



National Human Rights Commissions and Ombudspersons' Offices / Ombudsmen as National Preventive Mechanisms under the *Optional Protocol to the Convention against Torture*

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Introduction

The Optional Protocol to the Convention against Torture (OPCAT) establishes a system of visits to places of detention by independent experts for the better prevention of torture and other cruel, inhuman and degrading treatment or punishment.

The system relies on an international UN Subcommittee on Prevention of Torture (SPT), together with National Preventive Mechanisms (NPMs) in each State.¹ States have the option of creating a new institution to serve as NPM, or designating an existing institution or institutions if they meet the requirements of the OPCAT.

Although there are a number of ways in which National Human Rights Institutions (NHRI) can contribute to the prevention of torture and other forms of ill-treatment², the scope of this paper is limited to the issues that commonly arise when a national human rights commission or Ombudsperson's³ office is

¹ Article 3 of the OPCAT provides: "Each State party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment."

² For more information on the role of NHRIs in preventing torture, please see "The Role of National Human Rights Institutions in the prevention of torture and cruel, inhuman or degrading treatment or punishment", APT position paper, 2005, See: http://www.apt.ch/component?option=com_docman/task.doc_download/gid,190/Itemid,59/lang,en/.

³ Many existing institutions use the title "Ombudsman" as an anglicized version of the original Swedish term. Since in English this term could be understood as implying an assumption about the gender of the office-holder, in this paper we tend to use the term "Ombudsperson". In some regions, Ombudspersons are more commonly referred to as "Public Defenders" or similar terms. In general, the use of the word "Ombudsperson" in this document is intended to include all similar institutions, whatever their formal name.

considered as a possible NPM. Indeed, this document is intended to prompt decision-makers to take a hard second look at the appropriateness of designating existing general-purpose institutions as NPMs.

States may initially assume that designation of an existing national human rights commission or Ombudsperson's office would be an expedient and inexpensive way to meet the obligation to have an NPM under the OPCAT. However, such existing institutions rarely already meet all the requirements of the OPCAT. Amendments to legislation, organizational restructuring, and the provision of additional human, logistical and financial resources are almost always needed if an existing human rights commission or Ombudsperson is to assume the NPM role. Further, in some cases, aspects of the composition, work, or status of an existing institution may make it simply inappropriate for designation as an NPM, whether or not changes could be made.

Ombudspersons offices typically enjoy independent status guaranteed by the country's Constitution, and have experience dealing with issues of the appropriateness of State action vis-à-vis particular individuals. In most cases, Ombudspersons offices are charged with a very wide subject-matter mandate, though some countries have one or more specialized Ombudspersons. With few exceptions, the office of Ombudsperson is occupied by one individual who has actual decision-making authority, though, in most instances, he or she is assisted by staff. Ombudspersons typically do not have the power to order government decision-makers to do particular things to correct a situation, relying instead on persuasion, whether in private or through political pressure created through publicity in particular cases. Ombudspersons and their staff tend to come from a legal background. Sometimes their mandate is limited to assessing the fairness of procedures rather than the correctness or appropriateness of substantive decisions. Some Ombudspersons are restricted to reaching decisions by reference only to national, as opposed to international, standards, whereas the empowering legislation of others may expressly refer to international treaties.

National human rights commissions, on the other hand, are normally made up of a relatively large number of members. They may or may not have a firm Constitutional foundation. Again, they tend to have a broad subject-matter mandate, though the human rights perspective normally restricts the scope of mandate slightly as compared to Ombudspersons. The powers of human rights commissions vary widely depending on their character. At one end of the spectrum, the commission may be highly independent and given a quasi-judicial power to make public findings in individual complaints and issue binding orders to public officials. At the other end of the spectrum, a commission may not be particularly independent (indeed may include representatives of government ministries) and serve primarily or exclusively as an advisory body to the Government. Commission members and staff may come from a range of backgrounds, though often legal backgrounds remain the most common. Again, some national human rights commissions are limited to applying rights under national law, while others may be expressly authorized to apply international human rights law and principles.

Consideration of the points explained below in each national context will help to highlight the specific additional legal measures and human and financial resources actually required to comply with the OPCAT. Careful examination of these issues may also expose problems that designation as an NPM could pose for the institution's existing work and mandate. In some cases this may lead to recognition that a new specialized institution will best enable the State to comply with the OPCAT; while in others it will help ensure that discussions between the government, civil society and national institutions is based on a realistic assessment of the legislative, human and financial implications of transforming an existing national institution into an NPM under the OPCAT.

Given the number of NHRIs throughout the world⁴, it would not have been possible, or desirable for the purpose of this paper, to assess all of them against the requirements of the OPCAT. Only those NHRIs that, at the time of writing, either had been formally, or were highly likely to be designated as NPM, were considered.

Requirements for National Preventive Mechanisms under the OPCAT

The OPCAT sets out minimum requirements for NPMs. The APT has provided a detailed explanation of those provisions in the publication, *Guide to the Establishment and Designation of National Preventive Mechanisms* (hereinafter referred to as "NPM Guide"),⁵ so for present purposes the key requirements for effective NPMs may be summarized as follows:

- Mandate to carry out preventive visits
- Resources to carry out full programme of visits
- Access to all places of detention
- Access to all relevant information
- Right to conduct private interviews
- Independence
- Expertise
- Right to make recommendations and to receive a considered response
- Right to publish reports
- Necessary privileges and immunities
- Credibility.

⁴ See the list of NHRIs accredited by the International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights: http://www.nhri.net/2007/List_Accredited_NIs_Nov_2007.pdf.

⁵ The guide is available at www.apr.ch. The present paper focuses only on special issues vis-à-vis existing general-purpose commissions or Ombudspersons, but there are many other aspects analyzed in the NPM Guide that apply equally to these types of institutions and so this paper must be read in conjunction with the fuller treatment set out in the Guide.

The following sections of this paper examine each of these elements in turn, in the specific context of national human rights commissions and Ombudsperson's offices. Issues are illustrated with examples from particular countries that have designated an existing commission or Ombudsperson as NPM, or are considering doing so. More information about the current status of NPM establishment in each signatory and State Party to the OPCAT can be found in APT's *Country-by-Country NPM Status* summary report.⁶

1. Mandate to Undertake Preventive Visits

The OPCAT requires that each NPM have a mandate and capacity to undertake a programme of regular visits to examine the treatment of persons deprived of liberty and protect them from torture or other ill-treatment. Yet, the fact that an existing institution already visits places of detention from time-to-time does not necessarily mean that it is engaged in the type of activity that the OPCAT contemplates. Not every type of visit to a place of detention will follow the OPCAT approach: the prevention of future human rights violations through exposure of existing problems on a regular and repeated basis and a process of direct dialogue with officials.⁷ Nor does every type of visit or visiting institution enjoy the guarantees and employ the methodology contemplated by the OPCAT.⁸

For instance, the OPCAT is based on a distinction between regular visits undertaken to all places of detention to prevent ongoing and future ill-treatment of any detainee in the place, and infrequent visits undertaken to particular individuals in order to investigate ill-treatment that has already taken place. While there can be considerable overlap between these two functions in practice, undertaking visits only after-the-fact to investigate individual cases will usually fail to achieve the broad preventive effect, which is the purpose and object of the OPCAT.

A distinction may also be drawn between visits that have as their primary purpose the protection of detainees from abuse and which therefore may require advocacy on behalf of detainees (i.e. a human rights approach), and visits that are mainly for other purposes (general inspection, review of fiscal performance, criminal or impartial fact-finding investigations as part of an adjudicative process, etc.)

National human rights commissions can have extensive experience and expertise with a "human rights"-centred approach to issues. Some national human rights commissions may even already carry out visits to places of detention. Ombudsperson's offices too may have visited places of detention in order to investigate particular formal or informal complaints received in their

⁶ See www.apt.ch/npm

⁷ See Preamble and articles 1, 4, 19, 22 of the OPCAT and chapter 3 of the NPM Guide.

⁸ See articles 18, 19, 21 and 22 of the OPCAT and chapters 6 and 7 of the NPM Guide.

offices, or as part of having focused on a particular countrywide issue in a given year. With some exceptions, however, these institutions do not usually have a history of systematic preventive visits to all places of detention in the country.

Here it is important to examine carefully the frequency, purpose, and nature of the visits the commission or Ombudsperson already undertakes. Of course, visits of any kind can provide visitors with greater familiarity with the situation inside closed places. However, if past visits have tended to be reactive, infrequent, focused on the investigation of individual complainants, or for mixed objectives, some training and changes to methodology are usually necessary to ensure the institution understands and is able to conduct effective *preventive* visits. For instance, bodies that typically stay within the administrative sections and meeting rooms in places of detention, without walking through the sections with cells and where other inmate activities take place, cannot possibly hope to fulfill the functions expected by the OPCAT without significant changes to their methodology.

If the institution will continue to exercise quasi-judicial or public fact-finding functions concerning individual complaints, while undertaking new functions to implement a constructive dialogue through preventive visits under the OPCAT, some internal structural changes may also be necessary in order to ensure that both detainees and prison officials understand the nature of any discussions they have with Commission or Ombudsperson's staff. Otherwise, it may be difficult to establish or maintain the cooperative relationship between the NPM and government officials upon which the OPCAT visits depend, if those same officials are potentially subject to prosecution or judgment by the NPM. Likewise, if the NPM functions are expected to be performed by the same staff also responsible for investigating individual complaints, this may well generate a great deal of confusion, first and foremost for the staff themselves, who will not be clear about the capacity in which they operate, as well as for the public in general.

Also, individuals may feel less willing to speak openly with the NPM if they fear their identity or the information they provide may be disclosed at some later stage (as part of a prosecution or hearing, for instance). Furthermore, the workload and urgency of individual complaints can overwhelm and erode the institution's ability to maintain a vigorous and comprehensive programme of preventive visits. These considerations should be weighed together with the possibility that combining the NPM functions with a public investigative or complaints adjudication function can bolster the strength of an institution's recommendations.

The approach mandated to Ombudsperson's offices, and the scope of their power to make recommendations, varies from country to country. The OPCAT requires that the NPM approach its work with the aim of improving conditions of detention and protecting persons in a practical sense. Thus, institutions whose mandate has traditionally focused mainly on the fairness of procedures rather than the appropriateness of substantive outcomes may not be well-equipped for substantive issues and those requiring technical

expertise in the NPM's preventive work. Institutions that traditionally have been charged with determining whether specific administrative action complied with national laws, proper administrative procedure or standards of fairness⁹ may also find it difficult to assume the role of advocate on behalf of detainees, commenting on government or parliamentary "policy" choices, and potentially proposing that the legislature pass, amend, or repeal laws. Detainees and staff in places of detention may also find it confusing to have an institution that has an established approach or role of a more legalistic kind now taking different approaches and assuming different roles under OPCAT.

2. Resources to Carry Out a Full Programme of Visits

Additional financial and human resources will almost always be required for a general-purpose national human rights commission or Ombudsperson's office to be in a position to undertake a sufficiently focused and frequent programme of preventive visits to meet OPCAT obligations. A body charged with covering a wide range of rights for all citizens of a country may face budget pressures that restrict its ability to undertake what can be a resource-intensive programme of field visits to all places of detention in a country (police stations are a typical example – a crucial area of concern for any NPM yet in most countries they are geographically dispersed and very numerous).

It is not enough that the Government simply designate a body and then expect it to find the resources to undertake the new OPCAT functions within an existing budget. The OPCAT specifically requires each State Party "to make available the necessary resources for the functioning of" its national preventive mechanism.¹⁰

The APT *Guide to the Designation and Establishment of National Preventive Mechanisms* provides greater detail on how an estimate of those needs can be calculated. However, we set out here several general observations of particular relevance to existing national human rights commissions and Ombudspersons' offices:

- A body that has historically only rarely or never undertaken field visits on a repeated basis, including to rural areas of a country, will always require additional physical and logistical resources to function under the OPCAT.

⁹ For example, the Danish Ombudsman "*is charged with the responsibility of ensuring that the public administration does not act in contravention to Danish law, notably public administrative law. It is thus a body exercising legality control...*": See Rehabilitation and Research Centre for Torture Victims (RCT), *Alternative Report to the Committee against Torture* (May 2007) at p. 20. Available at: http://www2.ohchr.org/english/bodies/cat/docs/ngos/RCT-Alternative_report.pdf.

¹⁰ See article 18(3) of the OPCAT.

- A body that has not typically required ongoing advice from medical or psychological professionals will require additional personnel or financial resources to obtain such expertise.
- A body that historically has visited only a particular type of place of detention – prisons for instance – will always require additional resources if it is now to cover the full range of places of detention (police stations, psychiatric institutions, military detention centres, etc.) required by the OPCAT.
- A body that is not already engaged in a comprehensive programme of preventive visits will usually require additional training at the outset, both on how to plan an effective programme, and how to carry the visits, and this will generally depend on additional funding in the initial years of operation. In addition, institutions that have previously based their work exclusively on a national law framework may require additional training about the international legal framework governing torture and ill-treatment.¹¹
- NPMs have the right (and Governments must encourage them) to have direct and confidential contact with the SPT, both while it is based in Geneva and during its visits, and this may require additional resources.¹²

In this regard, it must also be emphasized that the requirement that the NPM be able to function independently¹³ means that it must not be dependent on the Government to provide it with transportation for a particular visit (as this would provide too great an opportunity for the Government to control the timing, place, and degree of notice of particular visits), nor can it be left dependent on the Government to provide professional expertise from persons already employed by the Government for other purposes.¹⁴

The instrument designating the Costa Rican Defensoría de los Habitantes (Ombudsperson) as NPM expressly acknowledges that additional resources will be needed for the Defensoría to properly comply with OPCAT requirements.¹⁵

While the Estonian NPM, its Chancellor of Justice (Ombudsperson), enjoys many of the legal powers required by the OPCAT, concerns remain regarding the issue of resources. Following the UN Committee against Torture (CAT)'s review of Estonia fourth periodic report in November 2007, the CAT expressed misgivings regarding the Chancellor's ability to carry out both its

¹¹ See article 19(b) of the OPCAT.

¹² See articles 12(c) and 20(f) of the OPCAT.

¹³ See article 18(1) of the OPCAT.

¹⁴ For more detail on financial independence, see pp. 46-48 of the APT *Guide to Establishment and Designation of National Preventive Mechanisms*.

¹⁵ Presidential Decree n° 33568-RE-MSP-G-J, published 19 February 2007. See: <http://www.apr.ch/npm/americas/CostaRica1.pdf>:

mandate as NPM and investigate all complaints of violation of the provisions of the Convention, and recommended that the State provide it with adequate resources¹⁶.

The Polish Commissioner for Civil Rights Protection (Ombudsperson), also designated NPM, is a large institution with a wide mandate and considerable resources for its overall work. However, the Unit on Executive Criminal Law which is actually charged with carrying out OPCAT work consists of approximately eight staff, of whom only four or five undertake visits to places of detention. This does not appear to represent any increase over its pre-OPCAT resources in order to reflect its new functions. It is unclear how such a small number of people can physically visit all places of detention on a regular basis in a country of some 39 million people.

There were also originally concerns about the ability of the Moldovan Parliamentary Advocates (Ombudspersons) to act as an effective NPM given the restricted financial and human resources they had been allocated by the Government. The three Parliamentary Advocates (Ombudspersons) share co-equal authority within a Centre for Human Rights. These shortfalls appear to some extent to have been addressed by the establishment of a monitoring body, the so-called Consultative Council, comprising 12 persons, which will collaborate with the Moldovan Parliamentary Advocates as the country's NPM. Nonetheless, it remains to be seen in practice what additional financial resources will be given to the overall NPM, without which it will not be able to operate effectively.

The Government of Mexico has designated the National Human Rights Commission as NPM. A separate NPM Unit of 13 persons has been created, a number insufficient to undertake regular visits to all places of detention in a country of over 100 million inhabitants.¹⁷

These types of concerns have also been recognized by the European Committee for the Prevention of Torture (CPT), exercising its mandate under the European Convention for the Prevention of Torture. For instance, in its report on its 2002 visit to Denmark, the CPT found that "given the very wide scope of the Ombudsperson's mandate and the resources at his disposal, it is unrealistic to expect the Ombudsperson to carry out the regular monitoring of police stations advocated by CPT."¹⁸

¹⁶ UN Doc. CAT/C/EST/CO/4 (22 November 2007), para. 11.

¹⁷ Though the Commission claims it will also work with state-level human rights commissions through Memoranda of Understanding, it also claims that it cannot delegate its functions since it is the one and only designated NPM.

¹⁸ Report to the Government of Denmark on the visit to Denmark carried out by the CPT from 28 January to 4 February 2002. <http://www.cpt.coe.int/documents/dnk/2002-18-inf-eng.htm>.

3. Scope of Places to be Visited

The OPCAT requires that each NPM have access to any places of detention it chooses to visit, and all parts of those places. Existing institutions may have limitations on the scope of places that they are able to visit that may need to be removed if they are to serve as NPMs under the OPCAT. An institution that does not have any express legal right to visit places of detention of its choosing cannot qualify as an effective NPM under the OPCAT. This can be particularly problematic in Federal States, where jurisdiction over places of detention may be shared between the federal and provincial governments. In such instances, a federally-created human rights institution might not have the power to visit certain categories of closed institutions falling outside the scope of federal jurisdiction.

Amendments made to the Czech Public Defender of Rights (Ombudsperson)'s empowering law in order for him to serve as NPM provide a useful example of a broad scope of access:

1. (3) The Defender systematically visits places where there are or may be located persons whose freedom is restricted by public authority, or as a result of their dependence on care provided, to strengthen protection of such persons against torture, or cruel, inhumane and degrading treatment, or punishment or other mistreatment.

(4) The scope of activity of the Defender under clause 3 applies to

1. facilities performing custody, imprisonment, protective or institutional care, or protective therapy;
2. other places where there are or may be located persons whose freedom is restricted by public authority, especially police cells, facilities for holding foreigners and asylum facilities;
3. places where there are or may be located persons whose freedom is restricted as a result of dependence on the care provided, especially social care institutes and other facilities providing similar care, medical facilities and facilities providing social/legal protection of children...¹⁹

The Moldovan Parliament recognized that the existing scope of access to places of detention of its Parliamentary Advocates (Ombudspersons) was insufficient to meet OPCAT requirements, and so greatly expanded the list of places open to visits in the legislative amendments designating the Ombudspersons as NPM.²⁰

¹⁹ See Czech Law on the Public Defender of Rights (349/1999 Coll.) as amended 381/2005 Coll, In effect 1 January 2006, §1(2), (3), (4). See also §15(1), and §21a; see: <http://www.ochrance.cz/en/ombudsman/zakon.php>.

²⁰ See amendments to article 24 as contained in the Law on Modification and Completion of the Law No. 1349-XIII of 17 October 1997 on Parliamentary Lawyers,

The places of detention that the Costa Rican Defensoría de los Habitantes (Ombudsperson) is expressly authorized to visit were limited to those under the Ministry of Justice and the Ministry of Public Security, Interior and the Police. This definition is more restrictive than the text of the Protocol, as well as the general legislation and current practice of the Defensoría. This is one of the apparent inconsistencies that will need to be resolved when, as the existing “temporary” designation decree itself provides, the appropriate legislative changes are finally made.²¹

A careful comparison between an already-existing mandate to visit some places of detention, and the broad access required under the OPCAT, can reveal gaps. For example, the Maldives designated its Human Rights Commission as NPM in late 2007. Its already-existing legislation from 2006 includes a provision that: “The members of the Commission or persons assigned by the Commission accompanied by the members may without prior notice, inspect any premises where persons are detained under a judicial decision or a court order.”²² Yet one of the most important places to be visited under the OPCAT are places where persons may be held temporarily before they have appeared before any court, including but not limited to police stations. The lack of clarity in the existing legislation concerning such places therefore represents a serious gap that only legal amendment can correct.

4. Access to Information

The OPCAT requires that each NPM have access to all information concerning the number of persons deprived of their liberty, the number of places and their location, and all information referring to the treatment of such persons and their conditions of detention. National human rights commissions and Ombudsperson’s offices typically, but do not always, already enjoy this type of access. Sometimes where these powers are provided in respect of after-the-fact investigations, they need to be made expressly applicable to preventive visits (which do not depend on receipt of any particular complaint from the place of detention).²³

The New Zealand legislation permitting designation of existing institutions as NPMs is an example where new legislation was enacted to ensure that any NPM will have broad access; even though the particular institutions already have varying powers in this area, new legislation was needed to eliminate any possible gaps in relation to the new OPCAT mandate of these institutions.²⁴

No. 200-XVI of 26.07.2007, (Official Gazette No.136-140/581 of 31.08.2007). Available at: <http://www.apr.ch/npm/eca/Moldova2.pdf>.

²¹ Supra note 15.

²² Maldives *Human Rights Commission Act*, Act no. 6/2006, article 21(c). Available at: <http://www.hrcm.org.mv/downloads/HRCM%20Act%20English%20translation.pdf>.

²³ For instance, the Maldives *Human Rights Commission Act* provides such powers in respect of investigations of complaints (article 22), but does not clearly make them applicable to preventive visits under article 21(c).

²⁴ See article 28 of the Crimes of Torture Act 1989 as amended.

5. Private Interviews

The OPCAT requires that the NPM have the right to choose anyone to whom they wish to speak, and the right to conduct all such interviews in private, without witnesses, with a translator if the NPM deems necessary.²⁵ This is among the most critically important powers that an NPM must have in order to function effectively. Indeed, if a right to private interviews is not provided, the NPM actually risks placing detainees at greater risk of torture or other ill-treatment, or inadvertently facilitating a cover-up by the authorities. This is because detainees who are asked about abuse in the presence of the authorities holding them face an impossible dilemma – telling the visitor about any abuse may place them at risk of further abuse, but not telling the visitor allows the government to deny that any abuse is taking place.

Many human rights commissions and Ombudspersons offices already are provided with the power to conduct private interviews, whether in law or in practice. However, those institutions which do not have this power are fundamentally incapable of serving as NPMs, and an institution cannot qualify as an effective NPM under the OPCAT unless this power is expressly provided in law.²⁶

It is important that this right include the practical ability to choose where the interviews will take place.²⁷ This is so that the NPM can avoid listening-in by officials, and select a place where detainees will feel comfortable and where the NPM will not be identified with officials in the mind of the detainee. NPMs should generally avoid, then, using the Prison Warden's office or other such places for detainee interviews. The Mexican inter-secretarial Memorandum of Understanding designating the Mexican Human Rights Commission as NPM, requires that it be accompanied by personnel of the place of detention during its general inspection of the facility and that the personnel, and not the NPM visitors, decide where any private interviews will take place. Such restrictions are incompatible with the effective functioning of the NPM.

It is also important that any persons providing information to the NPM be confident that they will not be punished for doing so, and this requirement is

²⁵ Article 20(d) of the OPCAT.

²⁶ For instance, a right of private interviews with detainees, presently absent from the March 2006 Presidential Decree establishing the Mali Human Rights Commission, is one of the things that must be enshrined in parliamentary legislation for that institution to comply with OPCAT requirements. As another example, the legislation for the Human Rights Commission of the Maldives (Act no. 6/2006) is somewhat ambiguous on this point, the fact that its powers to conduct 'closed session' 'investigations' are not made expressly applicable to preventive visits is a potential gap that should be closed by legislative amendment. For an example of an institution which already enjoys this power, though it has not yet been designated NPM, see the 2004 Statute of the Office of the Ombudsman for Human Rights and Justice of Timor-Leste, art. 28 (f), available at: <http://www.asiapacificforum.net/members/apf-member-categories/full-members/timor-leste/downloads/legal-framework/Law-2004-7.pdf>.

²⁷ See APT, *Monitoring Places of Detention: a practical guide* at p. 80.

set out in Article 21(1) of the OPCAT. This protection should be expressly included in national legislation. For example, the statute empowering the Ombudsperson of Timor Leste makes it an offence to “threaten, intimidate or improperly influence any person who has complained to or cooperated with the Office or is intending to complain to or cooperate”.²⁸ The legislative amendments designated the Moldovan Parliamentary Advocates (Ombudsmen) as NPM essentially incorporated text of article 21(1) of the OPCAT text into Moldovan law.²⁹ The New Zealand law permitting designation of existing institutions as NPMs provides another good example of protection of this sort.³⁰

6. Independence

The Optional Protocol requires that NPMs be both functionally and personally independent.³¹ This means that the institution must not be included in the same reporting or other administrative structure as those responsible for the places it visits. It also means that the individuals who actually direct and work for the NPM must not be subject to direction by, or have other personal or political affiliations, with the government responsible for those places.

Many national human rights commissions and Ombudsperson’s offices have long-established records of independence from executive government that can serve to build confidence in the first years of operation of the Optional Protocol in their country. However, it is important to note that what may be acceptable for a body that provides general policy advice to government (such as the presence of politicians or representatives of government departments) may be wholly incompatible with their designation as an NPM. This is a particular acute concern given that the work of an NPM inherently involves collection and discussion of highly sensitive information about individual detainees.

For instance, in Mali, in March 2006 a National Human Rights Commission (NHRC) was established for the first time, and it appears that it is also intended to serve as NPM. However, the Commission was established by presidential decree, and more than a quarter of the membership of the Commission is to be representatives of various Ministries of government.³²

²⁸ See the 2004 Statute, art. 49(1) (e).

²⁹ See article 23¹(2), supra note 20.

³⁰ New Zealand Crimes of Torture Act 1989, as amended, section 30: “No person or agency who has provided information in good faith to a National Preventive Mechanism may, in respect of the provision of that information, be subject to any— (a) criminal liability; (b) civil liability; (c) disciplinary process; (d) change in detention conditions; (e) other disadvantage or prejudice of any kind (...) regardless of whether the information provided to the National Preventive Mechanism was true.” See: http://www.parliament.nz/en-NZ/PB/Legislation/Bills/e/1/0/00DBHOH_BILL7201_1-Crimes-of-Torture-Amendment-Bill.htm.

³¹ See article 18(1) of the OPCAT.

³² Presidential Decree n°6, 6 March 2006, available at: <http://www.apt.ch/npm/africa/Mali1.pdf>.

While such a structure could be useful if the body were simply to serve as an advisory body to the Government, the lack of independence that is inherent in the inclusion of government officials in the Commission's membership means that significant reform will be required before it can qualify as an NPM that meets OPCAT requirements.

It is also worth noting that in order to preserve any existing independence of a national human rights commissions or Ombudsperson's office, no decision to designate the institution as an NPM under the OPCAT should be taken without consultation with the institution and its consent. For instance, the instrument designating the Costa Rican Defensoría de los Habitantes (Ombudsperson) as NPM refers to a formal note of the Defensoría accepting this designation on the condition of receiving adequate resources.³³ The Government considered such acceptance necessary by virtue of the Defensoría's existing autonomy.

The notion of independence necessarily implies that the institution must be *perceived* as being independent by those it is meant to protect. This issue is tied to credibility, addressed in a later section below.

On the other hand, it must be recognized that in some States the law establishing a national human rights commission or Ombudsperson gives the impression that the institution is truly independent, while in reality due to personal connections of the office-holders, lack of resources, or other factors, it does not actually operate in an independent fashion. Such situations are similarly incompatible with the broad and substantial concept of independence in the OPCAT.

7. Expertise and Composition of Membership

The OPCAT requires that the members of the NPM have the required capabilities and professional knowledge to undertake preventive visits to places of detention. The detection and documentation of torture or other ill-treatment, as well as the overall evaluation of health care services, usually require that specialized medical or psychological expertise be available. Understanding the social and educational needs of prisoners may require the input of a professional social worker or educator. Assessing the validity of prison management's claim that particular measures are necessary for security could require the expertise of someone who has retired after a background in policing or prison management. Expertise on what is appropriate for men may not suffice to assess what is appropriate for women, or adults for children. The OPCAT specifically recognizes that it may be difficult for NPM members from a given gender or ethnic background to communicate effectively with or understand the needs of particular detainees from other genders or backgrounds.³⁴ All of this illustrates that the members

³³ Supra note 15.

³⁴ See article 18(2) of the OPCAT.

and staff of NPMs carrying out the visits and taking decisions for the NPM need to have diverse professional and personal backgrounds.

Some national human rights commissions may already have a mix of relevant professional expertise and personal backgrounds. However, many commissions are predominantly made up of lawyers and lack important expertise in other areas. The office of Ombudsperson is almost always occupied by a single individual,³⁵ usually assisted by a staff in the execution of duties. By the very nature of the institution, then, there is usually ultimately a single official (often a lawyer) who is the decision-maker³⁶. Of course, the Ombudsperson or human rights commission may be supported by a relatively large and diverse staff, but again particular areas of necessary expertise are often missing (e.g. medical expertise).

One of the potential weaknesses in the designation of the Polish Ombudsperson as NPM is that the majority of the staff apparently has a legal background. While these offices have the ability to hire external expertise such as medical doctors or psychologists, it is not known how frequently such persons are involved in visits to places of detention in practice. Other examples include the Danish Ombudsperson (which almost exclusively employs legal professionals, has only limited human rights expertise and no health professional expertise³⁷), as well as that of Estonia (of 44 staff, 33 are lawyers and the rest are administrative).³⁸

These types of concerns were also recognized in the legislation designating the Moldovan Centre for Human Rights, made up of the three Ombudspersons (or Parliamentary advocates), as NPM. The law expressly empowers the Ombudspersons “to involve independent specialists and experts from different fields, including lawyers, doctors, psychologists, representatives of civil society, in carrying out preventive visits to places where the persons deprived of liberty are or might be detained.”³⁹ In Mexico, for example, the NPM Unit within the National Human Rights Commission is

³⁵ One exception is the Moldova Human Rights Centre, which includes three co-equal Ombudspersons, who share a common mandate (but do not necessarily act as a single body – they are also independent from one another).

³⁶ This can be seen as difficult to reconcile with the obligation for NHRIs’ composition to reflect the “pluralist representation of the social forces” set out by article 4 of the Paris Principles. The Provedoria of Human Rights and Justice of Timor-Leste, headed by a single individual, addressed this issue by setting up a 11-member interim advisory council —pending an amendment to the enabling legislation of the PDHJ to create an enlarged pluralistic decision-making structure — whose members would come from various sectors (i.e. academia, faith-based groups, trade unions, legal community),

³⁷ See RCT, Alternative Report to the Committee against Torture (May 2007) at p. 20.

³⁸ See Mental Disability Advocacy Center, “Inspect” (2006), p. 23. Available at: <http://www.mdac.info/conference/documents/Inspect%20report.pdf>.

³⁹ See amendments to article 24, supra note 20. Similarly, in Timor Leste, the Provedoria (Ombudsperson’s office) has established a pluralistic advisory council with NGO representatives, members of the Bar Association, media, academics and other sources of outside expertise.

comprised of an interdisciplinary team and a medical doctor accompanies all visits.

Another issue that arises in designating an existing institution as an NPM, is that the possibility of carrying out regular visits to places of detention may not have been foreseen as a part of the work when existing personnel were recruited. Particularly where little or no additional specialized personnel are planned to be added as part of NPM designation, existing staff may be very uncomfortable with undertaking this new role. Prisoners, mental health detainees, immigration detainees, other persons deprived of liberty, and the officials operating such places, will be quick to detect that a visitor is afraid or uneasy being there, and this will seriously undermine the effectiveness of the NPM. This factor must be taken into account when any proposal to simply add NPM responsibilities to the work of existing personnel is considered, as is the case with the Costa Rican Ombudsperson.

8. Recommendations of the NPM

The OPCAT requires that NPMs have the right to make recommendations, including recommendations that explicitly take account of United Nations norms (as opposed to being restricted to national standards), and to have those recommendations considered by the appropriate officials through a dialogue about potential implementation measures.⁴⁰ Importantly, the NPM must also have the authority to “submit proposals and observations concerning existing or draft legislation.”⁴¹ This power should allow the NPMs, to suggest, whenever deemed appropriate, the reform of procedures (regulations, codes of conduct) being followed by detaining authorities, budget increases, or relevant policy changes.

Sometimes the absence of reference to international standards in the empowering legislation of an existing institution may be interpreted as preventing the NPM from taking into account United Nations norms.⁴²

To ensure compliance with the OPCAT concept of constructive dialogue, national legislation empowering the national human rights commission or Ombudsperson’s office can set out an obligation and procedure for government officials to respond to the institution’s recommendations. For instance, the law empowering the Czech Public Defender allows him or her, after delivering his findings and/or recommendations to the relevant officials, to set a time limit within which the officials must respond.⁴³ If no response is received or corrective measures are insufficient, the Law authorizes the Defender to inform superiors, the Government itself, and/or the public,

⁴⁰ OPCAT articles 19(b) and 22.

⁴¹ See article 19(c) of OPCAT.

⁴² For instance, the RCT concludes that the Danish Ombudsman may not be in a position to fulfill article 19(b) as “neither international human rights conventions nor ‘soft law’ are included in his standards of assessment.” See RCT, Alternative Report to the Committee against Torture (May 2007) at p. 22.

⁴³ Czech Law on the Public Defender of Rights, section 21a, supra note 19.

including by publicly naming the responsible officials.⁴⁴ A similar provision was included in the legislative amendments designating the Moldovan Ombudspersons as NPM.⁴⁵ The statute empowering the Ombudsperson of Timor Leste provides that “The organ to which a recommendation is addressed must, within sixty days, inform the Ombudsman for Human Rights and Justice of the extent to which the recommendation has been acted upon or implemented.”⁴⁶

However, the establishment of such a procedure should not preclude other types of informal consultations taking place, since the overall scheme of the OPCAT is one of constructive cooperation rather than litigious confrontation.

Problems can arise where legislation does not expressly provide for any government reaction to NPM recommendations. For instance, the Decree establishing the Mali Human Rights Commission simply states that the Commission is to “inform” the government about conditions of detention of detainees,⁴⁷ but is entirely silent about the responsibility of the government to communicate with the Commission in response to the information it receives.

The power to make recommendations concerning legislation or to propose new legislation is an area easily overlooked in the NPM designation process. While some national human rights commissions and Ombudsperson office already enjoy this power,⁴⁸ in other cases it does not or may not already exist⁴⁹ and so would need to be added.

⁴⁴ Czech Law on the Public Defender of Rights, sections 21a and 20(2), supra note 19.

⁴⁵ See article 27(1¹), supra note 20.

⁴⁶ 2004 Statute of the Office of the Ombudsman for Human Rights and Justice of Timor Leste, article 47(3).

⁴⁷ The March 2006 Presidential Decree uses the phrase « *informer régulièrement le gouvernement sur la situation carcérale des détenus* », supra note 32.

⁴⁸ Article 142 of the Estonian Constitution provides the Chancellor of Justice (designated as Estonia’s NPM), with authority to comment on and make proposals concerning legislation, and, extraordinarily, includes authority for the Chancellor to apply to the Supreme Court to repeal any law in respect of which his proposals to bring the law into conformity with the Constitution have not been accepted. See also section 22 of the Czech law: “(1) The Defender is authorized to recommend the issuing of, an amendment to or the annulment of a legal regulation or internal order. Such recommendations are presented to the authority concerned and, if the matter concerns a ruling, a governmental decree or a law, to the Government itself. (2) The authority concerned is obliged to present its point of view regarding the recommendations under clause 1 above within sixty days.” Article 24(e) of the 2004 Statute of the Office of the Ombudsman for Human Rights and Justice of Timor Leste, empowers the Ombudsperson to “recommend the adoption of new legislation, and propose the amendment of legislation in force and the adoption or amendment of administrative measures.”

⁴⁹ For instance, the RCT has concluded that the Danish Ombudsperson may not enjoy the full powers required by article 19(c) of the OPCAT: See RCT, Alternative Report to the Committee against Torture (May 2007) at pp. 21-22.

9. Publication of Reports

The OPCAT requires that the NPMs be entitled to make a public annual report, which the State Party is obliged to publish and disseminate.⁵⁰ For instance, section 23 of the Czech Law on the Public Defender (Ombudsperson) provides:

(1) The Defender shall submit an annual written report to Chamber of Deputies by 31st March each year on his/her activities during the past year; this report is a parliamentary publication. The report will also be sent to the Senate, the President of the Republic, the Government and other administrative authorities having competence over the entire territory of the Czech Republic; the report will be published in a suitable manner.

(2) The Defender will inform the public on a regular basis of his/her activities under this law and of any findings resulting from his/her activities. Reports from visits to facilities, including reactions received and selected reports on completed investigations in individual matters, shall be made public by the Defender as appropriate; (...).

Regardless of their designation as NPM under the Optional Protocol, most national human rights commissions or Ombudsperson's offices have the obligation to issue a report of activities on an annual basis, and present it to Parliament. For many of the NHRIs that have been designated as NPMs, it is not clear from the text of the OPCAT whether they will be expected to publish a separate report on all matters pertaining to their role as NPM, or whether one single consolidated report of activities would be enough for them to comply with article 23.

To ensure that this exercise represents a useful contribution to the constructive dialogue the NPM will strive to establish with the detaining authorities, the content of the annual report should take precedence over the form. It is true that, as most NHRIs have very broad mandates, a report that would not be OPCAT-specific could result in detention-related issues being diluted, something that would do little to induce substantial discussions on the follow-up to be given to the findings and recommendations contained therein.

Indeed, regardless of the format of the report, if a NHRI were to limit the description of its work as NPM to a listing of the places of detention visited during the year under review, an opportunity to engage with the authorities on the nature of required policy, legislative or administrative changes would be lost.

⁵⁰ OPCAT article 23.

10. Privileges and Immunities

NPMs are entitled to a range of privileges and immunities, which are needed to be effective in their work.⁵¹ Key examples include the right to keep the information it collects confidential, including that it be privileged from production to government officials,⁵² and immunity from arrest or detention for things done in connection with their NPM work, as well as immunity from prosecution or civil lawsuit for such acts.⁵³

Ombudsperson's offices, and in some instances human rights commission, often already enjoy such privileges and immunities. For instance, the law empowering the Czech Public Defender of Rights (Ombudsperson)⁵⁴ states:

7.(1) Criminal proceedings may not be instigated against the Defender without the approval of the Chamber of Deputies [Parliament]. Should the Chamber of Deputies refuse to give their approval, such action against the Defender shall be impossible for the duration of his/her term of office.

...

7.(4) State administration bodies, including bodies responsible for criminal proceedings, are authorised to consult the files of the Defender or may take away such files only on a legal basis and with the approval of the Defender. Should the Defender refuse to grant approval, the approval of the Chair of the Chamber of Deputies is required.

Similarly, the Constitution of the Republic of Estonia, which has designated its Ombudsperson (or "Legal Chancellor") as NPM, provides "Criminal charges may be brought against the Legal Chancellor only on the proposal of the President of the Republic, and with the consent of the majority of the membership of the Riigikogu [Parliament]".⁵⁵ Article 211 of the Polish Constitution provides that its NPM, the Commissioner for Citizens' Rights (Ombudsperson), "shall not be held criminally responsible nor deprived of liberty without prior consent granted by the [Parliament]." It further provides that the Commissioner "shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings", in which case "the Marshal of the [Parliament] shall be notified forthwith (...) and may order an immediate release".

However, where the members of an existing human rights commission or Ombudsperson office do not already have such privileges and immunities,

⁵¹ Article 35 of the OPCAT.

⁵² Article 21(2) of the OPCAT.

⁵³ See APT Guide to the Establishment and Designation of NPMs, pages 42 to 45.

⁵⁴ Czech Law on the Public Defender of Rights (349/1999 Coll.), supra note 19.

⁵⁵ Article 145, Constitution of Estonia, available at: <http://www.president.ee/en/estonia/constitution.php>.

they must be added to their empowering legislation before they can meet the requirements of an NPM under the OPCAT.

Additionally, where it is considered that the work of visiting will actually be undertaken by staff of the institution and privileges and immunities are currently provided only to the Ombudsperson or commission members themselves,⁵⁶ it must be recognized that in order to comply with the OPCAT and for the NPM to be effective, the privileges and immunities must be extended to the individuals who will actually carry out the visits.

11. Credibility

Even an NPM that has, on paper, all of the powers and mandate needed for an NPM, and has access to all of the financial, staff, and logistic resources needed to undertake visits, will fail to qualify as an effective NPM under the OPCAT if it lacks credibility in the eyes of detainees and authorities, civil society and the general public. This is for the most part an intangible quality of any national human rights commission or Ombudsperson's office, which can only be assessed through a broad consultative process that includes all interested parties, but allows for settings in which the views of non-governmental actors can be expressed in a climate of trust.

One means of bolstering the credibility, and bring additional expertise to, a human rights commission or Ombudsperson that is serving as NPM, is to expressly provide for it to share its responsibilities with civil society. However, any such engagement or partnering with civil society must be real and substantive – it is not enough to have “token” participation.

For example, on accession to OPCAT, Slovenia made a formal declaration, stating: "In accordance with Article 17 of the Protocol, the Republic of Slovenia declares herewith that the competencies and duties of the national preventive mechanism will be performed by the Human Rights Ombudsperson and in agreement with him/her also by non-governmental organisations registered in the Republic of Slovenia and by organisations, which acquired the status of humanitarian organisations in the Republic of Slovenia."

The Moldovan Parliamentary Advocates (Ombudspersons) are similarly charged with carrying out their work as NPM in collaboration with civil society. The amendments to their legislation enacted to designate them as NPM states that they are “to involve independent specialists and experts from different fields, including lawyers, doctors, psychologists, representatives of civil society, in carrying out preventive visits to places where the persons deprived of liberty are or might be detained.”⁵⁷ In addition, a Consultative

⁵⁶ Such as is the case under current plans in Costa Rica.

⁵⁷ See amendments to article 24, supra note 20.

Council is to be established to provide input to the Advocates' work as NPM, and that council is to include civil society representatives.⁵⁸

In both Slovenia and Moldova, the form this collaboration will actually take in practice remains to be established.

Spain represents another relevant example. The Spanish Government has publicly announced that the NPM will be a "mixed" model, with involvement of the Ombudsperson office and civil society. For its part, the national Ombudsperson office has also publicly proposed that it be designated as NPM. However, the NGO Network created to promote the OPCAT has publicly questioned the designation of the Ombudsperson (advocating instead for the creation of a new NPM) and is skeptical of possible token participation in such a model.⁵⁹

In Peru, on the other hand, where the Ombudsperson is an institution that has a great deal of credibility in the eyes of the general public, it has been the National Network of Human Rights NGOs which has actively advocated for its designation as NPM.

Conclusion

Any decision whether to designate a national human rights commission or Ombudsperson's office as the NPM under the OPCAT should only be taken after a careful and realistic assessment of the advantages and the disadvantages of the particular institution.⁶⁰ These types of institutions typically have strong constitutional or legal guarantees of independence. However, they often bring with them broad existing mandates, that risk detracting from the specialized and resource-intensive work of carrying out actual visits to places of detention on a systematic and preventive basis.

It is generally a mistake to assume that any human rights commission or Ombudsperson's office could be able to effectively act as an NPM within their existing budgets, structures and working methods. Additional financial, human, and logistical resources are almost always needed.

Institutions that were not designed with OPCAT in mind typically lack the very broad scope of access to all places of detention in the country that the OPCAT requires, and this is another area in which substantial legislative amendment is often necessary if a commission or Ombudsperson's office is

⁵⁸ See article 23²(1), Op. Cit.

⁵⁹ For more detail, see <http://www.apr.ch/content/view/120/5/lang,en/> and the APR Country-by-Country NPM Status Report at www.apr.ch/npm.

⁶⁰ Several States (Chile and Italy for instance) which have vowed to set up a NHRI have expressed a desire to merge this process with the designation of an NPM under the OPCAT. While it can make practical sense to create a NHRI with the powers and guarantees enjoyed by NPM rather than two separate entities, it should be reminded that the issues described in this paper apply equally to NHRI-in-the-making as to established NHRIs.

to be designated as NPM. If the institution does not already have the right to conduct private interviews with anyone it chooses, it simply cannot effectively carry out NPM work, indeed it risks putting detainees at greater risk of abuse. The right of detainees and others not to suffer repercussions for cooperating with the NPM is often not set out in the legislation of existing institutions, but should be a part of any NPM legislation.

Human rights commissions and Ombudsperson's offices usually are very well-equipped with legal expertise, but lack medical, psychological, social work, or law enforcement expertise, amongst others. The range of powers to make recommendations and the right to receive a considered response from government officials of any existing institution must be carefully reviewed to ensure it is compatible with OPCAT requirements. In this regard, the mandate of an NPM to comment on and propose legislation is often overlooked, but is a requirement of OPCAT.

Ombudspersons typically enjoy protections from arrest and prosecution, and in some cases from seizure of documents, connected with their work. In the case of members of human rights commissions this is perhaps less common. But in either case it is critical that such privileges and immunities, necessary to be effective as an NPM, be provided by law.

Finally it is important to recall that no matter how complete and robust the independence, powers and privileges of an institution may appear in its empowering legislation, it will never be effective as an NPM unless it enjoys credibility in the eyes of detainees, public officials, and the general public. In this regard, a means of reinforcing the credibility of an NPM is to explicitly provide for civil society to be involved in its work.

After a careful assessment of the obstacles and advantages of having an existing institution serve as NPM, decisionmakers, civil society, and the existing institutions themselves should engage in a frank and impartial discussion about whether the functions of NPM under OPCAT would be better served by a new institution or an existing institution. Where there is agreement that an existing institution provides the best foundation, Governments must nevertheless be prepared to make legislative amendments and to allocate the needed resources and structural reforms to make the new work of the institution possible.