CHALLENGES AND GOOD PRACTICES OF NPMS OPERATING IN DIFFERENT ORGANIZATIONAL STRUCTURES

BRIEFING PAPER

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Introduction

The Optional Protocol to the UN Convention Against Torture (OPCAT) requires states to 'maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level'.[1] The Protocol provides a range of powers in Articles 19-22 that the NPM should have in order to function effectively and Article 18(4) requires that when establishing an NPM due regard be paid to the Paris Principles, the document which has been seen as the benchmark against which NHRIs are now measured.[2] The text of the Protocol is now supplemented by further guidance from the SPT, including its Guidelines on National Preventive Mechanisms,[3] and Analytical Self Assessment Tool for National Preventive Mechanisms (NPMs).[4]

Beyond this, however, it is clear that there is no one model of NPM that will fit all states. Research indicates that a range of factors will influence and determine which may be the best type of body for that state, such as the existence of ombudspersons and or national human rights commissions within the jurisdiction, trends towards or away from the establishment of more, financial and political reasons and the esteem in which existing bodies are held.[5]

There are challenges and opportunities presented by the various different models which will be outlined here. State practice evidences a variety of approaches to the choice of body as NPM: some states have chosen to establish new bodies,[6] others designating their existing ombudspersons, or NHRIs. Some of these existing bodies have been joined by others such as with the 'ombudsman-plus' model,[7] and whereas others are a single-body NPM,[8] some states have designated a number of institutions to form the NPM as a collective.[9]

Although, therefore, some have chosen to select their national human rights commission as the NPM, or as part of the NPM, given the discussions taking place in Hungary have centred around the choice

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[1] OPCAT, Article 17.
[2] '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'.
[3] CAT/OP/12/5.
[4] CAT/OP/1.
[5] See Murray, Steinerte, Evans and Hallo de Wolf, The Optional Protocol to the UN Convention Against Torture, Oxford University Press, 2011. See also the various documents and excellent information provided by the Association for the Prevention of Torture: www.apt.ch
[6] E.g. as in Benin with the establishment of the *Observatoire National de Prévention de la Torture* ('ONPT').
[7] Such as the Slovenian Human Rights Ombudsman, an existing institution, who is designated as the NPM but will carry out his tasks in agreement with NGOs registered in the state, see correspondence with the SPT from the Permanent Mission of the Republic of Slovenia, http://www2.ohchr.org/english/bodies/cat/opcat/docs/NPM/Slovenia.pdf.
[8] E.g. the Albanian Peoples' Advocate (Avokati i Popullit).
[9] Such as the 18 member NPM in the UK, see http://www.justice.gov.uk/guidance/opcat.htm.

of the ombudsperson as the NPM, alone or as an 'ombudsman-plus' model, these will form the focus of this briefing paper.

1. A single body ombudsman as the NPM

The choice of the ombudsman as the NPM is an option that has been adopted by a number of states.[10] What is apparent is that there are inevitable changes that are required of an ombudsman once it is designated as NPM. Even though some governments may wish to argue that this is 'business as usual' for those institutions which are already carrying out visits to places of detention, our research indicates that some amendments to their methodology, procedures or internal structuring, for example, will be required if the tasks under OPCAT are to be fulfilled.

(a) Complaints/versus broader mandate

For many ombudspersons their remit may be primarily based on responding to complaints. The designation as NPM, with its broader, more preventive, approach raises some challenges.[11]

Firstly, one needs to consider how to relate the reactive approach of responding to individual complaints with the proactive preventive mandate required under OPCAT. On the one hand, complaints require investigation yet, on the other, OPCAT presupposes a dialogue between the NPM and the state and its authorities which may sit uneasily with the more adjudicatory complaints process.

Various ombudspersons have found ways around this by, for example, setting up a separate unit within their body to deal with OPCAT specifically.[12] Indeed, this is now something that the SPT advocates that the NPM do: 'where the body designated as the NPM performs other functions in addition to those under the Optional Protocol, its NPM functions should be located within a separate unit or department, with its own staff and budget'.[13] Furthermore, it is also recommended that any resources for the NPM work should be 'ring fenced'.[14]

Therefore, an ombudsperson may need to consider whether it is appropriate for the same staff to be undertaking complaints as well as the NPM visits.

For some ombudspersons, however, balancing this complaints approach with the broader preventive mandate does not appear to be a problem and indeed, designation as an NPM has provided an opportunity to adopt a broader rights-based approach to its work. Conversely, receipt of complaints may help an ombudsperson decide which institutions it should prioritise for its preventive visits. Furthermore, there is evidence that the more coercive powers that an ombudsman has, may in fact be very useful in convincing government and authorities to take note of its recommendations.[15]

(b) A preventive and rights-based approach

OPCAT requires that NPMs are 'preventive' mechanisms. As noted by Article 19(b) of OPCAT, when making their recommendations NPMs should take 'into consideration the relevant norms of the United Nations'. NPMs need to consider not only national law but also international human rights

[10] See list of NPMs designated by states as notified to the SPT, http://www2.ohchr.org/english/bodies/cat/opcat/mechanisms.htm.

[11] See E. Steinerte and R. Murray, 'Same but Different: National human rights commissions and ombudsman institutions as national preventive mechanisms under the Optional Protocol to the UN Convention against Torture', 6(1) Essex Human Rights Review (2009) 54-72. See also APT, National Human Rights Commissions and Ombudsmans Offices: Ombudsmen as NPMs, 2008.

[12] Such as in the Czech Ombudsperson.

[13], SPT, Guidelines on NPMs, para 32.

[14] SPT first annual report, para 28(viii).

[15] See Murray, Steinerte, Evans and Hallo de Wolf.

law, and the latter may be something with which may not traditionally have been their first point of reference.

In addition, ombudspersons may not necessarily have focused on human rights and it is arguable that the preventive mandate required under OPCAT necessitates an awareness of human rights and a human rights ethos. In practice, however, this broader human rights awareness may be something that will be acquired gradually, or indeed collectively by increasing links with other organisations, or ensuring a relationship with other institutions in the jurisdiction who may be able to provide this broader expertise.

A preventive visit may also require a different approach in its methodology than that undertaken in response to complaints. For example, visits need to be regular and the ombudsperson also needs to have the capacity to make unannounced visits.[16] This type of visit may require the examination of other documents such as training materials provided for staff in the institutions under consideration. A further challenge and one which is arguably not settled is the extent to which an NPM should be looking at the broader political and legal situation in the state when undertaking its NPM visits. There is an argument that an NPM should be looking also at the reasons for the detention in the first place, beyond simply the consequences of it. This may require a different approach to its methodology and changes to the content of its reports.

The designation of an existing ombudsperson therefore may be the obvious choice in some states but should still not be presumed to be straightforward and may well require changes to the founding legislation as well as its practice.

2. An 'ombudsman plus' model

The ability of one institution to fulfil all the requirements of OPCAT is a challenge that has been recognised and has led other states to select the 'Ombudsman-plus' model as their NPM, namely, to designate the ombudsperson but that the ombudsperson carry out the NPM functions in collaboration with NGOs and CSOs.[17]

(a) The benefits

There are a number of benefits of including NGOs as part of the formal NPM.[18] These include the ability to tap into additional expertise perhaps across a range of places of detention or, perhaps from a more human rights perspective. Having the possibility to collaborate with a range of organisations who may have greater expertise in visiting different types of places of detention can enhance the capacity of the NPM overall. Similarly, whereas an ombudsperson may not have traditionally focused on a human rights approach to its work, collaborating formally with a human rights centre or similar body which has this expertise provides the NPM with this collective capacity.

Engaging CSOs formally in the NPM enables them to provide additional information and for the ombudsperson to exploit contacts or relationships that the CSOs may have with relevant authorities. It also has the benefit of an ombudsperson being associated with organisations who carry considerable respect in the community and who are perceived as independent.

From the perspective of an NGO or CSO, engaging formally in the NPM may mean that their views are given greater weight and that these can be reflected in NPM official documents.

[16] Article 19, OPCAT.
[17] As in Slovenia.
[18] APT, Civil Society and NPMs, p.12.

However, the challenges should also not be ignored. If the NGO participates formally as an organisation in the NPM and is designated as such, it should carefully consider the following:

(b) Some challenges

Firstly, a CSO needs to consider whether on some issues it will still be able to stand separately and whether its role in the NPM will compromise in some ways its ability to critique it or government.

We have found from our research that formal involvement may limit the NGO's flexibility in the visits it may wish to do, what issues it may wish to focus upon and also may have an impact on its resources.

In addition, it may also impinge on how the NGO is perceived by others, and whether the NGO's independence is compromised by it being closely connected to and part of a designated/statutory body.

Furthermore, we also found in our research that by making a formal, visible and close link between NGOs and a statutory body, the NPM will be seen as too close to NGOs and civil society and too easily influenced by them and this may in turn impact on whether it is then able to gain the ear of government.

It is also important to bear in mind that whilst there may be certain attractions of being associated with a statutory body which has an excellent reputation and which is perceived as independent of government, this could change. Being part of the NPM when the ombudsperson does not have a positive reputation may also damage those associated with it.

There may therefore be certain benefits of operating at arms length from the official NPM.

3. Ways of ensuring NGO engagement with NPM

It is important that NGOs engage with the NPM, even if this is not in an official capacity. As the SPT Guidelines make clear, and as supported by research and the work of organisations such as APT, it is crucial for the effectiveness of the NPM if there is transparent, continual and regular engagement with NGOs in the designation, establishment and ultimate operation of the NPM.[19]

There are various ways in which this can be achieved which do not require formal designation as the NPM.

(a) As experts or in an advisory capacity

Article 18(2) of OPCAT require that the 'expert' members of the NPM be persons with the 'required capabilities and professional knowledge' and the SPT Guidelines on NPMs note that NPM members 'should collectively have the expertise and experience necessary for its effective functioning'.[20]

The NPM as an institution collectively should have the necessary expertise to carry out its functions effectively. In the case of an NPM with a number of constituent parts, this may not be a problem.[21] In addition, attempting to ensure the breadth of expertise in one individual, an ombudsperson, or a small

[19] SPT Guidelines, para 16. See also APT, The Optional Protocol Implementation Manual, 2010.
[20] SPT, Guidelines on NPMs, para 17.
[21] As in the UK, for example.

number of members, for example, can be problematic and unrealistic. One therefore needs to look also at the staff composition of these institutions, in particular those who are undertaking the visits.[22]

Outside expertise could also be provided by an individual from an NGO or CSO in their personal capacity through accompanying the NPM on visits,[23] to enable this approach to be 'multidisciplinary' and involve the breadth of expertise that the SPT suggest (legal, 'the medical profession, children and gender specialists and psychologists'[24]). The involvement of a broader range of backgrounds provides a greater appreciation of the different environments and different purposes of detention. This could be done through the establishment of a roster of experts from which individuals are drawn depending on the type of institution being visited.

The NPM can also engage with CSOs as institutions or indeed with other bodies. This could be done with the creation of Memorandum of Understanding which set out the scope of those relationships, either between the NPM and the CSO, [25] or between the CSO and the relevant authorities,[26] or more formally with the establishment of advisory councils or working groups.

Formal and informal relationships may need to be made with other organisations, both statutory and CSOs, in order achieve OPCAT's aims.

(b) Safeguarding this capacity

In order to ensure that this external expertise and other capacity can be drawn upon by the ombudsperson a number of safeguards need to be put in place. Firstly, it is important to ensure that the legislation establishing the ombudsperson provides he or she with the ability to engage external organisations or individuals as they think fit. A broader provision to this effect in the legislation can legitimise this.

In addition, the independence of the ombudsperson as the NPM is required by OPCAT. This independence must be enshrined in the legislation establishing or designating the NPM.

4. Importance of continuing to lobby for an OPCAT-compliant law

It is important that even if the 'ideal' model NPM is not the one that is being considered, that CSOs and others continue to lobby for an OPCAT-compliant law. It has been said elsewhere, including by the SPT, that the process of designation and establishment of an NPM and the appointment of its members should be transparent, inclusive and engage CSOs and others.[27]

Perhaps crucially in this context is the need to ensure that the independence of the NPM is protected in the legislation in a number of ways and in particular those which enable the NPM to make its own decisions and interpret its own mandate. Besides the credibility that this provides an NPM, an independent NPM with these powers to interpret its mandate as it thinks fit may then have the ability to bring on broad that CSO engagement even if it is not formally included in its legislation.

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[22] As noted by the SPT Guidelines: 'the NPM should ensure that its staff have between them the diversity of background, capabilities and professional knowledge necessary to enable it to properly fulfil its NPM mandate', SPT, Guidelines on NPMs, para 20.

[23] See, e.g. Georgia's Special Preventive Group, http://www.ombudsman.ge/index.php?page=777&lang=1&n=9.

[24] See SPT, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment to Sweden, CAT/OP/SWE/1, 10 September 2008, para 36. See also SPT, Guidelines on NPMs, para 20.

[25] Ombudsman of Kyrgyzstan has a MoU with the OSCE and with an NGO, 'Kylym Shamy', in June 2011, http://www.osce.org/bishkek/78517

[26] E.g. as in the Czech Republic where the Czech Helsinki Committee has an agreement with the Prison Service.

[27] SPT Guidelines on NPMs, para 16.

In addition, NGOs which are able to present a degree of coordination and a united front on some (if not all) issues may have greater impact.

Lastly, one should also not underestimate the importance of training and awareness-raising of government staff and other relevant authorities on the meaning and importance of OPCAT. Further training by NGOs, based both within and outside Hungary, may still be useful at this juncture to increase the likelihood of as fully an OPCAT compliant law as possible.