Written Submission to the Australian Human Rights Commission Consultation

Submission on OPCAT in Australia

Geneva, 21 July 2017

Introduction

The Association for the Prevention of Torture (APT) is an independent non-governmental organisation based in Geneva, working globally since 1977 to prevent torture and other forms of ill-treatment.[1] Among our priorities, we advocate for the ratification of the UN Optional Protocol to the Convention against Torture (OPCAT)[2] and for the adoption of legal and policy frameworks to ensure the effective prevention of abuse.

The APT welcomes the Australian government's decision to ratify the OPCAT by the end of the year. We would also like to extend our thanks to the Australian Human Rights Commission for inviting submissions from NGOs and other parties.[3]

The AHRC consultation asks a number of specific questions in relation to both the structure and functioning of an OPCAT system in Australia, as well as in relation to the existing monitoring framework and priority areas. Given that a number of national NGOs are likely to provide substantive input on the second category of question, the APT will limit itself in this submission to the first category – the structure and functioning of the NPM system – both areas of our established experience worldwide.

OPCAT Implementation in a Federal State (question 2)

- Australia is a large federal state and this has implications for OPCAT implementation and the possible NPM structure, in particular related to the existence of different state and federal jurisdictions and the associated gaps and overlaps in detention

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[1] See www.apt.ch.

[2] The Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) was adopted by the UN General Assembly in 2002 and came into force in 2006. It aims to minimise the risks of abuse by opening up prisons, police stations, mental health institutions and all other places of detention to examination by independent watchdogs. The basic premise behind the OPCAT is that the more open and transparent places of detention are, the lesser the risk for abuse. See http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx.

[3] https://www.humanrights.gov.au/opcat-consultation-page

monitoring. Article 17 of OPCAT mentions the possibility of having one or several independent NPM and specifies that "mechanisms established by decentralized units may be designated as NPM for the purpose of the protocol if they are in conformity with its provisions". This should be read in conjunction with Article 29, which makes clear that the protocol "shall extend to all parts of a federal state without limitations or exceptions.

- Among the 65 states that have ratified OPCAT and designated a National Preventive Mechanism (NPM), only a minority are federal systems. Some of these have chosen to designate one federal body as NPM (Switzerland, Mexico) whereas Brazil and Argentina have a set up a system combining a national body with Local preventive mechanisms (LPMs) in each province or state. Germany established one national body to visit places of detention under federal jurisdiction and one for those under the jurisdiction of states (rather than a separate body for each *Lander*). Austria designated one federal body along with regional commissions, which fall under the authority of the federal body.

- Some non-federal states have also a multiple body NPM (United Kingdom, New Zealand, Malta, and the Netherlands) composed of several existing bodies based on a thematic and/or geographical division. Similar systems are also under consideration in South Africa, Indonesia and Canada.

- Despite these examples and the lessons that can be drawn from them, the Australian context is unique. In particular the proposed combination – of multiple existing and/or new monitoring bodies at the state level, acting alongside several bodies with at the federal level – is something that has not yet been implemented elsewhere. Australian stakeholders will thus have to think creatively about how to resolve the various challenges that are likely to arise. The paragraphs in this section highlight some of these key challenges both for federal systems and for multiple body NPM, as well as the ways in which other NPMs in analogous situations, have found to resolve them.[4]

1. Coherence of the overall system

- Among the main challenges faced by existing multiple body NPMs is ensuring the overall coherence of the system. Given that multiple bodies are likely to be designated at both the state and the federal level in Australia, this challenge will require particular attention.

- Because established institutions also work in a diversity of different ways, reflecting their specific history, roles and status, differences in working methods may be deeply embedded and difficult to adapt. There is a risk that, following designation, each institution continues with "business as usual", without adapting to the new reality of being part of a national NPM system. A focus on coherence will be important to harmonise working methods and approaches across the NPM as a whole.

- Because any system will need to be understandable to government, detaining authorities, persons deprived of their liberty, and others, ensuring that whatever system is created is simple and clear should also be a consideration.

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[4] See also APT's paper on Implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Federal and other Decentralised States, March 2011. http://www.apt.ch/content/files_res/OPCAT%20and%20Federal%20States%20-%20Eng.pdf

- In Argentina, it was decided that a system composed of two new federal institutions combined with new local institutions would be created to fulfil the NPM mandate. The federal system of prevention includes a thirteen-member National Committee, which seeks to ensure harmonised standard and methods of work across the provinces. In addition, it is foreseen that each of the twenty-four provinces will create or designate a Local Preventive Mechanism, represented nationally by a Federal Council, which evaluates LPMs, conducts research and makes proposals to the National Committee for how the system could work better.

2. Coordination of the overall system

- Because the OPCAT definition of place of deprivation of liberty is very broad, it is likely that ratification will lead to a significant increase in the number and type of places that should be monitored than under the current framework. Ensuring that there are no gaps or overlaps in places that are visited by the multiple state and federal bodies making up the NPM will require close coordination and detailed planning. One step in this process will be to map all places of deprivation of liberty and to identify which places currently fall within the mandate of existing monitoring bodies. Following this mapping process, a number of additional steps will be necessary, including:
  o To amend laws and mandates, and allocate sufficient resources such that any gaps are filled.
  o To decide which bodies should conduct OPCAT monitoring in cases where there is an overlap in mandates, as well as identifying information sharing and coordination strategies. This may include, for example, detention by the federal police, border force and the intelligence services, where federal jurisdiction may overlap with that of institutions in that states or territories in which such facilities are located.
  o To identify coordination strategies for the moments at which detainees may pass from one detaining authority or jurisdiction to another – detainee transfers between states, for example, or medical evacuations from offshore detention to the mainland – given that these moments may pose particular risks in terms of torture and ill-treatment.
- A federal-level institution is likely to be given a future coordinating role. This presents a challenge, however, in terms of who carries out this coordination role, how it is done, and at what level of the institution. Specific challenges for the central coordinating institution include its role in facilitating decision-making, knowledge management, helping to set thematic objectives and priorities, speaking on behalf of the NPM, communicating with the SPT, and following up on reports and recommendations. Balancing the need to ensure a coherent monitoring approach among the different OPCAT bodies, while also respecting the principle of subsidiarity will also likely be a challenge.
- Because a number of existing monitoring bodies in each state and territory-level are likely to be designated as part of a future NPM, Australia may also wish to consider the creation of state and territory-level systems for coordination. This may include, for example, choosing one institution in each jurisdiction to act as local NPM coordinator. This institution could also represent the state or territory on the federal level coordinating body recommended below.
- In the UK, where a large number of institutions make up the NPM (albeit without the added complexity of a federal system) one body – Her Majesty's Inspectorate of

Prisons (HMIP) – acts as NPM coordinating body (while also conducting monitoring of prisons, immigration centres and other types of places of detention). This system seeks to promote cohesion and a shared understanding of OPCAT among the NPM members, to encourage collaboration and the sharing of information and good practice, and to facilitate joint activities. In addition, a five member steering group meets four times a year. Its role is to facilitate decision-making, set strategies for joint work, monitor the work of NPM bodies, and support the NPM coordinator in its role.

- Clear focal points and regular discussions at different levels of the institutions – including opportunities for peer to peer exchanges and learning from each other's experiences – have all also proven useful among multiple body NPMs elsewhere. It may also be desirable to conduct joint training of staff and to participate regularly in each other's visits to places of detention. This is in part because, while formal coordination structures and institutional focal points will be necessary, less formal contacts among staff from different institutions, who know each other through joint training, for example, can also help facilitate smooth coordination.

3. Preventive Approach

- Prevention is, at its core, forward looking and focused on achieving systemic change. Coordination and coherence are thus not only about ensuring good monitoring coverage and appropriate working methods, they are about multiplying the influence of each institution beyond the geographic, institutional or thematic area in which it worked before. This may mean, for example, making joint submissions on relevant policy and legislation or doing joint work on thematic and cross-cutting issues through inter-institutional working groups and the publication of joint thematic reports. In the UK, for example, three sub-groups exist within the UK NPM to try and achieve these effects: on children and young people (coordinated by the Office for the Children's Commissioner for England); on mental health (chaired by the Care Quality Commission); and a third group aimed at coordinating NPM activities in Scotland (chaired by Her Majesty's Chief Inspector of Prisons for Scotland). A key challenge in the Australian context is likely to be ensuring that, at the most basic level, recommendations made by different bodies are based on the same approach and aimed at achieving the same result. It will also be important, however, to ensure that recommendations and reports are made at the correct level or levels. Is something found in one West Australian care home just a problem in that institution or is it also a problem state-wide? Is it found in Tasmanian institutions of the same type? And are the root causes at the level of management and practices, public policy, or legislation? The answers to these kinds of questions will inform decisions about whether reports and recommendations need to be made, *inter alia,* to individual institutions, to state governments or to the federal parliament. Given that multiple bodies are likely to carry out the NPM mandate at both state and federal levels, the coordination arrangements required to ensure reports and recommendations are most effective will require careful and ongoing thought. State/territory and federal level coordination bodies, as recommended below are likely to be necessary in order to provide the general overview required.

4. Powers and Resources

- It is important to note that every institution in a federal multiple body NPM should comply with the requirements of the OPCAT. This means, for example, that each of the institutions comprising the NPM needs to be independent of the bodies they

oversee. Each institution also needs the necessary powers, mandate and resources (see Annex 1 for further discussion of OPCAT powers and requirements).

- On the question of resources, existing monitoring institutions taking on an NPM role are likely to require additional human and financial resources. NPM work, particularly in a large country such as Australia, is resource intensive, with many places of deprivation of liberty existing hundreds of kilometres from major cities. Making regular and unannounced visits to such places is likely to require significant additional resources for travel and accommodation of staff. Because the monitoring work of an NPM is extremely demanding, involving long detention visits, including at different times of day, as well as in different regions of the country, NPMs also require dedicated staff to fulfil this function, which for many institutions will mean additional human resource costs if existing functions are not to be harmed by the addition of additional mandates. Production and publication (and possibly translation) of reports will be an additional cost. The OPCAT requires that the NPM as a whole produce a single annual report, although given the diversity of detention issues in each state and territory, as well as the common thematic issues faced in many jurisdiction, the bodies making up the Australian NPM system may also consider publishing individual reports, state-level NPM reports and thematic reports focusing on common issues found in a number of jurisdictions. Proper coordination will also involve significant costs. Some of these will fall on the federal coordinating institution. But additional resources are also likely to be required for any state and federal coordinating council (see recommendations below), as well as for joint training, joint visits, and other coordination and coherence tasks.
- A linked challenge is that of multidisciplinarity. As the SPT Guidelines[5] point out, NPM staff should have the diversity of backgrounds, capabilities and knowledge required to understand the places that are being visited. NPM work requires (in particular) medical expertise, as well as the expertise of social workers, juvenile justice specialists and psychologists, among others. Not all of these professional backgrounds need to be represented among NPM staff, however, and many NPMs have contractual arrangements with NGOs and experts to help them fulfil these criteria. Arrangements for the sharing of specialised expertise among state and federal institutions as well as the creation of a shared national expert roster may also be useful in this regard.

Recommendations

- If Australia decides to proceed with a federal multiple-body NPM structure, coordination is critical to avoid gaps and contradiction and/or duplication of efforts. The APT recommends that extensive consideration is given to which body is best suited to the national coordinating role, as well as to the resources required to enable this body to facilitate the smooth, effective functioning of the NPM as a whole.
- The APT recommends that, in addition to designating a federal institution as the national NPM coordinator, Australia considers the creation of a "federal council" type body, similar to that envisaged in Argentina or to the UK's NPM steering group. Such a body could include one representative from each group of state and territory-level monitoring institutions and be tasked with:

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[5] Article 20, SPT Guidelines on national preventive mechanisms, CAT/OP/ 12/5, www2.ohchr.org/english/bodies/cat/opcat/docs/SPT_Guidelines_NPM_en.doc

- - o Promoting the coherence of the overall NPM system, by ensuring that working methods and practices are harmonised across the NPM as a whole.
    - o Supporting the federal NPM coordinating institution in its work by identifying shared priorities and cross-cutting issues, facilitating decision-making and setting strategies for joint work.
- At the state/territory level, monitoring institutions may also wish to designate one body as NPM coordinator (if more than one institution is designated).
- A successful implementation of the OPCAT requires absolute clarity concerning responsibility for places of deprivation of liberty. The broad OPCAT definition of such places means that many governmental authorities may be implicated, including not only justice, but also immigration, health, defence and social services, among others. The APT recommends thorough mapping of all such places and existing monitoring bodies, including a determination of who is responsible for each place, so that the most appropriate monitoring bodies (if any) are designated or created as part of the NPM and recommendations made under the OPCAT can be directed to the proper authorities and properly implemented.
- The APT recommends Australia considers carefully the potential legal pitfalls involved in OPCAT implementation and that, in particular, powers relating to reprisals, unannounced visits and others, are enshrined in law, in order to minimise the risk of legal challenges affecting NPM operations.
- The APT recommends that, no matter how Australia decides to implement the OPCAT, there should be an inter-governmental agreement on funding to ensure the mechanism as a whole has the resources it needs to conduct its business in an effective fashion. This is not only a prerequisite for a serious NPM, but also a specific obligation under article 18(3) of the OPCAT.
- The APT recommends a clear-eyed assessment of any existing visiting bodies for compliance with all OPCAT requirements. If they fall short in any way which is not readily reparable, a new body or bodies should be created to carry out NPM functions.
- The APT recommends that arrangement be made for ensuring that the issue of multidisciplinarity is addressed, including, for example, by: sharing specialised expertise among state and federal institutions and/or creating a shared national expert roster.

Priorities (question 3)

- Under Article 4 of the OPCAT, the scope of "places of detention" to be visited is very broad. It includes all places where persons are (or may be) deprived of their liberty, including, *inter alia:* prisons, federal and state police stations, border detention places, military and intelligence detention, social care homes, centres for migrants, psychiatric institutions, and means of transport. While prisons and police stations are monitored in many states under existing arrangements, many non-traditional places of detention will be new to monitoring institutions. The mapping process described in the section above will be essential not only to identify gaps and overlaps in monitoring coverage but also to identify priorities that may not have come up pre-OPCAT.
- Risks of torture exist in particular environments (where there is a culture of impunity, for example), at particular moments (such as during arrest or interrogation), in regard to particular practices (such as the use of punishment or restraints), and in particular

places (including, for example offshore detention or places outside the mandate of existing monitoring bodies). In addition, certain detained people or groups of detainees are especially vulnerable and require additional attention and protection. A series of risk factors will determine situations of vulnerability. These can be personal (such as age, gender, and ethnicity), environmental (such as the attitudes of prison personnel, and access to healthcare and legal services) or socio-cultural (such as the attitudes of society more broadly). Given these risks and vulnerabilities, it is essential that the OPCAT implementation process includes a risk perspective that, *inter alia*, considers the groups in situations of vulnerability in Australian detention and leads to a system and, later, a programme of visits, which gives them due attention and priority.

- Such a process should involve existing monitoring bodies, as well as civil society, and other experts. In Norway, for example, once the NPM was designated and operational, it waited six months before conducting its first visit in order to allow sufficient time for a process of planning, awareness-raising, development of methodology, and trust-building. Given the number of places of deprivation of liberty in Australia, the complexity of the risk factors at play, and available resources of the future NPM, such a preparatory process will be essential if the NPM is to be as effective as it can be.

- Crucially, for the functional independence of the NPM, it should be up to each NPM body to define its priorities and programme of visits, without direction or guidance from outside the NPM system. Because vulnerabilities and risks are not fixed, this process should be an ongoing part of NPM strategic and operational planning, including that undertaken as part of overall cooperation and coordination arrangements at the state/territory and federal level.

Recommendations

- A thorough mapping process should identify all places (and potential places) of deprivation of liberty. It should also identify all existing monitoring bodies in order to identify gaps and overlaps in monitoring coverage.
- The NPM should consult widely, including with civil society, in order to identify key monitoring priorities.

Civil Society (question 4)

- For Australia's future NPM system to be effective it must be seen as credible. For this to occur, it is vital that the process of establishing an NPM must itself be inclusive and transparent. Thus, the widest possible range of relevant actors should be included in discussions on the model, functioning and priorities of the future NPM, including civil society from a wide range of different fields relevant to the range of places of deprivation of liberty covered by the OPCAT. The current consultation process is a good step in this direction, although government should work to ensure that the widest possible range of NGO voices are heard as part of both state and federal consultations on the form of the future NPM going forward.

- Following ratification and NPM designation, civil society engagement will be no less important in pushing implementation forward and helping existing bodies to avoid the "business as usual" scenario outlined above. In other OPCAT states, civil society engagement has also been crucial in helping the NPM to, *inter alia*: map places of

deprivation of liberty, identify priorities, provide expert advice, participate in visits, and work together to push for implementation of recommendations.

- Formal structures for civil society engagement may be useful in this regard, including the inclusion of NGOs in an advisory capacity in any future NPM "federal council", and creating a roster of experts that the NPM can draw on, including from within civil society. NPMs elsewhere have also usefully convened regular civil society roundtables, in order to discuss thematic priorities, areas of concern, and strategies for achieving change. These can be complemented by informal contacts and regular engagement by the NPM with NGO networks. Transparency should be a key value of the future NPM and this should include providing opportunities for direct engagement at every level of the NPM, including state level bodies and federal coordinating institutions such as the Australian Human Rights Commission and the Commonwealth Ombudsman.
- In order to facilitate useful civil society engagement at every stage of the process, it is important that such engagement includes the widest possible range of organisations, including those representing Aboriginal and Torres Strait Islanders, minorities, former detainees, and those with particular expertise in relation to groups in situations of vulnerability, including migrants, LGBTI persons, and those detained in psychiatric institutions.

Recommendations

- The APT recommends that the process of establishing an NPM is both inclusive and transparent. The widest possible range of relevant actors should be included in discussions on the model, functioning and priorities of the future NPM, including civil society from a wide range of different fields relevant to the range of places of deprivation of liberty covered by the OPCAT.
- Following ratification and NPM designation, the APT recommends that the NPM establish formal and informal channels to ensure regular and constructive engagement with civil society.

Role of government and parliament (question 5)

- The OPCAT includes a number of obligations for states in relation to NPMs. Including: to refrain from interfering in their work and guaranteeing their functional independence (Article 18) and to grant and respect their powers of access to places, persons and information (Article 20). States are also required to not "order, apply, permit or tolerate" any reprisals or sanctions against those who come into contact with the NPM. Most relevant to this question, however, is Article 22, which imposes a positive obligation on the authorities to cooperate with the NPM. This means engaging with the NPM and its recommendations and entering into dialogue on implementation. States also have an obligation to publish and disseminate the NPM's annual reports. The SPT has recommended in this regard that:

    The NPM should establish: (a) a mechanism for communicating and cooperating with relevant national authorities on the implementation of recommendations, including urgent action procedures, (b) a means for addressing and resolving any operational difficulties encountered during the exercise of its duties, including during visits; (c) a policy for publicising reports,

or parts of reports including the main findings and recommendations, and (d) a policy regarding the production and publication of thematic reports."[6]

In a federal system, however, this is not as simple as it may seem, given the complex and overlapping mandates of state and federal authorities who may be the subject of NPM recommendations, including state and federal departments of health, state and federal police, border authorities, and many others. Effective OPCAT implementation will thus require both high levels of cooperation among the different institutions that make up the NPM system (as discussed above) but also among those bodies that receive and are responsible for the implementation of NPM recommendations. Engaging these actors early in the process will be essential if they are to understand the implications of OPCAT ratification and be able to prepare and respond accordingly.

- In addition to a basic legislative requirement for the authorities to engage with and respond to NPM recommendations, government may also consider, among others, training and awareness-raising among staff, and the identification of institutional focal points. NGOs should also ensure constructive exchanges with the authorities through thematic roundtables. In Switzerland, for example, the NPM brought together the heads of cantonal juvenile justice institutions for closed-door discussions of their draft recommendations before they were made public.

- Article 23 of the OPCAT refers to the publication of the NPM annual report, with governments under an obligation to publish and disseminate them. In Australia this may also include discussion of NPM reports in federal and state parliaments. In addition, because Article 19 gives NPMs the power to make proposals and observations concerning existing or draft legislation, state and federal parliaments should make a practice of proactively sending relevant draft legislation to the NPM. Peer to peer exchanges on this issue among NPM bodies will be particularly important.

Recommendations

- The APT recommends that the authorities at the state/territory and federal level should be engaged early in the process, including through existing fora for intergovernmental cooperation. This will be essential if they are to understand the implications of OPCAT ratification and be able to prepare and respond accordingly.
- Following ratification, the authorities may wish to consider a number of steps to facilitate cooperation with the NPM, including the creation of MoUs, participation in NPM roundtables for the discussion of recommendations and other issues, training and awareness-raising among staff, and the identification of institutional focal points.
- Following ratification, the APT recommends that state and federal parliaments make a practice of proactively sending draft legislation to the NPM for comment.

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[6] Subcommittee on Prevention of Torture, 2012, *Analytical self-assessment tool for National Prevention Mechanisms (NPM)*, CAT/OP/1, para. 31.

The SPT (question 6)

- Article 11 of the OPCAT provides the basis for the SPT's role in visiting OPCAT States parties and giving advice to states on NPM establishment and functioning, either during a visit or at a distance. Over the years, the SPT has focused more and more on its advisory function in relation to NPMs. This is an important part of the SPT's mandate and Australia may wish to take advantage of this role immediately following ratification. Even before it becomes an OPCAT state party, however, Australia may still wish to engage with the SPT and invite individual SPT members on an advisory visit – outside the SPT official programme of visits - in order to discuss NPM establishment and functioning.
- Articles 11 and 20 also ensure that NPMs can have direct contact with the SPT. Following OPCAT ratification and NPM designation, the NPM may wish to designate the coordinating institution as a single point of contact for the SPT. This role may include: streamlining requests for advice and information, facilitating contact with other NPM bodies during and beyond SPT visits, and coordinating applications to the OPCAT Special Fund.

Recommendations

- Australia may wish to invite individual SPT members on an advisory visit - outside the SPT official programme of visits - in order to discuss NPM establishment and functioning.
- The NPM may wish to designate the coordinating institution as a single point of contact for the SPT following ratification and NPM designation.

Steps following ratification (question 7)

- Responding to the myriad challenges identified in this submission will require a concerted effort at the state and federal levels, involving all of the key stakeholders, including existing monitoring institutions, government authorities, academia, civil society and experts. While the APT welcomes the current civil society consultation as an important step, state and federal governments should form OPCAT working groups tasked with leading robust national consultations aimed at: mapping key actors and places of detention; identifying solutions to the coherence and coordination challenges unique to the Australian context; and designing a roadmap for progressive implementation that can lead from the current situation to one in which all places of deprivation of liberty are regularly monitored by OPCAT compliant institutions. These working groups should also focus on raising awareness of OPCAT and its implications, in particular among both public and private institutions involved in detention. Each state and territory is currently at a different level in terms of its existing monitoring framework and it is imperative that, over time, they converge around an OPCAT compliant system – one that does more than just visit so-called "traditional" places of detention, such as police stations and prisons and includes, in particular, private institutions. At the intergovernmental level (i.e., Council of Australian Governments), a process should also be launched to regularly review implementation in order to ensure that full compliance with the OPCAT is achieved considering the time limits stipulated by Articles 17 and 24 of the treaty.

Recommendations

- The APT recommends Australia develops a clear implementation plan, including ways to address potential challenges arising from the designation of multiple existing institutions as NPM, as early as possible to ensure they are able to fulfil their obligations to set up an NPM system under article 17 in a timely fashion.
- The APT recommends that, where appropriate, formal inter-governmental consultation mechanisms such as the Council of Australian Governments should be utilised to facilitate the discussion on OPCAT ratification and domestic implementation and to raise awareness of its implications.
- There is a need for genuine and comprehensive consultation on the part of the federal government. Compromises can work as long as all the relevant parties agree. Federal decisions that overrule state governments, existing monitoring bodies or civil society concerns clearly risk fragmentation of the future NPM or even a breach of their treaty obligations.

ANNEX 1 – Key features of NPMs and NPM establishment

At the time of writing[7], NPMs have been officially appointed in 65 of the 83 States parties to the OPCAT[8]. Their structure varies from one country to another, as the OPCAT does not specify one single model for NPMs, as long as they fulfil the key requirements provided by the treaty.

So far, states have chosen different models, each of them with specific characteristics according to their context. Some states have conferred the NPM mandate to one or several existing institutions, including national human rights commissions and ombuds institutions. Others have created a completely new body, or several, to perform the NPM mandate. Other states have opted for a different model, for example combining existing institutions with new structures. Although states have drawn inspiration from observing the NPMs in other countries with similar characteristics, experience clearly indicates that no model can be replicated precisely.

1. Key features of NPMs

Despite the diversity of structures, all NPMs share the same mandate, as provided by the OPCAT. Their work aims at improving the treatment and conditions for persons deprived of their liberty by contributing to changes at different levels: within places of detention, at the level of the institutions responsible for those places; and in the legal and policy framework.

1.1.1 Preventive approach

The NPM's preventive mandate is different from the work done by other national bodies on torture and ill-treatment for a number of reasons.

It implies a thorough analysis of the whole range of factors that might be conducive to torture and ill-treatment. In this regard, visits to places of detention are a key part of an NPM's mandate. They allow NPMs to examine all aspects of detention and identify the factors that increase the risk of torture or ill-treatment for persons deprived of their liberty. These may include: the legal and administrative measures applied within the place; the material conditions; the regime of detention and the activities within the place; the medical care; the organisation and management of detainees and staff; and the relations between staff and detainees. Visits are also fundamental for the credibility of the NPMs, as they provide them with first-hand knowledge and information which form the basis of their recommendations to the authorities and their dialogue with them.

Although crucial to the work of NPMs, visits to places of detention are not an end in themselves; they are only one part of an NPM's preventive mandate. The causes of problems identified within places of detention often lie outside those individual places. Therefore, an NPM's work also encompasses an analysis of the legal framework, public policies and the institutional culture and functioning of those institutions responsible for places of detention (e.g., penitentiary service, police, and relevant ministries).

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[7] 28 June 2017
[8] See APT OPCAT Database at: http://www.apt.ch/en/opcat-database/

Another feature of NPMs' preventive approach is the focus on cooperation and constructive dialogue with the authorities in order to contribute to positive changes. Cooperation is not a synonym for complaisance though. It means entering into critical dialogue and developing a constructive working relationship with the authorities, based on mutual respect, in order to assist them to find solutions to the problems encountered.

Finally, the work of NPMs is about detecting early signs and identifying possible risks of torture and ill-treatment, and not about denouncing past violations. It focuses on the system of deprivation of liberty as a whole. In this regard, NPMs are not the best placed to investigate and resolve individual cases. However, as these cases can constitute important indicators for existing systemic problems, it is essential that NPMs collaborate with other actors whose mandates include dealing with such cases.

1.1.2   Incremental work

When determining the most appropriate structure for the NPM, it is important to consider that no NPM is able to fully perform its broad mandate from the very beginning. Experience from other OPCAT states parties indicates that NPM work is incremental and develops over time. For example, during their first year of operation usually NPMs focus on planning and developing processes, establishing relationships and starting some visits to places of detention.

While it is essential for NPMs to carry out visits to different places of detention, good practice suggests that NPMs need to find a balance between these visits and a more analytical work. A strategic approach to their work is key for NPMs to be able to contribute to systemic change, as long as, from the beginning, they are granted all the features and powers provided for by the OPCAT.

1.1.3   OPCAT requirements

Regardless of their structure, all NPMs should meet some minimum requirements provided by the OPCAT, which include the following:

➢ *Functional and personal independence*

The independence of NPMs - and that of their personnel - from the institutions which establish and fund them, as well as from the institutions that they are meant to monitor, is essential to be able to prevent torture and ill-treatment. States have the obligation to ensure that NPMs are able to make decisions and act independently, without any interference from state authorities. Having a strong legal basis for the NPM is a guarantee in this regard. NPM personnel must also be independent, transparent and accountable in their work, as the way NPMs are perceived has a direct impact on their effectiveness.

➢ *Financial independence*

Financial independence includes the provision of adequate resources to the NPM, but it is also closely linked to the source and process of resource allocation, and to the NPM's autonomy to determine and submit its budget, and to use it without any interference. Without financial independence, the NPM would neither be able to exercise its functional

independence nor be perceived as an independent institution. Financial independence also goes hand in hand with financial accountability.

➢ *Adequate level of funding*

NPMs' preventive mandate is a demanding and specialised task which requires regular presence in places of deprivation of liberty, specific expertise and dedicated personnel. Therefore, even if the state decides to designate an existing institution as NPM, it will have to allocate some additional resources to carry out this new function, not only at the moment of designation, but also over the years.

NPMs within existing institutions can benefit from the logistical and human resources already available within the institution. However, experience from other OPCAT states parties shows that these are often insufficient for the NPM to regularly visit all places of detention and properly follow up on its recommendations, and to perform all range of other activities that its preventive mandate would entail.

Additional resources are usually needed to: recruit new personnel to perform the NPM functions; remunerate external experts to support the NPM, such as medical doctors and psychologists; cover travel costs for NPM staff; conduct training for NPM staff and experts; develop specific communication materials; publish reports; participate in international exchanges and seminars.

➢ *Multidisciplinarity and diversity*

For an NPM to be truly effective, it is not enough that its members and staff are independent: they should be knowledgeable and have the relevant professional expertise. The NPM overall, as institution, should by multidisciplinary, bringing together the required variety of different fields of professional knowledge relevant to deprivation of liberty. It should also be representative of the wider society, ensuring gender balance and representation of ethnic and minority groups.

➢ Powers to access places, persons and information

NPMs should be granted access to all types of places of detention, as well as their installations and facilities, and to all relevant information, including disciplinary and medical records. They should also have the power to conduct unannounced visits. NPMs should also have the power to conduct private interviews with any person of their choice. This is closely linked to the need to protect interviewees from reprisals.

➢ *Power to report, make recommendations and comment on policy and legislation*

One essential part of NPM's preventive mandate is the power to make recommendations to the relevant authorities to prevent torture and other ill-treatment. Recommendations often stem from the visits conducted to places of detention and are included in the NPM's visits, thematic and annual reports. Furthermore, NPMs' holistic mandate should include the power to make observations to draft or existing policy and legislation.

➢ *Protection for persons deprived of liberty and others*

The OPCAT grants protection from reprisals for any person or organization that communicates information to the NPM, irrespective of the accuracy of such information. It also provides that confidential information collected by the NPM should not be disclosed, unless the individuals give their express consent.

1.1.4   Tailoring the NPM to the national context

The process to determine the most appropriate structure for the NPM is key for a number of reasons. It provides an opportunity to tailor the NPM to the needs and characteristics of the country. Furthermore, it helps to estimate the human and financial resources required for the future NPM. Finally, experience from other states parties to the OPCAT has demonstrated that the way it is conducted has an impact on the functioning of the NPM, as it influences the perception of the institution and help avoiding practical challenges at the implementation stage.

1.1.5   Mapping of places of detention and existing monitoring bodies

An initial mapping of places of detention and existing monitoring bodies is useful to identify existing gaps and the necessary characteristics and powers of the future NPM.

A factual inventory of places of detention should provide information on the location, size and capacity of all places of detention within the jurisdiction and control of the state, keeping in mind the broad definition of "places of detention" under article 4 of the OPCAT. It should therefore cover both public and privately-run institutions where persons are not free to leave at will, ranging from prisons and police stations to psychiatric institutions, care homes for children and elderly people, migrant centres, deportation flights, etc. It should also include information on persons deprived of liberty, including number of persons detained, sex, age, nationality, ethnic group, etc.

Gaining a comprehensive understanding of the functioning of bodies which already monitor places of detention in the country has proven very useful for national actors to identify gaps in detention monitoring, as well as identifying potential institutions that may have a role or not in the future NPM. The mapping of existing monitoring bodies should analyse several aspects of each body in light of OPCAT requirements, such as the independence, legal basis, mandate, composition, powers and immunities, resources and working methods.

Existing monitoring bodies may lack essential elements and powers which are required under the OPCAT, such as functional independence from the government and the power to have unrestricted access to all places of detention, to all relevant information and to all persons. They may also have characteristics and duties which are in conflict with the OPCAT, as the functional dependence on the government and the obligation to disclose confidential information.

1.1.6   Transparent and inclusive process

The designation of the NPM is undoubtedly a primary responsibility for states under the OPCAT. In practice, it means that the final decision is to be taken by the government, but as a result of a transparent and inclusive process. As recommended by the SPT, "the NPM should

be identified by an open, transparent and inclusive process which involves a wide range of stakeholders, including civil society"[9]. Experience from other states parties to the OPCAT suggests that conducting a transparent and inclusive process to determine the most appropriate NPM model for the country is essential to ensure the credibility of the future NPM.

This has been indeed the case in many countries, where the process has taken several years and has involved a wide range of national actors, including authorities from the executive, legislative and judiciary branches, civil society, national human rights institutions, existing monitoring bodies and international bodies.

On the contrary, in those states where the designation of the NPM has been, instead, the result of a unilateral decision by the government, it has led to several challenges at the time of implementation. For example, it has delayed the implementation of the NPM or it has led to the lack of cooperation between the NPM and other monitoring bodies or civil society.

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[9] See UN Subcommittee for the Prevention of Torture, *Guidelines on national preventive mechanisms* (herein after SPT, NPM Guidelines), UN Doc. CAT/OP/12/5, 9 December 2010, §16.