

## ORIGINAL ARTICLE OPEN ACCESS

# His Majesty's Inspectorate of Prisons for England and Wales, the UK National Preventive Mechanism and the UN Optional Protocol for the Prevention of Torture. Prospects for Prison Reform and the Treatment of Prisoners

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## ABSTRACT

HM Chief Inspector of Prisons for England and Wales is mandated under domestic law to visit and report on prison conditions and the treatment of prisoners. The Inspectorate's detailed monitoring work provides valuable and authoritative insights into individual prison establishments as well as the overall conditions in prisons and the treatment of prisoners in England and Wales. In spite of this, the implementation of HMIP's recommendations remains low. Furthermore its ability to make recommendations on wider regulatory and policy matters to government departments and relevant authorities remains limited in the absence of a more robust statutory framework. The article argues that HMIP's ability to influence prison reform could be bolstered by making fully operational its mandate under the Optional Protocol to the Convention against Torture (OPCAT) as well as by strengthening the collective UK National Preventive Mechanism (NPM).

## 1 | Introduction

HM Chief Inspector of Prisons for England and Wales 2022–23 Annual Report opens:

We have been struck by the long hours which many inmates have to spend locked in their cells in boredom. In several local prisons a proportion of the population, including unconvicted prisoners, were locked up for twenty-two hours or more each day, for weeks on end. In some training prisons, where a full working day was intended to be central to the life of the establishment, we found some of the population without any work and others employed on work which was unsatisfactory in nature or which was insufficient to support the

number of prisoners allocated to it. We believe there are powerful reasons why Prison Department must ensure that an inmate does not spend day after day in blank inactivity; he should be kept occupied for a normal working day at work, education, or some other constructive activity.

The passage is alarming, even more so given that as the report goes on to note 'It is 40 years since this (...) was published (...) and it remains as relevant now as it did in 1982. Each of my six predecessors has found a new form of words to describe this seemingly intractable problem'. The account, largely confirmed once again in HMIP 20023–24 annual report, provides a stark reminder of the failure to deliver rehabilitative criminal justice reforms. It reminds us of Foucault's scepticism about the possibility of

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prison reform more broadly. ‘So successful has the prison been that, after a century and a half of ‘failures’, the prison still exists producing the same results, and there is the greatest reluctance to dispense with it’ (Foucault 1979, 277). Whilst ministries and government departments are responsible for prison policies and practices, the inspectorate’s monitoring of prisons helps to keep track of change in the treatment of prisoners or lack of it. This is an important function the inspectorate fulfils. At the same time, given the persistent problems reported year after year, the considerations of South Africa’s Inspecting Judge of Correctional Services are a reminder of the contradictions inherent in the work of prison monitoring bodies ‘Do our watchful eyes, our reports, and feedback, our complaints, our protestations, do good? ... Or do they help perpetuate an inhumane and brutal system?’ (ICPR Annual Lecture 2022). Has monitoring of prison conditions become just auditing repeated systemic failures, perpetuating rather than alleviating the harms and problems associated with imprisonment (Kemp and Tomczak 2024)? HMIP’s work has been described as having an international reputation for excellence and a catalyst for change (Bennett 2014), to have such a pervasive influence that it can be said indirectly to regulate prison conditions in England and Wales (van Zyl Smit 2010, 532). Present and past HM Chief Inspectors have increasingly entered into public and political debates about prisons and prisoners’ rights. The current Chief Inspector, Charlie Taylor, has been very vocal about the need for a ‘fundamental reorientation’ of the prison system to reduce reoffending and deal with overcrowding.<sup>1</sup> He has spoken publicly about chronic staff shortages, squalid living conditions, self-harm and prison violence being all too common, often making prisons inhumane places.<sup>2</sup> Whilst a high public profile and media presence is important in influencing public debates, the question arises as to whether the inspectorate’s ability to inform prison debates and policies can and should be bolstered by a more robust mandate.

Section 5A of the Prison Act 1952 (as inserted by Section 57 of the Criminal Justice Act 1982) establishes the post of the Chief Inspector of prisons and provides the legal basis for monitoring prison conditions and the treatment of those in prison, young offender institutions and immigration detention facilities. Under Section 5A of the Prison Act 1952 (as amended) the Chief Inspector has to report to the Secretary of State on the treatment of prisoners and has to submit an annual report to the Secretary of State who will present it before parliament. The work of HM Chief Inspector and of the inspectorate of prisons (HMIP) is further detailed in a number of policy and practice documents which have been developed over the years.

Since 2009, the mandate of the Chief Inspector of prisons has been expanded when it became one of the more than twenty bodies designated as members of the National Preventive Mechanism (NPM) set up after the UK ratified the United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (henceforth referred to as OPCAT). OPCAT provides for the establishment of a system of regular visits to all places of deprivation of liberty to be undertaken by independent international and national bodies, known as the Sub-Committee for the Prevention of Torture (SPT) and the NPM respectively, in order to prevent torture and other forms of ill-treatment. OPCAT also sets out the powers

NPMs should be granted in order to carry out their preventive mandate, with the SPT also entrusted with providing guidance to its national counterparts (Article 11.1 (ii) OPCAT, Steinerte 2013).

The present article examines the extent to which the mandate and powers envisaged under the OPCAT are reflected in the mandate and work of HM Chief Inspector and the inspectorate of prisons. It is argued that currently HMIP, as a designated member of the NPM, complies with the OPCAT requirements pertaining to its independence as well as its inspection powers. However, its statutory powers do not fully reflect the OPCAT obligations in particular those set out in Articles 22 and 23 OPCAT pertaining to the ‘external dimension’ of the NPMs’ mandate. This gap could be addressed by amending s5A to reflect HMIP’s torture preventive mandate and the full range of OPCAT powers. Furthermore, given the UK NPM multi-body arrangement, it is argued that the role and powers of the collective NPM should also be reviewed in light of OPCAT obligations with a view to complement the role and powers of its individual members. In this last respect, a clear and robust legal basis would bolster the collective NPM’s ability, and indirectly HMIP’s, to make recommendations and engage in dialogue with the relevant authorities on prison reforms and the prisoners’ treatment.

The article starts with an overview of HM Chief Inspector’s statutory mandate and powers for monitoring prison conditions and the treatment of prisoners. Section 3 introduces the institutional set up chosen for the UK NPM and the implications for HMIP as one of its designated members. Section 4 looks at the mandate and powers NPM have under the OPCAT and assesses how HMIP meets these requirements by examining the extensive and thorough inspection methodology and processes developed over the years by the inspectorate. It is argued that these are very much reflective of the inspectorate’s expertise, professionalism and functional and operational independence in line with OPCAT requirements. In spite of the HMIP’s thorough and detailed monitoring, recommendations have a low uptake and are rarely actioned. Section 5 examines how the current legal framework limits the inspectorate’s ability to make recommendations on systemic and policy issues and to engage in meaningful dialogue with relevant authorities concerning the implementation of its recommendations. In this last respect, it is suggested that HMIP has a broader mandate under the OPCAT as a designated member of the UK NPM. Section 6 identifies the OPCAT powers which arguably HMIP is currently not using in full, specifically those provided in Articles 22 and 23 OPCAT, and argues that section 5A of the Prison Act 1952 could be amended accordingly to be brought fully in line with OPCAT. Section 7 examines the current role of the UK NPM as the umbrella body comprising the 21 individual members and its struggle to define its institutional identity and purpose. It is argued that the UK NPM has a distinctive torture prevention role to play in supporting in a complementary and subsidiary way the work of its individual members provided that its framework too is strengthened. Section 8 discusses the need for a statutory basis in line with the relevant OPCAT requirements to bolster its authority and enable it to coordinate and build on the work of its individual members more effectively, ultimately contributing to the protection of all those deprived of their liberty. The final section concludes.

## 2 | Monitoring Prisons in England and Wales: The Mandate of the Chief Inspector of Prisons

The statutory basis for monitoring and reporting on prison conditions and prisoners' treatment is found in Section 5A of the Prison Act 1952 as inserted by Section 57 of the Criminal Justice Act 1982 which establishes the post of the Chief Inspector of prisons, whose role can be traced back to the first half of the 19th century (Hardwick 2016). Traditionally, the Justice Secretary makes the appointment to the position from outside the prison service for an initial term of three years (Protocol MoJ-HMIP 2019). External appointments are seen as an indication of independence, which may be bolstered by 'strong personalities' holding the post of Chief Inspector (Padfield 2018). Under S5A(2), the Chief Inspector has a duty to carry out inspections of prisons and to report to the Secretary of State on them. S5A(3) requires the Chief Inspector in particular to report to the Secretary of State on the treatment of prisoners and conditions in prisons.<sup>3</sup> Whilst the Chief Inspector is expected to carry out independent inspections of prisons, S5A(4) provides that the Secretary of State 'may refer specific matters connected with prisons in England and Wales and prisoners in them to the Chief Inspector and require him [sic] to report on them'. S5A(5) provides that the Chief Inspector shall submit annual reports to the Secretary of State who shall lay a copy of that report before Parliament. The Chief Inspector heads HM inspectorate of prisons for England and Wales (HMIP) comprising a Deputy Chief Inspector and a team of around 70 staff, including inspectors, researchers, administrators.<sup>4</sup> Unlike the post of Chief Inspector, the inspectorate is not a statutory body but an 'arm's length body' meaning a public body designated by central government which, importantly, operates independently not only of the prison institutions, but also of the Prison Service and the Ministry of Justice (Quinn et al. 2020; House of Commons Justice Committee 2020).

The statutory provisions do not detail how the Chief Inspector or inspectorate are to operate and how to carry out the monitoring and assessment of prison conditions and of the treatment of prisoners. As discussed in the next sections, HMIP has steadily developed its own inspection process, monitoring methodology and criteria to evaluate prisons' outcomes.

Moreover, since 2009, the inspectorate's mandate has been expanded in light of its designation as a member of the UK NPM which the government set up to comply with its obligations under the OPCAT. In the following two sections the monitoring work of HMIP is examined against the OPCAT requirements for NPM, in particular in relation to its institutional set up and its operational powers.

## 3 | OPCAT National Preventive Mechanisms: Institutional Set Up

Article 1 OPCAT requires the establishment of a system of international and national regular visits to all places of deprivation of liberty in order to prevent torture and other forms of ill-treatment. The underlying presumption is that places of deprivation of liberty, including but not limited to prisons (SPT General Comment 1/2024), are inherently oppressive and can favour conditions conducive to ill-treatment. These visits are to

be carried out by the international monitoring body known as the UN Subcommittee on Prevention of Torture (SPT) and NPMs. With respect to the latter, Articles 3 and 17 OPCAT require State parties 'to 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'. It is clear that there can be 'one or several' such independent mechanisms. Article 17 goes on to state that 'mechanisms established by decentralised units may be designated as national preventive mechanisms'. Clearly a NPM can take many forms and may not necessarily be configured as a single, unitary entity (Murray and others 2011). As the former SPT Chairperson notes, it would be more accurate to refer to national preventive *systems* rather than to 'a' mechanism (Evans 2023, 105). For example, Australia has opted for a multi-agency arrangement,<sup>5</sup> whilst Italy has set up a National Authority overseeing and coordinating regional authorities.<sup>6</sup> A number of States have opted to establish entirely new institutions such as the General Inspector of Places of Deprivation of Liberty in France<sup>7</sup> or the National Agency for the Prevention of Torture in Germany.<sup>8</sup>

Following the ratification of OPCAT in 2009, the UK government chose to set up a multi-body mechanism to give effect to its obligations.<sup>9</sup> The UK NPM is the name given to the collective entity comprising 21 individual members. HMIP along with other bodies with inspection powers such as the Care Quality Commission (CQC), Children's Commissioner for England (CCE), Office for Standards in Education, Children's Services and Skills (Ofsted) as well as their equivalent in the other UK jurisdictions, are all members of the UK NPM (UK NPM Annual report 2020–21). The UK's choice is reflective of the different inspecting bodies already in existence at the time of the establishment of the NPM as well as of its devolved arrangements and constitutional specificities (Padfield 2018). This has resulted in an objectively complex institutional set up which, as discussed in the next sections, has to some extent obfuscated compliance and operational challenges for both the individual NPM members such as HMIP and the UK NPM itself.

## 4 | HMIP's OPCAT Mandate and Powers

As one of the designated members of the UK NPM, HMIP is expected to comply with OPCAT requirements and powers. HMIP's work, in particular its inspection powers are discussed in light of the relevant OPCAT requirements pertaining to its functional and operational independence, the regular system of visits and, its minimal powers.

### 4.1 | Functional and Operational Independence

Whilst NPMs may come in different formats and configurations, their functional and operational independence must be guaranteed (Murray 2008; Steinerte 2014). Article 18 requires State parties to guarantee that these torture prevention bodies are independent, free from government influence and provided with sufficient resources to carry out their work effectively. NPMs must be in a position to freely determine how to use the resources available to them in order to establish a work programme of a regular system of visits to all places of deprivation of liberty and to ensure sufficient staffing levels and professional expertise

(CAT/OP/12/5 paras 33–34). To ensure institutional stability and functional independence the NPM should have a clear legal base in a new or existing constitutional or legislative text which should also set out the powers of the NPM (CAT/OP/12/5 para 7).

HMIP is endowed with its own budget, its own staff and sets out its own annual programme of visits. As discussed in the next section, it has ample autonomy in deciding which institutions to visit and when to do so. Further evidence of its operational independence can also be found in its inspection methodology and criteria. Under the ‘healthy establishment’ test prisons are assessed against four areas relating to: safety of prisoners, respect for human dignity of prisoners, purposeful activity and preparing for resettlement. For each of these areas a set of criteria or ‘expectations’ help assess in detail the treatment of prisoners and prisons conditions (HMIP 2023, 8). The criteria have been regularly updated, reissued and referenced against relevant international human rights standards that are accepted as a yardstick for assessing conditions and treatment in all kinds of custodial settings, from prisons to army detention facilities (Owers 2006). The criteria are referenced against a wide range of relevant instruments, not limited to the European Convention on Human Rights (ECHR) as incorporated in the Human Rights Act (HRA) 1998, and the Courts’ relevant jurisprudence. This breadth of international sources is important due to the relatively few cases brought by detainees under the HRA and because the ECHR provides a narrower scope of protection compared to the extensive variety of issues faced by individual prisoners as well as prisoners as a population more generally. Sourcing and referencing the criteria against a broad range of international human rights standards and rules puts prisoners at the centre of the inspection process. It is also key to ensuring that the principled approach is not subject to policy changes and departmental policy priorities or prison management consideration (House of Commons Justice Committee 2018, Q510, Shute 2013, 507), which in turn enhances the inspectorate’s independence overall.

Whilst there is little doubt that HMIP meets the OPCAT requirements of functional and operational independence the lack of a statutory basis for the inspectorate is a noticeable gap. As the previous Chief Inspector, Peter Clark, commented ‘It would be very good to think that we could one day get the inspectorate on to a statutory basis, which we are not. There is this strange legal position at the moment where, in law, I exist but the inspectorate does not’ (House of Commons Justice Committee 2018, Q552). The anomaly would have been addressed by the Prisons and Courts Bill in 2016–17 had it not fallen through (Easton 2022). It is also worth noting that the Chief Inspector’s statutory provision does not refer to the OPCAT torture preventive task, though express and consistent references to its OPCAT mandate are made in the inspectorate’s reports and website.

## 4.2 | Regular System of Visits

Article 4 OPCAT requires that both the international visiting body, the SPT, as well as the NPMs carry out regular monitoring visits to all types of places where persons are deprived of liberty with a view to prevent ill-treatment. The regular visit requirement is reiterated in Article 19(a) in Part IV of the Optional Protocol dedicated to the mandate and powers of NPMs. Though there

is no definition of what a regular system of visits consists of, in light of Articles 20 and 21 OPCAT and the practice of various NPMs, it is generally understood that visits are to be undertaken as part of a constant pattern, recur frequently and at uniform intervals, they should be carried out at a time of the NPM own choosing, allowing unfettered access to all detainees and to all relevant information about those deprived of their liberty and their treatment (Hardwick and Murray 2019; Murray and others 2011, 117–119).

HMIP has a mandatory right of entry, at any time and without prior notice, to all prisons and immigration removal centres, whether publicly or privately run, and by invitation to military detention facilities in the United Kingdom, and overseas. In terms of frequency, prisons can expect to be inspected every 5 years, though this may vary for high risk custodial settings such as youth justice settings. The timing of inspections of an establishment is based on a dynamic risk assessment of a variety of factors, for example the functional type and the size of the establishment, intelligence received, significant changes to the establishment (HMIP Inspection Framework 2023, 11). In addition to its programme of inspections, HM Inspectorate of prisons also carries out independent reviews of progress (IRPs) in prisons and young offender institutions to assess and follow-up on the implementation of recommendations from previous inspections. Unlike full inspections which are carried out against the full inspection criteria, institutions are selected for IRPs if there are specific areas of concern due to, for example an urgent notification to the Secretary of State, repeated poor inspections, the vulnerability of those detained and/or failure to achieve previous recommendations or concerns about the leadership of the establishment and the capacity for change and improvement (HMIP Inspection Framework 2023, 21). The Inspectorate’s pragmatic approach has also allowed the implementation of flexible scrutiny visits in unexpected circumstances such as the short scrutiny visits implemented during the COVID-19 pandemic.

HMIP’s inspection process detailed in HMIP guide for inspectors (2018) is also evidence of unrestricted access to prisoners and all relevant information pertaining to detention. Access to prisoners should facilitate ‘listening to the detainee voice’ (HMIP Inspection Framework 2023 para 3.27), giving prisoners the opportunity to give an account of their experiences, though prisoners may not always be fully aware of inspections and their purpose, and some may even be sceptical of how inspections are carried out (van der Valk and Rogan 2021). The first week of inspection is dedicated to the survey of a representative proportion of the prisoner population. The survey is voluntary, anonymous and consists of a self-completion questionnaire asking questions covering the detainee ‘journey’ from reception to release (HMIP Detainee Survey). The survey is not intended to be a bottom-up participatory approach to monitoring (Buck and Tomczak 2024). Nevertheless the questionnaires, available in fourteen languages, are designed to allow detainees also to express beyond the constraints of pre-set questions, in their own words, what they find most positive and negative about the establishment through written comments. The survey is then supplemented with information gathered through individual interviews and focus groups during the second week of the inspection visit (HMIP Guide for Inspectors, 15). These together with interviews carried out with prison staff, documentation analysis and observation by



inspectors are the key sources of evidence gathered with the purpose of informing findings and ultimately bring about change (Quinn et al. 2020).

### 4.3 | Minimal Powers

Article 19 OPCAT sets out the NPMs minimal powers. Article 19(a) reiterates Article 4 OPCAT requiring NPMs to be given the power to regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in Article 4. Article 19(b) gives the NPM the power to make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent ill-treatment. Article 19(c) provides for the power to submit proposals and observations concerning existing or draft legislation. With regard to the latter, the SPT has clarified that the State should inform the NPM of any relevant draft legislation and to take into consideration any proposals or observations on any existing or draft policy or legislation the NPM may submit (SPT Guidelines on NPMs, para 28). Though Section 5A of the Prison Act (as amended) is silent on the matter, the Chief Inspector in line with Article 19(c) OPCAT often makes representations and regularly gives written and oral evidence on policy and legislative matters to relevant parliamentary committee in Westminster and other constitutional bodies such as the Equality and Human Rights Commission (HMIP Annual Report 2022–23, 16–17), as well as the Welsh Assembly on matters which are of devolved competence -for example the delivery of health and social care in prisons (Response to the National Assembly for Wales's Health and Social Care Committee: Inquiry into alcohol and substance misuse 2015).

S5A of the Prison Act as amended does not mention recommendations, HMIP has nonetheless developed its practice in line with the requirements set in Article 19(b). At the end of each visit the inspectorate will draw up a report with its findings. The establishment visited is scored against the published expectations. Four possible judgments can be awarded for each of the four healthy prison tests: (1) outcomes for prisoners are good, (2) outcomes for prisoners reasonably good, (3) outcomes for prisoners are not sufficiently good and (4) outcomes for prisoners are poor. The report contains recommendations and an action plan addressed mainly to the senior management team of the prison and the director/governor and a visit report will be published. Some recommendations might be addressed to the area manager (the person responsible for all prisons in one area) or the HM Prison and Probation Service (the part of the Home Office responsible for the whole of the prisons and probation system). Occasionally there will be a recommendation directed to the Minister (Owers 2006, 89). It is for the institution, or the authorities responsible for them, to seek to address any of the issues or shortcomings identified. The level of compliance with the recommendations varies from year to year and across the different individual institutions. HMIP 2022–23 annual report, for example, indicates that out of the total of 327 recommendations (for all types of prisons, including women's and children's establishments), 39% of recommendations have been achieved, 11% partially achieved and 50% have not been achieved (p.108).

## 5 | Prison Reform: Taking HMIP's Recommendations Seriously

The low uptake of recommendations is not a phenomenon limited to HMIP, other oversight bodies, such as the Prisons and Probation Ombudsman, have lamented the poor implementation of recommendations (Tomczak and McAllister 2021). The scant implementation can be explained partly by the lack of powers to solicit their implementation. HMIP's recommendations do not have to be accepted and it has no statutory powers to compel changes to be made (HoC Justice Committee 2019, para 171). Generally, prison authorities at different levels, be it prison governors, HM Prison and Probation Services (HMPPS) or ministers, do not have a duty to implement or take into consideration the inspectorate's recommendations, though most prisons managers find the inspection process helpful and may seek to implement the recommendations (Owers 2014, 213). Also, unlike other monitoring bodies such as the CQC, it cannot decide, for example, to shut down a failing prison nor to sanction prisons which are not complying with its recommendations (Owers to the All-Party Parliamentary Group on Penal Affairs 2023). Arguably the most robust tool the inspectorate may utilise where prison conditions are deemed unacceptable is the urgent notification process introduced in 2017 (MoJ Press Release 30 November 2017). Under the process the Chief Inspector of Prisons can directly alert the Secretary of State for Justice of any urgent and serious failings found in a particular prison. Once invoked, a team of specialists is brought together to develop an immediate concrete action plan which the Secretary of State must publish within 28 days. The process has proved to be quite effective in bringing about change in some individual prisons subject to the urgent notification.<sup>10</sup> However, it is a process deployed to address failures in a single establishment and not systemic failures across the prison system.

System-wide failures do not go unnoticed, though. HMIP regular and systematic monitoring of individual prisons allows it to gather and compare hard evidence across the sector. The data and information collected during the prison inspections feeds into the inspectorate's thematic and annual reports providing a broader and insightful view into prison conditions and the treatment of prisoners overall. Almost one-hundred thematic reports cover a wide range of cross-cutting issues, such as the report on 'What happens to prisoners in a pandemic?' issued during the COVID-19 pandemic (HMIP 2021), the reports on the quality of reading education (HMIP 2023), the adult black male prisoners and black prison staff (HMIP 2022), the mental health of prisoners (HMIP 2007), just to name a few. Annual reports provide a comprehensive analysis and review of the data collected through the inspections carried out during the year, identifying general trends, patterns and outcomes in prison conditions and prisoners' treatment. For example, over a 3-year-period annual reports continued to report the consistent lack or very limited availability of purposeful activities before, during – though significantly worse – and, after the COVID19 pandemic (HMIP Annual Reports 2020–21, 2021–22, 2022–23). This remains the case. In 2023–24, purposeful activity was judged to be poor or not sufficiently good in 31 out of the 39 adult prisons inspected (HMIP Annual Report 2023–24, 32).

Thematic reports usually contain recommendations, sometimes referred to as 'pathways to improvement' (e.g. Adult Black male prisoners and black prison staff report 2022). Annual reports do not have a final section specifically dedicated to recommendations though thematic findings indicate areas where interventions are needed. Arguably, annual reports could make a more explicit use of Article 19(b) OPCAT power 'to make recommendations to relevant authorities', the latter generally understood to comprise not only local prison but also ministerial and departmental authorities.

It remains the case that the recommendations contained in annual and thematic reports do not have to be accepted and there is no statutory power to compel changes. Thus, the inspectorate's role appears to be limited to bearing witness to the continuing systemic failures of prisons rather than reducing harms generated by degrading and dangerously deteriorating routines in the everyday lives of prisoners. In spite of the lack of progress, there is a belief that by continuing to chronicle these entrenched failings of an overcrowded, under-resourced system, inspections prevent 'what has become normal from becoming normative' (Owers 2009, 17). Clearly inspectors do wish and expect 'to be taken seriously' (P Clarke oral evidence to House of Commons Justice Committee 2018, Q513), especially if inspections are not only to chronicle but also improve prison conditions and prevent ill-treatment. It is submitted that taking the work and recommendations of the inspectorate seriously does not necessarily mean providing it with greater regulatory or enforcement powers, which some fear may lead to the inspectorate becoming part of the management regime (House of Commons Justice Committee 2019, Q328), and therefore compromise its autonomy and independence. It is argued that instead the inspectorate's mandate could be reinforced by giving full effect to the OPCAT obligations pertaining to the 'external' dimension of NPMs' work. As discussed in the next section, prevention of torture under OPCAT requires not only a regular monitoring system but also that the latter is able to generate wider discussions on the treatment of prisoners, to start meaningful and productive conversations with relevant authorities about findings and recommendations, and ways to bring about change.

## 6 | The External Dimension of OPCAT NPM's Work

Whilst the inspectorate's monitoring of prisons could be described as part of the 'internal' dimension of a NPM work, in the sense that is focused on looking inside those settings where individuals are deprived of their liberty, there is also a correlated 'external' dimension to its work. Article 22 OPCAT requires the 'state authorities' to examine recommendations of the NPM and 'enter into dialogue' with the NPM with regard to their implementation. The SPT has indicated that once dialogue starts this should also be maintained (SPT Analytical Assessment Tool for NPM paras 33–34). It is unclear what kind of channel or form dialogue should take, the timing and regularity of such dialogue, as well as which government authority should be responsible for ensuring an effective channel of communication. Arguably the SPT has deliberately avoided being too prescriptive in order to allow states some flexibility in finding arrangements that are more likely to work in the specific context. It is nonetheless clear that

there is an obligation for state authorities to take into account recommendations with a view to initiate discussions with the NPM about how to give effect to these.

Article 23 OPCAT requires the States parties to 'publish' and 'disseminate' the annual reports of the NPM. Whilst at first this might appear a simple information-giving exercise, the SPT has clarified in its guidelines that the State should ensure that the report is presented to, 'and discussed in, by the national legislative assembly, or Parliament' and that information should be 'widely disseminated' (SPT Guidelines on NPMs para 29). The guidelines suggest an expectation of conversations to be had in formal constitutional settings as well as of reaching out to the wider public (Nowak, Birk and Monina 2020, 952). In this last respect, the SPT has emphasised the importance of increasing public awareness and publicising the NPM findings and recommendations, through education and by making use of a broad range of media (SPT Analytical Assessment Tool for NPMs para 9.b).

S5A of the Prison Act 1952 (as amended) does not mention the obligation for the competent authorities, whether the prison authorities or the relevant ministerial department, to consider the Chief Inspector's recommendations and their implementation. The urgent notification is the only example whereby the Chief Inspector is understood to have the authority to initiate a process alerting the relevant ministerial authority and start a review of recommendations with a view to implement them. It is an example of how recommendations can be implemented if the right communication channels and clear procedures are in place even in the absence of an obligation to do so. However, the process is narrow in scope, in that it targets specific issues at individual institutions found to be failing. It is also a process that is triggered once failures have become 'unacceptable' and is essentially reactive rather than preventive in nature. Wider systemic issues, which have or might have implications for the treatment of prisoners and the prevention of ill-treatment, are not addressed under the urgent notification process.

S5A(5) of the Prison Act does require the Chief Inspector to submit to the Secretary of State an annual report to be laid before Parliament. The purpose of laying a paper is to make the information in the document available to the Houses of Parliament and to MPs (House of Commons MPs' Guide to procedure, 277). This could be an important opportunity to generate a wider discussion about prisons, the treatment of prisoners and the prevention of torture in line with Article 23 OPCAT. Nevertheless, there is no obligation for government authorities to hold discussions over the annual report findings and its recommendations. Neither is there a duty to disseminate widely the report both in constitutional and political settings as well as amongst the wider public. In this last respect, the inspectorate has found the task to be within its control and has increasingly sought to fill this gap by using a variety of media outlets to disseminate amongst the public its reports (HMIP Annual Report 2022–23, 92).

Where a state decides to implement its OPCAT obligations via multiple NPMs, it is reasonable to expect each of these individual members to meet the OPCAT requirements (Buckland and Olivier-Muralt 2019). However, it appears that HMIP, as a designated member of the NPM, is currently not in a position

to use the full range of OPCAT powers. This weakens the UK's compliance with the Optional Protocol as well as the HMIP ability to inform and contribute more incisively to debates on prison reform and prisoners' treatment. S5A of the Prison Act 1952 could be amended to be brought fully in line with OPCAT Articles 22 and 23 requirements. At the same time, OPCAT obligations should be fully implemented in respect of the collective UK NPM in order for it to function in a subsidiary and complementary manner to its individual members, including HMIP. For the collective NPM to be in a position to do so, as discussed next, it too would need a clearer and more robust framework.

## 7 | Complementary and Mutually Supportive Role of the UK NPM

Since its establishment the UK NPM has been rather less well-known or visible than its individual members (UK National Preventive Mechanism 2023). The objectively complex institutional set up chosen to give effect to OPCAT has to some extent meant that NPM, as a collective entity, has struggled to define and have its institutional identity and purpose recognised. Moreover, once the individuals members of the NPM were designated, the UK government was satisfied that the established NPM fully complied with the OPCAT obligations, including the requirements under Articles 17–23 of OPCAT (UK's response to the SPT's visit 2021, 3). The different function of this new overarching body might not have been so evident at the time of its establishment since individual members such as HMIP already had the expertise and operational powers to carry out visits to places of detention. However, whilst the roles might overlap, the inspectorial function is subtly but significantly different from preventive visiting (Evans 2020, 277). And whilst a system of regular visits to all places of deprivation of liberty is at the core of the OPCAT, this is not all there is to the prevention of ill-treatment (CAT/OP/12/6 30 2010, para 3). The role and powers of NPMs, in whatever shape or form, is context sensitive and should reflect the 'wide-ranging' and continuous nature of the duty to prevent torture and ill-treatment (CAT/C/GC/2 para 3). The obligation to establish a NPM, which stems from the duty to prevent torture, is not a one-off event, but subject to continuous and incremental development with a view to reinforce and refine formal aspects and working methods (SPT Analytical self-assessment tool for NPMs para 5). In the UK context, it might require devising flexible institutional and work arrangements between the collective NPM and its individual members to allow them to work in a complementary and mutually supportive manner for the purposes of the prevention of ill-treatment in places of deprivation of liberty. For example, the UK NPM might not need to undertake regular visits but it can have a role in harnessing and drawing on the knowledge and wide-ranging expertise of its individual members in order to produce a comprehensive, evidence-based understanding of the treatment of those deprived of their liberty across jurisdictions and across different settings of deprivation of liberty (NPM Annual report 2022–23, 9).

To be able to coordinate and facilitate the exchange of information across its members, the NPM would need more support and financial resources. Currently, the coordinating secretariat runs on a team of 2.5 full-time staff and a head of UK NPM Secretariat supported by two assistant coordinators (UK NPM Business

Plan Overview 2023–2025). The NPM is reviewing its operational framework and governance arrangements. A steering group has been set up to facilitate decision making and to take forward joint work (NPM Steering Group Terms of Reference 2023) with the Chair of the steering group now elected on a rotating basis for a three year period.<sup>11</sup> Changes to the governance are part of the NPM's intentional effort to clearly set out its identity and purpose to coordinate and provide a wider platform for all its 21 members, to act and speak with one voice on crosscutting issues regarding deprivation of liberty, and to liaise with its international counterpart the SPT (SPT, Guidelines on NPMs para 39).<sup>12</sup> But without the stability and independence conferred by a clear legal recognition it will be difficult for the NPM to play an effective role.

## 8 | UK NPM Statutory Recognition: A Prerequisite for Its Effective Functioning

At present the collective NPM, unlike most of its individual members, does not have its role and powers enshrined in a statutory text. Following the OPCAT ratification, the UK established the NPM on 31 March 2009 in accordance with a written ministerial statement to Parliament rather than with a formal legislative text. The SPT has expressed concern and has recommended adopting a clear legislative basis outlining the NPM's OPCAT duties and powers (SPT visit to the UK 2021, 6). The UK government objected noting that the designated 21 inspection bodies already have a statutory basis and therefor (CAT/OP/GBR/CSPRO/1 para 3). This misunderstands the role of the NPM, a mechanism that is not simply the sum of its many individual bodies. The UK NPM is taking responsibility for developing a broader role which builds on the strengths and the productive interaction of its members to allow it to gauge new insights into obstacles and opportunities for the prevention of ill-treatment. The NPM is well aware of the potential to glean a broad and comprehensive overview from its individual members' work allowing it 'to take a step back to look at systemic issues and good practice in different detention settings across the UK' (NPM Annual report 2022–23, 9). According to the NPM, most of the systemic issues remain such because of the failure of institutions to implement adequately recommendations from NPM members (NPM Annual report 2022–23, 16). Hence, the NPM is creating a recommendations database to follow up on key recommendations from its members (UK National Preventive Mechanism 2023, 7). A well-designed database can also help process vast amounts of information in order to identify broader policy and regulatory areas of intervention. In turn this could enhance the NPM's ability to engage in a productive process of dialogue with the relevant state authorities about reforms concerning places of deprivation of liberty generally as well as prison reform.

In this respect, its role as a salient interlocutor on matters pertaining to the treatment of those deprived of their liberty in any type of setting should also be acknowledged. In the same fashion as for HMIP, a legislative text should acknowledge its power to make recommendations (Article 19b OPCAT) and require the relevant state authorities to enter into dialogue with the NPM about the implementation of recommendations in line with Article 22 OPCAT and the SPT's guidance (SPT Guidelines on NPMs 2010 para 38). Arguably, the current lack of a statutory footing undermines the authority of the UK NPM. For example,

in the forward to the 2022–23 annual report the UK NPM Chair notes the progress as well as the many steps back across different detention settings. The Chair goes on to state:

The issues with detention in the UK are entrenched, complex and cross-cutting. A paradigm shift has long been required where detention is used only as a last resort and the system takes account of enlightened understanding. (NPM Annual report 2022–23, 6)

The report does not elaborate further on what is intended by a ‘paradigm shift’ or ‘an enlightened understanding’, but at the very least it appears to suggest the pressing need for discussions about reductionist approaches to deprivation of liberty. With hindsight the suggestion was and remains acutely relevant and important given the subsequent rushed emergency early release plan to ease dangerous levels of prison overcrowding.<sup>13</sup> The suggestion, however, remained just that. It is not framed as an Article 22 OPCAT recommendation, in fact there is no section/chapter containing recommendations in the annual report, in spite of the fact that annual reports should include recommendations as well as a narrative and any outcome of dialogue with the authorities (SPT Analytical self-assessment for NPMs 2016 para 35). The NPM instead appears in a stalemate waiting for the government to show some good-will to engage in dialogue whilst ‘In the meantime, our organisations will continue to inspect and monitor places of detention to prevent ill-treatment, upholding our human rights mandate’(NPM Annual report 2022–23, 6). The sense of disempowerment and lack of expectations is understandable given the disappointing level of institutional response to its annual reports. Since its establishment and in line with Article 23 OPCAT, the UK NPM has produced fourteen annual reports. These appear to have generated little to no institutional conversations, with the 2021–22 annual report neither published nor presented to Parliament due to UK government delays. Eventually the NPM proceeded to publish the report independently on its website but could not present it to Parliament (NPM Annual report 2022–23, 6). Again the 2022–23 annual report experienced similar delays leading to the report being published later and without written ministerial statement (NPM Press Release 8 February 2024). These shortcomings undermine the effectiveness of the NPM and its accountability to Parliament for the implementation of its mandate. The SPT has suggested that the NPM presents its annual report to Parliament directly without going through the Lord Chancellor and Secretary of State for Justice as currently envisaged (SPT visit to UK 2021, 10). The arrangement would further guarantee the mechanism’s independence and strengthen its ability to assess how the Government complies with its domestic and international human rights obligation to prevent torture in detention settings.

## 9 | Conclusion

HMIP’s work is pivotal in ensuring that prisons are opened up to external scrutiny. Its thorough and systematic work has generated numerous reports with recommendations on prison conditions and the treatment of prisoners. The inspectorate has the potential to act as a catalyst for wider change but in practice recommendations that could provide an important

contribution are only partially implemented, reports rarely make it onto any reform agenda and are seldom discussed with relevant authorities. Furthermore, there is no obligation for the latter to implement HMIP recommendations or to start discussions about how to go about their implementation. The article has argued that rather than giving the inspectorate regulatory and enforcement powers that may risk compromising its autonomy and independence, the role of the inspectorate could be reinforced by giving full effect to its OPCAT preventive mandate. This is premised on a two-pronged approach. Firstly, the inspectorate as a designated member of the NPM should see its OPCAT role and powers fully reflected in law along with the post of the Chief Inspector of Prisons. Specifically the ability of the inspectorate to inform and influence change could be strengthened by ensuring that the competent authorities have a duty to establish avenues for dialogue and to engage in discussions with the inspectorate about the implementation of recommendations on prisons and the treatment of prisoners and about ways to bring about change. Secondly, HMIP’s contribution to prison reform could be further bolstered by strengthening the collective NPM. As a multi-body mechanism, the UK NPM can provide a wider platform not only for HMIP but for all its individual members to meet and discuss challenges and best practices for the prevention of ill-treatment in different detention settings. It also has the potential to draw from the data and information gathered from its twenty one members and to act as a salient interlocutor on broad and cross-cutting policy areas. The UK NPM has proactively reviewed its operational framework and governance arrangements to improve its effectiveness in carrying out its OPCAT mandate in spite of financial, practical and legal constraints. In this last respect, providing the NPM with a statutory basis would be a first step enabling it to coordinate and support the preventive work of its individual members and to enhance the protection of all those deprived of their liberty.

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## Endnotes

<sup>1</sup><https://www.bbc.co.uk/news/uk-67837739>

<sup>2</sup><https://www.ft.com/content/244de68b-213b-441e-a9a5-c258b420b4a2>

<sup>3</sup>Section 46(1) of The Immigration, Asylum and Nationality Act 2006 extended the Chief Inspector’s remit to immigration detention centres, short-term immigration holding facilities and escort arrangements throughout the UK. The Police and Justice Act 2006 Section 28 added to the 1952 Act by setting out the Chief Inspector’s further powers and duties to cooperate and consult with other criminal justice Inspectorates and other bodies.

<sup>4</sup><https://hmiprison.justiceinspectorates.gov.uk/who-we-are/>

<sup>5</sup><https://www.npm.act.gov.au/>

<sup>6</sup><https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/NPM/Italy25April2014.pdf>

<sup>7</sup><https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/NPM/France.pdf>

<sup>8</sup><https://www.nationale-stelle.de/en/home.html>



<sup>9</sup>[https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/NPM/UKs\\_NPM.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/OPCAT/NPM/UKs_NPM.pdf)

<sup>10</sup>Not all prison authorities have reacted promptly, for example HMP Pentonville in January 2020 the inspectorate found that little had been done to respond to a very poor inspection report in 2019 until a few days before the IRP itself. HMIP 'Annual Report 2019-20', p.15.

<sup>11</sup>The Chair is currently held by HM Chief Inspector of Prisons for Scotland, Wendy Sinclair-Gieben, <https://nationalpreventivemechanism.org.uk/npm-chair/>

<sup>12</sup>Similar debates have been discussed about the role of the South African multi-body NPM see <https://sahrc.org.za/npm/index.php/npm-resources/general-reports/npm-annual-report-2022-23/download>

<sup>13</sup><https://lordslibrary.parliament.uk/government-plans-to-ease-prison-capacity-pressure-and-manage-the-needs-of-vulnerable-prisoners/>

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