



UK National Preventive Mechanism
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Scott McPherson
Director of Judicial, Rights, and International Policy
Ministry of Justice
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Dear Scott,

When we met in August 2016 we discussed my initial impressions of the NPM as its newly appointed independent chair. After eight months in my role as NPM Chair I have had opportunity to meet with all members of the NPM, shadow a number of visits or inspections of places of detention with members, as well meet as many of its stakeholders in the UK and international bodies (including several members or ex-members of the SPT and the CPT).

As a result I have been able to review the extent to which the UK NPM's structure complies with the requirements of OPCAT, taking into account the advice provided by the SPT to NPMs.¹ As you know from our initial discussion, the UK NPM's lack of legislation setting out both the mandate of the NPM itself and its constituent bodies, is a concern to us. It also troubles me that there are no statutory guarantees of independence for the NPM or its twenty members, and that the NPM does not have a separate budget.

My initial impression after spending time with members and meeting external stakeholders makes me concerned that these have a number of real consequences, as follows:

1. It clearly undermines the UK's formal compliance with OPCAT and the SPT's subsequent guidance and were the SPT to conduct a visit to the UK, we would be strongly criticised.
2. The UK government promotes the UK NPM around the world, yet our credibility is quickly questioned when other States learn of our lack of legislation.
3. Unless the NPM is incorporated into members' statutory requirements it affects the delivery of the NPM's overall mandate in practice, as many of its members' functions are much wider than their specific NPM mandate and this particular function may not always be a priority for them. Currently, the NPM role could be expressed merely as an aim in an organisation plan that is subject to change from year to year.

¹ "The mandate and powers of the NPM should be clearly set out in a constitutional or legislative text", UN SPT, *Guidelines on national preventive mechanisms*, 9 December 2010 (CAT/OP/12/5); see also UN SPT, *Analytical self-assessment tool for NPMs*, 6 February 2012 (CAT/OP/1).

4. The NPM itself should be accountable to parliament.²³ Parliament should set out in statute what is required of the NPM, so that it is able to hold the NPM to account for the mandate it has set out as well as its performance and finance. The absence of legislation also means the NPM is unable to lay its annual report in Parliament directly. It also hinders the ability of the NPM's stakeholders to hold them to account for their NPM work.
5. The NPM has a responsibility to assess how the government complies with its domestic and international human rights obligations relating to detention. Parliamentary accountability would provide the NPM with the appropriate independence from government to fulfil this role impartially.
6. The absence of a Parliamentary guarantee of the mandate and the independence of the NPM and its members can have a negative effect, allowing governments, particularly in times of austerity, to influence the critical approach that may sometimes need to be taken by them. A government could, in theory, decide to change the NPM and designation of members without the authority of Parliament.
7. The lack of a separate budget for the NPM, and in particular its coordination functions, compromises the NPM's financial and operational autonomy and inhibits the conduct of its affairs. NPM members are unable to guarantee the stability of their NPM work from year to year because of the discretionary way their budgets are set. The current informal arrangement between the Ministry of Justice and HM Inspectorate of Prisons, through which a nominal amount for NPM coordination is included in the overall HMIP budget, is unsuitable for a multi-body NPM requiring complex coordination.

These concerns have been put clearly into relief by the SPT's recent report on the similar, multi-body NPM in the Netherlands.⁴ This report, published after the SPT's visit to the Netherlands in July 2015, raises a number of concerns which are directly applicable to the UK NPM. I have enclosed a complete copy of the report.

In particular, the SPT clearly sets out the need for the mandate of a multi-body NPM to be set out in legislation:

"While acknowledging the existence of legal provisions providing the foundational basis for each individual institution within the NPM, a striking weakness in the current functioning of the NPM is the absence of a separate legislative text regulating NPM-specific functions, an NPM mandate, the relationship between NPM members and other bodies [...], and other issues that ought to be regulated, in line with part IV of the OPCAT." (paragraph 24)

And,

² OPCAT Article 18(4): ". When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.". See also Office of the UN High Commissioner for Human Rights (OHCHR), 'Principles relating to the Status of National Institutions (The Paris Principles)'; OHCHR 'Belgrade Principles' on the Relationship between NHRIs and Parliaments. See also: <http://www.ohchr.org/EN/NewsEvents/Pages/ParliamentsAndNHRIs.aspx>

³ There are currently two legislative texts that refer to the NPM and OPCAT. The Police and Fire Reform (Scotland) Act 2012 (<http://www.legislation.gov.uk/asp/2012/8/contents/enacted>) refers explicitly to the SPT and OPCAT (s. 93-96). The Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2015 which introduces reference to the SPT and OPCAT into the Prisons (Scotland) Act 1989 (<http://www.legislation.gov.uk/ssi/2015/39/contents/made?article-3-2-c>)

⁴ UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to the Netherlands for the purpose of providing advisory assistance to the national preventive mechanism: recommendations and observations addressed to the State party. Report of the Subcommittee. (CAT/OP/NLD/1).

“While the institutional format of the NPM is left to the State Party’s discretion, it is imperative that the State party enact NPM legislation which guarantees an NPM in full compliance with OPCAT and the NPM Guidelines. Indeed, the SPT deems the adoption of a separate NPM law as a crucial step to guaranteeing this compliance [...]”(paragraph 26)

In addition, the SPT identifies difficulties for an NPM made up of inspectorates that perform NPM functions as part of their broader remit and recommends that their NPM functions be segregated and performed autonomously (paragraph 38). Finally, the SPT reiterates its recommendation that the NPM should have a separate budget line in the State budget, to ensure its continuous financial and operational autonomy (paragraph 27).

It seems to me that this report by the SPT could have easily been written about the UK’s NPM: I believe that our system has many of the very same flaws. The NPM enjoys good cooperation between most NPM members, but where this works it is because of goodwill rather than any formal requirement or accountable structure. As far as I am aware, the Dutch and the UK NPMs are the only NPMs anywhere in the world that do not have the necessary legislation. I understand that the SPT raised concerns about the UK’s early plans to designate an NPM without legislation, and so I believe that we could, properly, be strongly criticised for not having addressed this issue.

In light of the above, I would like us to discuss these issues further at our next meeting. I think it would be helpful for us to develop a “roadmap” for the UK as the SPT suggested for the Netherlands, to make sure we can continue to enjoy our international standing and continue the efforts already made to strengthen our contribution to the prevention of ill treatment in detention.

We obviously do not have control over when the SPT might choose to visit the UK but in any event I will, at some point, need to raise these issues directly with the SPT and with the United Nations Committee Against Torture in advance of the examination of the UK’s periodic report later this year.

Regarding NPM legislation, I would like to propose the following:

- A legislative opportunity to establish the mandate of the UK NPM and its independence should be identified and pursued (perhaps in the proposed Prisons Bill). At the same time, we should establish whether separate devolved legislation or a consent mechanism would be needed for devolved administrations.
- This should include both the core NPM functions, and a duty on the named NPM members to cooperate with each other and with the NPM itself in performing the overall NPM role (with a power of the Secretary of State to add or remove members by statutory instrument);
- Opportunities for individual NPM members to include their responsibilities under OPCAT by amendment in their legislation to be sought during the current Parliament; and
- A recognition of HMI Prisons’ role under OPCAT be included in the Prisons Bill currently being drafted, which is particularly important for its own credibility given its coordination role for the NPM.

As discussed at our last meeting, we plan to publish this letter when appropriate.

I look forward to discussing with you soon,

Yours sincerely,

John Wadham
Chair
UK National Preventive Mechanism

Cc. Philip Barclay, Head of Security and Justice, Human Rights and Democracy
Department, Foreign and Commonwealth Office
Chris Ball, Prison Reform Policy, Ministry of Justice
Peter Clarke, HM Chief Inspector of Prisons (England and Wales) and NPM Steering
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Katie Kempen, Chief Executive, Independent Custody Visiting Association and NPM
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