

Response to the Law Commission consultation on mental capacity and deprivation of liberty

by the UK National Preventive Mechanism coordination

1. We welcome the opportunity to submit a response to the Law Commission consultation on mental capacity and deprivation of liberty.
2. The UK National Preventive Mechanism (NPM) was designated in 2009 as part of the UK's efforts to fulfil its obligations under the Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The NPM is made up of 20 statutory bodies, all of whom monitor places of detention. The NPM is coordinated by HM Inspectorate of Prisons (England and Wales).
3. The NPM's primary focus is the prevention of torture and ill treatment in all places of detention. Article 19 (c) of OPCAT sets out the requirement that the NPM have the ability to submit proposals concerning existing or draft legislation.
4. We very much welcome the Law Commission's attention to OPCAT compliance in proposing new regulatory and oversight arrangements for situations in which people who lack capacity to consent to care and treatment are deprived of liberty.
5. Through joint work conducted by NPM members, the NPM has highlighted concerns for the practice of *de facto* detention which its members have identified during their monitoring activities. The NPM has identified individuals at risk of being *de facto* detained in mental health and learning disability hospital care, general hospital care, care homes, children's homes and residential schools, and community settings, including shared and individual tenancies.¹
6. Members of the NPM with responsibility for monitoring and regulating social care and health settings, including formal deprivation of liberty and the informal practices already mentioned, operate under the different regulatory and legal frameworks of the UK. The Care Quality Commission is one of these members. A NPM subgroup focussing on mental health has been established to strengthen the coordination of the NPM's approach to mental health issues, and regularly discusses the NPM's focus on preventing ill treatment in the context of deprivation of liberty.

¹ UK NPM, *Monitoring places of detention: 4th annual report*, and *Monitoring places of detention: 5th annual report*. At: <http://www.nationalpreventivemechanism.org.uk/publications-resources/>.

Comments on the consultation document

7. The NPM Coordination would like to take this opportunity to provide some specific comments on the consultation document, as follows:
 - **Paragraphs 14.9, 14.10:** OPCAT does not specifically call for *inspection* of places of detention, rather it calls for both the UN Subcommittee on Prevention of Torture (SPT) and NPMs to have the ability to *visit* (Art. 11(a)) and to *regularly examine* the treatment of persons deprived of their liberty, so we would consider bodies that have powers to visit, regulate, inspect or monitor to be able to discharge responsibilities under OPCAT, should they meet other requirements (including independence).
 - **Paragraph 14.11:** Although 18 bodies were initially designated to the NPM, there are now 20 members of the NPM.²
 - **Paragraphs 14.11 (footnote 21), 14.12 (footnote 24):** These references relate to the UK NPM Annual Report, which is produced independently of the government.
 - **Paragraphs 14.12, 14.14:** Although in 2013 the UN Committee against Torture did comment on one area of the NPM's compliance with OPCAT, it does not scrutinise the NPM in detail nor systematically. The UN SPT is specifically mandated to provide the UK NPM (as all NPMs) with advice and assistance, training and technical assistance (OPCAT Art.11(b)). Furthermore, as part of the UN human rights framework, we would consider it legitimate for any UN treaty body to consider the extent to which the UK NPM discharges its duties under OPCAT in furtherance of the rights set out in a specific treaty.
8. Furthermore, it is worth noting that the SPT encourages all NPMs to assess their own OPCAT compliance in line with its 'Analytical Self Assessment Tool',³ and the members of the UK NPM have agreed a process by which this is conducted on an annual basis. The overall findings of this assessment are included in the NPM's annual report, which is laid before Parliament.⁴

The position of the UN SPT on the application of OPCAT to supported living and shared lives accommodation

9. The consultation document suggests that the UN SPT has not attempted to exercise such a "potentially extremely wide jurisdiction" (paragraph 14.10) as to include supported living and shared lives accommodation, and domestic settings where deprivations of liberty are occurring with state acquiescence, and that it has not definitively tested the aspects of OPCAT relating to deprivation of liberty in such settings. It is worth pointing out that as the UN SPT has never conducted a country visit to the UK, it is not clear whether or not it would seek to visit such settings if it did ever visit. The UK NPM is not able to confirm whether or not the SPT has visited similar settings in other countries. We are aware that the operation of NPMs in other countries varies considerably, in line with different legal

² See: http://www.nationalpreventivemechanism.org.uk/wp-content/uploads/2015/05/NPM-factsheet-1_Introducing-the-UK-NPM.pdf .

³ UN SPT, *Analytical Self-Assessment tool for NPMs*. At: http://www2.ohchr.org/english/bodies/cat/opcat/docs/AnalyticalToolsNPM_en.doc .

⁴ See: <http://www.nationalpreventivemechanism.org.uk/wp-content/uploads/2015/08/UK-NPM-self-assessment-write-up-pdf-370x524.jpg> .

frameworks and powers, as well as different needs and concerns relating to ill treatment in a given country context.

10. Further to the provisions in OPCAT Article 4, the UK NPM has been informed by the SPT that its view is that:

“The preventive approach which underpins the OPCAT means that as expansive an interpretation as possible should be taken in order to maximise the preventive impact of the work of the NPM.

The SPT therefore takes the view that any place in which a person is deprived of liberty (in the sense of not being free to leave), or where it considers that a person might be being deprived of their liberty, should fall within the scope of the OPCAT if it relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function. In any situations, the NPM ought also to be mindful of the principle of proportionality when determining its priorities and the focus of its work.”

11. We understand that the SPT aims to publish its position soon on its website.⁵ It is also worth noting that the SPT’s Guidelines on NPMs set out that:

“The State should allow the NPM to visit all, and any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within its jurisdiction.”⁶

12. In conclusion, the NPM would welcome further discussion of the compatibility of the Law Commission’s proposals with OPCAT, and the need to ensure the UK NPM’s ability to deliver on the expectations of the SPT.

⁵ <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx>

⁶ UN SPT, *Guidelines on National Preventive Mechanisms* (CAT/OP/12/5), paragraph 24.