried out unless clear diagnosis of fatal disease? Records kept of the clinical causes of residents' deaths?   |
| <b>E. Means of restraint</b>  |
| • What types of restraint are used? Seclusion? Physical restraint? Mechanical restraint (straps, straitjacket, bed sides, net bed, etc)? Chemical restraint? Other types?   |
| • Legal basis for use of restraints?  |
| • Is there a clearly-defined restraint policy regarding the procedures and modalities?  |
| • Who decides on the use of restraint? Possible to give authorisation in advance (" <i>pro re nata</i> ")?  |
| • Are there rules regarding the maximum duration of restraint? Longest duration in practice?  |
| • Staff properly trained (including in non-physical de-escalation techniques)?  |
| • Are all instances of restraint, including chemical restraint, recorded in a specific register?  |
| Mechanical restraint:   |
| • Always ordered by a doctor or immediately brought to the attention of a doctor in order to seek his/her approval?   |
| • Application exclusively by health-care staff or other staff? Are other residents on occasion involved in restraining an agitated resident?  |
| • Always continuously and directly monitored (human contact)? Supervision through CCTV?   |
| • Application always out of sight of other residents?   |
| 1 For methods to identify undernutrition, calculating quantity and quality of food and the CPT's role in assessing if undernutrition and the risk of it are appropriately monitored and addressed, see "Preliminary remarks on the development of some tools for assessing the nutritional status of some groups of persons deprived of their liberty" by Veronica Pimenoff (document CPT (2005) 6).  |
| <b>F. Safeguards in the context of involuntary placement<sup>2</sup></b>  |
| <b>1. Initial placement procedure</b>   |
| • Who decides on the involuntary placement? According to what procedure?  |
| • Does an involuntary placement order issued by a non-judicial body have to be approved by a court?   |
| • Is the person concerned heard by the decision-making body? Where does the hearing take place? At the institution?   |
| • Is the placement decision based on objective medical expertise, including of a psychiatric nature?  |
| • Is a second (independent) doctor always/in some cases involved?   |
| • Is the placement order limited in time or for an indefinite period?   |
| • Written notification? Information on reasons for placement?   |
| • Appeal procedures? To an independent body? Are residents informed about the possibility and modalities of lodging an appeal? Are they heard in the context of the appeal procedure?   |
| • If admitted on a voluntary basis, is the consent properly recorded (special form requiring resident's signature)?   |
| • Transformation of voluntary into involuntary stay: Is an involuntary civil placement procedure initiated in the event that a resident who has been admitted on a voluntary basis withdraws his/her previous consent to the placement and is prevented from leaving the institution or that the person concerned is no longer capable of giving his/her valid consent? Do the same safeguards apply to such "retained" residents and those who have been admitted on an involuntary basis? |
| <b>2. Review procedures</b>   |
| • Regular reviews of the involuntary placement decision? Automatic ( <i>ex officio</i> ) and/or at the request of the resident or his/her representative?   |

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| • In which intervals is the placement decision reviewed? Involvement of a court or another independent body?   |
| • Is the resident heard in person? At the institution?   |
| <b>G. Safeguards in the context of involuntary treatment</b>   |
| • Consent to treatment distinguished from consent to admission?  |
| • Consent free and informed?   |
| • Involvement of a second (independent) doctor/decision-making body or court in all/some involuntary treatment decisions?  |
| • Exceptions to the possibility to refuse treatment only based on law and relating to clearly-defined exceptional circumstances?   |
| • Possibilities of withdrawal of previous consent to treatment and appeal against involuntary treatment decision?  |
| • Consent properly recorded? Are there situation in which the written consent of the resident is required?   |
| • Regular reviews of involuntary treatment orders? Automatic and/or upon the request of the resident or his/her representative? Independence of review? Frequency of review?   |
| 2 Safeguards in the context of involuntary placement should apply to all residents of social care institutions who are deprived of their liberty. This also includes residents who are formally regarded as “voluntary”, but who are in practice not free to leave the institution and who are thus <i>de facto</i> deprived of their liberty. |
| <b>H. Safeguards regarding persons who are deprived of their legal capacity</b>  |
| <b>1. Procedure for the deprivation of legal capacity and appointment of a guardian</b>  |
| • Does the court which decides on the (partial) deprivation of legal capacity also decide on the nomination of a guardian or is the guardian appointed by another body (e.g. social welfare authority)?  |
| • Is the resident heard in person in the process of deprivation of his/her legal capacity and the appointment of a guardian?   |
| • Are the persons concerned given a copy of the decisions and informed (verbally and in writing) of the possibility and modalities for appealing against the decisions to deprive them of their legal capacity and to appoint a guardian?  |
| • Are the decisions on deprivation of legal capacity subject to a regular court review? How frequently?  |
| Can the person concerned initiate proceedings to restore the legal capacity? Does the person have effective access to legal assistance in the context of these procedures?   |
| • Who are the guardians (relatives, private associations, public officials, staff of the social care institution)?   |
| <b>2. Safeguards in the context of admission</b>   |
| • Who decides on the placement?  |
| • Does the guardian have to sign a private-law contract with the institution?  |
| • Which safeguards apply for the admission of legally incapacitated persons in a social care institution?  |
| • Is the admission of a person on the basis of consent given by his/her guardian considered to be voluntary or involuntary?  |
| • Is an additional approval by an outside body required in such cases?   |
| <b>3. Safeguards in the context of treatment and the use of means of restraint</b>   |
| • Which safeguards apply for the treatment of legally incapacitated persons? To what extent is the guardian involved in treatment measures? Are there situations where additional safeguards are required (e.g. approval by a court or another outside body)?  |
| • Which safeguards apply for the use of means of restraint vis-à-vis legally incapacitated persons? To what extent is the guardian involved in decisions on the use of restraint measures? Are there situations where additional safeguards are required (e.g. approval by a court or another outside body)?                                   |
| <b>I. Other issues</b>   |
| • Residents’ contact with the outside world (correspondence, telephone, visits)  |
| • Regular inspections/monitoring by an independent outside body?   |
| • Complaints procedures? Is there a system of legal counselling in place (such as “residents’ advocates”)?   |
| • Information of residents: Are residents informed of the institution’s routine and their rights including of complaints procedures e.g. in the context of involuntary placement or treatment and of discharge procedures? Is this information part of the admission contracts signed by the resident (or his/her legal representative)?       |