Culturally appropriate oversight of conditions of detention and treatment of detained Aboriginal and Torres Strait Islander people in the Northern Territory’s criminal justice system – in compliance with the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Report by Andreea Lachsz, Churchill Fellow
Awarded by The Winston Churchill Memorial Trust
I understand that the Churchill Trust may publish this Report, either in hard copy or on the internet or both, and consent to such publication.

I indemnify the Churchill Trust against any loss, costs or damages it may suffer arising out of any claim or proceedings made against the Trust in respect of or arising out of the publication of any Report Submitted to the Trust and which the Trust places on a website for access over the internet.

I also warrant that my Final Report is original and does not infringe the copyright of any person, or contain anything which is, or the incorporation of which into the Final Report is, actionable for defamation, a breach of any privacy law or obligation, breach of confidence, contempt of court, passing-off or contravention of any other private right or of any law.

Signed
Andrew

Date 28/11/2019
I acknowledge and pay my respects to the Traditional Custodians of the land on which I worked and lived in the Northern Territory, which is the focus of this report, and of Sydney, the Gadigal people of the Eora Nation, where this report was written. I pay my respects to the First Peoples of this land, and Elders past, present and future. I recognise that this land was and always will be Aboriginal and Torres Strait Islander land because sovereignty was never ceded.
EXECUTIVE SUMMARY

PURPOSE AND SCOPE OF THE FELLOWSHIP

This report considers how the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) obligation to designate a National Preventive Mechanism (NPM) could be met in the Northern Territory (NT), specifically in relation to places of detention in the criminal justice system (including prisons, youth detention facilities, police custody and court custody). OPCAT focuses on the prevention of torture and ill-treatment, and if OPCAT is properly implemented, establishing an effective NPM is an opportunity to minimise the human (and financial) cost of the ill-treatment of detainees. The Fellowship investigated overseas best practices in terms of not only OPCAT compliance, but of culturally appropriate oversight, focusing on Indigenous detainees. I visited jurisdictions that had ratified OPCAT and/or had criminal justice systems similarly experiencing the overincarceration of Indigenous people: New Zealand, Canada, England, Scotland, Northern Ireland and Switzerland. The model and recommendations proposed in this report are tailored to the unique NT context. Nonetheless, given that all jurisdictions in Australia suffer from the overrepresentation of Aboriginal and Torres Strait Islander people in their criminal justice systems, many of the recommendations contained in this report will be of relevance to, and all of the best practice examples can provide guidance on, effective OPCAT implementation across Australia.

CONSULTATION: ABORIGINAL COMMUNITY AND ABORIGINAL COMMUNITY CONTROLLED ORGANISATIONS

The NT’s criminal justice system is a system characterised by high rates of incarceration and a detention population that is overwhelmingly Aboriginal. An NPM that fails to achieve cultural competency will also be unable to advance the prevention of torture and ill-treatment of Aboriginal children in youth detention (almost 100% of the detention population) and Aboriginal people in prison (84% of the prison population).

A consistent finding throughout this report is that consulting with the NT Aboriginal community and Aboriginal Community Controlled Organisations (ACCOs) is essential. Given that NPMs should be designated through an ‘open, transparent and inclusive process’, it is well-established that consultation is essential in NPM designation or establishment. Consultation should be ongoing, in relation to all aspects of the NPM’s mandate, including its inspection framework, the expectations/standards that it uses in its inspections and evaluation of its efficacy and cultural competency. The NT NPM will have to maintain its independence while engaging in these ongoing consultations, which will present challenges, especially in a small jurisdiction like the NT, but it is not impossible to strike an appropriate balance. If the NT NPM is to be effective, it must achieve legitimacy among the Aboriginal community (which extends to those who are detained, with whom the NPM will need to engage).

As the NT moves towards Treaty negotiations and the establishment of the Aboriginal Justice Agreement, the United Nations Declaration on the Rights of Indigenous Peoples’ provisions on Aboriginal self-determination and the requirement that Government consults with Aboriginal people are likely to transform into Government obligations. These obligations will impact on the NPM in the future, and it was useful to research
during the Fellowship, how the Treaties in Canada and New Zealand have influenced and shaped their criminal justice systems (and NPMs).

**BEST PRACTICES IDENTIFIED IN OTHER JURISDICTIONS**

This report highlights best practices in the jurisdictions visited, including, but not limited to, the following:

- the New Zealand Office of the Children’s Commissioner’s approach of centring the experiences of detained children and its inspection framework, Mana Mokopuna, that focuses on the unique needs of Māori children;
- the Canadian Office of the Correctional Investigator’s practice of conducting its oversight work with reference to the legacy and continuing impact of colonisation on the experiences of First Nations, Métis and Inuit people in prisons;
- the UK NPMs’ reliance on a robust set of expectations, informed by international human rights law and not constrained by existing legislation and government policy.

In proposing the below model, I have incorporated and adapted the many effective aspects of the oversight bodies with which I met, recognising that the NT context is unique and a ‘cut and paste’ job of overseas best practices would not be appropriate.

**AN ABORIGINAL INSPECTORATE**

The overrepresentation of Aboriginal people in places of detention in the NT’s criminal justice system highlights the need to take a tailored and targeted approach to the prevention of torture and ill-treatment of Aboriginal people. Establishing an NPM that is an Aboriginal Inspectorate acknowledges the reality of the NT context – that the vast majority of the detainees who will fall within the mandate of an NPM operating in the criminal justice space will be Aboriginal. The proposed model includes a Deputy Inspector whose focus would be children and young people, and a specialised Children and Young People’s Unit within the Inspectorate.

Establishing an Aboriginal Inspectorate comes with a number of benefits, including:

- adopting a targeted approach to the protection needs of Aboriginal and Torres Strait Islander people detained in the NT;
- having an NPM which has the requisite multidisciplinary expertise, specifically in relation to the needs and situation of Aboriginal detainees and
- having an NPM whose foundation and structures support organisational cultural competency.

In the report I write the following: *As my Fellowship progressed, the question I needed to ask became clearer: If the NT were to take not the most convenient, the fastest, the cheapest path to establishing or designating an NPM, but the path that would most likely achieve the preventive objective of OPCAT, protecting Aboriginal prisoners and detainees from torture and ill-treatment, what would the NT NPM look like?*

When I first applied for this Fellowship, I did not expect that I would be making recommendations that depart from those of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the
Northern Territory with regard to which body should be designated the NPM. I have deep respect for the Commissioners and gave evidence at the Royal Commission. Given that the scope of my research was both wider (looking at detained adults as well as children) and narrower (looking solely at preventive functions under OPCAT) than the Royal Commission’s mandate, perhaps it is not surprising that we reached different conclusions. Of note, the report’s recommendation in relation to NPM designation is inconsistent with the Northern Territory Government public (as yet unfulfilled) commitment to implement the Royal Commission’s recommendations to expand the mandate of the NT’s Office of the Children’s Commissioner to include inspections of both youth detention facilities and out-of-home-care residences.

Other countries that have ratified OPCAT have not adopted the approach this report recommends, and there is no precedent for an NPM that has a mandate to focus solely on Indigenous detainees. I visited Geneva at the end of my Fellowship in order to gain a better understanding of NPMs from an international perspective, to determine whether there might be obstacles I had not yet considered, and to test whether the proposed model has merit. This was a useful exercise, but I have not been able to undertake the extensive consultation with ACCOs and the NT Aboriginal community that such an important question of policy, impacting directly on Aboriginal people, requires.

Which brings me full circle, back to what I have already highlighted: If OPCAT is to be effectively implemented in the NT, then the Northern Territory Government must engage in genuine consultations with Aboriginal people and organisations. The Government has until the end of 2020 to establish or designate its NPM(s), and I hope that this report will be of assistance in guiding its future consultations.

**KEY WORDS**
OPCAT; Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Torture; Cruel, Inhuman or Degrading Treatment or Punishment; ill-treatment; corruption; National Preventive Mechanism; NPM; Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Subcommittee on Prevention; SPT; inspectorate; inspection; monitoring; oversight; prevention; criminal justice; detention; custody; imprisonment; incarceration; prison; work camp; police; police cell; police custody; youth detention; court; court custody; detainee; prisoner; do no harm; reprisals; Northern Territory; cross-jurisdiction; Aboriginal and Torres Strait Islander peoples; Indigenous; Law and Justice Group; Aboriginal Justice Agreement; Treaty; Local Decision Making; Aboriginal Community Controlled Organisation; ACCO; culturally appropriate; culturally competent; cultural safety; data sovereignty; United Nations Declaration on the Rights of Indigenous Peoples; UNDRIP; human rights; international human rights; discrimination; racism; systemic racism; institutional racism; unconscious bias; colonisation; colonialism; Gladue; Aboriginal Social History.

**CONTACT DETAILS**
Andreea Lachsz
andreea.lachsz@gmail.com
@Lux_AI
Thank you to ARDS (Aboriginal Resource and Development Services) Aboriginal Corporation for translating the Executive Summary into Dhuwala, a Yolŋu language widely understood in the Gove region in North East Arnhem Land. I note that Dhuwala is just one of the many Aboriginal languages spoken in the Northern Territory, and that best practice as outlined in this report requires that both written and audio translations be made available in (at a minimum) the more widely spoken Aboriginal languages of the Northern Territory.

BUKUYANA

ŋnarra yaku Andreea Lachsz (Galikali). Ńthilinydjara ŋnarra NAAJA-ŋura djäma bilanyara Community Legal Education dihiyalara Arnhem Land ga wiripunjura wängajura. Djämanydjara ŋnarra yukurrana Nyomba Gänganjuwala wiyiŋumirri ga goŋdhu marranjaŋa ŋayi ŋarranha ga ŋarrakunydjara ŋayi ńŋoŋi’mirriŋuna.

ŋnarra birkka’yun ga malŋ’tahunmarama nhaltjan yurrugal walala warkthun ńnhala dharrunguŋura manymakkuma ga nhaltjan yurruluŋu yolŋu’ylŋu marŋgithirri nhaltjan walala yurrula djäma ńnuna djinawa dharrunguŋuŋura. Yurruna ŋnarra martoŋi bala wiripunjulilili wänjalili gaŋu-waŋaplilili malŋ’tahunmaraŋaru nhaltjan ńuli Yolŋu walala yurrula nhina gaŋdurrŋura ga nhaltjan walala yurruluŋu Gapmandhu galmunarama dąŋmaranawunjunga yolŋunha. Mak dhuwala NT-walala yurruluŋu wiripunjulili wängaŋura malany djäma.

ńnuni walaŋa NT Gapmandhu yurruluŋu gatjarr’yun ga malthun nhä yurrula ńnorra ńnhilimiyi djorra’ŋura ŋäthilinydjara walaŋa yurruluŋu wänganjamamirri manymakkunhamirri yolŋu’yuŋuŋuŋula. Ga yurruna walaŋa yurruluŋu bitjandhiyi bili djäma yolŋu’yuŋuŋuŋula walaŋaŋu.

Yurruna ŋnarra yurrula djälmirriyiirri ga gatjpuyun ŋnuni ńayi buwal’yurruluŋu dhuwaŋa wuŋkiriŋuŋu dhaŋruk wänganydhin märr walaŋa yurruluŋu marŋgithirri ga marŋgikuma. Dhuwaŋalanydjara dhaŋruk ŋnuni nhaltjuŋa ŋnarra wuŋkiriŋuŋa njarrakala djorra’ŋura.

DHÄWU-LAKARANHAWUY

bartjunmaranhaŋuru ga bulu gulmarama walalanka märr-walala yurru goŋ-nhirraŋmirri ga manymakkuma yäna milnyaŋ’miriw djàka ŋuriki yolŋu-yulŋuwu walalangu, ga yaka ŋanaŋu-yätjkuma walalanka.


WÄŃA YOLŊU-YOLŊUWALA GA YOLŊUWALA ORGANISATION-GALA

Dhuwala wänjaŋura ŋarakanjura Northern Territory, dhanaŋançaŋura yolŋunha ŋuli djuy’yun bala dharrungulilli ga yolŋu-yolŋuna dhanaŋthirrinya yurruŋa dhuwala dhaŋgirriyayndja ŋunhi bala bila djamarrkuljwala ŋunhilimi detention-nura ga daŋqandja dhuwala dhaŋgirriŋura. ŋunhi walala NPM yaka marŋg yolŋuwu romgu, banyjuna walala yurruru djàma manymakkuma ga gulmarama dhuwala rom ŋunhi ŋuli yätjkuma yolŋunha walalanka.

Dhiyajaranjdja dhåwuyu yurruru dhuakkarr Northern Territory Gapmangoo wæni buwalyurr yolŋu-yolŋuulwa nøli walalangu yurruŋa dhárrana bilina bilanyara bitjan Aboriginal Organisation ga mäkir-witjün walalanu dharukku. ŋunhi nøli ŋuli NPM wu djarr’yun yol Gapman organisation yurruru dhárra NPM. Nula nguunyndja ŋunhi ŋuli NPM djarr’yun wu nherran, walalanha Gapmandhoo ga NPM-thu yurruru bjàŋk nøt’thun yolŋunha


DHUWALANYDJA MANYMAK MIRITHIRRI DJÄMA BEŊURU WIRIPUNURU WÄŊAŊURU

Bili dhuwala Northern Territory yakanha bilinyara wiripu wäŋaŋuru Djarr’yun ga gatjarr’yun wiripunyuru wäŋauŋuru ga mär gaŋga bilmarama ɲunhiyi recommendations dhiyakayi Northern Territory NPM. Ga dhuwala ɲarra mäľ’maramanydjya gam’.

1. Dhuwala New Zealand Wupitjŋura dhiyalalami ɲunhi djämarrkuļu’wu Commissioner ɲunhi ɲuli dhukarr-yarranydjun ɲurukiyi yolŋuwu walalançu Maori djämarrkuļu’ dhuwala detention-ŋura.
2. Dhuwala Canadian Wopitj ŋuriki Correctional Investigator, ɲuli birrka’yun nhaltjan bilanyaramirriŋu colonisation dhiyanųwuŋgala yurruŋa yoŋuŋa-liiŋkumara dhuwala First Nations-nha, Yolŋu Metis ga Inuit yolŋu dhiyalalami gahnhdhurrulŋura.
3. Dhuwala UK NPMs nhaltjan ɲuli birrka’yun balakurruwiitjan human rights rom (Rom ɲunhi dhaŋaŋthu, ga wiripunyuru wäŋaŋuru walala yoraŋa, märryu-ŋapmarama Yolŋunjha.

ABORIGINAL INSPECTORATE: WUPITJ ɲUNHI ɲULI DJARR’YUN NHALTJAN GAPMAN DJÄMAMIRRI GA BİLİJTJUMAN, GA DHARRUŊGU GA DJÄMARRKUĻ’ JUSTICE DJÄMAMIRRI WALALA DJÄMA YUKURRA


Ga dhuwala mayali organisation ɲunhi ŋurukiyi baŋja Gapmangu yurru yurru-yirryunmarrama yolŋu-yolŋunjha ga gakaŋ walalançu manymakuma. Ga djämamjpy ɲunhiyi buwal’yurru nhäŋu nhaltjan yurru wäŋaŋura bilinyara bitjan dharruŋuŋuru ga galmuŋu ŋunhiyi ŋapmaramhawuy yolŋunjha beŋuru bunharanuŋu
yätjkunharaŋuru. Ga Deputy Inspector-yu yurru dhunupamirriyama walalaŋgu djamarrkulju’wu ga wiripuny whole dхаrra yurru bilinyara Children ga Young People’s Unit.

ņarranydja yukurra gatjarr’yun nhumlangala Aboriginal Inspectorate-gala, bili:
1. Ċunhinydjia buwal’yurru nhäŋu walalaynha Aboriginal däpmaranhawuynha yolŋunha ɣana
2. Djäkamirri staff (bilinyara marrŋgitj, wu rom-djämamirri, wu marŋgikunharamirri) walala ŋuli märraŋu ɣunhiyi djäl walalaŋgu Aboriginal däpmaranhawuynyu yolŋuwu
3. Ċunhinydja mayali bitjan warrpam organisation-thu yukurra nhäma ga ṣayaŋu-manymakkuma ga djamä latjukuma walalaŋgu yolŋu’yulŋuwu.

Dhiyalami djorra’ŋura ŋarra wukirri dhärük dhuwala bilinyaramirriyu, ŋarra maļŋ’amarama dhukarr ŋarra djälthirri, ga birrka’yun balakurruwitjanndhi. Mak dhuwala Northern Territory walala buwal’yurru yaka märraŋu dhuwaliyi waächtja, yurru ganganydja dhukarr määrranharawuy dhuwala NPM. Mak bäy NT djälthirri yukurra määrranharawu dhiyaku dhuwarkwu ɣunhi yurru gama walalanha bala NPM màr ɣunhiyinydja däl’nha mirithirri ga gulmaraŋuna yätjkunharaŋuru yolŋunha walalha däpmaranhawuynha yolŋunha. Ņarra yukurra birrka’yun nhaltjan ŋarra yurru malthun ŋulakurruwitjan dälkuru dhukarrkuru.


ņarranydja bäyŋu waŋa Yolŋu’yulŋuwala ga organisations-kala dhiyala Northern Territory-ŋura. Wiripuyu yurru warkthun dhuwala ɲäthilyun ga ɭuku-nherran ɲunhinha NPM-nha. 甯arra yukurra gatjpubun dhiyakiyiku report-ku ɲunhi buwal’yurru gunga’yurru Northern Territory Gapmannha ga nhätha walala yurru djamä Consultations nhanŋu.
IN-BUILT FLEXIBILITY OF STRATEGY ................................................................. Page 197
VISITS STRATEGY ENSURES SUFFICIENT CAPACITY FOR FUNCTIONS BEYOND INSPECTION Page 200
THE INSPECTORATE MUST HAVE CERTAINTY OF SUFFICIENT FUNDING FOR PLANNING TO BE TRULY STRATEGIC ................................................................. Page 201
THE INSPECTORATE SHOULD CONSULT WITH RELEVANT STAKEHOLDERS ......................... Page 202
CONSIDERING WHAT TYPES OF VISITS/INSPECTIONS WILL BE UNDERTAKEN BY THE INSPECTORATE ................................................................. Page 202

EXPECTATIONS/STANDARDS FOR INSPECTIONS – GENERAL
CONSULTATION, REVIEW OF EXISTING EXPECTATIONS/STANDARDS, AND TESTING EXPECTATIONS/STANDARDS ........................................................................................................ Page 210
TRANSPARENCY AND INDEPENDENCE OF THE INSPECTORATE’S EXPECTATIONS/STANDARDS ........................................................................................................ Page 211
EXPECTATIONS/STANDARDS SHOULD NOT BE CONSTRAINED BY GOVERNMENT LEGISLATION, REGULATIONS OR POLICIES ........................................ Page 212
NATIONAL NPM STANDARDS MUST BE SUFFICIENTLY FLEXIBLE TO BE APPLIED IN A CULTURALLY APPROPRIATE MANNER IN THE NT ........................................ Page 214
INTERNATIONAL HUMAN RIGHTS ........................................................................ Page 215
INCORPORATING INTERNATIONAL EXPERT VIEWS ............................................... Page 218
STANDARDS VS EXPECTATIONS: BEST PRACTICE OVERSEAS .......................... Page 219
A NOTE ON ESCORTED TRANSFERS/TRANSPORT ............................................ Page 223
A NOTE ON STAFF AT PLACE OF DETENTION ..................................................... Page 225
THE INSPECTORATE SHOULD ASSESS HOW THE CULTURES OF INSTITUTIONS IMPACT ON THE TREATMENT OF PRISONERS AND DETAINEES ................................ Page 228
THE INSPECTORATE SHOULD REGULARLY REVIEW AND UPDATE EXPECTATIONS/STANDARDS ........................................................................................................ Page 231

EXPECTATIONS/STANDARDS AND FRAMEWORKS FOR CULTURALLY COMPETENT INSPECTIONS
DATA SOVEREIGNTY: THE DATA COLLECTED MUST BE RELIABLE AND APPROPRIATE TO INFORM THE INSPECTORATE’S RECOMMENDATIONS ........................................ Page 233
FUTURE OBLIGATIONS UNDER TREATY ................................................................ Page 235
UNDRIPT .................................................................................................................. Page 239
CULTURALLY APPROPRIATE INSPECTION EXPECTATIONS/STANDARDS .................. Page 241
AN ABORIGINAL INSPECTION FRAMEWORK ....................................................... Page 245
CONSULTATION WITH ABORIGINAL COMMUNITY CONTROLLED ORGANISATIONS AND THE ABORIGINAL COMMUNITY ......................................................... Page 248
RECOGNISING THE LEGACY OF COLONISATION ............................................ Page 250
SYSTEMIC RACISM, UNCONSCIOUS BIAS AND DISCRIMINATION ........................ Page 257
TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT – MEANINGS ACROSS DIFFERENT CULTURES AND HISTORIES ................................ Page 266
INTERSECTIONALITY ............................................................................................... Page 270
AUSTRALIAN AND NT SOURCES FOR EXPECTATIONS/STANDARDS.......................................................... Page 272

PREPARING FOR THE INSPECTION
MOU WITH DETAINING AUTHORITIES.......................................................................................... Page 279
ESTABLISHING WHICH NGOS AND BUSINESSES ARE PROVIDING A SERVICE AT THE DETENTION SITE................................................................................... Page 280
REVIEW OF INFORMATION AND RESEARCH RELATING TO THE DETENTION SITE.............. Page 282
INSPECTION METHODOLOGY TO BE RESPONSIVE TO INFORMATION GATHERED.............. Page 285
THE INSPECTION TEAM............................................................................................................. Page 286

CONDUCTING THE INSPECTION
INSPECTIONS SHOULD GENERALLY BE UNANNOUNCED........................................................ Page 289
INSPECTIONS SHOULD BE OF SUFFICIENT LENGTH, WITH VISITS CONDUCTED ON DIFFERENT DAYS OF THE WEEK, AT DIFFERENT TIMES OF THE DAY............................................................. Page 289
INITIAL BRIEFING WITH DETAINING AUTHORITY..................................................................... Page 291
CONDUCTING INSPECTIONS THAT ARE TRAUMA-INFORMED AND RESPECTFUL OF DETAINEE’S DIGNITY........................................................................................................... Page 292
THE INSPECTION SHOULD “DO NO HARM”............................................................................ Page 294
NO REPRISALS FOR INDIVIDUALS OR ORGANISATIONS THAT COMMUNICATE WITH THE INSPECTORATE........................................................................................................... Page 297
THE DETAINEE’S EXPERIENCE IS CENTRAL............................................................................ Page 297
SOURCES OF EVIDENCE AND TRIANGULATING EVIDENCE................................................ Page 302
MAKING REFERRALS OF COMPLAINTS.................................................................................... Page 312

CONDUCTING AN INSPECTION IN A CULTURALLY APPROPRIATE MANNER
UTILISING ABORIGINAL INTERPRETERS.................................................................................... Page 315
USING FOCUS GROUPS TO OBTAIN THE INFORMATION OBTAINED VIA SURVEYS IN JURISDICTIONS OVERSEAS........................................................................................................... Page 318

PRESENTATION OF FINDINGS IN THE REPORT
STRUCTURE OF THE REPORT.................................................................................................... Page 323
THE REPORT SHOULD FACILITATE CONSTRUCTIVE DIALOGUE.......................................... Page 323
ENSURING THE REPORTS “DO NO HARM”............................................................................ Page 325
INCLUDING EVIDENCE TO SUPPORT THE INSPECTORATE’S FINDINGS.............................. Page 326

RECOMMENDATIONS
THE CHALLENGE OF HAVING NON-BINDING RECOMMENDATIONS....................................... Page 331
THE APT’S SMART MODEL...................................................................................................... Page 331
BALANCING WHAT IS PRACTICALLY ACHIEVABLE VS SUPPOSED BUDGETARY CONSTRAINTS................................................................................................................................. Page 334
TIME FRAMES FOR IMPLEMENTATION OF RECOMMENDATIONS...................................... Page 336
IDENTIFYING THE CAUSE(S) OF DETAINING AUTHORITY’S DEPARTURE FROM EXPECTATIONS/STANDARDS .................................................................................................................. Page 336
RECOMMENDATIONS TARGETED TO APPROPRIATE INDIVIDUAL, DEPARTMENT OR CONTRACTOR ............................................................... Page 337
RECOMMENDATIONS THAT WILL ALSO ASSIST THE INSPECTORATE TO FULFIL ITS MANDATE .............................................................. Page 340
MANAGING INCONSISTENCIES WITH PREVIOUS RECOMMENDATIONS ............................................................................................... Page 341
ENGAGING WITH DETAINING AUTHORITIES AT THE END OF THE INSPECTION ................................................................. Page 341

THE DETAINING AUTHORITY’S RESPONSE
THE OBLIGATION TO ENTER INTO DIALOGUE WITH THE INSPECTORATE .............................................................................................. Page 345
ESTABLISHING A TIMEFRAME FOR THE DETAINING AUTHORITY’S RESPONSE (AND A REPORT PUBLICATION TIMELINE) .............................................................................................................. Page 345
FACTUAL ACCURACY CHECKS BY DETAINING AUTHORITY ........................................................................................................ Page 346
THE DETAINING AUTHORITY’S RESPONSE – ACCEPT/PARTIALLY ACCEPT/REJECT RECOMMENDATIONS .......................................................................................... Page 347
DETAINING AUTHORITY’S ACTION PLAN FOR RECOMMENDATION IMPLEMENTATION .......................................................... Page 350

A PUBLICLY AVAILABLE REPORT
REASONS FOR HAVING A PUBLICLY AVAILABLE REPORT ........................................................................................................ Page 355
THE INTENDED AUDIENCE FOR THE REPORT ......................................................................................................................... Page 357
INSPECTORATE’S STRATEGY FOR ENGAGING WITH THE MEDIA .................................................................................................... Page 370

ESCALATION STRATEGY ........................................................................................................................................................................ Page 373

FOLLOWING UP RECOMMENDATIONS
FOLLOW-UP STRATEGY FOR RECOMMENDATION IMPLEMENTATION ........................................................................................................ Page 379
THE INSPECTORATE SHOULD NOT BE INVOLVED IN RECOMMENDATION IMPLEMENTATION .................................................................................................................. Page 382
FOLLOW-UP STRATEGIES IN OTHER JURISDICTIONS ..................................................................................................................... Page 383

ANNUAL REPORTS
PURPOSE AND CONTENTS OF THE REPORT ........................................................................................................................................ Page 392
REPORTS SHOULD BE WIDELY DISSEMINATED ................................................................................................................................. Page 395

THE INSPECTORATE’S OPCAT COMPLIANCE AND EFFICACY SHOULD BE EVALUATED
EVALUATING WHETHER THE INSPECTORATE IS SUCCESSFULLY ACHIEVING ITS GOAL OF CONTRIBUTING TO THE PREVENTION OF TORTURE AND ILL-TREATMENT .................................................................................................................. Page 398
THE INSPECTORATE’S SELF-ASSESSMENT ........................................................................................................................................ Page 399
EXTERNAL EVALUATION OF THE INSPECTORATE ............................................................................................................................ Page 403
EVALUATION OF THE NTG’S COMPLIANCE WITH ITS OBLIGATIONS UNDER OPCAT .................................................................................................................. Page 407
ACRONYMS AND ABBREVIATIONS

Aboriginal - Aboriginal and Torres Strait Islander
ACCO - Aboriginal Community Controlled Organisation
ADC - Anti-Discrimination Commission
AHRC - Australian Human Rights Commission
AIS - Aboriginal Interpreter Service
AJA - Aboriginal Justice Agreement
ALRC – Australian Law Reform Commission
APONT - Aboriginal Peak Organisations of the Northern Territory
APT - Association for the Prevention of Torture
ASH - Aboriginal Social History
ATSILS - Aboriginal and Torres Strait Islander Legal Services
BAME - Black, Asian and Minority Ethnic
CAT - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CJI/CJINI - Criminal Justice Inspection Northern Ireland
CLANT - Criminal Lawyers Association of the Northern Territory
CNPM - Coordinating National Preventive Mechanism
CNS - Custody Notification Service
CPT - Committee for the Prevention of Torture
CSC - Correctional Service Canada
CSO - Civil Society Organisation
Eng - England
Expert Mechanism - Expert Mechanism on the Rights of Indigenous Peoples
HMCIP - Her Majesty’s Chief Inspector of Prisons
HMICFRS - Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services
HMICS - Her Majesty’s Inspectorate of Constabulary in Scotland
HMIP - Her Majesty’s Inspectorate of Prisons
HMIPS - Her Majesty’s Inspectorate of Prisons for Scotland
HRC - Human Rights Commission
ICAC - Independent Commission against Corruption
ICV - Independent Custody Visiting
ICVA - The Independent Custody Visiting Association
ICVS - Independent Custody Visiting Scotland
ILL-treatment - cruel, inhuman or degrading treatment or punishment
IMB - Independent Monitoring Board
Inspectorate - Aboriginal Inspectorate
IPCA - Independent Police Conduct Authority
IPM - Independent Prison Monitor
ISO - Investigations and Standards Office
LDM - Local Decision Making
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>NAAJA</td>
<td>North Australian Aboriginal Justice Agency</td>
</tr>
<tr>
<td>NATSILS</td>
<td>National Aboriginal and Torres Strait Islander Legal Services</td>
</tr>
<tr>
<td>NHRI</td>
<td>National Human Rights Institution</td>
</tr>
<tr>
<td>NI</td>
<td>Northern Ireland</td>
</tr>
<tr>
<td>NPM</td>
<td>National Preventive Mechanism</td>
</tr>
<tr>
<td>NT</td>
<td>Northern Territory</td>
</tr>
<tr>
<td>NTG</td>
<td>Northern Territory Government</td>
</tr>
<tr>
<td>NTRC</td>
<td>Royal Commission into the Detention and Protection of Children in the Northern Territory</td>
</tr>
<tr>
<td>OCC</td>
<td>Office of the Children’s Commissioner</td>
</tr>
<tr>
<td>OCI</td>
<td>Office of the Correctional Investigator</td>
</tr>
<tr>
<td>OMCT</td>
<td>World Organisation Against Torture</td>
</tr>
<tr>
<td>OPCAT</td>
<td>Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment</td>
</tr>
<tr>
<td>OSCE ODIHR</td>
<td>Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights</td>
</tr>
<tr>
<td>OVP</td>
<td>Official Visitors Program</td>
</tr>
<tr>
<td>PRI</td>
<td>Penal Reform International</td>
</tr>
<tr>
<td>PRT</td>
<td>Prison Reform Trust</td>
</tr>
<tr>
<td>RCIADIC</td>
<td>Royal Commission into Aboriginal Deaths in Custody</td>
</tr>
<tr>
<td>SHRC</td>
<td>Scottish Human Rights Commission</td>
</tr>
<tr>
<td>Special rapporteur</td>
<td>Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
</tr>
<tr>
<td>SPT</td>
<td>Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
</tr>
<tr>
<td>UPR</td>
<td>Universal Periodic Review</td>
</tr>
<tr>
<td>YJAC</td>
<td>Youth Justice Advisory Committee</td>
</tr>
<tr>
<td>UNDRIP</td>
<td>United Nations Declaration on the Rights of Indigenous Peoples</td>
</tr>
<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
</tr>
<tr>
<td>UNODC</td>
<td>United Nations Office on Drugs and Crime</td>
</tr>
</tbody>
</table>
ACKNOWLEDGEMENTS

I would like to thank the following people with whom I met with overseas as part of my Churchill Fellowship, who so generously gave their time and expertise:

Peter Boshier the Chief Ombudsman for New Zealand, and those in the Ombudsman team whom I accompanied on an unannounced prison inspection, Jacki Jones, Michael Hughes, Eric Fairbain, Sue Silva, Lauren Rutter, Emma Roebuck, Ruth Nichols and Jon Royal; Liz Kinley and those in the New Zealand Office of the Children’s Commissioner team whom I accompanied on an unannounced youth detention facility inspection, Te Awa Puketapu, Sarah Hayward, Kirstin Tait, Noel Woods; from the New Zealand Independent Police Conduct Authority, Warren Young and Victoria Lea, whom I accompanied on visits to police stations; from the New Zealand Human Rights Commission, Hannah Northover, Jaimee Paenga, Jessica Ngatai and Hemi Pirih-Kaiwhakarite; from the New Zealand Office of the Inspectorate, Janis Adair and Sara Cunningham; from the New Zealand Howard League, Christine McArthy; from Just Speak, Tania Sawicki Mead; from People Against Prisons Aoteroa, Kendra Cox and Ti Lamusse; Professor Tracey McIntosh; Professor Elizabeth Stanley; from the Yukon Investigations & Standards Office, Eric Stevenson; from the Yukon Department of Justice, Tyler Plaunt; from the Council of Yukon First Nations, Shadelle Chambers, Laura Hoversland and Katherine Alexander; from the Yukon Human Rights Commission, Jessica Lott Thompson and Kelsey Lavoie; from the Louikdelis report Implementation Working Group, Allan Lucier, Mary Vanston, Christine Grant, Norma Davignon; from the Whitehorse Correctional Centre, Valerie Goodkey; from Kwanlin Dun First Nation, Gary Rusnak; from the Yukon Child and Youth Advocate Office, Bengie Clethero and Stephanie Sullivan; inspector David Louikdelis; Yukon lawyers Jennifer Cunningham, Andrea Bailey and Gavin Gardiner; from the Office of the Correctional Investigator, Ivan Zinger, Derek Janhevich, Martin Leuchs, Frederic Heran, David Hooey, Jean-Frederic Boulais, Stephanie Gauthier, and Johanne Vernet, whom I accompanied on a prison visit; from Indigenous Corrections, Correctional Services Canada, Marty Malby; from the Native Women’s Association of Canada Elena Finestone and Matthew Pringle (the latter with whom I met also in his capacity at the OPCAT Project); from Aboriginal Legal Services, Jonathon Rudin; from Her Majesty’s Inspectorate of Prisons, Jade Glenister and Esra Sari; from the Independent Monitoring Board, Dame Anne Owers and Sarah Clifford; from the Independent Custody Visiting Association, Katie Kempen; from the Howard League (England), Andrew Neilson; from the Prison Reform Trust, Kimmett Edgar and Soruche Saajedi; from the OPACT Project University of Bristol, Professor Rachel Murray; from the Criminal Justice Inspection Northern Ireland, Rachel Lindsay and Ian Cameron; from the Northern Ireland Independent Custody Visiting Scheme, Northern Ireland Policing Board, Gayle Carson and Lyne Black; Professor Phil Scraton; from the Northern Ireland Independent Monitoring Board, Stewart Malcolm, Claire Tully and Deena Haydon; from Her Majesty’s Inspectorate of Constabulary in Scotland, Laura Paton; from the Scottish Human Rights Commission, Diego Quiroz; from Her Majesty’s Inspectorate of Prisons for Scotland, Wendy Sinclair-Gieben; from Independent Custody Visiting in Scotland, Kirsty Scott; from the Association for the Prevention of Torture, Ben Buckland and Annaliese Boston; from the World Organisation Against Torture, Laure Elmaleh.

I would also like to thank those in the Northern Territory and other Australian jurisdictions, who met with me prior to my Churchill Fellowship, allowing me to brief them on my Fellowship research, as well as kindly providing me with useful information and suggesting avenues of enquiry:
From the Victorian Children’s Commission, Jo Shetliffe, Julie Nesbitt, Wayne Freeman; from the Victorian Ombudsman, Harriet McHugh-Dillon; from the Victorian Aboriginal Legal Service, Patrick Warner; from the NSW Inspector of Custodial Services, Fiona Rafter and Susan Stuart; from NSW Legal Aid (Children’s Civil Law Service), Andrea Hadaway and Sasha Da Silva; from the ACT Office of the Inspector of Correctional Services, Rebecca Minty; from the Commonwealth Ombudsman, Sally Reeves; Churchill Fellow, Steven Caruana; the Australian OPCAT Network; from Territory Families, Brent Warren; from Northern Territory Correctional Services, Rob Steer; from Northern Territory Police, Jennie Renfree and Ian Lee; from the Northern Territory Official Visitors Program, Raelene Geddes; from the Northern Territory Aboriginal Justice Unit, Leanne Liddle; from the Office of the Treaty Commissioner, Steve Rossingh; from the Northern Territory Department of the Attorney-General and Justice, Robert Bradshaw; from the Northern Territory Department of Chief Minister, Janet Hanigan; from the Northern Territory Reform Management Office, David Ah Toy; from the Northern Territory Children’s Court, Judge Greg Smith; from the Northern Territory Office of the Children’s Commissioner, Colleen Gwynne and Laura Dewson; from the Northern Territory Office of the Ombudsman, Peter Shoyer; from the Northern Territory Anti-Discrimination Commission, Sally Sievers; from Danila Dilba, Olga Havnen and Tess Kelly, from the North Australian Aboriginal Justice Agency, Priscilla Atkins, Clara Mills and lawyers from the civil and criminal teams; the Northern Territory Law Society Social Justice Committee.

I am incredibly grateful to my two referees for the Fellowship, Jared Sharp and Shahleena Musk, who have been very influential in my professional life, challenging me and supporting me in equal measure. I am also particularly grateful to the Aboriginal Elders and the Law and Justice groups with whom I have had the privilege to work, including Elders from the Makarr Dhuni in Galiwinku, the Burnawarra in Maningrida, the Mala Leaders in Ramingining, the Elders in Gunbalanya, the Ponki Mediators in the Tiwi Islands and the Kurdiji in Lajamanu. Through their patience and expertise they taught me so much, including the limitations of my own knowledge and experience. Their dedication to achieving just outcomes for their communities is truly inspiring. Others who have played important roles in shaping the experiences and knowledge that I have relied on in my investigations and in drafting this report are Will Crawford, Tania Herbert, Ulf Edqvist and Renata Sivacolundhu. And, of course, the most important acknowledgement of all – my family. I can’t thank you enough, for all of your love and support, particularly during my moments of doubt.

Finally, I would like to thank the Churchill Trust for giving me this incredible opportunity to go overseas to undertake research on a topic about which I am so passionate. The Trust has been supportive throughout the entire journey, and I certainly recommend others to apply for this challenging and enriching opportunity.
INTRODUCTION
BACKGROUND TO THE FELLOWSHIP

In November 2017, the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory released its report. In this report, the importance of independent oversight of youth detention by way of regular inspections to prevent the ill-treatment of children was identified. Australia then ratified the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) on 15 December 2017. Australia postponed its obligations under OPCAT for three years, but is required to set up a National Preventive Mechanism (NPM) or NPMs to conduct regular visits to places where people are deprived of their liberty, with the objective of preventing torture and ill-treatment. The Commonwealth Ombudsman has been designated the coordinating NPM and it is for the Northern Territory Government to establish or designate the NPM(s) in the NT.

PURPOSE AND SCOPE OF THE FELLOWSHIP

The purpose of this Fellowship was to investigate approaches to oversight in other jurisdictions, with the view to make recommendations for an NPM model for the NT that would be both OPCAT-compliant and culturally competent in performing its functions with respect to places of detention in the NT criminal justice system. Cultural competency of the NPM will be essential, in light of the gross overrepresentation of Aboriginal people in detention in the criminal justice system.

Investigations into OPCAT implementation in New Zealand and the UK examined the practices of existing NPMs. New Zealand and Canada were chosen as they have comparable colonial histories and unfortunately similarly experience overincarceration of Māori, First Nations, Métis and Inuit peoples in their criminal justice systems. The approaches of oversight bodies (noting that in Canada those bodies were not NPMs, as Canada has yet to ratify OPCAT) in those countries to delivering culturally appropriate oversight of places of detention were researched. As part of the Fellowship, I conducted meetings with staff working in the oversight bodies in New Zealand, Canada and the UK and was able to accompany some of them on announced inspections, unannounced inspections and visits to prisons, a youth detention facility and police cells. I also met with NGOs and academics, given civil society plays an important role in OPCAT implementation. As my Fellowship progressed, and I realised that my recommendations were going to depart somewhat from my initially anticipated position, I decided to visit a couple of NGOs in Geneva, in order to get a broader international perspective on OPCAT and NPMs.

ADAPTING LEARNINGS FROM THE FELLOWSHIP TO THE UNIQUE NORTHERN TERRITORY CONTEXT

The model and recommendations proposed in this report use and adapt aspects of the oversight bodies with which I met to make specific and targeted recommendations for the unique NT context. In doing so, I have drawn on my professional experience. In particular, I have relied on my experience at the North Australian Aboriginal Justice Agency as both a criminal defence lawyer and as the coordinator of the community legal education team and as a volunteer humanitarian observer with the Australian Red Cross Immigration Detention Monitoring program, participating in visits to centres in Australia, Papua New Guinea and Nauru.
TARGET AUDIENCE FOR THE REPORT

This report is particularly targeted at the NT: relevant Northern Territory Government agencies, Aboriginal Community Controlled Organisations (ACCOs), statutory bodies, and the legal profession. I also aim to disseminate my findings to the broader Aboriginal community in the NT. Although this report focuses on the NT, all jurisdictions in Australia are unfortunately characterised by the overincarceration of Aboriginal and Torres Strait Islander people, and as such, recommendations and best practice examples in this report will be useful to all those stakeholders working towards OPCAT compliance.

REPORT FORMAT

All of the recommendations are listed in a table at the front of the report (the table also identifies where the recommendations can be found in the body of the report). Recommendations related to achieving cultural competency have been indicated with the Aboriginal flag (✔). The report’s recommendations in the body of the report are in blue text boxes:

In the body of the report are excerpts from documents relevant to the oversight bodies and NGOs with which I met as part of the Fellowship, and which highlight best practices in overseas jurisdictions. The NTG and NT NPM(s) should consider incorporating these practices in the establishment and operation of the NPM(s), adapting them as appropriate for the NT context. Adopting these best practices can support the NT NPM(s) to achieve a high level of cultural competency while complying with obligations under OPCAT. Most importantly, adopting these practices can facilitate the prevention of the torture and ill-treatment of Aboriginal people in detention in the criminal justice system.

Best practice examples from overseas jurisdictions are in green text boxes:
<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>ORGANISATION/DEPARTMENT/INDIVIDUAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Zealand</td>
<td>Office of the Ombudsman&lt;br&gt;Office of the Children's Commissioner&lt;br&gt;Independent Police Conduct Authority&lt;br&gt;Human Rights Commission&lt;br&gt;Office of the Inspectorate&lt;br&gt;Howard League&lt;br&gt;Just Speak&lt;br&gt;People Against Prisons Aotearoa&lt;br&gt;Professor Tracey McIntosh&lt;br&gt;Professor Elizabeth Stanley</td>
</tr>
<tr>
<td>Canada</td>
<td>Yukon Investigations &amp; Standards Office&lt;br&gt;David Loukidelis&lt;br&gt;Loukidelis report Implementation Working Group&lt;br_YUVON&lt;br&gt;Yukon Department of Justice&lt;br&gt;Yukon Human Rights Commission&lt;br&gt;Yukon Child and Youth Advocate Office&lt;br&gt;Council of Yukon First Nations&lt;br&gt;Kwanlin Dun First Nation&lt;br&gt;Lawyers Jennifer Cunningham, Andrea Bailey and Gavin Gardiner&lt;br&gt;Office of the Correctional Investigator&lt;br&gt;Correctional Service Canada - Indigenous Corrections&lt;br&gt;Native Women’s Association of Canada&lt;br&gt;Aboriginal Legal Services&lt;br&gt;OPCAT Project</td>
</tr>
<tr>
<td>England</td>
<td>Her Majesty’s Inspectorate of Prisons&lt;br&gt;Independent Monitoring Board&lt;br&gt;Independent Custody Visiting Association&lt;br&gt;Howard League&lt;br&gt;Prison Reform Trust&lt;br&gt;Professor Rachel Murray</td>
</tr>
<tr>
<td>Scotland</td>
<td>Her Majesty’s Inspectorate of Constabulary in Scotland&lt;br&gt;Her Majesty’s Inspectorate of Prisons for Scotland&lt;br&gt;Independent Custody Visiting Scotland&lt;br&gt;Scottish Human Rights Commission</td>
</tr>
<tr>
<td>Northern Ireland</td>
<td>Criminal Justice Inspection Northern Ireland&lt;br&gt;Northern Ireland Independent Monitoring Board&lt;br&gt;Northern Ireland Independent Custody Visiting Scheme&lt;br&gt;Professor Phil Scraton</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Association for the Prevention of Torture&lt;br&gt;World Organisation Against Torture</td>
</tr>
</tbody>
</table>
SUMMARY OF RECOMMENDATIONS
### RECOMMENDATION

#### MAINTAINING, DESIGNATING OR ESTABLISHING THE NORTHERN TERRITORY NPM

<table>
<thead>
<tr>
<th></th>
<th>Recommendation</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Aboriginal communities and Aboriginal Community Controlled Organisations must be consulted in a transparent and inclusive process of NPM designation. The NTG should ensure that it engages in genuine consultation, recognising the inherent challenges of intercultural dialogue, and that it uses interpreters as appropriate.</td>
<td>38</td>
</tr>
<tr>
<td>2</td>
<td>The timeframe for NPM designation under OPCAT is shorter than the anticipated timeframe for finalising the NT Treaty or Treaties. Once the Treaty/Treaties are finalised, the NT NPM(s) must be responsive to the resulting obligations. This may entail changes to the structure, governance or operations of the NPM(s), but may also require that NPM designation itself be revisited.</td>
<td>41</td>
</tr>
<tr>
<td>3</td>
<td>Consultations with the Aboriginal community and Aboriginal Community Controlled Organisations should be guided by the NT Aboriginal Justice Agreement once it is finalised, given its focus on partnership between government and Aboriginal people and those objectives of the AJA and OPCAT that are shared. As with any Treaty/Treaties, the finalisation of the AJA may require that the designation, structure, governance or operations of the NPM(s) be revisited. Ongoing consultations under the AJA will be essential for the designated NPM to achieve both legitimacy among the NT Aboriginal community and cultural competency.</td>
<td>43</td>
</tr>
<tr>
<td>4</td>
<td>Consultations with the Aboriginal community and ACCOs should be guided by NT Local Decision Making.</td>
<td>45</td>
</tr>
<tr>
<td>5</td>
<td>The NPM must have a clear statutory basis, which will reinforce its independence.</td>
<td>48</td>
</tr>
<tr>
<td>6</td>
<td>The Commonwealth Government should respect the NTG’s decision on designation (and other matters relevant to the NPM), which should be reached through a robust consultation process.</td>
<td>48</td>
</tr>
</tbody>
</table>

#### SHOULD HAVE A NEW BODY AS THE NPM RATHER THAN DESIGNATING EXISTING BODIES

<table>
<thead>
<tr>
<th></th>
<th>Recommendation</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>A new body should be created and designated the NPM.</td>
<td>67</td>
</tr>
</tbody>
</table>

#### AN ABORIGINAL INSPECTORATE

<table>
<thead>
<tr>
<th></th>
<th>Recommendation</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>An Aboriginal Inspectorate should be created, if supported by the NT Aboriginal community and ACCOs, and designated the NPM with oversight of places of detention within the criminal justice system, focusing on Aboriginal prisoners and detainees.</td>
<td>77</td>
</tr>
<tr>
<td>9</td>
<td>The position of Deputy Inspector for Children and Young People should be created within the Aboriginal Inspectorate.</td>
<td>77</td>
</tr>
<tr>
<td>10</td>
<td>A specialised Children and Young People’s Unit should be created within the Inspectorate.</td>
<td>77</td>
</tr>
<tr>
<td>11</td>
<td>The Aboriginal Inspectorate’s mandate will primarily be Aboriginal prisoners and detainees. The exceptions to this will be on the rare occasions that: - there is a non-Indigenous youth in youth detention, at police stations in urban locations or remote Aboriginal communities, in court custody, in bail supported accommodation or police vehicles/planes/boats. - there is a non-Indigenous adult at a police station in a remote Aboriginal community, in court custody during circuit court in remote Aboriginal communities and in instances of transportation from/to those communities. The NTG should also either create a generalist inspectorate (which is preferred) or designate an existing body with NPM functions. This generalist NPM’s mandate should include non-Indigenous</td>
<td>78</td>
</tr>
<tr>
<td>Section</td>
<td>Recommendation</td>
<td>Page</td>
</tr>
<tr>
<td>---------</td>
<td>----------------</td>
<td>------</td>
</tr>
<tr>
<td>11</td>
<td>Adult prisoners and detainees at police stations and court cells in urban locations, prisons in Alice Springs and Darwin and Nhulunbuy and Barkly Work Camps, and transport between these locations by vehicle/plane.</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>Both the Northern Territory and Commonwealth governments should fund the work of the Inspectorate. The Inspectorate should be a separate agency, the Office of the Aboriginal Inspectorate, similar to the Office of the Independent Commissioner Against Corruption and the Ombudsman's Office, with a separate budget, that is not funded through any of the agencies responsible for the places of detention that come within the Inspectorate’s mandate.</td>
<td>84</td>
</tr>
<tr>
<td>13</td>
<td>The Inspectorate must be sufficiently resourced to effectively exercise its mandate under OPCAT.</td>
<td>86</td>
</tr>
<tr>
<td>14</td>
<td>The Inspectorate must not be directed how to use its resources.</td>
<td>87</td>
</tr>
<tr>
<td>15</td>
<td>Reports should be tabled in the Northern Territory Parliament, and also provided to the Commonwealth Ombudsman (as coordinating NPM) and the Commonwealth Government. Questions in Parliament relating to the contents of reports should be permitted in Aboriginal languages.</td>
<td>88</td>
</tr>
<tr>
<td>16</td>
<td>The NT Parliament should appoint the Inspector and Deputy Inspector, and the Inspectorate should select its staff through an open, transparent and inclusive process, that is prescribed by legislation.</td>
<td>91</td>
</tr>
<tr>
<td>17</td>
<td>The Inspectors and staff must not have any actual or perceived conflicts of interest, being independent from both the NTG and civil society. The onus is on both Parliament and the Inspectorate to ensure independence of all staff.</td>
<td>93</td>
</tr>
<tr>
<td>18</td>
<td>Secondments of currently employed staff in agencies responsible for places of detention in the NT should not be permitted. The benefits of having staff whose expertise is founded on having previously worked in places of detention should not override the importance of having independent staff who do not have conflicts of interest. A set period of time must have lapsed since employment with these agencies, before individuals can be employed as Inspectorate staff.</td>
<td>94</td>
</tr>
<tr>
<td>19</td>
<td>The Inspector and Deputy Inspector positions should be Aboriginal identified positions.</td>
<td>96</td>
</tr>
<tr>
<td>20</td>
<td>Staff in the Inspectorate must, across genders, include Aboriginal representation. Staffing of the Inspectorate should include Aboriginal staff across different relevant disciplines. These requirements should be provided for in legislation.</td>
<td>97</td>
</tr>
<tr>
<td>21</td>
<td>Efforts should be made to recruit Aboriginal staff, beyond having Aboriginal-identified positions, by engaging with relevant ACCOs and bodies in the NT.</td>
<td>97</td>
</tr>
<tr>
<td>22</td>
<td>The Inspectorate will need the confidence of the Aboriginal community to attract candidates and be a culturally safe work place to retain Aboriginal staff.</td>
<td>97</td>
</tr>
<tr>
<td>23</td>
<td>The Inspectorate should have staff with expertise on discrimination and the situation of minority prisoners.</td>
<td>97</td>
</tr>
<tr>
<td>24</td>
<td>The Inspectorate should have a multi-disciplinary team, where expertise could include (but should not be limited to) the following: medical professionals and psychologists, staff with</td>
<td>99</td>
</tr>
<tr>
<td>Expertise in the criminal justice system and international human rights standards and mechanisms, staff with specialisation in the fields of children and gender, social workers, educators and staff who have previously worked in agencies responsible for places of detention (preferably interstate).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The Inspectorate should ensure that its Aboriginal staff is similarly multidisciplinary.</td>
<td>100</td>
<td></td>
</tr>
<tr>
<td>If the Inspectorate is unable to attract staff across the relevant disciplines, it should ensure that it has the necessary expertise by engaging consultants, particularly from ACCOs.</td>
<td>101</td>
<td></td>
</tr>
<tr>
<td>The Inspectorate may also consider engaging consultants from ACCOs interstate, given potential difficulties in identifying appropriately qualified individuals with no conflicts of interest in a small jurisdiction like the NT.</td>
<td>101</td>
<td></td>
</tr>
<tr>
<td>People with lived experience of detention (or experts by experience), preferably Aboriginal people, should be involved in the design and operation of the Inspectorate. Children and young people should be involved in the work of the Inspectorate where appropriate. This approach should be required by legislation.</td>
<td>107</td>
<td></td>
</tr>
<tr>
<td>The Inspectorate should provide the appropriate support to staff and consultants with lived experience, recognising the risk of re-traumatisation.</td>
<td>108</td>
<td></td>
</tr>
<tr>
<td>The Inspectorate should recognise the value of the contribution and expertise of people with lived experience, and this recognition should be reflected in appropriate remuneration.</td>
<td>108</td>
<td></td>
</tr>
<tr>
<td>People, particularly Aboriginal people, who have previously been held in places of detention should not automatically be excluded from working as either staff or consultants. This approach should extend to their ability to participate in inspections. The Inspectorate should have guidelines in relation to who might be permitted to work with the Inspectorate (on staff or as a consultant), recognising that its mandate involves direct contact with vulnerable people.</td>
<td>110</td>
<td></td>
</tr>
<tr>
<td>All staff should receive ongoing training and professional development on the Inspectorate’s inspection framework and expectations/standards, developing international best practice in relation to NPMs, relevant international human rights and SPT guidelines/advice.</td>
<td>112</td>
<td></td>
</tr>
<tr>
<td>Professional development can be supported through engagement and/or ongoing relationships with NPMs in other jurisdictions, UN bodies, relevant international civil society with an interest in OPCAT (including UN-recognised groups, academics and NGOs) and international inspecting bodies that are not NPMs (such as the ICRC). It can also involve accompanying NPMs on inspections.</td>
<td>112</td>
<td></td>
</tr>
<tr>
<td>Training of staff must be delivered in a culturally appropriate manner for Aboriginal staff, including staff from remote Aboriginal communities, adapting training to accommodate different learning styles.</td>
<td>112</td>
<td></td>
</tr>
<tr>
<td>All Inspectorate staff and consultants must engage in ongoing cross-cultural training, beyond that provided in the initial induction.</td>
<td>113</td>
<td></td>
</tr>
<tr>
<td>The Inspectorate should have a strategy in place to mitigate the risk of staff desensitisation and burnout.</td>
<td>113</td>
<td></td>
</tr>
</tbody>
</table>
DEFINITIONS AND CATEGORIES OF PLACES OF DETENTION AND DETAINEEES

37 The Inspectorate should be permitted to visit any place of detention. This includes any place under the NTG’s jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.

Deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

38 The Inspectorate should have a thorough understanding of the types of places of detention, the categories of detainees that might be held in places of detention and the powers exercised in detaining/apprehending/arresting individuals, and it should map out the places of detention in the NT.

The expectations/standards used by the Inspectorate during inspections should be tailored to the purpose and type of detention and category of detainee.

The Inspectorate should be responsive to how gazetting might transform the purpose of places of detention when applying expectations/standards.

39 Places of detention that the Inspectorate should visit include, but are not limited to, correctional centres, correctional work camps, youth detention centres, secure bail accommodation, police custody, court custody and vehicles, boats and planes used by detaining authorities in transporting and/or holding detainees.

It should also include in its mandate places where detainees are being temporarily held, while still deprived of their liberty (eg hospitals while accessing healthcare).

The Inspectorate should not be precluded from inspecting places of detention where detention of the individual(s) by the detaining authority is unlawful.

WHAT DOES PREVENTION IN THE CONTEXT OF OPCAT MEAN?

40 An understanding of what constitutes prevention of torture and ill-treatment should be context-specific to the NT, and should be consistent with the SPT’s recommendation that prevention be broad enough to ‘embrace as many as possible of those things which in a given situation can contribute towards the lessening of the likelihood or risk of torture or ill-treatment occurring.’

Prevention should take a ‘holistic view focusing on the root causes of torture and the complex factors allowing torture to happen.’

41 In assessing whether conduct constitutes torture, the following should guide the Inspectorate:

The Convention Against Torture definition is ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’

Torture may be caused by a single method or the accumulation of multiple techniques and circumstances.
Torture may instantaneously achieve the pursued purpose, or only after repeated or prolonged exposure, or the purpose may not be achieved at all due to the victim’s resilience or other intervening circumstances.

<table>
<thead>
<tr>
<th>42</th>
<th>In assessing whether conduct constitutes ill-treatment, the following should guide the Inspectorate:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>There is no exhaustive list of what constitutes ill-treatment.</td>
</tr>
<tr>
<td></td>
<td>The context and the state of vulnerability of the detainees should be considered.</td>
</tr>
<tr>
<td></td>
<td>The conditions of detention and structural deprivation of human rights may constitute ill-</td>
</tr>
<tr>
<td></td>
<td>treatment.</td>
</tr>
<tr>
<td></td>
<td>Detainees may be accustomed to the treatment and/or conditions which in fact amount to ill-</td>
</tr>
<tr>
<td></td>
<td>treatment.</td>
</tr>
<tr>
<td></td>
<td>Cruel and inhuman treatment or punishment involves the infliction of severe pain or suffering,</td>
</tr>
<tr>
<td></td>
<td>whether physical or mental.</td>
</tr>
<tr>
<td></td>
<td>Cruel and inhuman treatment or punishment can arise from negligence or from conduct that</td>
</tr>
<tr>
<td></td>
<td>does not have a particular purpose.</td>
</tr>
<tr>
<td></td>
<td>Degrading treatment involves the infliction of pain or suffering (physical or mental) aimed at</td>
</tr>
<tr>
<td></td>
<td>humiliating the victim.</td>
</tr>
</tbody>
</table>

| 43 | Recognising that the conditions that give rise to ill-treatment frequently facilitate torture,   |
|    | prevention of ill-treatment, as well as torture, must be a fundamental aspect of the Inspectorate’s work. |

| 44 | The Inspectorate should consider how legislation, policies and institutions, both within the    |
|    | criminal justice system and more broadly, contribute to the overcrowding of places of detention.|
|    | The Inspectorate should appreciate the impact overcrowding has on the standards of treatment |
|    | and conditions in detention, and the resultant increased risk of torture or ill-treatment.     |
|    | The Inspectorate should also recognise that preventing deprivation of liberty is in itself a    |
|    | safeguard against torture and ill-treatment.                                                   |

| 45 | The Inspectorate should consider what factors contribute to the overrepresentation of Aboriginal |
|    | people in places of detention, recognising the increased risk of torture and ill-treatment of those |
|    | who experience socioeconomic and sociocultural marginalisation.                                 |

| 46 | When making recommendations regarding the overrepresentation of Aboriginal people in places of |
|    | detention, the Inspectorate should consider Aboriginal community-driven solutions, particularly in relation to diversion and alternatives to custodial sentences. |

**FUNCTION OF THE INSPECTORATE: INSPECTING (AND MONITORING?)**

| 47 | If there were to be a monitoring body in the NT, it should not undertake to resolve detainees’   |
|    | individual requests or complaints. The work of the monitors should focus on prevention of       |
|    | torture and ill-treatment.                                                                     |
|    | See also recommendations 152 and 153.                                                          |

| 48 | If there were to be a monitoring body in the NT, then it should sit with the inspecting body, the|
|    | proposed Inspectorate. This would guarantee the monitors’ independence. It would also support  |
|    | sharing of findings between, consistency in expectations/standards being used by and           |
|    | recommendations being made by monitors and inspectors. It would also facilitate monitors       |
|    | following-up on whether the recommendations made by inspectors were being implemented.       |
If there were to be a monitoring body in the NT, efforts should be made to recruit Aboriginal people, with relevant qualifications or experience, as monitors. Monitors should be paid for the work they undertake, recognising their qualifications and/or cultural expertise/expertise by experience.

It is recommended that there be no monitoring body as part of the NT NPM. Instead, the Inspectorate should be adequately funded to enable it to undertake visits to places of detention in the criminal justice system with sufficient regularity to meet the obligations under OPCAT.

**FUNCTION OF THE INSPECTORATE: BEYOND INSPECTION**

1. The Inspectorate should have a holistic understanding of the broader context in which it operates, identifying root causes which contribute to torture and ill-treatment.

2. The Inspectorate should have a clear strategy for proactively making recommendations on legislative change, as well as submitting proposals on draft legislation already under consideration. The Inspectorate should take a broad approach to what constitutes relevant legislation. The Inspectorate should make its recommendations public and it should follow up on those recommendations. The NTG (and Commonwealth Government) must examine the Inspectorate’s recommendations. The Inspectorate may collaborate with civil society where appropriate, particularly with ACCOs.

3. The Inspectorate should make reference to international human rights standards in its submissions on legislative and policy reforms.

4. The Inspectorate should make joint submissions with other NPMs where opportunities arise, at both the Territory level and the Commonwealth level. See also recommendation 77.

5. The Inspectorate should highlight the importance of incorporating Aboriginal world views into legislation and policy in a meaningful way.

6. The Inspectorate should provide evidence and make submissions to consultations and inquiries on operational issues in places of detention, ensuring to highlight the needs of Aboriginal prisoners and detainees.

7. The Inspectorate’s submissions should include recommendations to remove obstacles that compromise its ability to be OPCAT compliant or operate effectively.

8. The Inspectorate should have a clear strategy on how it will interact with Parliament and its members to promote implementation of its recommendations, while protecting its independence.

9. The Inspectorate should make submissions to international bodies and follow up on those bodies’ recommendations to the NTG and Commonwealth Government, where the issues relate to the prevention of torture and ill-treatment of detainees.

10. The Inspectorate’s submissions to international bodies should focus particularly on issues relating to Aboriginal prisoners and detainees.

11. The Inspectorate should consider opportunities to make joint submissions to international bodies with other NPMs or civil society (particularly ACCOs).

12. The Inspectorate should raise awareness of its work among the detaining authorities and the general public, promoting the importance of preventing torture and ill-treatment and the
Inspectorate’s unique mandate among the various detention oversight bodies. This can decrease resistance to its work and facilitate engagement with detainees. This function should not be aimed at increasing public confidence in the detaining authority, but promoting the Inspectorate’s role in the prevention of torture and ill-treatment of detainees.

63 The Inspectorate should focus on raising awareness of its work among ACCOs and the NT Aboriginal community, in both urban and remote settings. It should use appropriate platforms to reach this audience, and create written and oral resources translated into the Aboriginal languages spoken in the Northern Territory.

64 The Inspectorate should raise awareness among detaining authorities of international human rights relating to places of detention, to improve understanding of the human rights-based recommendations it makes.

65 The Inspectorate should raise awareness among the public of international human rights relating to places of detention, to improve understanding of the human rights-based recommendations it makes.

66 The Inspectorate should identify best detention practices in other jurisdictions, particularly those which are culturally appropriate for Indigenous people.

**INSPECTORATE’S RELATIONSHIP WITH OTHER NORTHERN TERRITORY STATUTORY BODIES (INCLUDING OTHER NPMs)**

67 The Inspectorate could consult with other NT NPMs, as appropriate, to develop best practice.

68 The Inspectorate should build relationships with NT statutory bodies, including NPMs, which have regular dealings with detaining authorities to obtain information, such as the pattern of complaints at the detention site(s).

69 The Inspectorate should have MoUs with other NPMs (and where appropriate, statutory bodies) to avoid duplication of work, to ease the burden of scrutiny on the detaining authorities, and to monitor and prevent reprisals against detainees who engage with the Inspectorate.

70 The Inspectorate should consider conducting joint inspections and thematic inquiries with NPMs in the NT where appropriate, sharing expert knowledge and taking the opportunity to make recommendations proposed and supported by more than one NPM. The Inspectorate could consider making arrangements for sharing costs or refunding other NPMs’ incurred costs.

71 Given the link between corruption and torture and ill-treatment in detention (and the tendency of corruption to have a disproportionate impact on detainees and Indigenous people), the Inspectorate’s mandate will overlap with that of ICAC (particularly the preventative function of ICAC’s mandate). The Inspectorate should establish guidelines on how this might influence its own operations.

**THE INSPECTORATE’S RELATIONSHIP WITH NPMS AND STATUTORY BODIES IN OTHER JURISDICTIONS**

72 At a minimum, there should be an MoU between the Inspectorate, NT generalist NPM (if established) and the NPMs with responsibility for places of detention in the criminal justice system in other jurisdictions. This could align with the cooperation and designation of responsibility among the detaining authorities across jurisdictions under existing government MoUs and service level agreements. There should be broader intergovernmental agreement in relation to NPMs across Australia.
| 73 | Given the fact that State and Territory borders do not reflect family and cultural ties of Aboriginal communities living in different jurisdictions, building relationships with NPMS in all jurisdictions, regardless of the existence (or content) of intergovernmental agreements, should be a priority. | 177 |
| 74 | The Inspectorate should collaborate with NPMS in the NT and across other Australian jurisdictions to facilitate consistency in standards (see also recommendation 100), data collection and data analysis. The Inspectorate and other NPMS should also share learnings and approaches with each other, with the view to improve practice. | 177 |
| 75 | The Inspectorate should consider conducting joint inspections and thematic inquiries with NPMS in other Australian jurisdictions, particularly in relation to the experiences of Aboriginal detainees. Undertaking this work would enable comparisons across jurisdictions, identifying universal issues of concern, divergent practices and best practices. Multiple NPMS supporting the same findings and recommendations can be more persuasive to detaining authorities than findings/recommendations of a single NPM. Joint reports also have the potential to engage a broader, cross-jurisdictional audience. | 177 |
| 76 | The Inspectorate could consider inviting a human rights institution, given its human rights expertise, to accompany it on select inspections. | 177 |
| 77 | Should NPMS in other Australian jurisdictions be open to this, the Inspectorate should draft joint submissions to parliamentary inquiries and on legislative reform at the Commonwealth level, when the issues are relevant to the OPCAT preventive mandate. A potential appropriate forum for this work could be a national thematic NPM subgroup focusing on Aboriginal and Torres Strait Islander peoples across places of detention (not necessarily limited to the criminal justice system). | 177 |

**INSPECTORATE’S RELATIONSHIP WITH CIVIL SOCIETY**

| 78 | The Inspectorate should build constructive relationships with civil society, recognising the complementary role it plays in torture prevention generally, and specifically in terms of the exercise of the Inspectorate’s mandate. Cooperation can be both formal and informal. | 177 |
| 79 | The Inspectorate must ensure it maintains its independence from civil society. Protecting its independence (both actual and perceived) requires an analysis of the nature of the relationship between the detaining authority and civil society stakeholder in order to establish an appropriate strategy for engagement. This analysis can determine, for example, whether the stakeholder has a potential conflict of interest arising from contractual arrangements for service delivery in detention or if there exists an adversarial relationship that may jeopardise the Inspectorate’s ability to engage in constructive dialogue with the detaining authorities. | 177 |
| 80 | The Inspectorate should prioritise coordinating with ACCOs and professionals who are Aboriginal and who have expertise in relevant fields. | 177 |
| 81 | The Inspectorate should also recognise that building the ACCOs’ confidence in its efficacy and cultural competency can assist promote awareness among Aboriginal detainees and their willingness to engage with the Inspectorate. | 177 |
The Inspectorate should recognise that the unions of staff working for the detaining authority are relevant stakeholders, as the working conditions of staff and/or industrial action can impact on the risk of torture or ill-treatment of detainees. Additionally, the Inspectorate should recognise that the interests of staff and detainees can either be in opposition or align.

**STRATEGY REGARDING LOCATIONS AND FREQUENCY OF VISITS**

| 83 | The Inspectorate shall have guaranteed independence in determining the location and frequency of its visits to places of detention, and be free from interference when developing its inspection strategy. It shall have access to all places of detention. |
| 84 | The Inspectorate should publish the criteria it develops in formulating its inspection strategy, including how it determines the types of inspections it will undertake, the places of detention it inspects and the frequency of those inspections. |
| 85 | The Inspectorate should be given access to information on the number of persons deprived of their liberty in places of detention, the number of places of detention and their location. Additionally, given its mandate, the Inspectorate should regularly be provided the number of Aboriginal prisoners and detainees in places of detention and the detainees’ preferred language. Of note, in the context of both police cells and court custody during circuit court in remote Aboriginal communities, recognising that the numbers at a point in time will not be as useful to the Inspectorate as throughput, the numbers of detainees and prisoners over periods of time should also be provided. The information provided to the Inspectorate should include that relating to places of detention that are only temporarily gazetted as such. |
| 86 | The Inspectorate should ensure that it undertakes inspections at all places of detention regularly, including inspections of any modes of transportation of detainees. No facility should be excluded due to its size or location. |
| 87 | The Inspectorate should not visit places of detention too frequently, as this impacts on the efficacy of prevention work, both in terms of the quality of the Inspectorate’s work, and the detaining authority’s ability to adequately respond to its findings and to implement its recommendations. The Inspectorate should visit facilities often enough for it to be effective in preventing torture and ill-treatment, through deterrence as well as its findings/recommendations. |
| 88 | The Inspectorate should have a robust risk assessment framework, which includes an assessment of risk of human rights violations at places of detention. |
| 89 | The Inspectorate should ensure that its schedule allows it sufficient capacity and flexibility to remain responsive to any developments, such as the need for urgent or follow-up visits. |
| 90 | The Inspectorate should ensure that its inspection schedule does not prevent it from having the capacity to exercise aspects of its mandate other than inspecting. |
| 91 | The Inspectorate should receive sufficient funding over funding cycles that are not too short to compromise its ability to be truly strategic in its planning. |
| 92 | The Inspectorate should inform its multi-year and annual strategic visit plans through consultation with relevant statutory bodies, NPMs and civil society. It should prioritise speaking with ACCOs. |
When planning the frequency and duration of visits, the Inspectorate should determine what type of visits/inspections it intends to undertake during the period under consideration. The type of inspections might include the following:
- full site inspections and shorter site inspections.
- analytical reports across multiple sites of detention or multiple visits over a period of time at the same detention site.
- thematic inspections.

The Inspectorate should consider, when planning its visits schedule, whether it might need to engage a consultant with expertise in specific subject matter for an inspection, or whether it might wish to undertake joint visits with NPMs in the NT or other jurisdictions.

**EXPECTATIONS/STANDARDS FOR INSPECTIONS – GENERAL**

<table>
<thead>
<tr>
<th>Number</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>96</td>
<td>In drafting the expectations/standards, the Inspectorate should consult with relevant stakeholders and subject matter experts (including those who are experts by experience, having been detained). Consultations should be conducted with academics, NGOs, statutory bodies and detaining authorities, both in the NT and in other jurisdictions.</td>
</tr>
<tr>
<td>97</td>
<td>In drafting the expectations/standards, the Inspectorate should review the existing expectations/standards of NPMs in overseas jurisdictions and inspectorates in other Australian jurisdictions.</td>
</tr>
<tr>
<td>98</td>
<td>The Inspectorate should independently determine the content of the expectations/standards, and it should make them publicly available.</td>
</tr>
<tr>
<td>99</td>
<td>The expectations/standards should not be constrained by the NTG/detaining authority’s legislation, regulations or policies. This is essential to maintaining the Inspectorate’s independence. The Inspectorate should not focus on detaining authorities’ and contractors’ outputs, but on outcomes for detainees.</td>
</tr>
<tr>
<td>100</td>
<td>Any national standards for NPMs should be based on international human rights law, be sufficiently broad and flexible to be capable of being applied in a culturally appropriate manner in the NT context, and should be complemented by expectations/standards specific to the NT context.</td>
</tr>
<tr>
<td>101</td>
<td>The Inspectorate should centre international human rights in its operations, including the expectations/standards it utilises. The Inspectorate should use its expectations/standards to identify conditions or treatment in detention that amount to a breach of human rights recognised under international law.</td>
</tr>
</tbody>
</table>
Rather than being viewed as aspirational, it should be recalled that international human rights standards are minimum standards. The Inspectorate can use expectations/standards that exceed these minimum standards as appropriate.

<table>
<thead>
<tr>
<th>102</th>
<th>The Inspectorate should incorporate into its expectations/standards international expert opinions and advice as appropriate.</th>
<th>219</th>
</tr>
</thead>
</table>

The Inspectorate should consider adopting HMIP’s approach of having sets of expectations, as opposed to standards, when conducting inspections. The expectations should make clear which human rights standards (and any other relevant standards) relate to particular expectations. These expectations should be assessed against indicators, ‘evidence that may show [an] expectation being met.’

<table>
<thead>
<tr>
<th>104</th>
<th>The Inspectorate should have tailored sets of expectations/standards for the different types of detention that will fall within its mandate, including, but not limited to the following: prisons (including work camps), police custody, court custody, youth detention facilities, bail supported accommodation, transport (including cars, planes and boats), detention while receiving medical care ‘offsite’ (eg at hospitals).</th>
<th>223</th>
</tr>
</thead>
</table>

The Inspectorate should consider adopting HMIP’s approach of having sets of expectations, as opposed to standards, when conducting inspections. The expectations should make clear which human rights standards (and any other relevant standards) relate to particular expectations. These expectations should be assessed against indicators, ‘evidence that may show [an] expectation being met.’

<table>
<thead>
<tr>
<th>105</th>
<th>The Inspectorate should have a different set of expectations/standards for particular groups of detainees with unique needs (particularly children and women).</th>
<th>223</th>
</tr>
</thead>
</table>

The Inspectorate should consider adopting HMIP’s approach of having sets of expectations, as opposed to standards, when conducting inspections. The expectations should make clear which human rights standards (and any other relevant standards) relate to particular expectations. These expectations should be assessed against indicators, ‘evidence that may show [an] expectation being met.’

<table>
<thead>
<tr>
<th>106</th>
<th>The Inspectorate should recognise that the treatment of staff is directly linked to treatment of detainees by staff, and its expectations/standards should reflect this.</th>
<th>227</th>
</tr>
</thead>
</table>

The Inspectorate should assess how the culture of the detaining authorities impacts on the treatment of prisoners and detainees. It should, for example, consider whether there exists a culture of impunity or a culture contrary to human rights. The Inspectorate should recognise that the culture of institutions may not align with their ‘outwardly professed values.’ It should consider how these cultures are shaped by external influences, including the political climate and media coverage.

<table>
<thead>
<tr>
<th>107</th>
<th>The Inspectorate should recognise that the culture of institutions may not align with their ‘outwardly professed values.’ It should consider how these cultures are shaped by external influences, including the political climate and media coverage.</th>
<th>231</th>
</tr>
</thead>
</table>

The Inspectorate should regularly review and update its expectations.

| 108 | The Inspectorate should regularly review and update its expectations. | 231 |

### EXPECTATIONS/STANDARDS AND FRAMEWORKS FOR CULTURALLY COMPETENT INSPECTIONS

<table>
<thead>
<tr>
<th>109</th>
<th>As the Inspectorate creates its inspection framework, expectations/standards and designs the surveys that it will use in places of detention, it is essential that it consults with the Aboriginal community and ACCOs to ensure that its questions, lines of enquiry and its expectations/standards facilitate the collection of data which will be effective in mitigating the risk of the torture and ill-treatment of Aboriginal detainees. Aboriginal worldviews and concepts of wellbeing, and culture as a strength should all be incorporated.</th>
<th>235</th>
</tr>
</thead>
</table>

The Inspectorate should ensure that its work, including the expectations/standards it uses, is informed by the obligations that a Treaty/Treaties will impose on the NTG, particularly in relation to the criminal justice system.

<table>
<thead>
<tr>
<th>110</th>
<th>The Inspectorate should ensure that its work, including the expectations/standards it uses, is informed by the obligations that a Treaty/Treaties will impose on the NTG, particularly in relation to the criminal justice system.</th>
<th>238</th>
</tr>
</thead>
</table>

In drafting it expectations/standards, the Inspectorate should be guided by UNDRIP.

<table>
<thead>
<tr>
<th>111</th>
<th>In drafting it expectations/standards, the Inspectorate should be guided by UNDRIP.</th>
<th>241</th>
</tr>
</thead>
</table>

In drafting it expectations/standards, the Inspectorate should consider the cultural appropriateness of every aspect of detention.

| 112 | In drafting it expectations/standards, the Inspectorate should consider the cultural appropriateness of every aspect of detention. | 241 |
113 The Inspectorate should have an overarching framework to guide its inspections, to ensure that in exercising its mandate it consistently employs a critical lens in assessing the cultural appropriateness of all aspects of conditions and treatment in detention.

114 The Inspectorate should consult with the Aboriginal community, ACCOs and relevant experts (eg on social and emotional wellbeing) when drafting and testing the inspection framework and expectations/standards being used.

The Inspectorate should ensure to consult with all relevant groups, such as Aboriginal children and young people.

The Inspectorate should prioritise consulting in the NT, but should also consult in other jurisdictions and with peak bodies where relevant.

During consultations, a ‘two-way learning’ approach should be adopted.

115 The ongoing impact of colonisation on the criminal justice system (particularly in relation to places of detention and detaining authorities) and the legacy of the systemic human rights abuses that occurred in Australia and the NT specifically should inform the work of the Inspectorate. This includes an understanding of the consequent intergenerational trauma and Aboriginal people’s contemporary relationship to the criminal justice system.

116 Both the strength and resilience of Aboriginal communities and the protective role of culture should be acknowledged in the Inspectorate’s expectations/standards.

117 The Inspectorate’s expectations/standards should acknowledge the impact of colonisation, particularly taking note of the incorporation of Gladue/Aboriginal Social History principles in decision making by Correctional Service Canada and at the Whitehorse Correctional Centre in Yukon (including in decision making regarding security classification, prison placement, transfers, segregation and internal discipline).

118 In order to properly assess the risk of torture or ill-treatment of Aboriginal detainees, the Inspectorate should incorporate into its expectations/standards an expectation that there is an absence of systemic racism at the place of detention/within the detaining authority.

119 The Inspectorate should assess whether political narratives or media representations in the NT negatively influence the culture within detention/detaining authorities, contributing to a culture of discrimination and putting Aboriginal detainees at higher risk of ill-treatment or torture.

120 The Inspectorate should assess whether there are discriminatory practices at the place of detention, impacting either on staff or detainees.

121 The Inspectorate should appreciate that an Aboriginal perspective of what constitutes torture, or cruel, inhuman or degrading treatment or punishment, may diverge from that of non-Aboriginal people. The suffering experienced by an individual, the significance that they attribute to particular conduct or a situation in detention, and their emotional response, will be determined in part by how their culture shapes their worldview.

122 The Inspectorate should appreciate that Aboriginal people may experience imprisonment differently.

123 The Inspectorate should appreciate, in its preventative work, that the long-term impact of torture and ill-treatment can be shaped by survivors’ culture and the historic-political context of the ill-treatment (including the history of colonisation).
| 125 | The Inspectorate should approach its work with an appreciation of intersectionality (eg gender, disability and Aboriginality). | 272 |
| 126 | The Inspectorate should incorporate recommendations from domestic Royal Commissions and Inquiries relevant to the prevention of torture and ill-treatment of Aboriginal prisoners and detainees in the NT, where it considers it relevant to do so. The Inspectorate should retain discretion as to which recommendations it includes in its expectations/standards, with the Commission and Inquiry reports informing rather than dictating how the Inspectorate exercises its mandate. The Inspectorate should not conduct audits on the implementation of recommendations from those Commissions and Inquiries. It can, however, follow-up on its own recommendations which have incorporated the Commission/Inquiry recommendations or choose to conduct a thematic review into implementation of Commission/Inquiry recommendations. | 275 |
| 127 | The Inspectorate should also consider the findings and recommendations/judgments of other NT statutory bodies (such as the Ombudsman, Children’s Commissioner and Anti-Discrimination Commissioner), coronial inquests and in litigation, where relevant to the prevention of torture and ill-treatment of Aboriginal prisoners and detainees. | 275 |
| 128 | The Inspectorate should refer to national standards relating to detention, particularly the cultural appropriateness of treatment and conditions in detention, where relevant and at its discretion. | 276 |
| 129 | The Inspectorate should refer to rights and standards in other Australian jurisdictions, particularly in relation to the cultural appropriateness of treatment and conditions in detention, where relevant and at its discretion. | 277 |
| 130 | The Inspectorate should refer to the reports and submissions of statutory bodies and NGOs in other jurisdictions, particularly in relation to the cultural appropriateness of treatment and conditions in detention, where relevant and at its discretion. | 277 |

**PREPARING FOR THE INSPECTION**

| 131 | The Inspectorate should create an MoU with the detaining authorities, clearly outlining the expectations and obligations of both parties. The MoU should address the Inspectorate’s access to the detaining authorities’ systems and records prior to and during the inspection, to assist in the preparation for and conducting the inspections (particularly important is access to the languages spoken by the detainees, to enable the Inspectorate to book interpreters for unannounced inspections). The MoU should be made publicly available and should not be a substitute legislative provision of the powers, privileges and immunities of the Inspectorate. | 280 |
| 132 | The Inspectorate should map out the non-government service providers at the detention site, to be included in its inspection of the detention site. | 281 |
| 133 | The Inspectorate should conduct relevant research into the detention site. Sources should include the detaining authority’s custody records, publicly available information from the media or courts, both publicly available information and information obtained directly by the Inspectorate from other NPMs, statutory bodies and civil society (particularly from ACCOs). The Inspectorate should review information it already holds on the detention site(s), including evidence, findings and recommendations from previous inspections, information previously | 285 |
provided by the detaining authority or its staff, and information from relevant correspondence from detainees and the public.

| 134 | The Inspectorate should be responsive to the information it receives/accesses in relation to the detention site(s), adapting its inspection methodology where it is appropriate to do so. | 285 |
| 135 | The inspection team should be comprised of staff (and consultants, where necessary) with the requisite subject matter expertise. Responsibilities for the inspection should be allocated according to expertise, to ensure complete coverage of subject matter areas, to avoid duplication of work, and to ensure staff expertise is being appropriately utilised. For thematic inspections, the Inspectorate could create advisory steering groups and/or working groups to ensure it has the relevant expertise. As when engaging consultants, the Inspectorate should ensure members of any advisory groups do not have an actual or perceived conflict of interest. It should make efforts to engage Aboriginal people (or where not possible, individuals who work for ACCOs) as consultants and members of advisory groups. | 287 |

**CONDUCTING THE INSPECTION**

| 136 | Inspections should generally be unannounced. | 289 |
| 137 | Inspections should be of sufficient length, conducted on different days of the week (including weekends) and at different times of the day (including evening, night and during shift changes). | 291 |
| 138 | The inspection should include an initial meeting with the manager of the detention site, to enable the detaining authority and Inspectorate to brief each other. This should include a briefing on any facility security issues and safety procedures, to support the Inspectorate’s unfettered access to all parts of the facility. | 291 |
| 139 | Inspectorate staff and consultants should conduct the inspection in a trauma-informed way, that respects the dignity of the detainees. Inspectorate staff and consultants should incorporate learnings from the training on trauma-informed practice that they have received, recognising the risk of retraumatising survivors of torture and ill-treatment when gathering evidence. | 293 |
| 140 | Inspectorate staff and consultants should ensure that they do not (and are not perceived to) collude with or behave in an overly friendly manner with detention staff when conducting the inspection, recognising the adverse impact this may have on detainees. | 293 |
| 141 | The Inspectorate should include in its procedures a requirement that the Inspectorate ask detainees how the Inspectorate can record and use the information it is provided; for example, whether the information can be used in a deidentified manner or not at all, and whether the detainee prefers that the inspector take written notes or audio recordings during the interview. | 293 |
| 142 | Inspectorate staff should ensure that the trauma-informed approach employed is effective cross-culturally. This includes recognising the impact of intergenerational trauma when engaging with Aboriginal detainees. When speaking with detainees, the inspectors should recognise that the cultural implications of ill-treatment can affect survivors’ ability to discuss their experiences. | 294 |
| 143 | The inspection should be conducted in compliance with the “do no harm” principle, recognising that confidentiality, security and sensitivity are essential to not endangering individuals or groups. The Inspectorate should advise detainees of its mandatory reporting obligations, and comply with these obligations in a manner that minimises the risk of conflict of interest (eg. the detaining authority subject of the report should not also be the recipient of the mandatory report). The Inspectorate should have a robust internal policy around how it will respond to allegations of criminal offending against detained children. |
| 144 | There must be no reprisals against individuals or organisations that communicate with the Inspectorate. This should be legislated for, and the Inspectorate should have a strategy to address both actual reprisals and threats of reprisals. |
| 145 | The detainee’s experience of detention is central, and the focus of evidence-gathering should be on outcomes, rather than legislation, policies and procedures. |
| 146 | The Inspectorate should collaborate with other relevant NT NPM(s) to ensure consistency of survey questions, to enable a comparison of the experiences of Aboriginal and non-Aboriginal detainees in the same place of detention. |
| 147 | The Inspectorate should objectively assess the evidence that it collects. |
| 148 | Sources of evidence should include detainees (individual discussions, focus groups, survey responses), documents, staff, other relevant third parties, and inspectors’ observations of facilities and operations. |
| 149 | The Inspectorate should consider whether it might be beneficial to speak with detainees formerly in police custody once they have been released or have been transferred to prison (either individually or in focus groups). |
| 150 | The Inspectorate should include in its inspections locations additional to the detention facility, such as hospitals, if detainees normally detained at the detention facility have been transferred to the other location, ‘offsite’. |
| 151 | Evidence should be triangulated (corroborated across different sources). The Inspection team should collect sufficient evidence to support findings, be responsive where contradictory evidence arises, and challenge each other as necessary. |
| 152 | The role of the Inspectorate is a preventative one, and it should not assist detainees make complaints or take individual requests. The Inspectorate may, however, use information from complaints/requests in identifying root causes and systemic issues, and in monitoring the implementation of its recommendations. |
| 153 | The Inspectorate should develop guidelines for reporting incidents of torture and ill-treatment and requesting that investigations or inquiries be conducted in individual cases. These guidelines should include the requirement that the consent of the detainee is obtained before such action is taken. |
| **CONDUCTING AN INSPECTION IN A CULTURALLY APPROPRIATE MANNER** |
| 154 | The Inspectorate should determine which interpreters it will need to book for its inspection based on the preferred language of detainees at the place of detention (to be provided by the detaining authority on a regular basis). |
| 155 | Inspectorate staff must be proficient at working with Aboriginal interpreters. They should complete AIS training on working with interpreters and follow AIS tips on effectively working with interpreters. |
| 156 | The Inspectorate should use existing subject matter dictionaries and plain English resources in its work, as appropriate. The Inspectorate should, in consultation with the AIS, develop an “NPM” plain English subject matter dictionary and/or a glossary of terms. The Inspectorate should consider translating (parts of) some of these resources into Aboriginal languages. |
| 157 | The Inspectorate should provide technical training to AIS interpreters on its mandate and how it conducts its inspections. |
| 158 | The Inspectorate should create plain English resources for dissemination in places of detention (both during inspections and to be made available in between inspections). These resources should include a brief outline of the Inspectorate’s mandate. These should also be translated into Aboriginal languages. |
| 159 | The Inspectorate should use detainee focus groups to conduct information sessions, with the assistance of interpreters, on its mandate and expectations/standards, in order to facilitate obtaining informed consent from detainees, to enable detainees to complete the surveys either during the session or afterwards (with the assistance of Inspectorate staff if requested) and to utilise human rights education as a preventative strategy. |

**PRESENTATION OF FINDINGS IN THE REPORT**

| 160 | The style and format of the Inspectorate’s reports should be consistent. |
| 161 | The Inspectorate’s report should facilitate constructive dialogue with the detaining authorities, by ensuring that its findings are evidence-based and balanced, highlighting both poor and good practices at the detention site. |
| 162 | The Inspectorate’s report should include no personal data without the consent of the person concerned, in accordance with obligations under OPCAT and a ‘do no harm’ approach. The Inspectorate should not reveal sources of the evidence which supports its findings, explicitly or otherwise, without the individuals’ consent. This is to ensure continuing confidence in its operations and willingness of detainees, staff and other stakeholders to engage with it. |
| 163 | The Inspectorate’s report should include direct quotes from detainees and staff, case studies, and photographs. |

**RECOMMENDATIONS**

| 164 | The Inspectorate should employ the APT’s double SMART model in formulating its recommendations: **Specific, Measurable, Achievable, Results-oriented, Time-bound; Solution-suggestive, Mindful of prioritisation, sequencing & risks, Argued, Root-cause responsive, Targeted.** |
| 165 | The Inspectorate should ensure that its recommendations are measurable, to enable it to properly assess whether the detaining authority has implemented them. |
The Inspectorate should make reference to good practice in other places of detention in making solutions-suggestive recommendations.

The Inspectorate should ensure that in formulating its recommendations, it carefully considers whether there may be negative consequences resulting from recommendation implementation.

The Inspectorate’s recommendations should not be influenced by the detaining authority’s budgetary constraints. The Inspectorate should obtain information about the detaining authorities’ budgets. This will provide it with a clearer view of what current budgetary constraints might impede the implementation of its recommendations, and will assist it to make recommendations relating to budget allocations at the appropriate times to the appropriate bodies.

The Inspectorate should ensure that in formulating its recommendations, it carefully considers whether there may be negative consequences resulting from recommendation implementation.

The Inspectorate should provide timeframes for implementation of recommendations, reflecting how urgent the implementation is. The Inspectorate should ensure to make its urgent recommendations promptly known.

The Inspectorate should identify the causes for detaining authorities’ departures from its expectations/standards.

The Inspectorate should direct its recommendations to the appropriate individual, department or contractor, respecting the delegation of authority, existing hierarchies (at detention sites and within government departments/organisations) and designated responsibility for service provision. It should, however, retain independence in determining to whom it should direct its recommendations.

NTG-targeted recommendations: The Inspectorate should direct its recommendations regarding NTG-delivered service provision to the relevant NTG detaining authority/department.

NTG/contractor-targeted recommendations: The Inspectorate should direct its recommendations regarding organisations/individuals who receive NTG funding to provide a service in the place of detention to both the organisation/individual and the NTG.

NTG/Commonwealth/contractor-targeted recommendations: The Inspectorate should direct its recommendations regarding organisations/individuals who receive Commonwealth Government funding to provide a service in the place of detention to the contractor and both the Commonwealth Government and the NTG (the latter being responsible for the place of detention, but not for the contract).

NTG/‘other’-targeted recommendations: The NTG, being responsible for the treatment and conditions in places of detention, should be the target of recommendations in relation to organisations/individuals delivering a service operating on a voluntary basis/receiving non-government funding.

The Inspectorate may make recommendations that will assist it to properly carry out its mandate.

The Inspectorate should ensure consistency in its recommendations at the same detention site over time, and across similar detention sites (where appropriate). When the Inspectorate makes a recommendation that contradicts an earlier one or one made at another similar site, then this should be justified and clearly explained.

The Inspectorate should engage with the detaining authorities at the end of the inspection. This will give the Inspectorate an opportunity to minimise the risk of misunderstandings by explaining
its findings and recommendations in person, to identify the recommendations that can be implemented at site level by the detaining authority, and to foster a respectful relationship built on constructive dialogue.

The Inspectorate should also meet with the non-government organisations and businesses providing services at the detention site. It should prioritise having debrief meetings with ACCOs providing services in detention.

**THE DETAINING AUTHORITY’S RESPONSE**

<table>
<thead>
<tr>
<th>175</th>
<th>Reports should be published in a timely manner. This requires the Inspectorate to provide a draft report to the detaining authority within a specified timeframe, an obligation which should be prescribed by legislation.</th>
</tr>
</thead>
<tbody>
<tr>
<td>176</td>
<td>Legislation should prescribe a timeframe for the detaining authority’s response (and subsequent publication of the report by the Inspectorate). If the detaining authority fails to respond, the Inspectorate should proceed to publication, noting the detaining authority’s failure to provide a response.</td>
</tr>
<tr>
<td>177</td>
<td>The detaining authority should be given an opportunity to conduct checks on the factual accuracy of the draft reports’ findings and to provide a response to the findings and recommendations. The Inspectorate should, however, retain discretion in relation to the content of its reports, protecting its independence.</td>
</tr>
<tr>
<td>178</td>
<td>The detaining authority (or contractor) must publicly respond to the Inspectorate’s recommendations (through the Inspectorate, so that the detaining authority’s response can be included in the Inspectorate’s report). The detaining authority should clearly state which recommendations are accepted, partially accepted or rejected, and the reasons for each of these decisions. This obligation be provided for in legislation.</td>
</tr>
<tr>
<td>179</td>
<td>The detaining authority should publish an action plan outlining what steps it will be taking to implement the Inspectorate’s recommendations. Assessment of the detaining authority’s progress against these action plans will form part of the Inspectorate’s follow up of recommendation implementation.</td>
</tr>
</tbody>
</table>

**A PUBLICLY AVAILABLE REPORT**

| 180 | The Inspectorate should make its reports publicly available, tabling its reports in Parliament. Making reports publicly available will promote the work of the Inspectorate to detaining authorities, detainees and the public (fulfilling one of the Inspectorate’s functions); improve the Inspectorate’s visibility and credibility and thus potential to successfully persuade detaining authorities to accept findings and implement recommendations; be a cost-effective way of supporting the Inspectorate’s preventive work through increased transparency and accountability of the detaining authority to the public and Parliament. No personal data should be published without the express consent of the person concerned. |
| 181 | The audience for inspection reports includes those in charge of the detention site, the detention site management and the frontline staff (of both the detaining authority and contractors). The Inspectorate’s report should be disseminated among all staff at the place of detention, to ensure that recommendations are universally understood, supported and implemented. Comparable detention facilities can also benefit from the Inspectorate’s site-specific reports. |
Supervisory authorities should also be provided the Inspectorate’s report.

<table>
<thead>
<tr>
<th>182</th>
<th>The Inspectorate should ensure that its reports are available and accessible to detainees. The Inspectorate should have both plain English and child-friendly one-page summaries of its inspection findings and recommendations, and it should translate this information into the main Aboriginal languages spoken by the detainees at the detention site. Given low literacy levels among detainees, the Inspectorate should also create visual aides and audio recordings of the summaries in English and Aboriginal languages. These summaries should be disseminated widely among detainees, and the reports in their entirety should also be accessible.</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>183</th>
<th>The audience for inspection reports includes the general public, and specifically the NT Aboriginal community. The Inspectorate should include the plain English and child friendly one-page summaries of its findings and recommendations, in English and the most widely spoken Aboriginal languages in the NT, at the beginning of its inspection reports. The Inspectorate’s distribution strategy for reports should include dissemination via platforms that will most likely reach the target audience (eg seeking permission to post on remote Aboriginal communities’ Facebook pages). The Inspectorate should present its assessment of the conditions and treatment in detention in an easily accessible and understandable way. The Inspectorate should not assume the readers’ knowledge of technical terms or procedures relating to detention.</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>184</th>
<th>The Inspectorate should disseminate its findings and recommendations using a range of approaches, as part of a comprehensive communications strategy. This may include media releases, short videos and radio segments (including on Aboriginal radio services, translated into Aboriginal languages), and the use of social media.</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>185</th>
<th>The Inspectorate should have a strategy for engaging civil society, particularly ACCOs, in relation to its inspection reports.</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>186</th>
<th>The Inspectorate should establish a strategy for its engagement with the media, given such engagement can either support the Inspectorate’s preventative work, or can lead to unintended negative consequences. The Inspectorate should recognise that the general public’s perceptions of those involved in the criminal justice system may be unfavourable and that there is a risk of selective reporting and misconstruction by the media. It must also recall that it must maintain a position whereby it can continue to engage in constructive dialogue with the detaining authorities. The Inspectorate should ensure it engages with Aboriginal media platforms, including radio stations and tv (eg NITV).</th>
</tr>
</thead>
</table>

**ESCALATION STRATEGY**

<table>
<thead>
<tr>
<th>187</th>
<th>The Inspectorate should ensure it has a strategy for escalation, in instances where it encounters conditions and treatment in detention which create a situation of high risk of torture and/or ill-treatment of detainees and/or its recommendations are not being implemented.</th>
</tr>
</thead>
</table>
This strategy may include escalating concerns to the supervisory authorities and responsible Minister; or scheduling an announced follow up inspection within a shorter timeframe, focusing solely on the areas of concern and monitoring recommendation implementation.

### FOLLOWING UP RECOMMENDATIONS

| 188 | The Inspectorate should have a follow-up strategy to encourage and evaluate the extent of recommendation implementation, through follow-up visits and other means (eg. obtaining information from other stakeholders, such as statutory bodies and civil society organisations). |
| 189 | The Inspectorate should follow up recommendations that were not accepted by the detaining authority or that may take some time to implement. |
| 190 | The Inspectorate should allocate sufficient resources to enable it to effectively evaluate recommendation implementation. |
| 191 | The Inspectorate must maintain its independence and should not be involved in the detaining authority’s implementation of Inspectorate recommendations. |
| 192 | The Inspectorate should follow up, during its regular inspection visits, on the detaining authority’s progress implementing recommendations from previous inspections. Recommendations can be closed (due to completion or lack of ongoing relevancy), repeated or amended, as appropriate. |
| 193 | The Inspectorate should consider including in its follow-up strategy approaches such as conducting specific follow up visits focused on the progress of implementation (these may be announced, alerting the detaining authority that it will be subject to increased scrutiny) and engaging with Ministers/government department CEOs. |

### ANNUAL REPORTS

| 194 | The Inspectorate’s annual report should include its main findings on conditions and treatment in detention in the NT, the recommendations that it has made to improve conditions and prevent torture and ill-treatment, the detaining authorities’ responses and the progress of recommendation implementation. The annual report should also outline the Inspectorate’s activities ‘beyond inspection’ for the year, such as submissions to inquiries. The report should include the challenges the Inspectorate faces and its future strategies. |
| 195 | Ministerial responses to the contents of the Inspectorate’s annual report could complement the detaining authorities’ responses to inspection reports. |
| 196 | The Inspectorate’s annual report should be tabled in the NT Parliament and widely disseminated, particularly in the NT (and to the NT Aboriginal community). There should be opportunities to discuss the contents of the report in Parliament (including in Aboriginal languages). The Inspectorate should use similar dissemination strategies for its annual report as those used for its inspection reports. The Inspectorate should also contribute to the Commonwealth Ombudsman’s Australian NPM Annual Report, to be tabled in the Australian Parliament and provided to the SPT. |

### THE INSPECTORATE’S OPCAT COMPLIANCE AND EFFICACY SHOULD BE EVALUATED

| 197 | The Inspectorate should regularly evaluate whether it is achieving its objective under OPCAT to advance the prevention of torture and ill-treatment of detainees. |
The Inspectorate should regularly conduct self-assessment with the view to measure and improve its efficacy, in order to continually improve its operations.

Evaluation should include an assessment of whether conditions and treatment in detention have improved. The Inspectorate’s evidence-based findings during repeat inspections of detention sites can assist to measure outcomes from previous inspections, and thus, the Inspectorate’s impact.

The Inspectorate should develop an appropriate set of KPIs for measuring whether the detaining and supervisory authorities are responsive to its work. The KPIs could include whether the detaining authorities accept and/or implement its recommendations from its inspections (indicating both its impact and whether the Inspectorate is successfully engaging in constructive dialogue with the authorities).

KPIs could also include an assessment of the impact of its functions beyond inspection, such as measuring NTG acceptance of recommendations included in submissions to inquiries or on proposed legislative reform.

The Inspectorate should reflect on its outputs, as well as its outcomes/impact. This will assist it to evaluate whether it is adequately engaging in broader preventative work ('beyond inspection').

The Inspectorate’s efficacy should also be subject to external evaluation and feedback, including by and from the SPT and the NTG.

The Inspectorate, the Commonwealth Ombudsman (as coordinating NPM), and other NPMs in the NT and other Australian jurisdictions could consider conducting informal peer reviews to build capacity and improve practices across Australian NPMs (both in terms of OPCAT compliance and conducting effective prevention work).

Feedback from civil society organisations should be invited and given serious consideration. The Inspectorate should note the source of the feedback, as potential conflicts of interest may influence that feedback.

The Inspectorate must maintain its independence and cannot be directed to accept advice.

The Inspectorate should invite and be responsive to evaluation by ACCOs (particularly NT ACCOs) of whether its structure, governance and operations are culturally appropriate. The Inspectorate should be respectful of the obligations that may arise and governance structures that may be developed through the AJA and future Treaty/Treaties when engaging with ACCOs and the NT Aboriginal community.

The Inspectorate should have a system by which suggestions and complaints regarding its operations can be made by detainees, their families and the general public. This should be widely publicised, including in places of detention and in remote Aboriginal communities, in plain English format and translated into Aboriginal languages.

Where an individual contacting the Inspectorate prefers to speak in an Aboriginal language, an interpreter should be used.

The Inspectorate could also invite feedback from detaining authority staff and contractors.

Where there are concerns that the Inspectorate is engaging in improper conduct, referrals can be made to ICAC.
| 209 | An evaluation of the Inspectorate’s efficacy must include an assessment of the degree to which the NTG has met its obligations under OPCAT, in turn enabling the Inspectorate to operate as intended under OPCAT. These obligations include guaranteeing Inspectorate staff immunity and protecting those who provide information to the Inspectorate from reprisals. | 408 |
INTRODUCTION TO OPCAT
There are numerous international sources that prohibit torture and other cruel, inhuman or degrading treatment or punishment (ill-treatment), including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Universal Declaration of Human Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the Code of Conduct for Law Enforcement Officials.¹

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is a unique instrument in that it focuses on ‘preventive rather than retrospective measures... It is also the first time that an international human rights instrument establishes a direct, complementary inter-relationship between preventive efforts at international and national level.’² As Olowu asserts, OPCAT ‘undoubtedly scores high in terms of the groundbreaking normative standards it creates.’³

¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) Art 2: ‘1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.’ Art 16(1): ‘Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.’

Universal Declaration of Human Rights, GA Res 217A (III) UN GAOR 3rd see, 183rd plen mtg, UN Doc A/810 (10 December 1948) Article 5: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN GA Res 34/169, UN GAOR, 34th sess, 106th plen mtg, Supp.No.49, UN Doc A/43/49 (9 December 1988) Principle 6: ‘No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.’

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 26 June 1987) Art 7: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’

Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) Art 37(a): ‘No child shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.’

Code of Conduct for Law Enforcement Officials, GA Res 34/169, UN GAOR, 34th sess, 106th plen mtg, UN Doc A/RES/34/169 (5 February 1980) Art 5: ‘No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.’

² Dejo Olowu, ‘Calibrating the Promise of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment’ (2007) 18 Stellenbosch Law Review 490.

³ Ibid.
OPCAT also prohibits reservations,4 and ‘does not require States Parties to submit periodic reports on measures taken to implement the instrument.’5

OPCAT asserts that ‘that the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention.’6 The objective of OPCAT is ‘to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.’17

OPCAT requires States 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,’ called national preventive mechanisms (NPMs),8 within one year of ratifying OPCAT,9 unless they make a declaration postponing the implementation of their obligations for an additional two years,10 which Australia has done.11 Particularly relevant to the Australian context, ‘provisions of [OPCAT] shall extend to all parts of federal States without any limitations or exceptions,’12 thus requiring that an NPM or NPMs be established and/or designated in the Northern Territory (NT). The NPM is to have an inspection function with the objective of strengthening the protection of detainees against torture and ill-treatment,13 having ‘access to all places of detention and their installations and facilities,’14 and making ‘recommendations to the relevant authorities’15 in pursuit of its objective. OPCAT requires that ‘States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel,’16 and NPM members ‘shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions.’17

---

7 Ibid Art 1.
8 Ibid Art 3.
9 Ibid Preamble: ‘Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.’
10 Ibid Art 24: ‘Upon ratification, States Parties may make a declaration postponing the implementation of their obligations under either part III or part IV of the present Protocol. This postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend that period for an additional two years.’
11 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Declarations and Reservations: Australia: ‘In accordance with Article 24 of the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, for three years.’
12 Ibid Art 35.
13 Ibid Art 20(c).
14 Ibid Art 19: ‘The national preventive mechanisms shall be granted at a minimum the power: (a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment.’
15 Ibid Art 20(c).
16 Ibid Art 19: ‘The national preventive mechanisms shall be granted at a minimum the power: (b) 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 torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations.’
17 Ibid Art 18(1).
18 Ibid Art 35.
The Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) was established under OPCAT,\(^\text{18}\) with a mandate that includes visiting places of detention and advising States regarding NPM establishment.\(^\text{19}\) The SPT’s announcement that it intends on visiting Australia in the coming months\(^\text{20}\) is a timely reminder that Australia has yet to meet its obligations in relation to NPM designation, including in the NT.

\(^{18}\) Ibid Art 2(1).

\(^{19}\) Ibid Art 11(1): ‘The Subcommittee on Prevention shall: (a) Visit the places referred to in article 4 and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment; (b) In regard to the national preventive mechanisms: (i) Advise and assist States Parties, when necessary, in their establishment; (ii) Maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities; (iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment; (iv) Make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment; (c) Cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.’

\(^{20}\) Office of the High Commissioner for Human Rights, UN torture prevention body announces upcoming country visits; expresses concerns regarding Brazil <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24769&LangID=E> (1 July 2019): ‘In the coming months, the UN Subcommittee on Prevention of Torture will visit Australia... The visits were decided during the Subcommittee’s confidential session held in Geneva from 17 to 21 June... The Subcommittee has a mandate to visit States that have ratified the Optional Protocol to the Convention against Torture, and assist those States in preventing torture and ill-treatment of people deprived of their liberty. The Subcommittee communicates its observations and recommendations to States through confidential reports, which it encourages countries to make public.’
MAINTAINING, DESIGNATING OR ESTABLISHING THE NORTHERN TERRITORY NPM
CONSULTATION

The SPT has stated that the NPM ‘be identified by an open, transparent and inclusive process which involves a wide range of stakeholders, including civil society.’ In the NT context, with a high percentage of the general population being Aboriginal (over 30%), almost all children in youth detention being Aboriginal and the majority of adult prisoners being Aboriginal (84% in 2016-2017), it is essential that the Northern Territory Government (NTG) prioritise consultations with both the NT Aboriginal community (including Elders and community leaders, such as members of Law and Justice Groups) and Aboriginal Community Controlled Organisations (ACCOs).

Conducting genuine, robust consultation with ACCOs and the NT Aboriginal community would also be consistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which although is not binding, has been supported by Australia since 2009, after it initially voted against its adoption. UNDRIP states that ‘Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures,’ and that ‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.’ In the Association for the Prevention of Torture’s (APT) report from the Regional Forum on the OPCAT in Latin America, it is also noted that ‘under article 6 of ILO Convention N°169, Indigenous peoples have to be consulted in the process of setting up of NPMs.’

As noted in the recent Indigenous Legal Assistance Program (ILAP) review, ‘[p]rograms are unlikely to be effective if they do not have a high level of Indigenous ownership, involvement and community support from conception to implementation.’ If the NT NPM is to be an effective body in strengthening the protection of Aboriginal detainees from torture and ill-treatment, then it is essential that consultation be prioritised, particularly in light of the fact that the NPM will be a statutory body rather than an ACCO.

Consultation must, however, be genuine, if OPCAT implementation is to effectively prevent the torture and ill-treatment of Aboriginal detainees. The report from the Canadian Royal Commission on Aboriginal Peoples makes an important point on intercultural dialogue:

---

21 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Guidelines on national preventive mechanisms, UN Doc CAT/OP/12/5 (9 December 2010) [16].
22 Australian Law Reform Commission, Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples Final Report, Report No 133 (2017) 81.
23 The Office of the Children’s Commissioner Northern Territory, Don Dale Youth Detention Centre Monitoring Report, 2 May 2019 [4]; The Office of the Children’s Commissioner Northern Territory, Alice Springs Youth Detention Centre Monitoring Report, 2 May 2019 [4].
27 Ibid Art 19.
28 Association for the Prevention of Torture, Preventing torture, a shared responsibility: Regional Forum on the OPCAT in Latin America Outcome Report (2014) 64.
there is a tendency for the more powerful party to try to overcome... difficulties by forcing its own way of doing things on the other party, on the assumption that this is clearly the ‘normal’ or ‘better’ way. However, the basis for genuine dialogue is destroyed when one party is compelled to speak and act exclusively through the medium of the other party’s language, cultural forms and institutions. Justice and basic courtesy demand that parties to a relationship be able to contribute to a dialogue in their own accustomed voices and ways, even if this requires some patience and perseverance on all sides.30

In conducting consultations on NPM designation, it is recommended that the NTG is mindful of the challenges of intercultural dialogue, very much a live issue in the context of the NT. Of course, interpreters must be used, but this is a bare minimum requirement.31

When consulting with the NT Aboriginal community, the NTG should also recall that ‘77% of Aboriginal people in the NT live in remote or very remote areas. There are 96 remote communities and over 600 homelands in the NT.’32 As such, it should ensure that it conducts consultations in remote Aboriginal communities, allocating sufficient resources to enable this work.

The proposed consultation process is described in greater detail directly below.

---

**RECOMMENDATION:** Aboriginal communities and Aboriginal Community Controlled Organisations must be consulted in a transparent and inclusive process of NPM designation. The NTG should ensure that it engages in genuine consultation, recognising the inherent challenges of intercultural dialogue, and that it uses interpreters as appropriate.

---

**NORTHERN TERRITORY TREATY/TREATIES**

**NT TREATY**

The NTG has made a commitment that ‘Treaty or Treaties will set the foundation for future agreements between Aboriginal people and the Northern Territory Government. A Treaty will allow both parties to negotiate and agree on rights and responsibilities and establish a long lasting legally based relationship.’33

The Treaty Commissioner has been appointed, although his terms of reference do not include negotiating the Treaties themselves. The Commissioner is in the process of consulting on issues such as the potential models

---


31 Australian Government, Department of the Prime Minister and Cabinet, *Protocol on Indigenous Language Interpreting for Commonwealth Government Agencies* (November 2017) 14: ‘The use of Indigenous language interpreters should be considered during the consultation, design and implementation stages of new programs to remote areas, and incorporated into contracts and funding agreements where appropriate.’


33 Northern Territory Treaty Commission, *Fact Sheet No 2*, 82.
for a Treaty/Treaties and the process for negotiating Treaties in the NT.³⁴ By late 2021, it is anticipated that the Commissioner will deliver his final report, including a proposed negotiation framework.³⁵

It is clear that a Treaty/Treaties in the NT will be finalised only after an NPM is designated in the NT. However, with the view to ensure that the NT NPM continues to be reviewed and improved as necessary, particularly in relation to its cultural competency and its ability to prevent the torture and ill-treatment of detained Aboriginal people, it is recommended that any future obligations that arise from a Treaty/Treaties are respected. The NTG has indicated that the sorts of obligations that might flow from a Treaty include ‘[r]ules around how Aboriginal groups and the Northern Territory Government should work together. This may include a formal group that provides a voice to government... Mechanisms for accountability so that all parties to a Treaty live up to the commitments they make.’³⁶

Under UNDRIP, ‘Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.’³⁷

One would imagine that the development of a Treaty will change the landscape of the NT, including in the area of criminal justice and consultation processes. The NT NPM must be responsive to these changes. Even after establishment, the NPM should be continuously evaluated on how it exercises its mandate, as well as whether there is a need for either redesignation or restructuring.

---

**YUKON UMBRELLA AGREEMENT**

The NTG has identified that an umbrella Treaty is one of the models which might be considered: with ‘a general agreement between the Northern Territory Government and Aboriginal people in the Territory under the umbrella Treaty, Aboriginal groups can negotiate separate agreements for additional or distinctive rights depending on their situation and regional needs.’³⁸

A visit to Yukon formed part of my Fellowship, where there exists an umbrella agreement between First Nations and the Government. The agreement states the following:

‘There are many Government programs today that do not work. In fact most of them don’t work. We know why they don’t work, but up till now, nobody asked us, or listened to us. They don’t work because they are White solutions for Indian problems. Only an Indian can understand, appreciate and feel what it means to be an Indian. If solutions are to be found which will work, it is we the Indian people who must find them. You can help.

There must be a system set up where the Indian people have some control over the programs that affect us. This control must not be just in the Administration of the program – but in the planning. If the idea behind the program is wrong, then we are wasting money, and people, trying to make it work.'
Only when we have identified the strengths of our Culture, and have worked out Indian solutions can we ask for your help with those solutions. You must respect our Cultural Heritage in all your attempts to help.\textsuperscript{39} ‘We have been told that one of our biggest problems with getting the Government to accept this Settlement is that we “are not credible”. This is supposed to mean that we cannot be trusted with responsibility. We have heard this for a long time now, and we are fed up hearing this. We now demand a chance to prove you wrong.’\textsuperscript{40}

What is clear from these words is that there is an expectation, an obligation, that government will accept that policies which achieve positive outcomes for Indigenous people must be Indigenous-driven. Any NPM established in the NT must respect whatever obligations will arise from the negotiated Treaty/Treaties, and respond appropriately, while ensuring that obligations under OPCAT continue to be met.

**NPMS – RESPECTING OBLIGATIONS UNDER THE TREATY OF WAITANGI**

**OFFICE OF THE CHILDREN’S COMMISSIONER**

‘Te Tiriti o Waitangi continues to be central to the work of the Office and within our tikanga framework. One way this is demonstrated is through our tikanga values which set out how we do our work. Our commitment has also been demonstrated through the practice of holding powhiri or mihi whakatau to welcome new staff and poroaki to farewell staff. Our monitoring team has focused on continuously developing and extending their cultural capability, to ensure effective engagement and interaction with mokopuna Māori and whānau, Māori staff within Oranga Tamariki sites and residences, and Iwi and Māori service providers across the communities we visit. A key aspect has been the monitoring team’s participation in cultural supervision so we can continuously strengthen our influence for mokopuna, who make up over 65% of Oranga Tamariki’s client group.’\textsuperscript{41}

**OFFICE OF THE OMBUDSMAN**

‘I aim to ensure the principles of Te Tiriti o Waitangi are at the heart of the work and culture of my Office. In order to do this, my staff and I must: understand Māori concepts, perspectives and values; understand the Treaty and barriers to its full realisation; and take seriously my mandate to be kaitiaki mana tangata (guardian of the mana of the people). I am taking steps to ensure my staff are appropriately skilled and confident to work with Māori. Specific measures I have in place are: working with Māori (staff and contractors) to better inform and design my work; developing staff cultural competency by offering training and encouraging the use of te reo Māori and key aspects of tikanga; supporting the work of the staff in my Treaty/Cultural Diversity Integrity Group, which has the role to infuse Office work practices and work culture with Māori concepts, perspectives and values; and publishing my analysis and findings, and following up recommendations, regarding issues affecting Māori under my jurisdiction.’\textsuperscript{42}

**INDEPENDENT POLICE CONDUCT AUTHORITY**

‘Our commitment to the Treaty of Waitangi: The IPCA is committed to being responsive to Māori as tangata whenua and recognising the Treaty of Waitangi as New Zealand’s founding document. Our staff receive training in Māori culture and protocol through a series of Tikanga Māori workshops covering: customs and traditional Māori values, the protocols of engaging with Māori families, correct pronunciation of Te Reo.’\textsuperscript{43}

\textsuperscript{39} Yukon Indian People, Together today for our children tomorrow: a statement of grievances and an approach to settlement (January 1973) 18.

\textsuperscript{40} Ibid 22.

\textsuperscript{41} Office of the Children’s Commissioner, Annual Report for the year ended 30 June 2018 (31 October 2018) 20.

\textsuperscript{42} Office of the Ombudsman, Strategic intentions for the period 1 July 2019 to 30 June 2023 (28 June 2019) 35-36.

\textsuperscript{43} Independent Police Conduct Authority, Our commitment to the Treaty of Waitangi <https://most0010142.expert.services/Site/about-us/treaty-of-waitangi.aspx>
THE NORTHERN TERRITORY ABORIGINAL JUSTICE AGREEMENT

ABORIGINAL JUSTICE AGREEMENTS (AJAs) IN AUSTRALIA

The Victorian Government Koori Justice Unit explains that the ‘first AJA was the Victorian Government’s direct response to the 1997 National Ministerial Summit, which reviewed the implementation of recommendations of the 1991 Royal Commission into Aboriginal Deaths in Custody.’ The AJA’s history is intimately linked to the Royal Commission into Aboriginal Deaths in Custody, a Royal Commission looking at Aboriginal people’s treatment in custody, which will also be the central focus of the NT NPM. The Australian Children’s Commissioners and Guardians have recognised the value of an AJA in supporting government and Aboriginal communities ‘to develop culturally safe and community-based responses,’ against a history of ‘past government practices and policies [that] have created trauma that in many cases continues to significantly affect the social and emotional wellbeing of Aboriginal and Torres Strait Islander children and young people.’

The ALRC describes AJAs in its Pathways to Justice inquiry as Government partnerships with Aboriginal and Torres Strait Islander communities and organisations, including at the local level, which create mechanisms of accountability and provide culturally appropriate responses within the criminal justice system. The purpose of the AJA is to ‘ensure that Aboriginal and Torres Strait Islander peoples are centrally involved in policy development affecting them.’

---

45 Australian Children’s Commissioners and Guardians, *Statement on conditions and treatment in youth justice detention* (November 2017) 16.
46 Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples Final Report*, Report No 133 (2017) 16.28, 16.29: ‘An AJA is a formal agreement between governments and Aboriginal and Torres Strait Islander communities to work together to improve justice outcomes. It enables strategic planning in relation to criminal justice issues affecting Aboriginal and Torres Strait Islander peoples, enabling the creation of joint justice objectives across departments and agencies. It facilitates partnerships between government and Aboriginal and Torres Strait Islander communities and organisations at multiple levels, including at the local level, to work together to develop, implement and evaluate responses to over-incarceration. It also improves accountability—setting out clear objectives and providing measurable action plans. State and territory governments may have other justice strategies or frameworks that seek to reduce Aboriginal and Torres Strait Islander incarceration. However, the ALRC considers that AJAs are an important initiative to promote partnership with Aboriginal and Torres Strait Islander peoples, drive strategic planning, and facilitate collaborative, culturally appropriate, and effective criminal justice responses.’ See also at 16.40: ‘Victoria has taken a long-term, staged approach to developing an AJA. The first phase began with AJA1 which, among other things, created infrastructure to facilitate ongoing, multi-layered collaboration with government and Aboriginal and Torres Strait Islander groups, including the creation of the Aboriginal Justice Forum and Regional and Local Aboriginal Justice Advisory Committees (RAJAC).’ See also at 16.41: ‘The Aboriginal Justice Forum (AJF) meets three times per year and is constituted by Victorian Government representatives and the Koori Caucus. The Caucus is comprised of representatives from the nine RAJACs and other peak Aboriginal and Torres Strait Islander organisations. The Caucus meets six weeks prior to the AJF to determine and discuss issues for the agenda, and again the day before the AJF.’ See also at 16.62: ‘In Victoria, part of the process of developing an AJA involved developing governance infrastructure and a representative process, which enables any group or body to participate in the Aboriginal Justice Forum.’
47 Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples Final Report*, Report No 133 (2017) 16.47: ‘AJAs provide an important means by which partnerships with Aboriginal and Torres Strait Islander peoples can be developed or strengthened, as well as an opportunity to ensure that Aboriginal and Torres Strait Islander peoples are centrally involved in policy development affecting them.’
THE NORTHERN TERRITORY AJA

The NTG has been undertaking consultations to develop an Aboriginal Justice Agreement (AJA) since July 2017, through the Aboriginal Justice Unit (AJU). The AJU’s focus is:

gathering information and perspectives from remote and regional communities in the NT to drive the development of the content of the AJA. It is intended that under the framework of the AJA, NTG will enter into a partnership with Aboriginal and non-government organisations to address the complex issues that contribute to the disadvantage and rising incarceration and recidivism rates of Aboriginal Territorians.48

With aims such as decreasing rates of incarceration, ‘provid[ing] Aboriginal people with services that support human rights, and individual and community resilience, reduc[ing] the over-representation of Aboriginal people in the criminal justice system,’49 it is clear that the AJA is of particular relevance to the implementation of OPCAT, a human rights instrument, under which an NPM considers issues such as overcrowding of prisons (discussed further, under What does prevention in the context of OPCAT mean?).

NAAJA’s submission to the ALRC Pathways to Justice ‘emphasised the importance of consultation, but noted also the issue of ‘consultation fatigue’ in circumstances where policy changes have been frequent. It is clear that the AJA must found a sustained commitment to working with Aboriginal and Torres Strait Islander communities to meet shared and agreed upon objectives.’50 Ongoing consultation with Aboriginal people living in the NT is an essential aspect of both designing and evaluating the efficacy of the NPM, but those responsible for undertaking these consultations should heed NAAJA’s caution.

Of note, consultation on NPM designation needs to immediately commence if the NT is to be compliant with OPCAT timeframes. As with the NT Treaty/Treaties, the AJA may not be finalised before NPM designation, but once it is, the NTG may need to revisit the designation, structure, governance or operations of the NPM. In the future, the NT AJA should guide consultation on all aspects of the NPM. In the interim, the Canadian Royal Commission on Aboriginal Peoples observation that there needs to be a ‘transformation of the colonial relationship of guardian and ward into one of true partnership’51 certainly has applicability in the NT.

---

48 Ibid 503.
49 Northern Territory Government, Department of the Attorney-General and Justice, Aboriginal Justice Agreement Fact Sheet (July 2017) 1.
50 Australian Law Reform Commission, Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples Final Report, Report No 133 (2017) 504.
The Chief Minister made the following statement regarding LDM:

Underpinning it all is Local Decision Making – if not the most significant Aboriginal Affairs reform of this generation it is, at least, the most decent. The degradation and humiliation of the Intervention convinced me 10 years ago meaningful progress, engagement, reconciliation and protection of culture lay not in taking power but returning power. My team and I believe this today more strongly than ever. We will partner with Aboriginal communities and organisations to determine the shape and control of local healthcare, schools, justice systems, local governments, housing, and how to grow happy and healthy kids.

LDM guiding principles include self-determination, whereby ‘Aboriginal people and communities understand their own needs and have the ability to develop their own solutions. They are leading decision making processes. We will respect culture and existing or traditional decision making processes.’

The NTG’s commitment recognises the role LDM can play in improving justice outcomes for Aboriginal people. Although the LDM agreements focus on decision-making and service delivery at a local level, the governance structures created under LDM should have the support of the local Aboriginal community, and thus consultation around the NPM could benefit from these community-endorsed mechanisms. Where agreements have been made, they should be respected and guide NPM consultations with the relevant communities covered by those agreements. For example, the Groote Eylandt LDM Agreement and accompanying measures taken by the Anindilyakwa Land Council and the Northern Territory Government ensure that the local community has control over areas that affect their well-being and culture.

RECOMMENDATION: Consultations with the Aboriginal community and Aboriginal Community Controlled Organisations should be guided by the NT Aboriginal Justice Agreement once it is finalised, given its focus on partnership between government and Aboriginal people and those objectives of the AJA and OPCAT that are shared. As with any Treaty/Treaties, the finalisation of the AJA may require that the designation, structure, governance or operations of the NPM(s) be revisited. Ongoing consultations under the AJA will be essential for the designated NPM to achieve both legitimacy among the NT Aboriginal community and cultural competency.
implementation plan could guide consultations on Groote Eylandt (particularly pertinent is the section of the plan which states the ‘purpose of this Implementation Plan is to demonstrate how the parties to the Agreement intend to work together to achieve the outcome for Law, Justice and Rehabilitation as set out in the Agreement and its Schedules’).

The Groote Eylandt Implementation Plan includes sections that are of relevance to the designation of the NPM, which is ultimately an obligation flowing from the Commonwealth Government’s ratification of OPCAT:

Other national and NT Law, Justice and Rehabilitation reforms may be developed and implemented during the period of the Agreement and this Implementation Plan. The Parties agree to work cooperatively to ensure any new NT and Commonwealth government policies and programs are effectively integrated into the Implementation Plan. Conversely, the NT Government commits to considering the LDM Agreement and this Implementation Plan in the development of new Law, Justice and Rehabilitation policy and programs to ensure that they complement and support the objectives and strategy set in this Implementation Plan.

Also relevant is that ‘[w]hile not a Party to the Agreement, the Department of the Prime Minister and Cabinet (PM&C) has been consulted about this Implementation Plan, and supports it in-principle.’

The implementation plan goes some way to recognising the impact of colonisation, an issue that is discussed in greater detail under Expectations/standards and frameworks for culturally competent inspections. Consultation on NPM designation under the LDM framework would benefit from bringing this lens to the dialogue:

The Groote Eylandt Archipelago is home to one of the oldest unbroken, continuing cultures in the world. Anindilyakwa culture, language and lore is still very strong. However, despite best intentions of all levels of government, it has experienced pressure from, but not limited to, the following: European contact and colonisation; the establishment of GEMCO manganese mining operations; the amalgamation of Community Government Councils; the Northern Territory Emergency Response; and differences between Anindilyakwa culture and the systems and structures of broader Australia. These challenges, among others, have contributed to serious social problems, including an over-representation of Anindilyakwa people in the justice system.

Despite these challenges, Traditional Owners for the Groote Archipelago are committed to a successful long term future for their people, particularly for their young people to successfully stand in both worlds.

collaborating with the ALC including sharing information to agree on how this control will be achieved; and v. set out the process and timeframes for the negotiation and agreement of Implementation Plans for identified priority service delivery areas according to the Schedules to this Agreement.’

See also at 5: ‘(f) The NT Government and the ALC also agree that they will adhere to the following specific principles when undertaking any work in accordance with this agreement: i. Anindilyakwa empowerment and decision-making will better provide solutions and a better way forward; ii. the voice of Anindilyakwa women must be heard loud and clear; iii. building, supporting and investing in strong governance is necessary to ensure local Anindilyakwa people drive local solutions; iv. both parties will always consult, work with and seek the agreement of Traditional Owners; v. the pace of Local Decision Making will be led by the ALC and agreed by the NT Government and in accordance with the agreed timelines to establish Implementation Plans and take the agreed steps within those Implementation Plans; and vi. the relationship between the ALC and the NT Government will be one of mutual trust and respect.’

See also at 3: ‘Terms of this Implementation Plan... (c) The ALC, in approving this Implementation Plan, warrants that it has undertaken the necessary consultations with Anindilyakwa Traditional Owners to obtain their consent to enter into the Implementation Plan, and engaged with other Anindilyakwa organisations and groups to take account of their views.’

55 Ibid 2.
57 Ibid 6.
58 Ibid 3.
Finally, the Implementation Plan acknowledges the work being undertaken in relation to AJAs and Treaty, discussed above:

- Policies and Reforms that may impact the Implementation Plan: (a) The NT Government is about to finalise the NT Aboriginal Justice Agreement, which will interact with, and enable elements of, this Implementation Plan. (b) The NT Government has appointed a Treaty Commissioner and has signed a Memorandum of Understanding with the four NT Land Councils to progress discussions on the possible development of a Treaty or Treaties. This ongoing discussion may interact with this Implementation Plan.\(^{60}\)

**RECOMMENDATION:** Consultations with the Aboriginal community and ACCOs should be guided by NT Local Decision Making.

**STATUTORY BASIS**

**LEGISLATION SUPPORTING THE NPM’S DESIGNATION AND INDEPENDENCE**

Steinerte asserts that the need for an NPM to have a clear legislative basis has been underlined by the SPT in both its preliminary NPM guidelines and the revised ones. The Subcommittee has even asserted that having a legal basis for an NPM is ‘a prerequisite for its institutional stability and functional independence’. It is also one of the stipulations of the Paris Principles which require NHRIs to be established by an official act so as to ensure their having a stable mandate. The SPT has even gone a step further in suggesting that a constitutional basis for NPMs would be preferred.\(^{61}\)

Steinerte’s reference to the Paris Principles relates to OPCAT Art 18(4): ‘When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.’\(^{62}\)

In its *OPCAT in Australia Interim Report*, the Australian Human Rights Commission (AHRC) noted that in Australia, many share the view of Steinerte:

Many attendees at the roundtables expressed concern that the Commonwealth Government does not intend to introduce legislation to enshrine the NPM model. A number of stakeholders strongly urged the Australian Government to introduce a dedicated statute to implement OPCAT. This accords with SPT guidance that conclusively states that it is best practice for NPMs to be implemented through legislation: While the institutional format of the NPM is left to the State Party’s discretion, it is imperative that the State Party enact

\(^{60}\) Ibid 6.


NPM legislation which guarantees an NPM in full compliance with OPCAT and the NPM Guidelines. Indeed, the SPT deems the adoption of a separate NPM law as a crucial step to guaranteeing this compliance.63

The above concerns apply equally to the NT context, and if the Commonwealth Government decides to not proceed with a legislative basis for the NPM, the NTG should not follow suit. The NTG should enact legislation in support of the designated NT NPM, recognising the challenges that the UK NPM has faced in operating without a statutory basis, as outlined below.

SUBMISSIONS TO THE COMMITTEE AGAINST TORTURE

UK NPM
In 2019, the UK NPM’s submission to the CAT raised concerns regarding the ‘need for the NPM to be placed on a statutory footing, in line with SPT advice… Currently, only two of the 21 members of the NPM have any reference to their OPCAT mandate written into the legislation that created them and which defines their role… The NPM itself is not recognised more generally in any legislation and has no separate legal identity…In addition, we have raised the need for individual NPM members to have their responsibilities under OPCAT included in their legislation.’64

HUMAN RIGHTS IMPLEMENTATION CENTRE OF THE UNIVERSITY OF BRISTOL
‘Despite the UK NPM being one of the longest-standing NPMs, and the requirement by the SPT that ‘the mandate and powers of the NPM should be clearly set out in a constitutional or legislative text’ this has not yet occurred. The UK NPM was designated by a written ministerial statement to parliament in 2009 but its mandate has never been consolidated in legislation. The UK NPM itself has consistently called upon the government to ensure such protection as a necessary part to its independence, and indeed the SPT has responded by stating unequivocally that ‘the lack of a clear legislative basis for the NPM has long been a matter of concern to the SPT. We are aware that some take the view that this is not legally necessary under the OPCAT. The SPT disagrees with this position, and should the SPT visit the UK on an official basis it is incontrovertible that this failing would feature in its report and recommendations – as it has in all other countries where there are similar shortcomings’. We would request that the UN Committee Against Torture in the Concluding Observations calls on the UK government to protect the mandate of the UK NPM and its constituent members in legislation.’65

COMMITTEE AGAINST TORTURE - CONCLUDING OBSERVATIONS
‘The Committee is concerned that while each of the 21 member bodies of the United Kingdom’s National Preventive Mechanism (NPM) operate under their own statutory provisions, the NPM itself is not provided for in legislation, and the legislation creating many of the NPM members does not refer to their NPM mandate. The Committee also remains concerned that the absence of legislation also impedes the NPM’s independence, notwithstanding action taken by the NPM to reduce its members’ reliance on seconded staff from places of deprivation of liberty…. The State party should clearly set out in legislation the mandate and powers of the NPM secretariat and its members and guarantee their operational independence, and ensure effective follow-up to and implementation of the NPM’s recommendations, in

64 United Kingdom National Preventive Mechanism, United Kingdom National Preventive Mechanism submission to the 66th session of the Committee against Torture (2019) 9.
65 Human Rights Implementation Centre of the University of Bristol, Submission to the UN Committee against Torture (CAT) 66th Session on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland on compliance with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (March 2019) [3] [4].
NPM STATUTORY BASIS -

Crimes of Torture Act 1989

Under the Crimes of Torture Act 1989 (NZ) (COTA), the NPM is to be designated as per the terms and conditions in the notice by Gazette (s26(3) and (4)). Designation may also be revoked. Steinerte critiques how this ‘raises concerns over the prospective stability of the NPM even though thus far this provision remains untested.’ On the other hand, the review of OPCAT in New Zealand notes the benefits of gazetting NPM designation, including ‘gaps or problems with the designations can be amended quickly and simply.’ This report recommends a basis in legislation as the preferred approach.

Many of the Articles under OPCAT are reflected in the New Zealand legislation:

Functions of the NPM are provided for under s27 (including the obligation to prepare at least one annual report to the House of Representatives, if the NPM is an Officer of Parliament. See also s36.). The NPM’s access to information is provided for under s28, including ‘the number of detainees in the places of detention for which it is designated; the treatment of detainees in those places of detention; the conditions of detention applying to detainees in those places of detention.’ Access to places of detention and persons detained is provided for under s29, and ability to conduct interviews under s30 (with legislation also addressing protection against reprisals, such as ‘criminal liability, civil liability, disciplinary process, change in detention conditions, other disadvantage or prejudice of any kind’). Of note, under s30(4), ‘[i]f requested by the National Preventive Mechanism, the person in charge of a place of detention must provide a safe and secure environment for the National Preventive Mechanism to conduct an interview with any detainee who is considered likely to behave in a manner that is… offensive, threatening, abusive, or intimidating to any person; or… threatening or disruptive to the security and order of the place of detention.’ Confidentiality is addressed under s33, making clear that the NPMs can make ‘public statements in relation to any matter contained in a report presented to the House of Representatives,’ as long as information about an identifiable individual is not disclosed without their consent. The Act also provides for powers, protections, privileges, and immunities under s34 and s35. The functions of the Central National Preventive Mechanism are outlined under s31 and s32.

---

66 Committee against Torture, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (2019) [16] and [17].
68 Human Rights Commission, The Optional Protocol to the Convention against Torture (OPCAT) in New Zealand 2007–2012: A review of OPCAT implementation by New Zealand’s National Preventive Mechanisms (April 2013) 17: ‘Under COTA, the Minister of Justice has the power to designate NPMs for specified places of detention14 at any time, by notice in the Gazette. While designations can be made, varied and revoked by the Minister at any time, and the process is an administrative procedure rather than legislative, the benefits of this are that any gaps or problems with the designations can be amended quickly and simply. This was demonstrated when, after the first year of operation, NPMs recommended changes to clarify the designations, and the Minister of Justice acted upon those recommendations. The designations of the Ombudsman and Children’s Commissioner were amended to clarify that their role covered care and protection residences as well as youth justice residences.’ See also Designation of National Preventive Mechanisms“ New Zealand Gazette, 6 June 2018, Notice Number 2018-go2603: ‘Pursuant to section 26 of the Crimes of Torture Act 1989, I hereby designate the following agencies to be national preventive mechanisms for the purposes of the Crimes of Torture Act 1989: An Ombudsman holding office under the Ombudsmen Act 1975 for the purpose of examining and monitoring the treatment of persons detained: in prisons and otherwise in the custody of the Department of Corrections; on premises approved or agreed under the Immigration Act 1987; in health and disability places of detention including within privately run aged care facilities; in youth justice residences and care and protection residences established under section 364 of the Oranga Tamariki Act 1989; in residences established under section 114 of the Public Safety (Public Protection Orders) Act 2014; in court facilities. The Independent Police Conduct Authority (for the purposes of examining and monitoring the treatment of persons detained in court facilities, in police cells, and of persons otherwise in the custody of the New Zealand Police), The Children’s Commissioner (for the purpose of examining and monitoring the treatment of children and young persons in care and protection and youth justice residences established under section 364 of the Oranga Tamariki Act 1989).’
69 Crimes of Torture Act 1989 (NZ).
70 Crimes of Torture Act 1989 (NZ).
HER MAJESTY’S INSPECTORATE OF CONSTABULARY IN SCOTLAND (HMICS) AND INDEPENDENT CUSTODY VISITING SCOTLAND (ICVS) -

*Police and Fire Reform (Scotland) Act 2012*

With the creation of a national police force, the HMICS (s71) and ICVS gained statutory footing. Of particular note is the explicit reference to OPCAT, with s93 stating that ‘[t]he provisions in this Chapter are in pursuance of the objective of OPCAT, that is, the objective of establishing a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.’

s94 outlines the arrangements that must be made for the ICVs, including being able to ‘access information relevant to the treatment of detainees and the conditions in which they are detained’ under (1)(b). HMICS must lay a copy of the report before Scottish Parliament (s79(3)).

**RECOMMENDATION:** The NPM must have a clear statutory basis, which will reinforce its independence.

**A NOTE ON THE FACT THAT THE NT IS A TERRITORY, RATHER THAN A STATE**

In its submission to the AHRC OPCAT in Australia consultation, the APT noted the following:

There is a need for genuine and comprehensive consultation on the part of the federal government. Compromises can work as long as all the relevant parties agree. Federal decisions that overrule state governments, existing monitoring bodies or civil society concerns clearly risk fragmentation of the future NPM or even a breach of their treaty obligations.71

The NT is not a State and is thus particularly susceptible to having its decision regarding NPM designation overruled by the Commonwealth Government. The Commonwealth Government should pay particular attention to the APT’s caution.

**RECOMMENDATION:** The Commonwealth Government should respect the NTG’s decision on designation (and other matters relevant to the NPM), which should be reached through a robust consultation process.

71 Association for the Prevention of Torture, Submission No 26 to Australian Human Rights Commission, OPCAT in Australia Consultation, July 2017, 10.
THE NORTHERN TERRITORY AND OPCAT
The NT has passed legislation in relation to SPT visits:

The primary purpose of the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill (OPCAT Bill) is to establish the necessary legislative arrangements for the United Nations Subcommittee to inspect places of detention in the Northern Territory.72

This legislation has particular relevance given the SPT’s announcement that it is visiting Australia.73
SHOULD HAVE A NEW BODY AS THE NPM RATHER THAN DESIGNATING EXISTING BODIES
AN OUTLINE OF CURRENT DETENTION OVERSIGHT IN THE NT

THE OFFICE OF THE CHILDREN’S COMMISSIONER

The Office of the Children’s Commissioner (OCC) currently deals with complaints and investigations\(^{74}\) and undertakes inquiries.\(^{75}\) The recommendation of the Royal Commission into the Protection and Detention of Children in the Northern Territory (NTRC), not implemented to date, to expand the OCC’s mandate to include monitoring of youth detention facilities is considered in detail under the below subsection, *A note on recommendations from other sources regarding the NT NPM*. Of note, although the OCC’s mandate has not been expanded, it has this year publicly released its first monitoring reports of the two NT youth detention facilities.\(^{76}\) The NTG did not provide a detailed public response to the reports, instead making a statement to the media.\(^{77}\)

OMBUDSMAN

The Ombudsman’s functions include ‘to investigate, and deal with complaints about, administrative actions of public authorities,’\(^{78}\) ‘to investigate, and deal with complaints about, conduct of police officers,’\(^{79}\) and ‘to consider and prepare reports on investigations of the conduct of police officers and to make recommendations about action that should be taken in relation to them.’\(^{80}\) It does not conduct regular inspections of places of detention.

ANTI-DISCRIMINATION COMMISSION

The ADC Community Visitor Program conducts 6 monthly monitoring and inspecting visits of ‘mental health facilities... and secure residential disability facilities where supervised persons are detained under Part 11A of the NT Criminal Code,’ bringing a human rights perspective to its visits, with a panel comprised of a ‘health professional, lawyer and community member.’\(^{81}\) The role and powers of the CVP are statutory.\(^{82}\)

Although this paper does not recommend the ADC be designated the NPM inspecting places of detention within the criminal justice system, there would certainly be opportunities for joint visits to secure residential disability facilities and other forms of collaboration, given the ADC’s expertise on issues related to discrimination, which will be an integral aspect of the Aboriginal Inspectorate’s work (discussed further under *Expectations/standards and frameworks for culturally competent inspections*).

\(^{74}\) *Children’s Commissioner Act 2013 (NT)* ss20-29.

\(^{75}\) *Children’s Commissioner Act 2013 (NT)* ss30, 31, 32, 33.

\(^{76}\) The Office of the Children’s Commissioner Northern Territory, *Don Dale Youth Detention Centre Monitoring Report* (2 May 2019); The Office of the Children’s Commissioner Northern Territory, *Don Dale Youth Detention Centre Monitoring Report* (2 May 2019).


\(^{78}\) *Ombudsmans Act 2009 (NT)* s10(1)(a).

\(^{79}\) *Ombudsmans Act 2009 (NT)* s10(1)(d).

\(^{80}\) *Ombudsmans Act 2009 (NT)* s10(1)(e).

\(^{81}\) Northern Territory Anti-Discrimination Commission, Submission No 1 to Australian Human Rights Commission, *OPCAT in Australia Consultation*, June 2017, 2.

\(^{82}\) Ibid 3.
INDEPENDENT COMMISSION AGAINST CORRUPTION

ICAC’s functions include identifying and investigating improper conduct. It prevents, detects and responds to improper conduct by developing and delivering education and training, conducting audits and reviews, referring matters for further investigation, disciplinary action or prosecution and making public comment. It prioritises matters that may involve corrupt conduct or serious anti-democratic conduct.83 It does not conduct regular inspections of places of detention.

OFFICIAL VISITOR PROGRAM

The functions of official visitors include inquiring into the treatment and behaviour of, and the conditions for, detainees in the youth detention centre for which the official visitor is appointed,84 and in prisons, inquiring into the treatment, behaviour and conditions of the prisoners at the facility.85 They take complaints,86 visiting at least once a month.87

NAAJA’s submission to the AHRC OPCAT in Australia Consultation reflects this report’s concerns about the Official Visitors Program’s (OVP’s) lack of independence and lack of cultural competency in relation to Aboriginal prisoners and detainees.88 Sitting within the agency that is the detaining authority and reporting to the Minister, the OVP is not independent and thus not OPCAT-compliant. Many other aspects of the OVP’s operations are not OPCAT compliant. The OVP’s visits to detention are subject to the conditions the CEO considers appropriate,89 they must report to the Minister and to the CEO on a specified matter if directed by the Minister.90 After their visits to prisons, OVP visitors must report to the Minister and to the Commissioner if directed by the Minister.91 ‘The Minister needs to be satisfied, via the reporting process, that individual Official Visitors are meeting the obligations of their appointment and that the Official Visitor Program overall

83 Independent Commissioner Against Corruption 2017 (NT) s18.
84 Youth Justice Act 2005 (NT) s170.
85 Correctional Services Act 2014 (NT) s30.
86 Youth Justice Act 2005 (NT) s163.
87 See also Northern Territory Department of the Attorney-General and Justice, Annual Report 2017-2018 (30 September 2018): ‘Most complaints made to official visitors are minor in nature and addressed by correctional centre staff on the day of the visit. More serious complaints, such as those relating to systemic issues, staff misconduct or inappropriate behaviour, are directed to the General Manager of the relevant correctional centre for further investigation, with follow up through the monthly report to the minister.’
88 See also Northern Territory Government, Official Visitors Handbook: A resource for Official Visitors to Adult Northern Territory Correctional Facilities (October 2014): ‘Official Visitors should be available at the facility to deal with the inquiries and complaints from anyone who has placed their name down on the list to be interviewed by the Official Visitor, and to allow time to conduct an examination of the facility... Official Visitors are required to resolve an inquiry or complaint, if it is possible to do so, by bringing it to the attention of the General Manager of the Centre... Where it is not possible for a complaint to be resolved locally, the Official Visitor can bring the complaint to the attention of the Commissioner, NTDCs or the Minister... When dealing with inquiries and complaints Official Visitors should...Deal with an inquiry or complaint by bringing it to the attention of the appropriate senior staff (eg the manager of security, the manger offender services and programs) or General Manager; Record details or inquiries or complaints in their official diary; Maintain statistical data for completion of reports to the Minister.’
89 Youth Justice Act 2005 (NT) s171, Correctional Services Act 2014 (NT) s29
90 North Australian Aboriginal Justice Agency, Submission No 45 to Australian Human Rights Commission, OPCAT in Australia Consultation, July 2017: ‘Based on NAAJA’s experiences, the inspection framework in the Northern Territory (NT) for places of detention would need to be substantially improved to be OPCAT-compliant. Of particular concern is the overwhelming need for an independent statutory body to be established to identify systemic issues in the delivery of correctional services... Despite the importance of their role, Official Visitors lack functional independence which is an essential requirement under OPCAT. As Article 1 of OPCAT states, the protocol’s objective is to establish a system of regular visits undertaken by independent bodies. The Official Visitor’s lack of independence is particularly highlighted by how they can be subject to conditions the Commissioner for Corrections deems appropriate. There is also no information surrounding how this service is made culturally appropriate for Aboriginal and Torres Strait Islander (ATSIC) people. For example, whether prisoners are provided with an interpreter when they meet with the Official Visitor is not addressed under legislation.’
91 Youth Justice Regulations 2006 (NT) r32(b).
92 Youth Justice Act 2005 (NT) s170(2) and s(3).
93 Correctional Services Act 2014 (NT) s30(3) and s(4).
is working effectively.” The Minister may appoint a person to be an official visitor for a detention centre, and for a custodial correctional facility, consulting with the Commissioner before appointing or reappointing a person as an official visitor. The Minister may terminate the appointment of a person as an official visitor for inability, inefficiency, misbehaviour or physical or mental incapacity. The Minister may, by Gazette notice, issue guidelines for Official Visitors to assist them in performing their functions under the Act. The rate of remuneration for Official Visitors will be determined by the Minister. Of note, the NTRC’s recommendation that the OVP report to the Minister, rather than Parliament, would compromise the OVP’s independence, required under OPCAT.

The purpose of the OVP is distinct from that of an NPM under OPCAT, with a focus on ‘maintain[ing] public confidence in correctional facilities and the management of prisoners in those facilities... [e]nsur[ing] that correctional facilities are appropriately managed in accordance with relevant legislation and community expectations.’ Further concerns arise in relation to the prescribed standards against which assessments are to be made, with limitations including that ‘[a]ssessments must be based on accepted and established standards for the management and treatment of prisoners held in correctional facilities,’ with the Handbook referencing the Standard Guidelines for Corrections in Australia and relevant legislation. ‘Official Visitors should... make observations and recommendations aligned with these standards.’

The manner in which the visits are conducted are also not OPCAT-compliant, as Official Visitors ‘cannot solicit prisoners who have not placed their name down on the list to be seen by the Official Visitor,’ and they require ‘the permission of management... to move around the facility with the assistance of staff.’ Finally the visits are not unannounced: ‘[t]he Official Visitor should contact the delegated officer at the correctional facility (at least one week prior) to arrange a suitable day and time to conduct the visit.’ Additionally, the evidence provided by an Official Visitor to the NTRC on the operation of the OVP was unfavourable in relation to multiple aspects of the program, including in terms of training and detaining

---

93 Youth Justice Act 2005 (NT) s169(1).
94 Correctional Services Act 2014 (NT) s26(1) and (4).
95 Ibid s27(1).
96 Ibid s32.
101 Ibid.
102 Ibid.
103 Ibid.
104 Ibid.
105 Ibid.
106 Statement by Karen Heenan, Official Visitor, *Royal Commission into the Detention and Protection of Children in the Northern Territory* (10 May 2017) [18]: ‘The training was woefully inadequate and not a reflection of the importance and significance of the role.’
authority responses to the Visitors.107 The NTRC found that ‘[t]he Official Visitors program failed to identify serious instances of mistreatment of children and young people, and poor living conditions in youth detention. The capacity of the Official Visitors program to deliver robust oversight was compromised by a lack of... inspection and/or monitoring experience and training for appointed visitors.’108

The NTRC recommended ‘that the Official Visitor Program be located in and managed by the Commission for Children and Young People.’109 NAAJA’s submission to the NTRC echoes its recommendations, proposing that the OVP be relocated to the OCC and that there be Aboriginal identified positions.110 This report recommends that monitoring by lay persons does not form part of the NPM in the NT, a position explained under Are both inspecting and monitoring functions necessary in the NT?

YOUTH JUSTICE ADVISORY COMMITTEE

The functions and membership of the Youth Justice Advisory Committee (YJAC) are such that it cannot be characterised as independent of detaining authorities in the NT. The functions of the Committee are ‘to monitor and evaluate the administration and operation of [the Youth Justice Act]; to advise the Minister (whether on request by the Minister or otherwise) on issues relevant to the administration of youth justice, including the planning, development, integration and implementation of government policies and programs concerning youth; to collect, analyse and provide to the Minister information relating to issues and policies concerning youth justice; any other functions imposed by this Act; any other functions as directed by the Minister.’111 Membership includes ‘one person nominated by the CEO; one person nominated by the Commissioner of Police; one person nominated by the Agency responsible for protection of children and young people; one person nominated by the Agency responsible for education of youth; one person nominated by the Agency responsible for crime prevention; one person nominated by a peak youth organisation; one person nominated by the Law Society Northern Territory; the remainder drawn from the community generally, and the Aboriginal community in particular. The Minister must be satisfied that each person appointed to be a member has experience, skills, qualifications or other credentials that the Minister considers appropriate for the person to satisfactorily contribute to the Committee’s work.’112

The NTRC recommendations support a continuation of YJAC as an advisory body to the NTG.113

107 Ibid [60-61]: ‘The Responses were limited and did not always respond to every concern I had raised in my reports. I also found that the Responses did not provide adequate transparency and detail in response to my concerns. I would have benefited from more dialogue or a greater and more frequent exchange of information to appreciate that the role was being taken seriously and that there was some level of accountability.’


110 North Australian Aboriginal Justice Agency, Submissions on Youth Detention, Royal Commission into the Protection and Detention of Children in the Northern Territory (July 2017) Recommendation 90, 146: ‘NAAJA recommends the introduction of a Community Visitors Program to fall under the purview of an Aboriginal Children’s Commissioner (see section 8.3.6), or the Children’s Commissioner. Community Visitors should have expanded powers including the power to visit detention facilities without notice and the power to inspect documents. Community Visitors should report on matters such as the appropriateness and standard of facilities, the adequacy of information provided to young people in detention and their family/guardian, the effectiveness of the complaints process and adequacy of information provided to young people about it, and staff treatment of young people. Further, there should be specific provision for the appointment of Aboriginal visitors to ensure the needs and concerns of Aboriginal children in detention are adequately addressed... [recommending that] the current Official Visitors Program be replaced with a Community Visitors Program established under an independent authority such as the Commissioner for Aboriginal Children and Young People. Further, that there should be Aboriginal identified positions within the Community Visitors Program.’

111 Youth Justice Act 2005 (NT) s204.

112 Ibid s206(2) and (3).

113 Commonwealth, Royal Commission into the Detention and Protection of Children in the Northern Territory, Final Report (2017) vol 4, 17: ‘The Commission considers that the Youth Justice Advisory Committee should still be retained to provide policy advice to the Northern Territory
YJAC’s annual report 2017-2018 described site visits to Don Dale Youth Detention Centre and Alice Springs police watch house, but descriptions and recommendations were incredibly brief compared to what might be expected of an NPM.114 Similarly, the section in the report on Alice Springs Youth Accommodation Support Service (ASYASS) Supported Bail Accommodation and Saltbush Supported Bail Accommodation were limited to description without any accompanying analysis.115 In its annual report 2016-2017, YJAC referred to its visit to Don Dale Youth Detention Centre. The purpose of the visit was, in part, an induction for new members via a tour (add odds with an inspection function, in terms of both purpose and independence), and was limited in scope to the ‘Make it Safe’ refurbishment. The descriptions are more detailed than in the later annual report, as described above, but no recommendations are made.216

As such, YJAC does not conduct visits as envisaged under OPCAT as part of its oversight role.

LAWYERS AND THE CUSTODY NOTIFICATION SCHEME

The SPT recognises that ‘access to a lawyer is important during periods of pretrial detention,’ and is a ‘fundamental safeguard against torture and other ill-treatment.’117 The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur), Nils Melzer, asserts that ‘States should ensure that preventive safeguards against torture and ill-treatment are put into place throughout all institutions, mechanisms and procedures. In particular, persons deprived of their liberty should be given the opportunity to inform their relatives, to contact a lawyer and to see a physician immediately after arrest and to access independent complaints mechanisms at any time.’118

The Committee for the Prevention of Torture (CPT) states that:

[to be fully effective, the right of access to a lawyer should be guaranteed as from the very outset of a person’s deprivation of liberty. Indeed, the CPT has repeatedly found that the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Further, the right of access to a lawyer should apply as of the moment of deprivation of liberty, irrespective of the precise legal status of the person concerned; more specifically, enjoyment of the right should not be made dependent on the person having been formally declared to be a “suspect”. For example, under many legal systems in Europe, persons can be obliged to attend – and stay at – a law enforcement establishment for a certain period of time in the capacity of a “witness” or for “informative talks”; the CPT knows from experience that the persons concerned can be at serious risk of ill-treatment.119

Government... which provides expert advice to the Northern Territory Government. The Commission for Children and Young People could provide secretariat assistance to the Youth Justice Advisory Committee but it could equally be supported the same way as the Early Childhood Expert Reference Panel. The Commission for Children and Young People, with its expanded powers and responsibilities, full-time professional staff and statutory independence, is likely to be in a better position to collect information and consider the effectiveness and administration of legislation than the Youth Justice Advisory Committee.’

115 Ibid.
116 Youth Justice Advisory Committee, Annual Report 2016-17, 22-23.
117 Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture 54th sess, UN Doc CAT/C/54/2 [26 March 2015] [91].
118 Nils Melzer, Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN DocA/73/207 (20 July 2018) [77](d).
119 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Extract from the 21st General Report of the CPT: Access to a lawyer as a means of preventing ill-treatment (2011) [19].
It is thus well-established that access to lawyers when individuals are first detained is an important protection against torture and ill-treatment, although this is a complementary function to the preventive visits by an NPM. In the NT, NAAJA operates the Custody Notification Service (CNS), under which lawyers are notified when an Aboriginal person is taken into custody (although not under the paperless arrest or protective custody regimes).

**MEDICAL PROFESSIONALS**

The SPT states that, ‘[l]n particular, health professionals have a key role to play in the prevention and documentation of torture and other ill-treatment and should be trained on the use of the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the Istanbul Protocol), to effectively investigate and document torture and other ill-treatment.’ With the proposed transfer of primary health care provision from the NTG to Danila Dilba and Central Australian Aboriginal Congress in the youth detention facilities, these ACCOs will have a significant prevention role in the future. Again, this function is to be differentiated from that of the proposed NPM.

**CREATING A NEW BODY WOULD NOT BE DUPLICATING A FUNCTION THAT ALREADY EXISTS**

Murray et al affirm that OPCAT:

- does not require that State Parties establish any new human rights bodies or mechanisms. Rather, Article 17 requires that States ‘maintain, designate or establish’ within one year of the entry into force of the Protocol ‘one or several independent national preventive mechanisms for the prevention of torture’. This was an essential element of the compromise package, as those States with such bodies would not have accepted any obligation that would have required them to duplicate what was already in existence. As a result, whether it is necessary

---

120 Association for the Prevention of Torture, “Yes, torture prevention works”: Insights from a global research study on 30 years of torture prevention (September 2016) 6-7.

121 Jacqueline Breen, ‘Paperless arrests’, protective custody left off NT scheme meant to prevent watch-house deaths’, ABC News <https://www.abc.net.au/news/2019-08-20/paperless-arrests-left-out-of-custody-notification-scheme/11399310> (20 August 2019): ‘[R]egulations tabled in NT Parliament show the rule will not apply to people taken into protective custody over their intoxication. Nor will it cover someone apprehended under the so-called paperless arrest laws, which allow NT Police to detain someone over an offence for which the maximum penalty is a fine rather than jail… The last death recorded in the Darwin watch house involved a paperless arrest custody — Yuendumu man Kumanjayi Wadadenty, 59, died in a cell three hours after he was arrested on the suspicion of drinking by a park in the city centre in 2015… The North Australian Aboriginal Legal Aid Agency (NAAJA) was contracted to run the CNS and has been receiving calls since June… NT Police said it had worked with NAAJA on a memorandum of understanding governing the scheme’s operations.’

122 Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture 54th sess, UN Doc CAT/C/54/2 (26 March 2015) [94].

123 Northern Territory Government, Territory Families, Statement of Commitments (April 2019) 1: ‘The Northern Territory Department of Health (NT Health) currently provides primary health care services at the Alice Springs Youth Detention Centre (ASYDC) and the Don Dale Youth Detention Centre (Don Dale). NT Health and Danila Dilba are at an advanced stage of negotiations for a contract by which Danila Dilba will take over provision of primary health care services at Don Dale. NT Health commits to use best endeavours to: conclude negotiations with Danila Dilba for the contracting out of the provision of Primary Health Care services at Don Dale by 1 August 2019, which negotiations will include a transition plan, funding levels, scope of the service, how the services relate to other NT services (referral pathways and allied services), timeframe/milestones in achieving transition, exchange of health records and back up arrangements; and open negotiations with Central Australian Aboriginal Congress (Congress) for the take over of Primary Health Care services at ASYDC by providing Congress by 30 April 2019 with a proposed scope of works.’
for a State to create a new body depends upon how comprehensive a system of inspectorial bodies is currently in place, their powers, and their independence.\footnote{124}{Rachel Murray, Elina Steinerte, Malcolm Evans, and Antenor Hallo de Wolf, ‘The Text of OPCAT’ in The Optional Protocol to the UN Convention Against Torture (Oxford University Press 2011) 54.}

However, as Evans and Haenni-Dale highlight, ‘[o]nly those bodies which fully comply with the criteria set out in the Optional Protocol may be designated under Article 17,’\footnote{125}{Malcolm D. Evans; Claudine Haenni-Dale, ‘Preventing Torture - The Development of the Optional Protocol to the UN Convention against Torture’ (2004) 4 Human Rights Law Review 50.} and as demonstrated above, none of the NT oversight mechanisms currently conduct OPCAT-compliant inspections of places of detention. The ADC is the statutory body which is the furthest progressed in terms of OPCAT-compliant inspections, with the OCC having undertaken a couple of monitoring visits, albeit limited by its current mandate.

**UK NPM**

‘The UK made the decision not to create a new body or bodies as it already had bodies undertaking monitoring and inspection functions, and the government assessed those bodies as having sufficient independence.’\footnote{126}{United Kingdom National Preventive Mechanism, United Kingdom National Preventive Mechanism submission to the 66th session of the Committee against Torture (2019) 7.}

**NEW ZEALAND ESTABLISHED ONE NEW NPM, AND DESIGNATED FOUR EXISTING BODIES AS NPMS**

‘A new entity, the Inspector of Service Penal Establishments (ISPE) was created through legislative change, and given responsibility for monitoring NZ Defence Force facilities. This ensured that the NPM was independent of the Defence Force and that military detention was opened up to regular, independent scrutiny for the first time.’\footnote{127}{Human Rights Commission, The Optional Protocol to the Convention against Torture (OPCAT) in New Zealand 2007–2012: A review of OPCAT implementation by New Zealand’s National Preventive Mechanisms (April 2013) 19.}

**A NOTE ON RECOMMENDATIONS FROM OTHER SOURCES REGARDING THE NT NPM**

**THE NTRC AND OVERSIGHT OF YOUTH DETENTION**

As already mentioned above, the NTRC recommended that the OCC take on the NPM functions in relation to youth detention facilities and other locations where children are detained.\footnote{128}{Commonwealth, Royal Commission into the Detention and Protection of Children in the Northern Territory, Final Report (2017) Findings and Recommendations, recommendation 40.3, 61: ‘The Commission for Children and Young People be provided with the following functions, in addition to those already contained within section 10 of the Children’s Commission Act (NT): to inspect… detention centres, residential facilities and any places that are required to be OPCAT compliant, and… any other place where a child who is in the child protection system resides, if a complaint of serious harm is raised.’ Also at recommendation 40.4, 62: ‘The Commission for Children and Young People be provided with functions that are compatible with the requirements of a National Preventative Mechanism as set out in OPCAT.’ Also at recommendation 40.5, 62: ‘The Commission for Children and Young People should, in addition to the current powers of the Children’s Commissioner contained within section 10(2) of the Children’s Commissioner Act (NT), be provided with the following powers: to inspect a place where children are involuntarily held or routinely accommodated in an institutional setting, without prior notice.’}
The NTRC rejected the approach of creating a new body, an inspectorate, although it did hear evidence from the Western Australian Inspectorate of Custodial Services. Of course, the NTRC’s mandate did not include consideration of places of detention within the criminal justice system that detain adults, which under OPCAT will need to be inspected. The NTRC was limited by its mandate, unable to consider how the NT might be OPCAT compliant across all places of detention in the criminal justice system. As a result of the different scopes of the NTRC and this report (in terms of which places of detention were being considered), different conclusions to that of the NTRC have been reached in this report. It is recognised that the NTG has made a commitment to create a Commission for Children and Young People which would ‘inspect detention facilities and out-of-home care facilities,’ that some NGO recommendations regarding inspections have accepted the NTG’s decision to implement the NTRC recommendations relating to OPCAT implementation, and that this report proposes an alternative approach. This paper’s scope considers only the NTRC’s proposed OCC NPM functions of monitoring and/or inspecting, and does not consider or make recommendations in relation to the OCC’s existing functions, such as complaints or investigations.

In rejecting an inspectorate model for the NT, as proposed in the Hamburger Report, the NTRC was correct in stating that the ‘needs of children are distinctly different from those of adult prisoners and there is a risk that if subject to one oversight body the needs of adult prisoners would dominate due to their numbers.’

However, this report’s proposed model of an Aboriginal Inspectorate as NPM (discussed in greater detail under An Aboriginal Inspectorate) would meet these unique needs via a Deputy Inspector, whose focus is to be children and young people, and a specialised Children and Young People’s Unit within the Inspectorate. This model would address the very specific needs of Aboriginal children, being best placed to respond appropriately to their vulnerabilities, which are unique due to the intersection of their age and Aboriginality. Although the NTRC raised concerns that a new inspectorate that focused only on youth detention, and not child protection, ‘would have a narrow and limited role,’ having a distinct Children and Young People’s Unit within an


130 Northern Territory Government, Safe, Thriving and Connected: Generational Change for Children and Families 2018-2023 (April 2018) 50: ‘The Northern Territory Government will implement the intent and direction of all recommendations relating to the Commission for Children and Young People over three stages. Stage 1 – commencing 1 July 2018 the Northern Territory Government will increase the operational budget of Office of the Children’s Commissioner by $580,000 per annum. This additional funding is to increase the Commissioner’s capacity to monitor and audit the youth justice and child protection systems, and inspect detention facilities and out-of-home care facilities. Stage 2 – funding of $100,000 in 2018-19 has been allocated to conduct consultations on the final design and responsibilities of the Commission for Children and Young People consistent with the powers outlined in the Royal Commission recommendations and best practice. Stage 3 – Following the consultation, design and costing process the Northern Territory Government will establish the new Commission for Children and Young People and develop the appropriate legislation to embed the agreed functions and powers.’

131 Aboriginal Peak Organisations of the Northern Territory and North Australian Aboriginal Justice Agency, NGO Alternative Report to the United Nations Committee on the Rights of the Child: Response to the Australian Government’s State Report on the United Nations Convention on the Rights of the Child: A joint report from the Aboriginal Peak Organisations of the Northern Territory (APD NT) and the North Australian Aboriginal Justice Agency (NAAJA) on issues affecting Aboriginal Children in the Northern Territory (1 November 2018) 164(c), 34: ‘The Australian Government ensure that the Office of the Children’s Commissioner is adequately resourced to perform monitoring functions consistent with the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).’

132 Commonwealth, Royal Commission into the Detention and Protection of Children in the Northern Territory, Final Report (2017) vol 4, 19: ‘The Commission understands that the intention of the Commonwealth Government is that multiple bodies from federal, state and territory governments will be responsible for inspections and the Commission thinks that the Commission for Children and Young People could be the natural body to undertake the inspection of places of detention that house children and young people for the purposes of Australia’s implementation of the OPCAT.’


Aboriginal Inspectorate (potentially with an expanded mandate to include child protection) would address this issue, and not result in ‘too many different independent oversight bodies’ in the small NT jurisdiction.

The NTRC considered the advantages of having an Aboriginal Children’s Commissioner in Victoria, as per the evidence provided by Mr Jackamos. The NTRC, having reflected on the evidence supporting the creation of an Aboriginal Children’s Commissioner, decided that the positive outcomes of having an Aboriginal Children’s Commissioner could be achieved by ‘ensuring that at least one Aboriginal person is, as Mr Jackamos is, a member of the relevant oversight body.’ The NTRC determined that it would be ‘anomalous’, given that the majority of children in the child protection system and youth detention in the NT are Aboriginal, ‘to create a specialist position dedicated to the interests of the majority of children, within a broader body dedicated to the interests of all vulnerable children.’

The NTRC also stated that ‘[i]f the Office of the Children’s Commissioner were to be replaced by the Aboriginal Children’s Commissioner, it leaves the question of who provides oversight for non-Aboriginal children.’

The NTRC considered how creating an Aboriginal Children’s Commissioner (while retaining a generalist OCC) would greatly reduce the function of the generalist OCC, ‘given how few vulnerable non-Aboriginal children are in detention or child protection.’ To that end, the NTRC made the recommendation to not create an Aboriginal Children’s Commission and to instead expand the OCC’s mandate under a Commission for Children and Young People (with two commissioners, one of whom is to be Aboriginal) to monitor youth detention and Out-Of-Home-Care (OOHC) residences.

With all due respect to the NTRC, this report does not agree that deciding whether to create a culturally competent specialist statutory body to address the specific and unique needs of Aboriginal children, who are grossly overrepresented in the NT’s child protection and youth justice systems, should be predicated on how

---

136 Ibid.
137 Ibid 26-27: ‘Mr Jackamos outlined a number of benefits that his role provides, including: having an Aboriginal person in the role who has the background and personal experience to understand, identify with and relate to Aboriginal people who engage with the Commission and child protection services. That person’s knowledge of the Aboriginal community, community infrastructure, clans and family trees is essential for credibility and acceptance by Aboriginal communities across Victoria; providing an Aboriginal-centric service that understands, hears and promotes the particular needs of Aboriginal children, and the ability to engage directly with the Aboriginal community, so that they understand their rights, and know where to direct their concerns.’
138 Ibid.
139 Ibid 27: ‘There is a clear need in the Northern Territory for a much greater focus on engagement with the Aboriginal community on issues relating to vulnerable children. On balance, however, the Commission does not recommend the introduction of an Aboriginal Children’s Commissioner in the Northern Territory. Taking the evidence and submissions as a whole, the main reasons given for the introduction of such a Commissioner were: the need to focus on the particular needs of Aboriginal children and families, the need for a senior statutory officer with the standing and cultural competence to communicate effectively with Aboriginal communities, and the need for a much greater focus on prevention and early intervention, not just crisis management.’
140 Ibid 27.
141 Ibid.
142 Ibid.
143 Ibid 27: ‘The fact that Aboriginal children are so grossly overrepresented in these systems, and have been for many years, does suggest a systemic failure by the Northern Territory Government and community to take account of their needs. A significantly increased focus on preventing these children from entering these systems is needed. While an Aboriginal Children’s Commissioner might assist with this task, on balance the Commission considers it would be preferable not to split the roles of oversight for Aboriginal and non-Indigenous children, but to instead have an office dedicated to all children, which includes a strong focus on the needs of Aboriginal children. The Commission considers that an appropriate way to meet the concerns expressed about focus, cultural competence and communication with Aboriginal people, is to ensure that at least one of the two Commissioners in the oversight body is an Aboriginal person.’
144 Also at 28: ‘Recommendation 40.2: The Commission for Children and Young People be provided with the resources and staff to ensure it can conduct its expanded functions, with two Commissioners, one of whom will be an Aboriginal person, and a minimum staffing level of 20 full-time equivalent employees.’
this might impact the function of the existing (or future generalist) OCC. It denies those Aboriginal children a more culturally appropriate service and better protection, on the basis of a decrease in workload for the current OCC. The very fact that a generalist OCC would have greatly decreased opportunity to exercise its mandate if there were an Aboriginal Children’s Commissioner (or an Inspectorate, as proposed in this paper) is in itself an alarming (and correct) conclusion, and should instead prompt a response that provides a targeted, tailored approach to address the specific needs of the vulnerable group of detained Aboriginal children.

In youth detention, almost 100% of children are Aboriginal,\(^\text{143}\) and this can only be characterised as a crisis in the youth justice system which necessitates a targeted approach, through an Aboriginal Inspectorate, to prevent the torture and ill-treatment of detained Aboriginal children. There may be, on occasion, non-Indigenous children in detention during inspections, but many of the standards and expectations of the Inspectorate would be applicable to non-Indigenous children, ensuring that the Inspectorate would be well-placed to effectively exercise its function in relation to this much smaller cohort.

Of note, this paper focuses on the criminal justice system, to the exclusion of OOHC residences, which should also be inspected under OPCAT. It is beyond the scope of this paper to consider with which body oversight of OOHC residences should sit. Given the high degree of cross-over between the youth justice and child protection spaces, it is not an insignificant limitation of this report. It is suggested, however, that the oversight function could sit with both the existing OCC and the proposed Aboriginal Inspectorate (expanding the mandate of the model proposed in this paper,\(^\text{144}\) and addressing the NTRC’s concern on this issue\(^\text{145}\)), with the bodies having jurisdiction over non-Indigenous and Indigenous children respectively. If this were to occur, then there could be opportunities for future collaboration and joint inspections between the OCC and Inspectorate, an approach considered in greater detail under Inspectorate’s relationship with other Northern Territory statutory bodies (including other NPMs).

**CIVIL SOCIETY SUBMISSIONS SUPPORTING THE CREATION OF AN INDEPENDENT CUSTODIAL INSPECTORATE**

APONT’s submission to the NTRC referenced the Hamburger Report, recommending the creation of an Inspector of Custodial Services.\(^\text{146}\) The Criminal Lawyers Association of the Northern Territory’s (CLANT) submission to the AHRC OPCAT in Australia Consultation referred to CLANT’s and the Making Justice Work

---


\(^{144}\) Noting that NPM designations can be reviewed. See Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2016 to 30 June 2017 (June 2018) 13.

\(^{145}\) Commonwealth, Royal Commission into the Detention and Protection of Children in the Northern Territory, Final Report (2017) vol 4, 25-26: ‘While the Commission sees advantages in the model of an Inspectorate of Custodial Services, on balance the model is not optimal as an oversight mechanism for the Northern Territory youth justice system. The principal reasons [include]... given the connection between the detention system and the child protection system... and the fact that each system raises issues relating to the treatment of vulnerable children, there are benefits in having a single body to provide oversight for both systems as the Children’s Commissioner currently does, drawing upon expertise in relation to vulnerable children in both roles.’

\(^{146}\) Aboriginal Peak Organisations Northern Territory, APO NT Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory (31 July 2017) 182: ‘There is overwhelming need for an independent statutory body to be established to identify systemic issues in the delivery of correctional services in the NT, and to ensure greater governmental accountability. A Statutory Authority was recommended in the Hamburger Report to deliver adult corrections and youth justice services. To provide governance and oversight to this authority, it was also recommended that a board be established, which would be chaired by an Indigenous person. It would be encompass membership from: Indigenous people, experts in particular disciplines and industrial unions. APO NT supports this recommendation. Also recommended in the Hamburger Report, is the need for an Inspector of Correctional Services to provide a ‘watchdog’ function over the correctional services governance and provide independent scrutiny of the department. The Office of the Inspector of Correctional Services will need to be independent from government, to ensure transparency and accountability.’
coalition’s repeated calls for the establishment of an Independent Custodial Inspector. 147 NAAJA’S submission to the AHRC OPCAT in Australia Consultation stated that the ‘NT would benefit from an independent custodial inspector, similar to the Western Australian Inspector of Custodial Services.’ 148 The Northern Territory Legal Aid Commission’s (NTLAC) submission to the NT Social Policy Scrutiny Committee inquiry into the Monitoring of Places of Detention recommended a model similar to that of the West Australia Inspector of Custodial Services. 149

COMMENTS BY THE SPECIAL RAPPOREUR

The Special Rapporteur has (albeit a couple of years ago) supported the approach of the Office of the Inspector of Custodial Services in Western Australia, stating they:

[welcome] the recent announcement by the Government that Australia intends to ratify [OPCAT]… which will require the establishment of a national system of independent and regular monitoring of all places of detention, a measure that the country is in dire need of. The Special Rapporteur visited the Office of the Inspector of Custodial Services in Western Australia, which offers a good model and should be replicated in other states and territories, with an added mandate to cover police custody. 150

MAKING STRATEGIC DECISIONS REGARDING NPM DESIGNATION AND AVOIDING ‘TURF WARS’

Murray et al’s caution on avoiding ‘turf wars’ should be heeded, as the NT and Australia move towards compliance with OPCAT:

[T]here is a clear need now to become more strategic in how OPCAT fits within the existing structures. These require an honest consideration not just by the SPT and NPMs as to their strengths and weaknesses but also an audit of what is available internationally, regionally, and nationally, to identify where they each fit, how they can avoid duplication, and how they can dovetail and support each other’s work. This can sometimes be difficult, with each institution often competing for space, trying to identify its own niche and role. As we have seen, when it comes to designation of NPMs, the vast majority of national bodies are vying for selection, with only a few

---

147 Criminal Lawyers Association of the Northern Territory, Submission No 21 to Australian Human Rights Commission, OPCAT in Australia Consultation, July 2017, 1: ‘CLANT has for several years publicly called for the ratification of OPCAT… [O]n 2 October 2014, on behalf of CLANT I was one of 11 signatories to a statement… calling for, among other things, an Independent Custodial Inspector. On 2 June 2015, CLANT endorsed a statement issued by the Making Justice Work Coalition… renewing that call. On 30 May 2016, I wrote on behalf of CLANT to the National Children’s Commissioner… urging the immediate ratification of… OPCAT… which would provide a mechanism for independent oversight of youth detention facilities in the Northern Territory. The associated Bill then before the Northern Territory was however allowed to lapse…I welcome the indication that has been provided by the recently elected Northern Territory government that an Independent Custodial Inspectorate will be established.’ See also at 6: From Making Justice Work joint statement – ‘Establish an Independent Custodial Inspector (such as exists in Western Australia) who has unfettered access to youth detention centres to ensure national and international standards are being complied with.’

See also at 12: From CLANT submission to the National Children’s Commission (30 May 2016): ‘The repeated calls by stakeholders including CLANT for the establishment of the NT Independent Custodial Inspector have been rebuffed.’


149 Northern Territory Legal Aid Commission, Submission No 3 to Social Policy Scrutiny Committee, Inquiry into the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2018, 4.2C: ‘During the Public Briefing in relation to this Bill, Mr Robert Bradshaw indicated that there may be a number of inspection bodies in the Northern Territory and that all NPMs are likely to be coordinated by the Commonwealth Ombudsman. The Commission is concerned that fragmentation of the inspectorate role in the Northern Territory is likely to result in inconsistent inspection standards, dilution of expertise about OPCAT style inspections and insufficient resource allocation for a truly preventative inspection framework. Again, the West Australian Inspector of Custodial Services is a prime example of the efficiency and effectiveness of reposing inspection functions in a single inspection body.’

150 Report of the Special Rapporteur on the rights of Indigenous peoples on her visit to Australia, UN GAOR 36th sess, Agenda Item 3, UN Doc A/HRC/36/46/Add.2 8 (August 2017) [80].

62
arguing for non-inclusion. These turf wars should not blur the identification of which institutions and bodies are best suited to particular tasks.151

There is no suggestion that this is currently the state of play in the NT, but there will clearly be different views on what the best model for the NT will be. That is why it is particularly important to ensure that designation and development of the NT’s NPM(s) is transparent and involves a robust consultation process.

WHY THE NT SHOULD CREATE A NEW BODY

As demonstrated above, creating a new body to be the designated NPM with oversight of the criminal justice system would not result in duplication of any currently existing oversight bodies or functions in the NT. In the below section (under An Aboriginal Inspectorate), there is more detailed discussion as to why this new body should be an Aboriginal Inspectorate, as opposed to a generalist custodial inspectorate.

Unlike some other Australian jurisdictions,152 there is no custodial inspectorate in the NT that has developed expertise over time in relation to monitoring and/or inspections. If the NTG were to consider existing NT statutory bodies/programs that could potentially be designated with the NPM function, it might look to those bodies that already have some experience in inspection and/or monitoring. In terms of monitoring places of detention in the criminal justice system, there exists the OVP (which has a number of significant shortcomings, as discussed above) and the OCC, which has only on two occasions conducted monitoring visits and currently does not have the mandate for inspecting/monitoring places of detention. The ADC is the most advanced NT statutory body in terms of OPCAT compliance, with regard to places of detention not considered in this report (prisons, youth detention facilities etc).

An important question that the APT asks is whether the existing oversight mechanisms are ‘readily reparable’. The APT submitted to the AHRC OPCAT in Australia Consultation that there needs to be ‘a clear-eyed assessment of any existing visiting bodies for compliance with all OPCAT requirements. If they fall short in any way which is not readily reparable, a new body or bodies should be created to carry out NPM functions.’

Given the lack of established institutions with the requisite expertise in the NT, perhaps a different question could be posed. The focus could shift away from how to ‘repair’ that which already exists. The fact that the NT has no custodial inspection bodies in operation could be regarded as a disadvantage, as compared with other Australian jurisdictions, with more work needing to be done. But it could just as easily be seen as an opportunity to create an innovative, culturally-appropriate, context-specific, OPCAT-compliant NPM model for the jurisdiction which has the highest rates of incarceration in Australia, and appalling overincarceration rates of Aboriginal people.

As my Fellowship progressed, the question I needed to ask became clearer: If the NT were to take not the most convenient, the fastest, the cheapest path to establishing or designating an NPM, but the path that would most likely achieve the preventive objective of OPCAT, protecting Aboriginal prisoners and detainees from torture and ill-treatment, what would the NT NPM look like?

**THE RISK OF THE PREVENTIVE AND REACTIONARY FUNCTIONS BECOMING INTERTWINED, OR THE PREVENTIVE FUNCTION BEING SUBSUMED, IF A COMPLAINTS-DRIVEN BODY IS DESIGNATED THE NPM**

The SPT has recommended that where an existing body is designated an NPM, the NPM function should be carried out by ‘a separate unit or department with its own staff and a separate budget... The relationship between the [NPM] function and the rest of the organization, the working methods and the safeguards applicable to preserve the independence of that function should be clearly set out in the relevant internal regulations.154 The SPT has noted on one of its country visits that there is a ‘danger that the preventive mandate of the [NPM] could become intertwined with or diluted by other functions of the [body], such as the reception and investigation of individual complaints.155

Operating in an analogous system of prevention of torture and ill-treatment, the CPT has asserted that ‘it is inadvisable for national preventive mechanisms or other similar monitoring bodies also to deal directly with formal complaints. Where the same institution is designated to handle complaints and to monitor places of deprivation of liberty, both functions should preferably be kept separate and performed by clearly distinct entities, each with its own staff.156

The risk of preventive and reactive functions becoming intertwined can certainly be mitigated (although not eliminated) through having a separate unit with separate staff, with the New Zealand Ombudsman being an example of good practice. There is an advantage of having a complaints-driven body also undertaking NPM functions, in terms of having information regarding complaints readily available (although it should be noted that information should not flow in the other direction, from the inspectorate unit to the complaints handling unit). This advantage is, however, significantly outweighed by the advantages of having a separate NPM, and it is recommended that a new body be created as the NT NPM.

**A REVIEW OF OPCAT IMPLEMENTATION IN NEW ZEALAND**

‘An initial challenge was the need to carefully manage the relationship between existing complaints and investigation roles of NPMs, and the new preventive monitoring role under OPCAT. Within the resources available, care has been taken to keep these roles as separate as possible. In particular, OPCAT visits have a distinct process and methodology and a clear preventive focus. Nevertheless, due to the limited resources and small teams that NPMs have, for the most part,
NPM staff carry out OPCAT monitoring alongside other work with the exception of the Ombudsman, whose inspectors do OPCAT work only. The complaints role has in fact been helpful. Analysis of complaints data can help to flag issues and inform OPCAT planning. Given the limited resources, and the impact that this has on NPMs’ ability to carry out visits, complaints information becomes even more important.¹⁵⁷

**OMBUDSMAN**

In its *Strategic intentions for the period 1 July 2019 to 30 June 2023*, the Ombudsman identified the following risk:

‘Loss of international credibility and reputation: There is a risk to New Zealand’s international credibility and reputation if my Office fails in any respect in my inspection and monitoring roles under international conventions. In relation to my inspection role, the international community has identified a risk inherent in having ‘a single institution...to serve both as [National Preventive Mechanism] and as a forum for individual complaints’.’

The Ombudsman identified the following strategy to manage this risk:

‘I maintain effective networks and work closely with the other New Zealand and international agencies involved. Strong internal separation between my inspection and general complaint handling roles.’¹⁵⁸

In its submission to the *AHRC OPCAT in Australia Consultation*, the APT made the following statement:

Because established institutions also work in a diversity of different ways, reflecting their specific history, roles and status, differences in working methods may be deeply embedded and difficult to adapt. There is a risk that, following designation, each institution continues with “business as usual”, without adapting to the new reality of being part of a national NPM system.¹⁵⁹

Taking a ‘business as usual’ approach in a complaints-driven oversight body as opposed to an inspection or monitoring oversight body risks a greater divergence from the NPM preventive function as intended under OPCAT. This is not to say that, should other Australian jurisdictions designate existing custodial inspectorates as NPMs, a lax approach should be taken in implementing the changes necessary to ensure OPCAT compliance. Rather, this is a comment on the risk of a greater degree of non-compliance with OPCAT if business does, indeed, continue as usual in a complaints-driven body.

The NTRC stated that ‘[w]hile the Commission sees advantages in the model of an Inspectorate of Custodial Services, on balance the model is not optimal as an oversight mechanism for the Northern Territory youth justice system. The principal reasons are... the Inspectorate model is appropriate for detention but less so for child protection, where oversight is less focused on inspections.’¹⁶⁰ Although this report focuses on the criminal justice system, OOHC residences should also be inspected under OPCAT. What is demonstrated in the NTRC’s comment is the risk that a complaints-driven body, if designated the NPM, could prioritise its complaints work rather than its preventive work (which may well be sidelined).

---


OPCAT PROJECT

Pringle from the Canadian OPCAT Project considers the Canadian context, and concludes that, ‘as most existing human rights bodies are complaints-driven and have no track-record of torture prevention, their focus and operation in practice would have to undergo wholesale modification. Thus, if such an approach were taken, it is almost inevitable that the implementation of [OPCAT] would necessitate significant institution-building and across-the-board organizational repurposing. 161

The reality is that, if the NTG were to designate an existing body with NPM functions, this would require a significant commitment of resources, both in terms of time and money, if it is to meet Australia’s obligations under OPCAT. As such, moving towards OPCAT compliance will require significant resources regardless of whether an existing body is designated the NPM or a new body is created.

THE RISK THAT THE BODY HAVING BOTH PREVENTIVE AND REACTIONARY FUNCTIONS WILL UNDERMINE THE NPM’S ABILITY TO ENGAGE IN CONSTRUCTIVE DIALOGUE WITH DETAINING AUTHORITIES

The SPT has stated, acknowledging the importance of an NPM having visibility, that:

Based on its experience in working with [NPMs] in different countries, the Subcommittee has noted that, in cases where ombudsman’s offices (national human rights institutions) have taken on the mandate of national preventive mechanisms, it has been difficult for them to build the kind of constructive dialogue envisaged in the Optional Protocol because the authorities have been unable to distinguish clearly between the preventive and reactive roles of these bodies. Since the role of ombudsman’s offices involves taking a critical look at State action, calling attention to problems when they arise and processing individual complaints, among other functions, the authorities are often reluctant to cooperate.162

Murray et al have also addressed this issue, commenting that:

for some ombudsmen whose remit was primarily based on responding to complaints, the designation as an NPM carries with it an additional challenge of how to relate this more reactive approach with the positive, proactive preventive approach required of OPCAT. In particular, complaints require investigation and OPCAT presupposes a dialogue between the NPM and the State which may sit uneasily with a more adjudicatory complaints process. Various ombudsmen have found ways around this, by for example setting up a separate unit within their body to deal with OPCAT specifically... For some it does not appear to be a problem and indeed they see OPCAT as providing an opportunity for adopting a wider, rights-based approach to their work.163

162 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the national preventive mechanism advisory visit to Ecuador made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/OP/ECU/2 (16 July 2015) 9 [32].
CONCLUSION

Of course, there are disadvantages to creating a new body rather than designating an existing statutory body and benefiting from ‘the expertise, experience and relationships that already existed,’\textsuperscript{164} or ready access to complaints information during preparation for a visit, as discussed above. It might cost more (in the short-term, as effective prevention of torture and ill-treatment decreases costs over time\textsuperscript{165}), and it might take longer to establish and to become fully and effectively functional. But avoiding the risk that the preventive work will be subsumed by or compromised by complaints-driven work (including through the body’s ability to engage in effective dialogue with the detaining authorities) is a compelling reason to establish a new, separate body with NPM responsibilities.

\textbf{RECOMMENDATION:} A new body should be created and designated the NPM.


\textsuperscript{165} National Interest Analysis [2012] ATNIA 6 with attachment on consultation, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 18 December 2002, [2009] ATNIF 10 [11]: ‘In addition to the human rights benefits, monitoring pursuant to the Optional Protocol has the potential to minimise the costs of addressing such instances, including avoiding some costs of litigation and compensation payments.’
AN ABORIGINAL INSPECTORATE
GROSS OVERREPRESENTATION OF ABORIGINAL PEOPLE IN PLACES OF DETENTION IN THE NT CRIMINAL JUSTICE SYSTEM

The Australian Bureau of Statistics has confirmed that for the June quarter 2019 ‘the Northern Territory continued to have the highest imprisonment rate of all states and territories, with 941 persons per 100,000 adult population.’¹⁶⁶ This number is higher than the USA, which is the country with the highest rate of imprisonment in the world, at 655 per 100,000 in 2018.¹⁶⁷

The ABS figure to the left compares the rates of incarceration in Australian States and Territories in June 2018, March 2019 and June 2019. Western Australia has the next highest incarceration rates after the NT, at a significantly lower 346 persons per 100,000.¹⁶⁸

The NT also has the second highest Aboriginal and Torres Strait Islander imprisonment rate among Australian States and Territories (the number of prisoners per 100,000 adult Aboriginal and Torres Strait Islanders), as can be seen in the figure to the left.¹⁷⁰

NTG statistics show that ‘the daily average number of Aboriginal prisoners in custody during 2016-17 was 1,376, which represented 84% of the total daily average.’¹⁷² According to the NT OCC reports, in February 2019, 94% of the young people in Don Dale Youth Detention Centre were Aboriginal¹⁷³ and in April 2019, 100% of the young people Alice Springs Youth Detention Centre were Aboriginal.¹⁷⁴

¹⁶⁹ Ibid.
¹⁷⁰ Ibid.
¹⁷¹ Ibid.
¹⁷³ The Office of the Children’s Commissioner Northern Territory, Don Dale Youth Detention Centre Monitoring Report, 2 May 2019 [4].
¹⁷⁴ The Office of the Children’s Commissioner Northern Territory, Alice Springs Youth Detention Centre Monitoring Report, 2 May 2019 [4].
Incarceration rates in the NT are shocking. The proportion of prisoners and detainees who are Aboriginal is shocking. That these NT statistics are not new information, the fact that these issues have persisted over time, should not lead to complacency or acceptance that these statistics are simply inevitable, that this is a reality that is somehow beyond anyone’s power to change. It is a crisis, an ongoing one, that requires particular attention.

These statistics alone, with almost all youth detainees in the NT being Aboriginal and the vast majority of adult prisoners in the NT being Aboriginal, support taking a tailored and targeted approach to the prevention of torture and ill-treatment of Aboriginal people in places of detention. The NPM, of course, cannot resolve the myriad of factors contributing to these astonishing rates of incarceration. But designating an NPM that is an Aboriginal Inspectorate acknowledges the reality of NT context – that the vast majority of the detainees who will fall within the mandate of an NPM operating in the criminal justice space will be Aboriginal, necessitating a targeted approach.

As the Council of Europe’s *Combating ill-treatment in prisons* handbook advises: ‘[o]verrepresentation occurs when the proportion of a certain group of people within a prison or criminal justice system is greater than the proportion of that group within the general population. Equitable treatment calls for the elimination of all forms of discrimination and also affirmative action to ensure that the special needs of minorities are met’ (when establishing whether a group of prisoners is a minority group, it is important to recall, particularly in the context of overrepresentation of Aboriginal people in detention in the NT, that this does not refer to a numerical minority).

**THE SPECIAL RAPPORTEUR’S COMMENTS**

Taking such a targeted approach would also be responsive to the Special Rapporteur’s assertion that: States are under a heightened obligation to protect vulnerable persons from abuse and should interpret the torture protection framework against the background of other human rights norms, such as those developed to eliminate racial discrimination.

The Special Rapporteur identified a number of factors which contribute to individuals’ or groups’ vulnerability to torture and ill-treatment:

- many of which may be inherent in the social, political and legal system... in environments that are obstructive or oppressive for them and where legal, structural and socioeconomic conditions may create, perpetuate or exacerbate their marginalization.

---

175 Jim Murdoch and Vaclav Jiricka, *Combating ill-treatment in prisons: A handbook for prison staff with focus on the prevention of ill-treatment in prison* (Council of Europe 2016) 56.

176 Ibid: ‘Minority groups are distinct from other prisoners on account of their ethnicity, race and descent. This distinctiveness will be reflected in different ethnic, religious and cultural practices and languages. A minority group is not necessarily a numerical minority, as it can involve any group disadvantaged by the dominant group in terms of social status, education, wealth or political power. It is especially important to realise that some ethnic, race or religious groups of prisoners or [I]ndigenous people may be in some prisons overrepresented in comparison to the situation in general population of the relevant state or region.’

177 Nils Melzer, Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN DocA/73/207 (20 July 2018) [16].

178 Ibid.
The above considerations are certainly applicable in the NT context.

**THE MOST CULTURALLY COMPETENT NPM FOR ABORIGINAL PEOPLE IS AN ABORIGINAL INSPECTORATE**

RCIADIC – A POLICY OR PROGRAM THAT WILL PARTICULARLY AFFECT ABORIGINAL PEOPLE

In considering how an Aboriginal Inspectorate might be a culturally competent approach to OPCAT implementation, the findings of the RCIADIC and the views of the Expert Mechanism on the Rights of Indigenous Peoples are of assistance.

The RCIADIC stated:

That in the implementation of any policy or program which will particularly affect Aboriginal people the delivery of the program should, as a matter of preference, be made by such Aboriginal organisations as are appropriate to deliver services pursuant to the policy or program on a contractual basis. Where no appropriate Aboriginal organisation is available to provide such service then any agency of government delivering the service should, in consultation with appropriate Aboriginal organisations and communities, ensure that the processes to be adopted by the agency in the delivery of services are appropriate to the needs of the Aboriginal people and communities receiving such services.  

Because the majority of prisoners and detainees in the criminal justice system in the NT are Aboriginal, the designation of the NPM and the NPM’s operations will constitute ‘the implementation of [a] policy or program which will particularly affect Aboriginal people,’  

‘where no appropriate Aboriginal organisation is available’  (since the NPM will be a statutory body, rather than an ACCO).

**THE EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES**

A Study by the Expert Mechanism on the Rights of Indigenous Peoples concluded that:

[the United Nations Declaration on the Rights of Indigenous Peoples should be the basis of all action, including at the legislative and policy levels, on the protection and promotion of indigenous peoples’ right to access to justice. The implementation of the Declaration should be seen as a framework for reconciliation and as a means of implementing indigenous peoples’ access to justice.]

It also noted that:

States should consider the impact of law and policy on indigenous peoples’ access to human rights processes and institute reform where such law and policy interferes with indigenous peoples’ enjoyment of substantive equality in this regard.

---

180 Ibid.
181 Ibid.
Aboriginal people’s potential to benefit from prevention of torture and ill-treatment under OPCAT, a human rights instrument, would be compromised should the NPM not be culturally competent. Aboriginal prisoners’ and detainees’ ability to enjoy substantive equality in terms of protection from torture and ill-treatment in detention would be diminished under these circumstances.

CULTURAL COMPETENCY – RELYING ON INDIVIDUAL STAFF VS THE BODY AS A WHOLE

An Aboriginal statutory body has greater potential of providing a culturally competent service than a generalist statutory body. The recent review of the Indigenous Legal Assistance Program (ILAP) highlighted the importance of having an Aboriginal and Torres Strait Islander specific service in achieving culturally competent service delivery. Aboriginal community-controlled service delivery is, of course, a different model to that of the proposed Inspectorate, but some aspects of the Aboriginal and Torres Strait Islander Legal Services (ATSILS) can be adopted in the structure, governance and operations of the NPM. Having a similarly tailored approach in a statutory NPM could assist the Inspectorate, in exercising its mandate, to partially achieve the ATSILS’ successful delivery of a culturally appropriate service.

As discussed above, under A note on recommendations from other sources regarding the NT NPM, the Victorian Aboriginal Children’s Commissioner position comes with advantages, including ‘knowledge… essential for credibility and acceptance by Aboriginal communities across Victoria.’ The proposed Aboriginal Inspectorate goes a step further, from having a senior position that focuses on the needs of Aboriginal and Torres Strait Islander people to establishing an entire statutory body that focuses on Aboriginal people.

The purpose of having an Aboriginal Inspectorate is to ensure that the NT NPM’s foundation and structures support organisational cultural competency (in addition to having a targeted approach to the prevention of torture and ill-treatment of Aboriginal detainees, discussed above). It mitigates some of the risks that might be associated with a generalist inspectorate, such as being overly dependent on the inspectorate’s leadership being genuinely committed to cultural competency. An Aboriginal Inspectorate, instead of relying on individuals, relies on structures. It could lessen the burden on Aboriginal staff to not only execute the core duties associated with their roles, but to additionally educate and support non-Indigenous staff or to provide organisational advice on how to improve the cultural appropriateness of the NPM’s operations (a problem that can be exacerbated when Aboriginal staff are not in management positions and do not having the requisite decision-making power to improve practice, being limited instead to giving advice). In contrast, the default position in an Aboriginal Inspectorate is the expectation that non-Aboriginal staff exercise cultural humility, with culturally appropriate service delivery being at the core of the Inspectorate’s operations.

---

See also at 22: ‘The current ILAP program is a five-year funding program due to expire on 30 June 2020. The outcomes of the ILAP review will help inform future Commonwealth funding arrangements for Indigenous legal assistance services from 1 July 2020.’
186 Cox Inall Ridgeway, Review of the Indigenous Legal Assistance Program 2015-2020 Final Report (February 2019) 46-47: ‘Community control is defined as “local communities having control of issues that directly affect their community”. Many studies have demonstrated an association between community control and delivery of services leading to better outcomes for Aboriginal and Torres Strait Islander people, in Australia and international contexts. The greatest distinction between these and other models of care is the role of culture and the embedding of a community’s cultural values, knowledge and beliefs into service delivery. This is carried out through a culturally appropriate and skilled workforce; high levels of community participation; and self-determination and empowerment.’
CONSULTATION IS ESSENTIAL TO ESTABLISH WHETHER THERE IS SUPPORT FOR AN ABORIGINAL INSPECTORATE AS THE NPM

Although this report recommends establishing an Aboriginal Inspectorate, if consultation with the NT Aboriginal community and ACCOs on NPM designation is not properly conducted, the potential of the Inspectorate to harness at least some of the benefits associated with ACCOs will be greatly diminished. If the Inspectorate does not have the confidence of the NT Aboriginal community and ACCOs, this will compromise its ability to build a relationship with them, which is essential to effectively carrying out its mandate (discussed in greater detail below, under The Inspectorate’s relationship with civil society). A lack of confidence in the Inspectorate can also impact on Aboriginal detainees’ willingness to engage with it, and given that the detainees’ experience is central to the work of the Inspectorate (discussed under Conducting the inspection), engaging with detainees must be a priority of any NPM. As Steinerte notes, ‘[i]t is hard to imagine how the NPM would be able to achieve anything if it did not have the trust of those deprived of their liberty.’

CONSULTATION IN RELATION TO THE ABORIGINAL INSPECTORATE MUST CONTINUE BEYOND INITIAL DESIGNATION - MAINTAINING LEGITIMACY AND PROVIDING A CULTURALLY APPROPRIATE SERVICE

Should support for an Aboriginal Inspectorate be secured following initial consultations, the continuing risk that the Aboriginal community will lose confidence in the Inspectorate must be mitigated by demonstrating an ongoing commitment to co-design (for example, refer to Expectations/standards and frameworks for culturally competent inspections) and receptiveness to Aboriginal people’s and organisations’ advice or criticism (discussed further under The Inspectorate’s OPCAT compliance and efficacy should be evaluated). The reality is that an Aboriginal Inspectorate is not community-controlled, and is thus at risk of becoming tokenistic.

The importance of engaging in ongoing consultation and engagement is increased in a small jurisdiction like the NT, where complying with the OPCAT requirement that NPMs maintain their independence from both civil society and the detaining authorities poses a significant challenge to achieving cultural competency. Given that the ACCOs with which the Inspectorate might otherwise partner (for example, to conduct joint inspections), may well be delivering services in places of detention (this is explored in greater detail below, under Preparing for the inspection), certain ACCOs may be conflicted out of certain collaborative activities with the Inspectorate. The obligation to maintain its independence deprives the Inspectorate of strategies to improve its cultural competency that, in another context, would certainly be strongly recommended.

THE INHERENT LIMITATIONS OF HAVING A NON-INDIGENOUS NPM ASSESSING THE CULTURAL APPROPRIATENESS OF SERVICE DELIVERY IN DETENTION

There would be a challenge would be assessing the cultural competency of detaining authorities. If a generalist inspectorate, a body with limited institutional expertise in relation to cultural appropriateness, will be assessing another body (the detaining authority) that similarly lacks this expertise, it is conceivable that even

A well-intentioned and committed generalist inspectorate would struggle to undertake this work effectively. As already identified above, an approach which relies on individual Aboriginal staff in a generalist inspectorate to take on this work comes with its limitations.

Additionally, ACCOs in the NT deliver a range of services that would be subject to the scrutiny of the Inspectorate, putting the Inspectorate in a position where it would potentially be assessing the cultural appropriateness of ACCO service-delivery in places of detention. An Aboriginal Inspectorate (that has been designated and designed with the requisite amount of consultation with the Aboriginal community and ACCOs, and that incorporates the recommendations of this report, particularly in relation to staffing) would be better placed to complete this challenging task than a generalist inspectorate.

**POTENTIAL UNDER TREATY/TREATIES IN THE NT: SELF-DETERMINATION AND THE ADMINISTRATION OF JUSTICE**

As part of the Fellowship, I visited Canada, which has both historic and modern treaties. As the NT advances towards Treaty negotiation, it might be useful to consider how Canada’s treaties have resulted in the administration of justice being (or having the potential to be) devolved to Indigenous people in Canada. Of course, the future content of the NT Treaty/Treaties cannot be predicted, nor what Aboriginal people in the NT aspire to achieve through Treaty/Treaties or how they will choose to exercise their right to self-determination. However, looking at Canada can assist in anticipating how the proposed Inspectorate might be impacted in the future by the NT Treaty/Treaties.

Since Canada has not yet ratified OPCAT (although there are some prison oversight mechanisms in place), one unfortunately cannot look to Canada for guidance on how to approach setting up an NPM that is suitable in the context of Treaties between Federal and Provincial Governments and First Nations, Métis and Inuit. But one can see how the devolution of the administration of justice to Indigenous people would only exacerbate the challenges inherent to having a generalist inspectorate, as opposed to an Aboriginal Inspectorate, functioning as the NPM. Where devolution of the administration of justice has occurred, this would involve assessing the cultural competency not only of a contracted ACCO service-deliverer, but of a detaining authority operating under a self-governing First Nation.

**SELF-GOVERNMENT RIGHTS IN CANADA**

‘Canada recognizes that Indigenous peoples have an inherent right of self-government guaranteed in section 35 of the Constitution Act, 1982. Canada’s Inherent Right Policy was first launched in 1995 to guide self government negotiations with Indigenous communities. Negotiated agreements put decision-making power into the hands of Indigenous governments who make their own choices about how to deliver programs and services to their communities… self-governing First Nations can make their own laws and policies and have decision-making power in a broad range of matters. This includes matters internal to their communities and integral to their cultures and traditions… Self-government is negotiated within the Canadian constitutional framework and federal legislation is passed before the negotiated agreement takes effect. Under self-government, Indigenous laws operate in harmony with federal and provincial laws. Indigenous laws protecting culture and language generally take priority if there is a conflict among laws.'
However, the Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act and other general laws such as the Criminal Code continue to apply.  

‘The guarantee in [the Canadian Charter of Rights and Freedoms] of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.’

YUKON
TESLIN TLINGIT COUNCIL - ADMINISTRATION OF JUSTICE AGREEMENT

The Administration of Justice Agreement outlines the principles of Teslin Tlingit Council’s contemporary justice system, including that it is ‘to be founded upon the traditional Teslin Tlingit clan processes for resolving disputes which retain holistic approaches respecting conflict resolution to achieve healing, rehabilitation and harmony within the Teslin Tlingit community and ‘the collective nature of Teslin Tlingit society.’ It provides for the establishment and jurisdiction of the Peacemaker Court (although ‘[t]he Teslin Tlingit Council, Yukon or Canada shall not confer powers or impose duties upon the Peacemaker Court for matters which would be within the exclusive jurisdiction of the Supreme Court’).

Of particular relevance to an NPM, is the ability to sentence individuals to terms of imprisonment, and that ‘Teslin Tlingit Council corrections programs may accommodate both custodial and non-custodial dispositions through facilities including... reciprocal use of facilities between Canada, Yukon and Teslin Tlingit Council as may be agreed by the Parties.’ Additionally, the Council has the power ‘to enact laws under the Final Agreement and Self-Government Agreement including the power of those laws to provide for the appointment of officers to enforce those law and powers of enforcement equivalent to those provided by laws of Yukon or Canada for officers enforcing similar laws in the Yukon.’

The Teslin Tlingit Council’s Administration of Justice Agreement thus provides for sentencing to terms of imprisonment and appointment of officers with enforcement powers, both of which would be directly relevant to an NPM’s mandate.

CARCROSS/TAGISH – FINAL AGREEMENT

‘Ratification of the Umbrella Final Agreement by the Yukon First Nations, through the Council for Yukon Indians, and by Canada and the Yukon signifies their mutual intention to negotiate Yukon First Nation Final Agreements in accordance with the Umbrella Final Agreement.’

Of particular relevance to an NPM, ‘[n]egotiations respecting a self-government agreement for a Yukon First Nation may include the following subjects... the administration of justice and the maintenance of law and order.’ Government and a Yukon First Nation may negotiate the devolution of programs and services associated with the responsibilities of the

181 Canadian Charter of Rights and Freedoms 1982 (Canada).
183 Ibid 8-9.
184 Ibid 12: ‘Teslin Tlingit Council may establish penalties of imprisonment for the violation of Teslin Tlingit Law, provided such imprisonment does not exceed the higher of the limits provided for in subsection 787(1) of the Criminal Code (Canada) or a term of six months.’
185 Ibid 14.
189 Ibid 415-416.
Yukon First Nation as agreed in negotiations... For greater certainty... Government and the Yukon First Nation may negotiate the devolution of programs and services dealing with the following... Yukon First Nation authority for the design, delivery and administration of tribal justice; and the division and sharing of Yukon First Nation and Government responsibility for the design, delivery and administration of programs relating to... policing and enforcement of law, corrections, probation services, community conflict resolution. The parties to the Umbrella Final Agreement may negotiate guaranteed representation for Yukon First Nations on government commissions, councils, boards and committees in the Yukon established to deal with the following matters... justice and law enforcement.

CARCROSS/TAGISH CONSTITUTION

‘[I]n exercising any of its powers, the Carcross/Tagish First nation Government shall not... require excessive bail, impose any cruel or unusual punishment, or set any fine greater than five thousand dollars or any imprisonment for a term greater than six months. ‘Subject to the approval of the Assembly, the Council shall have the following authorities and responsibilities... develop laws based on the custom and traditions of the Carcross/Tagish First Nation and in accordance with the Constitution and the Carcross/Tagish First Nation Self-Government Agreement and the inherent rights of its members.

SELF-ADMINISTERED AGREEMENTS AND POLICE

‘The [Self-Administered Agreements] agreements are negotiated by the First Nation or Inuit community (or group of communities), provincial or territorial governments, and the Government of Canada. Under such agreements, the communities are responsible for establishing and administering their own police service, often through the creation of an independent police governance board. ‘The terms and conditions of the FNPP state that SA services are meant to provide day-to-day policing to the communities they serve. ‘Since 1991, fifty-five First Nation communities have negotiated and implemented a total of seven self-policing arrangements. These arrangements include the Anishinabek, Nishnawbe-Aski, and United Chiefs and Council of Manitoulin (UCCM) regional police services, and single community police services in Akwesasne, Lac Seul, Six Nations and Wikwemikong. Amongst others requests, two PTOs, Grand Council Treaty #3 and the Association of Iroquois and Allied Indians have made formal requests to enter into self-policing negotiations. ‘The SA police service providers were asked to identify any special considerations given to geographical factors that might influence demands for policing services. An example of this is the responsibility of police services for moving prisoners who are making court appearances or going to hospitals for planned or emergency medical care. A key element identified by six of the respondents was the time spent transporting prisoners to different locations... in some cases, a police service... may lack cell blocks to separately house male and female prisoners, or juveniles and adults.
DEPUTY INSPECTOR AND SPECIALISED UNIT FOR ABORIGINAL CHILDREN AND YOUNG PEOPLE

As already discussed, it is proposed that the Aboriginal Inspectorate meet the unique needs to Aboriginal children via a Deputy Inspector whose focus is children and young people, and a specialised Children and Young People’s Unit within the Inspectorate. The reporting line from the Unit should be directly to the Deputy Inspector, the Unit should have its own staff and engage consultants as required and it should have its own inspection framework and set of expectations/standards (similar to HMIP’s expectations for children). The NTRC’s concern that having ‘an Inspectorate covering both juvenile custodial facilities and adult facilities’ would cause a ‘risk that young people are treated simply as small adults, or are given less attention because of their smaller numbers,’ would be addressed by establishing this specialised Unit.

WHAT ABOUT NON-INDIGENOUS PRISONERS AND DETAINEES?

As discussed above, under A note on recommendations from other sources regarding the NT NPM, many of the expectations/standards of the Inspectorate will be applicable to non-Indigenous children and would ensure that the Inspectorate would be well-placed to effectively exercise its function in relation to the statistically much smaller group of non-Indigenous children in youth detention, at police stations in urban locations and remote Aboriginal communities, in court custody, in bail supported accommodation and police vehicles, planes or boats.

---


209 Ibid.
In relation to non-Indigenous adults, similarly to youth, they will be much less likely to be detained in remote Aboriginal community police stations, court custody during circuit court in remote Aboriginal communities and transported from/to those communities, given that most of the population in remote communities is Aboriginal. As such, in these circumstances, the Aboriginal Inspectorate should exercise its mandate in relation to non-Indigenous detainees and prisoners, utilising its inspection expectations/standards and framework, as appropriate.

The main issue is which oversight body would be responsible for non-Indigenous detainees at police stations and in court cells in urban locations, prisons in Alice Springs and Darwin, Nhulunbuy and Barkly Work Camps, and transport between these locations by vehicle/plane (given that these numbers of non-Indigenous detainees will be greater than in locations considered above). Although beyond the scope of this paper, it is recommended that preferably a new body, a generalist inspectorate, be established. In the alternative, it would be open to the NTG to consider designating existing oversight bodies as NPMs, such as the Ombudsman.

**RECOMMENDATION:** The Aboriginal Inspectorate’s mandate will primarily be Aboriginal prisoners and detainees. The exceptions to this will be on the rare occasions that:

- there is a non-Indigenous youth in youth detention, at police stations in urban locations or remote Aboriginal communities, in court custody, in bail supported accommodation or police vehicles/planes/boats.
- there is a non-Indigenous adult at a police station in a remote Aboriginal community, in court custody during circuit court in remote Aboriginal communities and in instances of transportation from/to those communities.

The NTG should also either create a generalist inspectorate (which is preferred) or designate an existing body with NPM functions. This generalist NPM’s mandate should include non-Indigenous adult prisoners and detainees at police stations and court cells in urban locations, prisons in Alice Springs and Darwin and Nhulunbuy and Barkly Work Camps, and transport between these locations by vehicle/plane.
FUNDING AND PRESENTATION OF REPORTS – COMMONWEALTH OR NORTHERN TERRITORY GOVERNMENT?
NORTHERN TERRITORY AND COMMONWEALTH GOVERNMENT FUNDING

COMMONWEALTH FUNDING

Buckland and Olivier-Muralt have identified the challenges of OPCAT implementation in Brazil, a federal system in which there has been a ‘an alleged lack of available financial resources at the local level’ to establish operational LPMS (Local Preventive Mechanisms). In the absence of the federal government’s ability to ‘impose a decision on local governments... it is... up to [local governments] to take all the necessary steps to implement OPCAT at the local level.” Buckland and Olivier-Muralt suggest that “[o]ne possible and efficient way to influence decision-making at the local level would be to allocate specific federal funding, earmarked for local OPCAT implementation.”

Given the importance of adequate funding to the effective functioning of the NT NPM, it is recommended that the Commonwealth Government contribute to funding the establishment and operations of the Inspectorate, and that it encourages and supports having an NPM in the NT that is OPCAT-compliant. The Commonwealth Government should take care, however, to not dictate which body would be the most appropriate NPM for the unique NT context.

WHY SHOULD THE COMMONWEALTH GOVERNMENT PARTIALLY FUND THE NT NPM?

DETAINEES ALLEGED TO HAVE COMMITTED OFFENCES UNDER COMMONWEALTH LEGISLATION ARE HELD IN NT PLACES OF DETENTION

As noted by Buckland and Olivier-Muralt, in ‘Australia there are no federal prisons, so individuals sentenced under federal criminal law... are detained in correctional facilities under the authority of a state or territory government.” Even if the Commonwealth Government is not responsible for the day-to-day functioning of police stations or prisons in the NT, it is responsible for the detention of individuals in those facilities in the first place, when they are detained for (allegedly) committing crimes under Commonwealth legislation.

IMPACT OF COMMONWEALTH LEGISLATION ON THE NT – BAIL AND SENTENCING CONSIDERATIONS

Commonwealth legislation has relevance to the detention of people in the NT in ways other than by way of federal offences, with certain laws either directly or disproportionately affecting Aboriginal people. As discussed below (under Function of the Inspectorate: beyond inspection), the Inspectorate may decide to make recommendations in relation to legislation, such as Stronger Futures (the predecessor being the Northern Territory National Emergency Response Act) and the Commonwealth Crimes Act, where this legislation

---

211 Ibid.
212 Ibid.
213 Ibid.
214 Previously, under the Northern Territory National Emergency Response Act 2007 (Cth) s90 ‘Matters to be considered in certain bail applications: (1) In determining whether to grant bail to a person charged with, or convicted of, an offence against a law of the Northern Territory, or in determining conditions to which bail granted to such a person should be subject, a bail authority... (b) must not take into consideration any form of customary law or cultural practice as a reason for (i) excusing, justifying, authorising, requiring or lessening the seriousness of the alleged criminal behaviour to which
impacts on the rates of arrest, detention and imprisonment in the NT (see What does prevention in the context of OPCAT mean?), by either affecting bail and sentencing considerations for NT and Commonwealth offences\(^{215}\) or as a result of the criminal offences themselves.\(^{216}\)

**COMMONWEALTH-FUNDED SERVICE DELIVERY IN NT PLACES OF DETENTION**

As discussed below (under Preparing for the inspection), the Commonwealth also funds a number of services that operate in NT places of detention. For example, organisations may be funded to deliver these services through funding through either the Indigenous Advancement Strategy or Commonwealth Attorney General. These Commonwealth-funded services are relevant to the treatment of detainees, thus falling within the Inspectorate’s preventive mandate and being subject to inspection.

**THE NTG AND INSPECTORATE ARE SUPPORTING THE COMMONWEALTH GOVERNMENT TO MEET ITS OBLIGATIONS UNDER OPCAT**

The Inspectorate will be carrying out inspections and other functions of an NPM (discussed under Function of the Inspectorate: Beyond Inspection), such as contributing to the Commonwealth Government’s Annual OPCAT Report (an obligation discussed further under Annual reports), and ensuring that its efficacy and OPCAT compliance is evaluated (see The Inspectorate’s OPCAT compliance and efficacy should be evaluated). All of

the alleged offence relates, or the criminal behaviour to which the offence relates; or (ii) aggravating the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates.’

See also at s91: ‘Matters to which the court shall have regard when passing sentence etc.: In determining the sentence to be passed, or the order to be made, in respect of any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for: (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or (b) aggravating the seriousness of the criminal behaviour to which the offence relates.’

\(^{215}\) *Crimes Act 1914* (Cth) s15AB: ‘Matters to be considered in certain bail applications: (1) In determining whether to grant bail to a person charged with, or convicted of, an offence against a law of the Commonwealth or the Northern Territory, or in determining conditions to which bail granted to such a person should be subject, a bail authority— (b) must not take into consideration any form of customary law or cultural practice as a reason for (i) excusing, justifying, authorising, requiring or lessening the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates; or (ii) aggravating the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates.’ (2) If a person referred to in subparagraph (1)(a)(i) or (ii) is living in, or otherwise located in, a remote community, the bail authority must also take into consideration that fact in considering the potential impact of granting bail on that person.’

See also at 16A: ‘Matters to which the court shall have regard when passing sentence etc.—federal offences: (2A) However, the court must not take into account under subsection (1) or (2) any form of customary law or cultural practice as a reason for: (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or (b) aggravating the seriousness of the criminal behaviour to which the offence relates.’

See also at 16AA: ‘Matters to which the court shall have regard when passing sentence etc.—Northern Territory offences: (1) In determining the sentence to be passed, or the order to be made, in respect to any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for: (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or (b) aggravating the seriousness of the criminal behaviour to which the offence relates.’

See also at s19B: ‘Discharge of offenders without proceeding to conviction: (1A) However, the court must not take into account under subsection (1) any form of customary law or cultural practice as a reason for: (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or (b) aggravating the seriousness of the criminal behaviour to which the offence relates.’

\(^{216}\) *Stronger Futures in the Northern Territory Act 2012* (Cth): Imprisonable offences under this Act, s7: ‘The object of this Part is to enable special measures to be taken to reduce alcohol-related harm to Aboriginal people in the Northern Territory.’

See also at Division 2: Purpose of Division 2 is the ‘Modification of the NT Liquor Act and NT Liquor Regulations in alcohol protected areas.’

See also at s8: ‘Certain offences to apply in alcohol protected areas. The NT Liquor Act applies, while this Act is in effect, as if the following Division were included as Division 1AA of Part VIII of that Act (after Division 1 of that Part). Note: This Act ceases to have effect at the end of 10 years after commencement: see section 11B.’

See also at Division 1AA—Prohibitions in alcohol protected areas. s75B: ‘(1) A person commits an offence if: (a) the person; (i) brings liquor into an area; or (ii) has liquor in his or her possession, or under his or her control, in an area; or (iii) consumes liquor in an area; and (b) the area is an alcohol protected area. Maximum penalty: 100 penalty units or imprisonment for 6 months.’

See also at s75C: ‘(1) A person commits an offence if: (a) the person: (i) supplies liquor to a third person; or (ii) transports liquor intending to supply any of it, or believing that another person intends to supply any of it, to a third person; or (iii) possesses liquor intending to supply any of it to a third person; and (b) the third person is in an alcohol protected area. Maximum penalty: 100 penalty units or imprisonment for 6 months.’
these functions and responsibilities need to be carried out if the Commonwealth Government is to meet its obligations under OPCAT, and the Inspectorate should thus be partially funded by the Commonwealth Government.

NTRC RECOMMENDATIONS – A FEDERALLY FUNDED ROYAL COMMISSION

It is anticipated that the Inspectorate would be considering the NTRC recommendations in assessing conditions and treatment in youth detention facilities, police cells, bail supported accommodation and vehicles (although it will not be auditing NTRC recommendation implementation or defaulting to automatically incorporating these recommendations in its own expectations/standards). The fact that the NTRC was a Royal Commission called by the Commonwealth Government, a Commission that recommended OPCAT-compliant oversight of youth detention, further supports the position that the Commonwealth should financially contribute to the Inspectorate. In calling the Royal Commission, Prime Minister Turnbull had stated that, ‘[w]e need to expose the cultural problems, the administrative problems that allowed this type of mistreatment to occur. We want to know how this came about, we want to know what lessons can be learnt from it.’ An effective Inspectorate would undertake this preventive work.

COMMONWEALTH GOVERNMENT REVENUE MAKES UP TWO THIRDS OF THE NT’S TOTAL REVENUE

Providing funding to the NTG to support OPCAT compliance and the Inspectorate’s establishment and operations would also be appropriate, given that approximately two thirds of the NT’s revenue is Commonwealth revenue, rather than Territory own-source revenue. The funding to the NTG should be tied specifically to the NPM’s operations.

INDEPENDENCE OF THE INSPECTORATE THROUGH THE SOURCE OF FUNDS

Independence of the NPM is a focus of OPCAT: ‘The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies.’ Each State Party shall maintain, designate or establish... one or several independent national preventive mechanisms and ‘[t]he

---


218 Northern Territory Government, Budget Paper No.2: Budget Strategy and Outlook 2019-20, 52: 2019-20 Budget -Total Commonwealth revenue $4,389 million; Territory own-source revenue $2,265 million; Total revenue $6,654 million. See also at S1: ‘Total Commonwealth funding to the Northern Territory in 2019-20 is estimated at $4389 million, representing about 66 per cent of the Territory’s total non financial public sector revenue. This comprises $3017 million in general revenue assistance payments, largely GST revenue, and $1372 million in tied funding.’ See also at S2: ‘Commonwealth funding to the Territory includes both untied general revenue assistance, comprising GST revenue, GST top-up payments and grants in lieu of uranium royalties arising from the Commonwealth’s ownership of uranium, and tied funding to be used for specific purposes. General revenue is discretionary, with states determining how to spend this funding according to their specific priorities, as sovereign governments.’ See also at S1: ‘GST revenue is the largest single fiscal transfer from the Commonwealth, representing around 42 per cent of the Territory’s total revenue.’ See also at 8: ‘In recognition of the significant drop in the Territory’s GST revenue in recent years, the Commonwealth has committed to providing the Territory GST top-up payments in the form of untied general revenue, from 2019-20 to 2021-22.’ See also at S1: ‘Tied Commonwealth revenue is estimated to contribute $1372 million or 21 per cent of the Territory’s total revenue in 2019-20.’


220 Ibid Art 17.
States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.221

As Nowak et al note, there must exist a ‘legislative framework which guarantees the [NPM’s] structural independence from all branches of government, above all from the executive branch.’222 The Inspectorate should not be funded through nor report to any of the agencies which are responsible for the places of detention which it will inspect under its mandate. It is recommended that the Inspectorate be a separate agency, the Office of the Aboriginal Inspectorate (similar to the Ombudsman’s Office223 and ICAC224), as opposed to sitting within the Department of Attorney-General and Justice (which is responsible for correctional services (custodial services) and legal policy225), where the independent offices of the Anti-Discrimination Commission and the Children’s Commissioner are currently situated,226 or Northern Territory Police, Fire and Emergency Services (responsible for detention related to police operations)227 or Territory Families (which is the responsible agency for youth detention facilities and bail supported accommodation).228

HMIP – ISSUES RELATED TO RECEIVING FUNDING FROM THE MINISTRY OF JUSTICE

‘HMIP’s former Chief Inspector, Hardwick, advised the Justice Select Committee that he had threatened to suspend inspections as a result of having to ‘have his budget cleared on a weekly basis for inspections.’ He has suggested that the solution would be to have HMIP ‘not be sponsored by the department that has direct operational experience with the things that [it] inspect[s].’229 He told the Committee that ‘when the department whose services we are inspecting starts to say exactly how I should carry out those inspections, then I think it’s an issue about our independence.’230

Hardwick also told the Committee that there had been instances where there had been attempts to interfere with the content of HMIP’s reports.231

OPCAT also provides that ‘[w]hen establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.’232

---

221 Ibid Art 18(1).
224 Ibid 43.
225 Northern Territory Department of the Attorney-General and Justice, Annual Report 2017-2018 (30 September 2018) 78: Legal Policy ‘develops, reviews and implements legislative change, and advises the Attorney-General and the government on law and justice measures.’
227 Ibid 85.
228 Ibid 235.
Steinerte explains the Paris Principles in the context of OPCAT:

While not expressly mentioned in the text of OPCAT itself, financial independence is a requirement of the Paris Principles and it is detailed as follows: The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.233 Bearing in mind the direct reference to the Paris Principles in Article 18(4) of OPCAT, financial independence thus is another aspect that States parties must carefully consider when establishing their NPMs. Indeed, financial independence is a crucial factor that has a direct bearing upon the ability of an NPM to function independently and effectively.234

Steinerte notes that in relation to National Human Rights Institutions (NHRIs) ‘it has been argued that receiving funding through the legislature is a way of ensuring further independence from the executive... the further the distance between the NPM and the executive, the less the opportunities for undue influence (or perceptions of such).’235

Joint funding from both the NT and Commonwealth legislatures would mitigate, to some extent, the impact of any future decrease in funding resulting from the Inspectorate’s adverse findings in relation to either government’s legislation, policies or operations. Of course, the Inspectorate’s funding should be protected against such actions, but it is valuable to have an additional safeguard in place, especially given that, in the NT, the Government currently holds a very significant majority.

**RECOMMENDATION:** Both the Northern Territory and Commonwealth governments should fund the work of the Inspectorate.

The Inspectorate should be a separate agency, the Office of the Aboriginal Inspectorate, similar to the Office of the Independent Commissioner Against Corruption and the Ombudsman’s Office, with a separate budget, that is not funded through any of the agencies responsible for the places of detention that come within the Inspectorate’s mandate.

**SUFFICIENT FUNDING FOR EFFECTIVE DISCHARGE OF INSPECTORATE’S MANDATE**

OPCAT requires that ‘[t]he States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.’236 The SPT states that the NPM ‘should advocate for the provision of the resources necessary for the effective exercise of its mandate, with the assistance of the Subcommittee and/or other relevant actors if necessary.’237 Thus, although ‘OPCAT requires States Parties

---

234 Ibid 15.
235 Ibid 15-16.
236 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 18(3).
237 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [15].
only to provide the necessary resources ‘for the functioning’ of an NPM and not the ‘effective functioning’, the SPT has ‘provided some clarity... by firstly asserting that financial independence is firmly among the requirements of OPCAT and, secondly, requiring that NPM funding is such as to allow effective discharge of their mandate.’ Steinerte notes that ‘the source of funding has not been a real issue, at least not thus far. The real issue has been the level of funding and it is fair to say it has been among the top priorities for the vast majority, if not all, of NPMs around the world.’

The importance of adequate funding of oversight bodies has recently been highlighted in the NT by the Independent Commission Against Corruption.

---

SPT VISIT TO NEW ZEALAND (2014)

‘Most of the components of the NPM have not received extra resources since their designation to carry out their OPCAT mandate which, together with general staff shortages, have severely impeded their ability to do so. Moreover, the Children’s Commissioner and IPCA reported that their funding was earmarked for statutory functions, which excluded NPM-related work. In this regard, the SPT was concerned to learn that the OPCAT mandate - an international obligation - was not considered by the State party to be a ‘core function’ of the bodies designated as the NPM. The SPT is also concerned that inadequate funding might be used – or might be perceived by the bodies themselves as being used - to pressurize components of the NPM to sacrifice their OPCAT related work in favour of other functions. Should the current lack of human and financial resources available to the NPM not be remedied without delay, the State party will inevitably find itself in the breach of its OPCAT obligations.’

‘The SPT reminds the State party that the provision of adequate financial and human resources constitutes an ongoing legal obligation of the State party under article 18.3 of the OPCAT. It recommends that the State party:
(a) Ensure that the NPMs enjoy complete financial and operational autonomy when carrying out their functions and that they are able to freely determine how to use the resources available to them;
(b) As a matter of priority, increase the funding available in order to allow the NPMs to effectively implement their OPCAT mandate throughout the country;
(c) Ensure that the NPM is staffed with a sufficient number of personnel so as to ensure that its capacity reflects the number of places of detention within its mandate, as well as being sufficient to fulfil its other essential functions under the Optional Protocol;
(d) Provide the NPMs with the means to ensure that they have access to the full range of relevant professional expertise, as required by OPCAT.’

---

239 Ibid 15 (emphasis added).
240 Ibid 15-16.
242 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand, UN Doc CAT/OP/NZL/1 (28 July 2014) [12].
243 Ibid [14].
IPCA

The Annual Reports from 2015, 2017 and 2018 demonstrate how the IPCA has completed OPCAT inspections around its other functions.

‘Where possible during the reporting year when the Authority has visited Police facilities in the course of its ordinary work, the opportunity has been taken to conduct an unannounced visit of the attached custodial facility.’

‘Where possible during the reporting year, the Authority has visited Police custodial facilities in the course of its ordinary work. Where an incident requiring investigation comes to the attention of the Authority, staff often visit the facility to discuss the issues with custodial staff. In addition, the Authority takes the opportunity to make unannounced visits of custodial facilities when it is visiting a Police District for other reasons.’

‘Where possible during the reporting year, the IPCA has visited Police custodial facilities in the course of its ordinary work. Where an incident requiring investigation comes to the attention of the IPCA, staff often visit the facility to discuss the issues with custodial staff. In addition, the IPCA takes the opportunity to make unannounced visits at custodial facilities when it is visiting a Police District for other reasons. This has occurred in a number of places throughout the year, notably Christchurch, Rotorua, Manukau, Auckland, Waitakere, and Nelson.’

CAT CONCLUDING OBSERVATIONS - NPM FUNDING (2019)

‘Notwithstanding information provided by the State party that it will provide additional funds for the operation of the NPM, the Committee remains seriously concerned that the resources provided to the NPM, particularly for its secretariat, are clearly inadequate... The State party should... guarantee that the NPM’s secretariat and member bodies receive sufficient resources to discharge their prevention mandate independently and effectively.’

RECOMMENDATION: The Inspectorate must be sufficiently resourced to effectively exercise its mandate under OPCAT.

---

244 Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2016 to 30 June 2017 (June 2018) 26.


247 Committee against Torture, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (2019) [16] and [17].
THE INSPECTORATE MUST NEVER BE DIRECTED HOW TO USE ITS RESOURCES

Steinerte notes the importance of the ‘the ability of an NPM to freely decide how its funding is to be utilised without any interference, especially from the executive... To ensure this, the SPT has also required that NPMs enjoy complete financial autonomy and has linked this to the ability of an entity to be operationally independent.’ Nowak et al echo this view, stating that ‘neither the members nor the staff of the NPM may be subject to any orders or instructions by any State authority.’

RECOMMENDATION: The Inspectorate must not be directed how to use its resources.

REPORTS SHOULD BE PROVIDED TO BOTH THE COMMONWEALTH AND NORTHERN TERRITORY GOVERNMENTS

The Inspectorate should be an Officer of Parliament, independent of government, with all reports (including site, thematic, follow-up and annual reports) by the Inspectorate to be tabled in NT Parliament. Whether the reports are tabled by a Member or deemed tabled, questions during estimates should be permitted to be posed in Aboriginal languages, translated into English with the assistance of interpreters.

Even should the above recommendation in relation to Commonwealth funding not be accepted, the Inspectorate should still provide a copy of the report to the Commonwealth Government. The exact process for this is not prescribed by the report, although if it assists with its coordinating function, this could be done through the Commonwealth Ombudsman.

---

251 Emilia Terzon, ‘History made as NT politician speaks in Parliament with interpreter’, ABC News <https://www.abc.net.au/radio/programs/pm/aboriginal-politician-to-speak-own-language-in-parliament/11092966?bclid=IwAR2nMlGxu02zhwRIU%E2%80%93A6> (8 May 2019): ‘A long-running battle to get Aboriginal politicians speaking their own language on the floor of an Australian Parliament has finally been won today, at least partially. Politicians in the Northern Territory’s Parliament were being blocked from speaking any language other than English and were told it was disorderly, despite the region having more than 100 different Aboriginal languages and dialects.’
**RECOMMENDATION:** Reports should be tabled in the Northern Territory Parliament, and also provided to the Commonwealth Ombudsman (as coordinating NPM) and the Commonwealth Government. Questions in Parliament relating to the contents of reports should be permitted in Aboriginal languages.
STRUCTURE AND STAFFING OF INSPECTORATE
A NOTE ABOUT INDEPENDENCE

TRANSPARENCY AROUND THE APPOINTMENT OF INSPECTORS AND STAFF

The SPT’s Guidelines recommend that ‘the selection and appointment of members of the NPM... should be in accordance with published criteria’ and via an ‘open, transparent and inclusive process which involves a wide range of stakeholders, including civil society.’ Its Analytical assessment tool similarly supports such a recruitment process, also suggesting that the selection process ‘should preferably be prescribed in the governing national preventive mechanism legislation.’ Steinerte suggests that ‘[t]he sort of matters that should be specified, publicly, should include the NPM members’ period of office... and any grounds for members' dismissal,’ and Nowak and McArthur propose that ‘the members and staff of NPMs shall be appointed for a minimum period of four to six years and shall be protected against any arbitrary removal during their term of office.’

Steinerte notes instances where particularly good practice has been identified by the SPT:

There have been NPM selection processes which the SPT has praised as exemplary and even named as ‘a model for the open, transparent and inclusive participation of a wide range of stakeholders’. The latter is how the SPT described the Paraguayan process where the selection process was led by a Working Group comprising thirteen individuals, representing both state institutions and civil society.

HMIP – APPOINTMENT OF INSPECTOR

Carver highlights that in the UK, independent public bodies ‘often have rather weak formal guarantees that they will not suffer interference by the executive,’ referencing how in 2014 HMIP Chief Inspector, Hardwick, was advised that he would not be reappointed to his position at the end of his five year term, but instead would be expected to reapply. ‘Presumably the refusal to extend Hardwick’s contract was a response to his outspoken criticism of budget cuts and deteriorating conditions in prisons,’ an interference that Hardwick viewed as “intolerable.” ‘[T]he appointment process came under severe criticism from the Justice Committee of Parliament, which concluded: These events reinforce our previously expressed view that, in order to safeguard the independence of the post, the Chief Inspector of Prisons should be appointed by Parliament, not the Executive.’

---

252 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Guidelines on national preventive mechanisms, UN Doc CAT/OP/12/5 (9 December 2010) [16].
253 Ibid.
254 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [13].
Better practice is found in New Zealand, where the 'Ombudsmen are Officers of Parliament. Each Ombudsman is appointed by the Governor-General on the recommendation of Parliament. [They] are responsible to Parliament and independent of the Government.\textsuperscript{259}

**RECOMMENDATION:** The NT Parliament should appoint the Inspector and Deputy Inspector, and the Inspectorate should select its staff through an open, transparent and inclusive process, that is prescribed by legislation.

### INSPECTORS AND STAFF TO HAVE NO CONFLICTS OF INTEREST

The Special Rapporteur has noted that for NPMs to be effective ‘States must fulfil their obligations under the Optional Protocol and establish mechanisms that are formally and de facto independent from the authorities they monitor.’\textsuperscript{260} Once the NPM has been established, the onus is then on both the State and the NPM to ensure the NPM’s ongoing independence. Steinerte asserts that ‘once an NPM is operational, it is the responsibility of the NPM in question to maintain its independence, both actual and perceived... the NPM must be on a constant watch, engage in what has been described as ‘policing the boundaries of its own independence' against threats and challenges.’\textsuperscript{261}

This obligation to ensure that the NPM ‘carry out all aspects of its mandate in a manner which avoids actual or perceived conflicts of interest'\textsuperscript{262} extends to the staffing of the NPM. The SPT has established that the ‘State should ensure the independence of the NPM by not appointing to it members who hold positions which could raise questions of conflicts of interest,'\textsuperscript{263} and that '[m]embers of NPMs should likewise ensure that they do not hold or acquire positions which raise questions of conflicts of interest.'\textsuperscript{264}

Building confidence in the newly established Inspectorate will take some time, and should be a priority. The process of appointing the Inspector and Deputy Inspector, and the decision itself, is essential to this. One only need look at the backlash when former NT Chief Justice Martin was initially appointed Commissioner of the

---


\textsuperscript{260} Nils Melzer, Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN DocA/73/207 (20 July 2018) [35].


\textsuperscript{262} Fourth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, 46th sess, UN Doc CAT/C/46/2 (3 February 2011) [92]

\textsuperscript{263} Fourth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, 46th sess, UN Doc CAT/C/46/2 (3 February 2011) [80].

See also Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Argentina, UN Doc CAT/OP/ARG/1 (27 November 2013) [18]: ‘The Subcommittee also, however, recalls that, in accordance with its guidelines on national preventive mechanisms, the State party should ensure that the national preventive mechanism enjoys operational autonomy and independence and that it should refrain from appointing members to that mechanism who hold positions which could raise questions of conflicts of interest.’

\textsuperscript{264} Fourth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, 46th sess, UN Doc CAT/C/46/2 (3 February 2011) [81].
IMB – INSPECTION FRAMEWORK

‘Many of those in custody assume that IMB members are ‘part of management’ and demonstration of an IMB’s independence, manifestly and convincingly, is essential. It is why members must not have or be seen to have a conflict of interest, e.g. by being closely associated with HMPS, NOMS, the Home Office, a contractor or provider of services to the establishment.’

HMIPS - THE ISSUE AROUND SECONDMENTS

As discussed further below, individuals who have worked in places of detention bring valuable knowledge and experience to the work of NPMs. However, the UK has come under criticism for prioritising these benefits over the requirement to protect the independence of the NPM.

‘Further to the [Committee Against Torture]’s previous concluding observations... please indicate whether the State party has ended the practice of seconding individuals working in places of deprivation of liberty to the national preventive mechanism bodies. Please provide information on the material, human and budgetary resources allocated for the effective functioning of those bodies...

Her Majesty’s Chief Inspector of Prisons (HMCIP) is working to reduce reliance on secondees from the Scottish Prison Service (SPS), but also notes that there are some benefits from this practice, including accessing current, up to date, professional expertise and technical advice, and also the transfer of skills and expertise back to the inspected body at the end of periods of secondment, which may increase understanding and impact.

ICV – TIME LAPSE SINCE INVOLVEMENT IN THE CRIMINAL JUSTICE SYSTEM

The ICV policy on conflicts of interest is of particular value when considering the independence of consultants. The additional safeguard put in place, of requiring that a period of time has lapsed since those individuals have been directly involved in the criminal justice system, is an example of good practice.

‘ICVs cannot be serving Magistrates, police officers, police community support officers (PCSO), special constables, police staff or OPCC staff. All applications will be considered, however, care will be taken to avoid any potential conflict of interest. Applicants who have previously served as Magistrates, police officers, PCSOs, special constables, police or OPCC staff and are no longer in this role must allow a 12 month time lapse from their employment prior to applying for the role.

---

265 Anna Henderson, ‘Mick Gooda, Margaret White named new royal commission heads after Brian Martin stands down’, ABC News <https://www.abc.net.au/news/2016-08-01/brian-martin-stands-down-from-royal-commission/7677400> (1 August 2016): ‘The Federal Government has been forced to replace the head of the royal commission into the Northern Territory’s youth detention system, just a week after establishing the inquiry. Former Northern Territory chief justice Brian Martin was appointed to head the royal commission on Thursday, following the Four Corners report on the treatment of child prisoners in the Don Dale Detention Centre in Darwin. But Mr Martin has now stepped down, saying he does not have the “full confidence” of sections of the Indigenous community and was not prepared to compromise the inquiry.’


267 Scottish Government, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Position statement in response to list of issues (February 2019) 17.
of ICV. This is to preserve the independency of the scheme. Special consideration will be given to the appointment of solicitors, employees of the probation service and persons closely working within the criminal justice system.²⁶⁸

Questions on the ICV application forms indicate that in some instances, whether the potential visitor’s family is involved in the criminal justice system is also considered: ‘Are you related to any serving or retired police officer or employee of Cheshire Constabulary or the Office of the Police & Crime Commissioner? Do you have any other connection to Cheshire Constabulary or the Office of the Police & Crime Commissioner that may potentially impact your independence?’²⁶⁹

Of course, having family members working in places of detention should not automatically exclude candidates from being considered for positions at the Inspectorate, but it should be a consideration.

**NIPB – NO PRIOR INVOLVEMENT IN THE CRIMINAL JUSTICE SYSTEM**

The NIPB takes the above a step further, not permitting former police officers to participate at all.²⁷⁰ Given the size of the NT, it may be preferable to employ staff who have formerly worked in places of detention interstate.

**THERE MUST BE NO CONFLICTS OF INTEREST IN RELATION TO EITHER CIVIL SOCIETY OR THE DETAINING AUTHORITIES**

Murray et al highlight the challenges an NPM faces in achieving independence from both government and civil society, while continuing to engage in constructive dialogue with the detaining authorities and building the necessary relationship with civil society to effectively carry out its mandate:

- independence does not just mean independence from government but also independence from other stakeholders, whether those be Parliament, other statutory or constitutional bodies, or civil society. In practice, independent bodies that sit in this official watchdog position can find it difficult to mediate this space, having to develop allies in what are often seen as opposing camps of NGOs and government, yet not being able to class themselves as either. More consideration needs to be paid to the difficulties that holding such a position entails, not just from a legal responsibility point of view but also from the view of practically developing working relationships with various stakeholders in that particular jurisdiction.²⁷¹

If the NPM is to achieve the above, then its staff (and any consultants it engages) must have no conflicts of interest in relation to either civil society or the detaining authorities, which, again, will be challenging in a small jurisdiction such as the NT, particularly if the Inspectorate is to also ensure that it has the multidisciplinary staff required to successfully exercise its mandate.

**RECOMMENDATION:** The Inspectors and staff must not have any actual or perceived conflicts of interest, being independent from both the NTG and civil society.

The onus is on both Parliament and the Inspectorate to ensure independence of all staff.

²⁶⁹ Ibid.
²⁷¹ Rachel Murray, Elina Steinerte, Malcolm Evans, and Antenor Hallo de Wolf, ‘The Role of NPMs’ in The Optional Protocol to the UN Convention Against Torture (Oxford University Press 2011) 126.
**RECOMMENDATION:** Secondments of currently employed staff in agencies responsible for places of detention in the NT should not be permitted.

The benefits of having staff whose expertise is founded on having previously worked in places of detention should not override the importance of having independent staff who do not have conflicts of interest.

A set period of time must have lapsed since employment with these agencies, before individuals can be employed as Inspectorate staff.

---

**ABORIGINAL STAFF**

It is well-established that the NPM staff must be representative of those who are detained, and in the NT, the vast majority of those who are detained in the criminal justice system are Aboriginal. OPCAT requires that States, in relation to NPMs’ personnel, ‘shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.’ Murray et al’s findings include that, in some jurisdictions, ‘whether the NPM has members from a particular ethnic group on its membership can be crucial to its legitimacy.’ It is difficult to imagine an NPM without significant Aboriginal representation achieving legitimacy among the Aboriginal community in the NT. Having an Aboriginal Inspectorate without Aboriginal staff, including in managerial positions, will certainly jeopardise confidence in the Inspectorate. The APT further advises that the goal of NPMs being ‘credible in the eyes of the authorities, detainees, civil society and the public… can be achieved if members of the NPM have social legitimacy (eg. are known and respected).’

The APT’s report from the *Regional Forum on the OPCAT in Latin America* included a recommendation that ‘NPMs and LPMs should make sure to either include [i]ndigenous persons or persons having relevant expertise in their composition.’ NATSILS’ submission to the AHRC’s *OPCAT in Australia* consultation emphasised that the ‘legislation to give effect to the OPCAT should include the following features… [m]ultidisciplinary and diverse expertise, including gender balance and representation of ethnic and minority groups, specifically Aboriginal and Torres Strait Islander people,* and the AHRC’s *OPCAT in Australia Interim Report* noted the

---


See also: Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Honduras*, UN Doc CAT/OP/HND/3 (25 January 2013) 4 [10]: ‘As a minimum, this plan should provide for a well-structured staffing table (one that maintains a gender balance and ensures the inclusion of members of the country’s ethnic and minority groups) that is in accordance with the organization’s regulations and should give a description of each post.’


See also Matthew Pringle, ‘Instituting A National Preventive Mechanism In Canada – Lessons Based On Global OPCAT Implementation’, September 2018, 34-35: ‘It is imperative that decision-makers ensure that, not only is the future NPM adequately resourced in terms of financial, human and material resources, but also that professional diversity, gender balance and an adequate representation of minorities are also figured into its composition. In a racially diverse, multi-lingual country with a significant presence of Aboriginal peoples this requirement should ring even more true.’

276 National Aboriginal and Torres Strait Islander Legal Services, Submission No 47 to Australian Human Rights Commission, *OPCAT in Australia Consultation*, July 2017, 6.

See also at 2: ‘Aboriginal and Torres Strait Islander representation should be required in all oversight bodies and expert advisory panels.’

importance of having ATSI representation in the NPM. In line with NAAJA’s submission to the AHRC OPCAT in Australia consultation, it is recommended that the Inspector and the Deputy Inspector be Aboriginal-identified positions.

The APT notes that having staff who speak the language of the detainees is preferable. In the NT, with its diversity of Aboriginal languages, it would not be a feasible requirement that staff be able to cover all of the Aboriginal languages spoken in the NT. As discussed below, under Conducting an inspection in a culturally appropriate manner, interpreters will be an essential aspect of conducting inspections.

TREATY AND OPCAT OBLIGATIONS – MĀORI REPRESENTATION
INSTITUTION VS PERSONNEL

‘Both the Treaty of Waitangi and OPCAT requirements to have appropriate ethnic representation would suggest that there should be Māori input into NPM work at both the policy and operational levels. The Human Rights Commission has an Ahi Kā team of Māori staff, including te reo speakers, who work on Treaty and Indigenous Rights and who are keen to be involved in OPCAT work. If a NPM considered that Māori representation was required on a site visit, then this could be facilitated by seconding the required expertise to the team from within the NPM’s own office or from, for example, the Human Rights Commission. It should be noted that during the first stage of OPCAT implementation, there was quite high representation of Māori within NPMs but with personnel changes, this level of representation is now much less. As with the other areas of expertise this highlights issues about the structure and functioning of the NPM as an institution as opposed to the components of its personnel at any given time.’

As an example of best practice, on the inspection I shadowed with the New Zealand OCC, half of the staff were Māori, including the lead for the visit.

As discussed above (under Maintaining, designating or establishing the Northern Territory NPM), the NT NPM must be responsive to the obligations that will arise from the NT Treaty/Treaties. An example of what the obligation might entail is a strengthening of the OPCAT requirement that there be representation of minority groups, including Aboriginal people, among staff.

---

278 North Australian Aboriginal Justice Agency, Submission No 45 to Australian Human Rights Commission, OPCAT in Australia Consultation, July 2017, 3-4: ‘As stated, we are of the view that a Custodial Inspector is required and similar to the Western Australia scheme. We are of the view specific legislation to enable this is important. We further recommend that the legislation set out the structure including for adequate Aboriginal representation across the facets and levels of a proposed structure (including, if the Inspector is not Aboriginal, for a Deputy Inspector to be an Aboriginal identified position and for other representations across the structure). In our experience, the governance arrangements for Aboriginal people who constitute a significant proportion of the prison and detention populations (commonly between 80% – 100%) requires specifically set out legislation mandating Aboriginal involvement in this way. This is to ensure a level of genuineness and authenticity in the purported, stated approach of relevant agencies in relation to Aboriginal matters.’
279 Association for the Prevention of Torture, Monitoring places of detention: a practical guide (2004) 71: ‘In places of detention where persons from different ethnic or regional backgrounds are held, it is a strong advantage for a visiting body to reflect those groups and regions in the composition of their team. Language skills are a further point to be taken into consideration.’
Association for the Prevention of Torture, Monitoring Police Custody - A practical guide (January 2013) 26: ‘Similarly, if there is a reasonable likelihood of encountering detainees (or police officers) of a particular ethnicity, or who speak a minority language, someone from the same ethnicity or who speaks the same language should be part of the team.’
ICV – DIVERSITY AMONG VISITORS

‘Recruitment of Independent Custody Visitors (appointees) is open, non-discriminatory and well publicised. The OSPCC will aim to provide a suitable balance for visiting panels in terms of factors such as age, gender and ethnicity. This inclusive approach will also extend to those with disabilities and those who do not have English as their first language. All reasonable efforts will be made to accommodate applicants in these categories where they are considered suitable candidates.’

IMB – CHALLENGES IN RECRUITMENT PROCESSES

‘One of the recurring problems for boards is the recruitment and retention of members from diverse backgrounds. There are now much more transparent and objective recruitment processes, with trained independent interviewers. But our processes sometimes seem over-rigid, both in terms of the timing of campaigns and the way in which we test competencies. We are reviewing this and also continuing to look at ways of streamlining the administrative processes.’

The IMB acknowledges that the recruitment processes being overly rigid poses an obstacle to recruiting diverse staff. Having Aboriginal-identified positions or Aboriginal cadetships with the Inspectorate is a positive and recommended step, but the Inspectorate should also be proactive in engaging with ACCOs and relevant bodies when recruiting Aboriginal staff. Examples of relevant bodies or networks in the NT include Aboriginal Peak Organisations Northern Territory (APONT), Aboriginal Medical Services Alliance Northern Territory (AMSANT), NAAJA, Bilata Legal Pathways or Winkiku Rrumbangi NT Indigenous Lawyers Aboriginal Corporation. The Inspectorate could also actively engage with Charles Darwin University, for example, providing internships or pathways for recent graduates. Of course, the success of the Inspectorate in attracting suitable candidates will be determined in part on whether it is considered legitimate or perceived as tokenistic and ineffective by the Aboriginal community.

Retention of Aboriginal staff will be dependent on whether the Inspectorate is a culturally safe work place. This would require that, for Aboriginal staff working at the Inspectorate, ‘there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience, of learning together with dignity, and truly listening.’

**RECOMMENDATION:** The Inspector and Deputy Inspector positions should be Aboriginal identified positions.

---


283 Robyn Williams, ‘Cultural Safety – What does it mean for our work practice?’ (1999) 23 *Australian and New Zealand Journal of Public Health* 2. See also the definition of cultural safety in Cox Inall Ridgeway, *Review of the Indigenous Legal Assistance Program 2015-2020 Final Report* (February 2019) 45: ‘Cultural safety includes more than just cultural competency. It is a decolonisation process of embedding an Aboriginal and Torres Strait Islander worldview at all levels including policy, management and at the individual level.’ **In the context of the ILAP Review cultural safety... can include (but is not limited to)... Indigenous staff representation and leadership at the service, adherence to cultural protocols, identified positions, equal opportunities and career pathway progression for Aboriginal and Torres Strait Islander people, ongoing cultural competency and awareness training that is locally tailored for all staff, understanding of ongoing intergenerational trauma and its impact on Aboriginal and Torres Strait Islander rights.**

96
**EXPERTISE ON DISCRIMINATION AGAINST MINORITIES**

It is also recommended that the Inspectorate has staff with expertise on discrimination.

The APT’s website notes the following:


Paragraph 61: Independent authorities and expert bodies should be mandated to supervise and monitor pretrial and prison facilities, with expertise on discrimination and the situation of minority prisoners and adequate representation of minorities within the body’s membership.\(^{284}\)

---

MULTIDISCIPLINARY STAFF

OPCAT requires that ‘States Parties shall take the necessary measures to ensure that the experts of the [NPM] have the required capabilities and professional knowledge.’\(^{285}\) The Special Rapporteur has recommended that inspection teams be ‘composed of members of the judiciary, law enforcement officials, defence lawyers and physicians, as well as independent experts and other representatives of civil society.’\(^{286}\)

Murray et al note that:

the SPT has suggested that the approach should be ‘multidisciplinary’ and involve, among others, the legal profession, ‘the medical profession, children and gender specialists and psychologists’. Medical expertise is considered crucial, as a way of helping to identify the practical signs of abuse... There have also been calls for visiting members to have international expertise, namely expertise in human rights legal standards, arguably to enable them to apply consistency in approach in each visit. More broadly, there should be ‘appropriate knowledge’ in the NPM, to have experience in torture, specifically the prevention of torture, or someone who understands the system.\(^{287}\)

The APT further explains the value of having lawyers either on staff or engaged as consultants, as they bring ‘legal expertise, in particular a knowledge of international and regional laws, standards and norms on conditions of detention, codes of conduct for custodial staff, and more generally on the rights not to be subjected to torture or other ill-treatment, and to a fair trial.’\(^{288}\) Nowak and McArthur add to the above list ‘forensic experts... social workers... and persons with particular knowledge in the administration of criminal justice, police or prison administration.’\(^{289}\)

Staff expertise is required not only to evaluate evidence and reach objective conclusions to support the Inspectorate’s findings, it is also necessary to enable the Inspectorate to make solution-suggestive recommendations, in accordance with the APT’s double SMART model, discussed in greater detail below (under Recommendations).

Recalling the importance of avoiding conflicts of interest, having staff or consultants with an understanding of the operations of those agencies responsible for places of detention could lead to benefits such as the Inspectorate correctly identifying issues of concern, improving the triangulation of evidence gathered during inspections and identifying to whom recommendations should be made, as well as the content of those recommendations. It could also increase the detaining authority’s confidence in the Inspectorate (for example, having former detention staff as part of an inspection could decrease resistance to Inspectorate

---


\(^{287}\) Rachel Murray, Elina Steinerte, Malcolm Evans, and Antenor Hallo de Wolf, ‘The Role of NPMs’ in The Optional Protocol to the UN Convention Against Torture (Oxford University Press 2011) 135-137.

\(^{288}\) See also Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the national preventive mechanism advisory visit to Ecuador made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/OP/ECU/2 (16 July 2015) 14 [64].

\(^{289}\) Association for the Prevention of Torture, The role of lawyers in the prevention of torture (January 2008) 8.

recommendations based on the detaining authority’s perception that Inspectorate staff have no appreciation of the reality of operating a place of detention).

**SPT VISIT TO NEW ZEALAND**

‘Whilst the SPT was impressed by the commitment and professionalism of NPM experts, it was concerned that the number of staff were inadequate, given the large numbers of places of detention within their mandates. It was also concerned at the lack of NPM expertise in medical and mental health issues.’

**HMIP – MULTIDISCIPLINARY STAFF**

‘Inspectors are drawn from a range of backgrounds, including… former prison managers with operational experience working in custodial establishments, and social care, probation, police and legal backgrounds. In addition Inspectorate staff also include: health care inspectors, drugs inspectors, social researchers, editorial and administrative staff.’

**RECOMMENDATION:** The Inspectorate should have a multi-disciplinary team, where expertise could include (but should not be limited to) the following: medical professionals and psychologists, staff with expertise in the criminal justice system and international human rights standards and mechanisms, staff with specialisation in the fields of children and gender, social workers, educators and staff who have previously worked in agencies responsible for places of detention (preferably interstate).

**MULTIDISCIPLINARY ABORIGINAL STAFF**

Preferably, the Inspectorate’s staff will be comprised of Aboriginal staff across disciplines. This would assist in ensuring that all aspects of detention are viewed through both a culturally appropriate lens and an expert lens. This report supports NATSILS submission to the AHRC *OPCAT in Australia* consultation, recommending that ‘NPMs should be comprised of Aboriginal and Torres Strait Islander people and culturally trained health and welfare professionals.’

Similarly, NAAJA’s submission that where ‘health or mental health professionals should be included on visiting teams, such staff would need expertise in terms of ATSI people perspectives. For example, many psychological tools including assessing risk used for ATSI people are not ‘normed’ on

---

290 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand, UN Doc CAT/OP/NZL/1 (28 July 2014) [13].
292 National Aboriginal and Torres Strait Islander Legal Services, Submission No 47 to Australian Human Rights Commission, *OPCAT in Australia Consultation*, July 2017, 16.

Commonwealth, Royal Commission into Aboriginal Deaths in Custody, National Report (1991) vol 5: ‘Health services provided within correctional institutions should be adequately resourced and be staffed by appropriately qualified and competent personnel. Such services should be both accessible and appropriate to Aboriginal prisoners. Correctional institutions should provide 24 hour a day access to medical practitioners and nursing staff who are either available on the premises, or on call… wherever possible, Aboriginal prisoners or detainees requiring psychiatric assessment or treatment should be referred to a psychiatrist with knowledge and experience of Aboriginal persons. The Commission recognises that there are limited numbers of psychiatrists with such experience.’
Indigenous Australian perspectives but are seen as the most relevant tool. Discussed in greater detail below (under Expectations/standards and frameworks for culturally competent inspections), the Canadian case of Ewert considers the issue of culturally-appropriate assessment of risk for prisoners.

The importance of Inspectorate staff having an understanding of what constitutes culturally appropriate health care provision in detention is demonstrated by the following:

[a] review of deaths in custody two decades after the landmark Royal Commission into Aboriginal Deaths in Custody found that the number of Aboriginal deaths in custody had increased over the previous five years. The report found that most of the deaths were due to natural causes, replacing self-harm as the leading cause of deaths in custody. This is a particularly concerning trend in the justice system that must be addressed through the provision of culturally sensitive and supportive health care.

**RECOMMENDATION:** The Inspectorate should ensure that its Aboriginal staff is similarly multidisciplinary.

**ENGAGING CONSULTANTS WHERE THE INSPECTORATE DOES NOT HAVE THE EXPERTISE ON STAFF**

In its submission to the AHRC OPCAT in Australia consultation, the APT, recognising the challenges to achieving a multi-disciplinary team, suggested that:

[n]ot all of these professional backgrounds need to be represented among NPM staff, however, and many NPMs have contractual arrangements with NGOs and experts to help them fulfil these criteria. Arrangements for the sharing of specialised expertise among state and federal institutions as well as the creation of a shared national expert roster may also be useful in this regard.

Where the Inspectorate does decide to engage consultants, it should ensure that neither the individual nor the organisation(s) for which they work or with which they are affiliated have an actual or perceived conflict of interest. The Inspectorate may also consider engaging consultants from ACCOs interstate, given potential difficulties in identifying appropriately qualified individuals with no conflicts of interest in a small jurisdiction like the NT. There will be opportunities to engage consultants from ACCOs in the NT, however, such as Miwatj.

The AHRC’s OPCAT in Australia Interim Report identified different approaches, whereby ‘NPM bodies directly involve civil society and individual professional experts in their inspections’ or ‘an advisory council, or panel of experts, be established to provide information and advice, particularly about vulnerable detainees, to the NPM bodies.’

---

294 National Aboriginal and Torres Strait Islander Legal Services, Submission No 47 to Australian Human Rights Commission, OPCAT in Australia Consultation, July 2017, 15.
297 Ibid.
HMIPS – ENGAGING CONSULTANTS

‘Consultant Forensic Child and Adolescent Psychiatrist Dr Helen Smith will work closely with the HM Inspectorate of Prisons for Scotland and others to review support for young people in HM Prison & Young Offenders Institution Polmont... Dr Smith, who is also clinical lead for West of Scotland Child and Adolescent Mental Health Service and Honorary Senior Clinical Lecturer at the University of Glasgow, brings extensive experience of work to improve the mental health of young people in secure care.’

RECOMMENDATION: If the Inspectorate is unable to attract staff across the relevant disciplines, it should ensure that it has the necessary expertise by engaging consultants, particularly from ACCOs.

RECOMMENDATION: The Inspectorate may also consider engaging consultants from ACCOs interstate, given potential difficulties in identifying appropriately qualified individuals with no conflicts of interest in a small jurisdiction like the NT.

PEOPLE WITH LIVED EXPERIENCE – ON STAFF OR AS CONSULTANTS

Including staff or consultants with lived experience accords with the principle that the detainee’s experience of detention is central to the Inspectorate’s work (discussed under Conducting the inspection). People with lived experience can, and should, be involved in a myriad of ways, including the design of the NPM, in drafting expectations/standards and the inspection framework, in preparing for inspections, partaking in the inspection itself, providing feedback during the inspection regarding what evidence might need to be properly triangulated (should they not be entering the place of detention themselves), in drafting recommendations, in analysing the detaining authority’s response and providing training to staff.

This report supports NATSILS’ submission to the AHRC OPCAT in Australia consultation, that ‘[i]t is fundamental that people with lived experience of detention, particularly Aboriginal and Torres Strait Islander people, play an active role in the ongoing consultation, design and implementation process.’

The APT’s submission to AHRC OPCAT in Australia consultation recommended that ‘[i]n order to facilitate useful civil society engagement at every stage of the process, it is important that such engagement includes the widest possible range of organisations, including... former detainees,’ and the AHRC OPCAT in Australia

---

299 National Aboriginal and Torres Strait Islander Legal Services, Submission No 47 to Australian Human Rights Commission, OPCAT in Australia Consultation, July 2017, 18.
300 Association for the Prevention of Torture, Submission No 26 to Australian Human Rights Commission, OPCAT in Australia Consultation, July 2017, 8.
**Interim Report** recognised that the ‘most effective NPM bodies will work collaboratively with... people with lived experience of the places of detention that are being inspected.'

---

**ARTICLE BY A FORMER DETAINEE - IN RELATION TO THE LOUKIDELOS REPORT**

Jay writes the following: ‘My early experience as an “insider” shaped my worldview on the dangers of treating one group of people as “other” and highlighted the harms that can so easily occur in a prison environment where there is such a stark divide between those who have power and those who do not. One of the heartening things about David Loukidelis’s report is that it is informed by many conversations with those at WCC. He states that “their intelligent and thoughtful stories gave me a much richer and clearer picture than I could otherwise have hoped for” and “contributed enormously to my work.” Spending time really listening to those imprisoned makes it harder to separate them into a different category of “others” and instead promotes understanding, empathy and respect. It is on this human foundation that Yukoners can build for the future.’

Of course, speaking with and obtaining the views of detainees is central to an inspection. However, Jay’s description of this risk of ‘othering’ those who are detained does highlight a risk that Inspectorate staff, just as detention staff, are susceptible to. Inspectorate staff, even with the best of intentions, can bring assumptions or unconscious biases to their work. Having staff or consultants with lived experience of detention working with the Inspectorate can mitigate this risk, improving the Inspectorate’s ability to achieve positive outcomes for those who are detained.

Including staff with lived experience improves an NPM’s ability to effectively carry out its mandate, by increasing its ability to genuinely appreciate the culture of an institution and through challenging assumptions (as recognised during an APT symposium on monitoring psychiatric institutions), which could in turn assist an NPM to build a better understanding of what should be classified as torture and cruel, inhuman or degrading treatment or punishment. A conclusion reached at The Global Forum on OPCAT was that an ‘inclusive approach involves action on two fronts... Engaging victims, service users and former detainees. This means ensuring a victim-centred approach to torture prevention, focusing on the person, their rehabilitation and their perspective on what can be done to stop torture occurring.’

---

104 Stevens, Jem, Institutional culture in detention: a framework for preventive monitoring, Penal Reform International and the Association for the Prevention of Torture (2015) 19: ‘To work on culture change, monitoring bodies need the expertise and skills of perception to be able to understand the culture in places of detention through their visits. This means ensuring diverse know-how relevant to the institutions they visit. Monitors with firsthand experience in these places, such as former staff or detainees, may be able to draw on this experience to grasp the culture in similar institutions.’
105 Association for the Prevention of Torture, Third Jean-Jacques Gautier Symposium on monitoring psychiatric institutions (September 14 2016) https://www.apt.ch/en/news_on_prevention/third-jean-symposium-focused-on-monitoring-psychiatric-institutions/; ‘The multidisciplinary approach of the discussion allowed for a rich and constructive exchange of views. The perspective of service users in particular was crucial in pushing the reflection further and in questioning certain assumptions on the issues discussed.’
106 Association for the Prevention of Torture, Jean-Jacques Gautier NPM Symposium 2016 Monitoring psychiatric institutions Outcome report (2016) 19: ‘A consensus was reached in which situations of imminent danger to the life of a person could justify treatment without consent. The views and experiences of former service users illustrated the various positions and complexity of this issue. Some believed that forced treatment could be justified in order to save a life, while others were of the opinion that any forced treatment is a violation of the right not to be tortured since certain treatments can cause serious harm to the person’s health in the medium or long-term, and should therefore be prohibited in favour of an ongoing attempt to seek consent and alternatives. Finally, it was clearly stated that crisis situations should be seen to be exceptional and cannot under any circumstances form the basis of public policy on this matter.’
Murray et al canvass how expertise in the form of lived experience or service use can be incorporated in the functioning of the NPM. They refer to ‘a study of the examination of mental health and social care inspectorates [that] recommended… [i]n order to ensure credibility of the inspectorate's work, people who have experienced mental health services and services for people with intellectual disabilities should be actively recruited as inspectors.’ They note this particular issue has received more attention in the context of the CRPD than OPCAT, however, and identify the relevancy of this recommendation to other places of detention, such as juvenile facilities. This position is supported by the APT report from the NPM Symposium on addressing children’s vulnerabilities in detention, where ‘it was suggested that children and young people should also be involved in the work of NPMs.’

The HRC convened four roundtable meetings of the National Preventive Mechanism during the reporting period to share information and discuss key issues… One meeting provided an opportunity for the National Preventive Mechanism to explore perspectives, common concerns, and future opportunities for dialogue with several civil society organisations… It was acknowledged that the lived experience of detained persons is as relevant in an OPCAT monitoring context as in other areas where the human rights of vulnerable groups are at risk.

Following the publication in 2014 of the SPT visit report, New Zealand became eligible for the SPT/OPCAT Special Fund for projects implemented between 1 January and 31 December 2016. We were successful in an application this year for funding to provide training and monitoring skills to a group of people who have personal experience of using or caring for someone who uses mental health services in New Zealand. These ‘Experts by Experience’ will assist our Inspectors to undertake visits to places of detention.

‘New Zealand’s project, ‘Strengthening the capacity of the Ombudsman Office to monitor and report the detention conditions of persons with psychological disabilities’ was for USD$18,699.00.’

HMICS focuses on user experiences through speaking to relevant stakeholders in their inspections, and legislation requires that scrutiny incorporate the views of service users. The Aboriginal Inspectorate could expand on this, and legislate for the employment of staff and engagement of consultants with lived experience in its operations.

In accordance with our commitment to conduct our scrutiny activity in a way that is user focused, throughout our scrutiny process we aim to gain user perspectives from key stakeholders, including staff associations and relevant health care centres and secure psychiatric units are often overlooked by preventive bodies. People with actual experience of these places can provide important insights if included in monitoring teams.’

---

partners... Wherever possible we seek to assess the user perspective from those who have experienced it firsthand. In the course of our Inspection of Custody Centres across Scotland, for example, we spoke to detainees, doctors, solicitors and independent custody visitors who have had direct experience of Police Scotland’s delivery of custody to secure the widest possible user perspective.¹³¹

EXAMPLES OF THOSE WITH LIVED EXPERIENCE OF DETENTION BEING GIVEN PLATFORMS IN NON-NPM CONTEXTS

Throughout the Fellowship, a number of examples of how the lived experience of detainees is incorporated in (non-NPM/oversight) service delivery or policy development were highlighted.

PRISON INMATE COMMITTEES – REPRESENTATIVE BODIES

‘An Inmate Committee is a representative body. As such, it should reflect, wherever possible, the cultural, spiritual and ethnic background of the inmate population.’¹³² The principles of the committees include ‘[t]o assist in the rehabilitation and reintegration of inmates into communities as law abiding citizens, [t]o establish a means for inmates to provide input regarding institutional operations, thus contributing to safe and secure institutions...’ The Inmate Committee will make recommendations to the Institutional Head on decisions affecting the inmate population, except decisions relating to security matters. The Inmate Committee is responsible for making recommendations to the Institutional Head or delegate regarding the use of the Inmate Welfare Fund.¹³³

Inmate committee members exercising their role is demonstrated in the following news article:

“People are just saying enough is enough, they’re just barely getting by now,” said John Curcio, chair of the inmate committee at Bath Institution, a medium security prison west of Kingston, Ont. Inmates there refused to go to work Tuesday as a protest. “A lot of these guys send their money home,” he said. “We can’t help our families or save for the future”...

At Fenbrook Institution, a medium security prison near Gravenhurst, Ont., inmates also stayed away from work. Greg McMaster, inmate committee chair, said the prisoners are frustrated and angry about the cumulative effects of the harsh measures brought in by the Harper government in recent years. “They are feeling the crushing effects of longer sentences, double bunking and now this,” he said. “We’ve had no recreation budget for the past three years and the infrastructure is crumbling. We can’t even afford to bring our families in for a family visit. And now many of us won’t be able to afford phone contact with our families,” he said. “It’s just one thing after another”...

“I don’t see a valid correctional objective to this,” said Todd Sloan, a lawyer who represents several inmate committees in Ontario prisons. “People are basically furious,” he said. “There are people who have worked for years and years to

See also Public Services Reform (Scotland) Act 2010 (Scot) s112: ‘(1) The persons, bodies and office-holders listed in schedule 19 (the “listed scrutiny authorities”) must make arrangements which— (a) secure continuous improvement in user focus in the exercise of their scrutiny functions, and (b) demonstrate that improvement. (2) User focus is the involvement of users of scrutinised services in the design and delivery of scrutiny functions in relation to those services and the governance of the listed scrutiny authorities. (3) Scrutinised services are services provided in pursuance of functions and activities which are— (a) subject to scrutiny by a listed scrutiny authority, or (b) provided by a person, body or office-holder which is subject to scrutiny by a listed scrutiny authority. (4) Users of a service include— (a) persons who will or may use the service in the future, (b) persons who act on behalf of others in respect of whom the service is provided, and (c) other persons with a direct interest in, or directly affected by—(i) the provision of the service, or (ii) the scrutiny of the service or the person, body or office-holder providing it... (7) In this section references to the scrutiny functions of a person, body or office-holder are to such of the functions of the person, body or office-holder as relate to the regulation, audit or inspection of other persons, bodies or office-holders or their functions or activities.’
¹³³ Ibid.
earn their way (in prison) into a situation where they can earn some relatively speaking decent wages and learn a trade and now that is all being thrown out from under them.”

CORRECTIONS POLICIES INFORMED BY THE VIEWS OF FORMER ABORIGINAL PRISONERS

‘In 1990, there were plans for five new regional federal facilities. A report called Creating Choices, by the Task Force for Federally Sentenced Women, recommended that one of these should be specifically for Aboriginal women. The Native Women’s Association of Canada proposed the concept of a healing lodge. This was supported by former federal Aboriginal offenders who were serving as advisors to CSC. Two important issues prompted the creation of healing lodges.”

Of note, the concept of providing a platform for detainees is not alien to the NT, with the NTRC recommending that, “Territory Families introduce a Detainee Representative Group program to enable detainees to meet formally each fortnight with the superintendent of youth detention.” Given that NT detaining authorities are moving towards acknowledging the voice of current and former detainees (beyond making requests and complaints), then surely the Inspectorate should be giving a voice to those with lived experience.

The Prison Reform Trust (PRT), with which I met as part of the Fellowship, has undertaken work as part of its Active Citizens Programme to empower prisoners to have their views heard by the prison administration. It has also undertaken work that involves serving prisoners, ex-prisoners and connected organisations as part of its Prison Policy Network.

PRISON REFORM TRUST – ACTIVE CITIZENS PROGRAMME

THE PROGRAMME

‘The Prison Reform Trust launched the active citizens programme in 2015. We ran active citizens forums in ten prisons, working with groups of prisoners to study a specific problem and propose solutions for the governor to consider. Aims: Draw on the perspectives of people in prison to tackle a selected theme and report to the governor, [g]ive residents a chance to exercise responsibility inside prison, [e]ncourage governors to improve conditions of prisons. PRT meets the governor to decide on a theme for the forum. We recruit eight to 12 prisoners to the forum. The forum holds four sessions to examine the problem, analyse its causes, and decide on possible solutions. The forum sends its report to the governor. The governor meets the group to discuss their proposals. We tackled topics such as preventing fights, keeping the environment clean, treating prisoners as adults, and preparing for release. The forums allowed governors to see problems from the prisoners’ point of view. For example, if prices increase at the prison shop (canteen) but wages stay the same, disputes will arise and violence may increase.”

THE BENEFITS OF INCORPORATING THE VIEWS OF THOSE WITH LIVED EXPERIENCE

People in prison have an important perspective on how that prison works. They see first-hand the obstacles to rehabilitation. Their knowledge of life on the wings can shed light on why it’s hard to translate policy into practice. Drawing on this expertise is part of effective governance.\(^{318}\)

‘So, what can a forum tell a governor that is not already obvious from adjudications, staff intelligence, MQPL surveys, and official data? One forum was asked to comment on how to treat people as responsible adults. A member described the visits room, where residents must use assigned seats. If they leave it, the visit will be curtailed. Governors who observe visiting hours may be reassured by the good order when everyone is in their allocated seats. When this man’s wife brought their young children, and the children became disruptive, she had to bring them back to the table. If he tried to discipline them, his visit would be stopped. He said his children knew that he had to behave, just as they did. His role as father – his adult status - was compromised. This story shows how the residents’ experience and knowledge can broaden our understanding of a system that is too often taken for granted.’\(^{319}\)

PARTICIPANT’S TESTIMONIAL

‘My name is Bethan Doci. I took part as both a serving prisoner and an active citizen in the forum convened by the Prison Reform Trust at HMP Downview. The forum highlighted the importance of using prisoners’ experiences and knowledge to help with specific problems... Looking ahead and moving forward, active forums provide one way to develop prison life and utilise prisoners’ experience in the most beneficial way. Experience and insight into living within a prison environment is knowledge that should be used to contribute to the smooth running and efficiency of a prison.’\(^{320}\)

PRISON REFORM TRUST – PRISON POLICY NETWORK

THE NETWORK

The PRT ‘[makes] prisoners’ views central to all that [they] do, give them the chance to speak for themselves, and keep them informed.’\(^{321}\)

‘This report outlines the key findings of the first consultation undertaken with the Prison Policy Network (PPN) as well as some emerging issues for wider debate. The PPN was launched in July 2018 as part of the Prison Reform Trust’s strategic objective to give prisoners a stronger influence in how policy on prisons is made. It is an emerging network of current serving prisoners, ex-prisoners and connected organisations who are interested to share their experiences and ideas with policy makers. The PPN aims to share the views of people with experience of living in prison with those involved in prison policy development nationally through research, consultation and reports.’\(^{322}\)

‘The PPN will ask its members to apply their expertise to three questions about key topics of interest each year. The Prisoner Policy Network will share prisoners’ expertise on key issues publishing reports with the results. We aim to publish two or three key reports a year. We will use the reports to influence policy and key decision makers using all the networks that Prison Reform Trust has developed throughout its history.’\(^{323}\)

THE IMPORTANCE OF LIVED EXPERIENCE

‘Why do we need it? Reforming how prisons operate is a complex task—changing the policy that directs the practice is key to achieving this. Prison policy is developed through research, consultations and debate but prisoners are rarely part of the process. The Prisoner Policy Network will be a collective voice using the Prison Reform Trust’s connections and

\(^{318}\) Ibid 4.

\(^{319}\) Ibid 11.

\(^{320}\) Ibid 3.

\(^{321}\) Prison Reform Trust, Strategic Plan 2018-2023 (May 2018) 1.


\(^{323}\) Prison Reform Trust, Prison Policy Network: ‘What do you need to make best use of your time in prison?’(2019) <http://www.prisonreformtrust.org.uk/portals/0/documents/PPN/PPN%20leaflet%20February%202019.pdf?dm_t=0,0,0,0,0> 2-3.
expertise to make sure that the prisoner viewpoint – “the lived expertise of imprisonment” - is both heard and used in policy.\footnote{Ibid.}

\section*{THE USE OF DIRECT PRISONER QUOTES FROM DETAINEES}

‘The report attempts to represent the views of those who responded to this consultation, rather than the views of Prison Reform Trust. As such, verbatim quotes from respondents are used liberally throughout (in italics) so that the story is told through the words of those with the lived experience and not through the words of the report writer.’\footnote{Lucy Wainwright, Paula Harriott and Soruche Saajedi, \textit{What incentives work in prison? A Prisoner Policy Network Consultation}, Prison Reform Trust (2019) 1.}

\section*{PROVIDING FEEDBACK TO PRISONERS}

‘These reports will also be published in Inside Time and broadcast on National Prison Radio and will be in prison libraries to read.’\footnote{Prison Reform Trust, Prison Policy Network: \textit{What do you need to make best use of your time in prison?} (2019) <http://www.prisonreformtrust.org.uk/portals/0/documents/PPN/PPN%20leaflet%20February%202019.pdf?dm_t=0,0,0,0,0> 3}

The practice of the PRT of using direct quotes in its reports is included in this report’s recommendations, in relation to the presentation of the Inspectorate’s findings (see \textit{Presentation of findings in the report}). Also, recommendations echoing the PRT’s best practice of ensuring their reports are accessible to detainees are discussed below (under \textit{A publicly available report}).

Although the focus of this paper is overseas practice, it should be noted that there are organisations in Australia, such as Sisters Inside, which exemplify best practice in working with people who have lived experience: ‘[a]ll of [their] work is directly informed by the wisdom of criminalised women and, wherever possible, Sisters Inside employs staff with lived prison experience.’\footnote{Sisters Inside, Submission No 42 to Australian Human Rights Commission, \textit{OPCAT in Australia Consultation}, July 2017, 2}

\section*{RECOMMENDATION: People with lived experience of detention (or experts by experience), preferably Aboriginal people, should be involved in the design and operation of the Inspectorate.}

\textit{Children and young people should be involved in the work of the Inspectorate where appropriate. This approach should be required by legislation.}

\section*{PROVIDING APPROPRIATE SUPPORT TO STAFF AND CONSULTANTS WITH LIVED EXPERIENCE}

In its submission to the AHRC \textit{OPCAT in Australia} consultation, Sisters Inside noted that:

\begin{quote}
[i]t is crucial that NPMs recognise both the vulnerability and immeasurable expertise of women and children with lived prison experience. Mechanisms used to engage with this cohort must address the risks associated with participation… former prisoners are at risk of retraumatisation as they recall and recount their treatment in prison. It is therefore important that the NPMs work closely with community-based organisations to host discussions that prioritise the voices and experience of people who have been in prison.\footnote{Ibid 9.}
\end{quote}
In the same submission, Sisters Inside also suggested the following:

NPMs could also ensure direct input from ‘experts with experience’ by: employing people with lived prison experience; hosting safe, accessible and open consultations specifically for people with lived prison experience; resourcing the emotional support required to facilitate participation by people with lived prison experience (e.g. advance preparation, debriefing, follow-up counselling); providing the practical support required to facilitate women’s participation (e.g. transport and childcare); and recognising the unique contribution of these organisational and individual experts (e.g. remuneration at similar levels to academic experts). 329

**RECOMMENDATION:** The Inspectorate should provide the appropriate support to staff and consultants with lived experience, recognising the risk of re-traumatisation.

**RECOMMENDATION:** The Inspectorate should recognise the value of the contribution and expertise of people with lived experience, and this recognition should be reflected in appropriate remuneration.

**CRIMINAL RECORD SHOULD NOT AUTOMATICALLY EXCLUDE PEOPLE FROM BEING INSPECTORATE STAFF OR CONSULTANTS**

An easily anticipated challenge to employing and engaging people with lived experience is the potential resistance to having people with lived experience of detention (police cells, detention centres and prisons) involved in Inspectorate work because they have criminal records. However, having a criminal record should not automatically exclude someone from participating in the work of the Inspectorate, including the actual inspections (noting that those with lived experience can contribute in a number of ways, and decisions on the most appropriate nature of involvement in Inspectorate work should be made on a case-by-case basis).

The Inspectorate should have guidelines in relation to who might be permitted to work with the Inspectorate (on staff or as a consultant), recognising that its mandate involves direct contact with vulnerable people, including children and survivors of domestic violence, and access to confidential and sensitive information (including personal medical information of detainees).

Engaging those with lived experience would not be inconsistent with other practices currently existing in the NT. The NT Police do not automatically exclude individuals with traffic or criminal records. For example, the NT Police Auxiliary Scheme (‘employ[ing] sworn officers for police duties, which did not require fully trained police officers... The Frontline Support stream incorporates... Watch House’ duties) requires that applicants

---

See also at 9: ‘In 2017, Sisters Inside has organised and hosted roundtable discussions allowing women with lived prison experience to speak directly to the United Nations Special Rapporteur on violence against women, its causes and consequences, the Anti-Discrimination Commission of Queensland and the Queensland Parole System Review team. Accordingly, we could contribute expertise to developing the necessary safeguards to minimise the risks of participation in NPM processes.’

329 Ibid 9-10.
meet the minimum requirement of being of good character as per the NT Police Recruitment Integrity Guidelines, undergoing ‘[i]ntegrity background checks... to identify any criminal/traffic offences.’

Applicants must make full disclosure in their application including all criminal and civil proceedings, all spent convictions, all traffic offences including traffic tickets and court appearances, all juvenile offences including police cautions, all Domestic Violence Order History and any bankruptcy proceedings. If an applicant declares any of these matters their application may be taken before the Integrity Committee. Applicants will be advised and given the opportunity to provide a written response to the Integrity Committee. The Integrity Committee will make a determination about the applicants suitability to proceed in line with NT Police Recruitment Integrity Guidelines.

---

**ICVA – VISITORS WITH CRIMINAL RECORDS**

‘Please note that a criminal record will not necessarily be a bar to obtaining a volunteering position.’

---

**APPLYING GLADUE PRINCIPLES TO CRIMINAL RECORDS**

In Canada it has been proposed that, in considering an offender’s sentencing history to determine an appropriate sentencing disposition for a matter before the court, caution should be exercised in relation to criminal records predating Gladue. The reason for this caution is that ‘seemingly race-neutral sentencing policies’ have in fact constructed a system that has failed Aboriginal people and ‘previous convictions registered under a system that has failed the convicted person must be viewed differently than other convictions, if considered at all.’

Gladue is considered in greater detail below (under *Expectations/standards and frameworks for culturally competent inspections*). It should be noted that in the NT, both historic and current legislation disproportionally impacting on Aboriginal people has contributed to their overincarceration (and criminal records). Both the conduct that has been criminalised and the sentencing processes have impacted on Aboriginal people’s criminal histories, and this should be recognised when assessing the suitability of a potential candidate. Historically, relevant legislation has included the criminalisation of absconding from mandatory rehabilitation (the vast majority of people in mandatory rehabilitation being Aboriginal people) and the criminalisation of breaching an Alcohol Protection Order. A continuing issue is the NT’s mandatory sentencing regime (in relation to violent offences, breaches of domestic violence orders, property damage and drug offences) which limits the judiciary’s ability to exercise its discretion to sentence in a way that appropriately reflects the seriousness of the offence and the individual’s personal circumstances.

---


331 Northern Territory Police, ‘Assessment Guidelines for Recruiting staff and the Integrity Committee’


335 Alcohol Mandatory Treatment Act 2013 (NT) s72.

336 Alcohol Protection Orders Act 2013 (NT) s23.

In assessing whether a candidate is suitable for a staff position or consultancy, the Inspectorate could take into account a range of factors when considering criminal records, including the nature of the offending, the number of offences, the types of sentences in the candidate’s criminal history (including, but not limited to, no conviction being recorded and the lengths of the terms of imprisonment) and the time lapsed since the last offending, all viewed through the lens of the Gladue principles.

It should also be noted that in terms of police custody, some individuals will have experienced detention in circumstances where no criminal offending was alleged, such as under protective custody or the paperless arrest laws. Additionally, a former detainee who has experienced police custody or prison may actually have no criminal history, in circumstances where they were charged and the charge was ultimately dropped or they were found not guilty.

**RECOMMENDATION:** People, particularly Aboriginal people, who have previously been held in places of detention should not automatically be excluded from working as either staff or consultants. This approach should extend to their ability to participate in inspections. The Inspectorate should have guidelines in relation to who might be permitted to work with the Inspectorate (on staff or as a consultant), recognising that its mandate involves direct contact with vulnerable people.

**TRAINING OF STAFF**

The SPT has recommended that training be undertaken by NPM members to ‘ensure that the standard operating procedures... are uniformly applied by all its members, with a view to ensuring consistency of working methods and the transfer of knowledge among all. Adequate training for all persons participating in visits, including associated experts, is essential.’[338]

**IPCA - BEST PRACTICE INTERNATIONALLY**

‘A member of the Authority’s OPCAT team undertook consultations with agencies associated with the United Nations Office in Geneva, the headquarters for the UN High Commissioner for Human Rights. The engagement was principally focused on enhanced collaboration, particularly in relation to the Authority’s developmental and preventive work, as well as future OPCAT initiatives at the regional and international levels. It involved staff from the Association for the Prevention of Torture... meetings were also held with human rights experts from other diplomatic missions and with United Nations staff. The Authority’s representative participated in a meeting of the OPCAT Contact Group, an independent body recognised by the UN. The Contact Group includes: Amnesty International; the Association for the Prevention of Torture; the Human Rights Implementation Centre of the University of Bristol; the International Federation...

[338] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to Armenia undertaken from 3 to 6 September 2013: observations and recommendations addressed to the national preventive mechanism, UN Doc CAT/OP/ARM/2 (22 February 2017) [44].
Of Action by Christians for the Abolition of Torture; International Disability Alliance... Further engagement during the year involved meetings with senior staff from the International Committee of the Red Cross... In the United Kingdom, the Authority engaged with a number of agencies [NPMs and oversight bodies].’

‘The liaison with these agencies has enhanced the capability of the Authority as both a Police oversight body and a National Preventive Mechanism. It has provided the Authority with an opportunity to study methodology and best practice within comparable agencies, and fostered relationships that will contribute to the ongoing acquisition of knowledge. A particular highlight was the opportunity to accompany an inspection team from Her Majesty’s Inspectorate of Prisons (HMIP) and Her Majesty’s Inspectorate of Constabularies (HMIC) on unannounced visits ... The lessons of the overseas experience will be shared with other [New Zealand] agencies... who have expressed a desire to discuss the UK experience and operating practices.’

WORKSHOPS WITH INTERNATIONAL EXPERTS

‘With the support of the Asia Pacific Forum (APF) of national human rights institutions and the international Association for the Prevention of Torture (APT), the Commission was able to bring two experts to New Zealand for a workshop with the NPMs. It provided a valuable opportunity to draw on overseas experiences and to consider expert perspectives on the way the New Zealand Preventive Mechanisms were working. The experts also met with government agencies to discuss developments to date and share their assessment of desirable changes and priorities for future development.’

IMB MAGAZINE – KEEPING STAFF ABREAST OF RELEVANT DEVELOPMENTS AND REPORTS

Articles in the magazine include the following:

‘A promise worth keeping: The government’s long-awaited strategy on female offenders has now been published. Katy Swaine Williams, Senior Programme Manager at the Prison Reform Trust, considers the document.’

‘Rising Tide: A recent report has highlighted significant trends in the outcome of prison disciplinary proceedings. Rob Preece, Campaigns and Communications Manager at the Howard League for Penal Reform, explains.’

ICVA - TRAINING FOR VOLUNTEERS

ICVA creates and updates training material, which is complemented by ‘ongoing, up-to-date and accessible training through a new ‘bitesize’ format – training presentations, on contemporary topics, designed to be delivered within existing ICV meetings. ICVA developed modules based on... requests.’

ICVA also distributes newsletters that ‘provide information on national work including sharing the results of custody inspections, changes to PACE Codes and learning from schemes,’ and ‘in depth guidance documents on how to respond to a death in custody... where prison detainees may be temporarily located in police custody.’

---

140 Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2009 to 30 June 2010 (November 2010), 5.
142 Ibid 9.
144 Ibid.
145 Ibid 12.
146 Ibid.
At the annual national conference there were ‘insights from academic and operational experts on policing’ and at another conference, there was training on communication skills and a briefing on the Angiolini Review and National Custody Strategy.  

Further support was provided via ‘a range of mediums, including a face-to-face briefing, presentations... blogs and YouTube tutorials.’

---

**RECOMMENDATION:** All staff should receive ongoing training and professional development on the Inspectorate’s inspection framework and expectations/standards, developing international best practice in relation to NPMs, relevant international human rights and SPT guidelines/advice.

---

**RECOMMENDATION:** Professional development can be supported through engagement and/or ongoing relationships with NPMs in other jurisdictions, UN bodies, relevant international civil society with an interest in OPCAT (including UN-recognised groups, academics and NGOs) and international inspecting bodies that are not NPMs (such as the ICRC). It can also involve accompanying NPMs on inspections.

---

The way in which the training is delivered should be done in a culturally appropriate way, recognising different learning styles, particularly among Aboriginal people in remote communities.

---

**RECOMMENDATION:** Training of staff must be delivered in a culturally appropriate manner for Aboriginal staff, including staff from remote Aboriginal communities, adapting training to accommodate different learning styles.

---

**CROSS-CULTURAL TRAINING FOR INSPECTORATE STAFF**

The RCIADIC recommended that:

[a]ll employees of government departments and agencies who will live or work in areas with significant Aboriginal population and whose work involves the delivery of services to Aboriginal people be trained to understand and appreciate the traditions and culture of contemporary Aboriginal society; [s]uch training programs should be developed in negotiation with local Aboriginal communities and organisations; and [s]uch training should, wherever possible, be provided by Aboriginal adult education providers with appropriate input from local communities.

The Inspectorate should provide training to all of its staff and consultants (although the latter will clearly be to a different degree and frequency) in accordance with the RCIADIC recommendations.

---

148 Ibid 10.
149 For an example of good practice: Ben Grimes and Will Crawford, *Strong foundations for community based legal education in remote Aboriginal communities* (October 2011) 10: ‘The NAAJA approach is in essence a Participatory Action Research (PAR) project that is informed by the principles of adult learning, Aboriginal and bilingual learning and intercultural communication. PAR is a specific community development model that is particularly useful for working with minority communities that are disempowered and excluded from decision making processes. PAR is also a particularly appropriate form of research/learning to be conducted with Aboriginal communities because it strongly accords with the AIATSIS guidelines for ethical research in Australian Indigenous communities.’
THE IMPORTANCE OF AVOIDING STAFF BURNOUT AND DESENSITISATION

Nick Hardwick, former Chief Inspector of HMIP, stated that he ‘feared that he was becoming desensitised; that he was getting prison-horror fatigue. “You shouldn’t do this job for too long because you get used to things you shouldn’t get used to.”’ Hardwick’s comment is indicative of the risks inherent to undertaking detention oversight work, and the Inspectorate should be mindful of the risks to staff: of vicarious trauma, desensitisation and burnout.

There are measures that can be taken to mitigate the risk of desensitisation and burnout of staff, including ensuring that workloads are manageable and supports are in place to minimise vicarious trauma (such as regular team debriefs, availability of counselling, and fostering a culture that encourages staff to request extra support where needed). Reviewing and revising the Inspectorate’s strategies, such as escalation of concerns in relation to conditions and treatment in detention facilities, can also support long-term staff who may become disillusioned if their work is not achieving the outcomes and improvements they are pursuing.

Measures can also include utilising consultants on inspections (as they can bring a ‘fresh set of eyes’ in their analysis of the conditions and treatment in detention), inviting feedback from civil society in relation to the Inspectorate’s published reports, and providing staff with ongoing training and professional development opportunities so they are abreast of and are regularly reminded of developments and best practice both nationally and internationally.

RECOMMENDATION: All inspectorate staff and consultants must engage in ongoing cross-cultural training, beyond that provided in the initial induction.

RECOMMENDATION: The Inspectorate should have a strategy in place to mitigate the risk of staff desensitisation and burnout.

---

DEFINITIONS AND CATEGORIES OF PLACES OF DETENTION AND DETAINERS
PLACES OF DETENTION

OPCAT – PLACES OF DETENTION

OPCAT requires that States:

allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.\(^{352}\)

OPCAT defines deprivation of liberty as:

any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.\(^{353}\)

---

RECOMMENDATION: The Inspectorate should be permitted to visit any place of detention. This includes any place under the NTG’s jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence.

Deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

---

PLACES OF DETENTION IN THE NT

The Inspectorate’s sets of expectations/standards to be used during inspections should reflect the different types of detention in the NT, recognising that the purpose for which the place of detention is being used requires the application of different sets of expectations (this is discussed in more detail under Expectations/standards for inspections – general).

For example, custodial correctional services establishments can be a correctional centre, a court custody centre, or a police custody centre.\(^{354}\) A police station is a police custody centre if it has been declared to be a police custody centre by the Minister by Gazette notice\(^{355}\) and while it is being used for the custody of a prisoner or to accommodate a person who the Commissioner has agreed is to be accommodated at a custodial correctional facility under section 66 or 163.\(^{356}\) An area of a courthouse is a court custody centre if it has been declared to be a court custody centre by the Minister by Gazette notice\(^{357}\) and while it is being used for the

---

\(^{352}\) Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 4(1).

\(^{353}\) Ibid Art 4(2).

\(^{354}\) Correctional Services Act 2014 (NT) s11(1)(a).

\(^{355}\) Ibid s13(a).

\(^{356}\) Ibid s13(b).

\(^{357}\) Ibid s14(a).
custody of a prisoner or to accommodate a person who the Commissioner has agreed is to be accommodated at a custodial correctional facility under section 66 or 163.\textsuperscript{558}

While it might be tempting to dismiss the varying purposes of places of detention as mere ‘technicalities’, these purposes determine which of the Inspectorate’s expectations for the detainees’ treatment and the conditions of their detention are applicable. For example, a police station’s cells in a remote NT community can be used to temporarily detain people the police have arrested or apprehended, or they could be used for the custody of detainees transferred from a youth detention facility or prison to have their matters heard during circuit court, which sits in many remote communities in the NT.\textsuperscript{559} There will often be overlap in the expectations/standards for police custody and court custody, but they will certainly differ in some respects.

Another relevant NT example is when the police watch house was temporarily gazetted a youth detention facility following a disturbance at Don Dale Youth Detention Centre\textsuperscript{360} (and consideration was given to ‘gazetting a section of Holtze prison to house the children’\textsuperscript{361}). The Inspectorate’s expectations for a police watch house, which functions to detain individuals for short periods of time upon arrest or apprehension are entirely different to the expectations/standards for the conditions and treatment of children in a youth detention facility. Similarly, the expectations/standards for adult detainees in a prison could not be applied in assessing the risk of torture or ill-treatment for detained children being held in that same prison.

LEGALISED POLICE CELLS

‘Legalised Police Cells (LPCs), which are unique to certain parts of Scotland, derive historically from the inaccessibility of the Scottish courts in outlying districts and islands. These police cells have been “legalised” and as such are used to hold prisoners awaiting trial locally, or who have been returned from prison for sentencing or following conviction, pending transfer to prison.’\textsuperscript{362}

In Scotland, where there are separate inspectorates for the constabulary and for prisons, the type of detention (police cells or legalised police cells) determines which inspectorate has the mandate to conduct inspections:

‘[T]his report does not touch on the complexities of ‘legalised police cells’ as these fall within the statutory remit of the Prison Service Inspectorate.’\textsuperscript{363} ‘There are nine Police Stations in Scotland where cells have been ‘legalised’. Prisoners (rather than individuals taken into custody by the police) can be held in these cells for up to 30 days. The cells are in stations which are not near to prisons: Hawick, Kirkwall, Lerwick, Lochmaddy, Stornoway, Thurso, Campbeltown, Dunoon.

\textsuperscript{558} Ibid s14(b).
\textsuperscript{363} Her Majesty’s Inspectorate of Constabulary for Scotland, Thematic Inspection of the Care and Welfare of persons detained in police custody in Scotland (January 2013) 10.
The Inspectorate should ensure it has a thorough understanding of the different types of places of detention in the NT criminal justice system, map out these places of detention, and develop and apply its expectations/standards accordingly. Of note, the Inspectorate should not only inspect youth detention facilities, police cells and court facilities in relation to youth, but also secure bail accommodation, in accordance with NTRC recommendation that the NPM ‘monitor and inspect all institutional settings where children and young people are routinely accommodated, or where children are involuntarily detained. Such places include detention centres, police cells... secure bail accommodation.’

ABSENCES FROM DETAINEES’ ‘USUAL’ PLACE OF DETENTION AND TRANSPORTATION BETWEEN LOCATIONS

There will be instances where prisoners may not be in the usual place of detention (eg prison or youth detention facility), but their freedom is still restricted during their temporary absence. For example, they may be granted leave permits (for a purpose the Commissioner considers appropriate, such as education and training, employment, compassionate grounds, recreation, participation in community projects, reintroduction into the community) be working at a place outside the custodial correctional facility, or be transported to hospital for provision of appropriate health care (where arrangements must be made as soon as practicable after the prisoner is taken to the facility to ensure the prisoner does not pose a threat to patients or staff of the facility or the general public and is not able to leave the facility unescorted), including pregnant prisoners giving birth. Also a prisoner may be admitted to an approved treatment facility. Similarly, a youth may be absent from the centre, including under the supervision of a member of the staff of the detention centre or a police officer. Prisoners continue to be in the lawful custody of the Commissioner if the prisoner is at a health care facility, attending court; working at a place outside a custodial correctional facility, being transported to a custodial correctional facility, or between 2 places (eg. health care facility, court, work), or are absent from a custodial correctional facility as authorised by a leave permit. There will thus clearly be circumstances where the prisoner is still detained, but in a different place of detention than the ‘usual’ one (an example being attendance at a hospital for treatment, with relevant security measures being taken to restrict detainees’ freedom of movement).

Also of relevance will be instances where detainees are transported (for example, from the location where they were arrested or apprehended to a police cell, prison, youth detention facility, hospital etc, or where they

---

366 Correctional Services Act 2014 (NT) s112.
367 Ibid s118.
368 Ibid s53.
369 Ibid s86.
370 Ibid s87(1) and (2).
371 Ibid s90.
372 Mental Health and Related Services Act 1998 (NT) s84 and s86: ‘the Commissioner of Correctional Services and the Chief Health Officer may make arrangements to ensure the security and good order of prisoners receiving treatment under [the Mental Health and Related Services Act].’
373 Youth Justice Act 2005 (NT) s165.
374 Correctional Services Act 2014 (NT) s9.
are transported from or to a court before which the prisoner has been ordered to appear, or a health care facility\(^{377}\).

**DETAINEES**

Different categories of detainees can be held in the same places of detention, and the Inspectorate’s expectations/standards should reflect this. The Inspectorate should also have a thorough understanding of existing powers to detain, apprehend and arrest individuals, to inform both the formulation of and application of its expectations/standards.

**CUSTODIAL CORRECTIONAL FACILITIES – CATEGORIES OF DETAINEES**

In custodial correctional facilities, categories of detainees may include adults on remand or sentenced to a term of imprisonment, youth on remand or sentenced to a term of imprisonment,\(^{376}\) children residing with female prisoners,\(^{377}\) serious sex offenders detained on interim or continuing detention orders,\(^{378}\) detainees under a custodial supervision order,\(^{379}\) and sheriff’s detainees.\(^{380}\) There will be some expectations or standards that are applicable across categories of detainees, but the Inspectorate should ensure it adopts a tailored approach where appropriate.

**CORRECTIONAL OFFICERS’ POWERS TO DETAIN**

Furthermore, the powers of the detaining authority may vary under different circumstances. For example, correctional officers can exercise the powers and have the immunities of a police officer to arrest an unlawfully absent prisoner.\(^{381}\) They can also arrest a person suspected of offence (including escaping from lawful custody), who is in the vicinity of a custodial correctional facility, and they can use reasonable force in doing so. The General Manager may detain the person at the facility until the person is delivered to a police officer.\(^{382}\)

Similarly, in relation to youth, the ‘superintendent of a detention centre or a member of the staff of the centre may exercise the powers of a police officer to arrest and take into custody a detainee who has escaped, or is otherwise unlawfully absent, from a detention centre.’\(^{383}\)

---

\(^{375}\) Ibid s39.

\(^{376}\) Ibid s66.

\(^{377}\) Ibid s57.

\(^{378}\) Serious Sex Offenders Act 2013 (NT) s8: ‘Under a final continuing detention order the detainee is to be detained indefinitely, under an interim continuing detention order the detainee is to be detained pending determination of the proceeding. If they are not in custody, the order also has effect as a warrant for arrest.’ See also s10 for duration of order, and s11 for expiry date of interim continuing detention order.

\(^{379}\) Criminal Code Act 1983 (NT) s43ZA: ‘“A custodial supervision order commits the accused person to custody a custodial correctional facility where there is no practicable alternative given the circumstances of the person.”’

\(^{380}\) Correctional Services Act 2014 (NT) s6; Correctional Services Act 2014 (NT) s163: ‘The Commissioner may, in accordance with an arrangement with the sheriff agree to accommodate a person who is in the custody of the sheriff. A person accommodated under this section is not a prisoner and to the extent practicable, must be kept separate from prisoners.’

\(^{381}\) See also Youth Justice Act 2005 (NT) s167B.

\(^{382}\) Correctional Services Act 2014 (NT) s141.

\(^{383}\) Correctional Services Act 2014 (NT) s150.

\(^{383}\) Youth Justice Act 2005 (NT) s167(1). Detainees are to be returned to a detention centre or appropriate place (eg police station or health care facility) as soon as practicable under s167A.
POLICE AND CORRECTIONAL OFFICERS’ POWERS TO APPREHEND A PRISONER/DETAINEE

There exists also the power to apprehend a prisoner and return them to the approved treatment facility where they had been admitted, where the prisoner is absent from the facility without leave granted or the prisoner has been granted leave and the prisoner fails to return to the facility by the end of the leave, the leave is cancelled or the prisoner fails to comply with a condition of the leave. Reasonable force may be used in these circumstances. 384

POLICE CUSTODY – ARRESTS AND APPREHENSIONS

Police can arrest individuals without a warrant under a number of circumstances385 or with a warrant. They can also apprehend people with a warrant387 or without a warrant.388

Again, the reasons for the arrest or apprehension informs expectations/standards around how the detainee should be treated and the conditions of their detention. For example, an individual apprehended and taken into ‘protective custody’ because they are intoxicated and unable to care for themselves389 may require particular medical attention and extra care. Similarly, a person apprehended under the Mental Health and Related Services Act must be treated in accordance with their specific set of needs.390 Of course, it is not suggested that a person arrested for committing an offence and who is intoxicated should not be provided the medical treatment and care necessary in their circumstances, but the reasons for the arrest or apprehension should guide the Inspectorate as to what additional considerations might be required in particular circumstances.

384 Mental Health and Related Services Act 1998 (NT) s83A.
385 Police Administration Act 1978 (NT) s124: ‘Without warrant, arrest any person who the member has reasonable cause to believe is a person for whose apprehension or committal a warrant has been issued by any Supreme Court Judge, Local Court Judge or justice of the peace.’
386 At s123: ‘A member of the Police Force may, without warrant, arrest and take into custody any person where he believes on reasonable grounds that the person has committed, is committing or is about to commit an offence.’
387 At s125: ‘A member of the Police Force may, without warrant, arrest and take into custody a person if the member believes on reasonable grounds that the person has, in a State or another Territory, committed an offence against the law of that State or Territory and there is under the law of the Northern Territory a similar offence that is punishable by imprisonment for a period exceeding 6 months.’
388 At s133AB: ‘The person was arrested because the member believed on reasonable grounds that the person had committed, was committing or was about to commit, an offence that is an infringement notice offence. The member may take the person into custody and hold the person for a period up to 4 hours or if the person is intoxicated – hold the person for a period longer than 4 hours until the member believes on reasonable grounds that the person is no longer intoxicated.’
389 Youth Justice Act 2005 (NT) s124: ‘Police officer can arrest a youth without a warrant if they breach a condition of their periodic detention order.’
390 Police Administration Act 1978 (NT) s121; Serious Sex Offenders Act 2013 (NT) s49; Mental Health and Related Services Act 1998 (NT) s76.
ICVA joined a national working group that is developing practical guidance for police forces on how to conduct a voluntary interview. This guidance states that ICVs can speak to anyone undertaking any such interview taking place in police custody, but does not extend beyond custody suites, therefore providing nominal oversight. ICVA remains concerned that voluntary interviews can constitute de-facto detention, where an interviewee could not leave the interview without being arrested and formally detained if they attempted to leave. Furthermore, we remain concerned that this type of interview should have oversight under OPCAT. We will continue to pursue this issue over the year ahead.\(^{391}\)

Although this section has focused on lawful detention, the Inspectorate should not be precluded from considering detention that is unlawful. If detaining authority staff have detained an individual, whether or not the detention is lawful is something that the Inspectorate might comment on, but the fact that there has been an error or abuse of power on the part of detaining authority staff should not prevent the Inspectorate from exercising its mandate. In fact, the risks of ill-treatment and torture may well be greater in circumstances of unlawful detention.

**RECOMMENDATION:** The Inspectorate should have a thorough understanding of the types of places of detention, the categories of detainees that might be held in places of detention and the powers exercised in detaining/apprehending/arresting individuals, and it should map out the places of detention in the NT.

The expectations/standards used by the Inspectorate during inspections should be tailored to the purpose and type of detention and category of detainee.

The Inspectorate should be responsive to how gazetting might transform the purpose of places of detention when applying expectations/standards.

**RECOMMENDATION:** Places of detention that the Inspectorate should visit include, but are not limited to, correctional centres, correctional work camps, youth detention centres, secure bail accommodation, police custody, court custody and vehicles, boats and planes used by detaining authorities in transporting and/or holding detainees.

It should also include in its mandate places where detainees are being temporarily held, while still deprived of their liberty (eg hospitals while accessing health care).

The Inspectorate should not be precluded from inspecting places of detention where detention of the individual(s) by the detaining authority is unlawful.

---


120
WHAT DOES PREVENTION IN THE CONTEXT OF OPCAT MEAN?
PREVENTION IS CONTEXT-SPECIFIC AND REQUIRES A BROAD AND HOLISTIC APPROACH

The CAT requires States to ‘take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.’ Murray et al describe how the Committee Against Torture’s ‘understanding of and recommendations in respect of effective measures are in a process of continual evolution, as, unfortunately, are the methods of torture and ill-treatment,’ rather than being limited to the preventive obligations explicitly provided for in the CAT. They reference the Committee’s General Comment which states that ‘[t]he provisions of Article 2... constitute the foundation of the Committee’s authority to implement effective means of prevention, including but not limited to those measures contained in the subsequent articles 2 to 16, in response to evolving threats, issues and practices.’

The SPT takes the position that ‘it is not possible to devise a comprehensive statement of what the obligation to prevent torture and ill-treatment entails in abstracto, noting that a State’s compliance with ‘its formal legal commitments as set out in international instruments and which have a preventive impact... will rarely be sufficient to fulfil the preventive obligation: it is as much the practice as it is the content of a State’s legislative, administrative, judicial or other measures which lies at the heart of the preventive endeavour.’

Furthermore, the SPT states that:

there is more to the prevention of torture and ill-treatment than compliance with legal commitments. In this sense, the prevention of torture and ill-treatment embraces — or should embrace — as many as possible of those things which in a given situation can contribute towards the lessening of the likelihood or risk of torture or ill-treatment occurring. Such an approach requires not only that there be compliance with relevant international obligations and standards in both form and substance but that attention is also paid to the whole range of other factors which bear upon the experience and treatment of persons deprived of their liberty and which by their very nature will be context specific.

Birk et al describe prevention as an ‘action... taken... with a view to proactively creating an environment where torture is less likely to happen,’ a ‘holistic view focusing on the root causes of torture and the complex factors allowing torture to happen rather than on the individual level of violations.’

In its Fourth Annual Report, the SPT noted that:

the prevalence of torture and ill-treatment is influenced by a broad range of factors, including the general level of enjoyment of human rights and the rule of law, levels of poverty, social exclusion, corruption, discrimination, etc. Whilst a generally high level of respect for human rights and the rule of law within a society or community does not provide a guarantee against torture and ill-treatment occurring, it offers the best prospects for effective prevention. To that end, the Subcommittee is deeply interested in the general situation within a country

192 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) Art 2(1).
194 Ibid 61.
195 Fourth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, 46th sess, UN Doc CAT/C/46/2 (3 February 2011) [105].
196 Ibid.
197 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 28.
concerning the enjoyment of human rights and how this affects the situation of persons deprived of their liberty.\textsuperscript{398}

\textbf{RECOMMENDATION:} An understanding of what constitutes prevention of torture and ill-treatment should be context-specific to the NT, and should be consistent with the SPT’s recommendation that prevention be broad enough to ‘embrace as many as possible of those things which in a given situation can contribute towards the lessening of the likelihood or risk of torture or ill-treatment occurring.’ Prevention should take a ‘holistic view focusing on the root causes of torture and the complex factors allowing torture to happen.’

\textbf{TORTURE VS ILL TREATMENT (CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT)}

\textbf{TORTURE}

CAT defines torture as follows:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.\textsuperscript{399}

The Special Rapporteur has stated that:

\textit{[w]ithout doubt, intentionally inflicting pain or suffering on a powerless person for purposes such as coercion, intimidation, punishment or discrimination always amounts to torture, irrespective of whether the intended pain or suffering is caused by a single method or the accumulation of multiple techniques and circumstances, and regardless of whether the pursued purpose is achieved instantaneously, only after repeated or prolonged exposure, or cannot be achieved at all due to the victim’s resilience or other intervening circumstances.} \textsuperscript{400}

Definitions (and specific prohibited practices) can be found in other international instruments including the \textit{Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment} and the \textit{Standard Minimum Rules for the Treatment of Prisoners}.\textsuperscript{401}

\textsuperscript{398}Ibid [107].
\textsuperscript{399}Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) Art 1(1).
\textsuperscript{400}Nils Melzer, Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN DocA/73/207 (20 July 2018) [46].
\textsuperscript{401}Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN GAOR, 13th sess, UN Doc A/RES/3452(XXX) (9 December 1975) Art 1: ‘1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners. 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.’ Standard Minimum Rules for the Treatment of Prisoners, GA Res 70/175, UN GAOR, 70th sess, Agenda Item 106, UN Doc A/RES/70/175 (17 December 2015) Rule 43(1): ‘1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited: (a) indefinite solitary confinement; (b) Prolonged solitary confinement; (c)
During one of its country visits, the SPT recalled:

that, at the international level, there is no list of behaviours that are considered to amount to torture or ill-treatment. The forms of behaviour in question are so varied and depend to such a great extent on the context in which they take place and the state of vulnerability in which the victims find themselves that it is impossible to define them within more or less rigid categories that could in any way be considered to be exhaustive.  

Giffard, in The Torture Reporting Handbook, recognises that ‘[t]here are... many ‘grey areas’ which do not clearly amount to torture, or about which there is still disagreement, but which are of great concern to the international community. Examples include: Corporal punishment imposed as a judicial penalty... Solitary confinement, Certain aspects of poor prison conditions, particularly if combined.'  

Of particular interest is how the particular vulnerabilities of a group of people might result in conduct that might not otherwise amount to torture, be defined as torture. Giffard includes in this list of grey areas ‘[t]reatment inflicted on a child which might not be considered torture if inflicted on an adult.' How torture and ill-treatment might be differently defined for Aboriginal people in the NT is considered in greater detail under Expectations/standards and frameworks for culturally competent inspections.

**RECOMMENDATION:** In assessing whether conduct constitutes torture, the following should guide the Inspectorate:  
The Convention Against Torture definition is ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’ Torture may be caused by a single method or the accumulation of multiple techniques and circumstances. Torture may instantaneously achieve the pursued purpose, or only after repeated or prolonged exposure, or the purpose may not be achieved at all due to the victim’s resilience or other intervening circumstances.

**CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

Murray et al note that, in its General Comment No 2, the Committee Against Torture described how:

[in practice the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the

Placement of a prisoner in a dark or constantly lit cell; (d) Corporal punishment or the reduction of a prisoner’s diet or drinking water; (e) Collective punishment.’

*Standard Minimum Rules for the Treatment of Prisoners, GA Res 70/175, UN GAOR, 70th sess, Agenda Item 106, UN Doc A/RES/70/175 (17 December 2015) Rule 32(1)(d): ‘1. The relationship between the physician or other health-care professionals and the prisoners shall be governed by the same ethical and professional standards as those applicable to patients in the community, in particular... (d) An absolute prohibition on engaging, actively or passively, in acts that may constitute torture or other cruel, inhuman or degrading treatment or punishment, including medical or scientific experimentation that may be detrimental to a prisoner’s health, such as the removal of a prisoner’s cells, body tissues or organs.’

Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the national preventive mechanism advisory visit to Ecuador made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/OP/ECU/2 (16 July 2015) [66].


Ibid.
measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure. 405

The Special Rapporteur has observed that ‘it is difficult to envisage any realistic scenario of the intentional and purposeful infliction of pain and suffering on a powerless person that would not amount to torture... Moreover, it must be recalled that any cruel, inhuman or degrading treatment or punishment, regardless of whether it may be formally qualified as torture, is unlawful and cannot be justified under any circumstances.’ 406

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment’s General Clause states that the:

term “cruel, inhuman or degrading treatment or punishment” should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time. 407

The Special Rapporteur has stated that:

ill-treatment denotes any other cruel, inhuman or degrading treatment or punishment, which does not necessarily require the intentionality and purposefulness of the act or the powerlessness of the victim... Torture and ill-treatment can take an almost endless variety of forms that cannot be catalogued in an exhaustive manner, ranging from police violence, intimidation and humiliation to coercive interrogation, from denial of family contacts or medical treatment to the instrumentalization of drug withdrawal symptoms, and from inhuman or degrading detention conditions to prolonged arbitrary detention or abusive solitary confinement, to name a few. 408

The conditions of the place of detention can amount to ill-treatment, where there exists a ‘structural deprivation of human rights,’ 409 or in instances where the conditions impact on either the mental or physical

406 Nils Melzer, Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/73/207 (20 July 2018) [46]. See also Nils Melzer, Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/73/207 (20 July 2018) [7]: ‘While the manifold manifestations of torture and ill-treatment may not always involve the same severity, intentionality and purposeful instrumentalization of pain or suffering, all involve violations of physical or mental integrity that are incompatible with human dignity.’ 407 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Res 43/173, UN GAOR, 49th sess, 76th plen mtg, Supp.No.49, UN Doc A/43/49 (9 December 1988) General Clause.
408 Nils Melzer, Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/73/207 (20 July 2018) [7]. See also Theo van Boven, Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/59/324 (1 September 2004) [48]: ‘The lack of medical treatment for torture survivors in custody may not only be considered as a prolongation of the torture, it may also have far-reaching consequences in terms of their rehabilitation. Indeed, victims with serious physical injuries who are left medically unattended because of lack of will or means may see their condition worsen to the point that medicine may not be of any help once they are referred to the medical profession.’
409 Manfred Nowak, Special rapporteur on the question of torture, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Addendum: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention, UN Doc A/HRC/13/39/Add.5 (5 February 2010): In considering the ‘combined deprivation and non-fulfilment of... existential rights which amounts to a systematic practice of inhuman or degrading treatment or punishment,’ the Special Rapporteur has noted his particular concern where there is ‘structural deprivation of most human rights, mainly the rights to food, water, clothing, health care and a minimum of space, hygiene, privacy and security necessary for a humane and dignified existence.’
integrity of detainees.\textsuperscript{410} In the APT’s practical guide to monitoring places of detention, it highlighted that there will be circumstances in which certain aspects of the detainees’ treatment are psychologically harmful, but to which the detainees may have become accustomed and to which they may not explicitly refer when speaking with monitors. The APT pointed to examples including ‘systematically ignoring a request until it is repeated several times; speaking to persons deprived of their liberty as if they were small children... entering detainees’ cells suddenly and without reason; creating a climate of suspicion among the detainees; authorising departures from the regulations one day and punishing them the next.’\textsuperscript{411}

**CRUEL OR INHUMAN TREATMENT OR PUNISHMENT**

Nowak and McArthur define cruel and inhuman treatment or punishment as:

the infliction of severe pain or suffering, whether physical or mental, by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Such conduct can be both intentional or negligent, with or without a particular purpose... There are no clear legal criteria for distinguishing cruel from inhuman treatment, apart from our common understanding of the meaning of the words ‘cruel’ and ‘inhuman’.\textsuperscript{412}

They conclude that:

[w]hether or not cruel or inhuman treatment can also be qualified as torture depends on the fulfilment of the other definition requirements in Article 1, above all whether inhuman treatment was used for any of the purposes spelled out therein.\textsuperscript{413}

**DEGRADING TREATMENT OR PUNISHMENT**

Nowak and McArthur define degrading treatment or punishment as

the infliction of pain or suffering, whether physical or mental, which aims at humiliating the victim. Even the infliction of pain or suffering which does not reach the threshold of 'severe' must be considered as degrading treatment or punishment if it contains a particularly humiliating element.\textsuperscript{414

\textsuperscript{410} Theo van Boven, Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/59/324 (1 September 2004) [46]: ‘Poor detention conditions, such as overcrowding, inadequate sanitation and hygiene, lack of food and medical assistance, not only may put at risk the physical integrity of detainees, but have far-reaching consequences on their mental integrity. The Special Rapporteur has observed that in some cases detainees are deliberately subjected to poor conditions while in pre-trial detention in order to break their will and to elicit confessions and information, or to be able to present them before the court as unwholesome and dangerous, which would erode any sympathy they might have received from the judge. The Special Rapporteur also notes that prolonged solitary confinement in conditions of severe material deprivation and with no or little activity may have a serious impact on the psychological and moral integrity of the prisoner.’


\textsuperscript{412} Manfred Nowak and Elizabeth McArthur, Part I Substantive Articles, Art.16 Cruel, Inhuman or Degrading Treatment or Punishment in *The United Nations Convention Against Torture: A Commentary* (Oxford University Press 2015) 557.


See also Manfred Nowak and Elizabeth McArthur, Part I Substantive Articles, Art.1 Definition of Torture in *The United Nations Convention Against Torture: A Commentary* (Oxford University Press 2015) 67-68: ‘In principle, every form of cruel and inhuman treatment (including torture) requires the infliction of severe pain or suffering. Only in the case of particularly humiliating treatment might the infliction of non-severe pain or suffering reach the level of degrading treatment or punishment in violation of Article 16.’
HMIP – RESPECT AND DIGNITY

Dame Anne Owers, former Chief Inspector of HMIP, warned ‘it is very important in terms of the mandate we all have that we recognize that this mandate is to prevent torture and inhuman and degrading treatment and not to chronicle it or monitor it. We have essentially failed if we are monitoring torture. That is why, in my view, we have to pitch our tent and standards [looking to] the respect for the dignity of the human person, because it is there that things start to go wrong.’\(^{415}\)

HMIP’s standards around respect (for example in the context of police custody) reflect this approach:

‘3.1 Detainees are treated with dignity and their diverse needs, while in custody, are met.
Indicators: Police officers and staff interact with detainees courteously and all detainees are treated with dignity from the first point of contact; Detainees are able to disclose confidential information, and any situation or condition that makes them vulnerable, in private; Police officers and staff listen to detainees and are alert to and understand the impact of detention, particularly for those detainees identified as vulnerable. Effective support to cope with their detention is provided; Police officers and staff engage positively with detainees during their detention, particularly those who are vulnerable and high risk.’\(^{416}\)

Huber considers how detaining authorities might balance security and dignity, writing that the ‘responsibility of the state goes beyond preventing active abuse against prisoners: it includes refraining from humiliating routines that infringe on human dignity and serve no security or other purpose, and ensuring that the suffering involved in places of detention does not exceed the level inherent in the deprivation of liberty.’\(^{417}\) Of relevance in the NT context, the Council of Europe’s *European Prison Rules* has identified that ‘[p]articular attention needs to be paid to the requirements of ethnic and linguistic minorities [and that a] failure to provide effective treatment for prisoners who are unable to communicate with the treatment staff because of a language barrier may cause the detention to be found to be degrading.’\(^{418}\)

---

**RECOMMENDATION:** In assessing whether conduct constitutes ill-treatment, the following should guide the Inspectorate:

- There is no exhaustive list of what constitutes ill-treatment.
- The context and the state of vulnerability of the detainees should be considered.
- The conditions of detention and structural deprivation of human rights may constitute ill-treatment.
- Detainees may be accustomed to the treatment and/or conditions which in fact amount to ill-treatment.
- Cruel and inhuman treatment or punishment involves the infliction of severe pain or suffering, whether physical or mental.
- Cruel and inhuman treatment or punishment can arise from negligence or from conduct that does not have a particular purpose.
- Degrading treatment involves the infliction of pain or suffering (physical or mental) aimed at humiliating the victim.

---


CONSIDERATION OF OVERCROWDING AND THE CAUSES OF OVERREPRESENTATION OF ABORIGINAL PEOPLE IN PLACES OF DETENTION

FACTORS WHICH CONTRIBUTE TO OVERCROWDING IN PLACES OF DETENTION

The Special Rapporteur has noted from his country visits:

that one of the most commonly observed obstacles to the respect of human dignity and to the prohibition of torture and other forms of ill-treatment is overcrowding in places of detention. Overcrowding strains existing infrastructure, staffing, services and resources, which in turn leads to a decline in the standards of detention: failure to separate vulnerable groups, such as children, women, and ill prisoners, due to a lack of space; and insufficient beds, food, water, washing facilities, ventilation, sanitary conditions, recreational, educational or vocational opportunities, staffing to ensure discipline and security of the detainees, medicines, level of health care, etc. In this context, the Special Rapporteur recalls the jurisprudence of several international and regional human rights mechanisms, which has found that poor conditions of detention can amount to inhuman and degrading treatment.419

Going a step further, the Special Rapporteur has also stated that ‘avoiding depriving a person of his/her liberty is one of the most effective safeguards against torture and ill-treatment.’420

In its practical guide on monitoring police detention, the APT references the SPT’s broad preventive approach to encourage NPMs to recognise how a range of policies might impact on the risk of torture and ill-treatment, including overcrowding in pretrial detention. Relevant considerations might include homelessness, rehabilitation of drug users, arrest quotas421 or an overburdened judicial system.422 The APT concludes that ‘it is essential to look beyond the findings of individual visits: monitors should also analyse the prevailing legal framework, public policies, and the institutions and actors involved.’423

419 Manfred Nowak, Special rapporteur on the question of torture, Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/62/221 (13 August 2007) [55].
420 Ibid [59].
421 Association for the Prevention of Torture, Monitoring Police Custody - A practical guide (January 2013) 17: ‘The SPT, the international preventive mechanism established by the OPCAT, describes its preventive approach as revolving around the need to “engage with the broader regulatory and policy frameworks relevant to the treatment of persons deprived of their liberty and with those responsible for them”, and to explore “how these are translated into practice.” The same can be said for national bodies in charge of monitoring the police. Policies on crime, security, policing, juvenile justice, health, drug users, migrants, homelessness and many other issues can impact on the risk of torture and conditions of detention. Monitors should have a clear grasp of which policies may have an impact, whether positively or negatively, in the contexts in which they work. For instance, policies on crime, such as the use of “arrest quotas or ‘zero tolerance’ policies can result in a rise in arrests and, consequently, overcrowding in pre-trial detention. Similarly, public policies on rehabilitation for drug users can divert people out of the criminal justice system and into public health institutions and processes.”
422 Ibid 16.
423 Ibid.
INTERROGATING WHETHER OVERCROWDING IS A RESULT OF “TOUGH ON CRIME” POLICIES OR HIGH CRIME RATES

The Special Rapporteur has noted that ‘[s]o-called “tough on crime” policies, which excessively penalize non-violent offences, are not only counterproductive in terms of failing to reduce long-term crime rates but also create environments conducive to corruption and torture or ill-treatment... inevitably lead[ing] to excessive incarceration, prolonged pretrial detention and overcrowded, under-resourced detention facilities, with all the... manifestations of corruption and abuse to be expected in such situations.’\textsuperscript{424} The European CPT has similarly found that the ‘phenomenon of prison overcrowding... seriously undermines attempts to improve conditions of detention, recognising that high crime rates cannot always be to blame for high rates of incarceration, and rather than “throwing increasing amounts of money at the prison estate... current law and practice in relation to custody pending trial and sentencing as well as the range of non-custodial sentences available need to be reviewed.”\textsuperscript{425}

OVERCROWDING DUE TO PRE-TRIAL DETENTION

The SPT has recognised the role of NPMs in identifying systemic issues resulting in the excessive use of pretrial detention,\textsuperscript{426} which is a ‘principal cause of poor conditions of detention,’\textsuperscript{427} particularly of concern when detainees are held for lengthy periods of time in places not fit for that purpose (such as at police stations), where staff are not appropriately trained, increasing the risk of torture or ill-treatment.\textsuperscript{428} The SPT encourages consideration of alternatives to pre-trial detention, that are to be “applied in a non-discriminatory manner and be accessible to all.”\textsuperscript{429}

---

\textsuperscript{425} European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Extract from the 11th General Report of the CPT: Developments concerning CPT standards in respect of imprisonment (2001) [28].

\textsuperscript{426} Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture 54th sess, UN Doc CAT/C/54/2 (26 March 2015) [95]: ‘The Subcommittee recognizes the important role to be played by NPMs in identifying and addressing the system-wide factors that affect the excessive use and misuse of pretrial detention. NPMs are therefore encouraged to submit information to the Subcommittee on the various local conditions that influence the application of pretrial detention in their respective country contexts. The Subcommittee is committed to working with NPMs to find country-specific recommendations to address any problems.’

\textsuperscript{427} Ibid [77]: ‘In particular, it is known that the excessive use and length of pretrial detention is a major cause of overcrowding, which is rife in many States parties. Overcrowding imposes a significant burden on all aspects of the functioning and management of places of detention and is a principal cause of poor conditions of detention. It also has a considerable impact on the working conditions for staff in places of detention.’

\textsuperscript{428} Ibid [81].

\textsuperscript{429} Ibid [89].
and the length of imprisonment.\textsuperscript{431} It reflected on a potential overreliance on custodial sentences and the recidivism rates, particularly for Māori.\textsuperscript{432}

\textbf{RECOMMENDATION:} The Inspectorate should consider how legislation, policies and institutions, both within the criminal justice system and more broadly, contribute to the overcrowding of places of detention. The Inspectorate should appreciate the impact overcrowding has on the standards of treatment and conditions in detention, and the resultant increased risk of torture or ill-treatment. The Inspectorate should also recognise that preventing deprivation of liberty is in itself a safeguard against torture and ill-treatment.

\section*{FACTORS CONTRIBUTING TO THE OVERINCARCERATION OF ABORIGINAL PEOPLE IN THE NT}

Penal Reform International points to the role of discrimination in the overrepresentation of Indigenous people in pre-trial detention,\textsuperscript{433} and UNODC recognises that imprisonment serves to further marginalise those who are discriminated against, ‘affecting their families and communities, while perpetuating existing racial and ethnic stereotyping.’\textsuperscript{434}

\section*{SPT VISIT TO NEW ZEALAND}

The SPT made a number of comments in relation to the overrepresentation of Māori in New Zealand’s criminal justice system, and the need for a targeted and tailored culturally appropriate response.

‘The SPT observed that there is a disproportionately high number of Māori at every stage of the criminal justice system. While commending the establishment of Māori Focus Units in Hastings and Rimutaka prisons, among others, and the strides made by the State party to address both Māori and general recidivism through reintegration programmes, the SPT is concerned at the absence of such programmes in other prisons, particularly women’s prisons.’\textsuperscript{435} ‘The SPT notes that Māori recidivism, particularly youth recidivism, is attributable to a broad range of factors requiring targeted responses which go well beyond those provided by the criminal justice system.’\textsuperscript{436} ‘The SPT recommends that the State...’

\begin{itemize}
\item Remand, which is already a matter of grave concern. Furthermore, the SPT is deeply concerned that the Bail Amendment Bill could exacerbate the disproportionately high number of Māori in prison, given the high rate of Māori recidivism, and the number of Māori currently on remand.’\textsuperscript{431}  Ibid [27]: ‘The SPT learned that it is necessary to have completed a number of training and rehabilitation programmes before parole can be granted. However, the SPT noted with concern that there was a shortage of places on such programmes, especially in women prisons. The practical difficulties of managing prisoners’ movements in accordance with the classification system had the effect of impeding some detainees to attend courses and thus prevented them from being released on parole to which they would otherwise have been eligible, consequently increasing the length of their imprisonment.’\textsuperscript{432}  Ibid [33-34]: ‘It is, however, concerned that this has not led to a reduction in the prison population, which suggests there may be an over-use of custodial sentences. Moreover, given that reoffenders constitute the largest proportion of the prison population, more needs to be done if the ambitious governmental plan to reduce reoffending by 25\% by 2017 is to be achieved. The SPT believes that this must include a greater focus on programmes of social reintegration, as well as more active involvement with the Māori community, including strengthening indigenous initiatives and developing community-based Māori-specific programmes focusing on prevention of reoffending. The SPT recommends that the State party investigates the reasons for the current high incarceration rates, and explores the possibility of expanding the use of non-custodial measures. The SPT also recommends that greater emphasis be placed on reintegration programmes.’\textsuperscript{433} Penal Reform International and the Association for the Prevention of Torture, Pre-trial detention: Addressing risk factors to prevent torture and ill-treatment (2015) 8.
\item\textsuperscript{435} Ibid [50].
\item\textsuperscript{436} Ibid [51].
\end{itemize}
The SPT has recommended ‘[r]epealing outdated offences... [as] an effective way of reducing pretrial detention with minimal cost.’\(^{438}\) In the NT, this might include conduct criminalised under the Commonwealth Stronger Futures legislation (discussed above, under Funding and presentation of report – Commonwealth or Northern Territory Government?). Legislation, now repealed, that had previously criminalised behaviour such as absconding from mandatory rehabilitation\(^{439}\) or breaches of alcohol protection orders\(^{440}\) increased detention and imprisonment rates, disproportionately impacting on Aboriginal people.

Detention by police for non-criminal conduct such as protective custody,\(^{441}\) or for non-imprisonable offences under the paperless arrests regime\(^{442}\) (again, disproportionately impacting on Aboriginal people, as established by a coronial inquest;\(^{443}\) see also Definitions and categories of places of detention and detainees) also contribute to increased rates of detention in police custody.

Similarly, bail and sentencing legislation can result in an overreliance on pre-trial detention and custodial dispositions. The NT’s mandatory sentencing laws and provisions not permitting the use of suspended sentences\(^{444}\) would be examples of legislation that the Inspectorate might consider, as these laws interfere with judicial discretion and lead to an increase in the numbers and lengths of custodial sentences. Mandatory sentencing is of particular relevance to the overrepresentation of Aboriginal people in prisons, with the UNODC asserting that, ‘[a]lthough the concept of mandatory sentencing itself is race, ethnicity and descent neutral, it has a disproportionate impact on minority groups, when the offences selected are likely to be those committed by the socially disadvantaged and when applied in a situation where legislation and law enforcement practices lead to significant racial and ethnic disparities in arrest and detention.’\(^{445}\) Other relevant legislation would include the Commonwealth Criminal Code (discussed above, under Funding and presentation of report – Commonwealth or Northern Territory Government?)

\(^{437}\) Ibid [52].
\(^{438}\) Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture 54th sess, UN Doc CAT/C/54/2 (26 March 2015) [90].
\(^{439}\) Alcohol Mandatory Treatment Act 2013 (NT) s72.
\(^{440}\) Alcohol Protection Orders Act 2013 (NT) s23.
\(^{441}\) Police Administration Act 1978 (NT) s128. See also s129.
\(^{442}\) Police Administration Act 1978 (NT) s133AB.
\(^{443}\) Inquest into the death of Perry Jabanangka Langdon [2015] NTMC 016 [87]: ‘As is outlined in these findings, it is glaringly apparent that the paperless arrest scheme disproportionately impacts on Aboriginal Territorians who make up the vast majority of those detained under the new laws, although they are only around 29% of the Northern Territory population. In my view, laws that impact so disproportionately on one sector of our community are manifestly unfair. Moreover, they are irreconcilable with the recommendations of the Royal Commission, which urged that Police use arrest and detention as an option of last resort. It is no coincidence that just 5 months after the “paperless arrest” laws were introduced, the first person to die being held in custody under s133AB is an Aboriginal man.’
\(^{444}\) Australian Law Reform Commission, Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples Final Report, Report No 133 (2017) 281: ‘The ALRC understands that the NT Government is in the process of reviewing provisions that impose mandatory penalties. The ALRC welcomes the review. During this Inquiry, stakeholders in the NT identified a number of mandatory sentencing provisions to be particularly problematic in terms of their application to Aboriginal and Torres Strait Islander offenders. NAAIA submitted that “[t]he following provisions should be prioritised for immediate repeal, as they disproportionately affect Aboriginal people: Part 3 Division 6 of the Sentencing Act – Aggravated property offences; Part 3 Division 6A of the Sentencing Act – Mandatory Imprisonment for violent offences; Sections 120 & 121 of the Domestic and Family Violence Act; Part 3 Division 6B of the Sentencing Act – Imprisonment for sexual offences; Section 53A of the Sentencing Act – Mandatory non parole periods for offences of murder; Section 37(3) of the Misuse of Drugs Act. The Northern Territory governments should also abolish: Provisions which remove the availability of suspended sentences (or other sentencing alternatives) for certain classes of offences or at all. Provisions which remove the availability of home detention orders for offences that are not suspended wholly.’
presentation of report – Commonwealth or Northern Territory Government?) which prohibits consideration of Aboriginal customary law in mitigation in both bail and sentencing decisions.

The APT has recorded, from a symposium on children’s vulnerabilities in detention, that ‘NPMs could greatly contribute to protecting children’s rights by raising awareness of the situation of children deprived of their liberty and advocating on key issues. These include: deprivation of liberty to be used only as a measure of last resort and for the shortest appropriate time; increasing the minimum age of criminal responsibility; a separate and specialised juvenile justice system; and alternative measures to detention for children (including by showing the financial benefits of such policies for the state).’ The NTRC recommendations could be relied upon, for example, by the Inspectorate, as its recommendations include raising the age of criminal responsibility to 12 and that ‘youth under the age of 14 years may not be ordered to serve a time of detention, other than where the youth has been convicted of a serious and violent crime against the person, presents a serious risk to the community, and the sentence is approved by the President of the proposed Children’s Court.’

THE INCREASED RISK OF TORTURE AND ILL-TREATMENT OF ABORIGINAL PEOPLE IN PLACES OF DETENTION

The Special Rapporteur has referred to the ‘[i]ncreased risks of torture or ill-treatment [that] arise in… circumstances of vulnerability, usually marked by factors such as power asymmetry, structural inequalities, ethnic divides and socioeconomic and sociocultural marginalization,’ with ‘most of the victims of arbitrary detention, torture and inhuman conditions of detention [being] ordinary people who belong to the poorest and most disadvantaged sectors of society, including those belonging to the lowest classes, children, persons with disabilities and diseases… Indigenous communities.’ Not only is ‘[s]ocioeconomic marginalisation… an important factor exposing persons to abuse by States,’ because ‘[t]orture, ill-treatment, arbitrary detention and inhuman or degrading conditions of detention are most likely to be inflicted on persons belonging to the poorest and most disadvantaged sectors of society,’ those persons are also less likely to be taken seriously should they complain.

---

448 Nils Melzer, Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc/A/73/207 (20 July 2018) [63].
449 Manfred Nowak, Special rapporteur on the question of torture, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms: Torture and other cruel, inhuman or degrading treatment, UN Doc A/64/215 (3 August 2009) [40].
450 Nils Melzer, Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc/A/73/207 (20 July 2018) [65]: ‘Marginalization and disempowerment foster the irregular generation of income for life sustenance, often through petty criminality. At the same time, tough penal policies and excessive recourse to incarceration give rise to a vicious cycle of violence and incarceration that expose the most marginalized to an almost inescapable downward spiral of brutalization… To make matters worse, the stigma and marginalization faced by those in poverty often mean that their complaints of ill-treatment are taken less seriously.’
ABORIGINAL COMMUNITY-DRIVEN SOLUTIONS TO DECREASE RATES OF INCARCERATION OF ABORIGINAL PEOPLE

In its sixth annual report, the SPT stated the following:

Custodial sentences, which the State justice system usually imposes in criminal cases, are barely used in the [I]ndigenous justice system, as community ties determine the structure of the individual and collective identity of community members, and imprisonment directly undermines these ties. For many [I]ndigenous persons, imprisonment constitutes cruel, inhuman and degrading treatment and even a form of torture. Strengthening the [I]ndigenous justice system and its forms of social control and punishment for violating its laws could therefore serve to prevent torture and cruel, inhuman or degrading treatment of [I]ndigenous persons.\(^{451}\)

An example of community driven solutions being used to divert Aboriginal children in Lajamanu (a remote community in the NT) from the criminal justice system involved the use of Warlpiri dispute resolution practices.\(^{452}\) The Warlpiri conflict resolution process:

reflects many restorative justice principles which could be drawn upon and used in [the] current youth justice framework in the NT. By taking a strengths-based approach and drawing upon existing Aboriginal conflict resolution strategies, this approach could offer many benefits, such as breaking the cycle of repeat offending and diverting young people from the criminal justice system, along with actively engaging communities in the process.\(^{453}\)

---

\(^{451}\) Sixth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture 50th sess, UN Doc CAT/C/50/2 (23 April 2013) [93-94].

\(^{452}\) Jones, Alexandria, Chapman, Robert, Holmes, Miles, Patrick, Warlpungku Jerry Jangala, ‘The Warlpiri Ngalkinpa: Principles of Warlpiri Conflict Resolution’ (2017) 3: ‘A conflict between two groups of male youths one evening, ostensibly over basketball, escalated over the following days involving more and more family members from each side of the conflict and threatening to evolve into a serious community-wide dispute. Those involved were aged between 10 and 18 and, while news of the building tension had been circulating for days, there was a noticeable increase in the number of young men congregating around the basketball courts one afternoon. Initially, senior members of the community kept an eye on things from afar, while those more closely involved with the conflict began loosely assembling closer to the basketball courts. As Alex Jones and Andreea Lachsz from the CLE team and Robert Chapman from the CLC drove through town, they were flagged down by two prominent Kurdiji members who were in a discussion with two police officers. Robert Chapman went to speak with them and, after some discussion, it was agreed that the Kurdiji would initially attempt to diffuse the conflict using Warlpiri dispute resolution practices rather than get the police directly involved in the first instance. The police agreed with this course of action. This agreement and the support of the process by police was an important aspect to the mediation’s success.’ Also at 3-4: ‘For example, in Lajamanu, the principles of Warlpiri conflict resolution involve kinship, repairing relationships, and avoiding apportioning of blame. It focuses on community responsibility, harnessing the fear of shame, atonement, harmony and identifying the underlying cause of the dispute. Expressions of anger are permitted during the process.’

\(^{453}\) Ibid 8.
In the Acknowledgements in this report, I referred to the Law and Justice groups with which I worked when I was at NAAJA:

Law and Justice Groups (or Cultural Authorities) are an example of Aboriginal community-driven responses to justice issues which empower local community Elders to participate in the criminal justice system, enhance traditional authority structures and work to resolve conflicts that arise in the community.454

The NTG has recognised that:

Law and Justice Groups have the potential to fulfil a number of important roles envisaged under the NT AJA including developing and implementing local action plans with place-based strategies to address community safety and justice issues. They are also well-placed to advise courts on matters relevant to the sentencing of local Aboriginal people, including cultural information, significant traumatic events or incidences that may have affected the offender, victims, witnesses or families and potential options for rehabilitation. [They] can impart unique knowledge about Aboriginal defendants that court officials and other parties may not have access to.455

RECOMMENDATION: When making recommendations regarding the overrepresentation of Aboriginal people in places of detention, the Inspectorate should consider Aboriginal community-driven solutions, particularly in relation to diversion and alternatives to custodial sentences.

454 Aboriginal Peak Organisations Northern Territory, APO NT Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory (31 July 2017) 169-170.
455 Northern Territory Department of Attorney-General and Justice, Pathways to the Northern Territory Aboriginal Justice Agreement (2019) 74. See also Northern Territory Department of Attorney-General and Justice, Pathways to the Northern Territory Aboriginal Justice Agreement (2019) 103: ‘In all stages of the NTAJA, governance committees will be established to serve as the forum for Aboriginal community representatives to directly discuss Aboriginal justice issues with Chief Executive Officers (CEOs) of NTG agencies. The establishment of local Law and Justice Groups (LJGs) will provide a platform for Aboriginal Territorians to develop culturally-competent, place based strategies to improve local justice outcomes.’
FUNCTION OF THE INSPECTORATE: INSPECTING (AND MONITORING?)
DETOINION OVERSIGHT OTHER THAN INSPECTING AND MONITORING

Deitch lists the functions of prison oversight as being ‘Regulation; Audit; Accreditation; Investigation; Legal; Reporting; Inspection/Monitoring.’ She states that ‘[e]ach of these functions is an essential—but separate—part of effective prison oversight.’ She describes the function of regulation as oversight by government and legal entities which have the power of enforcement, whether this be through the ‘imposition of fines, the ability to close an institution, or the ability to hire or fire directors... through the passage of laws and the ability to control the purse strings of the agency.’ She notes that ‘audits do not necessarily focus on the treatment of prisoners or even on issues of direct concern to prisoners.’ Investigation is a reactive function to a complaint or scandal, ‘ensur[ing] accountability and redress for the victim.’ Legal oversight involves ‘courts and the legal process to achieve redress for wrongdoing as well as corrective action’ in relation to both conditions and treatment in detention, involving sanctions and potentially ongoing supervision. Although ‘[t]ransparency may be a by-product of court oversight... it is not the primary goal.’ The reporting function’s purpose is to increase transparency, with pressure potentially resulting in improvements and accountability. Reporting can involve ‘media, human rights groups, and temporary commissions.’

In contrast, inspecting and monitoring are functions that focus on prevention, and the treatment of detainees, although without the capacity to enforce implementation of recommendations, instead relying on persuasion.

MONITORING AND INSPECTING: FREQUENCY OF VISITS

During the Fellowship, it was noted that monitoring bodies visit places of detention on a more frequent basis than the inspecting bodies operating in the same jurisdiction.

IMB (ENG) – MONITORING FRAMEWORK

‘Monitoring involves frequent, systematic and purposeful observation to determine how well objectives are met. It involves keeping track of outcomes continually... Inspection, by contrast, is episodic and involves critical examination, looking especially for strengths and weaknesses. Typically it includes scrutiny of processes, where the inspectors themselves are experts equipped to make technically sound recommendations for improvement.’

---

457 Ibid.
458 Ibid 1440.
459 Ibid 1441.
460 Ibid 1442.
463 Ibid.
464 Ibid 1442-1443.
465 Ibid 1443.
HMIPS – INDEPENDENT PRISON MONITORING
FREQUENCY OF VISITS TO DETENTION

‘IPMs are volunteers from local communities who monitor treatment and conditions in Scotland’s prisons. Each prison is monitored at least once per week. IPMs make observations about treatment and conditions, and also look into issues prisoners raise.’\textsuperscript{467}

ICV - MONITORING

‘There are approximately 1,700 independent custody visitors (ICVs) in the UK. These volunteers make unannounced visits to their local police custody to speak to detainees and examine their custody records in order to ensure that their rights, entitlements and wellbeing are upheld. Furthermore, ICVs check on the conditions of custody that detainees are held in and check their general dignity and wellbeing... ICVs made over 8,500 visits across 2017/18; they spoke to over 26,000 detainees during these visits. This means that ICVs spoke to approximately 3.5% of all detainees in police custody in this period, with schemes typically visiting each custody suite around once each week.’\textsuperscript{468}

MONITORING VS RESOLVING COMPLAINTS/REQUESTS

Although monitoring bodies in the jurisdictions visited as part of the Fellowship monitor conditions and treatment and take requests or complaints and resolve individual detainees’ issues, it is recommended that for the NT context, preventive and reactive functions are kept separate, for reasons already outlined above (under Should have a new body as the NPM rather than designating existing bodies).

HMIPS – INDEPENDENT PRISON MONITORING
ASSISTANCE WITH COMPLAINTS AND REQUESTS

The ‘[r]ules made under section 39 may make provision for assistance to be provided by independent prison monitors to prisoners in any complaints process provided for under those rules.’\textsuperscript{469} 2017-18 was the second full year of the operation of Independent Prison Monitoring, the responsibility of HMIPS since August 2015. Over 120 IPMs ensured that every prison was visited every week to monitor the conditions and treatment in prison, through observing practice, and responding to prisoners’ requests for assistance... dealing with more than 900 requests from prisoners... We have been encouraged to see improvements being implemented as establishments respond positively to the observations and findings of IPMs. Some of these changes have related to the circumstances of individual prisoners, while others have led to improvements in processes affecting the wider population in the prison.’\textsuperscript{470}

\textsuperscript{467} Her Majesty’s Inspectorate of Prisons Scotland, \textit{HM Chief Inspector’s Annual Report 2017-2018} (September 2018) 4.
\textsuperscript{468} The Independent Custody Visiting Association, \textit{Annual Report 2017/18} 5.
\textsuperscript{469} Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order (No 39) 2015 (Scot) s7D(4).
\textsuperscript{470} Her Majesty’s Inspectorate of Prisons Scotland, \textit{HM Chief Inspector’s Annual Report 2017-2018} (September 2018) 10.
IMB (NI) - FUNCTIONS

‘An IMB is appointed for each prison in Northern Ireland under the Prison Act (Northern Ireland) 1953. The IMB deal with a variety of issues and are required to: satisfy themselves regarding the treatment of prisoners, the state of the prison premises and the facilities available to prisoners to allow them to make purposeful use of their time... report matters of concern to the appropriate Governor and when necessary to the Justice Minister; examine the treatment of prisoners including provision for their health care and other welfare while in prison; ensure they are informed and visit prisoners on restriction of association; and attend some Adjudications of prisoners who have been charged with an offence against Prison Rules.’

‘The IMB deal with a variety of issues and are required to... consider requests and complaints made by prisoners.’

IMB (ENG) - APPLICATIONS

‘During their visits, boards take applications from prisoners and detainees, in relation to their own individual concerns, which they then raise with the establishment itself. Across all prisons, the highest proportion of applications (23%) related to prisoners’ property, followed by 13.5% about healthcare and 11.5% about sentence management.’

APPLICATIONS AND REQUESTS NOT AN ALTERNATIVE TO THE COMPLAINTS SYSTEM

‘An establishment should run an effective complaints system. Applications and Requests are not an alternative and IMBs need to discourage those being held from perceiving them this way. It is unhelpful for the IMB to appear to offer a substitute (which militates against the establishment ensuring that its own system is fit for purpose). Ideally, Applications and Requests should identify issues (one of which might be that the complaints system is unsatisfactory).’

RECOMMENDATION: If there were to be a monitoring body in the NT, it should not undertake to resolve detainees’ individual requests or complaints. The work of the monitors should focus on prevention of torture and ill-treatment. See also recommendations 152 and 153.

FUNDING SOURCES AND REPORTING LINES OF MONITORING BODIES

Monitoring bodies that are funded by or report to the detaining authority raise concerns around independence. The preferred model is that of the Independent Prison Monitors, which sit under the prison inspectorate, HMIPS.

---

471 Independent Monitoring Board, Our Role <http://www.imb-ni.org.uk/ourrole.htm>
472 Ibid.
See also Independent Monitoring Board, Independent Monitoring Board Annual Report 2017-18 Maghaberry Prison, 3: ‘The Board is required to: consider requests and complaints made by prisoners to the Board.’
473 Independent Monitoring Boards, IMB National Annual Report 2017/18 (June 2019) 42. See also at 55.
SCOTTISH PARLIAMENT JUSTICE COMMITTEE’S REPORT

“In his Review of Proposals to Improve Arrangements for Independent Monitoring of Prisons, Professor Andrew Coyle... stated that current arrangements for prison monitoring in Scotland do not meet the standards required by... OPCAT... but noted that, if his recommendations were implemented, Scotland would in future have a robust system for independent monitoring... Professor Coyle explained that non-compliance with OPCAT... “is solely because the budget for [the Visiting Committees] work sits with the Scottish Prison Service; it is not any judgment on the independent monitoring that they do.” The Committee heard evidence that the new structure, where monitors will be funded through HM Inspectorate of Prisons Scotland (“HMIPS”) will meet the requirements of OPCAT. The Committee welcomes the proposal to remove the funding and support of independent monitoring of prisons from the Scottish Prison Service thereby ensuring that prison monitoring in Scotland becomes OPCAT compliant.”475

HMIPS – RESPONSIBLE FOR BOTH INSPECTION AND MONITORING

‘The Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2015 came into force on 31 August 2015, and from that date HMCIPS assumed overall responsibility for the monitoring of prisons, which is carried out on a day-to-day basis by approximately 120 volunteer IPMs. HMIPS inspect and monitor against a set of published Standards, which were reviewed and relaunched in May 2018.’476 This system replaced the Visiting Committees.

THE ROLE OF PRISON MONITORING CO-ORDINATORS

Under legislation, prison monitoring co-ordinators are appointed and assigned to prisons by the Chief Inspector,477 and are paid a salary.478 The co-ordinators must ‘comply with any instructions issued by the Chief Inspector under section 7(2)(e), and have regard to any guidance published by the Chief Inspector under section 7(2)(f);’479 report annually (in such form and made by such date as the Chief Inspector may direct480) in relation to the monitoring at the prison, the conditions and treatment of prisoners, and ‘otherwise in relation to such matters as the Chief Inspector may require.’481 The co-ordinators are to ‘arrange for specific matters in relation to a prison, which have been referred to the prison monitoring co-ordinator by the Chief Inspector, to be investigated by one or more independent prison monitors assigned to the prison.’482 The co-ordinator must then report back to the Chief Inspector.483 The co-ordinators’ functions include ensuring the effective monitoring of each prison,484 such as appointing independent prison monitors and assigning them to a prison, arranging for them to visit the prison, supporting them to carry out their duties, arranging training and meetings of IPMs assigned to the same prison, and evaluating IPMs’ performance.485 The co-ordinator can visit prisons (and any parts of prisons) unannounced, ‘speak in private with any independent prison monitor, prisoner, visitor, prison officer or other person working at the prison... examine any prison records, other than...”

See also Andrew Coyle, Review of Proposals to Improve Arrangements for Independent Monitoring of Prisons (January 2013) 26: ‘Scottish Ministers should provide funding at a level which will enable independent monitors to carry out their role in a manner which conforms to OPCAT. This funding should not be administered by the Scottish Prison Service.’
477 Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order (No 39) 2015 (Scot) s7A.
478 Ibid s7B(9).
479 Ibid s7B(4).
480 Ibid s7B(7).
481 Ibid s7B(6).
482 Ibid s7B(2)(d).
483 Ibid s7B(6).
484 Ibid s7B(1).
485 Ibid s7B(2).
personnel records, or any documents containing information, the disclosure of which would, in the opinion of the governor of the prison, have implications for the security of the prison.*486

THE ROLE OF INDEPENDENT PRISON MONITORS
IPMs are to visit prisons at least once a week,*487 monitoring the conditions and treatment in prison and investigating the matters referred to them by the co-ordinator.*488 IPMs can visit prisons unannounced*489 and their powers reflect those of the coordinator.*490 IPMs must also ‘have regard to any guidance on the monitoring of prisons published by the Chief Inspector under section 7(2)(f).*491 Their travel and subsistence expenses are paid for.*492

THE ROLE OF THE PRISON MONITORING ADVISORY GROUP
Under legislation, the Chief Inspector must establish a prison monitoring advisory group, comprised of the Chief Inspector, each of the prison monitoring co-ordinators, at least three independent prison monitors, and such other persons as the Chief Inspector considers appropriate.*493 Its functions include to review the effectiveness of prison monitoring, training arrangements for IPMs and the guidance published by the Chief Inspector (and to contribute to its preparation) and to make recommendations for improvement.*494 For example, in 2016-2017 it ‘focussed on supporting the development and effective implementation of the new system’ and in its annual review identified a need of improved oversight of training.*495 It meets on a quarterly basis.*496

CRITICISM OF THIS MODEL WHEN IT WAS PROPOSED
‘The main criticism of a [monitoring] model under the auspices of HM Inspectorate of Prisons is that it would elide the important distinction between inspection and monitoring. OPCAT recommends a “layered” approach to national preventive mechanism activities and this would arguably be weakened under this model. It would also weaken the local features of monitoring since the independent monitors might be subject to influence in their work by HM Inspectorate of Prisons.’*497

BENEFITS OF THIS MODEL
‘There are real benefits from having both inspecting and monitoring under the remit of HMIPS. This allows information sharing, joint working and a coordinated approach, without in any way compromising the independence of the IPMs.’*498 It also decreases duplication of work.*499

---

*486 Ibid s7B(5).
*487 Ibid s7B(3).
*488 Ibid s7D(1).
*489 Ibid s7D(2).
*489 Ibid s7D(6).
*490 Ibid s7D(5)(c).
*491 Ibid s7D(8).
*492 Ibid s7F.

See also Her Majesty’s Inspectorate of Prisons Scotland, Independent Prison Monitoring Advisory Group <https://www.prisoninspectortatescotland.gov.uk/get-involved/monitoring-advisory-group>: Current members, external to HMIPS include ‘Alan Mitchell, Chair of the Advisory Group... a member of the Scottish Human Rights Commission... David Croft... formerly Deputy Director of Prisons for the Scottish Prison Service and formerly the Governor of HMP Edinburgh. Dan Gunn... formerly Director of Operations for the Scottish Prison Service... [and] Vice Chair of the Scottish Association for the Study of Offending. Anne Hawkins... worked in the NHS for over 35 years and for many years managed Mental Health services. She chaired the National Prison Healthcare Network supporting the transfer of prison healthcare to the NHS. Jim McManus... currently represents the UK on the European Committee for the Prevention of Torture. He was formerly a Professor of Criminal Justice at Glasgow Caledonian University and previously Chairman of the Parole Board for Scotland... Pete White...the founder and Chief Executive of Positive Prisons?’ Positive Futures, a charity which seeks to share lived experience of people in the criminal justice system in order to improve the effectiveness of justice.’

*494 Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order (No 39) 2015 (Scot) s7F.
Murray et al have raised the issue of whether lay visiting meets the criteria of a professional NPM, where members have the ‘necessary expertise, act independently, and with integrity’, having an understanding of the purpose of the monitoring. Pringle reflects on the APT’s reservations in relation to ‘designating lay-visiting bodies as NPMs due to their inherent limitations in terms of professionalization and expertise.’ He notes that such an approach is uncommon, and that lay visiting is generally complemented by oversight by professionals. In the context of the CPT (rather than NPMs under OPCAT), it has been suggested that ‘to ensure that monitoring is truly independent… its members shall be experts on prison matters, appointed in a way that ensures their impartiality and seeks to include members with a range of skills, including medical expertise.’ Additionally, Nowak and McArthur recognise that ‘to conduct regular visits to all places of detention in a country, to examine regularly the treatment of persons detained therein and to make recommendations to the relevant authorities is a highly professional, time consuming, responsible and emotionally demanding task which cannot be achieved by a few volunteers.’ They suggest that payment be such that it attracts ‘competent and professional individuals.’

On a practical level, other challenges also arise, with difficulties in recruiting volunteers leading to inconsistency in the implementation of a monitoring schemes and creating gaps in oversight. Particularly important to oversight of the conditions and treatment of Aboriginal detainees is having Aboriginal NPM members (discussed in greater detail under Structure and staffing of the Inspectorate). The importance of having a diversity of volunteers was recognised by monitoring bodies in the jurisdictions visited as part of the Fellowship, but with the roles being voluntary, this was challenging to achieve.

RECOMMENDATION: If there were to be a monitoring body in the NT, then it should sit with the inspecting body, the proposed Inspectorate. This would guarantee the monitors’ independence. It would also support sharing of findings between, consistency in expectations/standards being used by and recommendations being made by monitors and inspectors. It would also facilitate monitors following-up on whether the recommendations made by inspectors were being implemented.

VOLUNTEER MONITORS

500 Rachel Murray, Elina Steinerte, Malcolm Evans, and Antenor Hallo de Wolf, ‘The Role of NPMs’ in The Optional Protocol to the UN Convention Against Torture (Oxford University Press 2011) 127.
504 Ibid.
505 Her Majesty’s Inspectorate of Constabulary for Scotland, Thematic Inspection of the Care and Welfare of persons detained in police custody in Scotland (January 2013) 8.
506 Independent Custody Visiting Association, ICVA Business Plan 2018/19 (?) 8; Northern Ireland Independent Custody Visiting Scheme, Independent Custody Visiting… are you interested? If you found yourself in custody, wouldn’t you want someone to check on your welfare? 3.
Furthermore, in the NT context, it would be inappropriate to rely on Aboriginal people to volunteer their time rather than contracting and paying monitors to undertake visits (while paying Inspectorate staff and consultants), as this fails to adequately recognise Aboriginal people’s contribution by way of cultural expertise. As the NT AJA consultations found, ‘[o]ften the same people – the leaders in the community – are frequently asked to assist many government agencies when there is trouble in the community, but more often than not, they are not paid or respected for their skills that they contribute in this role.’

**RECOMMENDATION:** If there were to be a monitoring body in the NT, efforts should be made to recruit Aboriginal people, with relevant qualifications or experience, as monitors. Monitors should be paid for the work they undertake, recognising their qualifications and/or cultural expertise/expertise by experience.

---

**ARE BOTH INSPECTING AND MONITORING FUNCTIONS NECESSARY IN THE NT?**

In Scotland in 2015, Visiting Committees were replaced with Independent Prison Monitors, which are now the responsibility of HMIPS. Outlined below are the reasons for this change in the monitoring system. The primary reasons were the concern was that Visiting Committees were not independently funded and thus not OPAT-compliant and that inspections were not conducted frequently enough to meet Scotland’s obligation under OPCAT that the NPM ‘regularly examine the treatment of the persons deprived of their liberty in places of detention’ under Art 19(a).

---

**THE COYLE REVIEW**

The Coyle Review stated that ‘it would be hard to argue that the frequency of inspections on their own meet the OPCAT requirement of “regular visits”,’ and that the ‘intensity of regular monitoring involved in visits of such frequency, if they are carried out properly, is of a different quality from that involved in inspections which take place every three or four years. Taken together the two distinct functions of inspection and monitoring constitute the preferred OPCAT model of layered monitoring.’

---

**SHRC - CONSULTATION SUBMISSION TO THE SCOTTISH GOVERNMENT**

The functions of monitoring and inspection are distinct and complementary. Taken together these two separate mechanisms - inspection and monitoring - provide an effective means of preserving and promoting human rights and of preventing abuse in prisons. It is important that each function is preserved within the new system... At present, Her Majesty’s Chief Inspector of Prisons for Scotland is required to inspect the 16 prison establishments in Scotland and to report to the Scottish Ministers. The intensity of regular monitoring to a prison is of a different quality from that involved

---


508 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).


510 Ibid.
in inspections which take place every three or four years by the Inspectorate. The central importance of both inspection and independent monitoring to the oversight of practice in prisons is also highlighted in the European Prison Rules 2006. It is therefore essential that the Order provides greater clarity about how these two accountability mechanisms are considered and preserved, particularly as in Scotland HM Inspectorate of Prison undertakes a role of inspections by statutory duty.\textsuperscript{511}

**SCOTTISH PARLIAMENT JUSTICE COMMITTEE’S REPORT**

The report on proposed reforms to prison monitoring noted that ‘[m]any respondents... argued that the ideal approach to [NPMs] was through a layered approach, including both monitoring and inspection as two distinct elements. This reflected the view of Nick Hardwick... who, in his capacity as the head of the UK’s NPM stated— “The lay monitoring body provides a frequency of visiting that cannot be achieved by a professional inspectorate... The lay body publishes an annual report which, rather than being a snapshot of the prison at the time of an inspection, paints a picture of an establishment over the course of a year. The monitoring of the lay body complements the monitoring of the inspectorate and vice versa. In our view, it is these layers of monitoring that, in total, meet the OPCAT requirements.”’\textsuperscript{512}

The Inspectorate model proposed in this report includes regular inspections of correctional facilities, prison work camps, youth detention facilities, bail supported accommodation, court cells and police cells in urban and remote locations, as well as transport used in transferring detainees. The number of visits is not prescribed in this paper (although further guidance in developing a strategy for visits is discussed below, under *Strategy regarding locations and frequency of visits*), but it is recommended that the Inspectorate visit these locations on a regular basis, as required by OPCAT. The main challenge will be regularly visiting police custody\textsuperscript{513} and court custody (during circuit court sittings) in remote Aboriginal communities and transport between remote and urban locations. However, the NT is a much smaller jurisdiction than Scotland and England, with fewer places of detention, and adequately resourcing the Inspectorate to be able to visit these locations on a regular basis would be a more efficient and effective means of meeting obligations under OPCAT than establishing both monitoring and inspection mechanisms.

**RECOMMENDATION:** It is recommended that there be no monitoring body as part of the NT NPM. Instead, the Inspectorate should be adequately funded to enable it to undertake visits to places of detention in the criminal justice system with sufficient regularity to meet the obligations under OPCAT.

\textsuperscript{511} The Scottish Human Rights Commission, *Consultation Submission to the Scottish Government: The Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014* (October 2014) 4.
\textsuperscript{512} Ibid 3-4.
FUNCTIONS OF THE INSPECTORATE: BEYOND INSPECTION
THE PREVENTIVE PACKAGE

The SPT has identified that the risk of torture is affected by an incredibly broad range of factors, including ‘the general level of enjoyment of human rights and the rule of law, levels of poverty, social exclusion, corruption, discrimination.’ It has stated that preventive work ‘requires a holistic, sensitive and deep understanding of the context in which an NPM is located. From such a perspective, NPMs have the possibility to gather the relevant data to understand the structural causes of torture and ill-treatment, going beyond the consideration of its symptoms. The NPM must therefore look at all levels where the causes might be found, including the broader legal, policy and institutional frameworks.’

The OPCAT preamble recognises that prevention work is a multifaceted project, ‘[r]ecalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures.’ The SPT refers to the ‘preventive package’, and describes prevention under OCPAT as ‘commenting on draft... legislation; providing public education; undertaking capacity-building; and actively engaging with State authorities.’ This could also include submissions on ‘relevant human rights action plans,’ commentary on existing legislation, or providing training those who are concerned with people deprived of their liberty.

Although care should be taken to protect the Inspectorate’s independence, the SPT recognises that authorities may request an NPM to exercise its mandate in relation to the above.

RECOMMENDATION: The Inspectorate should have a holistic understanding of the broader context in which it operates, identifying root causes which contribute to torture and ill-treatment.

SUBMISSIONS ON LEGISLATIVE AND BROADER POLICY REFORM RELEVANT TO THE PREVENTION OF TORTURE AND ILL-TREATMENT

GENERAL

The Committee Against Torture has provided guidance that:

514 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 28.
515 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).
516 Eleventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture 63rd sess, UN Doc CAT/C/63/4 (26 March 2018) [54].
517 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [9c].
518 Association for the Prevention of Torture, Monitoring places of detention: a practical guide (2004) 53-54. See also Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to Hungary undertaken from 21 to 30 March 2017: observations and recommendations addressed to the national preventive mechanism, UN Doc CAT/OP/HUN/2 [34].
519 Ibid.
520 Ibid.
The Inspectorate should make submissions on both draft and existing legislation and policy, where relevant to its mandate. The NTG should inform the Inspectorate of draft legislation under consideration (there should be ‘effective procedures and regulations... set up within the NPM and with the authorities to ensure that they are systematically included in the law drafting process'). The Inspectorate should take a proactive approach of suggesting legislative and policy changes necessary for the prevention of torture and ill-treatment of detainees. The SPT suggests that NPMs ‘have a strategy for setting priorities and should follow up on the comments that it makes' (where appropriate, this may involve cooperation with civil society, such as universities or research institutes, or participating in working groups involved in law reform), and that they ‘advocate and lobby with parliamentarians for necessary legislative changes and their implementation.' The SPT also recommends that an NPM ‘make public its observations on existing and draft legislation.' The NTG (and Commonwealth Government) should ‘take into consideration any proposals or observations on... legislation received from the NPM.'

A recent example in the NT where the Inspectorate may have been expected to make submissions is in relation to the 2019 Youth Justice Amendment Bill. The Inspectorate, had it existed, may have also considered reforms other than those related to legislation, such as the proposed new site of Don Dale Youth Detention Centre. During a country visit, the SPT noted that the replacement of prisons in poor conditions was an opportunity to ‘offer essential advice to the authorities concerning the improvements being made and the changes required. The current reform programme provides an opportunity for the [NPM] to enhance its

---

522 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 19(c).
523 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Guidelines on national preventive mechanisms, UN Doc CAT/OP/12/5 (9 December 2010) [28].
524 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 62.
525 Ibid.
526 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Honduras, UN Doc CAT/OP/HND/3 (25 January 2013) [14].
527 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 62.
528 Ibid 66.
529 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to Armenia undertaken from 3 to 6 September 2013: observations and recommendations addressed to the national preventive mechanism, UN Doc CAT/OP/ARM/2 (22 February 2017) [36].
530 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Guidelines on national preventive mechanisms, UN Doc CAT/OP/12/5 (9 December 2010) [28].
531 Youth Justice Amendment Bill 2019 (NT).
532 Law Council of Australia, ‘Proposed Don Dale site ‘flouts’ Royal Commission recommendations, affront to process’ (Media Release, 15 August 2019): The Northern Territory Government’s decision to build the new Don Dale detention centre next to an adult prison sends the message it is a ‘rite of passage’ for young inmates, lawyers say. Both the Law Society Northern Territory and Law Council of Australia have slammed this week’s announcement, which contradicts a key recommendation of the Royal Commission into the Detention and Protection of Children in the Northern Territory.’
533 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the national preventive mechanism advisory visit to Ecuador made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/OP/ECU/2 (16 July 2015) [8].
visibility and position itself as key player in the area of prevention and in the protection of detainees from torture and ill-treatment.\textsuperscript{534}

**RECOMMENDATION:** The Inspectorate should have a clear strategy for proactively making recommendations on legislative change, as well as submitting proposals on draft legislation already under consideration. The Inspectorate should take a broad approach to what constitutes relevant legislation. The Inspectorate should make its recommendations public and it should follow up on those recommendations. The NTG (and Commonwealth Government) must examine the Inspectorate’s recommendations. The Inspectorate may collaborate with civil society where appropriate, particularly with ACCOs.

**JOINT SUBMISSIONS AND A FOCUS ON HUMAN RIGHTS**

**NPMS’ JOINT SUBMISSION ON THE CORRECTIONS AMENDMENT BILL**

The NPM made a joint submission, focusing ‘on areas of overlap between two or more NPMs, specifically; segregation of prisoners at risk of self-harm, reviews of mother and baby placement decisions, use of police jails, use of mechanical restraints on prisoners being treated in hospital, and cell sharing.’\textsuperscript{535}

The bill included proposed provisions on the use of mechanical restraints on prisoners being treated in hospital.\textsuperscript{536} The NPMs’ submission included the following, notably making reference to international human rights law:

‘While the NPMs have numerous concerns with this proposal (and these may be addressed in the NPM’s individual submissions) our primary concern as a collective is the possibility of the use of a mechanical restraint on a woman in hospital who is giving birth. The current law does not preclude the use of mechanical restraints on women prisoners who are giving birth. The United Nations Rules for the Treatment of Women Prisoners and Noncustodial Measures for Women Offenders (the Bangkok Rules) recognise women are different from men, therefore some different minimum standards are needed to meet their needs while in prison. Rule 24 states “Instruments of restraint shall never be used on women during labour, during birth and immediately after birth.” We suggest a clause is added amending section 87(4) of the Corrections Act to add a paragraph (d) stating a mechanical restraint “may not be used during labour, during birth and immediately after birth.”\textsuperscript{537}

---

\textsuperscript{534} Ibid [9].

\textsuperscript{535} OPCAT National Preventive Mechanisms, Submission to the Justice Committee on the Corrections Amendment Bill (February 2019) 1-2.

\textsuperscript{536} Explanatory Note, Corrections Amendment Bill 2018 (NZ) 2: ‘When a prisoner receives hospital treatment outside prison, the continuous use of mechanical restraints may be necessary to prevent escapes and maintain public safety. However, the use of mechanical restraints, such as handcuffs, for more than 24 hours during a hospital visit is not expressly permitted in legislation. The Bill amends the 24-hour time limit on the application of mechanical restraints so it does not apply to prisoners who have been temporarily moved to hospital.’ Also at 8: ‘Clause 20 amends section 87, which relates to the restraint of prisoners, to explicitly allow extended use of a mechanical restraint if it is necessary to secure a prisoner who is being treated in a hospital outside a prison. Another amendment prohibits the use of chains or irons on a prisoner in any circumstances. It is made clear that handcuffs are not within the definition of chains or irons.’

\textsuperscript{537} OPCAT National Preventive Mechanisms, Submission to the Justice Committee on the Corrections Amendment Bill (February 2019) 4.
NPM SUBMISSIONS
MINISTRY OF JUSTICE CONSULTATION

The response to the Ministry of Justice Consultation was ‘submitted on behalf of all members of the UK NPM,’ ‘focusing on the principles that must underpin best practice for children who are deprived of their liberty in a criminal justice context.’ The NPM referred to international law in its submission, and identified specific issues of concern and good practices identified during its site inspections.

JOINT COMMITTEE ON HUMAN RIGHTS INQUIRIES

The NPM also made a submission to the Joint Committee on Human Rights Inquiry, providing information on its 2014-2015 joint project on isolation and solitary confinement, using human rights-based criteria to examine practices across detention settings including prisons, and the resultant guidance on monitoring isolation in detention, allowing consistency in approach across the NPMs and potentially ‘inform[ing] detention practice and policy.’

RECOMMENDATION: The Inspectorate should make reference to international human rights standards in its submissions on legislation and policy reforms.

RECOMMENDATION: The Inspectorate should make joint submissions with other NPMs where opportunities arise, at both the Territory level and the Commonwealth level. See also recommendation 77.

FOCUS ON INDIGENOUS PRISONERS AND DETAINEES

The Regional Forum on the OPCAT in Latin America proposed that NPMs ‘should embark on the issue of the rights of [I]ndigenous peoples more forcefully and should use their power to promote structural changes in public policies, including legislative reforms.’

538 United Kingdom National Preventive Mechanism, Response to the Ministry of Justice Consultation ‘Transforming Youth Custody’ (April 2013) 1.
539 Ibid 2: ‘The UN Convention on the Rights of the Child (UNCRC) sets out clearly the rights to which every child is entitled including, and sometimes especially, those in custody. The UNCRC states emphatically that all rights in the Convention are inviolate and inalienable and apply to all children whatever their circumstances.’
540 United Kingdom National Preventive Mechanism, Response to the Ministry of Justice Consultation ‘Transforming Youth Custody’ (April 2013) 4: ‘On a recent inspection we observed how a good physical environment has a positive impact on the behaviour of young people. Evidence from the establishment suggested that there were less incidents on that Unit than others even though it contained some of the most serious offenders. Young people felt that they were being respected and it made a difference to their behaviour.’ Also at 8: ‘During a recent inspection of one YOI, an NPM member found that 48% of young people lived over 100 miles from home. In a survey only 22% of young people said that it was easy for them to get visits, which is significantly worse than the comparator of 35%. 20% of young people did not get visits.’
541 United Kingdom National Preventive Mechanism, UK National Preventive Mechanism Submission to Joint Committee on Human Rights Inquiry: Mental Health and Deaths in Prison (02 March 2017) 3.
542 Ibid 4.
OCC – LEGISLATION SHOULD REFLECT A MĀORI WORLD VIEW

‘Māori children make up only 15 percent of the wider population, yet are 61 percent of children in care, and 71 percent of admissions to youth justice residences. It is clear the system needs to change in fundamental ways to better serve their needs. We can see little evidence that the new system has been designed with the needs of the majority of the children and young people it serves at the centre – that is, starting from a Māori world view. Rather, the Māori concepts introduced in the Bill give the impression of being secondary considerations for Māori children in addition to the purposes and principles that apply to all children who come into contact with the care and protection and youth justice systems. The additional concepts are often only to be considered “where practicable”. This is the wrong way around.’

RECOMMENDATION: The Inspectorate should highlight the importance of incorporating Aboriginal world views into legislation and policy in a meaningful way.

OCI - EVIDENCE TO THE HOUSE OF COMMONS
FOCUS ON INDIGENOUS-SPECIFIC NEEDS

The OCI gave evidence of practices within the correctional system that particularly disadvantage Indigenous people, such as a failure on the part of Correctional Services Canada (CSC) to create a ‘risk assessment tool specific to Indigenous people,’ and the practice of placing Indigenous people with mental health issues or FASD in higher security classification than necessary, rather than being placing them in a more therapeutic environment.

The OCI also gave evidence on the extremely high rate of trauma among Indigenous women: ‘I think one thing we are also very sensitive to is that the rate of trauma among [I]ndigenous women is very high, extremely high. I would argue that, yes, they are offenders, but first and foremost they have also been victims. The rate of physical, sexual, and psychological abuse is extremely high. The rate of trauma is also extremely high. The rate among [I]ndigenous women with respect to self-harm and suicide attempts is off the charts, much higher than for non-[I]ndigenous women. The service confines these women in an overly restrictive and harsh environment when it comes to secure units. There is no therapeutic approach and certainly no trauma-informed approach to address the high needs of these women.’

RECOMMENDATION: The Inspectorate should provide evidence and make submissions to consultations and inquiries on operational issues in places of detention, ensuring to highlight the needs of Aboriginal prisoners and detainees.

545 House of Commons, Standing Committee on Public Safety and National Security, Indigenous people in the federal correctional system (June 2018) 18-19.
546 House of Commons, Standing Committee on Public Safety and National Security, Indigenous people in the federal correctional system (June 2018) 24.
FOCUS ON OPCAT COMPLIANCE

NPM - LETTER TO JUSTICE COMMITTEE REGARDING OPCAT NON-COMPLIANCE

‘I am particularly concerned by the fact that the UK NPM itself is not provided for in legislation. This results in there being no guarantee of independence, no system of accountability, and Parliament having no role in setting out either its mandate or its objectives. This is in violation of the clear requirement of NPMs, as set out by the United Nations Subcommittee on Prevention of Torture. The lack of legislation undermines our legitimacy nationally and internationally, fails to protect our independence and functions from interference and does not assist us to deliver on our day to day tasks as an NPM. I am also concerned that the absence of legislation might suggest that the NPM is not regarded by the government as being particularly important. I believe legislation on the NPM and its members would be an opportunity to establish a proper system of accountability to Parliament itself. Members of the NPM also wish to see their own responsibilities under OPCAT incorporated into their own statutes. Currently, the legislation of only two of the members of the NPM refers to OPCAT (both in Scotland). It is of course particularly relevant to your current inquiry into prison reform that the legislation under which HMIP and the IMBs currently operate does not reference their roles under OPCAT or as part of the NPM.’

IMB (ENG) - EVIDENCE IN RELATION TO ITS OWN STRUCTURE AND FUNDING LIMITATIONS

The IMB provided written and oral evidence to the Justice Select Committee inquiry on prison governance committee in relation to the fact that the IMBs do not have a statutory basis, and receives inadequate funding:

‘First, the new structure has no statutory basis. Each IMB remains a separate and independent statutory body. It is therefore not possible for the IMBs as a whole to have a corporate existence as an independent arms’ length body, capable of employing staff and with direct responsibility for its own budget. Nor is there a formal report to Parliament. Currently, IMBs and the new governance structure are supported by a secretariat composed of Ministry of Justice civil servants. Because they are not independent of the department, it has been agreed that they should not make substantive decisions in relation to members or IMB policies; these are now made within the new governance structure. However, this is not a long-term solution. The new structure lacks statutory authority, and is over-reliant on the work and goodwill of volunteers.

‘Second, the extensive work done by unpaid public appointees needs a much stronger financial base. In any week there are around 950 monitoring visits to prisons in England and Wales. Other organisations that rely on unpaid volunteers to carry out technical or statutory work recognise that this requires sufficient central support: to recruit and retain members, support board leaders and members, deliver and update training and provide accurate and current information. Currently this is done within a budget of £1.6 million, which covers both central support and the travel and subsistence expenses of the members. This is an insufficient resource to support the scale and scope of monitoring being carried out: to assist with recruitment, provide the support and advice that unpaid board members should expect, and ensure that their findings can be of maximum benefit to Ministers and HMPPS.’

150

1548 Independent Monitoring Boards, Written evidence to the Justice Select Committee inquiry on prison governance: Written evidence from Independent Monitoring Boards (IMBs) (PPG0031) (June 2019) [8].
1549 Independent Monitoring Boards, Written evidence to the Justice Select Committee inquiry on prison governance: Written evidence from Independent Monitoring Boards (IMBs) (PPG0031) (June 2019) [9].
RECOMMENDATION: The Inspectorate’s submissions should include recommendations to remove obstacles that compromise its ability to be OPCAT compliant or operate effectively.

EXAMPLES OF WRITTEN SUBMISSIONS AND ORAL EVIDENCE

**HMIP**

Written submissions and oral evidence by HMIP in 2018-2019 were on areas such as prison healthcare and solitary confinement and restraint in youth detention. In 2017-2018, submissions and evidence to consultations and inquiries included the care and management of transgender and intersex detainees and the review of dying well in custody, as well as joint submissions with Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) on the Police and Criminal Evidence Act.

**IMB (ENG)**

IMB submitted evidence to Justice Committee inquiries such as the inquiry on prison population, addressing the need to focus on alternatives to prison. IMB highlighted issues through reference to IMB site reports, including previously identified ‘factors that impact on the prison population, as well as on the experience of those in prisons.

---


552 United Kingdom National Preventive Mechanism, Monitoring places of detention Ninth Annual Report of the United Kingdom’s National Preventive Mechanism 1 April 2017 – 31 March 2018 (January 2019) 25-26: ‘HMICFRS and HM Prisons made joint submissions in relation to the Home Office Statutory consultation on the revision of PACE codes C, H, E and F and to the National Appropriate Adult Network’s review of its National Standards... HMI Prisons responded to a number of consultations throughout the year, including: the Home Office’s revision of Detention Services Order ‘Care and management of transgender and intersex detainees’ and Detention Services Order ‘Surveillance Camera Systems’; the Advisory Board on Female Offenders in relation to the female offender strategy; the review of the Dying Well in Custody Charter by the National Health Service... the London Assembly consultation on Women in the Criminal Justice System; the review of the Equality Monitoring Tool by Her Majesty’s Prison and Probation Service; the annual review by the Medway Local Safeguarding Children Board of safeguarding and the use of restraint at Cookham Wood Young Offender Institution and Medway Secure Training Centre; and the National Institute for Health and Care Excellence consultation on preventing suicide in community and custodial settings. In addition, HMI Prisons provided oral and written evidence to the House of Commons’ Justice Select Committee’s inquiry into Transforming Rehabilitation and written evidence to its Prisons Population 2022: planning for the future inquiry.’


554 Independent Monitoring Boards, Written evidence to the Justice Select Committee inquiry on the prison population: Written evidence from the Independent Monitoring Boards (IMBs) (pp0059) (September 2018).

555 Ibid.
During 2017-2018, HMIPS ‘gave oral and written evidence on prisoner voting to the Equality and Human Rights Committee, and on the use of remand to the Justice Committee,’\(^{556}\) and made submissions on the Management of Offenders (Scotland) Bill and Home Detention Curfew.\(^{557}\)

### OCC

‘Our Office has had the opportunity to comment on and make recommendations to improve many of the proposals in this Bill at earlier stages of their development. Some of our feedback has been taken on board and is reflected in the draft legislation. In other areas, we think more needs to be done to achieve the transformational, child-centred vision outlined by the Expert Advisory Panel (EAP) in its 2016 report.\(^{558}\)

### A NOTE ON INTERACTION WITH PARLIAMENT

Birk et al recognise that:

many NPMs attend parliamentary sessions relevant to their work, mostly specialised committees... on invitation or on their own initiative... a useful means to engage in a meaningful way with members of Parliament and advocate for implementation of their recommendations... a very useful entry point for communication and cooperation with Parliament, leading to parliamentary debates and the ordering of studies on NPM relevant subjects.\(^{559}\)

Birk et al note that ‘Parliament is an important partner for the NPM that can help generate greater visibility of its findings and promote the implementation of its recommendations... a few NPMs can even bring specific issues of implementation to the attention of the Parliament.’\(^{560}\) Although they consider how ‘interaction with parliamentary groups and individual MPs may be useful for follow-up to recommendations,’\(^{561}\) they recommend that NPMs have a strategy on how they interact with parliament (including ‘identify[ing] the right contact points, [via] a thorough analysis and documentation of stakeholders’\(^{562}\) that takes into account the fact that the NPM must maintain its independence.\(^{563}\)

### RECOMMENDATION: The Inspectorate should have a clear strategy on how it will interact with Parliament and its members to promote implementation of its recommendations, while protecting its independence.


\(^{560}\) Ibid 65.

\(^{561}\) Ibid.

\(^{562}\) Ibid.

\(^{563}\) Ibid.
The SPT recognises the role the NPM has in making submissions to United Nations bodies and committees, including to the Committee on the Rights of the Child, the UN Committee Against Torture, and for the Universal Periodic Review (UPR). The Inspectorate should, for example, make efforts to meet with the Special Rapporteur on the rights of Indigenous peoples during visits to Australia.

The SPT also recognises the important role played by the NPM in following up on UN bodies’ recommendations where they relate to the NPM’s mandate. These strategic opportunities to ‘strengthen follow-up and implementation of their recommendations’ should be seized by NPMs.

---

**RECOMMENDATION:** The Inspectorate should make submissions to international bodies and follow up on those bodies’ recommendations to the NTG and Commonwealth Government, where the issues relate to the prevention of torture and ill-treatment of detainees.

---

**EXAMPLES OF NPM SUBMISSIONS TO INTERNATIONAL BODIES**

**NPM JOINT SUBMISSION TO INTERNATIONAL BODIES**

‘A strong foundation upon which to hold the government accountable and realise and protect the human rights of New Zealand’s most vulnerable population groups can be built by having a more integrated approach to international treaty body reporting. Such reporting can identify common concerns across relevant international human rights treaties such as CAT, the Convention on the Rights of Persons with Disabilities (CRPD), the International Covenant for Civil and Political Rights (ICCPR), as well as the Universal Periodic Review (UPR).’

The NPMs have met with and made a submission to the UN Working Group on Arbitrary Detention and to the one-year response following New Zealand’s examination by the Committee Against Torture. The Human Rights Commissioner attended New Zealand’s examination by the Human Rights Committee, with concluding observations...
noting that the Ombudsman’s OPCAT function must be adequately resourced. The NPMs’ joint submission to the [UPR] highlighted the over-representation of Māori in the prison system, the submission to the Committee on the Elimination of All forms of Racial Discrimination highlighted the ‘significant ethnic disparities in detention rates and criminal justice outcomes,’ and the submission to the Committee on the Elimination of All Forms of Discrimination against Women raised the issue of the overincarceration of Māori women.

**RECOMMENDATION:** The Inspectorate’s submissions to international bodies should focus particularly on issues relating to Aboriginal prisoners and detainees.

**NPM**

**SUBMISSION TO COMMITTEE AGAINST TORTURE IN 2019**

‘The NPM highlighted how its ability to fulfil its mandate is undermined by inadequate funding for its coordinating function and the fact that it does not have a statutory basis, and the fact that despite advocacy on this issue with the government, there had not been progress.’

The submission to UNCAT addressed issues in detention in the UK supported by ‘evidence from inspection and monitoring visits carried out by NPM members in England, Wales, Scotland and Northern Ireland since 2013.’ The NPM also responded to UNCAT’s concluding observations.

**SUBMISSION TO THE UN HUMAN RIGHTS COMMITTEE**

‘This submission draws from the reports and information of three members of the NPM: HM Inspectorate of Prisons... HM Inspectorate of Constabulary... and the Office of the Children’s Commissioner for England.’

Recommendations included that ‘Police forces should collect and publish data on police detention, collated by gender, race and ethnicity and age. Regular reports should be provided by forces to the Police and Crime Commissioner, and be published on PCC’s websites to improve transparency.’

The NPM’s submission to the United Nations Human Rights Committee included recommendations related to the right of convicted prisoner to vote. The report stated that ‘HMI Prisons is not aware of any concrete, current legislative proposal to give effect to the ruling of the European Court of Human Rights on prisoners’ right to vote, though proposals were presented to Parliament by the previous government. HMI Prisons has stated its position that the UK should comply

---

572 Ibid 5.
574 Ibid 2-5.
576 Ibid 7.
577 United Kingdom National Preventive Mechanism, Response of the UK National Preventive Mechanism to the CAT Committee Concluding Observations on the fifth periodic report of the United Kingdom (5 March 2014).
578 United Kingdom National Preventive Mechanism, Submission to the UN Human Rights Committee’s Seventh Periodic Review of the United Kingdom at the Committee’s 114th session (2015) [3].
579 Ibid [10].
with the judgement of the European Court of Human Rights... Recommendation: Present legislation to parliament to give effect to the judgement of the European Court of Human Rights.\textsuperscript{580}

**IMB (ENG) - BRIEFING TO THE CPT**

The IMB briefed members of the Council of Europe’s Committee on the Prevention of Torture during their visit to the UK in May 2019.\textsuperscript{581}

The above examples focus on joint submissions with other NPMs, but where appropriate, collaborating with civil society organisations is an approach also open the Inspectorate.\textsuperscript{582}

**RECOMMENDATION:** The Inspectorate should consider opportunities to make joint submissions to international bodies with other NPMs or civil society (particularly ACCOs).

**PROMOTING THE ROLE OF THE INSPECTORATE AND TORTURE PREVENTION TO THE PUBLIC, DETAINES AND DETENTION STAFF**

The SPT has recommended on country visits that NPMs:

- develop a strategy for disseminating information about the national preventive mechanism... among the relevant authorities and the general public... to explain how the fulfilment of its mandate adds value... and to clarify the nature of the principle that guides its work, which is based on sustained cooperation and dialogue over the long term as a means of assisting the authorities to make any changes required to prevent torture and ill-treatment.\textsuperscript{583}

Improving understanding of the Inspectorate’s role can assist it to overcome any resistance that it may initially encounter due to the fact that there already exist a number of other oversight mechanisms in the NT. This can be achieved if the public, civil society and the detaining authorities can appreciate that the Inspectorate’s role is different to that of existing mechanisms, given its preventive function.\textsuperscript{584} For example, strategies to promote its role could include organising conferences or workshops.\textsuperscript{585} Promotion of OPCAT and the Inspectorate

\textsuperscript{580} Ibid [47]-[48].
\textsuperscript{581} Independent Monitoring Boards, IMB National Annual Report 2017/18 (June 2019) 43.
\textsuperscript{583} Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the national preventive mechanism advisory visit to Ecuador made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/OP/ECU/2 (16 July 2015) 9 [33].
\textsuperscript{585} Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Honduras, UN Doc CAT/OP/HND/3 (25 January 2013) [13].
among detainees should also be undertaken, increasing detainees’ awareness of their rights and alerting them to the Inspectorate’s existence. 586

However, promoting the work of the Inspectorate should not be confused with strengthening public confidence in the detaining authority. The latter might be an outcome of the Inspectorate’s work, but it is not its purpose.587 In fact, it is conceivable that there would be times when existing public confidence in the criminal justice system (and conditions and treatment in detention) may be at odds with the goal of preventing ill-treatment, particularly in a jurisdiction where a ‘tough on crime’ ethos dominates.

---

**REVIEW OF OPCAT IN NEW ZEALAND**

‘As a result of implementing OPCAT there have been improvements in the conditions of detention and in the way that detainees are treated within New Zealand. The fact that detaining agencies have been so willing to take OPCAT on board has been a significant factor in the success of implementation so far… Awareness and acceptance of OPCAT monitoring has grown through efforts to raise awareness of the role and function of NPMs, and after institutions have had the opportunity to see how it works in practice.’588

---

**NPMS – PROMOTING AWARENESS**

Approaches to raise awareness have included writing an article for the Police Association’s Ten One magazine on the IPCA’S role and the positive outcomes achieved in New Zealand as a result of OPCAT.589

At the request of organisations such as the Department of Corrections and the Mental Health Foundation, Ombudsman inspectors presented on [Crimes of Torture Act]. To further increase awareness, meetings were held with civil society groups and regularly with individuals from the Ministries of Health and Justice, the Department of Corrections, the New Zealand Parole Board and the Mental Health Commission.590 The Human Rights Commission ‘facilitated a joint Briefing by the National Preventive Mechanism to the Incoming Minister of Justice. The two priorities highlighted for the next three-year period were resourcing of NPMs, raised previously on several occasions both by NPMs and by international monitoring bodies, and the gap in monitoring aged care and dementia facilities.’591

The IPCA has made efforts in the past to promote awareness of OPCAT via its website, with information provided for both the police and the public. It also produced OPCAT factsheets ‘produced for display in Police custody suites, offering guidance on the standards expected in detention facilities, and information about the Authority’s role’ and held a Civil Society Forum ‘where NGOs and other agencies (such as District Health Board mental health staff) with a working knowledge of Police detention issues were invited to discuss their experience in this field.’592

---


590 Ibid 14.


ICVS

In order to ensure that there is consistent messaging and understanding about the purpose of, and need, for the ICV scheme in Scotland, the National Manager engages regularly with partners in Police Scotland, and has provided inputs on Independent Custody Visiting at Custody Officer training courses. Information on ICVS continues to be made available on the Police Scotland intranet site. ¹⁵⁷

**RECOMMENDATION:** The Inspectorate should raise awareness of its work among the detaining authorities and the general public, promoting the importance of preventing torture and ill-treatment and the Inspectorate’s unique mandate among the various detention oversight bodies. This can decrease resistance to its work and facilitate engagement with detainees. This function should not be aimed at increasing public confidence in the detaining authority, but promoting the Inspectorate’s role in the prevention of torture and ill-treatment of detainees.

Promotion of the Inspectorate’s work must target ACCOs and the NT Aboriginal community, in both urban and remote settings. This will require translating written and oral information into Aboriginal languages.

**RECOMMENDATION:** The Inspectorate should focus on raising awareness of its work among ACCOs and the NT Aboriginal community, in both urban and remote settings. It should use appropriate platforms to reach this audience, and create written and oral resources translated into the Aboriginal languages spoken in the Northern Territory.

THE ROLE OF HUMAN RIGHTS EDUCATION IN THE PREVENTION OF TORTURE

The CAT states that:

> Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. ²⁵⁴

Steinert draws attention to that fact that ‘since OPCAT’s Preamble notes that effective prevention ‘requires education and a combination of various legislative, administrative, judicial and other means’, it is not hard to imagine NPMs engaging in, for example, awareness raising campaigns and training programmes for law enforcement officials.’ ²⁵⁵


¹⁵⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) Art2(1).

This view is supported by the SPT’s assertion that the NPM’s mandate encompasses:

[a]ssisting in the formulation of programmes for the teaching of the prohibition and prevention of torture and ill-treatment and carrying out research into human rights and, where appropriate, taking part in the execution of such programmes and research in schools, universities and professional circles. 596

In its annual report, the SPT recognises that ‘[h]uman rights education and training is a key mechanism for the prevention of torture and ill-treatment in that it can help counter the numerous root causes,’ of torture and ill-treatment,597 referencing the United Nations Declaration on Human Rights Education and Training.598

Where the target audience for the training includes Aboriginal people for whom English is not a first language, or who reside in remote communities and are not conversant with Western legal systems, Article 3 of the Declaration on Human Rights Education and Training is of particular importance: ‘[h]uman rights education and training should use languages and methods suited to target groups, taking into account their specific needs and conditions.’599

596 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [9].
597 Fifth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, 48th sess, UN Doc CAT/C/48/3 (19 March 2012) [69].
598 Ibid [68]: “The United Nations Declaration on Human Rights Education and Training establishes that human rights education “comprises all educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all human rights and fundamental freedoms”. It also states that “by providing persons with knowledge, skills and understanding and developing their attitudes and behaviours, to empower them to contribute to the building and promotion of a universal culture of human rights, it contributes to the prevention of human rights violations.”
599 See also United Nations Declaration on Human Rights Education and Training, UN Doc A/RES/66/137, 66th sess (16 February 2012).

Article 1: ‘1. Everyone has the right to know, seek and receive information about all human rights and fundamental freedoms and should have access to human rights education and training. 2. Human rights education and training is essential for the promotion of universal respect for and observance of all human rights and fundamental freedoms for all, in accordance with the principles of the universality, indivisibility and interdependence of human rights. 3. The effective enjoyment of all human rights, in particular the right to education and access to information, enables access to human rights education and training.’

Article 2: ‘1. Human rights education and training comprises all educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all human rights and fundamental freedoms and thus contributing, inter alia, to the prevention of human rights violations and abuses by providing persons with knowledge, skills and understanding and developing their attitudes and behaviours, to empower them to contribute to the building and promotion of a universal culture of human rights. 2. Human rights education and training encompasses: (a) Education about human rights, which includes providing knowledge and understanding of human rights norms and principles, the values that underpin them and the mechanisms for their protection; (b) Education through human rights, which includes learning and teaching in a way that respects the rights of both educators and learners; (c) Education for human rights, which includes empowering persons to enjoy and exercise their rights and to respect and uphold the rights of others.’

Article 4: ‘Human rights education and training should be based on the principles of the Universal Declaration of Human Rights and relevant treaties and instruments, with a view to: (a) Raising awareness, understanding and acceptance of universal human rights standards and principles, as well as guarantees at the international, regional and national levels for the protection of human rights and fundamental freedoms; (b) Developing a universal culture of human rights, in which everyone is aware of their own rights and responsibilities in respect of the rights of others, and promoting the development of the individual as a responsible member of a free, peaceful, pluralist and inclusive society; (c) Pursuing the effective realization of all human rights and promoting tolerance, non-discrimination and equality; (d) Ensuring equal opportunities for all through access to quality human rights education and training, without any discrimination; (e) Contributing to the prevention of human rights violations and abuses and to the combating and eradication of all forms of discrimination, racism, stereotyping and incitement to hatred, and the harmful attitudes and prejudices that underlie them.

Article 5: ‘1. Human rights education and training, whether provided by public or private actors, should be based on the principles of equality, particularly between girls and boys and between women and men, human dignity, inclusion and non-discrimination. 2. Human rights education and training should be accessible and available to all persons and should take into account the particular challenges and barriers faced by, and the needs and expectations of, persons in vulnerable and disadvantaged situations and groups, including persons with disabilities, in order to promote empowerment and human development and to contribute to the elimination of the causes of exclusion or marginalization, as well as enable everyone to exercise all their rights.’

RAISING AWARENESS AMONG DETAINING AUTHORITY STAFF ON OPCAT AND INTERNATIONAL HUMAN RIGHTS STANDARDS

‘Overall, awareness of the OPCAT process within agencies has developed, although the preventive aims and rationale behind some of the recommendations made in visit reports are not always understood. To address this NPMs have conducted OPCAT training with staff from detaining agencies but, particularly in those areas with a high turnover of staff, this need is ongoing.\footnote{Human Rights Commission, The Optional Protocol to the Convention against Torture (OPCAT) in New Zealand 2007–2012: A review of OPCAT implementation by New Zealand’s National Preventive Mechanisms (April 2013) 36.}

‘Raising awareness of OPCAT and the human rights standards relating to detention was the focus of a workshop with prison managers, undertaken in collaboration with the Ombudsmen’s Office, Ministry of Justice and the Department of Corrections. The workshop provided an overview of the human rights framework and explored how Corrections staff could apply a human rights approach to their work.\footnote{Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2009 to 30 June 2010 (November 2010) 5.}

RECOMMENDATION: The Inspectorate should raise awareness among detaining authorities of international human rights relating to places of detention, to improve understanding of the human rights-based recommendations it makes.

Just as educating detention staff can promote detaining authority acceptance of the Inspectorate’s recommendations, public understanding of human rights can generate interest in and support for the Inspectorate’s recommendations (in turn increasing public pressure on detaining authorities to accept and implement those recommendations).

Dixon describes how ‘[s]ocial disapproval is contingent on the public being aware of the standards of appropriate behaviour in the area of detention. Such standards must, in other words, form part of society’s "legal consciousness". A "legal consciousness" encompasses "people’s routine experiences and perceptions of law in everyday life." Dixon notes the potential of publishing reports to ‘increase the prevalence of anti-torture and anti-ill-treatment rights-based norms within society’s legal consciousness.’\footnote{Amy Dixon, ‘The Case for Publishing OPCAT Visit Reports in New Zealand’ (2013) 11 New Zealand Journal of Public and International Law 568-569.} She identifies how ‘[e]ducation and communication play a vital role in developing such norms. Just as the media plays a significant role in "setting acceptable standards of human rights within which a society operates."’\footnote{Ibid.}

When the Inspectorate promotes OPCAT and its mandate, it should emphasise that OPCAT is a human rights instrument and promote respect for the international human rights standards it will be relying on in formulating its recommendations.

\footnote{Ibid.}
IDENTIFYING BEST DETENTION PRACTICES IN OTHER JURISDICTIONS (AUSTRALIA AND OVERSEAS), PARTICULARLY CULTURALLY APPROPRIATE PRACTICES

The Inspectorate should identify best detention practices in other jurisdictions that could positively contribute to the prevention of torture and ill-treatment in the NT.

For example, during the Fellowship, I learned of Aboriginal Healing Lodges in Canada.

**ABORIGINAL HEALING LODGES**

‘Healing Lodges reflect the physical space and programs of the Aboriginal culture. The needs of the offenders under federal sentence are addressed through Aboriginal teachings, ceremonies, contact with Elders and children and interaction with nature. Program delivery is premised on individualized plans, a holistic approach, an interactive relationship with the community and a focus on release preparation. The Healing Lodges operate from a unique perspective, placing a high value on spiritual leadership as well as role modeling through life experiences of staff. These Lodges are responding to the dramatic over-representation of Aboriginal peoples in corrections in Canada... The Healing Lodges are also responding to the need that has been voiced by the Aboriginal community that the mainstream programs that are available in prisons are not working for Aboriginal offenders, as every program indication will substantiate.

In 1990, the Task Force on Federally Sentenced Women recommended that one of the five new regional federal facilities for women should be a Healing Lodge for Aboriginal women. The Healing Lodge concept was proposed by an Aboriginal women's group who advised the Service on this option.\(^{605}\)

**QUEBEC - CONSIDERED BUILDING SMALLER REGIONAL CORRECTIONAL FACILITIES**

‘The modern treaty era began in 1973 after the Supreme Court of Canada decision (Calder et al. v. Attorney-General of British Columbia), which recognized Aboriginal rights for the first time. This decision led to the development of the Comprehensive Land Claims Policy and the first modern treaty, the James Bay and Northern Québec Agreement signed in 1975.\(^{606}\)

The Agreement stipulated that ‘[a]s quickly as possible after the execution of the Agreement and after consultation with Cree local authorities, the appropriate detention institutions will be established within the “judicial district of Abitibi” so that Crees subject to imprisonment, committal or detention, shall not be imprisoned, committed or detained in any institution below the 49th parallel of latitude, except where they are detained pending trial or pending their sentence or judgment before a court having jurisdiction below the 49th parallel of latitude. However, Crees who, after their sentence, are imprisoned, committed or detained in any place whatsoever, have the right, if they so desire, to be imprisoned,\(^{605}\)

---

\(^{605}\) Correctional Service Canada, Backgrounder – Aboriginal Healing Lodges (2013).

committed or detained in small institutions situated within the territory of James Bay, if such institutions are appropriate taking into consideration all circumstances... All institutions, penitentiaries and places of detention in the “judicial district of Abitibi” for the Crees and non-Native persons shall be staffed totally or in part by Crees taking into account the available Cree manpower suitable.\textsuperscript{607}

There were no correctional facilities in Nunavik,\textsuperscript{608} and ‘in 2002... the Government of Québec committed to building a correctional facility in Nunavik by December 31, 2005, that could accommodate 40 inmates. The Agreement stated that Québec favoured the institution of smaller correctional facilities in various regions, when possible, in order to foster the gradual reintegration of offenders. The city of Inukjuak was to have the first facility.’\textsuperscript{609} In 2007, the decision was reversed, “[a]ccording to the statements collected, the estimated $300 million cost and the reluctance of several communities to have a correctional facility in their own backyard contributed to the decision.”\textsuperscript{610}

\textbf{RECOMMENDATION:} The Inspectorate should identify best detention practices in other jurisdictions, particularly those which are culturally appropriate for Indigenous people.

\begin{flushright}
\textsuperscript{608} Le Protecteur du Citoyen, Special Report by the Québec Ombudsman: Detention conditions, administration of justice and crime prevention in Nunavik (18 February 2016) [88].
\textsuperscript{609} Ibid [89].
\textsuperscript{610} Ibid [90].
\end{flushright}
INSPECTORATE’S RELATIONSHIP WITH OTHER NORTHERN TERRITORY STATUTORY BODIES (INCLUDING OTHER NPMS)
NPMS - DEVELOPING BEST PRACTICE

The Inspectorate should consult with other NT NPMs in developing its inspection framework and expectations/standards. However, as the Inspectorate will focus on the prevention of torture and ill-treatment of Aboriginal detainees, there will not be uniformity in approach of the NPMs responsible for monitoring places of detention in the NT.

HMIPS – STRATEGIC PLAN

The ‘Inspectorate will be working collaboratively with its inspection partners Healthcare Improvement Scotland (HIS), Education Scotland, the Scottish Human Rights Commission (SHRC), the Care Inspectorate and Children and Young Peoples Commissioner Scotland (CYPCS) to co-design a risk-based approach to inspection. This new approach will recognise the importance of the findings from Independent Prison Monitors (IPMs), utilise the considerable existing findings available, draw on our partners’ best practice in scrutiny models and complement the existing Standards for Inspecting and Monitoring Prisons in Scotland that are founded on the Human Rights Based Approach – PANEL Principles. ⁶¹¹

RECOMMENDATION: The Inspectorate could consult with other NT NPMs, as appropriate, to develop best practice.

NPMS - INFORMATION SHARING, AVOIDING DUPLICATION OF WORK AND MONITORING OF ANY REPRISALS

SHARING INFORMATION

As discussed under Preparing for the inspection, the APT recommends that NPMs meet with other actors who have regular dealings with the detaining authority in order to obtain useful information in relation to the place of detention being visited. The sort of information that would be useful includes the nature and number of complaints to statutory bodies such as the NT Ombudsman and the OCC. The Inspectorate should also meet with other relevant NT NPMs (such as the generalist NPM undertaking inspections in places of detention within the criminal justice system).

IMB (ENG)

‘We have Protocols with Her Majesty’s Chief Inspector of Prisons and with the Prisons and Probation Ombudsman, and have regular meetings to share information and discuss matters of common concern. ⁶¹²

⁶¹¹ Her Majesty’s Inspectorate of Prisons Scotland, HM Chief Inspector’s Strategic Plan 2019-2022 (May 2019) 3.
AVOIDING DUPLICATION OF WORK AND EASING THE BURDEN OF SCRUTINY

The APT has noted that to ensure that the ‘multiplication of oversight is positive,’ oversight bodies must ‘communicate... and coordinate their actions’. 613

PUBLIC SERVICES REFORM (SCOTLAND) ACT – SCRUTINY
DUTY OF CO-OPERATION

‘The persons, bodies and office-holders listed in schedule 20 (the “scheduled scrutiny authorities” 614) must co-operate and co-ordinate activity with each other... with a view to achieving the purpose... [which is] improving the exercise of the scrutiny functions of the scheduled scrutiny authorities in relation to... policing... having regard to efficiency, effectiveness and economy.’ 615

HMICS – MOU WITH AUDITOR

‘The Police and Fire Reform (Scotland) Act 2012 places a duty on the Auditor General for Scotland (AGS) and Her Majesty’s Inspectorate of Constabulary in Scotland (HMICS) to cooperate and coordinate activity with each other with a view to improving how we carry out our respective functions. This Memorandum of understanding sets out how we intend to fulfil this duty. It describes our respective powers and responsibilities and proposes a framework for collaborative working. This framework is designed to optimise the skills and experience involved in audit and inspection, avoid duplication of effort and minimise the burden of scrutiny.’ 616

‘In fulfilling our duty to cooperate, we are committed to: Joint discussions on planning our audit and inspection work, including sharing risk assessments; Sharing relevant information and respecting confidentiality of shared information; Maintaining effective communication and liaison; Working together where appropriate; Sharing knowledge, skills, expertise and experience.’ 617

‘We believe there is much to be gained by both organisations in sharing our respective knowledge, skills and expertise. We will investigate different approaches for doing this, for example, through shared training on audit or inspection methodology... Future audit work may use findings from HMICS inspections, and similarly, future inspections may refer to published audit judgements. It is important therefore that both organisations have confidence in the quality of the audit and inspection work being undertaken, the evidence used and the published judgements. Sharing knowledge and expertise will contribute towards building mutual confidence in the quality of our audit and inspection work.’ 618

613 Association for the Prevention of Torture, Inspection mechanisms <https://www.apt.ch/detention-focus/en/detention_issues/29/>
614 Public Services Reform (Scotland) Act 2010 (Scot) sch 20 includes HMICS.
615 Ibid s114.
616 Audit Scotland and Her Majesty’s Inspectorate of Constabulary Scotland, Memorandum of understanding: For cooperation between Audit Scotland, on behalf of the Auditor General for Scotland, and HM Inspectorate of Constabulary in Scotland (HMICS) (September 2014) 1.
617 Ibid 2-3.
618 Ibid 3.
MONITORING AND PREVENTING REPRISALS AND SANCTIONS AGAINST DETAINEES

Protocol between HMIP, IMB and Prisons and Probation Ombudsman

‘This protocol is intended to assist joint working between the three organisations with a clear focus on ensuring that prisoners/detainees are protected from any victimisation/sanctions which might take place for communicating or trying to communicate with the IMB, HMIP or the PPO.’ The overlapping remits and duties of HMI Prisons, IMBs and the PPO place them in a unique position to work together to combine their experience and evidence base, in order to learn lessons and better prevent sanctions being applied to prisoners/detainees in the future.

‘The term ‘sanctions’ covers a range of acts or omissions attributable to staff who carry out, permit or tolerate ill-treatment of a prisoner/detainee as a result of communication with HMI Prisons, IMBs or the PPO. These may include punishments such as a removal of basic entitlements (for example, access to food, water, exercise or medical care), limits on communication with the outside world (for example, restricting visits), isolation, humiliation, physical, verbal or psychological abuse, or threats of any of the above. These may also include administrative punishments, such as recategorisation, loss of employment, relocation within an establishment or transfer to another establishment. This protocol covers allegations of sanctions occurring in prisons, young offender institutions, secure training centres and immigration detention facilities.’

Of note, detention centre staff are protected by relevant agencies’ policies rather than under this MoU.

Protocol between HMIP and HMICFRS

‘This protocol sets out a broad principle for how Her Majesty’s Inspectorate of Prisons (HMI Prisons) and Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) will work together, in line with their obligations under [OPCAT] to: prevent any detainee held in police custody from being subjected to sanctions or other prejudice arising from their, or someone acting on their behalf’s, communication with either party; protect any detainee held in police custody should they be subjected to sanctions as a result of communication with HMI Prisons or HMICFRS; and provide reassurance to detainees that they can freely communicate with HMI Prisons and HMICFRS without fear of sanctions or other prejudice.’

RecommenDation: The Inspectorate should have MoUs with other NPMs (and where appropriate, statutory bodies) to avoid duplication of work, to ease the burden of scrutiny on the detaining authorities, and to monitor and prevent reprisals against detainees who engage with the Inspectorate.

---

621 Ibid 2.
622 Ibid: ‘Prison and immigration detention staff who have similar concerns about sanctions as a result of contact with HMI Prisons, IMBs or the PPO are protected by the relevant agencies’ reporting wrong doing’, ‘whistleblowing’ and public interest disclosure policies to which they should be directed.’ See also Her Majesty’s Inspectorate of Prisons and Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services, Protocol between Her Majesty’s Chief Inspector of Prisons and Her Majesty’s Chief Inspector of Constabulary and Fire & Rescue Services 2: ‘Police staff who have similar concerns of sanctions as a result of contact with HMI Prisons or HMICFRS are protected by the relevant agencies’ reporting wrong doing’, ‘whistleblowing’ and public interest disclosure policies to which they should be directed.’
623 Her Majesty’s Inspectorate of Prisons and Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services, Protocol between Her Majesty’s Chief Inspector of Prisons and Her Majesty’s Chief Inspector of Constabulary and Fire & Rescue Services 2.
NPMS - JOINT SITE AND THEMATIC INSPECTIONS/REVIEWS

The Inspectorate should consider conducting joint site inspections and thematic reports with other NPMs in the NT. This supports sharing of expert knowledge. For example, the Inspectorate could consider conducting joint visits with the NT ADC (should it be designated NPM for mental health institutions), as the ADC’s expertise on issues relating to discrimination, which is of particular interest to the Inspectorate (as discussed below, under Expectations/standards and frameworks for culturally competent inspections), would benefit the Inspectorate’s work. The Inspectorate could also undertake joint visits with the generalist NPM, which would be particularly useful in enabling comparisons to be drawn between the experiences of Aboriginal and non-Aboriginal detainees.

SPT – OPPORTUNITIES FOR COOPERATION

REVIEW OF OPCAT IMPLEMENTATION

‘Initially, international guidelines such as the APT’s materials were the basis of NPMs’ policies and working methods. As NPMs have gained experience, and been required to work innovatively within their limited resources to effectively meet OPCAT requirements, they developed their own practice. Examples of these practice developments include… each NPM having only very small visiting teams and using other NPMs to provide additional perspectives and expertise, including on site visits.’

SPT VISIT TO NEW ZEALAND

‘It... seems that the rigid mandates of NPMs lead to missed opportunities for synergies and cooperation. For instance, the Children’s Commissioner monitors Youth and Justice Residences but has no mandate to consider the treatment of minors and juvenile offenders in police custody... or penitentiary institutions. The SPT believes that the Children’s Commissioner ought to be able to engage in thematic cross-cutting studies with regard to the treatment of minors deprived of liberty.’

‘Given that the State Party is under a continuing obligation regarding the effective functioning of the NPM, the SPT recommends that the authorities... Support the NPMs as they seek to develop and maintain a collective identity through, inter alia, joint visits and joint public reports, harmonized working methods, shared expertise and enhanced coordination.’


\[625\] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand, UN Doc CAT/OP/NZL/1 (28 July 2014) [14].

\[626\] Ibid [17].
COOPERATION BETWEEN NPMS – LEGISLATIVE OBLIGATIONS, INSPECTION FRAMEWORKS AND STRATEGIC PLANS

HMIP

LEGISLATIVE DUTY TO COOPERATE WITH OTHER INSPECTORATES

‘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... As part of the joint inspection programme with other criminal justice Inspectorates, the Chief Inspector of Prisons jointly inspects police custody with HM Chief Inspector of Constabulary... HM Inspectorate of Prisons jointly inspects Secure Training Centres (STCs) with Ofsted... By invitation, HM Chief Inspector of Prisons also carries out inspection of... prisons in Northern Ireland (on behalf of Criminal Justice Inspection Northern Ireland (CJINI)).’

INSPECTION FRAMEWORK

‘HM Inspectorate of Prisons works jointly with other inspectorates such as HM Inspectorate of Constabulary, Ofsted, HM Inspectorate of Probation, Care Quality Commission and the Royal Pharmaceutical Society. This joint work ensures expert knowledge is deployed on inspections and avoids multiple inspection visits.’

‘The Inspectorate’s relationships with partner inspectorates, inspected bodies and other organisations are governed by a number of service level agreements (SLAs), memoranda of understanding (MOUs) and agreed protocols. These include... MOUs with the... Health Inspectorate Wales, Care Quality Commission, HM Inspectorate of Prisons (Scotland)... HM Inspectorate of Constabulary, HM Inspectorate of Constabulary (Scotland)... protocols with the... Criminal Justice Inspectorate Northern Ireland.’

HMIPS – STRATEGIC PLAN

‘The Children and Young People’s Commissioner Scotland promotes and safeguards the human rights of children and young people under 18, or up to 21 if they have care experience. During prison inspections where establishments hold prisoners under the age of 18, the office of the Children and Young People’s Commissioner are invited to review the prison against international human rights standards. Their findings are incorporated into the HMIPS final report.’

ANNUAL REPORT

‘Each inspection was carried out by a multi-disciplinary team from the following scrutiny bodies in addition to HMIPS: Healthcare Improvement Scotland (HIS), Education Scotland (ES), The Care Inspectorate (CI), The Scottish Human Rights Commission (SHRC).’

---

628 Ibid 9.
629 Ibid 9.
REFUNDING COSTS INCURRED

CJI – BUSINESS PLAN

‘CJI will be working with HM Inspectorate of Prisons (HMIP) on our unannounced prison inspection during 2018-19. This inspection will also involve the Education and Training Inspectorate (ETI) and the Regulation and Quality Improvement Authority (RQIA). CJI will also be engaging with these Inspectorates in relation to work as part of the UK’s National Preventive Mechanism in support of [OPCAT] during the year. CJI will consult and share knowledge with colleagues from... HM Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS) drawing on their insights following inspection work in England and Wales in relation to inspections such as those on local policing arrangements; police custody... CJI will refund the costs of visiting Inspectors where possible and has made suitable budget provision for this purpose in 2018-19.’\(^632\)

DELEGATING FUNCTIONS

HMIP

‘The responsibility for inspecting and reporting on the efficiency and effectiveness of police forces in England and Wales falls to HMICFRS. Since the start of the police custody inspection programme in 2008, HMICFRS has delegated certain functions to HMI Prisons to enable a joint approach, drawing on the combined expertise of both inspectorates. The joint HMICFRS/HMI Prisons national programme of unannounced police custody inspections ensures that custody facilities in all 43 forces in England and Wales are scrutinised, at a minimum, every six years.’\(^633\)

EXAMPLES OF JOINT INSPECTIONS

CJI

‘This unannounced inspection was conducted by Criminal Justice Inspection Northern Ireland (CJI) and Her Majesty’s Inspectorate of Prisons in England and Wales (HMIP) with the support of the Regulation and Quality Improvement Authority (RQIA) and the Education and Training Inspectorate (ETI).’\(^634\)

‘Health care was inspected by colleagues from the Regulation and Quality Improvement Authority (RQIA) and learning and skills were inspected by Inspectors from the Education and Training Inspectorate (ETI).’\(^635\)

\(^634\) Criminal Justice Inspection Northern Ireland, Report on an unannounced inspection of Maghaberry Prison 9-19 April 2018 (November 2018) 5.
\(^635\) Ibid 59.
The Authority has expanded its site visit methodology to include multi-agency specialist site visits in specific cases... the Authority responded to an acute case requiring immediate and specialist attention by engaging with other national organisations that had expertise in the key areas of concern. This specialist visit was the first of its kind conducted by NPMs under OPCAT in New Zealand and resulted in immediate remedial work being undertaken by the NZ Police, the local District Council, the NZ Fire Service, and the Department of Labour. The visit was positively received; it facilitated a solution to issues that affected both staff and detainees and responded to conditions that had prevailed at this particular station for some time. The specialist site visit model, as developed by the Authority, is an important tool for cases that require immediate and effective action in the future. It allows the Authority to harness the specialist skills of practitioners and expedite resolution where individual action may be less effective.636

The Authority continued to work closely with the Human Rights Commission and other NPMs during the year. The Authority and the Office of the Children’s Commissioner (OCC) took part in a joint three-day site visit to a Youth Justice residence in March 2011... The visit was a valuable learning opportunity and allowed staff to share methodologies and perspectives. The Authority also contributed to the OCC draft report on the site visit. Where resources and capacity permits, the collaboration between NPMs will continue and will add significant value and depth to OPCAT work in New Zealand.637

JOINT THEMATIC REPORTS

HRC/IPCA/OCC REPORT – YOUNG PEOPLE IN POLICE DETENTION

This review of young people in Police detention was launched in December 2010 by the Independent Police Conduct Authority, the Office of the Children’s Commissioner and the Human Rights Commission as part of each agency’s mandate under [OPCAT]. OPCAT’s expansive preventive mandate enables monitoring bodies to consider a range of human rights treaties and standards in their work and to identify methods beyond site visits that will contribute to the prevention of ill-treatment. It is on this basis that this joint thematic review has been conducted.638

This review focused on systemic issues and what might be done to ensure conditions of youth detention are safe, humane and in compliance with international standards. Practice around the country appears to be variable, with many of the issues identified stemming from the fact that Police cells were never intended for the detention of young people.639

Two core issues have been raised by this review. Firstly, how can the numbers of young people being detained in Police custody be reduced? Secondly, what can be done to improve the treatment of those young people who are detained in Police custody?640

639 Ibid 7.
640 Ibid 47.
UK NPM – TRANSITIONS AND PATHWAYS BETWEEN DIFFERENT TYPES OF DETENTION

‘In 2015, NPM members agreed to focus joint efforts on examining the pathways between different detention settings for those with mental health needs, and the transitions from child to adult custody in criminal justice settings. Given that NPM members usually examine treatment and conditions in detention by looking at an individual establishment, they were keen to explore issues relating to the treatment of detainees during movements from one establishment to another that this approach did not capture. The NPM wanted to identify and document the risks that moves between places of detention pose for detainees and how they are treated during these moves.641

‘Human rights standards focus on treatment and conditions in given detention settings (particularly prisons) and on the legal basis for the detention... and focus little, if at all, on the principles or standards that should govern any movement between settings. We intend to give thought to the possibility of establishing a human rights framework that might govern NPM members’ evaluation of pathways and transitions, and influence future policy.’642

RECOMMENDATION: The Inspectorate should consider conducting joint inspections and thematic inquiries with NPMs in the NT where appropriate, sharing expert knowledge and taking the opportunity to make recommendations proposed and supported by more than one NPM. The Inspectorate could consider making arrangements for sharing costs or refunding other NPMs’ incurred costs.

ICAC – THE LINK BETWEEN TORTURE & ILL-TREATMENT AND CORRUPTION

THE LINK BETWEEN CORRUPTION AND TORTURE & ILL-TREATMENT – LACK OF TRANSPARENCY, ACCOUNTABILITY AND RESPECT FOR HUMAN RIGHTS

The SPT has noted that:

there is a recognized correlation between the levels of corruption within a State and the prevalence of torture and ill-treatment: corruption breeds ill-treatment, and disregard for human rights contributes to the prevalence of corruption.643

The SPT has asserted that ‘corruption facilitates, perpetuates and institutionalizes human rights violations... [it] threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice,’644 where ‘the rejection of transparency and accountability make the protection of human rights difficult, if not impossible.’645 It notes ‘a strong correlation between the levels of corruption within a State and the levels of torture and ill-treatment found there. One reason is that in States with high levels of corruption

See also United Kingdom National Preventive Mechanism, UK National Preventive Mechanism Submission to Joint Committee on Human Rights Inquiry: Mental Health and Deaths in Prison (02 March 2017) 2.
642 United Kingdom National Preventive Mechanism, UK National Preventive Mechanism Submission to Joint Committee on Human Rights Inquiry: Mental Health and Deaths in Prison (02 March 2017) 3.
643 Seventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, 52nd sess, UN Doc CAT/C/52/2 (20 March 2014) [72].
644 Ibid [76].
645 Ibid [82].
See also at [98].
there may be less likelihood of torture and ill-treatment being either discovered or prosecuted. The SPT recognises that ‘[t]hose who commit corrupt acts will attempt to protect themselves from detection and to maintain their positions of power. In doing so, they are likely to further oppress those in positions of vulnerability, who are more likely to be… exploited and less able to defend themselves. In this way, corruption reinforces their exclusion and the discrimination to which they are exposed.

Of particular relevance to the Inspectorate, the SPT has noted that corruption disproportionally impacts on those who are vulnerable, such as detainees and Indigenous people.

THE LINK BETWEEN CORRUPTION AND TORTURE & ILL-TREATMENT – A LACK OF RESOURCES

The Special Rapporteur has identified that inadequately resourced detention systems can lead to corruption, particularly ‘where insufficiently resourced public services and institutions are authorized to use force and coercion’ such as in places of detention, increasing the risk of ‘corruption, discrimination, torture and ill-treatment’ of detainees. Outcomes of inadequately resources may include subjecting detainees to detention conditions that constitute cruel, inhuman or degrading treatment, or shortages of staff and equipment which ‘almost inevitably triggers situations or practices conducive to violence and abuse.’ The Special Rapporteur concluded that the foreseeability of these outcomes renders them ‘intentional for the purposes of State and individual accountability.’

PREVENTION OF TORTURE & ILL-TREATMENT REQUIRES PREVENTION OF CORRUPTION

Both the SPT and the Special Rapporteur have identified that the prevention of torture and ill-treatment requires the elimination of corruption. It is thus clear that the Inspectorate and ICAC will have some overlap in their mandates (particularly in relation to ICAC’s preventative function), although as discussed below.

---

646 Ibid [82].
647 Ibid [81].
648 Ibid [80].
649 Nils Melzer, Report of the Special Rapporteur: Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/HRC/40/59 (16 January 2019) [56]: ‘The Special Rapporteur has recognised that ‘inadequate funding of public services, including poor infrastructure and equipment, and insufficient number, remuneration and training of staff significantly increase the risk of corruption and abuse. The risks of torture and ill-treatment arising in conjunction with corruption are particularly high where insufficiently resourced public services and institutions are authorized to use force and coercion, such as… police forces… prison staff… In detention facilities, inadequate staffing, infrastructure and supplies often significantly downgrade the general conditions of detention and create fertile ground for cycles of corruption, discrimination and torture or ill-treatment.’
650 Ibid [41].
651 Ibid.
652 Seventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, 52nd sess, UN Doc CAT/C/52/2 (20 March 2014) [82]: ‘Corruption within a State seriously impedes the eradication of torture and ill-treatment. Hence, to prevent torture and ill-treatment it is also critical to prevent and eradicate corruption.’ See also Seventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, 52nd sess, UN Doc CAT/C/52/2 (20 March 2014) [98].
653 Nils Melzer, Report of the Special Rapporteur: Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/HRC/40/59 (16 January 2019) [43]: The ‘manifestation of torture and ill-treatment as a “side effect” of corruption cannot effectively be addressed through anti-torture measures alone. Accordingly, the obligation to take effective measures for the prevention of torture and ill-treatment can be said to include a duty to take comprehensive and decisive action for the eradication of the corrupt practices and corrupt environments conducive to such abuse.’
654 Independent Commissioner Against Corruption Act 2017 (NT) s18(1)(c): ‘The ICAC has the following functions… to prevent, detect and respond to improper conduct by: developing and delivering education and training… auditing or reviewing practices, policies and procedures of public bodies and public officers… developing and delivering advice, reports, information and recommendations… referring matters to a referral entity for investigation or further investigation, disciplinary action or prosecution… making public comment.’
(under The Inspectorate’s OPCAT compliance and efficacy should be evaluated), the Inspectorate’s operations themselves will fall within the remit of ICAC.

**RECOMMENDATION:** Given the link between corruption and torture and ill-treatment in detention (and the tendency of corruption to have a disproportionate impact on detainees and Indigenous people), the Inspectorate’s mandate will overlap with that of ICAC (particularly the preventative function of ICAC’s mandate). The Inspectorate should establish guidelines on how this might influence its own operations.
THE INSPECTORATE’S RELATIONSHIP WITH NPMS AND STATUTORY BODIES IN OTHER JURISDICTIONS
CROSS-JURISDICTIONAL CUSTODY ISSUES

AN INTER-GOVERNMENT AGREEMENT

The AHRC OPCAT in Australia Interim Report suggested that the:

Australian Government could also explore whether some other legal arrangement, such as an intergovernmental agreement, could go some way to fulfilling the relevant requirements. The terms of this agreement should clearly articulate the mandate and powers of NPM bodies and cover the various aspects of the NPM model."^{655}

This echoed the APT’s submission that ‘there should be an inter-governmental agreement on funding to ensure the mechanism as a whole has the resources it needs to conduct its business in an effective fashion. This is not only a prerequisite for a serious NPM, but also a specific obligation under article 18(3) of the OPCAT.’^{656}

EXISTING CROSS-BORDER AGREEMENTS RELEVANT TO DETAINING AUTHORITIES

Of note, the NTG already has a number of cross-border agreements with other governments in relation to the criminal justice space, specifically the transportation of detainees, police cells, youth detention facilities and prisons (and thus relevant to the Inspectorate’s mandate). Any MoU(s) between the Inspectorate, NT generalist NPM and the relevant NPMs in other jurisdictions should take into account the cooperation and designation of responsibility outlined in existing MoUs and service level agreements between the detaining authorities across jurisdictions.

Western Australia (WA), South Australia (SA) and the NT have a prison service MoU, which outlines responsibilities including that ‘in relation to prisoner transfers, the sending authority has the responsibility to organise transport and it is expected that transport details and arrangements will be made according to protocols.’^{657} Parts 18 through to 22 of the MoU address, among other issues, the cost sharing arrangements between jurisdictions.^{658} The three jurisdictions also have a police MoU stating that the ‘[p]olice services in the three jurisdictions can operate outside their home jurisdiction within the cross border region’^{659} and that ‘[f]lexible arrangements include... [that] each police service will... charge the offender at the nearest location where detention facilities exist... manage prisoner delivery from one participating jurisdiction to another,’ as well as addressing ‘bail arrangements, detainee location and transfer, deaths in custody and other custody incidents.’^{660} Finally, there is a juvenile justice service level agreement between seven agencies in NT, SA and WA^{661} which states that the ‘allocation of jurisdictional responsibilities are agreed to for the various processes

---

^{656} Association for the Prevention of Torture, Submission No 26 to Australian Human Rights Commission, OPCAT in Australia Consultation, July 2017, 6.
^{658} Ibid.
^{660} Ibid.
or events that juvenile justice personnel are involved in... court ordered detention, remand or police detention, transportation."662 It establishes that ‘[i]f a young person is on remand or in police detention, it is agreed that the responsibility for transportation lies with the state in which the young person is detained, and that the state needs to consult with the authority in the other state about the intent to transport and availability of placement.’663

There is also relevant legislation that provides for movement of detainees across State and Territory borders. For example, detainees may be subject to interstate custodial leave permits,664 being in the custody of an interstate escort.666 Should an interstate prisoner escape the custody of the interstate escort, a correctional officer or police officer may arrest an interstate prisoner, subsequent to which a Local Court Judge may order to prisoner be returned to the ‘participating State in which the permit was issued’ or ‘delivered to an interstate escort for that purpose’.667 Youth may also be transferred to another State668 or from another State,669 in the custody of an escort (eg police officer).670

ABORIGINAL COMMUNITIES ACROSS STATE/TERRITORY BORDERS

State/Territory borders do not reflect the family and cultural ties of the Aboriginal communities living in different Australian jurisdictions. With the fluidity of movement across borders, it is particularly important that the Inspectorate build relationships with NPMs in other jurisdictions.

RECOMMENDATION: At a minimum, there should be an MoU between the Inspectorate, NT generalist NPM (if established) and the NPMs with responsibility for places of detention in the criminal justice system in other jurisdictions. This could align with the cooperation and designation of responsibility among the detaining authorities across jurisdictions under existing government MoUs and service level agreements.

There should be broader intergovernmental agreement in relation to NPMs across Australia.

Administration Authority South Australia; NT Correctional Services; NT Police; Department of Corrective Services, Western Australia; Western Australia Police.'
662 Ibid.
663 Ibid.
664 Correctional Services Act 2014 (NT) s123: ‘An interstate custodial leave permit permits the prisoner specified in the permit to be absent from the custodial correctional facility ... and authorises the escort to take and keep in custody the prisoner for escorting the prisoner to the participating State... and within the participating State for the purpose specified in the permit and returning the prisoner to the custodial correctional facility.’
665 Ibid s128: ‘The interstate escort of an interstate prisoner is authorised while in the Territory to take and keep custody of the interstate prisoner for the purposes and period set out in the applicable corresponding permit; and to take and keep custody of the interstate prisoner for returning the interstate prisoner to the participating State.’
666 Ibid s120.
667 Ibid s129.
668 Youth Justice Act 2005 (NT) s184.
669 Ibid s185.
670 Ibid s187.
**CONSISTENCY IN NPM PRACTICE ACROSS AUSTRALIAN JURISDICTIONS**

**STANDARDS**

The AHRC interim OPCAT report proposed that:

- the Australian Government commit to the development of national standards that set minimum conditions of detention to protect the human rights of detainees in the various detention settings covered by OPCAT. Those standards should have legislative force and should deal with issues including the protection of particularly vulnerable detainees, such as... Aboriginal and Torres Strait Islander people.\(^{671}\)

Discussed in greater detail under *National standards must be sufficiently broad and flexible to be culturally appropriate for the NT context*, this report supports the AHRC’s recommendation.

**NPM – GUIDANCE ON ISOLATION IN DETENTION**

‘This guidance was developed on the basis of the findings of the review of isolation and solitary confinement across detention settings conducted by NPM members in 2014–15, and draws from international standards and best practice. NPM members found wide variations in the practices, procedures, safeguards against harm and experiences of detainees arising from isolation, even when it was applied in similar circumstances. The guidance provides a framework that NPM members will apply when examining the issue and making recommendations, and aims to improve consistency of approach. It allows NPM members to identify and promote good and improved practice. We hope the document will also inform detention practice and policy.’\(^{672}\)

‘In January 2017, the NPM published its guidance on isolation in detention... NPM members continue to work to incorporate the guidance into their inspection and monitoring work. This has included HMI Prisons using the guidance when scoping human rights standards for its revision of Expectations.’\(^{673}\)

**DATA COLLECTION AND ANALYSIS**

The AHRC interim OPCAT report also recommends consistency in data collection, under Proposal 6:

- The Commission proposes that the Australian Government commit to the development of national standards that govern how detention inspections should take place by the bodies performing the NPM function. Those

---


standards should have legislative force and, among other things: provide for good practice and national consistency in the collection and analysis of data related to detention.\(^{674}\)

Recommended below (under *Conducting the inspection in a culturally appropriate manner*), the Inspectorate (and the generalist NT NPM) should use a survey to record detainees’ experiences of detention. Where other jurisdictions incorporate a survey in their inspection methodology, there should be consistency at least in terms of some of the core information and data captured, to enable comparisons across jurisdictions and to capture experiences of Aboriginal and Torres Strait Islander detainees across Australia.

**SHARING LEARNINGS AND APPROACHES**

The SPT has recommended that NPMs consider ‘establishing and maintaining contacts with other national preventive mechanisms with a view to sharing experiences and reinforcing effectiveness.’\(^{675}\)

---

**NPMS – IMPROVING PRACTICE**

‘In its role as the Central National Preventive Mechanism, the Human Rights Commission continued to liaise with NPMs, and hosted three round table meetings of the OPCAT organisations. At the meetings, there is a focus on strengthening professional practice by discussing experiences and challenges as they arise.\(^{676}\) The IPCA and the Human Rights Commission facilitated a periodic NPM workshop focused on: a quality review of OPCAT monitoring checklists; plans for engagement; and methods of streamlining reporting, data collection, recommendation implementation, and performance measures. All participants noted the value of the initiative and work on the agenda items will continue in the next reporting year.\(^{677}\)

‘The Commission convened a roundtable meeting of the NPMs chairs, and numerous official level meetings with NPMs. The chairs meeting focused on the sharing of information, and discussion of key issues and projects. Key issues raised include mental health, private prisons, national standards for custodial facilities, the mandate of the NPMs, and the need for a preventive approach.’\(^{678}\)

---

**ICVA – REVIEWING OTHER NPMS’ REPORTS & SHADOWING OTHER NPMS’ VISITS**

‘ICVA has implemented a new process whereby it reads all published inspection reports, summarises salient findings and shares these reports with the local scheme. This process highlights areas where the [police] force is an outlier – either in positive or negative work – and suggests where ICVs can add value to the process. We anticipate that this will increase

---


\(^{675}\) Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Analytical assessment tool for national preventive mechanisms*, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [9b].


\(^{677}\) Ibid 10-11.

scrutiny on the police force and increase the number of recommendations achieved, thereby continuously improving police custody.\textsuperscript{679}

‘ICVA’s Chief Executive and Chief Operating Officer both shadowed full inspections in police custody... ICVA was able to gain a solid understanding of the process, where it is similar and differs from ICVA as well as increasing the inspectorates’ understanding of ICVA’s role.\textsuperscript{680}

\textbf{RECOMMENDATION:} The Inspectorate should collaborate with NPMs in the NT and across other Australian jurisdictions to facilitate consistency in standards (see also recommendation 100), data collection (including through the use of surveys) and data analysis.

The Inspectorate and other NPMs should also share learnings and approaches with each other, with the view to improve practice.

\textbf{JOINT INSPECTIONS AND THEMATIC INQUIRIES WITH NPMS IN OTHER JURISDICTIONS}

The Inspectorate should consider conducting joint inspections and thematic inquiries with NPMs in other Australian jurisdictions, particularly in relation to the experiences of Aboriginal detainees. Of course, being an Aboriginal Inspectorate, the Inspectorate’s focus will always be on Aboriginal detainees, but this may not be the case in other jurisdictions (noting, however, that generalist NPMs may choose to conduct thematic work in relation to Aboriginal detainees). Adopting this approach would enable comparisons across jurisdictions, identifying universal issues of concern, divergent practices and best practices. Additionally, multiple NPMs supporting the same findings and recommendations can be more persuasive to detaining authorities than where the source is one NPM, and there is the potential to reach a broader audience across Australia.

Examples of the aspects of detention that NPMs might decide to focus on cross-jurisdictionally include detainee access to cultural activities or leave to attend significant cultural events (such as ceremonies or funerals); the transportation/transfer of detainees between police stations and circuit courts in remote Aboriginal communities and places of detention in urban locations; or how intergenerational trauma affects Aboriginal detainees’ experience of detention.

\textbf{OCI – SPIRIT MATTERS REPORT}

\textbf{FOCUS ON ABORIGINAL DETAINEES}

‘It has been 20 years since the Corrections and Conditional Release Act (CCRA)... came into force on June 18, 1992, and 13 years since the Supreme Court of Canada’s landmark decision in R. v. Gladue. Twenty years later, the Office of the Correctional Investigator (OCI) believes that it is both timely and important to review Aboriginal-specific sections of the CCRA... It examines the status and use of Section 81 and 84 provisions up to the period ending March 2012, identifies...\textsuperscript{679} The Independent Custody Visiting Association, Annual Report 2017/18 11.\textsuperscript{680} Ibid 10.
some best practices in Aboriginal corrections and assesses the commitment by CSC to adopt the principles set out in R. v. Gladue.681

RECOMMENDATIONS
‘CSC should create the position of Deputy Commissioner for Aboriginal Corrections to ensure that adequate co-ordination takes place between and among the various components of CSC, federal partners and Aboriginal communities.’682

‘In all negotiations, CSC should enter into Memoranda of Understanding with the appropriate agency or First Nation leadership to ensure that the leadership and Elders are involved and considered equal partners in those negotiations.’683

‘CSC must resolve the issues faced by Elders in both institutions and Healing Lodges to ensure that their primary concern and responsibility is the healing of Aboriginal offenders. Further, CSC should set realistic standards of service, caseloads and payment for Elder services. CSC should be responsible for reporting on progress made in achieving those standards as part of its Management Accountability Framework.’

‘CSC should partner with Aboriginal collectives, be they Tribal Council, Métis or Inuit organizations or urban associations, to develop protocols for Section 84 releases into their respective communities. These protocols… would define the relationship between CSC and Aboriginal communities and set in place a process for accepting and monitoring released offenders under Section 84.’684

‘CSC must expand its staff training curricula to include in-depth training about Aboriginal people, history, culture and spirituality for all staff, including training in the application of Gladue principles to correctional decision-making. This training should not just be “one-offs,” but rather ongoing training provided throughout an employee’s career.’685

HMIP - THEMATIC REPORT ON RACE RELATIONS IN PRISON

PROCESSES VS OUTCOMES
‘Our own inspections over recent years have charted the developing race relations work within individual prisons. Progress has been made. In general, we find that the processes for addressing racism and discrimination are in place. Prisons have race relations liaison officers (RRLOs) and a race relations management team, usually chaired by the governor or deputy governor; they carry out ethnic monitoring of many activities with the aim of identifying any disproportionate take-up; they have in place a system for making and investigating racist incident complaints. Many prisons have prisoner diversity representatives. Yet, in spite of this, our prisoner surveys regularly and routinely find that black and minority ethnic prisoners have worse perceptions of their treatment than white prisoners across many key areas of prison life. And in many of our inspection reports, we still draw attention to differential outcomes, and to a lack of training and support for staff and race relations managers. This report seeks to get behind those perceptions, and to identify the barriers that still exist to delivering race equality in prisons, and the areas for future development.’686

METHODOLOGY
Our research was conducted in four parts. First, we analysed in more detail the survey responses… Second, in focus groups with visible minority prisoners, we explored the source of those perceptions: identifying differences between different prisoner groups. Third, in interviews with white and visible minority staff, race relations officers and governors, we drew out the differing perceptions of those staff groups about race in prisons and how further progress can be made.

681 The Correctional Investigator Canada, Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act (22 October 2012) 7
682 Ibid 34.
683 Ibid.
684 Ibid.
685 Ibid.
686 Her Majesty’s Inspectorate of Prisons, Parallel worlds: A thematic review of race relations in prisons (December 2005) 1.
Finally, we examined the tools for change currently in use within prisons, and identified ways in which they can be improved to provide a more accurate picture, and a more effective mechanism for promoting racial equality. We have not set out recommendations, against which we expect to see an action plan: there already is one... Instead, this report highlights the key areas that need to be developed to implement that plan effectively. Some prisons are already doing effective work, and we list those areas of good practice, which could be replicated.\textsuperscript{687}

FINDINGS

‘Our principal finding, which forms the title of this report, is that there is no shared understanding of race issues within prisons: instead, there are a series of parallel worlds inhabited by different groups of staff and prisoners, with widely divergent views and experiences. Governors and white race relations liaison officers have the most optimistic ‘management view’, generally believing that the regime operates fairly, although recognising that more needs to be done. Great reliance is placed upon recruiting more black and minority ethnic staff. Yet the minority ethnic staff we interviewed were finding it difficult to influence change and felt a lack of direction and support from senior managers. They were much less likely than their white colleagues to believe that their prison was tackling race effectively, though most believed that progress had been made... White staff, on the other hand, were likely to believe that racism was principally an issue between prisoners, not one for staff, and were unaware of the extent to which visible minority colleagues felt discriminated against... Visible minority prisoners’ perceptions were the most negative. In surveys, they reported poorer experiences than white prisoners across all four of our tests of a healthy prison – safety, respect, purposeful activity and resettlement... On two key indicators, safety and respect, the responses of black and Asian prisoners differed.\textsuperscript{688}

AN INTERSTATE STATUTORY BODY WITH HUMAN RIGHTS EXPERTISE ACCOMPANYING THE INSPECTORATE ON INSPECTIONS

NATSILS submitted to the AHRC consultation that:

   it is essential that NPM bodies and the standards they adopt are informed by a human rights-based approach. In developing a human-rights based approach, we recommend that NPM bodies be required to liaise closely with human rights bodies. In this regard, we recommend that the Aboriginal and Torres Strait Islander Social Justice Commissioner be a key stakeholder.\textsuperscript{689}

\textsuperscript{687} Ibid.
\textsuperscript{688} Ibid 2.
\textsuperscript{689} National Aboriginal and Torres Strait Islander Legal Services, Submission No 47 to Australian Human Rights Commission, OPCAT in Australia Consultation, July 2017, 17.
The recommendation that a human rights based approach to expectations/standards be adopted is discussed further below (under Expectations/standards for inspections – general). The APT notes that National Human Rights Institutions (NHRIs) can also assist an NPM ‘to develop its mandate by sharing their experience and methodologies... [and] in developing effective ways of working with the authorities and establishing a constructive, ongoing dialogue.’

There may, thus, be opportunities for an NHRI to support the Inspectorate during its inspections. For example, the HMIPS model of conducting joint inspections with the Scottish Human Rights Commission (SHRC) could be replicated in the NT context, should the AHRC be open to accompanying the Inspectorate on select inspections (noting that there is currently no human rights commission in the NT). Of note, the AHRC, should it accompany the Inspectorate, would not be doing so in its capacity as a complaints mechanism. The fact that the AHRC is a federal statutory body, rather than an NT one, comes with the benefit that this mitigates the risk of a conflict of interest that could jeopardise the independence of the Inspectorate. There would need to be an MoU supporting this work, to clearly describe the respective roles of the organisations during inspections, and obligations (for example, maintaining confidentiality, information not to be retained or used by the AHRC for other purposes, AHRC not to take complaints from individuals during inspections etc).

---

**SHRC - ASSISTING WITH HMIPS DEVELOPMENT OF STANDARDS AND CONDUCTING INSPECTIONS**

**SHRC LEGISLATION**

‘Places of detention: powers of entry, inspection and interview

(1) For the purposes of an inquiry, the Commission may

(a) enter any place of detention for the purpose of exercising any power under paragraph (b) or (c),

(b) inspect the place of detention, and

(c) conduct interviews in private with any person detained there, with that person’s consent.

(2) In this section, “place of detention” means any premises, vehicle or other place in or at which an individual is or may be detained by, or with the authority or consent of, a Scottish public authority.

**HMIPS STRATEGIC PLAN**

The Scottish Human Rights Commission (SHRC) provides ‘an important contribution to every prison inspection by providing an expert view on whether prisoner’s human rights are upheld. Their findings are incorporated into the HMIPS final report. They also assisted... in developing the revised quality indicators for our inspection and monitoring Standards, which are based on the Panel Principles.’

**INSPECTION REPORT – ‘A HUMAN RIGHTS BASED APPROACH OVERVIEW OF HMP PERTH’**

‘A human rights based approach requires the recognition of rights as legally enforceable entitlements, and is linked to national and international human rights law. It is important that all categories of prisoners enjoy the full range of human rights. Whilst the large majority in HMP Perth do, this was not the case for a minority of prisoners... The report identifies areas where a more proactive approach is required, in particular to ensure that more marginalised prisoners do not fall

691 Scottish Commission for Human Rights Act 2006 (Scot) asp 16 s11(3): ‘an individual is detained in or at a place if he or she is imprisoned there or otherwise deprived (to any extent) of his or her liberty to leave the place.’
through the gap. Reasonable adjustments for disabled prisoners are an important legal requirement that need to be improved. Staff should be assisted through further training to understand their duties and responsibilities in relation to human rights. Greater effort should also be made to embed transparency and accountability in relation to human rights and equality. The realisation of human rights is facilitated in practice by both the provision of information and the need for proactive action to be taken to ensure prisoners are accessing their rights in practice.

HRC - BRINGING A HUMAN RIGHTS PERSPECTIVE ON VISITS

The HRC is New Zealand’s CNPM (Coordinating National Preventive Mechanism). Of note, in Australia it is not an NHRI, but the Commonwealth Ombudsman.

‘The CNPM’s responsibilities, as developed by the NPMs and CNPM, include Providing human rights expert advice; Coordinating and facilitating engagements with international human rights bodies and civil society consistent with the Commission’s broader mandate under the Human Rights Act 1993 section 5(1) to “promote respect for, and an understanding and appreciation of, human rights in New Zealand society.”

‘A Human Rights Commission advisor joined the Office of the Ombudsman on their inspection of Christchurch Men’s Prison. This provided a valuable experience for the Human Rights Commission to understand on-the-ground monitoring and consider how best to support monitoring staff as the CNPM.

RECOMMENDATION: The Inspectorate could consider inviting a human rights institution, given its human rights expertise, to accompany it on select inspections.

JOINT NPM SUBMISSIONS TO PARLIAMENTARY INQUIRIES AND ON LEGISLATIVE REFORM

THEMATIC SUBGROUPS

‘Four NPM subgroups provide forums for sharing information, strengthening monitoring approaches, and coordinating responses to government policy developments and consultations. There are three thematic subgroups (children and young people; police; mental health) and one that brings together NPM members in Scotland.

‘The NPM sub-group focused on children and young people in detention continued to serve as a mechanism for NPM members to exchange information and intelligence, and to consider joint work on issues affecting detained children. The group is chaired by the Children’s Commissioner for England.

696 Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2016 to 30 June 2017 (June 2018) 6-7.
697 United Kingdom National Preventive Mechanism, United Kingdom National Preventive Mechanism submission to the 66th session of the Committee against Torture (2019) 8.
THE COORDINATING NPM - COMMONWEALTH OMBUDSMAN

The Commonwealth Ombudsman has stated that its role as the NPM Coordinator will not include participating in ‘secondary inspections’, focusing on ‘research, sharing expertise and developing communities of practice focused on areas of vulnerability or concern.’

THE ROLE OF THE HRC – COORDINATING NPM

‘The Commission’s primary functions in its capacity as the Central National Preventative Mechanism are to coordinate the activities of the NPMs and liaise with the SPT. In carrying out these functions it consults and liaises with NPMs, reviews their reports, identifies systemic issues, coordinates the submission of information to the SPT, and makes, in consultation with NPMs, recommendations to Government. The Commission also publishes the combined annual report of the five OPCAT organisations. It convenes regular roundtable meetings of the NPMs, and meetings with civil society.’

Functions include: ‘Consulting and liaising with NPMs and coordinating the activities of the NPMs, including... meeting with international bodies, making joint submissions to international treaty bodies, and providing communications and reporting/advocacy opportunities; ‘Assisting with monitoring when and where requested by NPMs; ‘Organising training and development activities, such as thematic workshops.’

RECOMMENDATION: Should NPMs in other Australian jurisdictions be open to this, the Inspectorate should draft joint submissions to parliamentary inquiries and on legislative reform at the Commonwealth level, when the issues are relevant to the OPCAT preventive mandate.

A potential appropriate forum for this work could be a national thematic NPM subgroup focusing on Aboriginal and Torres Strait islander peoples across places of detention (not necessarily limited to the criminal justice system).


703 Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2013 to 30 June 2014 (December 2014) 6.
INSPECTORATE’S RELATIONSHIP WITH CIVIL SOCIETY
CIVIL SOCIETY PERFORMS A COMPLEMENTARY ROLE TO THAT OF THE INSPECTORATE

THE INSPECTORATE SHOULD BUILD CONSTRUCTIVE RELATIONSHIPS WITH CIVIL SOCIETY

The report from the APT/OSCE ODHHR organised annual NPM meeting noted that Article 18(4) of OPCAT references the Paris Principles (‘[w]hen establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights’704), which in turn state ‘that in the view of the fundamental role played by the NGOs in expanding the work of the national institutions, they shall develop relations with NGOs devoted to promoting and protecting human rights.’705 The SPT has also explicitly stated that an NPM ‘should... take benefit from cooperation with civil society, universities and qualified experts.’706 In one country visit report, the SPT recommended that the NPM ‘redouble its efforts to promote trust and to build a climate of constructive cooperation with civil society.’707

Carver and Handle, in reviewing the efficacy of torture prevention, look to Peru and Georgia, which:

offer examples of strongly independent institutions that have engaged in effective monitoring, often in politically unfavourable circumstances... What they have in common is a solid legal basis for their independence, vigorous and often very courageous leadership, and a capacity to build alliances with civil society organizations.708

There are different approaches to building relationships with civil society, through both formal and informal cooperation. For example, NPMs could ‘hold regular meetings with the NGOs or annual forums in order to discuss issues of concern, NPM annual reports and recommendations.’709 One practice that the Inspectorate could adopt is to send embargoed reports to civil society organisations (CSOs), to give them opportunities to draft media releases in anticipation of the Inspectorate publicly releasing its reports.710

IPCA

‘The Authority aims to integrate civil society meetings, as far as possible, into its regional site visit... The Authority has identified the value in engaging with individuals and groups, including: lawyers, including Legal Aid and Community Law Centre lawyers and advocates; social workers; detention advocacy groups and other human rights NGOs; health service

706 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [13]. See also Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 72.
707 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the national preventive mechanism advisory visit to Ecuador made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/OP/ECU/2 (16 July 2015) [45].
710 Ibid.
practitioners, advocates, inspectors, and liaison staff; and other stakeholders who work at the operational and strategic levels.\textsuperscript{711}

**CIVIL SOCIETY’S COMPLEMENTARY ROLE**

Civil society (both organisations and individuals) play a complementary role to that of an NPM in the prevention of torture and ill-treatment, and are thus relevant stakeholders for the Inspectorate.

Civil society may cooperate with the Inspectorate in a number of ways, including by raising the profile of the Inspectorate’s mandate and work (both among the public and detainees), delivering training to Inspectorate staff, contributing to the development of the inspection framework and expectations/standards, providing information to the Inspectorate that could assist both in developing a strategy for inspections and in preparation for inspections at particular sites, incorporating the Inspectorate’s findings and recommendations in its own work on torture prevention, monitoring implementation of the Inspectorate’s recommendations, working to prevent reprisals against those who engage with the Inspectorate (an opportunity identified by the SPT, with reference to public defence lawyers\textsuperscript{712}) and evaluating the efficacy of the Inspectorate’s work.

**COOPERATION WITH ACADEMICS**

‘In June 2017, the NPM and the Human Rights Implementation Centre at the University of Bristol co-hosted a roundtable on complaints and capturing data on ill-treatment in detention in the UK. The roundtable brought together NPM members, academics, NGOs and government officials to discuss how complaints of ill-treatment are recorded by places of detention, how ill-treatment is defined and perceived in different detention contexts and to what extent NPM members should take a harmonised approach to possible ill-treatment. Following this, NPM members agreed to undertake a thematic project on ill-treatment in detention in 2018–19, with the aim of providing clear guidance on how NPM members should respond to such incidents.’\textsuperscript{713}

**IPCA JOINT THEMATIC REVIEW – ADVISORY GROUP**

‘The Authority also established an Independent Advisory Group, made up of academics, practitioners, members of the judiciary, and advocates. It will ensure a range of views are heard during the review. The Authority and the OCC will conduct a joint site visit as part of the review.’\textsuperscript{714}

\textsuperscript{711} Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2009 to 30 June 2010 (November 2010) 11.

\textsuperscript{712} Fifth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, 48th sess, UN Doc CAT/C/48/3 (19 March 2012) [82].


\textsuperscript{714} Independent Police Conduct Authority, Annual Report 2010-2011 (November 2011) 25.
IMB (ENG) – DELIVERY OF TRAINING TO NPM STAFF

On 13 November 2018 IMB held a workshop on the topic of “Segregation” looking at how we can monitor it more effectively... The opening speakers were Jade Glenister, Assistant Coordinator of the... UK NPM... and Senior Policy Officer at HMIP and Dr Kimmett Edgar, Head of Research at the Prison Reform Trust (PRT)... Kimmett Edgar’s recent report on segregation, ‘Deep Custody’, co-written by Dr Sharon Shalev...

The speakers suggested that IMB members checked that other options were considered prior to segregation; the nurse making the segregation risk assessment knew the prisoner well enough to make a sound judgement; Segregation Review Boards were multidisciplinary, with decision-making shared among members, including the prisoner and the sending wing; plans for reintegration were considered from the outset; phased reintroduction to normal location was considered; the unit was clean, safe and well-maintained; special clothing was used only very exceptionally (there are other ways of keeping someone safe than removing their clothing); segregated prisoners were given an explanation of the regime and received it consistently; access to regime (showers, phone, exercise, reading material) and in-cell facilities (radios, TVs, kettles) were restricted only after individual risk-assessment and not denied as a matter of policy; segregation did not lead to solitary confinement (defined as 22 hours or more without meaningful human contact: being given food or medication, a quick check or hello through the door is not enough – a proper conversation is required).  

RECOMMENDATION: The Inspectorate should build constructive relationships with civil society, recognising the complementary role it plays in torture prevention generally, and specifically in terms of the exercise of the Inspectorate’s mandate. Cooperation can be both formal and informal.

THE INSPECTORATE MUST MAINTAIN ITS INDEPENDENCE

Steinerte writes that NPMs must maintain their independence:

‘so as not to be perceived to be a part of the civil society which may become detrimental to NPM’s dialogue with state authorities. This is a difficult line to tread... But what is also important is that NPMs themselves are clear about the division of work and definition of roles and responsibilities... as there is a real risk of loss of independence, especially perceived independence, for both.’

She highlights that an NPM’s unique status is based on its ability to build relationships with detaining authorities, in contrast to an NGO, and it is this ‘that makes it potentially more powerful than an NGO.’

IMB (ENG) - MONITORING FRAMEWORK

‘Reporting must be objective. IMBs are independent of all external groups and pressures, be they political or commercial, trades unions or employers, prisoner or detainee charities or families. IMB evaluations may align with the views of a
group but, when this occurs, it is because the IMB has independently made its own, evidence-based judgement, that happens to agree with the group’s, not because it has been influenced by them.718

Discussed in greater detail below (under Preparing for the Inspection) is the importance of the Inspectorate identifying the NGOs which are involved in delivering services in the places of detention that come within the Inspectorate’s remit, and how this should guide the Inspectorate’s engagement with them.

The Inspectorate should also look beyond contractual arrangements in understanding the different types of relationships that civil society might have with the detaining authority to properly understand how certain types of engagement with them might compromise the Inspectorate’s actual or perceived independence. For example, lawyers may be involved in civil litigation with the NTG in relation to conditions or treatment in detention,719 and the Inspectorate should properly assess which types of engagement with those lawyers would best strike an appropriate balance of maintaining relationships with both the lawyers and the detaining authority. For example, in this instance, it might be appropriate for lawyers to provide information and recommendations in relation to the detention site, but not to accompany the Inspectorate during a site inspection.

**RECOMMENDATION:** The Inspectorate must ensure it maintains its independence from civil society.

Protecting its independence (both actual and perceived) requires an analysis of the nature of the relationship between the detaining authority and civil society stakeholder in order to establish an appropriate strategy for engagement.

This analysis can determine, for example, whether the stakeholder has a potential conflict of interest arising from contractual arrangements for service delivery in detention or if there exists an adversarial relationship that may jeopardise the Inspectorate’s ability to engage in constructive dialogue with the detaining authorities.

---

**A NOTE ON ACCOS**

The SPT has recommended that NPMs pay ‘special attention... to developing relations with civil society members devoted to dealing with vulnerable groups.’720 In the context of the Inspectorate’s work, ACCOs are particularly important CSOs. In its submission to the AHRC OPCAT in Australia consultation, NAAJA recommended that, in relation to Aboriginal Legal Services, ‘provisions are made for liaison with relevant NGOs during visits and as an informal meeting to inform the NPM process. This insight may assist and complement the key role of NPM to inspect... and can assist in practical advice for certain centres.’721

719 ‘Don Dale detainees lose again in legal fight against NT government’. NITV <https://www.sbs.com.au/nitv/nitv-news/article/2019/02/19/don-dale-detainees-lose-again-legal-fight-against-nt-government> (19 February 2019): ‘The four male youths filed the action against the government in 2016 over an incident in 2014 when they were tear-gassed, handcuffed and restrained in spithoods. Graphic footage of the incident was broadcast by the ABC and lead to the royal commission into Northern Territory youth justice. The four former detainees, who are now adults, argued that prison officers were not authorised to use tear gas on them and that unreasonable force was used to subdue them. But their appeal bid was rejected by three Supreme Court judges.’

See also JB & Ors v Northern Territory of Australia (No 2) [2019] NTCA 3.

720 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [13].

LOUKIDELIS REPORT - COUNCIL OF YUKON FIRST NATIONS CONFERENCE
EXPLORING JUSTICE: OUR WAY

The conference hosted by the Council of Yukon First Nations exemplifies how Indigenous organisations can promote the engagement of oversight bodies with the local Indigenous community on the experiences of Indigenous detainees and existing community concerns.

Loukidelis states: ‘[O]ne aspect of this report’s preparation deserves special mention here. This is the two-day conference, Exploring Justice: Our Way, that the Council of Yukon First Nations organized and hosted. This was a vitally important opportunity for me to hear from, to speak with, dozens of First Nations individuals and First Nations representatives from all over Yukon over the course of two very full and rewarding days. The sharing of traditional justice perspectives and personal testimony greatly enriched my understanding of the experience of First Nations individuals and First Nations communities with the criminal justice system. I am grateful to the CYFN’s leadership for organizing this event and to the CYFN’s staff for their excellent work.’

‘WCC clients present and past, First Nations governments, Yukon government officials, health care professionals and community organisations attested to... the prevalence among WCC clients, including First Nations clients, of PTSD, FASD, psychological trauma, depression and other mental illness, and the prevalence of addictions. The Yukon Mental Wellness Strategy acknowledges this: “Mental health and substance use issues continue to be a priority concern for many First Nations communities. In recent years, there has been growing recognition and acknowledgment of the legacy and effect of colonization and residential schools on First Nations families and communities. Intergenerational trauma is seen in rates of substance abuse and violence that are greater among First Nations people than in other populations in Canada.” This reality was at the forefront at Exploring Justice: Our Way. Speaker after speaker from First Nations across Yukon and elsewhere spoke about it. Several courageous individuals shared their suffering publicly, providing poignant, moving testimony.’

‘A key goal was to enable First Nations representatives and First Nations individuals from throughout Yukon to share their knowledge and experience. While not exhaustive, the following points highlight key perspectives shared at Exploring Justice: Our Way:

- Every First Nations individual in Canada is negatively affected by the residential school experience, even those who did not attend a residential school. The associated inter-generational trauma is pervasive and severe.
- Principles of reconciliation must motivate how WCC treats First Nations individuals held there.
- Alternatives to separate confinement are needed. Restorative justice approaches, including circle sentencing, should be used wherever possible, to avoid use of separate confinement and to improve life at WCC. A pilot program for restorative justice is needed in the short term...
- Meaningful consultation with, and involvement of, First Nations is needed at WCC. A revamped advisory body is needed to achieve this, and the Corrections Branch must be committed to its success.
- Elders were clear that greater access for elders to WCC clients is needed, and that the elders committee needs to be enhanced and given more say about WCC’s operation.
- A sizeable number of WCC clients are young people and more needs to be done to work with them, at WCC and in their communities, to help them improve their lives. Traditional learning and law also need to be taught.

723 Ibid 18.
• WCC offers arts and crafts programs, but there are insufficient spiritual and cultural programs and supports. More is needed in these areas.
• Approaches taken at the Fraser Valley Institution for Women, a federal correctional facility, should be adapted at WCC. These include: meaningful First Nations programming, spiritual care using traditional ceremonies and sacred objects, aboriginal liaison officers (who work with elders at the facility), re-integration plans, and culturally-appropriate training of facility staff.
• Healing villages such as those operated by CSC are needed in Yukon.
• Wherever possible, WCC clients should be given the support of families and peers to help them integrate back into their communities.
• The Yukon Mental Wellness Strategy must address the needs of those involved in the justice system.724

LOUKIDELIS REPORT – PARALLEL FIRST NATIONS REPORT

‘The legal expert undertaking an inspection of the Whitehorse Correctional Centre (WCC) as well as the lawyer hired by the Council of Yukon First Nations (CYFN) to highlight First Nations interests both gave brief updates on their work at CYFN’s justice conference last week. Inspector David Loukidelis and Whitehorse lawyer Jennie Cunningham appeared together on the second day of the “Exploring Justice: Our Way” conference...

Cunningham said she has been retained by [Council of Yukon First Nations] to create a report parallel to Loukidelis’s on the effects of the WCC and the justice system on First Nations people and recommendations on how to address those effects. Cunningham said that she’s identified six key themes through consultation with the community — healing versus punishment, the impermeability of the WCC, meaningful consultation with Yukon First Nations on the direction of corrections in the territory, the use of separate confinement, proper mental health care and advocacy and access to legal counsel.

“Justice... means radically different things for different people,” Cunningham said. “The (WCC) building itself ... is a supermaximum security building. The Whitehorse Correctional Centre itself, the building itself, comes into conflict with many of the concepts we’ve been addressing at this conference: reconciliation, restorative justice, reintegration, healing.... For anyone who’s been inside or visited anyone inside, it’s alarming, and the most alarming part is the inability to ever go outside, or rarely ever go outside.”725

RECOMMENDATION: The Inspectorate should prioritise coordinating with ACCOs and professionals who are Aboriginal and who have expertise in relevant fields.

INCREASING DETAINEE AWARENESS AND ENGAGEMENT

The New Zealand HRC has identified that:

[t]hrough their advocacy or support work, NGOs may have earned a particularly high degree of trust on the part of detainees. Where such an NGO considers it appropriate, it could greatly enhance the effectiveness of the NPM by promoting awareness among the detainee population of the NPM’s existence, any upcoming visits and its mandate and working methods, and by encouraging detainees to cooperate with and provide information to the NPM.  

Birk et al echo this position, noting that an NGO can improve an NPM’s visibility, should it ‘function awareness of the NPM among the detainee population.’[727] The SPT has suggested that ‘CSOs can also assist with providing information to detainees about the NPM should they ask.’[728]

In the NT context, ACCOs are particularly well-placed to not only provide information about the Inspectorate’s role in a culturally appropriate manner (for example, NAAJA conducting community legal education sessions in prisons and youth detention facilities, or in remote Aboriginal communities), but also to inspire confidence in the Inspectorate (should the ACCOs themselves have confidence in the efficacy and cultural competency of the Inspectorate).

**RECOMMENDATION:** The Inspectorate should also recognise that building the ACCOs’ confidence in its efficacy and cultural competency can assist promote awareness among Aboriginal detainees and their willingness to engage with the Inspectorate.

---

**A NOTE ON DETAINING AUTHORITY STAFF UNIONS**

As discussed in greater detail below (under Expectations/standards for inspections – general), the working conditions of the staff of the detaining authority impact on the conditions and treatment of detainees. In fact, poor working conditions can be a root cause of the torture or ill-treatment of detainees (eg. understaffing and overworked staff). Strike action itself can also increase the risk of torture or ill-treatment of detainees. Thus, the Inspectorate, in looking to prevent ill-treatment and torture, should recognise that detention staff unions are relevant CSOs.

There will often be times where the interests of the unions and their staff will be in conflict with detainees, but there will certainly be times where interests do align.[729] Either way, the Inspectorate staff should recognise

---


[728] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the national preventive mechanism advisory visit to Ecuador made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/OP/ECU/2 (16 July 2015) 11 [43].

[729] ‘Don Dale Youth Detention Centre handed back to Territory Families after riots’ <https://www.abc.net.au/news/2018-11-08/don-dale-youth-detention-detainees-police-watch-house/10477424> (8 November 2018): ‘But Mr McCue, from the NT police union, said the situation should have been avoided entirely. “We’ve gotta ask the question — why? And why does it keep occurring, and who’s responsible?” he said. “That’s just simply not
these unions as relevant stakeholders in their work. Indeed, in its analytical assessment tool for NPMs, the SPT identifies trade unions as a stakeholder with which an NPM might cooperate.  

**HMICS – PARTNERSHIP GOVERNANCE**

In best practice, HMICS recognises unions as relevant stakeholders.

---

**RECOMMENDATION:** The Inspectorate should recognise that the unions of staff working for the detaining authority are relevant stakeholders, as the working conditions of staff and/or industrial action can impact on the risk of torture or ill-treatment of detainees. Additionally, the Inspectorate should recognise that the interests of staff and detainees can either be in opposition or align.

---

...good enough. We need a proper facility to avoid these things in the future." The Community and Public Sector Union said a recruitment drive had addressed understaffing."

730 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Analytical assessment tool for national preventive mechanisms*, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [43].

STRATEGY REGARDING LOCATIONS AND FREQUENCY OF VISITS
OPCAT requires States grant NPMs ‘[a]ccess to all places of detention and their installations and facilities [and] [t]he liberty to choose the places they want to visit and the persons they want to interview.’\textsuperscript{732}

**STRATEGY INDEPENDENTLY DEVELOPED AND CRITERIA MADE TRANSPARENT**

The SPT recommends that NPMs ‘develop criteria for selecting the facilities to be visited and ensure that all facilities are visited periodically,’\textsuperscript{733} and that ‘[s]uch criteria should be transparent, clear and published.’\textsuperscript{734} For example, the New Zealand Ombudsman has listed issues that they wanted to progress in the NPM Annual Report.\textsuperscript{735}

Under Art 18(1) of OPCAT the functional independence of the Inspectorate must be guaranteed. This independence should extend to how it develops a strategy for the inspections it undertakes and how it chooses to allocate its resources. Also of note, in a different context to OPCAT, rule 84(1) of the Mandela Rule states that external inspectors can ‘freely choose which prisons to visit, including by making unannounced visits on their own initiative.’\textsuperscript{736}

**RECOMMENDATION:**

*The Inspectorate shall have guaranteed independence in determining the location and frequency of its visits to places of detention, and be free from interference when developing its inspection strategy. It shall have access to all places of detention.*

**RECOMMENDATION:**

*The Inspectorate should publish the criteria it develops in formulating its inspection strategy, including how it determines the types of inspections it will undertake, the places of detention it inspects and the frequency of those inspections.*

**ASSESSING THE LOCATIONS OF PLACES OF DETENTION AND DETAINEE NUMBERS**

As required by Art 20(a) of OPCAT, the NTG must give the Inspectorate ‘[a]ccess to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location.’\textsuperscript{737}

\textsuperscript{732} Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 20(e).

\textsuperscript{733} Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to Armenia undertaken from 3 to 6 September 2013: observations and recommendations addressed to the national preventive mechanism, UN Doc CAT/OP/ARM/2 (22 February 2017) [39].

\textsuperscript{734} Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [22].

\textsuperscript{735} Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2016 to 30 June 2017 (June 2018) 20-21.


\textsuperscript{737} Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).
Additional to this, given the Inspectorate’s mandate, the NTG should provide information about the numbers of detainees who are Aboriginal. In order to enable the Inspectorate to conduct unannounced visits, information should be regularly provided to the Inspectorate on detainees’ first/preferred languages at the various detention sites. This will assist the Inspectorate to determine which interpreters it will need to engage for unannounced visits to particular places of detention (without this information, the Inspectorate would have to either announce its inspection to obtain this information so it could adequately prepare with regards to interpreter bookings or it would have to obtain this information at the beginning of an unannounced visit, risking interpreters being unavailable for the inspection, significantly compromising its ability to engage with detainees).

In relation to both police cells and court custody during circuit court in remote Aboriginal communities, recognising that the numbers at a point in time will not be as useful to the Inspectorate as throughput (given the small numbers of detainees at any given time), the numbers of detainees and prisoners over periods of time (throughput) should also be provided to the Inspectorate. HMICS defines throughput (used as part of its analysis\(^{738}\)) as ‘all new arrests, all new detentions, persons detained for purposes of a search... detainees transferred in to the custody centre from another centre [and] detainees attending for identification parade.’\(^{739}\) The APT also makes mention of ‘[p]ersons... detained in police custody for their own safety... This is sometimes called protective detention.’\(^{740}\) As discussed in greater detail above, under Definitions and categories of places of detention and detainees, detainees may be held in police custody for different purposes, with police exercising different powers under legislation. All detainees, regardless of the reason for their detention, should be counted in the throughput that is to be provided to the Inspectorate.

**RECOMMENDATION:**

The Inspectorate should be given access to information on the number of persons deprived of their liberty in places of detention, the number of places of detention and their location. Additionally, given its mandate, the Inspectorate should regularly be provided the number of Aboriginal prisoners and detainees in places of detention and the detainees’ preferred language.

Of note, in the context of both police cells and court custody during circuit court in remote Aboriginal communities, recognising that the numbers at a point in time will not be as useful to the Inspectorate as throughput, the numbers of detainees and prisoners over periods of time should also be provided. The information provided to the Inspectorate should include that relating to places of detention that are only temporarily gazetted as such.

\(^{738}\) Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of custody centres across Scotland (October 2018) 8.

\(^{739}\) Her Majesty’s Inspectorate of Constabulary in Scotland, Thematic Inspection of Police Custody Arrangements in Scotland (August 2014) 82.

NO INSTITUTIONS SHOULD BE EXCLUDED

Although the SPT recommends that the NPM consider the ‘type and size of the institution,’ it also states that ‘no institution should be excluded either because of its type or location.’ This is particularly relevant to the NT, which is geographically large with a relatively small population and many remote Aboriginal communities. This means that at certain remote police stations, the throughput will be relatively small, and they may be more challenging or expensive to get to (due to both distances and the weather patterns in the NT, with some remote Aboriginal communities only accessible via plane during the wet season). On the other hand, the very fact that some of these locations are so remote means that they are less likely to be subject to public scrutiny, and should therefore be a central aspect of the Inspectorate’s work. Furthermore, the remote locations of police stations and courts means that the distances travelled when transferring detainees between remote community police stations/circuit court sittings in remote communities, youth detention facilities and prisons are great, rendering Inspectorate oversight of transportation essential.

Exemplifying best practice, HMICS conducts inspections of custody centres with lower throughput, such as those in rural locations or on islands, noting that at times there were no detainees present on their visits. The IPCA similarly conducts visits to both rural and urban locations.

**RECOMMENDATION:** The Inspectorate should ensure that it undertakes inspections at all places of detention regularly, including inspections of any modes of transportation of detainees. No facility should be excluded due to its size or location.

**FREQUENCY: OPTIMISING THE IMPACT OF INSPECTIONS**

The SPT recommends that an NPM ‘plan its work and its use of resources in such a way as to ensure that places of deprivation of liberty are visited in a manner and with sufficient frequency to make an effective contribution to the prevention torture and other cruel, inhuman or degrading treatment or punishment.’ The Special Rapporteur has declared that ‘[r]egular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture,’ although Nowak and McArthur do note that OPCAT does not define what is meant by “regularly” examine (they do suggest, however, that in order for an NPM’s work to have a preventive impact, larger places of detention should be visited every few months and pre-trial detention facilities should be visited more frequently than those which hold sentenced prisoners). It will be for the Inspectorate to decide how

---

741 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to Armenia undertaken from 3 to 6 September 2013: observations and recommendations addressed to the national preventive mechanism, UN Doc CAT/OP/ARM/2 (22 February 2017) [39].
742 Ibid.
743 Her Majesty's Inspectorate of Constabulary Scotland, Inspection of custody centres across Scotland (October 2018) 4.
745 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Guidelines on national preventive mechanisms, UN Doc CAT/OP/12/5 (9 December 2010) [34].
frequently the various places of detention will need to be visited to enable it to effectively conduct its preventive work (through both the deterrent effect of its visits and its findings and recommendations).

It should be noted, however that the Inspectorate should not undertake inspections too frequently as this can impact on its ability to adequately prepare for inspections, conduct inspections of sufficient length and complete quality reports, which would in turn jeopardise its ability to undertake a sophisticated appraisal of the risk of torture and ill-treatment. Additionally, if inspections are too close in time, then the detaining authorities may not have sufficient time to respond to the findings and implement the Inspectorate’s recommendations and the frequent visits may result in monitoring fatigue among detaining authorities. Furthermore, if the Inspectorate is not effective in exercising its mandate, this can in turn affect its reputation, compromising detainees’ confidence in the Inspectorate and its perceived legitimacy among civil society. Additionally, as discussed in greater detail below (under Escalation Strategy), too frequent visits eliminate the means of escalating concerns through increased frequency of inspections and follow-up visits.

ICVS

‘A total of 1,455 visits were carried out in police custody centres between the periods of 1 April 2017 – 31 March 2018.’\(^748\)

‘The frequency of visits are categorised as Weekly/Fortnightly/Monthly/Quarterly/Bi-annually/Annually. The regional coordinators determine the frequency of visits by considering the throughput in each centre. The Custody Estate is separated into three categories by Police Scotland – a. Primary Custody Centre – a centre which is open to receive custodies on a full time basis. b. Weekend Opening Centre – a centre which in routinely used at peak weekend times. c. Ancillary Custody Centre – a centre which may be opened due to demand or location.’\(^749\)

RECOMMENDATION: The Inspectorate should not visit places of detention too frequently, as this impacts on the efficacy of prevention work, both in terms of the quality of the Inspectorate’s work, and the detaining authority’s ability to adequately respond to its findings and to implement its recommendations. The Inspectorate should visit facilities often enough for it to be effective in preventing torture and ill-treatment, through deterrence as well as its findings/recommendations.

RISK ASSESSMENT AND THE SEVERITY OF THE HUMAN RIGHTS CONCERNS AT PLACES OF DETENTION

The SPT notes that criteria should include a consideration of ‘the severity of the human rights issues of which the mechanism is aware.’\(^750\) For example, Carver and Handley, in their study on whether prevention of torture

what the phrase ‘regularly examine’ means. But for the purpose of achieving a meaningful preventive, i.e. deterrent, effect, it is essential that the NPM conducts visits to all larger places of detention every few months. There is, of course, some flexibility for NPMs to determine the exact frequency of their visits, taking into account certain rules to be established by the Subcommittee on the basis of its advisory function stipulated in Article 11(b) [OPCAT] as well as the nature of the different types of detention facilities. For example, pre-trial detention facilities… shall be visited more frequently than prisons for longterm convicts, bearing in mind that the fluctuation in such facilities is much higher and the contact with the outside world much more restricted. As with the CPT and the Subcommittee on Prevention, NPMs shall conduct both regular visits, follow-up visits and ad hoc visits in particular circumstances.’\(^748\)


\(^750\) Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to Armenia undertaken from 3 to 6 September 2013: observations and recommendations addressed to the national preventive mechanism, UN Doc CAT/OP/ARM/2 (22 February 2017) [39].
works, found that despite the fact that the greatest risk of torture (noting this study did not extend to ill-treatment) is in police custody, monitoring bodies focused more on prisons. They recommended that monitoring bodies more frequently visit police stations. Similarly, the SPT recognises that ‘while all detainees are in a position of vulnerability, those in police cells awaiting questioning and those in pretrial custody… are particularly vulnerable.'

The SPT also recommends that information provided by CSOs be used in planning visits strategically. The Inspectorate’s visit schedule should thus reflect priorities determined, in part, by information provided by CSOs on human rights concerns in places of detention.

The SPT does caution, however, that ‘[w]hile the [NPM] should prioritize the most problematic issues and institutions, it should not exclude from the scope of its work any particular form of institution or geographical area.'

---

**HMIP - INSPECTION FRAMEWORK**

‘The inspection of facilities is predicated on a dynamic risk assessment. Issues taken into account include: the time elapsed since the last inspection, the functional type and the size of the establishment, prisoner outcomes as assessed by the Inspectorates’ healthy prison assessments, significant changes to the establishment or changes in leadership, intelligence received via correspondence or in other ways, serious incidents reported to HM Prisons and Probation Service (HMPPS, formerly NOMS), prison rating system (PRS) scores, the Inspectorate health care assessment, the age of the buildings… A draft inspection programme is developed from November onwards for the following financial year… The programme is agreed approximately three months before the start of the financial year but may change as risk assessments change.'

**FREQUENCY OF VISITS**

‘Prisons, young offender institutions holding young adults, and specialist units - Inspected at least every five years. Inspections will be determined by risk assessment. Most prisons can expect to be inspected every two to three years. Some high risk institutions may be inspected more frequently.’

‘Police force areas - All suites inspected at least once every six years. In partnership with HM Inspectorate of Constabulary.’

‘Court custody - Court custody facilities inspected at least once every six years. Secure training centres (STCs) Inspected every year. In partnership with Ofsted.’

See also Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Analytical assessment tool for national preventive mechanisms*, UN Doc CAT/OP/1/Rev.1 (25 January 2016) (22).


Seventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, 52nd sess, UN Doc CAT/C/52/2 (20 March 2014) (80).

Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the national preventive mechanism advisory visit to Ecuador made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc CAT/OP/ECU/2 (16 July 2015) 11 (43).


Ibid.

Ibid.

Ibid.

Ibid.
CJINI - FRAMEWORK

‘Proportionate to risk. Over time, inspectors should modify the extent of future inspection according to the quality of performance by the service provider. For example, good performers should undergo less inspection, so that resources are concentrated on areas of greatest risk.’

HMIPS - STRATEGIC OBJECTIVE

‘Strategic Objective 1: Develop a more strategic approach to inspection and monitoring. To deliver this objective our organisational objectives are to [c]o-design and develop a risk-based approach to a new inspection framework, with our partners... Recruit a qualified researcher to analyse our findings from inspection and monitoring to inform our future work.’

ISO - RISK ASSESSMENT PROCESS

‘ISO uses a risk assessment process when determining what programs and services to select for inspection. Programs and services that have the highest potential for risk are prioritized, such as those where non-compliance with corrections policy could result in serious injury or death, or where the rights of inmate may be significantly affected. Lower risk programs may also be subject to inspection.’

OCC - MONITORING FRAMEWORK

‘We will look at a variety of information to give a sense of the broader environment the sites and residences, and the care and protection and youth justice systems, are operating within. For example, we may look at: broad changes in policy direction or service delivery changes that could impact on the way Child, Youth and Family operates, wider factors in the community such as Police apprehension rates for young offenders or diversion practices, that may have a flow on impact into or away from the system... Bringing all this information together will give us a picture of what is happening at both a national and local level and will provide the basis for identifying the themes for our monitoring.’

IPCA - PROPOSED LEGISLATION THAT POLICE CELLS BE USED TO HOLD PRISONERS

‘The Authority has been concerned for some time about the number of remandees that are detained in Police cells – generally for two or three nights, but sometimes considerably longer. The reasons for these detentions vary. They may sometimes arise from the fact that a person has been remanded for a short period to re-appear in a local court, and it is

760 Criminal Justice Inspection Northern Ireland, Inspection Framework, 1.
The Authority’s concerns have been exacerbated by the use of Police cells over the last 2-3 years to deal with Corrections overflow when prisons in particular areas have reached capacity. The use of cells for this purpose would be extended by a proposed amendment to the Corrections Act 2004 that would allow any gazetted Police jail, or any part of a Police jail, to be gazetted as part of an established Corrections prison. This would enable remandees and sentenced offenders to be held in such a jail, staffed and maintained as a Corrections facility, for a single period not exceeding 7 days and a cumulative period of not more than 21 days over a 12 month period...

In the 2018/19 financial year, the Authority will... be undertaking a comprehensive audit of all custody units in which detainees are currently being held overnight... An overall report on the use of Police cells for remandees will also be prepared and published.764

---

**RECOMMENDATION:** The Inspectorate should have a robust risk assessment framework, which includes an assessment of risk of human rights violations at places of detention.

**IN-BUILT FLEXIBILITY OF STRATEGY**

The NPM should ‘[leave] room for flexibility in the allocation of resources to ensure that follow-up and urgent visits can be undertaken.’765

**RECOMMENDATION:** The Inspectorate should ensure that its schedule allows it sufficient capacity and flexibility to remain responsive to any developments, such as the need for urgent or follow-up visits.

**VISITS STRATEGY ENSURES SUFFICIENT CAPACITY FOR FUNCTIONS BEYOND INSPECTION**

Similarly, ‘the national preventive mechanism... should not exclude from the scope of its work... any national preventive mechanism task other than visiting.’766

**RECOMMENDATION:** The Inspectorate should ensure that its inspection schedule does not prevent it from having the capacity to exercise aspects of its mandate other than inspecting.

---


765 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [22].

766 Ibid [46].
THE INSPECTORATE MUST HAVE CERTAINTY OF SUFFICIENT FUNDING FOR PLANNING TO BE TRULY STRATEGIC

The Inspectorate must have funding cycles that are of sufficient length to permit it to undertake truly strategic multi-year planning, and sufficient funding should be provided from its establishment. The NT has many places of detention over a large geographic area, with many locations in remote regions, with the function of some places of detention changing at times (for example, when circuit court is sitting in remote Aboriginal communities).

NPM – SUBMISSION TO COMMITTEE AGAINST TORTURE

‘In addition, some NPM members face challenges with the budgets necessary to carry out their NPM work and in some cases are significantly under-resourced. This is due a range of factors including budget cuts and freezes (leading to less funding in real terms), budgets for NPM work within the 21 organisations not being ringfenced and so being allocated alongside competing priorities, and budgets being awarded on an annual basis making forward planning difficult. Further budget cuts to NPM members would result in many having to reduce the number of inspections and monitoring visits undertaken; this has already been the case for one NPM member. In addition, most members report that additional funding would allow them to increase their preventive work through providing training to their own staff and those working in places of detention, promoting best practice, carrying out stakeholder engagement work and contributing to research and thematic work (including jointly with other NPM members).”

HMICS - INSPECTION FRAMEWORK

‘Our inspection programme (known as our scrutiny plan) is determined annually. Issues to be inspected are identified during the course of our day-to-day work and intelligence gathering. Each year, we consult with stakeholders and invite suggestions as to which issues we should inspect. In choosing which issues to inspect, we take a range of factors into consideration including: whether it is in the public interest to inspect the issue, whether we can add value by carrying out an inspection, whether the issue relates to a high risk area of policing, whether there is an evidence gap about a particular aspect of policing, whether the issue impacts on equalities or human rights, whether any other scrutiny body has considered the issue, whether we have sufficient resources and capacity to carry out the inspection.”

RECOMMENDATION: The Inspectorate should receive sufficient funding over funding cycles that are not too short to compromise its ability to be truly strategic in its planning.

767 United Kingdom National Preventive Mechanism, United Kingdom National Preventive Mechanism submission to the 66th session of the Committee against Torture (2019) 8-9 (emphasis added).

768 Her Majesty’s Inspectorate of Constabulary Scotland, HMICS Inspection Framework (11 May 2018) 4.
THE INSPECTORATE SHOULD CONSULT WITH RELEVANT STAKEHOLDERS

As discussed in greater detail above, the Inspectorate should build relationships with other NT (and where relevant, other jurisdictions’) statutory bodies, NPMs and civil society to incorporate individuals’ and organisations’ expertise and knowledge into its planning, in order to maximise its efficacy in preventing the torture and ill-treatment of Aboriginal detainees. The inspectorate should consult with relevant stakeholders when drafting both its multi-year and annual plans. This can be done through a combination of targeted meetings as appropriate, and other regular meetings and ongoing, informal correspondence. The Inspectorate should prioritise speaking with relevant ACCOs.

RECOMMENDATION: The Inspectorate should inform its multi-year and annual strategic visit plans through consultation with relevant statutory bodies, NPMs and civil society. It should prioritise speaking with ACCOs.

CONSIDERING WHAT TYPES OF VISITS/INSPECTIONS WILL BE UNDERTAKEN BY THE INSPECTORATE

SITE LEVEL INSPECTIONS – FULL AND SHORTER INSPECTIONS AND SHORTER VISITS

The NZ OCC has previously undertaken ‘a mix of full, in depth visits and shorter, “informal” visits... a cluster of visits to several places within a given city/region over a two or three day period... specialist site visits involving specialists from other agencies and NPMs.\textsuperscript{769}

ANALYTICAL REPORTS ACROSS MULTIPLE PLACES OF DETENTION AND MULTIPLE VISITS TO THE SAME DETENTION SITE

The APT recognises the value of analytical reports in identifying patterns of violations (and their causes) across multiple sites of detention.\textsuperscript{770} For example, HMICS has undertaken inspections across multiple police custody sites, providing it the opportunity to highlight inconsistencies in practice: ‘[w]hile progress has been made in achieving consistent processes and practice in custody centres across Scotland since the creation of Police


\textsuperscript{770} Association for the Prevention of Torture, Monitoring places of detention: a practical guide (2004) 90: ‘The visiting mechanism can decide to draw up reports following a series of visits over a given period. Such a strategy enables the visiting mechanism to adopt a more comprehensive and analytical view of the issues that have arisen during the monitoring. A more thematic approach can also be chosen to focus on a limited selection of issues of particular concern. Analysing several visits to several places assists in identifying a pattern of problems or violations. It can also highlight a whole spectrum of root causes of problems in places of detention. The recommendations can then address the different actors who need to intervene to address these causes, which may be external to the prison or Ministry (i.e., legislation, sentencing policy, provision of staff training). Analytical reports can complement the visit reports on which they are based.’
Scotland, some inconsistencies persist. Analytical reports would be particularly useful in the NT context in relation to police stations in remote Aboriginal communities.

**OCC – MONITORING FRAMEWORK**

“Our new approach will ensure we include sites and residences in our visits that are considered to be leading practice and delivering excellent outcomes for children, alongside sites and residences that may not be achieving the same level of performance. By visiting a sample of sites and residences across a particular theme we will be better placed to provide a systemic view of practice across Child, Youth and Family and to support the sharing of excellent practice across the organisation to drive collaborative learning and improvement.”

**OCC – MULTIPLE DETENTION SITES**

“This report focuses on our findings under the OPCAT mandate. It aggregates the findings of our monitoring of seven CYF residences over the last nine months (from July 2016 to March 2017). Under the OPCAT mandate, we have a special focus on preventing mistreatment, checking that children and young people’s rights are upheld, and ensuring that children and young people in places of detention are not being subjected to torture or other cruel, inhuman or degrading treatment or punishment. Our OPCAT findings are informed by the monitoring we do under our wider, general mandate.”

**HMICS - INSPECTION OF MULTIPLE CUSTODY CENTRES ACROSS SCOTLAND**

“The aim of this inspection... was to assess the treatment and conditions for those detained in police custody centres across Scotland. We inspected 17 custody centres and assessed what progress had been made in achieving positive outcomes, adhering to national policy and processes, and implementing previous HMICS recommendations.”

HMICS published a thematic report in 2014, reporting on ‘the national arrangements for the delivery of police custody, including an assessment of issues such as leadership and governance, resources and partnerships,’ which was “followed by five inspections of police custody in particular areas, usually linked to [their] inspections of local policing divisions.”

**CJINI - COMPARISON OF PRACTICE ACROSS SERVICE PROVIDERS AND DETENTION SITES**

“The inspection identified a number of areas where the treatment of prisoners could be improved including the need for a more consistent approach to the handcuffing of prisoners by the service providers. Good practice suggests, and we would endorse, that prisoners should not be routinely handcuffed when travelling in secure vehicles unless individual risk...”

---

771 Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of custody centres across Scotland (October 2018) 5.
775 See also Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of custody centres across Scotland (October 2018) 3.
776 Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of the strategic arrangements for the delivery of police custody (June 2019) 9.
777 Ibid.
assessments demonstrate a high level of risk. Male and female prisoners should always be transported separately.\textsuperscript{777} A particular issue emerged in relation to the handcuffing of prisoners. Overall, CJI found the standard of service provided by the individual providers was inconsistent... It is our view that prisoners should not be routinely handcuffed when travelling in secure vehicles unless individual risk assessments demonstrate a high level of risk.\textsuperscript{778} ‘Finally, Inspectors found the court custody facilities, which are part of the fabric of the courthouses to be of variable quality. The disparity between the best and worst facility is high with four of the court custody facilities barely being deemed fit for purpose.’\textsuperscript{779}

THEMATIC REPORTS/INSPECTIONS

This report does not adopt the definition of CJINI of a thematic report,\textsuperscript{780} but instead defines a thematic report as a report which focuses on particular aspects of detention (for example, segregation) or particular groups of detainees (for example, children in police stations). It is anticipated that there will be particular areas or themes that the proposed Aboriginal Inspectorate might wish to focus on, such as the cultural appropriateness of health services across adult correctional facilities, the impact of denial of temporary leave for Aboriginal prisoners to participate in funerals or ceremonies, the impact on Aboriginal children being detained in youth detention centres far from their communities, or programs and education being delivered in English only.

Birk et al describe the aim of a thematic report as:

highlight[ing] particular issues and provid[ing] a more analytical insight into a problem, identifying root causes as well as systemic changes to be implemented. Although the OPCAT does not expressly mention thematic reports, the SPT has acknowledged this possibility in its 2012 Guidelines.\textsuperscript{781}

The APT observes the benefits of thematic reports that ‘look beyond visits themselves to holistically embrace systemic problems. Reports that do not ‘point a finger’ at particular police stations tend to encourage systemic reform rather than the mere application of sanctions against the particular station(s) identified,’ which is particularly useful when issues of concern find their roots in the institution’s culture (eg. ethnic profiling).\textsuperscript{782}

NPM - PURPOSE OF THEMATIC WORK

‘The NPM as a whole and its members (both individually and jointly) undertake a range of thematic work on detention issues in order to explore areas of concern, gain a greater understanding of particular topics, provide information to policy makers to effect change and strengthen their own working practices.’\textsuperscript{783}

\textsuperscript{777} Criminal Justice Inspection Northern Ireland, An inspection of Prisoner Escort and Court Custody arrangements in Northern Ireland (October 2010) vi.
\textsuperscript{778} Ibid vii.
\textsuperscript{779} Ibid viii.
\textsuperscript{780} Ibid ix.
\textsuperscript{781} Criminal Justice Inspection Northern Ireland, The Inspection Process <http://www.cjini.org/TheInspections/Our-Approach/The-Inspection-Process>: ‘The decisions around the type of expertise and information required may depend on whether the inspection is of a single agency or a thematic inspection. A thematic inspection is one which covers more than one agency or organisation and therefore seeks to consider not only the way single agencies undertake work themselves but how they work in partnership with other organisations in the criminal justice system.’
\textsuperscript{782} Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 34.
\textsuperscript{783} Association for the Prevention of Torture, Monitoring Police Custody - A practical guide (January 2013) 83.
The Inspectorate should be mindful that it may be difficult to engage some members of the public on the topic of detention, particularly as site reports will be formulaic in their structure and potentially overwhelming in content, given the many areas relevant to conditions and treatment in detention that are to be addressed. Thematic reports have the potential to instead provide an informative and engaging narrative, for those members of the public who are not familiar with human rights or the fact that people who are detained have rights at all. As Birk et al relayed, ‘[s]ome NPMs mentioned that with thematic reports it was easier to capture public attention on a topic, which in turn proved beneficial with regard to the implementation of recommendations.’\footnote{Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 34-35.} As the Inspectorate progressively publishes more site reports, the risk that the public will disengage with the information provided in site reports is a very real risk. There are likely to be similar issues arising across different detention sites, and it is conceivable that there will be repetition in the reports’ findings and recommendations as the detaining authorities reject recommendations or fail to implement recommendations they have, in fact, accepted. It is in this context that thematic reports may be more successful in engaging members of the public.

Dame Owers has written that HMIP’s ‘[t]hematic reviews can take significant time to achieve results, but have been instrumental in, for example, the takeover of health services in prisons by the National Health Service as a whole, with considerable improvements in the quality of care.’\footnote{Anne Owers, ‘Comparative Experiences of Implementing Human Rights in Closed Environments: Monitoring for Rights Protection’ (2014) 31 Law in Context: A Socio-Legal Journal 212.} However, as the NZ HRC has noted, ‘thematic reports are resource intensive and the extent to which they enhance OPCAT effectiveness needs to be balanced against any reduction in the capacity of NPMs to conduct monitoring visits.’\footnote{Human Rights Commission, The Optional Protocol to the Convention against Torture (OPCAT) in New Zealand 2007–2012: A review of OPCAT implementation by New Zealand’s National Preventive Mechanisms (April 2013) 53.} It will thus be essential for the Inspectorate to be strategic in deciding which thematic reviews it will undertake.

---

**IPCA – DEATHS IN POLICE CUSTODY**

‘Site visits form part of a broader system of prevention under the OPCAT. In addition to site visits, NPMs engage in other strategic capacity building and prevention initiatives to fulfil their mandate.’\footnote{Independent Police Conduct Authority, Thematic Report: Deaths in Custody - A Ten Year Review (June 2012) 11.}

‘In late 2010 the Independent Police Conduct Authority (the Authority) began a review of deaths in police custody which had taken place during the preceding 10 years. This review was prompted by several deaths in custody of heavily intoxicated detainees, and was conducted in light of the Authority’s responsibilities as a National Preventive Mechanism under the Optional Protocol to the Convention against Torture.’\footnote{Ibid 7.} ‘The review consisted of: the analysis of 27 deaths in or following police custody which were referred to the Authority under section 13 of the Independent Police Conduct Authority Act 1988 (the Act) during the 10-year period from 1 January 2000 to 1 January 2010, an assessment of New Zealand Police policies and procedures for managing people in custody; and consideration of international policies and research on deaths in police custody.’\footnote{Ibid.}
Of note, the recommendations included an OPCAT-related one, recognising that how effectively an NPM operates determines its ability to identify opportunities to mitigate risk: ‘The Authority recommends that the New Zealand Police engage with the Authority to develop an OPCAT awareness strategy and advance the agreed plan to develop an IPCA / Police OPCAT panel. The OPCAT awareness strategy and joint panel will provide a platform for raising staff awareness about custodial issues and enable effective implementation of custody-related recommendations.’

OMBUDSMAN – THEMATIC REPORT ON USE OF RERAINTS ON PRISONERS AT RISK OF SELF-HARM OR SUICIDE &
NPM – EXPERT REPORT ON SECLUSION AND RERAINT

‘A thematic inspection into the care and management of prisoners at risk of self-harm or suicide found that the use of restraints on five prisoners amounted to cruel, inhuman or degrading treatment. In March 2017 Chief Ombudsman Peter Boshier published our first thematic OPCAT report A Question of Restraint, about the use of seclusion and restraint in five At-Risk Units in New Zealand prisons. Some jurisdictions that have ratified OPCAT have banned the use of tie-down beds....
Our OPCAT team also supported international human rights expert Dr Sharon Shalev when she visited New Zealand in late 2016 at the invitation of the Human Rights Commission to consider seclusion and restraint practices in prisons, health and disability units, youth justice and care and protection residences. Dr Shalev’s report Thinking Outside the Box recommended New Zealand eliminate the use of mechanical restraints altogether.’

HMIP - INSPECTION FRAMEWORK

‘The Inspectorate also undertakes an annual programme of thematic work and joint work with other criminal justice and associated inspectorates.’

HMIP - MoU REGARDING THEMATIC REPORTS

‘HMIP may undertake thematic reviews. The nature and subject of these reviews will be a matter for the Chief Inspector but will be informed by the annual consultation arrangement... Where additional fieldwork is required for thematic reviews, individual governors or directors will be approached directly to agree access and make appropriate arrangements. HMIP will discuss the emerging findings of its thematic inspections, with NOMS before the report is finalised.’

790 Ibid 92-95.
791 Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2016 to 30 June 2017 (June 2018) 19.
792 Her Majesty’s Inspectorate of Prisons, Inspection framework (2017) 12.
HMIP – INCENTIVES FOR CHILDREN AND YOUNG PEOPLE TO PROMOTE GOOD BEHAVIOUR

HMIP exemplifies best practice in comparing how prisoners and detainees across ethnicities and religions experience a place of detention, to determine if there are any differences in experiences. This report, for example, compared survey responses across ethnicity and religion, including black and minority and white children and young people.

‘Institutions holding children and young adults have undergone notable change over recent years as the population of both groups has reduced. While this reduction is welcome, there is evidence from inspection that outcomes for those that remain have been significantly impacted by deteriorating behaviour. Current behaviour management schemes have been ineffective in reducing violence, which is at historically high levels in all types of institution we reviewed... The review looks at the fundamentally important issue of the relationships between those detained and the staff charged with their care. Those relationships are crucially influenced by staff turnover, which can lead to a lack of consistency in approach, staff shortages and, all too frequently, a lack of sufficient time out of cell. The issue of inconsistency in behaviour management is important as it damages the all-important element of trust in the relationship. When trust diminishes, a consequence is often a decline in respect for staff and, in the worst cases, a complete withdrawal from behaviour management systems... This thematic inspection... aimed to: identify what good practice is taking place in terms of behaviour management, and which areas are experiencing difficulty/could be improved... explore how incentives and behaviour management systems operate... make recommendations regarding incentives and behaviour management.’

UK - NPM MEMBERS’ THEMATIC WORK

The UK NPM has done some thematic work centred on detainees’ experiences, a particularly useful exercise in relation to children and young people. ‘In November 2017, the CCE published Children’s Voices: The Wellbeing of Children in Detention in England, a review of detained children’s subjective views and experiences. In March 2018, the CCE published a report, in collaboration with Dame Louise Casey, entitled Voices from the Inside, which focused on the life experiences...’

794 Her Majesty’s Inspectorate of Prisons, Incentivising and promoting good behaviour A thematic review by HM Inspectorate of Prisons (March 2018) 21: ‘It is concerning, given the central role of relationships in behaviour management, that in YOIs young people from a black or minority ethnic or Muslim background are consistently more negative about interactions with staff.’

Also at 22: ‘In our surveys, only 57% of children from a black and minority ethnic background, in YOIs holding 15–17-year-olds, reported that most staff treated them with respect, compared with 73% of white children. Fewer black and minority ethnic children reported having a personal officer and only 26% of those from a black and minority ethnic background reported that staff had checked on them personally in the last week, compared with 42% of white children. In addition, 28% of children from a black and minority ethnic background reported that they would have no one to turn to if they had a problem, compared with 19% of white children... The reasons behind these perceptions are complex, but it is clear that a significant proportion of young people in custody are more negative than others about staff. Children from a black and minority ethnic background made up 46% of the total population in the youth secure estate in April 2017. Young adults from a black and minority ethnic background made up 65% of the respondents to the surveys included in this report. Without understanding and addressing these differences it is therefore unlikely that the behaviour management can be effective with all young people detained.’

Also at 36-37: ‘It was concerning that in STCs and YOIs young people from a black and minority ethnic or Muslim background had more negative perceptions of the fairness of the incentives scheme. Those from black and minority ethnic groups in STCs were less likely to feel the incentives and sanctions scheme was fair (54% compared with 78% from white backgrounds). This was also true of Muslim children in STCs, only 35% of whom reported being treated fairly by the rewards and sanctions scheme (compared with 71% of their non-Muslim peers)... While the effectiveness of incentive schemes needs to improve for all young people, these responses suggest that black and minority ethnic and Muslim young people have a different experience of incentives and sanctions than their white or non-Muslim peers. They are more likely to be subject to disciplinary procedures and less likely to feel that the main method of promoting positive behaviour is fair. If behaviour management is to improve across the estate the reasons behind these perceptions need to be understood and addressed.’

795 Ibid 31, 52, 55.

796 Ibid 6.
ISO - THEMATIC INSPECTIONS

The ISO has carried out two comprehensive inspections of Whitehorse Correctional Centre, including the ‘[u]se of long term separate confinement (segregation) [and] [e]arned remission and release date of inmates’ in 2011 and in 2014 ‘[s]eparate confinement including short and long term [and] [i]nmate complaint system.’

**RECOMMENDATION:** When planning the frequency and duration of visits, the Inspectorate should determine what type of visits/inspections it intends to undertake during the period under consideration. The type of inspections might include the following:

- full site inspections and shorter site inspections.
- analytical reports across multiple sites of detention or multiple visits over a period of time at the same detention site.
- thematic inspections.

**RECOMMENDATION:** The Inspectorate should conduct thematic reports:

- The reports can provide greater insight into risks or issues and assist in identifying root causes, particularly where the issues of concern are widespread and/or do not originate at the site level (for example, where the root cause is the institutional culture). The acquired depth of understanding would strengthen recommendations at both site and systemic level.
- Thematic reports may better resonate with the public, increasing the likelihood of detaining authorities being subject to public pressure to implement recommendations.

**RECOMMENDATION:** The Inspectorate should consider, when planning its visits schedule, whether it might need to engage a consultant with expertise in specific subject matter for an inspection, or whether it might wish to undertake joint visits with NPMs in the NT or other jurisdictions.

---


798 Ibid 23.

799 Ibid.

EXPECTATIONS/STANDARDS FOR INSPECTIONS – GENERAL
CONSULTATION, REVIEW OF EXISTING EXPECTATIONS/STANDARDS, AND TESTING EXPECTATIONS/STANDARDS

CONSULTATION AND TESTING OF EXPECTATIONS/STANDARDS

<table>
<thead>
<tr>
<th>HMIP - EXPECTATIONS FOR COURT CUSTODY</th>
</tr>
</thead>
</table>
| ‘The expectations have been drawn up through a process of consultation with HM Courts and Tribunals Service (HMCTS), the Ministry of Justice, the private contractors that staff court custody facilities, Lay Observers, the Youth Justice Board (YJB), National Offender Management Service (NOMS) and other relevant organisations. They were tested during two pilot inspections of courts and revised using experience from the pilots.’  

<table>
<thead>
<tr>
<th>HMIPS – STANDARDS FOR COURT CUSTODY</th>
</tr>
</thead>
</table>
| ‘These standards have been drawn up through a process of consultation and are based on international human rights. They are referenced against relevant law, international and professional guidance, policy and research findings.’  

CONSULTATION AND INCORPORATING OWN AND OTHER NPMS’ LEARNINGS

<table>
<thead>
<tr>
<th>HMIP – POLICE CUSTODY</th>
</tr>
</thead>
</table>
| ‘[The expectations] are also drawn from inspection experience and wider consultation with stakeholders, including police forces and non-police groups. They incorporate learning from HMICFRS’s thematic inspection of the welfare of vulnerable people in police custody and from the cumulative experience of our joint inspections of police custody to date.’  

CONSULTATION WITH PEOPLE WHO HAVE LIVED EXPERIENCE

The AHRC *OPCAT in Australia Interim Report* recommended that in developing national standards for inspection, the views of detainees be sought.  

---


HMIP - EXPECTATIONS FOR WOMEN IN PRISON

'These Expectations were developed following detailed consultation with groups of women prisoners themselves, governors and staff from women’s prisons and a range of other voluntary and statutory organisations which provide services to or are interested in the treatment of women in prison.'

RECOMMENDATION: In drafting the expectations/standards, the Inspectorate should consult with relevant stakeholders and subject matter experts (including those who are experts by experience, having been detained). Consultations should be conducted with academics, NGOs, statutory bodies and detaining authorities, both in the NT and in other jurisdictions.

RECOMMENDATION: In drafting the expectations/standards, the Inspectorate should review the existing expectations/standards of NPMs in overseas jurisdictions and inspectorates in other Australian jurisdictions.

TRANSPARENCY AND INDEPENDENCE OF THE INSPECTORATE’S EXPECTATIONS/STANDARDS

The Inspectorate must independently establish what expectations/standards it will use, free of interference, and in compliance with OPCAT\(^6\) (although consultations should guide the content\(^7\)).

The Inspectorate should be transparent about the expectations/standards that it uses, publishing them and ensuring that they can be easily accessed. The purpose of taking this approach is manifold, including providing guidance to the detaining authorities on ‘the standards that the Inspectorate expects to find and the sources of evidence’ relied upon during inspection.\(^8\) Having transparency around expectations/standards can also promote the work of the Inspectorate, can increase confidence in its operations among the general public and relevant civil society stakeholders, and provides an opportunity for feedback (see The Inspectorate’s OPCAT compliance and efficacy should be evaluated). Transparency around expectations/standards also facilitates their use as an educative tool for detainees, increasing understanding of the Inspectorate’s mandate and detainee engagement during inspections.

OCC

‘For consistency and transparency of ratings, the OCC uses a five-point rating scale for OPCAT monitoring. We assess residences against the six OPCAT domains and give them a rating... ratings of ‘transformational’, ‘well placed’ and ‘developing’ indicate a residence is compliant with the standard required for the relevant OPCAT domain, while ratings

\(^{805}\) Her Majesty’s Inspectorate of Prisons, Expectations Criteria for assessing the treatment of and conditions for women in prison (2014) 9.

\(^{806}\) Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 1, Art 17, Art 18(1).

\(^{807}\) Her Majesty’s Inspectorate of Prisons, Inspection framework (2017) 9.

\(^{808}\) Her Majesty’s Inspectorate of Prisons, Expectations Criteria for assessing the treatment of and conditions for detainees in court custody (2012) 3.
of ‘minimally effective’ or ‘detrimental’ indicate a residence is non-compliant with an OPCAT domain. We consider a... ‘developing’ rating to be a pass, but would expect [the detaining authority] to take action to improve its performance in the areas where development is required. In determining our ratings, we give particular weighting to the voices of children and young people and the residence’s responsiveness to mokopuna Māori, both of which are relevant across every domain we assess.  

**RECOMMENDATION:** The Inspectorate should independently determine the content of the expectations/standards, and it should make them publicly available.

**EXPECTATIONS/STANDARDS SHOULD NOT BE CONSTRAINED BY GOVERNMENT LEGISLATION, REGULATIONS OR POLICIES**

**THE INSPECTORATE SHOULD BE GUIDED BY BEST PRACTICE AND ACHIEVING POSITIVE OUTCOMES FOR DETAINEES**

Steinerte cautions against an NPM becoming ‘a kind of an auditor of government policy by assessing the extent to which the institution in question complies with criteria set out by the government.’

Owers, in explaining the importance of NPMs having independent standards that are not constrained by detaining authority and government standards, states that:

> [m]any targets and standards by which agencies work are focused on process or output – those are the easy things to measure. It is all too tempting to measure what is measurable rather than what is important. Our standards must be based on outcome not process, on quality not quantity... [NPMs] are also, as bodies committed to international human rights, interested in best practice rather than compliance with minimum standards. We may be seeking things that are not yet achievable.

She also notes that ‘[a]nother reason for independence is that in any institution good people can stop seeing things that are wrong because they become normalised.’

The role of the Inspectorate is to consider how to best mitigate the risk of torture and ill-treatment of detainees, and the experience of the detainee should be central to its work. The Inspectorate cannot be bound by the NTG’s or detaining authority’s legislation or policies, nor should it be overly focused on processes or output, rather than outcomes. In fact, the SPT clarifies that an NPM’s mandate actually includes ‘[p]erforming systematic reviews of interrogation rules, instructions, methods and practices and of arrangements for the detention and treatment of persons subjected to any form of detention in any territory

---

812 Ibid.
under a State party’s jurisdiction, with a view to preventing any cases of torture, and examining rules or instructions issued in regard to the duties and functions of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of detention in order to verify conformity with the Convention, the Optional Protocol and other human rights instruments.

HMIP - EXPECTATIONS

In assessing the health of prisons and other places of detention under [the] four tests, the Inspectorate developed detailed criteria, called Expectations, and set out the evidence that should underpin those criteria... They are not the same as the standards that those institutions may set themselves, or the targets... set by government, for a number of reasons. Standards and targets usually set the bottom line, not the best practice; they are likely to focus on process and output, rather than qualitative outcomes, and on cost rather than value (often measuring what is measurable rather than what is important); and in some settings or countries they may deviate from what is right. All institutions have a tendency to become self-referential and to have a default setting of institutional convenience.

HMIP - EXPECTATIONS FOR POLICE CUSTODY

Expectations for Police Custody sets out the framework and criteria used by the inspectorates to assess police custody arrangements and the outcomes for those detained. The Expectations are independent but are informed by the Police and Criminal Evidence Act (PACE) 1984 and its Codes, professional guidance to the police on detention and custody, and international human rights standards relevant to police custody.

OCI – PROCEDURES VS OUTCOMES

GLADUE PRINCIPLES

Despite incorporation into CSC’s policy framework, there is little evidence to suggest that Gladue principles are routinely applied by CSC authorities or making a tangible difference in the lives of Aboriginal people under federal sentence. ‘CSC has extended the application of Gladue factors to correctional decision-making, which means in practice that the circumstances of an Aboriginal offender must be considered in security classification, penitentiary placement, institutional transfers and administrative segregation decisions. ‘Short cuts and what appears to be a time-saving approach (template or checklist) are not likely to lead to better outcomes or more informed Gladue decision-making.

814 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [9d].
815 Ibid [9e].
820 Ibid.
NATIONAL NPM STANDARDS MUST BE SUFFICIENTLY FLEXIBLE TO BE APPLIED IN A CULTURALLY APPROPRIATE MANNER IN THE NT

The AHRC’s *OPCAT in Australia Interim Report* recommended that the:

Australian Government should commit to developing national standards on how inspections should take place, and that set minimum conditions of detention to protect the human rights of detainees. Those national standards should have legislative force, reflect international benchmarks and be developed through an open, independent process.  

The AHRC *OPCAT in Australia Interim Report* recognised that:

[n]ational standards setting out minimum conditions of detention would be... complex, because they would need to be tailored to the differing detention environments covered by OPCAT. Stakeholders suggested that such standards could be based on relevant international human rights law sources... [and] draw on existing models such as those developed by the SPT, the Association for the Prevention of Torture and the [AHRC].

The AHRC recommended that the standards address all issues of relevance under OPCAT and that the process of developing the standards be transparent and consultative.

Particularly in light of the fact that the NT does not have a human rights act or charter (unlike the ACT and Victoria), this report supports the AHRC recommendation that there be national standards, so long as they are sufficiently broad and flexible to be capable of being applied in a culturally appropriate way in the NT.

---

**RECOMMENDATION:** The expectations/standards should not be constrained by the NTG/detaining authority’s legislation, regulations or policies. This is essential to maintaining the Inspectorate’s independence.

The Inspectorate should not focus on detaining authorities’ and contractors’ outputs, but on outcomes for detainees.

---

**RECOMMENDATION:** Any national standards for NPMs should be based on international human rights law, be sufficiently broad and flexible to be capable of being applied in a culturally appropriate manner in the NT context, and should be complemented by expectations/standards specific to the NT context.

---

822 Ibid 29-30.
823 Ibid 29.
824 Ibid 30.
INTERNATIONAL HUMAN RIGHTS

The SPT has said that recommendations ‘should reflect, among other things, relevant international norms and practices.’ Murray et al have noted the challenge that arises if existing bodies other than ones founded on human rights are designated NPMs (such as ombudsmen), in that there would need to be a shift to a human rights based approach. The Inspectorate, being a new body, could ensure to centre human rights, alongside cultural competency, in all of its operations.

INTERNATIONAL HUMAN RIGHTS ARE MINIMUM STANDARDS

In a jurisdiction such as the NT, where there is no charter or act for human rights, and a robust human rights culture does not exist, it could be easy to fall into the trap of drafting recommendations that never exceed those human rights prescribed by international human rights law. A strong recommendation of this report is that international human rights guide the development of the expectations/standards, but it should be recalled that these rights are the bare the minimum, which can certainly be exceeded in Inspectorate expectations/standards that aim to mitigate the risk of torture and ill-treatment. As the APT has said, ‘[i]t should be remembered that international standards are minimum standards and can be exceeded in recommendations if the monitoring organisation considers this justifiable based on human rights, professional, best practice or other relevant grounds.’

The Inspectorate has the opportunity to make a contribution to the cultivation of the human rights culture of the NT, with the New Zealand experience being that ‘implementation of the OPCAT system has made the human rights standards relating to detention more visible, and with greater awareness has come improved understanding and application of those standards.’

HMIPS – STANDARDS
A HUMAN RIGHTS BASED APPROACH

HMIPS focuses on human rights in its standards, exemplifying best practice:
‘A human rights-based approach requires building the ability of the duty bearer to meet their obligations as well as enabling prisoners to understand and claim their rights. It includes a robust system of accountability for instances where human rights standards are not met... As a duty bearer, the state has certain obligations towards prisoners to ensure that their rights are upheld and enforced. The state has obligations to meet a high level strategic and policy direction, but also at the lower level implementation of policy and the knowledge and understanding of those involved. A human rights-based approach helps to develop the capacity of the state to meet all these obligations and ensures that human rights form the golden thread from policy through to practice.’

825 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [31].
827 Association for the Prevention of Torture, Briefing N°1 Making Effective Recommendations (November 2018) 5.
Three types of state obligation:
RESPECT: To refrain from interfering with the enjoyment of a right e.g. there is no arbitrary use of force
PROTECT: To prevent other parties from interfering with the enjoyment of rights e.g. thorough investigations into any incidents take place
FULFIL: To take active steps to put in place laws, policies, institutions, procedures and to allocate resources to enable people to enjoy their rights e.g. budgets are allocated in order to provide support for prisoners who require assistance.\(^{830}\)

The central components to a human rights-based approach have been distilled into five principles: Participation, Accountability, Non-discrimination and equality, Empowerment and Legality.\(^{831}\) The PANEL principles will mean that Inspectors and Independent Prison Monitors are looking to answer a number of additional questions relating to Participation, Accountability, Non-discrimination and equality, Empowerment and Legality to ensure that the [quality indicator] has met an adequate outcome.\(^{832}\)

HMIPS - STANDARDS
AN EXAMPLE OF A HUMAN RIGHTS BASED APPROACH TO STANDARDS

An example of how the HMIPS standards incorporate a human rights based approach is outlined below.

One of the HMIPS standards, standard 1, relates to ‘lawful and transparent custody’.

The standard is described as follows: ‘The prison complies with administrative and procedural requirements of the law, ensuring that all prisoners are legally detained and provides each prisoner with information required to adapt to prison life. The prison ensures that all prisoners are lawfully detained. Each prisoner’s time in custody is accurately calculated; they are properly classified, allocated and accommodated appropriately. Information is provided to all prisoners regarding various aspects of the prison regime, their rights and their entitlements. The release process is carried out appropriately and positively to assist prisoners in their transition back into the community.’\(^{833}\)

The ‘quality indicators’ used in assessing whether the standard is being met are listed,\(^{834}\) and then are further described through ‘features’ and ‘specifications’. For example, ‘[q]uality indicator 1.1 is that upon arrival, all prisoners are assessed regarding their ability to understand and engage with the admission process.’ Features of this quality indicator include ‘[p]roactivity to ensure understanding.’ One of the specifications for this quality indicator is ‘[t]he prisoner’s ability to understand is a paramount consideration as soon as they enter the prison establishment.’


At the end of the section for the standard, any further legal standards relevant to indicators are included (eg. ‘Council of Europe Recommendation on Juvenile Offenders Subject to Sanctions or Measures 2008 Section 63.2\(^{836}\)).
Also included under the standard, are some ‘[q]uestions which may be helpful in monitoring and inspecting the PANEL principles.’ For example, under participation, one question is: ‘[a]re prisoners able to seek clarification at any point during the admission or release process?’ It is also noted that ‘protected characteristics must be considered and referenced throughout.’

OMBUDSMAN’S SITE AND THEMATIC REPORTS – DETAINING AUTHORITY HAS BREACHED CAT (DEGRADING TREATMENT)

There are also opportunities for the Inspectorate to make explicit findings of breaches of human rights law, particularly in relation to the CAT, as the Ombudsman has done.

‘All cells, including the unscreened toilets, were subject to CCTV monitoring, which was displayed in the staff base and master control. The cameras could be viewed by anyone entering the staff base and presented a significant privacy issue. The Department of Corrections’ policy for toilets in the ISU cells to be unscreened gave prison staff (and others) the ability to observe, either directly or through camera footage, prisoners undertaking their ablutions or in various stages of undress. I consider that this amounts to degrading treatment or punishment for the purpose of Article 16 of the Convention against Torture.’

‘The use of the tie-down bed in New Zealand prisons... All of these prisoners were assessed as at risk of suicide or self-harm and they were all being managed in ARUs. I believe in each of these cases their care was in breach of Article 16 of the Convention, i.e. amounting to inhuman and/or degrading treatment of prisoners.’

ICV – DETAINING AUTHORITY COMPLIANCE WITH HUMAN RIGHTS ACT

‘In carrying out... functions, the [Northern Ireland Policing Board] is under a further duty, namely to monitor the performance of the police in complying with the Human Rights Act 1998.’ ‘In monitoring PSNI’s compliance with the Human Rights Act 1998, the Policing Board... will continue to keep under the review the arrangements for the Independent Custody Visitors Scheme and critically assess the Reports of the custody visiting teams.’

837 Ibid 1.
838 Ibid 2.
842 Ibid 12.
SHOULD ALSO BE RESPONSIVE TO FINDINGS AND RECOMMENDATIONS FROM INTERNATIONAL TREATY BODIES

NPM - ANNUAL REPORT
TREATY BODIES’ RECOMMENDATIONS

Recommendations from the Universal Periodic Review relevant to the mandate of the NPM included ‘to allow for individual complaints under CAT; enact a complete prohibition on torture; take measures to improve prisoner safety and conditions in prisons; consider adopting action plans to reduce prison crowding and to address self-harm in prisons.’

The Committee on the Rights of Persons with Disabilities recommended ‘the investigation and elimination of all forms of abuse of persons with disabilities in institutional facilities; and eradicating the use of restraint for reasons related to disability within all settings.’

RECOMMENDATION: The Inspectorate should centre international human rights in its operations, including the expectations/standards it utilises. The Inspectorate should use its expectations/standards to identify conditions or treatment in detention that amount to a breach of human rights recognised under international law. Rather than being viewed as aspirational, it should be recalled that international human rights standards are minimum standards. The Inspectorate can use expectations/standards that exceed these minimum standards as appropriate.

INCORPORATING INTERNATIONAL EXPERT VIEWS

The Inspectorate should review expert opinions on detention practice internationally. This can be done as a desk review, or as the New Zealand NPM has done, by directly engaging the services of an expert.

OPCAT SPECIAL FUND – REVIEW OF SECLUSION AND RESTRAINT PRACTICES

THE SPT VISIT TO NEW ZEALAND AND CONCLUSIONS OF OTHER UN BODIES
‘The Subcommittee on the Prevention of Torture visited New Zealand in 2013. In relation to seclusion and restraint practices, the Subcommittee recommended the immediate cessation of the practice of holding prisoners in prolonged detention in disciplinary cells based on perceived security risk and that the protection of vulnerable detainees should not be achieved at the cost of their own detention conditions.
‘The issue [of seclusion and restraint] has also been addressed by the United Nations Committee against Torture, most recently in concluding observations made following New Zealand’s 6th periodic review in 2015... In 2014 the United

844 Ibid.
845 Sharon Shalev, A Review of Seclusion and Restraint practices in New Zealand (28 April 2017) 4-5.
Nations Committee on the Rights of Persons With Disabilities, also recommended in its concluding observations, that immediate steps be taken to eliminate the use of seclusion and restraints in medical facilities.\textsuperscript{846}

THE UN SPECIAL FUND

The purpose of the UN Special Fund is ‘to help finance the implementation of the recommendations made by the Subcommittee on Prevention after a visit to a State Party, as well as education programmes of the national preventive mechanisms.’\textsuperscript{847}

‘In late April 2017 the Commission released Dr Shalev’s report, Thinking Outside the Box – A review of seclusion and restraint practices in New Zealand. This report outlined several serious concerns about New Zealand’s seclusion and restraint practices. The report was completed with funding from the Office of the United Nations High Commissioner for Human Rights, through the Special Fund of the OPCAT. It was commissioned by the Human Rights Commission to provide an independent perspective on seclusion and restraint practices in several different detention contexts and to identify areas of best practice, as well as areas that require improvement.’\textsuperscript{848}

REPORT DRAFTED BY INTERNATIONAL EXPERT

‘Dr Shalev is an international expert in the field of solitary confinement and seclusion. She is a research associate at the Centre for Criminology at the University of Oxford and a Fellow of the Mannheim Centre for Criminology at the London School of Economics and Political Science. She completed her doctorate on American Supermax Prisons, is the author of the influential Sourcebook on Solitary Confinement and has recently completed a comprehensive study of segregation units and close supervision centers in England and Wales.’\textsuperscript{849} ‘The views expressed by Dr Shalev do not necessarily represent those of the Human Rights Commission or the individual National Preventive Mechanism partners. However, they provide an important catalyst for further discussion and action.’\textsuperscript{850}

\textbf{RECOMMENDATION:} \textit{The Inspectorate should incorporate into its expectations/standards international expert opinions and advice as appropriate.}

\textbf{STANDARDS VS EXPECTATIONS: BEST PRACTICE OVERSEAS}

\textbf{HMIP – EXPECTATIONS & INDICATORS}

HMIP has sets of expectations for different types of places of detention and different groups of detainees.\textsuperscript{851} Expectations are assessed against indicators,\textsuperscript{852} which ‘describe evidence that may show [an] expectation being met, but do not exclude other ways of achieving it.’\textsuperscript{853}

\textsuperscript{846} Ibid 5.
\textsuperscript{847} See also OPCAT National Preventive Mechanism, New Zealand’s 6th periodic review under the Convention against Torture (February 2015).
\textsuperscript{848} Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 26(1).
\textsuperscript{849} Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2016 to 30 June 2017 (June 2018) 1.
\textsuperscript{850} Sharon Shalev, A Review of Seclusion and Restraint practices in New Zealand (28 April 2017) 1.
\textsuperscript{851} Ibid.
\textsuperscript{852} Her Majesty’s Inspectorate of Prisons, Our Expectations, <https://www.justiceinspectorates.gov.uk/hmiprisons/our-expectations/>
\textsuperscript{853} Her Majesty’s Inspectorate of Prisons, Expectations Criteria for assessing the treatment of and conditions for men in prisons (2017) 6.
\textsuperscript{854} Ibid 15.
HEALTHY PRISON TESTS

‘Expectations are the documents which set out the criteria we use to inspect prisons and other forms of detention. They are based on international human rights standards and are used to examine all aspects of life in detention... The tests vary slightly but all have been developed from our four tests of a healthy prison, which are:

Safety: Prisoners, particularly the most vulnerable, are held safely.
Respect: Prisoners are treated with respect for their human dignity.
Purposeful activity: Prisoners are able, and expected, to engage in activity that is likely to benefit them.
Rehabilitation and release planning: Prisoners are supported to maintain and develop relationships with their family and friends. Prisoners are helped to reduce their likelihood of reoffending and their risk of harm is managed effectively.
Prisoners are prepared for their release back into the community.'

HMIPS – STANDARDS, QUALITY INDICATORS, FEATURES, SPECIFICATION AND LEGAL STANDARDS

HMIPS uses specifications, where HMIP uses indicators.

‘Each Standard has a number of Quality Indicators (QIs) which are graded individually to inform the overall grade for the Standard as a whole. Under each QI, there is a “Features” section, a “Specification” section and a “Legal Standards” section.

“Features” gives a brief overview of the themes in the QI and the key areas of interest to guide Inspectors and Independent Prison Monitors.
“Specification” provides a more detailed description of evidence that could demonstrate that the outcome has been achieved for prisoners in relation to the QI. However, this description is neither exhaustive nor prescriptive and does not preclude the establishment from proving that the appropriate outcomes have been met by alternative means. It is for the Inspector or Independent Prison Monitor (IPM) to analyse what they observe and come to a judgement about whether the outcome has been met.

“Legal Standards” includes the relevant sections of both domestic law and human rights law which apply to the QI. Reference to independent legal sources is important because these provisions inform HMIPS as to what constitutes a satisfactory outcome for prisoners. HMIPS will be looking to what outcome is expected in the Legal Standards and measuring the performance of an establishment against these rather than their own subjective judgement. Also included in the “Legal Standards” section is reference to the PANEL principles.'

HMICS – INSPECTION FRAMEWORK

‘Each theme is supported by a range of indicators setting out what we expect to find during our inspections. In relation to custody inspections, our ‘outcomes’ theme features additional indicators specific to custody. These focus on the treatment of and conditions for detainees.’

‘Our inspections are based on an inspection framework which ensures a consistent and objective approach to our work. The framework consists of six themes: Outcomes; Leadership and governance; Planning and process; People; Resources; Partnerships. Each theme is supplemented by a range of indicators setting out what we expect to find during our inspection.’

---

854 Her Majesty’s Inspectorate of Prisons, Our Expectations, <https://www.justiceinspectorates.gov.uk/hmiprisons/our-expectations/>
856 Her Majesty’s Inspectorate of Constabulary Scotland, HMICS Custody Inspection Framework (13 May 2015) 1.
857 Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of custody centres across Scotland (October 2018) 3.
**OCC – OPCAT DOMAINS & MOKOPUNA MĀORI**

The OCC assesses ‘compliance against the six OPCAT domains: treatment, protection system, material conditions, activities and contact with others, medical services and care, and personnel. At two of these visits, we also assessed their performance against other domains from our general monitoring framework, with a particular focus on the quality of: leadership and direction, people development, social work practice, and partnerships and networks.’ In the New Zealand context, we always assess responsiveness to mokopuna Māori, who make up more than 70% of young people in youth justice residences. *\textsuperscript{858}*

---

**OMBUDSMAN – SIX CORE INSPECTION CRITERIA**

‘I have developed six core inspection criteria (the criteria), each of which describes the standards of treatment and conditions in prison. These criteria are underpinned by a series of indicators that describe evidence Inspectors look for to determine whether the treatment and conditions are conducive to preventing torture, or cruel, inhuman or degrading treatment or punishment, or impact adversely on detainees. The list of indicators underpinning the criteria is not exhaustive, and does not preclude a prison demonstrating that the expectation has been met in other ways. This was the seventh full inspection undertaken using my new inspection criteria. These criteria are being trialled and refined as necessary. On completion of the trial, I will publish the criteria on my website. I propose to update the criteria over time. The following criteria were examined during the 10-day inspection: Criteria 1: Treatment; Criteria 2: Reception into prison; Criteria 3: Decency, dignity and respect; Criteria 4: Health and wellbeing; Criteria 5: Protective measures; Criteria 6: Purposeful activity and transition to the community. *\textsuperscript{859}*

For example, for criteria 1: treatment:

‘Expected outcomes... The Prison has robust oversight measures and standards in place for preventing torture and other cruel, inhuman or degrading treatment or punishment. Such protection measures are subject to regular review by senior managers to ensure standards are consistently achieved. The Prison takes all reasonable steps to ensure the safety of all prisoners. Prisoners live in a safe and well-ordered environment where positive behaviour is encouraged and rewarded. Unacceptable behaviour is dealt with in an objective, fair and consistent manner. There is regular and responsive consultation with prisoners about their safety.’ *\textsuperscript{860}*

---

**RECOMMENDATION:** The Inspectorate should consider adopting HMIP’s approach of having sets of expectations, as opposed to standards, when conducting inspections. The expectations should make clear which human rights standards (and any other relevant standards) relate to particular expectations. These expectations should be assessed against indicators, ‘evidence that may show [an] expectation being met.’

---


\*\textsuperscript{860} Ibid 7-13.
Included below are some examples of expectations that the Inspectorate should consider including in its own expectations.

**HMIP - EXPECTATIONS FOR MEN IN PRISONS**

Expectations under leadership (‘when leadership has an observable impact on outcomes for prisoners... how leadership supports or obstructs the achievement of other expectations’\(^{861}\)) include ‘[r]espectful outcomes for prisoners are supported by effective leadership and management,’ for which there are indicators such as ‘[t]here is a clear strategy for listening to and taking account of prisoner perceptions’\(^{862}\).

Expectations under diversity (‘[t]here is a clear approach to promoting equality of opportunity, eliminating unlawful discrimination and fostering good relationships. The distinct needs of prisoners with particular protected characteristics and any other minority characteristics are recognised and addressed.’\(^{863}\)) include ‘[p]risoners with protected characteristics and any other minority characteristics are treated equitably and according to their individual needs’, for which there are indicators such as ‘[s]taff make reasonable adjustments to ensure that prisoners with protected characteristics can participate in activities which meet their needs’\(^{864}\).

**HMIP – EXPECTATIONS FOR COURT CUSTODY**

Some notable inclusions in HMIP’s expectations relating to court custody focus on transport to court (including detainees not being held in vehicles while waiting for their case to be heard in court)\(^{865}\) and being treated with respect and their diverse needs being addressed (including being protected from publicity and hygiene packs being provided to women).\(^{866}\)

For example, under the expectation that ‘[f]orce is only used as a last resort and is proportionate and lawful,’ there are indicators such as ‘[d]etainees are not routinely handcuffed when being moved within secure areas.’\(^{867}\)

**HMIP – EXPECTATIONS FOR POLICE CUSTODY**

Some notable inclusions in HMIP’s expectations relating to police custody are first contact and opportunities for diversion,\(^{868}\) and that ‘[d]etainees have access to swift justice... Bail conditions are proportionate, legitimate and necessary to manage the risks posed by the suspect.’\(^{869}\)

---

\(^{861}\) Her Majesty’s Inspectorate of Prisons, Expectations Criteria for assessing the treatment of and conditions for men in prisons (2017) 4.

\(^{862}\) Ibid 36.

\(^{863}\) Ibid 23.

\(^{864}\) Ibid 25.


\(^{866}\) Ibid 7, 8.

\(^{867}\) Ibid 9.


\(^{869}\) Ibid 17-18.
**RECOMMENDATION:** The Inspectorate should have tailored sets of expectations/standards for the different types of detention that will fall within its mandate, including, but not limited to the following: prisons (including work camps), police custody, court custody, youth detention facilities, bail supported accommodation, transport (including cars, planes and boats), detention while receiving medical care ‘offsite’ (eg at hospitals).

---

**HMIP – EXPECTATIONS FOR WOMEN IN PRISON**

‘[HMIP’s] Expectations for women in prison differ from our previous general adult Expectations where: provision needs to be different to men based on different needs, consistently poorer outcomes for women on a specific issue warrant greater focus, the incidence or nature of particular issues in women’s prisons merits a different emphasis or approach, for example: victimisation, bullying, children and families.’

The Inspectorate should consider incorporating the below expectations:

Expectations include that the ‘safety of women’s children and other dependents is assessed and safeguarded,’ for which there are indicators such as ‘[a]ppropriate action is taken to identify children or other dependents who may be at risk as a result of the carer’s imprisonment and take action to promote their safety where necessary; Women are allowed the time and facilities necessary (including free phone calls) to make arrangements for children and other dependents… Breastfeeding women are identified and given appropriate advice and support by a health care practitioner. The names, ages and current care arrangements for women’s children or other dependents are recorded on reception, and subsequently used to generate a support plan…. All women with dependents are referred to a family support worker and offered services to reduce the trauma of separation.’

Another expectation is that when ‘women are physically restrained, it is for the minimum amount of time necessary, by trained staff using approved techniques… [s]taff working in women’s prisons are aware of which women are pregnant and are specifically trained in the control and restraint of pregnant women.’

---

**RECOMMENDATION:** The Inspectorate should have a different set of expectations/standards for particular groups of detainees with unique needs (particularly children and women).

---

**A NOTE ON ESCORTED TRANSFERS/TRANSPORT**

Movement and transfer of detainees in the NT will often involve long distances, potentially to and from very remote locations, by vehicle, plane and boat.

APT and Penal Reform International have identified the risks involved during transport:

---

872 Ibid 41.
Transport from the place of arrest to the police station, from the initial place of detention to another facility, and from detention to court, are also situations of particular risk... Conditions experienced by detainees during transport may also give rise to concerns about inhumane or degrading treatment. This might include crowded vehicles, inadequate temperature and ventilation and lack of consideration for hygiene... There are few standards that prescribe safeguards to prevent torture and ill-treatment during the transport of detainees, and safeguards in place for police stations and detention centres, such as video cameras, are also typically absent during this period.\textsuperscript{873}

The risks associated with transport were demonstrated in the WA case of Mr Ward, ‘an Aboriginal elder who died from heatstroke while being transported from Laverton to Kalgoorlie by Department of Corrective Services’ contractors, [despite warnings] that the use of the vehicle used to transport Mr Ward would be inhumane for anything other than a short trip.’\textsuperscript{874}

It is thus important that the Inspectorate give appropriate attention to the transport of detainees, although inspecting this aspect of detention might be logistically slightly trickier (which is why thematic inspections, for example, might be an appropriate approach to oversight). Of note, the NT OPCAT legislation relating to SPT visits includes in the definition of place of detention ‘vehicles used to convey detainees,’\textsuperscript{875} and it is anticipated that the NTG would be consistent in the definition it uses in the corresponding NT NPM legislation.

\begin{itemize}
\item HMIP – EXPECTATIONS FOR PLANES FOR OVERSEAS ESCORT
\item Although the below comes from HMIP's expectations in relation to escorts of immigration detainees, this set of expectations could still be useful to the Inspectorate when drafting its own expectations in relation to escorts of detainees or prisoners in planes in the NT. For example:
\item ‘Detainees are adequately prepared for the removal. They are treated with respect and sensitivity at the initiation of the journey, and staff understand individual needs and risks,’ with indicators including ‘[d]etainees considered vulnerable have a risk assessment and a care plan where appropriate, which travel with them at all times. Information relating to health and special needs, such as whether... they are at risk of harm to themselves or others, is relayed to escort staff.’\textsuperscript{876}
\item ‘Detainees’ health needs are met,’ with indicators including ‘[a]ll detainees have immediate access to health care from suitably qualified staff, and detainees with significant health needs have easy access to health care professionals;
\end{itemize}

\textsuperscript{873} Penal Reform International and the Association for the Prevention of Torture, Pre-trial detention: Addressing risk factors to prevent torture and ill-treatment (2015) 4-5.
\textsuperscript{874} National Aboriginal and Torres Strait Islander Legal Services, Submission No 47 to Australian Human Rights Commission, OPCAT in Australia Consultation, July 2017, 4.
\textsuperscript{875} Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018 (NT) s4: ‘(1) A place of detention means any place that the Subcommittee must be allowed to visit under Article 4 of the Optional Protocol that is subject to the jurisdiction and control of the Territory. Note for subsection (1): Under Article 4 of the Optional Protocol the Subcommittee may visit any place under the Territory’s jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence. (2) Without limiting subsection (1), any of the following places that are subject to the jurisdiction and control of the Territory and in which persons are involuntarily deprived of their liberty are places of detention for the purposes of this Act: (a) a correctional centre, prison, detention centre or other similar place (however described); (b) a part of a facility: (i) at which health services are provided; and (ii) where a person may be held under restraint or in seclusion or isolation; (c) a police station or court cell complex; (d) a vehicle used or operated to convey detainees.’
\textsuperscript{876} Her Majesty’s Inspectorate of Prisons, Expectations for immigration detention: Criteria for assessing the conditions for and treatment of immigration detainees (2018) 157.
Detainees who need to take medication during escort are able to do so. Before removal, detainees are provided with a summary of their medical notes or discharge letter to ensure continuity of care.877

HMIP - THEMATIC REVIEW OF TRANSFERS AND ESCORTS

As noted above, a thematic review of transport could be an approach adopted by the Inspectorate. Prior to the thematic report referred to below, HMIP had undertaken three previous thematic reports on detainees under escort.878

‘Inspections across the settings we inspect have separately identified some areas of concerns with escort services. This thematic report collates these findings to provide a national and comprehensive overview of detainee and children’s treatment and experiences during escorts and transfers in England and Wales.879 As part of the methodology of the inspection, an analysis was conducted of previous inspections’ findings.880 HMIP ‘carried out an analysis of survey data on transfers and escorts collected during our routine inspections of prisons and YOIs.881 HMIP also referred to the Lay Observers’ previous findings.882

A NOTE ON STAFF AT PLACE OF DETENTION

THE LINK BETWEEN TREATMENT OF STAFF AND STAFF TREATMENT OF DETAINEES

As already raised in this report, the Inspectorate should include in its expectations/standards the working conditions for detention staff. How detention staff are treated can affect how staff, in turn, treat detainees and whether qualified staff can be successfully recruited and retained. For example, the Independent Review of Ontario Corrections identified that ‘negative experiences of staff have a direct impact on how those imprisoned will experience their custody and that, in turn, unfair or abusive treatment can contribute to assaultive and violent inmate behaviour.883

Penal Reform International (PRI) and APT have described how work cultures impact on staff working conditions, which then impact on the risk of torture or ill-treatment of detainees. For example, a prison culture where ‘prison officers ‘see themselves as part of an unvalued, unappreciated occupational group... [including] a perception that managers are bureaucrats who do not understand the nature of the operational work, the dangers and difficulties involved, and that prison management does not properly support officers’ can in turn affect staff ‘motivation and on how they treat prisoners. Negative experiences and emotions are usually linked to a lower quality of life for prisoners.885

877 Ibid 168.
878 Her Majesty’s Inspectorate of Prisons, A thematic review by HM Inspectorate of Prisons: Transfers and escorts within the criminal justice system (December 2014) 17.
879 Ibid 15.
880 Ibid 21.
881 Ibid.
882 Ibid 18.
885 Ibid 3.
The Howard League’s research briefing on the role of prison officers considers how improved conditions for staff can improve conditions of and treatment in detention.

‘Many of today’s problems stem from the lack of value placed on the role of the prison officer, both by employers and in wider society... Prison officers feel they have been overstretched and neglected. Their ideas on how things could be improved are all too often ignored... Ministers, officials and prison leaders must demonstrate that they value prison officers and the work they do by focusing on professionalising the officer role and creating clear career paths that enable experienced and skilled officers to progress. The impact of placing more value on prison officers and providing working environments in which they contribute and succeed cannot be understated. As one prison officer put it, ‘If staff feel they are being taken seriously and their welfare is being looked after... this will feed back to the prisoners: there’ll be better working relationships, better morale.’

‘Many officers no longer felt that they could make a difference as the conditions in their prisons meant they could not form quality relationships with prisoners. Low staffing levels, high workloads and frequent rotations to different parts of the prison made many officers feel powerless to achieve what they saw as a central part of their role.’

HMIP’s thematic review on race relations in prisons found that minority ethnic staff faced unique challenges in their role. For some, this impacted on the way they interacted with minority ethnic detainees, as they did not want to alienate their white colleagues.

‘In these circumstances being a minority ethnic member of staff is a difficult role. Prisoners from minority ethnic groups who believe that white staff favour white prisoners might logically expect black staff to do the same for them, and visible minority staff confirmed that some minority ethnic prisoners did approach them more readily than white staff. In these circumstances some visible minority staff were loath to alienate their white colleagues whose support they needed, and took a tough line with visible minority prisoners for this reason. Some tried to pursue issues raised, avoiding trigger words such as ‘discrimination’ or ‘racism’, and others took a particular interest in visible minority prisoners’ needs despite the consequences. At interview, 31% of visible minority staff said they dealt differently with black and Asian prisoners, another 31% said they did partly, and 37% said they responded no differently to visible minority prisoners. They made the following comments:

‘I don’t like the word racism. I don’t see black or white’
‘You have to be careful when using the word “discrimination”. You have to say unequal treatment’
‘I try and get the prisoners not to use the word “racism”, because officers switch off when they hear that word. They stop listening. It’s best to resolve things informally’
‘My problems are not with the inmates, but with staff only. They see me talking to black inmates and they see it as a problem.’

Howard League for Penal Reform, The role of the prison officer: research briefing (2017) 2-3
Ibid 3.
Her Majesty’s Inspectorate of Prisons, Parallel worlds: A thematic review of race relations in prisons (December 2005) 23.
STANDARDS/FRAMEWORKS REFLECTING THE WORKING CONDITIONS AND NEEDS OF DETENTION STAFF

IMB – MONITORING FRAMEWORK

‘Although Boards have no comparable responsibilities for staff, staff problems which affect those held in custody or detention are the Board’s proper concern.’

HMIPS – STANDARDS RELATING TO CONDITIONS FOR PRISON STAFF

HMIPS has included in its standards that ‘Staff at all levels and in each functional staff group understand and respect the value of work undertaken by others’ and that “Good performance at work is recognised by the prison in ways that are valued by staff.” Specifications under these standards include:

- ‘there is a unity of purpose, supportive environment and mutual trust between colleagues in the establishment. There are arrangements in place which enable management to consult with staff on matters to do with their working conditions’ and
- ‘A formal system exists for managing poor performance and attendance. The prison deals effectively with issues of sickness and absence. This is seen positively by staff and they feel it works well. A system of annual appraisals functions well and good performance is recognised visibly in a meaningful way. Recognition of good work occurs on both a local level and on a national level where appropriate. Staff at all levels feel their work is valued.’

HMICS – INSPECTION FRAMEWORK

‘Police Scotland/Custody Division work with staff groups and trade unions to develop and review people policies, strategies and plans… [that] recognise and value people’s contributions… encourage people to share information, knowledge and good practice and involve people in reviewing and improving the organisation while working together as a team… provide a healthy and safe working environment, promote and encourage work-life balance and focus on the wellbeing of their employees.’

RECOMMENDATION: The Inspectorate should recognise that the treatment of staff is directly linked to treatment of detainees by staff, and its expectations/standards should reflect this.

---

891 Ibid 8.
892 Ibid 7.
893 Ibid 8.
THE INSPECTORATE SHOULD ASSESS HOW THE CULTURES OF INSTITUTIONS IMPACT ON THE TREATMENT OF PRISONERS AND DETAINERS

Stevens (Penal Reform International/APT) addresses the significance of institutional culture in preventive work, defining culture in places of detention as:

- the shared assumptions and values of staff and detainees, which guide behaviour within the detaining organisation. These are the shared attitudes about what is important within the detaining organisation, how problems are solved and what type of behavior is acceptable. Staff working in places of detention are socialised into the culture of the organisation and it can be difficult for them to step back and assess it objectively or break out of it.

The culture in detention develops:

- gradually over time through a complex mix of factors internal and external to the organisation. These include...
  - the idea of what the organisation does and why. This can be set by legislation and public policies as well as by management in explicit policies. However, just as important are unwritten rules and informal endorsement by managers which motivate the behaviour of staff.

As Stevens notes, 'cultures... endure beyond individuals who come and go.'

HOW CULTURES ARE SHAPED BY INFLUENCES EXTERNAL TO THE PLACE OF DETENTION

BROADER SOCIETAL ATTITUDES

Stevens cautions that, '[a]lthough places of detention seem completely cut off from the outside world, in reality they do not exist in a vacuum. Cultures within them are influenced by broader societal attitudes, including public opinion, media narratives and dominant beliefs in the wider institutional framework in which the deprivation of liberty takes place.' Nowak recalls often being asked 'why he seems to be more concerned with the human rights of criminals than with the human rights of victims of crime.' He has said, of members of the public, that '[t]o justify their lack of empathy with detainees, they hold that 'since these people are behind bars, they must have done something wrong and deserve to be treated that way.' Huber describes how public opinion tends to range from indifference to '[calls] for harsh treatment and regimes in detention, not factoring in that imprisonment itself constitutes the sanction handed down by courts and should not be compounded by inhumane treatment or abuse in prison, attitudes which are 'rarely countered by political actors or authorities.'

---

896 Ibid.
897 Ibid 5.
898 Ibid.
899 Manfred Nowak, Special rapporteur on the question of torture, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms: Torture and other cruel, inhuman or degrading treatment, UN Doc A/64/215 (3 August 2009) [46].
900 Ibid.
902 Ibid.
HMIPS’ standards include an assessment of how the prison engages with the media, the public and the local community, which is a particularly commendable, as this creates an expectation that the detaining authority take responsibility for providing information to and building relationships with those external stakeholders, which, in turn, have the potential to either impede or support progress towards more humane conditions and treatment in detention.

The standard provides that:
‘The prison is effective in communicating its work to the public and in maintaining constructive relationships with local and national media... The prison has a recognised outward focus and is proactive in engaging with the public in a general, but also in a more localised sense to the surrounding community. All appropriate means of informing the public about the work of the prison are employed, in order to encourage better public understanding of the role of the prison in the community. Examples of engagement with the local community may include working with schools, faith institutions, community centres, groups for children and young people. The prison also has effective links with media groups either online with social and broadcast media, or in print.”

“TOUGH ON CRIME” RHETORIC

Huber discusses how security and dignity are balanced in places of detention, and how this is impacted by political or media pressure to adopt a “tough on crime” approach. Such an approach can adversely impact on the rights of detainees, including in relation to the prohibition of torture. The APT, for example, has noted how public perception that children frequently offend can lead to increased pressure for punitive responses, which in turn undermines children’s rights, often in the context of ‘a lack of public awareness of the conditions and treatment of children deprived of their liberty.’ The Special Rapporteur has identified how a ‘tough on crime approach’ can result in an increased reliance on incarceration, overcrowding in prisons, and an increased risk of torture or ill-treatment associated with the resultant deterioration of conditions and treatment in detention. It can also lead to further restrictions on the liberty of those who are incarcerated, such as the use of solitary confinement. As Sapers and Zinger have attested, ‘[t]he need for independent oversight increases when law and order become politicized,’ with oversight functioning as ‘an effective counterweight to the natural tendency of large social control institutions to overreact to social and political pressures.”

---

804 Ibid 6.
806 Nilis Melzer, Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN DocA/73/207 (20 July 2018) [40].
UNDERSTANDING THE CULTURE OF THE INSTITUTION OR PLACE OF DETENTION

Stevens notes that:

[t]here may... be incongruence between outwardly professed values of a place of detention and how its culture develops in reality. Monitoring bodies will need to examine cultural attributes at all levels to fully understand the culture of a detaining organisation. Although these bodies will often have an intuitive feeling for what the culture is, it may be a challenge for them to stand back, assess it objectively and analyse it in a way that can be communicated. This can take time and regular engagement and therefore means that the culture of an institution cannot be assessed within a short visit.909

HMICS has similarly recognised that the ‘vision of leaders’ may not be reflected by practice on the ground.910

The Inspectorate will need to interrogate the ‘[u]nderlying assumptions which make up the unspoken rules of the organisation... [that] may not be expressed on the conscious level and can thus be difficult for outsiders to detect.’911 This might entail assessing whether there exists a culture of violence,912 ‘a hostile ‘us and them’ attitude... between staff and persons deprived of their liberty,’913 a culture of impunity,914 or a culture ‘contrary to human rights principles.’915

The Inspectorate should particularly focus on whether there exists a culture of human rights in detention, given that in the NT there exists no human rights act or charter or human rights commission, and the Special Rapporteur has recognised that ‘[t]orture and ill-treatment are more likely to persist in a system that lacks a strong institutional human rights framework.’916 A culture contrary to human rights might be evidenced by views of ‘persons deprived of their liberty as lesser beings or as having forfeited their rights through committing wrongs’917 or ‘detainees... [losing] their status as individuals in the eyes of staff, becoming more like ‘inanimate objects.’’918

910 Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of the strategic arrangements for the delivery of police custody (June 2019) 10.
912 Ibid 9.
913 Ibid.
914 Ibid: ‘A culture of impunity exists when there is a general tolerance of human rights abuses in places of detention and those responsible are not held to account – whether in criminal, civil, administrative or disciplinary proceedings – or when penalties are too lenient to act as a deterrent. Pacts of silence among staff, also known as ‘esprit de corps’ (the practice of not reporting or covering up acts of wrongdoing by colleagues), contribute to such a culture. Impunity is entrenched when rule of law institutions fail to provide accountability, including through impartial investigations and prosecution of perpetrators. The UN Special Rapporteur on torture has highlighted that impunity is a major root cause of the on-going prevalence of torture and other ill-treatment in many countries.’
915 Ibid 7.
916 Nils Melzer, Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN DocA/73/207 (20 July 2018) [36].
918 Ibid.
Stevens notes that:

[t]here is often scepticism among staff of places of detention about human rights: that they actually mean giving privileges to the detainees to the detriment of the needs of the staff. In reality however, moving the culture of places of detention to one based on human rights can bring important benefits for both staff and persons deprived of their liberty.\textsuperscript{219}

\textbf{RECOMMENDATION: The Inspectorate should assess how the culture of the detaining authorities impacts on the treatment of prisoners and detainees. It should, for example, consider whether there exists a culture of impunity or a culture contrary to human rights.}

\textbf{The Inspectorate should recognise that the culture of institutions may not align with their “outwardly professed values.” It should consider how these cultures are shaped by external influences, including the political climate and media coverage.}

\section*{THE INSPECTORATE SHOULD REGULARLY REVIEW AND UPDATE EXPECTATIONS/STANDARDS}

The Inspectorate should regularly review and update its expectations (as does HMIP,\textsuperscript{920} the New Zealand Ombudsman\textsuperscript{921} and Office of the Children’s Commissioner\textsuperscript{922}), incorporating learnings from its own operations, improvements in practice among other NPMs and developments and advances in fields relevant to the Inspectorate’s work (eg. healthcare provision in prisons\textsuperscript{923}).

\textbf{RECOMMENDATION: The Inspectorate should regularly review and update its expectations.}

\textsuperscript{219} Ibid 12.
\textsuperscript{920} Her Majesty’s Inspectorate of Prisons, \textit{Guide for inspectors} (2018) 20-21: ‘New and developing subject areas (inspection practice papers). In addition to the subject areas covered in Expectations there will be new and developing areas requiring attention during inspections. Any new and developing inspection practices will be circulated by the Management Board in a practice paper. Management Board practice papers will be disseminated electronically and stored alongside the manual, categorised by healthy establishment test for easy retrieval. As inspection practice develops and evolves this will be included formally in the relevant version of Expectations as it is updated and reprinted.’
\textsuperscript{921} Her Majesty’s Inspectorate of Prisons, \textit{Expectations for police custody: Criteria for assessing the treatment of and conditions for detainees in police custody} (2018) 3: ‘This is the third version of Expectations for police custody, the standards by which we inspect outcomes for detainees in police custody. The Expectations were updated in May 2018 to reflect changes introduced by the Policing and Crime Act 2017.’
\textsuperscript{922} Human Rights Commission, \textit{Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2017 to 30 June 2018} (April 2019) 19: ‘This year, we further reviewed our trial prison inspection criteria and incorporated prisoner focus groups, staff forums and regular unit prison population checks into our inspection methodology. It is our intention to publish these criteria once they have been developed fully and undergone consultation.’
\textsuperscript{923} Ibid 13: ‘Another significant project we have underway is... an evaluative rubric to increase the transparency and robustness of our OPCAT monitoring. The OPCAT rubric will define good practice for every element we assess under each OPCAT domain. The new rubric will consist of a four point rating scale – excellent, good, inadequate and harmful – where the highest two ratings represent compliance with the OPCAT standards and the lowest two ratings show non-compliance. We expect to begin piloting the new rubric by July 2019.’
\textsuperscript{921} The Association of Members of Independent Monitoring Boards, \textit{Independent Monitor}, Issue 126 (February 2019) 8-9: ‘Dr Miranda Davies is a senior research analyst at the Nuffield Trust, and is leading an 18-month research project exploring prisoners’ physical healthcare needs and quality of care. As the project reaches the 12-month mark she reflects on the experience so far of carrying out research in prisons and looks ahead to the potential implications of the work for monitoring prison healthcare.’
EXPECTATIONS/STANDARDS AND FRAMEWORKS FOR CULTURALLY COMPETENT INSPECTIONS
DATA SOVEREIGNTY: THE DATA COLLECTED MUST BE RELIABLE AND APPROPRIATE TO INFORM THE INSPECTORATE’S RECOMMENDATIONS

As the Inspectorate establishes its inspection framework, expectations/standards and designs the surveys that it will use in places of detention, it is essential that it consults with the NT Aboriginal community and ACCOs to ensure that its standards and the data it collects will advance the objective of preventing the torture and ill-treatment of Aboriginal detainees. Effectively exercising its preventive mandate will be contingent on it ensuring that the data collected through its inspections and surveys will not be, as Lovett describes, ‘unreliable or inappropriate data,’ leading either to a lack of progress or ‘to the perpetuation of ineffective policies and programs because [its] ability to assess... outcomes and effectiveness is limited.’

Smith refers to the RCIADIC recommendation that:

[w]hen social indicators are to be used to monitor and/or evaluate policies and programs concerning Aboriginal people, their informed views should be incorporated into the development, interpretation and use of the indicators, to ensure that they adequately reflect Aboriginal perceptions and aspirations.

At the UN Permanent Forum on Indigenous Issues:

[I]ndigenous representatives have raised concerns about the relevance of existing statistical frameworks for reflecting their world views and have highlighted their lack of participation in data collection processes and governance. As a result, the collection of data on [I]ndigenous peoples is viewed as primarily servicing government requirements rather than supporting [I]ndigenous peoples’ development agendas.

There is support for the view that ‘UNDRIP has implications for [I]ndigenous data sovereignty.’ As an Aboriginal Inspectorate would not be an ACCO, the control of data will remain in the hands of a non-Indigenous statutory body, and Aboriginal communities will have to continue to ‘rely on outsiders with the requisite resources to obtain... information... which typically involves significant compromises over the control of data and therefore data sovereignty.’ Snipp identifies some of these compromises as being ‘the content of these data, the purposes for which these data are to be used and who will ultimately control access to these data.’ Although an Aboriginal Inspectorate cannot address all of these concerns, it does have the capacity to minimise how great the compromise will be. Through robust consultation on its expectations/standards and surveys (recognising that the Inspectorate must retain discretion as to the content of the final expectations/standards, the survey questions and the inspection framework, in order to maintain its independence) the content of the data and the purposes of use would be significantly shaped by ACCOs and the NT Aboriginal community. Similarly, through publication of its reports, the Inspectorate would be providing

---

927 Ibid.
929 Ibid.
Aboriginal people access to some of the data that it collects (albeit limited by the Inspectorate’s obligations regarding confidentiality under OPCAT).930

With the assistance of the ACCOs and NT Aboriginal community, the Inspectorate will be better placed to crystallise the relevant concepts into survey questions that facilitate the collection of data that has value to the Aboriginal community, particularly Aboriginal detainees. As Lovett notes (in relation to health and wellbeing), the question asked ‘invariably informs the way we analyse and report data—the way we give it meaning… This… is critical to understanding how we engage in the measurement of Aboriginal and Torres Strait Islander health and wellbeing in Australia’.931

Lovett highlights the risks to be mindful of when collecting data in relation to Aboriginal and Torres Strait Islander people:

the manner of its collection, manipulation and reporting… causes great consternation among those of us who lament the inability of the questions on which statistical collections are based to reflect our individual and community realities… there is seemingly a difficulty converting concepts into questions that capture meaningful data about important constructs that give Aboriginal and Torres Strait Islander lives meaning and value, despite having Indigenous advisory structures. The result is a large ‘evidence gap’.932

Assumptions that ‘Indigenous wellbeing will be improved through Indigenous people adopting values and practices of mainstream western society’ has been criticised, as has relying on statistical indicators that are ‘sourced from existing data sources collected for the purpose of informing government frameworks’ that do not necessarily reflect the world views of Aboriginal people.933 The Inspectorate will have to ‘prioritise Indigenous ways of knowing, being and doing’934 in its research (in the surveys it uses and the expectations/standards that is relies upon) if its work is to centre Aboriginal detainees’ experiences of detention in its work (as is recommended in this report). Lovett lists some measures of wellbeing that would be ‘consistent with [I]ndigenous conceptions of wellbeing… [including] relationships with country, spirituality and rituals… identity and identity representation and racism…heritage and language… agency, self-determination, empowerment, fate and control… [and] cultural continuity.’935 Adopting this approach can assist the Inspectorate to collect data and evidence that can be genuinely useful in assessing the risk of torture and ill-treatment of Aboriginal detainees, appreciating that just as women’s and children’s needs are unique (and the risks of torture and ill-treatment differ in certain respects across these groups of detainees), so are certain needs and risks unique to Aboriginal people. The Inspectorate should commit to empowering Aboriginal people to guide the Inspectorate in accurately identifying those risks.

930 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 21(2): ‘Confidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.’


934 Ibid 235.

The Inspectorate should also recognise Aboriginal culture as both a strength and protective factor in its risk assessments, with culture having been acknowledged, for example, as integral to addressing Aboriginal and Torres Strait Islander disadvantage.\textsuperscript{936} As Grimes and Crawford note, ‘[p]articularly when working in the context of Aboriginal communities there can be a tendency to focus on problems and what isn’t working. A strength based approach will celebrate what is working and seek to build on the pre-existing strengths.’\textsuperscript{937} If the Inspectorate focuses solely on the vulnerabilities of Aboriginal detainees, it will miss opportunities to make recommendations that would strengthen protections against their torture and ill-treatment.

\textbf{LOUKIDELIS REPORT – CULTURE AS A STRENGTH AND PROTECTIVE FACTOR}


‘Mental wellness is a balance of mental, physical, spiritual, and emotional. This balance is enriched as individuals have: purpose in their daily lives whether it is through education, employment, care giving activities, or cultural ways of being and doing; hope for their future and those of the families that is grounded in a sense of identity, unique First Nations values, and having a belief in spirit; a sense of belonging and connectedness within their families, to community, and to culture; and finally a sense of meaning and an understanding of how their lives and those of their families and communities are part of creation and a rich history.’\textsuperscript{938}

\textbf{RECOMMENDATION: As the Inspectorate creates its inspection framework, expectations/standards and designs the surveys that it will use in places of detention, it is essential that it consults with the Aboriginal community and ACCOs to ensure that its questions, lines of enquiry and its expectations/standards facilitate the collection of data which will be effective in mitigating the risk of the torture and ill-treatment of Aboriginal detainees. Aboriginal worldviews and concepts of wellbeing, and culture as a strength should all be incorporated.}

\textbf{FUTURE OBLIGATIONS UNDER TREATY}

As discussed above, the Inspectorate should be responsive to the obligations that will arise from the NT Treaty/Treaties, in relation to all aspects of its operations. It should also ensure that its work, including the expectations/standards it uses, is informed by the obligations that a Treaty/Treaties will impose on the NTG, particularly in relation to the criminal justice system. For example, the NTG has identified that outcomes of the Treaty/Treaties might include a ‘[t]ruth telling process around the history of the Northern Territory, teaching about the displacement, the trauma, and the massacres,’ and ‘[p]rotection and support for Aboriginal language and culture.’\textsuperscript{939} Recommendations of this report include that the expectations/standards reflect the

\textsuperscript{936} Ibid 220.
\textsuperscript{937} Ben Grimes and Will Crawford, \textit{Strong foundations for community based legal education in remote Aboriginal communities} (October 2011) 14-15.
\textsuperscript{938} David Loukidelis, \textit{Whitehorse Correctional Centre Inspection Report} (May 2018) 7.
\textsuperscript{939} Northern Territory Government, Office of Aboriginal Affairs, \textit{Treaty in the Northern Territory}, 2.
impact of colonisation and the fact that Aboriginal culture is both a strength and protective factor. This report’s suggestions will potentially be transformed into obligations by the NT Treaty/Treaties in the future.

### OCC – SUBMISSION ON LEGISLATIVE BILL
**TREATY OF WAITANGI**

‘The… teams have rightly identified that the new system needs to work better for Māori. It is my strong view that to achieve this will require recognition of the need to consider the needs of tamariki and rangatahi Māori through a Māori lens. This would be a considerable paradigm shift for the care and protection and youth justice systems. Making this shift would be consistent with the obligations imposed on the Crown in the Treaty of Waitangi.’

### WAITANGI TRIBUNAL
The Waitangi Tribunal, ‘[s]et up by the Treaty of Waitangi Act 1975… is a permanent commission of inquiry that makes recommendations on claims brought by Māori relating to Crown actions which breach the promises made in the Treaty of Waitangi.’

‘It is [the Tribunal’s] statutory requirement to inquire into claims against the Crown submitted by Māori. Our task is first to assess whether Crown acts or omissions have been consistent with Treaty principles. Where inconsistency is found, we must identify if this has caused or is likely to cause prejudice. If so, the Tribunal may make recommendations to the Crown for how to remedy this prejudice.’

The Tribunal’s decisions demonstrate how the obligations arising under a Treaty with Indigenous peoples, particularly in relation to the criminal justice system, might provide guidance on the content and/or focus of NPM expectations/standards. The below decisions in relation to Māori reoffending rates and prisoner voting rights are examples of the types of Treaty obligations that deserve the attention of an NPM.

### MAORI REOFFENDING RATES
‘Current estimates put the total prison population in 2017 at 10,000. As at June 2016, Māori made up 50.8 per cent of all sentenced prisoners in New Zealand’s corrections system, despite comprising just 15.4 per cent of New Zealand’s population.’

‘[T]he proportion of sentenced Māori prisoners reconvicted after release from prison after two years is 63.2 per cent, while the proportion of sentenced Māori prisoners reconvicted after five years is 80.9 per cent. This contrasts with 49.5 per cent non-Māori sentenced prisoners reconvicted two years after their release, and 67.7 per cent after five years. Reimprisonment rates are similarly skewed.’

‘These figures, to say the least, make for sober reading. Further… following steady progress in reducing reoffending rates since 2011, this progress has slowed dramatically over the last two years.’

---


943 Ibid 79. Also at 79: ‘Of all sentenced male prisoners in New Zealand, 50.4 per cent are Māori men. Māori women make up 56.9 per cent of all sentenced female prisoners. Young Māori figure prominently. Some 65 per cent of youth (under 20 years) in prison are Māori, up from 56 per cent a decade ago.’

944 Ibid 11.

945 Ibid.

Also at 11: ‘After two years, 41.3 per cent of released Māori prisoners are reimprisoned, and after five years 54.7 per cent are reimprisoned. By comparison, 30.5 per cent of non-Māori released from prison are reimprisoned after two years, and after five years 43.6 per cent are reimprisoned.’
‘[T]he Treaty principles identified as relevant to the issues before [the Tribunal]… arising out of the fundamental Treaty exchange of kāwanatanga and rangatiratanga, are those of active protection, equity, and partnership.’ 946 ‘The Crown is constrained in what it can do by its governing legislation. It is also clear that the Crown has a Treaty obligation to take reasonable steps to reduce Māori reoffending rates. What is reasonably expected of the Crown must be seen in context, which in this case is the persistently, and unacceptably disproportionate rate of Māori reoffending.’ 947

The Tribunal recognised the efforts made to reduce inequity in Maori and non-Maori offending rates, but went on to state that ‘more must be done and, so long as this inequity continues, the Department must make the reduction of Māori reoffending an urgent priority.’ 948 ‘This general reoffending reduction target seems to have been made under the assumption that Māori offenders would respond at the same or better rate as non-Māori. If the number of Māori in prison came close to being proportionate to the national population figures, the Department’s approach might have been understandable. As it stands, attempting to reduce reoffending overall without a specific, tailored approach to the group of New Zealanders most obviously overrepresented inverts the order of priority. It is our view that acting equitably in this situation does not mean targeting all reoffenders equally. It means acting fairly in the circumstances.’ 949

The Tribunal ‘concluded that the Crown is not sufficiently prioritising the active protection of Māori interests, or the achievement of equitable outcomes between Māori and non-Māori. Given the severity of the situation, to choose not to commit to a measureable strategy with a dedicated budget and a target to reduce Māori reoffending rates is a significant omission, and unjustified in the circumstances. The Crown’s actions and omissions in this regard constitute breaches of the Treaty principles of active protection and equity.’ 950 The Tribunal did not find a breach of the principle of partnership.

NPM ACKNOWLEDGEMENT OF THE TRIBUNAL’S DECISION

‘We are concerned that our criminal justice system is not responding to the needs of Māori. The Waitangi Tribunal stated that the Crown has a Treaty responsibility to reduce inequities between Māori and non-Māori reoffending rates to protect Māori interests. This responsibility requires the Crown to work in partnership with Māori, not just simply inform itself of Māori interests. Some detaining agencies are making great strides towards reducing inequities while others have some way to go. There needs to be an overarching kaupapa, bicultural frameworks, and strategies that make a real difference for Māori.’ 952

946 Ibid 11.
947 Ibid 80.
948 Ibid 81.
949 Ibid 83.
950 Ibid.
951 Ibid.
952 See also at 85-87: ‘The Crown, through the Department, by failing to make an appropriately resourced, long-term strategic commitment to reducing the rate of Māori reoffending has not sufficiently prioritised the protection of Māori interests. We therefore find that in this respect the Crown has breached the Treaty principle of active protection. The Crown, through the Department, has not sufficiently prioritised or appropriately targeted the reduction of Māori reoffending rates in line with that of non-Māori in the context of persistent and grossly disproportionate Māori reoffending rates. We therefore find that the Crown has breached the Treaty principle of equity.’
953 Ibid 85-87: ‘With regard to the Treaty principle of partnership, the Crown is currently making good faith attempts to engage with iwi and hapū through relationship agreements, and through the Māori Advisory Board. We see potential in these and we wish to see this potential develop. We find that the Crown has not breached the Treaty principle of partnership as it relates to Crown efforts to reduce Māori reoffending. However, as discussed, in the event that the Crown fails to live up to its statements of commitment to developing its partnerships with iwi and hapū, its actions will likely be in breach of its partnership obligations.’
954 Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2016 to 30 June 2017 (June 2018) 3.
The disproportionality of Māori in youth justice residences is, arguably, as bad as any part of the criminal justice system. This is a matter for serious concern. The Waitangi Tribunal report released in April makes it clear that action is needed to address reoffending among Māori adults. This will require careful consideration in the context of mokopuna Māori too.953

MAORI PRISONER VOTING RIGHTS

In 2010, the Electoral (Disqualification of Sentenced Prisoners) Amendment Bill was passed by Parliament, amending the Electoral Act 1993. Introduced as a member’s Bill, the amendment extended an existing restriction preventing prisoners serving a sentence of three years or more from voting to all prisoners serving sentences of imprisonment at the time of a general election.954

We find that on the issue of consultation and informed advice, that Crown officials failed to ensure adequate consultation with Māori and offered support and advice to the Law and Order Select Committee which failed to provide sufficient information about the specific effect the legislation would have on Māori and Crown rights and obligations under the Treaty. By failing to consult Māori and providing inadequate advice, the Crown failed to actively protect Māori rights under the Treaty. It also failed in its duty of informed decision-making under the principle of partnership and contributed to the Act as amended being in breach of the Treaty. We find as a matter of fact that Māori have been disproportionately affected by section 80(1)(d) of the Electoral Act 1993. By failing to ensure potential consequences for Māori were recognised and taken into account in the select committee process and/or by failing to propose the repeal of the provision once those effects were recognised, the Crown has failed in its duty to actively protect the right of Māori to equitably participate in the electoral process and exercise their tino rangatiratanga individually and collectively. We find this to be a breach of the principles of active protection and equity and hence kāwanatanga obligations to reduce inequity.955

Māori are disproportionately and prejudicially affected by section 80(1)(d) of the Act and therefore we find the Act is in serious Treaty breach because: Māori are significantly more incarcerated than non-Māori, especially for less serious crimes; young Māori are more likely to be imprisoned than non-Māori impeding the development of positive voting habits; the practical effect of disenfranchisement goes wider than the effect on individual prisoners, impacting on their whānau and communities; and the legislation operates as a de facto permanent disqualification due to low rates of re-enrolment amongst released prisoners.956

RECOMMENDATION: The Inspectorate should ensure that its work, including the expectations/standards it uses, is informed by the obligations that a Treaty/Treaties will impose on the NTG, particularly in relation to the criminal justice system.
The APT’s report from the Regional Forum on the OPCAT in Latin America notes that:

States should systematically implement international standards with regard to the rights of [I]ndigenous persons in the context of criminal justice and detention. In doing so, they should take heed of the guidance provided by the SPT in its 6th Annual report.\textsuperscript{957}

In drafting it expectations/standards, the Inspectorate should be guided by UNDRIP,\textsuperscript{958} which states that the ‘rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.’\textsuperscript{959} There are a number of articles which would have relevance to the Inspectorate’s expectations/standards, including those outlined below.

For example, an UNDRIP article that clearly would be of relevance to the Inspectorate when assessing the provision of health and mental health services in places of detention is ‘Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.’\textsuperscript{960}

Rights under UNDRIP may be relevant to the conditions of and treatment in detention, or they may be relevant because detention impacts on Aboriginal people’s ability to remain connected to their communities, families and country and ability to practice their culture:

- Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture;\textsuperscript{961}

- States shall provide effective mechanisms for prevention of, and redress for: [a]ny action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;\textsuperscript{962}

- Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as ceremonies;\textsuperscript{963}

- Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects;\textsuperscript{964}

- Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.\textsuperscript{965}

\textsuperscript{957} Association for the Prevention of Torture, Preventing torture, a shared responsibility: Regional Forum on the OPCAT in Latin America Outcome Report (2014) 65.

\textsuperscript{958} Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2017 to 30 June 2018 (April 2019) 4: ‘In February 2018, the Commission hosted a training day for NPM staff working in the OPCAT area. This aimed to provide new frameworks and perspectives that could be incorporated into monitoring activities... The training focused on human rights treaties and how these could be utilised in OPCAT monitoring. Specific sessions covered the United Nations Declaration on the Rights of Indigenous Peoples.’


\textsuperscript{960} Ibid Art 24(2).

\textsuperscript{961} Ibid Art 8(1).

\textsuperscript{962} Ibid Art 8(2)(a) and (d).

\textsuperscript{963} Ibid Art 11(1).

\textsuperscript{964} Ibid Art 12(1).

\textsuperscript{965} Ibid Art 13(1).
Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.\textsuperscript{966}

The following article is also relevant to the Inspectorate:

States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.\textsuperscript{967}

The above article is relevant not only in terms of the places of detention themselves, but also to how the NTG and detaining authorities communicate to the public about Aboriginal prisoners and detainees, recognising the impact of broader societal attitudes on the cultures of institutions such as places of detention and detaining authorities (discussed in greater detail above, under \textit{Expectations/standards for inspections – general}).

The UNDRIP also supports the recommendation that there should be a focus on particular groups of Aboriginal people in the Inspectorate’s expectations/standards:

Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.\textsuperscript{968}

\textbf{OCI – HEALING LODGES AND SELF-DETERMINATION}

‘CSC must also ensure each Lodge is meaningfully and respectfully connected to an Indigenous community. Historically, CSC has not fully engaged with local Chiefs and Councils in a meaningful way, which has led to a long-standing sense of alienation and mistrust among Indigenous communities. The nurturing and support of positive connections is key to reconciliation and to repairing the relationship between CSC and Indigenous communities. It will also allow for the sharing of expertise and exchange of learning. Meaningful partnerships must be built upon trust and facilitate the self determination and healing of Indigenous inmates and communities.’\textsuperscript{969}

‘I recommend that CSC re-allocate very significant resources to negotiate new funding arrangements and agreements with appropriate partners and service providers to transfer care, custody and supervision of Indigenous people from prison to the community. This would include creation of new section 81 capacity in urban areas and section 84 placements in private residences. These new arrangements should return to the original vision of the Healing Lodges and include consultation with Elders.’\textsuperscript{970}

\textsuperscript{966} Ibid Art 25.
\textsuperscript{967} Ibid Art 15(2).
\textsuperscript{968} Ibid Art 22.
\textsuperscript{969} The Correctional Investigator Canada, \textit{Annual Report 2017-2018} (29 June 2018) 64.
\textsuperscript{970} Ibid 65.
**RECOMMENDATION:** In drafting its expectations/standards, the Inspectorate should be guided by UNDRIP.

### Culturally Appropriate Inspection Expectations/Standards

A robust appraisal of the cultural appropriateness of a place of detention requires the Inspectorate to look beyond those aspects of detention that might seem the most obvious place to start, such as the availability of cultural programs, the use of interpreters and hiring of Aboriginal staff. That is not to say that those things are not essential considerations for the Inspectorate. But assessing these aspects of detention should only be a place to start. If this is also where the Inspectorate finishes, its assessment has fallen short.

Every single aspect of detention must be assessed through the same lens, and broadly speaking, be subject to the same question: ‘Is this culturally appropriate?’ And therein lies the strength of having an Aboriginal Inspectorate; its focus never wavers, that lens is a permanent fixture. Just as gender-mainstreaming has become accepted practice (and recommended to Ecuador’s NPM by the SPT), so should the practice of assessing every aspect of detention through a ‘culturally-appropriate’ lens be adopted. The APT has come to similar conclusions, observing that an inclusive approach to inspection involves ‘ensuring that the issues of vulnerable groups are mainstreamed into preventive work.’

**RECOMMENDATION:** In drafting its expectations/standards, the Inspectorate should consider the cultural appropriateness of every aspect of detention.

For example, in the NT context, part of the Inspectorate’s assessment might entail considering whether police conduct in arresting or apprehending someone, or conducting a search was culturally appropriate.

---

971 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the national preventive mechanism advisory visit to Ecuador made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/OP/ECU/2 (16 July 2015) [51].


973 Charles Darwin University, ‘Maningrida Collaboration Agreement Between the Maningrida Elders and Charles Darwin University’ (2012) 9: ‘If during a time of ceremony the Northern Territory Police wish to execute a search warrant, warrant of arrest, a search for alcohol or conduct a ‘drug bust’ in the community where a ceremony is being held and the police activity may involve arresting or interrogating the hosts of the male or female ceremony, or there are victims or persons of interest within the perimeter of the ceremony ground or near the perimeter of the ceremony ground (that is within viewing distance of the restricted men’s or women’s ceremony) which are considered restricted areas by Aboriginal customary law, the Northern Territory Police will seek collaboration from the Maningrida Elders, namely the Dalkarra or Djirrikay, Senior Djunggay law man or the Senior Djunggay law woman, in order to: 1. Ascertain to whom the ceremony belongs, 2. Speak with the appropriate Aboriginal customary law leaders for the ceremony, and 3. Give information to the Aboriginal customary law leaders for the ceremony regarding the police intentions and the grounds for their intended actions. Having taken the above steps police will then make sure the Senior Djunggay law man or woman or their appointee accompanies the member of the Northern Territory Police to conduct the Police activity.’

974 Charles Darwin University, ‘Maningrida Collaboration Agreement Between the Maningrida Elders and Charles Darwin University’ (2012) 9-10: ‘If there are items of cultural significance in the care of a person, their house, or vehicle which are taboo to the general public, including women, children and non-initiates, then the Police must not expose the items until the senior Dalkarra or Djirrikay law man or the Senior Djunggay law woman in the presence of the member of the Northern Territory Police. The Dalkarra or Djirrikay man initiated to the appropriate ceremony can expose the object
In its sixth Annual Report, the SPT considered the issue of the rights of detained Indigenous people, noting the Indigenous people should be ‘placed in the detention centre nearest to their [I]ndigenous community and their family, so that they are able to receive frequent visits and follow their traditional practices and customs, which will minimize the risk of their being isolated from their relatives, culture and religion;’ should not be ‘segregated or subjected to discrimination on account of their status. Nor should they be pushed to abandon their language, traditional dress or customs by means of threats, mockery or humiliation;’ and should ‘have the right to freedom of expression in the language of their preference. Any ban or restriction on the use of this language is a violation of the rules on the collective treatment of detainees and is particularly serious when the language represents part of a person’s identity as a member of his or her [I]ndigenous community.’ Additionally, it required that ‘[I]ndigenous women in detention enjoy the same protection as [I]ndigenous men, and... their dignity is respected as regards practices related to their sexuality and traditional values associated with, inter alia, their appearance, hair, clothes, and nudity.’

The UNODC Handbook on Prisoners with special needs asserts that ‘[I]ndigenous peoples comprise a vulnerable group in the criminal justice system and have special needs based on culture, traditions, religion, language and ethnicity, which prison systems often fail to address. Some of the needs are common to all. Others vary depending on the culture and background of the prisoner.’ The Handbook considers numerous aspects of detention in identifying the specific needs of Indigenous prisoners. This includes particular difficulties experienced by Aboriginal detainees, whose links to family, community, culture and land are adversely impacted by incarceration, an issue that is magnified in the NT, with family contact being impacted by the great travel distances and often prohibitive costs of travel. Considerations included in the Handbook that would also be relevant to the Inspectorate are how detaining authorities communicate with prisoners who do not speak English, or for whom English is not a first language (including in relation to advising detainees

---

that contains the items of sacred significance only if the person has been authorised to do so and has been put in charge as the keeper of the ceremony items of sacred significance under the supervision of a Senior Dzunggay law man. Members of the Northern Territory Police must not touch, abuse, remove or damage any part of the sacred items of cultural significance. Items must be whole and intact, until a senior Dalkarra or Djirrikay law man or Senior Dzunggay law man is present with the member of the Northern Territory Police. The members of the Northern Territory Police will respect the integrity of any sacred male and female ceremonial activities that are in progress. Where Police believe on reasonable grounds that a serious offence has taken place which contravenes Northern Territory law and the offences or the offender are connected to a sacred place (such as a ceremonial ground) that is considered a restricted area under Aboriginal customary law, then Police can liaise with the Maningrida Elders in order to mediate the appropriate method for Police to obtain access to the required place or person. Even when accompanied by appropriate senior Dalkarra or Djirrikay law man or Senior Dzunggay law man, only male members of the Northern Territory Police are permitted to enter a restricted area when men’s ceremonies are conducted. Female members of the Northern Territory Police shall not perform police duties connected to men’s ceremonies.’

---

975 Sixth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture 50th sess, UN Doc CAT/C/50/2 (23 April 2013) [89] (f), (g), (h) and (i).

See also Council of Europe, Revised Commentary to recommendation CM/REC(2006)2 of the Committee of Ministers to Member States on the European Prison Rules (May 2018) 12 and 13, with regard to prisoner placements and access to family. Furthermore, at 13, it is noted that the ‘CPT has warned that ‘the overall effect on the prisoner of successive transfers could under certain circumstances amount to inhuman and degrading treatment.’

979 Similar issues have been identified in the Canadian context.

See Le Protecteur du Citoyen, Special Report by the Québec Ombudsman: Detention conditions, administration of justice and crime prevention in Nunavik (18 February 2016) [105]: ‘Incarcerating Inuit in Southern Québec correctional facilities deprives them of the support of their family and community, which plays a key role in social reintegration. Because of the high transportation costs, inmates’ relatives generally rarely if ever visit them during their incarceration.’ Also at [107]: ‘Telephone calls are often the only means of communicating with family… longdistance fees… can add up quickly.’
of their rights, and detainees asserting those rights), and how they support Aboriginal prisoners to achieve equal access to justice. The Handbook addresses how safety and security of the place of detention impacts on Aboriginal people. It considers the infrastructure itself, and whether Aboriginal detainees are accommodated in a culturally appropriate way. It looks to whether the numerous needs of Aboriginal people, resulting from socioeconomic marginalisation, are addressed, and at the rehabilitation programs provided, how program participation impacts on Aboriginal detainees’ security classification, and whether this in turn impacts on parole, and whether the spiritual needs of Aboriginal detainees are met. The Handbook references the work, vocational training and education available to Aboriginal people, the mental health care provided, and the preparation undertaken for release and post-release support. Whether the detaining authority involves the Aboriginal community in program design and delivery is another consideration, as is the detaining authority’s management policies and strategies, including in relation to non-discrimination, whether there is Aboriginal staff (including in managerial positions), and if there is appropriate training provided to staff.

I accompanied the Ombudsman’s team of inspectors on an unannounced visit to the Northland Regional Corrections Facility, where 47% of the prison population was Māori. A section of the report from that inspection focuses on the facility’s relationship with local iwi.

‘Cultural provision across the site was limited. Relationships between the Prison and iwi were fragile however, I am encouraged to learn of the willingness of all parties to overcome difficulties and provide a strong response to shared needs to an officer who does not understand them is daunting for Inuit inmates.’

Addresses how language barriers ‘can exacerbate Aboriginal detainees’ sense of isolation severely’, as well as issues such as the language used in written copies of prison rules, disciplinary hearings and programs. Also at 71-72: Addresses language and prison rules, programs, and the prohibition of punishment for speaking Indigenous languages.

Addresses the importance of continuing contact with community, and culturally relevant programs.

Addresses how socioeconomic marginalisation can result in particular needs, including in relation to mental health care.

Addresses considerations such as ensuring that ‘[a]s far as possible, the training and work provided should correspond to the employment opportunities in the community to which they intend to return.’

Addresses language and prison rules, programs, and the prohibition of punishment for speaking Indigenous languages.

Addresses the importance of continuing contact with community, and culturally relevant programs.

Addresses provision of information on rights and how they support Aboriginal prisoners to achieve equal access to justice. The Handbook addresses how safety and security of the place of detention impacts on Aboriginal people. It considers the infrastructure itself, and whether Aboriginal detainees are accommodated in a culturally appropriate way. It looks to whether the numerous needs of Aboriginal people, resulting from socioeconomic marginalisation, are addressed, and at the rehabilitation programs provided, how program participation impacts on Aboriginal detainees’ security classification, and whether this in turn impacts on parole, and whether the spiritual needs of Aboriginal detainees are met. The Handbook references the work, vocational training and education available to Aboriginal people, the mental health care provided, and the preparation undertaken for release and post-release support. Whether the detaining authority involves the Aboriginal community in program design and delivery is another consideration, as is the detaining authority’s management policies and strategies, including in relation to non-discrimination, whether there is Aboriginal staff (including in managerial positions), and if there is appropriate training provided to staff.
challenges. The Prison was the first to establish a working relationship with a recognised iwi. Ngāti Rangi have Kaitiaki status and mana whenua over the site. However, it was evident from discussions with prisoners, staff and service providers that there was a regrettable lack of engagement with mana whenua. The Prison Director reported that relationships with Ngāti Rangi had been difficult for some time. However, I am encouraged to learn of the willingness of all parties to overcome difficulties and provide a strong Māori response to shared challenges.

The report also referred to other barriers to properly supporting Māori prisoners, such as information management, staffing shortages and a lack of engagement with delivering a cultural appropriate service. The survey results showed that 40% of prisoners could access cultural services, but that only 12% of that 40 were prisoners on remand, and focus groups revealed that a ‘common theme... was the lack of access to culture support, and cultural programmes and activities, particularly for those prisoners on remand.

The Ombudsman recommended that ‘relationships with Ngāti Rangi be re-established as a first step towards implementing a step change in the development and delivery of culturally appropriate services in the Prison.

OCI – SHORTCOMINGS OF PRISON IN RELATION TO NEEDS AND SITUATION OF INUIT PEOPLE

‘The legislation is silent on Inuit principles of justice, language, cultural and spiritual rights, and ceremonial and dietary requirements. The legislation is devoid of any references to Inuit culture. No attempt is made to ensure that the correctional system and decision-making are responsive to the unique needs of Inuit People. ‘

‘For the most part, the policy framework is silent on the unique needs and situation of Inuit people. The policy does not provide specific requirements or guidance for decision-making that would take into account the unique needs and historical situation of incarcerated Inuit People. The only Inuit-specific policy provisions are for programming (Carving Program and Land Program). There are no specific provisions for decision-making or for meeting religious and cultural needs. Moreover, very little addresses issues such as access to Elders, language, cultural needs, and ceremonial and dietary requirements. Finally, no principles of Inuit justice are elaborated. ‘

‘The policy should allow for more access to outside community resources and impose obligations to provide Inuit-specific and tailored programming, inclusive of readily accessible substance abuse counselling and violence prevention.

‘The review of law and policy also suggests that NU Corrections is not operating within a rigorous and modern legal and policy framework. The most significant deficiency of this framework is its apparent lack of specificity and responsiveness to its unique Inuit inmate population. This raises serious concern, but also offers significant opportunities. As NU Corrections moves towards investing significant funds to renew its infrastructure, modernising the NU Corrections Act and Regs will provide benefits and opportunities... Engaging communities and its stakeholders via a broad consultation and public debate... will ensure that the new Act is consistent with NU culture, traditions, values and objectives.

993 Ibid 2.
994 Ibid 21.
995 Ibid.
996 Ibid 23.
997 Ibid 22.
999 Ibid 13.
1000 Ibid 15.
1001 Ibid 16.
The report’s recommendations were to be implemented in accordance with the Government’s obligation that Corrections work ‘in collaboration with Yukon First Nations in developing and delivering correctional services and programs that incorporate the cultural heritage of Yukon First Nations and address the needs of offenders who are First Nation persons.’

The Loukidelis report made a number of recommendations targeted to First Nations prisoners, including supporting First Nations officers, appointing a full-time First Nations services officer for WCC to help improve outcomes for First Nations individuals at WCC, whose specific duties should include those recommended in this report, and either establishing a new First Nations advisory board for WCC or enhancing First Nations representation on the existing board, including to ensure good representation of First Nations from across Yukon. It recommended that ‘WCC staff, notably correctional officers, have adequate training in First Nations matters, and also training in trauma-informed approaches to corrections clients.’

The report recommended that WCC offer ‘improved culturally-appropriate programs and services... The focus should be on better supporting spiritual renewal and healing, and connection with traditional knowledge and practices, including to improve mental wellness outcomes. Programs that exist or are in development in other jurisdictions should be considered and adapted to Yukon needs. The branch should consult with WCC clients, elders and First Nations. This work should be supported by the First Nations services officer for WCC. This recommendation should implement improvements in access to elders and to spiritual practices such as smudging and sweats. This should include serious consideration of re-purposing unused portions of WCC for First Nations programs and supports, including smudging and sweat facilities. The Corrections Branch should, with the support of First Nations, work to increase the complement of elders who visit WCC and ensure that they are able to do so as often as needed to meet the needs of WCC clients who wish to see them,’ The report outlined culturally-relevant programs in other Canadian jurisdictions, and also recommended adopting a restorative justice process approach prior to laying disciplinary charges, involving, where possible, circle sentencing.

The report recommended consideration of alternatives to imprisonment, and that ‘the government should examine the feasibility of building further treatment centres such as the Jackson Lake facility and program, operated by Kwanlin Dun First Nation,’ and that, ‘in consultation with First Nations governments and others,’ it conduct a review of bail conditions.

In applying the ‘lens’ referred to above, the framework utilised by New Zealand’s OCC is an example of best practice. The Inspectorate would be better able to exercise its mandate by establishing a framework for its

1004 Ibid 14.
1005 Ibid.
1006 Ibid.
1007 Ibid.
1008 Ibid 75-77.
1010 Ibid 14.
1011 Ibid 15.
inspections that focuses on the particular needs of Aboriginal prisoners, to complement the expectations/standards that it will rely on.

OCC - MANA MOKOPUNA

The OCC created Mana Mokopuna in part due to an Expert Panel Report released in 2015, as the ‘changes to CYF and the establishment of Oranga Tamariki provided an opportunity for OCC to review how [it] monitor[s] their services. Ensuring that Māori are better supported is an integral part of this kaupapa.’ OCC tested this ‘new [I]ndigenous Māori ‘lens’... developed to assess the quality of children and young people’s experiences. This is important because... over 70% [of children] in youth justice residences are Māori... This ‘lens’ was designed to ensure that [the OCC]: Consider the cultural values and beliefs that are important to our [I]ndigenous children and their families and whānau, hapū, and iwi; Focus on children and young people’s experiences and outcomes; Hold high aspirations for all children and young people.’

Mana Mokopuna considers how ‘[i]dentity and belonging are fundamental for all children and young people to thrive. For mokopuna Māori, being supported to have a positive connection to their identity is critical to their wellbeing. Whakapapa is fundamental to Māori culture, connection and belonging. The Mana Mokopuna approach is based on an explicit expectation that, for mokopuna Māori, Oranga Tamariki and its contracted providers will enable and support positive connections with their whakapapa. The equivalent experiences are also expected for non-Māori children, in relation to their genealogy and cultural identity, in the context of their immediate and wider family.’

THE PRINCIPLES

‘We have identified six principles that support children and young people to reach their potential. The principles of Mana Mokopuna could be seen as representing a child’s journey through life: Whakapapa recognises that all children have whakapapa – bloodlines as well as a history of people, places and stories – before they are born; Whanaungatanga recognises that all children are born into relationships as part of their family, whānau, hapū, iwi and wider family groups; Aroha recognises that all children have the need to love and be loved; Kaitiakitanga recognises that children’s wellbeing is supported by safe and healthy environments; Rangatiratanga recognises that all children have the right to have their views listened to, and where appropriate, acted on, and to be supported to be leaders in their own lives; Mātauranga recognises that all children need opportunities to learn about the world, their culture and the culture of tangata whenua.’

Each of the principles is further described in the framework, for example:

‘Whakapapa is about blood lines, genealogy, places of significance such as maunga, awa and marae. It is about significant tupuna (ancestors), significant events and significant pūrākau (stories). All whakapapa can be traced back to Atua (Gods); When children and young people know of and are able to connect to places, ancestors, events and stories related to their whakapapa, it creates a strong sense of belonging and identity. This enables children and young people to walk confidently in the world.’

DESIRED EXPERIENCE UNDER THE PRINCIPLES

1012 Office of the Children’s Commissioner, Mana Mokopuna (September 2018) 4.
1013 Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2016 to 30 June 2017 (June 2018) 11.
1014 Office of the Children’s Commissioner, Mana Mokopuna (September 2018) 6.
1015 Ibid 9.
1016 Ibid 10.
Mana Mokopuna outlines the desired experience under each principle. For example, under Whakapapa, the desired experience is that ‘[c]hildren and young people know of and can connect to places, ancestors, events and stories related to their whakapapa. Children and young people have a strong sense of belonging and identity that enables them to walk confidently in the world.’

Also included are ‘[q]uestions we ask to understand what children and young people are experiencing in relation to each of the ideal experiences,’\textsuperscript{1017}

\textbf{OCC REPORT ON SECURE RESIDENCES – MOKOPUNA MAORI}

The OCC used its six OPCAT domains in its assessment of the secure residences, and additionally assessed responsiveness to Māori. It found ‘[i]nconsistent cultural capability to enable tailored treatment and activities for mokopuna Māori,’\textsuperscript{1018} and recommended that ‘Oranga Tamariki needs to immediately ensure that each residence has access to the cultural advice, supervision and support needed to integrate and embed the principles of Te Toka Tumoana into practice and deliver culturally responsive services to mokopuna Māori. A clear national focus on consistently implementing this framework needs to be prioritised. It cannot remain an optional component of residential practice.’\textsuperscript{1019}

The report considered specific areas of improvement,\textsuperscript{1020} variable quality of practice,\textsuperscript{1021} fundamental system issues\textsuperscript{1022} and particular incidents of concern,\textsuperscript{1023} concluding that there was ‘[i]nsufficient proactive national support for the vision, cultural capability building and partnerships necessary with local iwi to address the needs of mokopuna Māori. As a consequence, the approach to meeting the cultural needs of mokopuna Māori in some residences is ad hoc and heavily dependent on the leadership of residence managers and the attitudes and experience of their staff. This is a significant issue given that over 70% of young people in youth justice residences... are Māori.’\textsuperscript{1024}

The report recommended that ‘[r]ather than starting with Western/pakeha concepts and adding on Māori ideas to achieve change, we should apply a Te Ao Māori lens (Māori world view) and ensure the best of tauiwi (non-Māori) knowledge is included. Underpinning any transformational change for residences in this area will be having strong partnerships with iwi and Māori organisations and having ready access to ongoing cultural advice, mentoring and support.’\textsuperscript{1025}

\textbf{RECOMMENDATION:} The Inspectorate should have an overarching framework to guide its inspections, to ensure that in exercising its mandate it consistently employs a critical lens in assessing the cultural appropriateness of all aspects of conditions and treatment in detention.

\begin{flushright}
\textsuperscript{1017}Ibid 13. \textsuperscript{1018}Office of the Children’s Commissioner, State of Care 2017: A Focus on Oranga Tamariki’s Secure Residences (May 2017) 35-36. \textsuperscript{1019}Ibid 36. \textsuperscript{1020}Ibid 18. \textsuperscript{1021}Ibid 18-19. \textsuperscript{1022}Ibid 19-21. \textsuperscript{1023}Ibid 22. \textsuperscript{1024}Ibid 21. \textsuperscript{1025}Ibid 44.
\end{flushright}
CONSULTATION WITH ABORIGINAL COMMUNITY CONTROLLED ORGANISATIONS AND THE ABORIGINAL COMMUNITY

As with other aspects of the Inspectorate, the Aboriginal community, ACCOs and those with expertise in relevant areas, should be consulted during the drafting and finalising of the expectations/standards. In its submission to the AHRC *OPCAT in Australia* consultation, NATSILS recommended that ‘NPMs work closely with Aboriginal and Torres Strait Islander Legal Services, including NATSILS as their representative body,’\(^\text{1026}\) and that NPMs ‘liaise with and observe the recommendations made by Aboriginal and Torres Strait Islander community controlled organisations, relevant royal commissions, parliamentary inquiries and other reviews to inform the development of human-rights based standards.’\(^\text{1027}\)

**OCC - MANA MOKOPUNA**

The OCC exemplifies best practice in the consultations it undertook in drafting Mana Mokopuna and the feedback it sought from children and young people, centring the views of those with lived experience.

**DEVELOPMENT OF MANA MOKOPUNA**

‘Stage One: Understanding the concept of mana and development of the principles. We drew primarily from literature and interviews with mokopuna Māori. Mana Mokopuna was also influenced by Te Toka Tumoana – the bi-cultural practice framework developed by Oranga Tamariki.’\(^\text{1028}\)

‘Stage Two: Methodology for developing the ideal experiences under each principle. Each principle describes the desired experiences for children and young people. These definitions and descriptions were developed from three main sources: Quotes and insights from interviews with children and young people; Hui and wānanga with kaimahi Māori from Oranga Tamariki, Kōkiri Marae, Tui-Keretu Ltd, Timotimo Education, Barnardos NZ and OCC; Insights from four pūrākau, selected by kaimahi Māori from OCC and performed by Timotimo Education, at a dedicated wānanga.’\(^\text{1029}\)

‘Based on feedback from children, young people, families and whānau, Mana Mokopuna will continue to evolve. We look forward to seeing how Mana Mokopuna will grow – not only in our own practice but within the wider context of Aotearoa New Zealand and beyond.’\(^\text{1030}\)

**CONSULTATION WITH CHILDREN AND YOUNG PEOPLE REGARDING MANA MOKOPUNA**

‘At the Office of the Children’s Commissioner we have transformed how we fulfill our legislative mandate in monitoring approved care services. Mana Mokopuna is the lens that our Office is now using to monitor the experiences of children and young people who are in care and protection or youth justice settings. Starting from a Māori world view, the Mana Mokopuna lens supports practice that enhances a child’s mana and supports the holistic wellness of the child.

We wanted to explore the principles of our Mana Mokopuna lens with tamariki and rangatahi Māori. We did this through a number of different activities such as polls, face to face conversations, and group discussions. The Mana Mokopuna lens is constantly being improved as we learn about the lived experiences of children and young people in care.'

\(^{1026}\) National Aboriginal and Torres Strait Islander Legal Services, Submission No 47 to Australian Human Rights Commission, *OPCAT in Australia Consultation*, July 2017, 18.

\(^{1027}\) Ibid 17.


\(^{1029}\) Ibid 12.

\(^{1030}\) Ibid 15.
This engagement was designed to seek the input of children and young people outside of the care environment to ensure that our aspirations for children and young people in care align with our aspirations for all children and young people.\textsuperscript{2}

Grimes and Crawford provide guidance on how to approach sharing knowledge across cultures, which should be applied during consultations with the NT Aboriginal community on the content of expectations/standards. Their article is in relation to legal services, but it has applicability to the Inspectorate:

Two-way learning: Respect must be shown for traditional authority and knowledge, and acknowledgement must be given that other participants have their own expertise. Project facilitators must equally be students of local legal and cultural systems. Engaging in two way learning puts into practice the important principle that learning occurs by moving from what is known to what is unknown as it allows Western legal concepts to be compared or contrasted to well understood traditional concepts of law, justice and dispute resolution... Two way learning also allows the facilitators to take the initiative in creating a learning environment by modeling learning behavior and being willing to make mistakes and show ignorance. Lastly, two-way learning allows the facilitators to feed lessons learned from participant communities back to the legal service, with the aim of increasing understanding of that community and generating better models of service delivery in those communities.\textsuperscript{3}

\textbf{RECOMMENDATION:} The Inspectorate should consult with the Aboriginal community, ACCOs and relevant experts (eg on social and emotional wellbeing) when drafting and testing the inspection framework and expectations/standards being used. The Inspectorate should ensure to consult with all relevant groups, such as Aboriginal children and young people. The Inspectorate should prioritise consulting in the NT, but should also consult in other jurisdictions and with peak bodies where relevant. During consultations, a ‘two-way learning’ approach should be adopted.

\textsuperscript{1} Office of the Children’s Commissioner, \textit{What does the Mana Mokopuna lens mean to tamariki and rangatahi Māori?} (December 2017) 5.
\textsuperscript{2} Ibid 8.
\textsuperscript{3} Ben Grimes and Will Crawford, \textit{Strong foundations for community based legal education in remote Aboriginal communities} (October 2011) 13.
RECOGNISING THE LEGACY OF COLONISATION

THE ONGOING IMPACT OF COLONISATION ON THE CRIMINAL JUSTICE SYSTEM AND PLACES OF DETENTION

Recognising the ongoing impact of colonisation should be central to the work of the Inspectorate, if it is to effectively carry out its mandate in recognising the risks that need to be mitigated to prevent the torture and ill-treatment of Aboriginal detainees. The continuing negative effects of colonisation are widely acknowledged. For example, the Australian Children’s Commissioners and Guardians recognised, in a statement on youth detention, that ‘Aboriginal and Torres Strait Islander children and young people experience intergenerational trauma and the continuing impacts of dispossession, colonisation and discrimination.’

It is necessary for the Inspectorate to recognise the impact of colonisation both when undertaking assessments at the site level and when looking more broadly at risk factors, such as the overrepresentation of Indigenous people in prisons. Although an inspection assesses the situation in a place of detention at a point in time, the Inspectorate must have an understanding of the legacy of the NT’s (and Australia’s) colonial history in order to accurately identify the conditions and treatment in detention (and their root causes) that currently constitute, or have the potential to lead to, torture or ill-treatment.

In the *Regional Forum on the OPCAT in Latin America Outcome Report*, the APT wrote that:

> [t]he colonial past of Latin America was characterised by systematic human rights violations, including racism and discrimination, against [l]nigenous peoples. This past is still present in the legal, political and social realms as well as in the mind-set and attitudes of people in Latin American societies today. Public institutions such as prisons are no exception to this, with a number of serious consequences for [l]nigenous persons who find themselves in prison. In case of [l]nigenous women, a double vulnerability exists.

Cuneen describes how, in Australia, the criminal justice system has its roots in the dispossession of and violence against Aboriginal and Torres Strait Islander peoples, with successive policies of control and ‘protection’ continuing the colonial project. Cuneen writes that ‘[c]olonisers claimed the moral and political right to impose specific systems of law and punishment over Indigenous peoples—systems which were alien to the colonised. In this sense, the original ‘violence of incarceration’ has its roots in dispossession from land and denial of sovereignty.’ Cuneen describes how historically ‘the role of the criminal justice system as an agent of colonial policy... often involved in outright violence, or as an instrument of policies of containment,'
control and removal,’ ‘characterised both by its repressiveness and military character,’ later utilised to advance a policy of ‘protection’ of Aboriginal people, ‘through extensive surveillance and penal sanctions built around the deprivation of liberty.’ Cuneen refers to Atkinson’s description of ‘these policies of containment and enforced dependency as the structural violence of colonisation.’

The criminal justice system, and the detaining authorities and places of detention associated with it, do not exist in a vacuum. In order to gain an understanding of the root causes of torture or ill-treatment of Aboriginal detainees, the Inspectorate must first consider how history has shaped the contemporary NT criminal justice system and the contemporary relationship between it and Aboriginal people. RCIADIC, which is of particular relevance to the Inspectorate, highlighted how the current disadvantages experienced by Aboriginal people and their relationships with the criminal justice system (in the case of police, for example) are influenced by this history.

OCI – REFERENCE TO THE TRUTH AND RECONCILIATION COMMISSION

‘On December 18, 2015 the Truth and Reconciliation Commission issued its final report Honouring the Truth, Reconciling for the Future. In response, the Government of Canada has committed to implementing all of the recommendations. The goals are ambitious. Confronting and repairing the harm visited upon Aboriginal people as a result of colonialism and restoring a relationship among equals will not be easy. Ending the cycles of intergenerational violence, abuse and discrimination that find their way into our jails and prisons will require deliberate and sustained action.’

OCI – CONSIDERING ABORIGINAL SOCIAL HISTORY IN INVESTIGATIONS OF DISTURBANCES/IN RELATION TO REHABILITATION NEEDS IN PRISONS

‘The Board’s failure to acknowledge the Indigenous composition (social histories) and character of the riot leads directly to its failure to account for the gang behaviour and dynamics of the incident. There is every reason to believe that had the Board approached its investigation from an Indigenous social history perspective its findings would have been markedly different. As it is, the Board makes no recommendations and draws no lessons learned involving Indigenous corrections whatsoever.’

‘Just as there are several pathways into prison for Indigenous people – poverty, family violence, addiction, intergenerational trauma and abuse (resulting from Residential Schools, 60s Scoop, involvement of child welfare agencies) – so too must there be more than one way out. CSC does not require a non-Indigenous person entering prison to follow their spirituality, healing or cultural traditions in order to engage in programming. To expect a person of Indigenous ancestry to follow an Aboriginal healing path or cultural traditions when imprisoned is one thing, but to make

1038 Ibid 210-211.
1039 Ibid 211.
1040 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, National Report (1991) vol 5: ‘police training courses be reviewed… such training should incorporate information as to: The social and historical factors which have contributed to the disadvantaged position in society of many Aboriginal people; The social and historical factors which explain the nature of contemporary Aboriginal and non-Aboriginal relations in society today; and The history of Aboriginal police relations and the role of police as enforcement agents of previous policies of expropriation, protection, and assimilation.’
1041 The Correctional Investigator Canada, Annual Report 2015-2016 (30 June 2016) 44.
that a determinant for release is quite another. Indigenous people walk in the “two worlds” all their lives. The approach to Pathways and the AICs seems somewhat parochial, if not patronizing.\footnote{Ibid 67.}

\section*{INTERGENERATIONAL TRAUMA}

Recently, an ALRC report stated that:

\begin{quote}
[t]he legacy of historical dispossession and dislocation from land, culture and family has ongoing harmful effects for Aboriginal and Torres Strait Islander peoples, commonly described as ‘intergenerational trauma’: It is defined as the subjective experiencing and remembering of events in the mind of an individual or the life of a community, passed from adults to children in cyclic processes as ‘cumulative emotional and psychological wounding’ … [H]istorical trauma can become normalised within a culture because it becomes embedded in the collective, cultural memory of a people and is passed on by the same mechanisms through which culture, generally, is transmitted.

As Professor Harry Blagg, Dr Vickie Hovane and Dorinda Cox described: ‘[f]or Aboriginal people, intergenerational trauma is a collective consequence of colonisation rather than simply an individual experience. It is compounded by negative contact with the justice and related systems, such as children’s protection.\footnote{Australian Law Reform Commission, \textit{Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples Final Report}, Report No 133 (2017) 79.}

It is against this background that comments such as that of the Special Rapporteur, remarking on the adverse impact on torture survivors’ family life, whether through difficulty ‘resuming satisfactory relationships,’\footnote{Theo van Boven, Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, \textit{Torture and other cruel, inhuman or degrading treatment or punishment}, UN Doc A/59/324 (1 September 2004) [50].} or family members’ unwillingness or inability to support survivors who have resultant physical or mental issues which require additional care,\footnote{Ibid [51].} should be understood.

\section*{OCC - TRAUMA-INFORMED PRACTICE}

The New Zealand OCC has stated that ‘[f]or mokopuna Māori, trauma informed practice also takes into account the impact of colonisation on Māori – for example, severed ties with whakapapa, the separation from language, the loss of identity – which have all contributed to the disadvantages that Māori experience today. We would therefore expect trauma informed practice for mokopuna Māori to include cultural interventions required to move young people towards ‘ora’ or wellbeing.\footnote{Office of the Children’s Commissioner, \textit{State of Care 2017: A Focus on Oranga Tamariki’s Secure Residences} (May 2017) 18.}

\section*{RECOMMENDATION:}
\emph{The ongoing impact of colonisation on the criminal justice system (particularly in relation to places of detention and detaining authorities) and the legacy of the systemic human rights abuses that occurred in Australia and the NT specifically should inform the work of the Inspectorate. This includes an understanding of the consequent intergenerational trauma and Aboriginal people’s contemporary relationship to the criminal justice system.}

1043 Ibid 67.
1045 Theo van Boven, Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, \textit{Torture and other cruel, inhuman or degrading treatment or punishment}, UN Doc A/59/324 (1 September 2004) [50].
1046 Ibid [51].
It is important to be ensure that acknowledging the history of colonisation and its ongoing adverse impacts does not eclipse the strength and resilience demonstrated by Aboriginal communities. In its expectations/standards, the Inspectorate should acknowledge the importance of culture and identity.

**RECOMMENDATION:** Both the strength and resilience of Aboriginal communities and the protective role of culture should be acknowledged in the Inspectorate’s expectations/standards.

THE CANADIAN APPROACH – GLADUE (ABORIGINAL SOCIAL HISTORY) PRINCIPLES

**GLADUE PRINCIPLES**

The Canadian case of *Gladue*\(^{1048}\) considered s718.2(e) of the Canadian *Criminal Code*, which provides that ‘all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of [A]boriginal offenders.’\(^{1048}\) The case acknowledged the many reports and commissions that ‘intimately tied’ the overrepresentation of Aboriginal people in the criminal justice system with colonisation’s legacy,\(^{1050}\) and that ‘[y]ears of dislocation and economic development have translated, for many [A]boriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation.’\(^{1051}\)

The Gladue Reports that have been written for individual Aboriginal accused following the case have linked ‘political histories of race relations and the current treatment of Aboriginal peoples… [and] demonstrate the role of the state in the production of criminal histories’, where ‘the prevalence of violence is, in large part, a function of state policies.’\(^{1052}\) The reports link offending and community turmoil to the intergenerational trauma and behavioural patterns arising from policies of assimilation.\(^{1053}\) This approach does not attribute the accused’s circumstances to their ‘Aboriginal heritage or culture,’ and shifts some of the moral culpability from the accused to the State.\(^{1054}\) Importantly, an application of the Gladue principles does not impose a burden on the accused to prove a causal link between systemic factors and the offending as ‘these interconnections are simply too complex.’\(^{1055}\) Instead, what is required, is a ‘link between the collective experience and the individual circumstances of the offender,’\(^{1056}\) appreciating the ‘devastating intergenerational effects of the collective experiences of Aboriginal peoples.’\(^{1057}\)

---


\(^{1049}\) *Criminal Code*, RSC 1985, c C 46, s718.2(e).


\(^{1053}\) Ibid 465.


\(^{1056}\) Ibid 58.


253
The Expert Mechanism on the Rights of Indigenous Peoples has recognised that, in ‘Canada, efforts to address high incarceration levels include the Gladue sentencing principles, which seek to address overrepresentation of indigenous persons in custody, where possible, by compelling judges to pay particular attention to the unique circumstances of indigenous peoples and their social histories in determining suitable sentence for indigenous offenders.’

CORRECTIONAL SERVICE CANADA (FEDERAL) - GLADUE PRINCIPLES

The Expert Mechanism also noted that, in detention, ‘indigenous peoples may face a higher likelihood of segregation and maximum security designation, and may be held in substandard conditions with inadequate access to basic services. In addition, imprisonment can cause particular challenges because of separation from family, community and culture.’

‘Once in custody, indigenous youth may be less likely to benefit from noncustodial sentencing options or restorative justice measures, and more likely to receive the most punitive measures and to be subjected to the harshest treatments, such as being placed in secure confinement.’

In Canada, it is not only the courts that consider Gladue principles. Correctional Service Canada (CSC) also applies Gladue principles in its operations, and it is this application of the principles which will be of particular relevance to the Inspectorate (although, as has been discussed above, it is certainly within the NPM’s mandate to consider factors which contribute to rates of imprisonment, including pre-trial detention and sentencing practices).

Under legislation, CSC must apply the Gladue principles to decision-making, with Aboriginal Social History be taken into consideration except for the purpose of risk assessment. The CSC is to ‘[c]onsider restorative (culturally appropriate) alternatives as opposed to having only a risk-based approach.’ Hannah-Moffat and Maurutto note that ‘Gladue reports present offenders not simply as dysfunctional ‘risky’ criminals, but rather as individuals firmly situated within racialized histories of oppression that place them ‘at risk’ (this is in contrast to, for example, presentence reports). The OCI addresses, in its annual report, how CSC applies Gladue in its decision-making around issues pertaining to security and ‘retained liberty’, such as ‘security classification, penitentiary placement, transfer, segregation, internal discipline.’

DISCIPLINE OF PRISONERS

‘Aboriginal social history: the various circumstances that have affected the lives of most Aboriginal people. Considering these circumstances may result in alternate options or solutions and applies only to Aboriginal offenders... These

---

1059 Ibid [44].
1060 Ibid [67].
1062 Bill C-83 An Act to amend the Corrections and Conditional Release Act and another Act 2019 (Canada) s 79.1: ‘In making decisions under this Act affecting an Indigenous offender, the Service shall take the following into consideration: systemic and background factors that have contributed to the overrepresentation of Indigenous persons in the criminal justice system and that may have contributed to the offender’s involvement in the criminal justice system; and the Indigenous culture and identity of the offender... The factors described... are not to be taken into consideration for decisions respecting the assessment of the risk posed by an Indigenous inmate.’
1063 Lisa Allgaier, Aboriginal Social History and Corrections at Violence and Aggression Symposium (June 15-17, 2014) 14.
1065 Ibid 264.
1066 The Correctional Investigator Canada, Annual Report 2014-2015 (26 June 2015) 39: ‘Though the Service has integrated Gladue principles into policy as well as provided some training to staff members, there remains insufficient and uneven application of Gladue social history considerations in correctional decision-making. For example, it is not uncommon to find in an Aboriginal offender’s file a brief reference that Aboriginal social history was considered in a correctional decision that impacts retained security and liberty interests (e.g. security classification, penitentiary placement, transfer, segregation, internal discipline). However, there is often very little meaningful analysis with respect to how these considerations impacted, influenced, altered or mitigated the decision. Simply stating that Aboriginal social history was considered does not make it so nor does it ensure the due diligence expected by the policy requirement.’
circumstances include the following (note that this is not an exhaustive list): effects of the residential school system, sixties scoop into the adoption system, effects of the dislocation and dispossession of Inuit people, family or community history of suicide, family or community history of substance abuse, family or community history of victimization, family or community fragmentation, level or lack of formal education, level of connectivity with family/community, experience in the child welfare system, experience with poverty, loss of or struggle with cultural/spiritual identity.

PSYCHOLOGICAL RISK ASSESSMENTS
In its Annual Report, the OCI made recommendations in support of the decision in the case of Ewert:
‘On September 18, 2015, in Ewert v. Canada, the Federal Court released a far-reaching decision stating that the psychological risk assessment scales used by CSC are unreliable for use with Indigenous people as they fail to respond to their unique needs, lack scientific evidence and are susceptible to cultural bias. CSC regularly uses these scales to assess risk of violence as well as psychopathic personality disorder among both Aboriginal and non-Aboriginal offenders. The scores of these tests and case management analysis of the offender’s overall risk rating are then used to make significant liberty decisions (e.g. security rating, access to temporary absences, penitentiary placement)... Given Justice Phelan’s ruling in Ewert v. Canada, the recommendations coming out of the Truth and Reconciliation Commission and the Government of Canada’s recent commitments to Indigenous peoples, the time seems right to build a culturally-informed risk assessment tool, from the ground up, founded on Gladue principles and designated for use with male Indigenous offenders. I recommend that the Service develop new culturally appropriate and gender specific assessment tools, founded on Gladue principles, to be used with male and female Indigenous offenders.’

SEGREGATION/HIGH SECURITY
Under s10(c) of the Canadian Charter of Rights and Freedoms there exists the right ‘to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful,’ [including] the right to challenge the decision to transfer a person to a higher security facility or place an individual in segregation. Decisions that are unreasonable or made in an unfair manner are unlawful. Recent court decisions have found that procedural fairness for placements in segregation includes the following components... Fair and meaningful reviews of the inmates’ segregation must be conducted [and] take into account... Indigenous issues raised by the segregation decisions. The decision to place an individual in segregation may be unreasonable if... An Indigenous inmate’s placement decision did not take into account his or her Indigenous heritage and the impact, appropriateness or availability of Indigenous spiritual or cultural programming.’

1067 Correctional Service Canada, Standard Operating Procedures, Commissioner’s Directive Number 580: Discipline of Inmates (2015). See also Correctional Service Canada, Standard Operating Procedures, Commissioner’s Directive Number 580: Discipline of Inmates (2015): ‘The Serious Disciplinary Hearing Advisor will normally after conviction, but before sentencing, advise the ICP on issues and recommendations which might affect sentencing. Such issues might include, but are not limited to the particular needs and circumstances of the inmate, including the relevant cultural and historical factors in an Aboriginal inmate’s background (Aboriginal social history).’

1068 The Correctional Investigator Canada, Annual Report 2015-2016 (30 June 2016) 46-47. See also Ewert v. Canada [2018] 2 SCR 165 [61], [65], [67].

YUKON CORRECTIONS (PROVINCIAL) - GLADUE PRINCIPLES
YUKON HUMAN RIGHTS COMMISSION SETTLEMENT AGREEMENT

As part of a settlement agreement (‘in relation to the use of segregation for prisoners with mental disability as well as for Indigenous prisoners within the Yukon correctional system’\(^{1070}\)), Whitehorse Correctional Centre is to, ‘in consultation with the [Yukon Human Rights Commission] and appropriate Indigenous resources, seek recommendations regarding the further consideration of Indigenous Social History into the policies and practices at the Whitehorse Correctional Centre, and particularly in, but not limited to, the following areas: case planning and case management for Indigenous inmates; use of the Secure Supervision Placement program for Indigenous inmates; training provided to staff and management of the Whitehorse Correctional Centre; and training for independent hearing adjudicators, including the use of pre-existing “Gladue” reports.’\(^{1071}\)

LOUKIDELIS REPORT – RECOMMENDATIONS IN GLADUE PRINCIPLES IN DISCIPLINARY HEARINGS

‘The Corrections Branch should take measures to ensure that, if a First Nations individual at WCC is to be sentenced for a disciplinary offence, any existing Gladue report that is available is used in the sentencing. If one is not available, the Corrections Branch should be required to provide the adjudicator with information sufficient to enable the adjudicator to consider Gladue factors in fashioning an appropriate sentence. The Corrections Branch also should ensure that disciplinary adjudicators are provided with training and information necessary to enable them to apply Gladue factors in disciplinary proceedings.’\(^{1072}\)

‘This should be a leading consideration in disciplinary proceedings involving First Nations individuals at WCC. It is obvious that separate confinement for a disciplinary infraction is penal in nature—it is a punishment. As a matter of principle Gladue factors should inform all decisions to punish an First Nations individual by separate confinement. This does not mean that each disciplinary sentence will require a Gladue report comparable to those prepared for criminal sentencing purposes. If an First Nations individual at WCC is to be sentenced for a disciplinary offence and a Gladue report is already available, it should be used in the WCC sentencing. If one is not available, the Corrections Branch should be required to provide the adjudicator with information sufficient to enable the adjudicator to consider Gladue factors in fashioning an appropriate sentence.

The Corrections Branch advised that disciplinary adjudicators receive the Yukon First Nations History and Culture Training program, but they should also be provided with training and information necessary to enable them to apply Gladue factors in disciplinary proceedings.’\(^{1073}\)

THE CANADIAN APPROACH SHOULD BE ADOPTED BY THE INSPECTORATE

The High Court of Australia rejected the Gladue approach for sentencing purposes, and there is no obligation on police, the Department of Correctional Services or Territory Families in the NT to take into consideration Aboriginal Social History in its decision-making. However, this report recommends that the Inspectorate incorporate into its expectations/standards acknowledgement of the impact of colonisation on the Aboriginal

---

1073 Ibid 81.
community and thus on Aboriginal detainees. A “culturally-appropriate” lens under an Aboriginal framework should take into account Australia’s colonial history, as outlined above. The Gladue Principles have great relevance to the NT context, with Aboriginal people continuing to experience the negative impacts of colonialism, including socioeconomic disadvantages.

The RCIADIC in 1987 recommended training of the judiciary on the ‘unique or exceptional social condition of Aboriginal people.’\textsuperscript{1074} The ALRC recommended in its 2017 report that there should be legislation providing that ‘courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples,’ and that this legislation prescribe ‘a duty to enquire.’\textsuperscript{1075} Furthermore, the ‘NT government advised the ALRC that Aboriginality as a sentencing factor will be considered in the NT as part of the Aboriginal Justice Agreement that is under development.’\textsuperscript{1076} These recommendations and developments further support that it is appropriate for the Inspectorate to conduct its inspections with an understanding of how the legacy of colonisation might be the root cause of some of the risks of torture or ill-treatment of Aboriginal detainees, and to adopt the Canadian approach of applying Gladue principles in assessing decision making by detaining authorities.

**RECOMMENDATION:** The Inspectorate’s expectations/standards should acknowledge the impact of colonisation, particularly taking note of the incorporation of Gladue/Aboriginal Social History principles in decision making by Correctional Service Canada and at the Whitehorse Correctional Centre in Yukon (including in decision making regarding security classification, prison placement, transfers, segregation and internal discipline).

**SYSTEMIC RACISM, UNCONSCIOUS BIAS AND DISCRIMINATION**

**SYSTEMIC AND INSTITUTIONAL RACISM**

The NTRC considered whether institutional racism was a relevant factor in the child protection and youth justice systems in the NT. Giving an example from evidence before the NTRC, it defined institutional racism as the:

> process by which people from ethnic minorities are systematically discriminated against by a range of public and private bodies. If the result or outcome of established laws, customs or practices is racially discriminatory, then institutional racism can be said to have occurred. Institutional racism operates ‘irrespective of the intent of the individuals who carry out the activities of the institution.’ It often arises due to an organisational failure to understand the impact of, or appropriately ensure compliance with, policies and procedures affecting particular people, such as the many Aboriginal children and young people who are the subject of this inquiry.\textsuperscript{1077}

\textsuperscript{1075} Australian Law Reform Commission, Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Report No 133 (2017) 204-205.
\textsuperscript{1076} Ibid 207.
The NTRC also considered the discriminatory treatment of Aboriginal people under the NT Intervention. There was a missed opportunity recently in an NT coronial case to consider whether policing failings in an investigation could be attributed to institutional racism, but NT Police has taken steps to ‘tackle its perceived race problem by implementing training focused on raising awareness of “unconscious bias”, following a series of bungled investigations into the deaths of several people, most of them Aboriginal.’

More recently, the issue of racism was raised during the NT AJA consultations:

During the NTAJA consultations a number of Aboriginal people shared their own or other people’s experiences of being treated unfairly in their dealings with justice agencies because they were Aboriginal. Racism, discrimination and unfair treatment is unacceptable to the Northern Territory Government in any form, and may also be unlawful. The Agreement will work to reduce racism, discrimination and unfair treatment across all justice agencies and in all spheres of life in the Territory. This will require Aboriginal people and organisations to work closely with professionals in the justice system to create a changed culture in which there is no tolerance for racism and discrimination.

As outlined below, a number of reviews conducted in the jurisdictions visited as part of this Fellowship (I was referred to the reviews during meetings) have considered the question of systemic racism. Making a recommendation that the Inspectorate enquiring whether systemic racism exists should be distinguished from the Inspectorate making presumptions that systemic racism exists. The Inspectorate’s enquiring into whether systemic racism exists should be approached in the same manner that all other aspects of detention are assessed; establishing an expectation regarding the treatment and conditions in detention, with the view to mitigate risks of torture and ill-treatment, and then assessing the performance of the detaining authority (either at site level or higher) against this expectation.

For an Aboriginal Inspectorate, it is essential that in assessing the risk of torture or ill-treatment of Aboriginal detainees, it turns its mind to the possibility of systemic racism, making clear that one of its expectations is that there is an absence of systemic racism within detaining authorities and at detention sites. As identified by NATSILS, Australian NPMs ‘can assist in... preventing ill-treatment, which may arise as a result of prejudice, cultural incompetency.’ For example, the NPM members’ experience in Costa Roca has been that ‘[they] need to be particularly cautious with regards to the situation of [I]ndigenous persons when visiting detention

---

1078 Commonwealth, Royal Commission into the Detention and Protection of Children in the Northern Territory, Final Report (2017) vol 1, p173: ‘The underpinning legislation ‘deemed’ these and other measures to be ‘special measures’; non-discriminatory measures to advance the rights of affected Aboriginal people. The Australian Human Rights Commission and various United Nations human rights mechanisms have disputed this characterisation as inappropriate and wrong in law. To ensure the Commonwealth Government had the certainty to undertake these actions without legal impediments, the intervention legislation removed the application of the Racial Discrimination Act and the Anti-Discrimination Act (NT) to the Northern Territory. The discriminatory treatment of Aboriginal people in the Northern Territory under these laws has been widely condemned.’

1079 Steve Schubert, ‘Incompetent’ police botched investigation into Indigenous woman’s death, but not racist, NT coroner says’, ABC News <https://www.abc.net.au/news/2018-06-21/incompetent-police-botted-investigation-indigenous-woman-death/9893504> (21 June 2018): ‘Lawyers for Ms Green's family submitted that the coroner should find the police failings were due to "institutional racism", referring to a report of a failed investigation of a black man in the United Kingdom. The coroner said that the similarities "certainly invite some consideration", but ultimately could not find so because the UK report was introduced too late in the coronial process to properly put it to senior police. I am loathe to refer to a finding of institutional racism until there is an opportunity to specifically examine that issue throughout an inquest and with all levels of the police force," he said.’


1082 Northern Territory Department of Attorney-General and Justice, Pathways to the Northern Territory Aboriginal Justice Agreement (2019) 94.

1083 National Aboriginal and Torres Strait Islander Legal Services, Submission No 47 to Australian Human Rights Commission, OPCAT in Australia Consultation, July 2017, 16.
facilities, as the administration often ignores them and they are, therefore, made invisible. Guards often portray them as “well behaved” but we need to look beyond this and pay extra attention to their conditions."  

HMIP THEMATIC RACE RELATION REPORT – INSTITUTIONAL RACISM

Of note, HMIP conducted a thematic review into the progress since the Mubarek inquiry (discussed in greater detail below).

‘There was both confusion and resistance to the concept of institutional racism. There is no doubt that many white staff felt undermined by it, wrongly believing that it meant that they must be racist by virtue of the fact that they worked in prisons... There was also some cynicism about race relations on the part of white staff and some fatigue with a subject that always cast them in the role of the ‘bad guys’. There was a sense that white staff were being victimised by the race relations agenda and had to defend themselves against false accusations of racism by visible minority prisoners. Some white staff identified ‘political correctness’ as a barrier to progress, and were aware that they should not use certain words or phrases but were not entirely sure why. One trades officer said ‘for some reason I don’t understand we can’t have banter with prisoners’. It was also the case that in some instances, where colleagues had been dismissed for racial misconduct, this had left a residue of anxiety and resentment among their white colleagues.’

RECOMMENDATION: In order to properly assess the risk of torture or ill-treatment of Aboriginal detainees, the Inspectorate should incorporate into its expectations/standards an expectation that there is an absence of systemic racism at the place of detention/within the detaining authority.

STEPHEN LAWRENCE INQUIRY INTO POLICE – INSTITUTIONAL RACISM

INSTITUTIONAL RACISM – DEFINITION

‘Taking all that we have heard and read into account we grapple with the problem. For the purposes of our Inquiry the concept of institutional racism which we apply consists of: The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people. It persists because of the failure of the organisation openly and adequately to recognise and address its existence and causes by policy, example and leadership. Without recognition and action to eliminate such racism it can prevail as part of the ethos or culture of the organisation. It is a corrosive disease.’


See also at [6.30]: ‘The Commission for Racial Equality (CRE) in their submission stated:– ‘Institutional racism has been defined as those established laws, customs, and practices which systematically reflect and produce racial inequalities in society. If racist consequences accrue to institutional laws,
INSTITUTIONAL RACISM – EVIDENCE AND FINDINGS

‘Given the central nature of the issue we feel that it is important at once to state our conclusion that institutional racism exists both in the Metropolitan Police Service and in other Police Services and other institutions countrywide.’

‘Given the fact that these predominantly white officers only meet members of the black community in confrontational situations, they tend to stereotype black people in general. This can lead to all sorts of negative views and assumptions about black people, so we should not underestimate the occupational culture within the police service as being a primary source of institutional racism in the way that we differentially treat black people.’

‘It is vital to stress that neither academic debate nor the evidence presented to us leads us to say or to conclude that an accusation that institutional racism exists in the MPS implies that the policies of the MPS are racist. No such evidence is before us. Indeed the contrary is true. It is in the implementation of policies and in the words and actions of officers acting together that racism may become apparent. [The Metropolitan Police Service’s (MPS) policies were not racist, but the majority of officers were white and the culture was therefore one of ‘white values and white beliefs’. Officers tended to interact with black people only in confrontational situations and thus formed negative stereotypes about this community. These became ‘rooted in the widely held attitudes, values and beliefs’ of the organisation through the canteen culture: the small talk between officers on the job. Racism thus became a norm of the occupational culture, which was ‘all-powerful in shaping officers’ views of a particular community’. This institutional racism also reflected racism in wider British society.’

‘We hope and believe that the average police officer and average member of the public will accept that we do not suggest that all police officers are racist and will both understand and accept the distinction we draw between overt individual racism and the pernicious and persistent institutional racism which we have described. [There is a small but significant difference between acknowledging that such features “can” exist and acknowledging that they “do” exist... We assert again that there must be an unequivocal acceptance that the problem actually exists as a prerequisite to addressing it successfully. ’

‘We understand Sir Paul’s anxiety about labels. But the fact is that the concept of institutional racism exists and is generally accepted, even if a long trawl through the work of academics and activists produces varied words and phrases in pursuit of a definition.’

...
SCARMAN REPORT ON POLICE - RACIAL DISADVANTAGE/DISCRIMINATION

The Scarman Report into the Brixton disorders in 1981, which resulted in the establishment of the ICVs, determined that institutional racism did not exist, pointing instead to that racial disadvantage and racial discrimination. As part of the recommendations arising from the investigation and following report, Lord Scarman advocated a system for members of the public from local communities to inspect the way the police detained people in their custody. Originally referred to as lay visiting, independent custody visiting is the system that has been developed to meet this recommendation.

‘During the first half of 1981 several outbreaks of unrest occurred in major cities throughout the country. The most significant of these disorders took place in Brixton when hundreds of young people attacked property and the police. The cause of these disorders centred around people protesting about oppressive policing and in particular the alleged harassment of people, especially young black people, by the police – in short, these incidents were anti-police and voiced a lack of trust in the law and order authorities.’

“Institutional racism” did not exist, he said, pointing instead to “racial disadvantage” and “racial discrimination”. His warning was stark: “ Urgent action” was needed to prevent racial disadvantage becoming an “endemic, ineradicable disease threatening the very survival of our society”. Positive discrimination to tackle racial disadvantage was “a price worth paying”... But the Commission for Racial Equality says his wider social and economic reforms were “seriously out of key” with the political tempo of the times. Lord Scarman later acknowledged he could have been “more outspoken about the necessity of affirmative action to overcome racial disadvantage”.

MUBAREK INQUIRY – RACISM IN PRISONS

‘In 2006, Lord Justice Keith published the findings of his inquiry. He highlighted a number of issues relating to racism and religious intolerance and identified 13 failings in race relations at Feltham. He made a total of 88 recommendations for improvement, including ten relating specifically to race and diversity.

RACE REVIEW INTO PRISONS – INSTITUTIONAL RACISM

‘In March 2000, Zahid Mubarek was murdered by his racist cellmate in Feltham Young Offenders Institution. This tragedy marked a watershed in the history of tackling race issues in the Prison Service. Zahid’s murder, along with negative reports on a number of prisons and a successful tribunal case brought by a Black prison officer against HMP Brixton, led to the Commission for Racial Equality’s (CRE) formal investigation into racial equality in the Service. The CRE’s investigation focused on three prisons —Brixton, Feltham and the privately-run Parc. Part One was published in July 2003 and covered

1095 BBC News, ‘Q&A: The Scarman Report’ <http://news.bbc.co.uk/g/0/pr/ff/-/hi/programmes/bbc_parliament/3631579.stm> (27 April 2004): “Its terms of reference were “to inquire urgently into the serious disorder in Brixton on 10-12 April 1981 and to report, with the power to make recommendations”... He found the disorders were not planned but a spontaneous outburst of built-up resentment sparked by particular incidents. He found loss of confidence and mistrust in the police and their methods of policing. Liaison arrangements between police, community and local authority had already collapsed before the disturbances... The problems of racial disadvantage and inner-city decline were highlighted and a more concerted and co-ordinated approach to tackling them was seen as essential.”
1096 Independent Custody Visiting Association, Become an independent custody visitor FAQ <https://icva.org.uk/purpose/>
1097 Ibid.
the circumstances leading to the murder of Zahid Mubarek at Feltham. The CRE also uncovered numerous failures across the three establishments covered by the investigation which are detailed in Part Two, published in December 2003. 1100 ‘[The CRE] found institutionalised ways of working which had a profoundly negative impact on the promotion and achievement of race equality. As well as specific issues surrounding prisoner treatment, the complaints system and access to goods, facilities and services, they [the CRE] found an absence of management information systems and structures and the failure to give race equality matters the priority and attention they required under law. The CRE made several findings of unlawful racial discrimination and identified 14 failure areas... failures at the strategic policy level when practices were introduced without considering the potential consequences for Black and Minority Ethnic (BME) prisoners. They also reported failures of line management when staff were allowed to ignore instructions or orders.’1101 ‘To mark the end of the five-year partnership agreement with the CRE (now Equality and Human Rights Commission (EHRC)) in December 2008, a review was commissioned to assess the progress made in addressing the failure areas identified by the CRE in their formal investigation.’1102 ‘[T]he fact remains that differential treatment of BME prisoners has not yet been fully addressed... In addition, with regards to almost all aspects of prison life, the perceptions of BME prisoners are still more negative than those of their White counterparts.’1103

LAMMY REVIEW INTO PRISONS – DIFFERENTIAL TREATMENT

‘There is evidence to suggest differential treatment against BAME offenders in both the adult and the youth estates.’1104 ‘These worrying differences in Her Majesty’s Inspectorate of Prisons (HMIP) survey data are, of course, the perceptions of prisoners. But the pattern is too consistent to be ignored. In any case the question is simply what kind of problem the prison service has: are BAME prisoners treated less respectfully, fairly and safely by prison officers – or is there simply endemic mistrust between BAME prisoners and prison staff?’1105

THE MĀORI AND THE CRIMINAL JUSTICE SYSTEM: A NEW PERSPECTIVE – HE WHAIPAANGA HOU - INSTITUTIONAL RACISM

‘In 1988 Moana Jackson... released his report... that critiqued the ways that Māori offending had been dealt with in western systems... It argued that institutional racism pervaded the criminal justice system and the position of Māori in this system was inseparable from the historical, socio-economic, and cultural bases of Māori offending.’1106

INDEPENDENT REVIEW OF ONTARIO CORRECTIONS - ADDRESSING SYSTEMIC DISCRIMINATION AGAINST INDIGENOUS PEOPLE IN THE CORRECTIONAL SYSTEM THROUGH APPLICATION OF GLADUE PRINCIPLES

The Independent Review of Ontario Corrections recommended that ‘the ministry broaden its response to the Truth and Reconciliation Commission’s Calls to Action by critically examining all aspects of correctional practice, recognizing the

1100 Ibid 3.
1101 Ibid.
1102 Ibid 7.
1103 Ibid 15.
1105 Ibid 52.
impacts of systemic discrimination, and adopting measures to counteract these trends. Specific attention should be paid to the meaningful incorporation of Gladue factors into every decision impacting an Indigenous person’s liberty.1107

‘Considerations of the particular circumstances of Indigenous people and the ongoing impacts of colonialism and systemic discrimination in the justice system must be proactively applied to decision-making processes within corrections... Gladue factors are clearly applicable beyond the sentencing stage and must be taken into account whenever an Indigenous person’s liberty interests are at stake... the impact of systemic discrimination and an Indigenous person’s cultural, spiritual, programming, and service needs must be taken into account when determining whether an Indigenous person should be placed in segregation... These considerations should similarly be taken into account when determining an Indigenous inmate’s security classification, institutional placement and parole, as well as when adjudicating and providing consequences for institutional misconduct, approving or denying temporary absences, setting conditions individuals must abide by while in the community, and determining appropriate levels and modes of community supervision. Human rights obligations also require that standard policies and operating procedures within institutions – including for example the amount of time that visitors can spend with an inmate or the impact of long-distance phone charges – be examined through an Indigenous lens to ensure that any unintended discriminatory impacts are mitigated.’1108

‘Although policy directs staff to pay attention to an individual’s Indigenous background in the provision of culturally appropriate supports and programming, this direction is entirely focused on appropriate service provision rather than redressing underlying systemic failings. Particular attention should be paid to the interaction between systemic discrimination and Corrections’ use of risk/needs assessments... Risk and needs assessment and prediction measures and tools must be culturally appropriate and not further import systemic bias into correctional decision making... In the context of Indigenous peoples, the identified needs could be significantly higher given the ongoing legacy of colonization.’1109

THE CULTURE IN THE PLACE OF DETENTION/THE DETAINING AUTHORITY

As discussed above, the Inspectorate should consider how external influences shape the culture in places of detention/within detaining authorities, including whether it contributes to a culture of racism or discrimination. Stevens notes that ‘[s]tereotyping and attitudes of superiority and disdain towards minorities, which often reflect attitudes in wider society, can exist both among staff and other detainees. Such attitudes may also develop if staff only interact with minority groups in confrontational situations.’1110 The Special Rapporteur has asserted that ‘State leaders should discard violent or discriminatory political narratives, policies and practices based on stigmatization, demonization or marginalization of any kind. Particular efforts should be made to prevent torture and ill-treatment against persons experiencing specific vulnerabilities, such as... [I]ndigenous groups.’1111 The Inspectorate should assess whether political narratives or media representations in the NT negatively influence the cultures of detention, shaping a culture of discrimination and consequently placing Aboriginal detainees at higher risk of ill-treatment or torture.

1108 Ibid 184.
1109 Ibid 184-185.
1111 Nils Melzer, Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN DocA/73/207 (20 July 2018) [77](i).
DISCRIMINATION

The Special Rapporteur has described places of detention as ‘particularly disempowering environments that combine power asymmetry, stigmatization and discrimination with other forms of vulnerability... The risks and marginalization associated with detention are further exacerbated in the case of persons with particular vulnerabilities.’ It is recognised that ‘groups or persons that are marginalised or discriminated against in society (e.g... [I]ndigenous peoples...) are particularly vulnerable to abuse and more likely to be subjected to torture or other forms of ill-treatment when deprived of their liberty.’ The UNODC has stated that ‘[d]iscrimination against... [I]ndigenous minorities in the closed and coercive environment of prisons can lead to violence against such groups by other prisoners and their harsher treatment by prison staff.’

Discrimination can manifest in a number of ways, including ‘[p]hysical and verbal abuse... [or] in various practices, procedures and access to services,’ such as classification, accommodation, disciplinary punishments searching procedures, education, health care and prisoner programmes, work, temporary release, home leave and parole decisions, as well as ‘[m]any other forms of subtle discrimination... in attitudes of prisoners and staff.’ For example, the Special Rapporteur has identified that ‘[d]iscriminatory attitudes towards some vulnerable groups can mean that they are perceived as being less credible in their allegations or not fully entitled to an equal standard of protection,’ taking particular note of children from marginalised and vulnerable groups that are overrepresented in institutions. The SPT has noted the ‘nexus between poverty, discrimination and pretrial detention’ and that ‘[d]iscriminatory attitudes may also expose [vulnerable groups] to conditions of detention stricter than those applied to other detainees,’ and Huber recommends that ‘[m]onitoring bodies... enquire into possible discriminatory practices and the misinterpretation of specific needs as ‘security threats’. They should be conscious that in prison systems that overemphasise security, persons in situations of vulnerability, including... [I]ndigenous people... may be more affected and face higher risks of being exposed to abuse.’

---

1112 Ibid [66].
1113 Association for the Prevention of Torture, “Yes, torture prevention works”: Insights from a global research study on 30 years of torture prevention (September 2016) 15.
1116 Nigel Rodley, Special Rapporteur of the Commission on Human Rights, Question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/55/280, 55th session (11 August 2000) [14].
1117 Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture 54th sess, UN Doc CAT/C/54/2 (26 March 2015) [78].
Additionally, negative work cultures can result in staff being subjected to discriminatory behaviour at the hands of ‘managers, peers and prisoners’ (eg. ‘not being professionally encouraged or being overlooked for training and promotions’) which in turn can influence staff treatment of prisoners.\textsuperscript{1119}

\textbf{HMIP – EXPECTATIONS FOR POLICE CUSTODY (DISCRIMINATION)}

The expectations include the following: ‘\textit{[t]he force promotes respect for people from all backgrounds and with diverse needs and raises awareness of the discrimination that can be faced by particular groups.’ Indicators include: ‘A race equality governance and accountability framework is established, linked to the force’s risk register... Staff can demonstrate their understanding of the disproportionate outcomes for black, Asian and minority ethnic communities in the criminal justice system. Where staff come across unfair or discriminatory treatment they are able and required to take action in challenging, eliminating and reporting it... Results of race equality monitoring, and any other monitoring required for protected characteristics, are communicated to all staff and staff understand how they can implement and monitor appropriate action.’\textsuperscript{1120}

The expectations also include: ‘Staff show an understanding of equality and diversity and know how to respond to the specific needs... There are arrangements that enable these detainees to be treated according to their individual need,’ with indicators including: ‘inappropriate language and behaviour, if it occurs, is addressed by staff and there is strong leadership to enable a culture of challenge in relation to this. Homophobic and other derogatory language and behaviour is not tolerated.’\textsuperscript{1121}

\textbf{HMIP – THEMATIC REVIEW OF RACE RELATIONS IN PRISONS}

In its thematic review, HMIP found that minority staff evaluated the treatment of minority prisoners differently to white staff.

‘White staff made little comment about racism among staff, but spoke instead about prisoner behaviour. They saw their job mainly as one of policing racial tension among prisoners, protecting their visible minority colleagues from prisoner abuse and protecting themselves from false accusations of racism. They understood that visible minority prisoners should have fair and equal access to the regime, which they were in general confident they had, and be able to practise their faith, which they were confident they could. They were much more confident than visible minority staff that the needs of visible minority prisoners were met: 79% (compared to 54% visible minority staff) believed those needs were fully met, and none (compared to 17%) believed that they were not met.’\textsuperscript{1122}

\textsuperscript{1119} Penal Reform International and the Association for the Prevention of Torture, Staff working conditions: Addressing risk factors to prevent torture and ill-treatment (2015) 3.

\textsuperscript{1120} Her Majesty’s Inspectorate of Prisons, Expectations for police custody: Criteria for assessing the treatment of and conditions for detainees in police custody (2018) 7-8.

\textsuperscript{1121} ibid 13.

\textsuperscript{1122} Her Majesty’s Inspectorate of Prisons, Parallel worlds: A thematic review of race relations in prisons (December 2005) 25.
R V EWERT – DISCRIMINATION ARISING FROM RACIST ATTITUDES OR CULTURALLY INAPPROPRIATE PRACTICES

‘Numerous government commissions and reports, as well as decisions of this Court, have recognized that discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system, including the prison system.’

RECOMMENDATION: The Inspectorate should assess whether there are discriminatory practices at the place of detention, impacting either on staff or detainees.

TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT – MEANINGS ACROSS DIFFERENT CULTURES AND HISTORIES

TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

As Giffard notes in The Torture Reporting Handbook, ‘[i]n order... to make a distinction between the different forms of ill-treatment and assess the degree of suffering involved, [one] must take the particular circumstances of the case and the characteristics of the particular victim into account each time,’ as ‘[t]he nature and degree of suffering experienced by an individual... may depend on many personal characteristics of the victim - for example, sex, age, religious or cultural beliefs, health.’

In The Torture Reporting Handbook, Giffard delves further into how perceptions of what constitutes torture can vary across cultures:

One particularly significant factor which may affect an assessment of the severity of the degree of suffering experienced is that of culture. It is important to be aware that different cultures, and indeed individuals within a particular culture, have different perceptions of what amounts to torture. This can be relevant in two ways - on the one hand, it can mean that behaviour which is thought of as torture by a culture or individual victim, may not normally constitute torture in the eyes of the international bodies. On the other hand, it can mean that treatment which is consistently considered by the international community to amount to torture is not viewed as such by the person who has been subjected to it. For example, in one country, beatings, even severe beatings, may not be considered torture but rather normal practice, whereas tearing a woman’s clothing (without more) may be.

1123 Ewert v. Canada [2018] 2 SCR 165 [57].
1124 Ibid [59].
1126 Ibid 13.
1127 Ibid 14.

266
Kirmayer et al explain that ‘[h]ow individuals appraise a particular situation depends on how they interpret its significance in terms of their personal history and cultural meaning systems. As a result, there may be significant differences in how people view even apparently similar events across cultures.’\textsuperscript{1128} The individual’s ‘e)motional response then is... determined by a situation or event... by the individual’s appraisal of what the event means and by the responses of others.’\textsuperscript{1129} They provide the example of ‘how violation of cultural norms was used to induce shame and helplessness in Guantanamo detainees. Deliberate transgression of religious symbols of the sacred has been used to deliver faith-based torture.’\textsuperscript{1130}

In its submission to the AHRC \textit{OPCAT in Australia} consultation, NAAJA wrote that it:

\begin{quote}

is very important to recognise that many Aboriginal people have different world-views and interpretations of words can differ substantially to other people’s views. We note at a foundational level a concern raised by community about the lack of respect towards Aboriginal laws and perspectives which is evident both within prison and detention facilities and through the operation of the Western legal system. This can be degrading towards Aboriginal people and damage the relationship between Aboriginal communities and the law.\textsuperscript{1131}

\end{quote}

NAAJA writes of:

\begin{quote}

the overarching nature of many laws that impact Aboriginal people without taking into account Aboriginal cultural authority structures and alternatives to prison... the inability of Aboriginal prisoners to attend to cultural obligations including funerals and other matters are vitally important in considering cruel and inhuman treatment yet are often excluded from processes seeking to improve the prison and detention system. An NPM can serve a potentially important role if it is able to take these views on board and... integrate them to broader systemic change and processes related to OPCAT.\textsuperscript{1132}

\end{quote}

\textsuperscript{1129} Ibid 89.
\textsuperscript{1130} Ibid 92.
See also at 95: “Forcing individuals to transgress cultural and religious norms and values then constitutes multiple forms of violence, causing direct injury, blocking efforts to give meaning to suffering, and damaging their social identity in ways that may lead to persistent feelings of estrangement from others.”

See also Yutaka Arai-Yokoi, ‘Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR’ (2003) 21 \textit{Netherlands Quarterly of Human Rights} 390-391: “The fact that the elements of degrading treatment consist chiefly of psychological factors makes it difficult to search for any objectively verifiable act or conditions that can be uniformly perceived as degrading,’ and although there is ‘an element of relativity arising in the subjective response of the victim to maltreatment and his/her particular cultural values... an entirely subjective standard must not be relied upon.’

See also Penal Reform International and the Association for the Prevention of Torture, \textit{Body searches: Addressing risk factors to prevent torture and ill-treatment} (2015) 6: ‘The educational, cultural and religious background of the detainees, including taboos on sexual matters, are factors that can either cause a search to be humiliating or degrading, or cause it to be perceived by the detainee as such. The European Court of Human Rights has recognised that for searches to be degrading or humiliating, ‘it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others’.’

See also at 5-6: ‘The lack of respect and understanding of Aboriginal law and culture shows the added layer of vulnerability faced by Aboriginal people in the justice system and detention environments which may be interpreted as ‘cruel and degrading treatment’. These different perspectives must be considered by the NPM bodies and highlighted as real issues for the way we collectively understand and interpret these words.’

\textsuperscript{1132} Ibid 8.
ABORIGINAL PEOPLE EXPERIENCE PRISON DIFFERENTLY

The APT’s report from the Regional Forum on the OPCAT in Latin America highlighted that ‘[t]he main structural issue is the fact that the very institution of a prison is alien to most [I]ndigenous cultures and that these institutions are not designed in light of the needs of [I]ndigenous peoples,’ pointing to the SPT’s assertion that ‘[c]ustodial sentences... are rarely used in the [I]ndigenous justice system, as community ties determine the structure of the individual and collective identity of community members, and imprisonment directly undermines these ties. For many [I]ndigenous persons, imprisonment constitutes cruel, inhuman and degrading treatment and even a form of torture.’

The APT noted that ‘[t]he impact of detention on [I]ndigenous persons is particularly grave in view of the fact that ties to their land, which are of fundamental importance to them, are severed... Prevailing racism and discriminatory attitudes towards [I]ndigenous peoples were seen as aggravating factors.’

GLADUE – ABORIGINAL PEOPLE EXPERIENCE IMPRISONMENT DIFFERENTLY

The Gladue principles echo the APT’s statements.

‘Another consideration in Gladue was how Aboriginal people experience imprisonment differently, addressing a ‘blind assumption that punishment equally affects all persons regardless of background or culture.’’ The purpose of Gladue was to decrease overreliance on prison as a sentencing disposition, rather than necessarily to reduce crime. The opportunity for rehabilitation of Aboriginal people in prison is impacted by the fact that prison is ‘often culturally inappropriate and regrettably discrimination towards [Aboriginal people] is so often rampant in penal institutions.’

R v SHARMA

‘As recorded in the Gladue decision... discrimination toward Aboriginal offenders, whose lives have been impacted by the legacies of colonialism and systemic discrimination, are "more adversely affected" by incarceration including on account

---

1134 Ibid 63.
1137 Ibid 450.
of discrimination often being rampant in penal institutions where the internment milieu is often culturally inappropriate.\textsuperscript{1138}

In ‘the TRC Final Report, the Commission concluded that: Prison today is for many Aboriginal people what residential schools used to be: an isolating experience that removes Aboriginal people from their families and communities. They are violent places and often result in greater criminal involvement as some Aboriginal inmates, particularly younger ones, seek gang membership as a form of protection. Today’s prisons may not institutionally disparage Aboriginal cultures and languages as aggressively as residential schools did, but racism in prisons is a significant issue. In addition, prisons can fail to provide cultural safety for Aboriginal inmates through neglect or marginalization. Many damaged people emerged from the residential schools; there is no reason to believe that the same is not true of today’s prisons.'\textsuperscript{1139}

\textbf{THE IMPACTS OF TORTURE ON SURVIVORS FROM DIFFERENT CULTURES}

The Special Rapporteur emphasised ‘that each individual responds in his own way to the experience of having been tortured, depending on various factors, such as age, gender, family status, socio-economic status, cultural background, etc. Another factor is the so-called “psychological preparedness for trauma”, which includes a strong belief system (political, religious or other), the ability to give meaning to the traumatic experience, predictability or controllability of traumatic stressors.’\textsuperscript{1140}

Kirmayer et al state that ‘before, during, and after the experiential ruptures of torture, individuals use all the resources of culture to make sense of suffering and reconstruct their lives.’\textsuperscript{1141} They explain how culture shapes the suffering that is experienced both during torture and in its long-term effects,\textsuperscript{1142} including ‘emotional experience, symptoms, and functioning,’\textsuperscript{1143} and that to develop an understanding of this suffering, one must have ‘knowledge of the cultural meanings of the torture in relation to the communities from which survivors come and those to which they return.’\textsuperscript{1144} Similarly, Mechthild et al note that ‘[i]n a traumatic situation, the

\textsuperscript{1138} R. v. Sharma, 2018 ONSC 1141, 2018 CarswellOnt 2566 [122].
\textsuperscript{1139} Ibid [123].
\textsuperscript{1140} See also Rachelle Larocque, Segregation Literature Review (January 2017) 26: ‘Indigenous individuals may be particularly vulnerable to the harmful effects of segregation, given the “intergenerational effects of Indigenous social histories (i.e., residential schools experience; involvement in the child welfare, adoption and protection systems; dislocation and dispossession of Indigenous people; poverty and poor living conditions on many native reserves; family or community history of suicide, substance abuse and/or victimization.”’” As discussed earlier, there are serious institutional effects as a result of segregation placement, such as the inability to complete correctional programming, obtain conditional release or cascade to lower levels of security – all of which affect Indigenous offenders and create greater barriers to release.’
\textsuperscript{1141} Theo van Boven, Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/59/324 (1 September 2004) [49].
\textsuperscript{1143} Ibid 86: “While some theories portray the response to torture as biologically fixed and determined [whether as the response to intense pain, conditioned fear, or loss of control], a cultural perspective insists that structures of meaning and social practices reach down into the body to shape experience from its inception. Although pain and fear are universal responses to injury and the threat of injury, their relationship to suffering is complex and mediated by meaning and context... Forms of physical and psychological pain and suffering share some common neurobiological pathways and regulatory systems... but these are influenced by cultural factors both developmentally and through current social contexts. Thus, both the experience of pain and fear during torture and their long-term effects are shaped by culture.’
\textsuperscript{1144} Ibid 90.
\textsuperscript{1145} Ibid 92.
culture specific frames of reference influence the evaluation of the event of the trauma itself, its interpretation and its consequences. The culturally shaped actual and anticipated reaction of the social environment significantly affects the course of trauma reaction and coping mechanisms.¹¹⁴⁵

In the context of clinical practice, Kirmayer et al caution against the application of “crude stereotypes” which ‘hides what is most central to culture, namely the taken-for-granted assumptions of the observer,’ emphasising that a ‘[l]ack of understanding of others’ cultural worlds leads to inhumane responses to their predicaments.’¹¹⁴⁶ Mechthild emphasises the importance of, in therapeutic interventions, the ‘underlying culturally bound interpretations’ of ‘frames of reference as well as modes of thinking and behaviour.’¹¹⁴⁷

Kirmayer et al clearly articulate how these considerations are relevant to an NPM: ‘[u]nderstanding the cultural contexts of torture and its aftermath is essential both for effective treatment of survivors and for the prevention of torture.’¹¹⁴⁸ It is essential that the Inspectorate is able to appreciate not only what might constitute torture or ill-treatment in Aboriginal cultures, as discussed above, but to also appreciate the long-term impacts of torture and ill-treatment across cultures, and what is required in culturally appropriate therapeutic interventions. This highlights again the importance of having a multi-disciplinary inspecting team, with psychologists and psychiatrists that have the requisite cross-cultural knowledge. This is all the more important in the context of the ongoing impact of colonisation on Aboriginal people and communities, given the legacy of intergenerational trauma. As Mechthild et al note, ‘the societal, historic-political and the current social context of the traumatisation [should] also to be included in systemic consideration.’¹¹⁴⁹

**RECOMMENDATION:** The Inspectorate should appreciate, in its preventative work, that the long-term impact of torture and ill-treatment can be shaped by survivors’ culture and the historic-political context of the ill-treatment (including the history of colonisation).

**INTERSECTIONALITY**

**GENDER AND ABORIGINALITY**

The UNGA has ‘[called] upon all States to adopt a gender-sensitive approach in the fight against torture and other cruel, inhuman or degrading treatment or punishment, paying special attention to violence against

See also at 93.
women and girls,’ and ‘[encouraged] the Special Rapporteur to continue to include in his recommendations proposals on the prevention and investigation of torture and other cruel, inhuman or degrading treatment or punishment, including its gender-based manifestations.’

The Inspectorate will address the specific needs of women who are detained (as discussed above, under *Expectations/standards for inspections – general*), and given its mandate, it will be particularly well-placed to focus on the treatment and conditions of detention as they relate to Aboriginal women, properly evaluating the experience of Aboriginal women in detention, rather than limiting its approach by separately considering the experience of women and the experience of Aboriginal people. The risk that an NT NPM might consider the needs of women separately to those of Aboriginal people, and fail to properly address the particular and unique needs of Aboriginal women is mitigated through the proposed structure of the Inspectorate. Just as the needs of Aboriginal children and young people will be better addressed by an Aboriginal Inspectorate, so will the needs of Aboriginal women.

As PRI has noted, the Bangkok Rules require prison authorities to recognise that women from different cultural backgrounds have distinctive needs, and adapt their service provision accordingly. Also noted is the overrepresentation of Indigenous women in prisons and that they are ‘statistically more likely to have been victims of domestic violence and are at particular risk of stigma and ostracisation from their communities.’

---

**NATIVE WOMEN’S ASSOCIATION OF CANADA**

‘NWAC’s work on violence against Indigenous women draws attention to the root causes of violence which is essential to understanding Indigenous women’s route to criminalization, over-incarceration, and barriers to rehabilitation and reintegration into their communities. NWAC’s work analyzes the effects of intergenerational trauma from residential schools and the Indian Act, R.S.C., 1985, c. 1-5, which includes addictions, poverty, disabling mental health issues, racism, and child welfare involvement. NWAC understands how these factors increase Indigenous women’s and girls’ vulnerability to imprisonment and contribute to higher levels of security classification and segregation for Indigenous women while imprisoned.’

‘If granted leave to intervene, the Proposed Intervenor intends to make the following submissions:

a. The constitutionality of administrative segregation under s. 15 of the Charter must be viewed through an intersectional lens which addresses the constellation of characteristics related to the grounds of race (Indigeneity), disability, gender and sex. The Proposed Intervenor submits that arguments concerning the constitutional rights of prisoners cannot ignore the intersection of race, disability, gender and sex, especially in light of the disproportionate and rising rates of Indigenous women in federal prisons, and the high incidence of disabling mental health issues and trauma experienced by imprisoned women, which were shown on the record below to be disproportionately high for Indigenous women;

i. the unique and manifold ways in which isolated prisoners who are Indigenous women, women with disabling mental health issues, and/or Indigenous women with disabling mental illness experience the effects of isolation including, for example, the exacerbation of pre-existing trauma, the intergenerational effects of past and continuing colonial policy and

---

1150 General Assembly Res 63/166, *Torture and other cruel, inhuman or degrading treatment or punishment*, 63rd sess, Agenda item 64(a), UN Doc A/RES/63/166 (19 February 2009) [9].

1151 Ibid [29].


1153 Native Women’s Association of Canada and West Coast Legal Education and Action Fund, *Notice of Motion in British Columbia Civil Liberties Association and The John Howard Society of Canada v Attorney General of Canada* (31 May 2018) [19].

271
practices, impacts of unconscious bias arising from ostensibly neutral state laws or action, lack of access to rehabilitative and reintegrative programming, and greater incidence of self-harming behaviours;

ii. the disproportionate harms arising from the use of ostensibly neutral classification and assessments tools, or matrices that fail to appropriately account for the sex, race and/or mental health of imprisoned persons;

iii. the realization of substantive equality as opposed to formal equality, and the significance of that distinction in the context of indirect, adverse effects discrimination arising from the law.\textsuperscript{1154}

**DISABILITY AND ABORIGINALITY**

The UNGA has also ‘[called] upon States to ensure that the rights of persons with disabilities, bearing in mind the Convention on the Rights of Persons with Disabilities, are fully integrated into torture prevention and protection, and welcomes the efforts of the Special Rapporteur in this regard.’\textsuperscript{1155}

NATSILS submitted to the AHRC *OPCAT in Australia* consultation that:

[d]espite the high prevalence of disability within the justice system, justice policy largely ignores the impact of disability on justice outcomes and the health and wellbeing of those who are detained. Aboriginal and Torres Strait Islander people with disability are particularly susceptible to imprisonment. Aboriginal and Torres Strait Islander people with disability who are in detention typically have co-occurring disabilities, such as: hearing loss, which is usually bi-aural; higher rates of psychological distress; an unstable housing and social support environment; and exposure to trauma and violence. They have also faced a lifetime of systemic barriers to their early childhood development, schooling and further education, and employment prospects. The interaction of discrimination and systemic barriers they have faced over their life as a person who is both Aboriginal and has disability effectively places them on pathway towards detention.\textsuperscript{1156}

**RECOMMENDATION:** The Inspectorate should approach its work with an appreciation of intersectionality (eg gender, disability and Aboriginality).

**AUSTRALIAN AND NT SOURCES FOR EXPECTATIONS/STANDARDS**

Although this Fellowship focused on overseas practices, the Inspectorate should also refer to findings, recommendations, judgments and best practices at a national level and from interstate jurisdictions, as well as looking to relevant NT sources.

\textsuperscript{1154} Ibid [28].

See also Native Women’s Association of Canada, *Federally Sentenced Aboriginal Women Offenders* (June 2017) 2: ‘Aboriginal women are more likely to be classified as maximum security prisoners than are other women: fifty percent of the women in prisons who are classified at this level are Aboriginal. This classification issue continues in spite of the fact that the government agreed in 1990 to discontinue the use of security rating scales, in part because they had not been validated for Aboriginal women. Aboriginal women also form the majority of the women ‘placed on the management protocol’, a new super maximum designation that NWAC and others have identified as illegal. Aboriginal women are more likely to be housed in a facility that has a higher security rating than is for their personal assessed level of risk. This means that Aboriginal women face unnecessary restrictions on their ability to access programs and services while incarcerated. The lack of appropriate facilities near to their homes means that many Aboriginal women prisoners continue to be faced with long-term geographic separation from their children, families and communities.’

\textsuperscript{1155} General Assembly Res 63/166, *Torture and other cruel, inhuman or degrading treatment or punishment*, 63rd sess, Agenda item 64(a), UN Doc A/RES/63/166 (19 February 2009) [10].

\textsuperscript{1156} National Aboriginal and Torres Strait Islander Legal Services, Submission No 47 to Australian Human Rights Commission, *OPCAT in Australia Consultation*, July 2017, 8.
ROYAL COMMISSIONS, INQUIRIES, INVESTIGATIONS BY STATUTORY BODIES, DECISIONS IN CORONIAL INQUESTS AND CIVIL LITIGATION

The Inspectorate should refer to, and incorporate as relevant, recommendations from Northern Territory and Commonwealth Royal Commissions and Inquiries when drafting and updating its expectations/standards. A similar approach was adopted by NPMs in the UK, considering recommendations from reviews and delivering training on the relevant findings and recommendations to those carrying out visits.

THE REPORT OF THE INDEPENDENT REVIEW OF DEATHS AND SERIOUS INCIDENTS IN POLICE CUSTODY – HMIP/HMICFRS EXPECTATIONS & ICVA TRAINING

‘In October 2017, the Report of the Independent Review of Deaths and Serious Incidents in Police Custody was published. The review was undertaken by Dame Elish Angiolini and commenced work in October 2015 to examine the procedures and processes around deaths and serious incidents in police custody in England and Wales, identify areas for improvement and develop recommendations. The report made a number of findings and recommendations relevant to the work of NPM members, including in relation to the use of restraint, intoxication, rousing of detainees, mental health and medical care. HMI Prisons and HMICFRS considered these recommendations in the revision of their Expectations for Police Custody. ICVA developed a briefing for its members and a training session for independent custody visitors on the review’s findings and recommendations, which was delivered during 2018.’

The Inspectorate should not, however, view its inspections as an audit of the detaining authorities’ implementation of the recommendations that arose from those Commissions or Inquiries. Nevertheless, it could choose to undertake a thematic inspection on implementation of those recommendations if it chooses to. For example, HMIP did a thematic report in relation to an inquiry that was precipitated by a racist murder of a prisoner by another prisoner.

HMIP - THEMATIC REPORT ON IMPLEMENTATION OF RECOMMENDATIONS FROM THE ZAHID MUBAREK INQUIRY

THE ZAHID MUBAREK INQUIRY

‘The racist murder of Zahid Mubarek by Robert Stewart in HMYOI Feltham in March 2000 has been described as the Prison Service’s Stephen Lawrence moment. Shortly after his attack on Zahid, the police discovered that Stewart had strong racist views... For four years after his murder, successive Home and Justice Secretaries refused the call by Zahid Mubarek’s family and others for an Inquiry into his murder, on the grounds that Prison Service internal inquiries had been sufficient to identify any weaknesses in the system. Eventually the House of Lords ruled that, in order to comply with its obligations under the European Convention on Human Rights, the United Kingdom was required to conduct a Public Inquiry. The subsequent Inquiry by Mr Justice Keith, published in 2006, laid bare a series of institutional failings and made far-reaching recommendations for change. Ministers and the National Offender Management Service have since stated that almost all the recommendations have been accepted and most fully implemented.’

1158 Her Majesty’s Inspectorate of Prisons, Thematic report by HM Inspectorate of Prisons: Report of a review of the implementation of the Zahid Mubarek Inquiry recommendations (June 2014) 6.
WHY HMIP CHOSE TO DO A THEMATIC REPORT

‘The Zahid Mubarek Trust was established by members of Zahid’s family who were determined to ensure that positive words about change and implementation were translated into action. Frustrated by a lack of communication from the National Offender Management Service and concerned that implementation of the recommendations was no longer a priority, the Trust encouraged us to use our inspection evidence to assess what progress had been made and sustained. We shared many of their concerns and were pleased to do so.1159 This short report does not attempt to assess how far each of the individual Inquiry recommendations has been implemented. Too much has changed with regard to the prison population itself, procedures and policies to make that a meaningful exercise. Rather we looked at the broad themes that the Inquiry addressed and examined what evidence there was of positive change.1160 Despite the significance and the wide scope of the Zahid Mubarek Inquiry findings and recommendations, until now there has not been an independent review of the extent to which the Inquiry’s recommendations have made a difference to the way black and minority ethnic prisoners are treated and all prisoners protected from racist violence.’1161

SCOPE OF THE REPORT

‘The focus of this review... is not to examine how specific procedures have been amended to minimise the opportunities for a racist prisoner to kill his cell mate. The purpose is to explore the extent to which the changes that the Inquiry called for have become embedded in culture and practice, and whether prisons and young offender institutions have become safer as a result of the initiatives and the work the Prison Service has undertaken since the Inquiry reported.’1162

FINDINGS

‘There was a real danger that the Keith Inquiry into Zahid Mubarek’s murder had become filed under ‘completed business’. This report shows that there is no room for such complacency and we hope this review will provide those responsible for the current inquiry with a clear and helpful reminder of why the lessons from the Keith Inquiry are still relevant today and why work is still urgently required to ensure those lessons continue to be understood, accepted and acted on.’1163

The Inspectorate should be guided by the recommendations from the Royal Commission into Aboriginal Deaths in Custody, including those relating to consultation on monitoring and evaluation of policies and programs,1164 staff training and development programs,1165 reducing the number of Aboriginal people in custody and consultation in relation to the infrastructure of police cells,1166 placing Aboriginal prisoners close to their family or place of residence or giving financial assistance to the family to visit them,1167 and leaves of absence.1168

The Inspectorate should also refer to the more recent Royal Commission into Institutional Responses to Child Sexual Abuse, with relevant recommendations including those related to the cultural safety of Aboriginal and

1159 Ibid.
1160 Ibid.
1161 Ibid.
1162 Ibid.
1163 Ibid 9.
1165 Ibid [96], [97], [154].
1166 Ibid [148].
1167 Ibid [168], [169].
1168 Ibid [171].
Torres Strait Islander children in youth detention, and the Little Children Are Sacred Report recommendations, such as ‘culturally appropriate rehabilitation programs for juvenile sex offenders in detention.’

Of course, the Inspectorate should also consider the recommendations and judgments of the NTRC, from reports by NT statutory bodies including the Ombudsman, Anti-Discrimination Commission and the Office of the Children’s Commissioner, from coronial inquests and of courts.

**RECOMMENDATION:** The Inspectorate should incorporate recommendations from domestic Royal Commissions and Inquiries relevant to the prevention of torture and ill-treatment of Aboriginal prisoners and detainees in the NT, where it considers it relevant to do so. The Inspectorate should retain discretion as to which recommendations it includes in its expectations/standards, with the Commission and Inquiry reports informing rather than dictating how the Inspectorate exercises its mandate.

The Inspectorate should not conduct audits on the implementation of recommendations from those Commissions and Inquiries. It can, however, follow-up on its own recommendations which have incorporated the Commission/Inquiry recommendations or choose to conduct a thematic review into implementation of Commission/Inquiry recommendations.

**RECOMMENDATION:** The Inspectorate should also consider the findings and recommendations/judgments of other NT statutory bodies (such as the Ombudsman, Children’s Commissioner and Anti-Discrimination Commissioner), coronial inquests and in litigation, where relevant to the prevention of torture and ill-treatment of Aboriginal prisoners and detainees.

---


See also at 15, Recommendation 15.2: ‘Given the Australian Government’s commitment to ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the National Preventive Mechanism(s) should be provided with the expertise to consider and make recommendations relating to preventing and responding to child sexual abuse as part of regularly examining the treatment of persons deprived of their liberty in places of detention.’

See also at 18, Recommendation 15.10: ‘State and territory governments should ensure they have an independent oversight body with the appropriate visitation, complaint handling and reporting powers, to provide oversight of youth detention. This could include an appropriately funded and independent Inspector of Custodial Services or similar body. New and existing bodies should have expertise in child-trauma, and the prevention and identification of child sexual abuse.’


1173 Eg. *Inquest into the death of Perry Jabanangka Langdon* [2015] NTMC 016.
NATIONAL STANDARDS - THE CULTURAL APPROPRIATENESS OF TREATMENT AND CONDITIONS

Potentially useful national standards relating to the cultural appropriateness of treatment and conditions in detention that the Inspectorate may consider reflecting in its own expectations/standards include the Australasian Juvenile Justice Administrators Standards and Principles,1174 and the Corrective Services Administrators’ Council’s Guiding Principles.1175 As discussed above (under Expectations/standards for inspections – general), the Inspectorate should be guided by any national standards that may be adopted by NPMs across Australia.

RECOMMENDATION: The Inspectorate should refer to national standards relating to detention, particularly the cultural appropriateness of treatment and conditions in detention, where relevant and at its discretion.

RIGHTS AND STANDARDS IN OTHER AUSTRALIAN JURISDICTIONS - THE CULTURAL APPROPRIATENESS OF TREATMENT AND CONDITIONS

Again, the Inspectorate may review the standards of inspectorates (and NPMs, once established) in other Australian jurisdictions, to inform the content of its own expectations/standards. Of particular note, the Western Australia Office of the Inspector of Custodial Services has Inspection Standards For Aboriginal Prisoners. Similar to the considerations in Gladue, those standards recognise that ‘dispossession, white settlement and the cumulative acts of colonial and state governments have left a distinct and enduring legacy of economic, social, cultural and political disadvantage for almost all Aboriginal people,’1177 and it directly addresses the issue of structural racism.1178 Also, in good practice, the WA OIC connects standards to international human rights, including directly referencing ‘cruel inhuman and degrading punishment’.1179 The WA OIC’s standards consider many aspects of detention through the lens of cultural appropriateness, adopting an approach similar to that recommended in this report, as discussed above.

1176 Government of Australia through the Corrective Services Administrators’ Council, Guiding Principles for Corrections in Australia (2018) 2.3.14, 4.1.10, 5.1.5, 5.1.6, 5.2.4, 5.4.4.
1177 Western Australia Office of the Inspector of Custodial Services, Inspection Standards For Aboriginal Prisoners (July 2008) 1.
1178 Ibid 1-2: ‘The notion does not presume that individual staff possess racist or discriminatory attitudes or beliefs. The concept of structural racism looks to outcomes, not intentions. If the provision of facilities, conditions and services are such that they simply would not be tolerated in a non-Aboriginal prison, then it can be said that the outcome is structurally racist. This kind of racism proceeds from systemic indifference, from the failure at all levels within the organisation to question one’s own assumptions about what is acceptable. It is likely to be found in areas where the prisoners are mostly undemanding and compliant – characteristics particularly associated with Aboriginal prisoners in the regions. It is more insidious than overt, attitudinal racism and more difficult to challenge and confront.’ See also at 27: ‘A38 Key performance indicators for each prison should measure and report on processes to address racism, including structural racism.’
1179 Ibid 4: ‘Ultimately, relocating Aboriginal prisoners outside their ‘country’ imposes emotional and spiritual distress beyond that imposed upon non-Aboriginal prisoners. This practice arguably constitutes ‘cruel inhuman and degrading punishment’, in terms of the applicable Human Rights Conventions to which Australia is party.’
1180 Ibid 4: ‘Aboriginal prisoners should be able to serve out their sentence within their own country.’ Also at 9: ‘Care should be taken to ensure that significant Aboriginal cultural values are not unknowingly or unnecessarily transgressed or that European cultural assumptions are placed on Aboriginal behaviour… Many Aboriginal people have a desire to comply with authority and this may result in a ready acquiescence and to giving answers that are felt to be what the questioner wants to hear. This aspect of behaviour must never be exploited or abused. Careful explanation should be given to ensure that the prisoner understands where he or she may exercise choice, and the full implications accruing to all choices.’
Rights in other jurisdictions may also be relevant, for example, cultural rights under s 19(2) of the Victorian Charter.\footnote{Victorian Equal Opportunity and Human Rights Commission and Commission for Children and Young People, \textit{Aboriginal cultural rights in youth justice centres} (June 2018) 6: ‘Section 19(2) of the Charter states that Aboriginal people hold distinct cultural rights and must not be denied the right, with other members of their community to enjoy their identity and culture, maintain and use their language, maintain their kinship ties, maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs. Under the Charter, the public sector agencies and officials have an obligation to give proper consideration to the cultural rights of Aboriginal people when making a decision. They also have an obligation to act compatibly with those rights… A lack of protection of cultural rights has the ability to exacerbate emotional trauma of young people in custody.’}\footnote{Victorian Equal Opportunity and Human Rights Commission and Commission for Children and Young People, \textit{Aboriginal cultural rights in youth justice centres} (June 2018) 13, 14.}

\textbf{RECOMMENDATION:} The Inspectorate should refer to rights and standards in other Australian jurisdictions, particularly in relation to the cultural appropriateness of treatment and conditions in detention, where relevant and at its discretion.

\textbf{REPORTS AND SUBMISSIONS OF BODIES IN OTHER JURISDICTIONS}

Also useful sources of information to guide expectations/standards are reports from bodies in other Australian jurisdictions, such as VEOHRC’s (which considered issues such as staff training and culturally appropriate architecture of facilities),\footnote{Koorie Youth Council, \textit{Inquiry into Youth Justice Centres in Victoria submission} (March 2017) 9: ‘The protective power of culture: Cultural context is also key to understanding the strengths of Aboriginal young people. Connection to culture provides a sense of belonging and wellbeing that acts as a protective factor against contact with the justice system and other forms of disadvantage. The Koorie Youth Council’s consultations with young people consistently identify a connection with culture and identity as a key determinant of resilience and wellbeing.’} publications such as the Victorian Commission for Children and Young People’s cheat sheet,\footnote{Koorie Youth Council, \textit{Inquiry into Youth Justice Centres in Victoria submission} (March 2017) 10-11.} or submissions from bodies such as the Koorie Youth Council (addressing relevant considerations such as the protective power of culture\footnote{Koorie Youth Council, \textit{Inquiry into Youth Justice Centres in Victoria submission} (March 2017) 9: ‘The protective power of culture: Cultural context is also key to understanding the strengths of Aboriginal young people. Connection to culture provides a sense of belonging and wellbeing that acts as a protective factor against contact with the justice system and other forms of disadvantage. The Koorie Youth Council’s consultations with young people consistently identify a connection with culture and identity as a key determinant of resilience and wellbeing.’} and the importance of culturally safe engagement with young people who have had contact with the criminal justice system to inform practice. The latter would be useful, for example, to inform the Inspectorate’s engagement with detainees and people with lived experience.\footnote{Koorie Youth Council, \textit{Inquiry into Youth Justice Centres in Victoria submission} (March 2017) 10-11.}

\textbf{RECOMMENDATION:} The Inspectorate should refer to the reports and submissions of statutory bodies and NGOs in other jurisdictions, particularly in relation to the cultural appropriateness of treatment and conditions in detention, where relevant and at its discretion.
PREPARING FOR THE INSPECTION
MOU WITH DETAINING AUTHORITIES

In its submission to the AHRC *OPCAT in Australia* consultation, the APT suggested that the NPM and authorities might consider creating an MoU.1186 Negotiating an MoU would support effective and efficient inspections, ensuring that the obligations and expectations of both the detaining authorities and the Inspectorate are firmly established, are consistent across different detention sites, and that inspections are less likely to be impacted adversely by opposition to the Inspectorate as a result of staff turnover and the potential loss of institutional knowledge. MoUs also beneficial in that the relationship between the Inspectorate and the detaining authority is transparent to civil society and detainees (the MoU should be publicly available), which has the potential to increase confidence in the Inspectorate. It can also facilitate constructive dialogue between the Inspectorate and the detaining authorities by providing clarity and certainty about respective roles and responsibilities, removing the need for ongoing negotiations and/or relying on individual's goodwill. Of note, this MoU should not replace legislative provision for the powers, privileges and immunities of the Inspectorate.

MOU BETWEEN HMIP AND THE NATIONAL OFFENDER MANAGEMENT SERVICE

The MoU authorises HMIP staff to have ‘unfettered access to establishments, records and prisoners. This will include the immediate provision of keys on arrival for authorised inspection staff. Records will include electronic images and records identified by inspectors relevant to the inspection, as well as relevant records held regionally or nationally.’ The MoU also clarifies what items HMIP staff can bring into the place of detention, which removes the need for negotiation at site level.1187

It also establishes obligations on the part of HMIP, such as ‘[seeking] in all instances to minimise unnecessary burdens on establishments during inspections,’ that on ‘full inspections, the inspection team will endeavour to provide informal feedback throughout the inspection to explain and reinforce its findings and evidence base. HMIP will provide a formal debrief with indicative judgments on the final day of the inspection,’ with the MoU further clarifying how the debrief should be conducted and procedures around the debrief note.1188

The Inspectorate should be regularly provided a muster, and the preferred languages of detainees, to enable the Inspectorate to book interpreters for unannounced visits (as discussed above, under *Strategy regarding locations and frequency of visits*), and it should have prior access to custody records, including the information management system, to further assist in its preparation of an inspection.

---

1188 Ibid 15-16.

See also Independent Monitoring Boards, IMB National Annual Report 2017/18 (June 2019) 43: ‘We have concluded a Protocol with the MoJ, which has been presented to the Justice Committee; and are reviewing our service level agreements with Home Office Detention and Escorting Services and HMPPS.’

See also Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2009 to 30 June 2010 (November 2010), 7: ‘The Authority will continue to work on establishing a relationship agreement or formalised Memorandum of Understanding with police in respect of the Authority’s OPCAT functions.’

279
ESTABLISHING WHICH NGOS AND BUSINESSES ARE PROVIDING A SERVICE AT THE DETENTION SITE

The Special Rapporteur has noted that:

Many States increasingly outsource part of their traditional public services to private contractors, including law enforcement functions... This development generally has not been accompanied by sufficiently strong national regulation, oversight and accountability structures to control and enforce the compliance of corporate actors and other private contractors with human rights, thus resulting in widespread impunity for violations...

Under international law, however, States cannot absolve themselves of their responsibility for torture and ill-treatment carried out on their behalf, under their direction or control, at their instigation or with their consent or acquiescence. States are obliged to take effective measures with a view to prohibiting and preventing torture and ill-treatment in all such circumstances.\textsuperscript{1189}

\textbf{HMICS - INSPECTION OF CUSTODY CENTRES}

In its inspection of custody centres across Scotland, issues HMICS looked at included the provision of legal assistance and information.\textsuperscript{1190} It also looked at the role of the appropriate adult: ‘In one case we observed, we noted that an appropriate adult attended but contributed little to helping the detainee understand the legal processes taking place at the custody centre. This, coupled with other anecdotal evidence we heard from custody staff, suggests there is a need for some appropriate adults to have a greater awareness of their role, and improved training in supporting vulnerable people.’\textsuperscript{1191}

\textbf{IMB (ENG) - ANNUAL REPORT}

The IMB looks to the service providers in detention, listing them in its annual report:

‘Maintenance: Carillion (to January); Government Facilities Service Ltd (GFS) (from February)

Education: Novus

Escort contractor: Serco

Community Rehabilitation Company (CRC): Penrose (subcontracted by MTCNovo via the London CRC)

\textsuperscript{1189} Nils Melzer, Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN DocA/73/207 (20 July 2018) [51-52].

\textsuperscript{1190} Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of custody centres across Scotland (October 2018) 26.

\textsuperscript{1191} Ibid 29.
Healthcare and Pharmacy: Care UK
Mental Health: Barnet, Enfield and Haringey Mental Health Trust NHS coordinates the work of Care UK primary mental health nurses with its own secondary mental health, inpatient and day care services.
Substance Misuse Programme: Phoenix Futures
Gym qualifications: Active IQ
Housing resettlement: St Mungo’s
Gang violence reduction: Catch22
Visitors Centre: Spurgeons (to September); Prison Advice and Care Trust (PACT) (from October).\textsuperscript{1192}

As part of its preparation for an inspection, the Inspectorate should map out the non-government service providers at the detention site, as it must include their operations in its inspection of the site, and these organisations will be subject to scrutiny. For example, in youth detention facilities, the Inspectorate should look at Danila Dilba’s social and emotional wellbeing service,\textsuperscript{1193} Danila Dilba’s and Central Australian Aboriginal Congress’ provision of primary health services, once the transition from NTG is complete,\textsuperscript{1194} and the Balanced Choice Program.\textsuperscript{1195} In prisons and youth detention facilities, it should include in its inspection NAAJA’s throughcare,\textsuperscript{1196} NAAJA’s and NTLAC’s community legal education services\textsuperscript{1197} and civil law prison services. In relation to prisons, it should consider the Salvation Army’s Prison Visitor Transport Shuttle\textsuperscript{1198} and Larrakia Nation’s Return to Country service.\textsuperscript{1199} In terms of police custody, the Inspectorate should include the CNS, operated by NAAJA,\textsuperscript{1200} and the Register of Appropriate Support Persons (RASP) run by the Australian Red Cross.\textsuperscript{1201} As already mentioned above, the Inspectorate should not conduct joint visits to a place of detention with organisations which provide services in the place of detention, whether those services are funded by the Commonwealth Government or the NTG.

RECOMMENDATION: The Inspectorate should map out the non-government service providers at the detention site, to be included in its inspection of the detention site.

\textsuperscript{1193} Danila Dilba, Services: Don Dale Youth Support <https://ddhs.org.au/services/don-dale-youth-support>
\textsuperscript{1194} Northern Territory Government, Territory Families, Statement of Commitments (April 2019) 1.
\textsuperscript{1195} Balanced Choice Program, <https://au.linkedin.com/company/balanced-choice-program>
\textsuperscript{1198} The Salvation Army, Prison Visitor Transport Salvo Shuttle <https://www.salvationarmy.org.au/locations/northern-territory/ny05/darwin-corps-community-centre/>
\textsuperscript{1199} Larrakia Nation, Outreach Services <larrakia.com/services/outreach-services/>: Return to country
\textsuperscript{1201} Australian Red Cross, Volunteer role description: Register of Appropriate Support Persons (August 2019) 1.
REVIEW OF INFORMATION AND RESEARCH RELATING TO THE DETENTION SITE

REVIEW OF THE INSPECTORATE’S INFORMATION

The Inspectorate should review evidence, findings and recommendations from previous inspections at the detention site and any other relevant correspondence from detainees at the detention site or from the public.

**HMIP – REVIEW OF ITS OWN INFORMATION**

GUIDE FOR INSPECTORS

‘Once the subject allocation has been made [for the inspection], [inspectors] should identify the recommendations from the previous full inspection report and list them against the relevant inspector for that area, for inclusion in the inspection pack. Main recommendations listed should also include the statement of concern they addressed. All inspections follow up these recommendations to assess progress.’\(^{1202}\)

‘The coordinating inspector prepares information to be included in the inspection pack. The inspection support team holds an intelligence file on each establishment, which mainly comprises correspondence from detainees and members of the public.’\(^{1203}\)

THEMATIC REPORT

‘Analysis was undertaken of the most recent inspection reports for all STCs and YOIs holding children, and YOIs holding young adults... We also conducted analysis of survey data from the 2016–17 annual reporting year for children in YOIs and STCs, and within two YOIs holding young adults.’\(^{1204}\)

INFORMATION PROVIDED TO THE INSPECTORATE BY THE DETAINING AUTHORITY

The Inspectorate should reflect on what sort of information it should regularly be provided in relation to incidents or detaining authorities’ decisions, such as further restrictions on the liberty of detainees or discipline of detainees. This would be additional to the information that it would have access to during inspections (such as to registers recording use of force).

**IMB (NI) – PRISON AND YOUNG OFFENDER CENTRES RULES**

A complementary approach to having an MoU is having a set of rules that clearly define the information that is to be provided to the Inspectorate. This should not be a substitute for an MoU, or legislation.


\(^{1203}\) Ibid 12.

\(^{1204}\) Her Majesty’s Inspectorate of Prisons, *Incentivising and promoting good behaviour A thematic review by HM Inspectorate of Prisons* (March 2018) 16.
The prison rules require that IMB monitors be informed of a range of incidents in the prison, including when a prisoner dies, or a prisoner’s association has been restricted or a prisoner is restrained (although recognising that the role of the IMB extends to being present at reviews of such restrictions and restraints, which would not form part of the Inspectorate’s role), or a prisoner is ‘temporarily confined in a special cell or observation cell.’

INFORMATION FROM THE DETAINING AUTHORITY’S CUSTODY RECORDS

The Inspectorate should review the detaining authority’s custody records. This requires the Inspectorate to have access to the custody records before, as well as during, an inspection.

HMICS – CUSTODY RECORDS

‘In advance of our visits to each of the custody centres, we reviewed a sample of custody records of people who had been detained there during the previous month. The size of the sample was proportional to the annual throughput of detainees and was purposively selected to be broadly representative of the proportions of men, women, children and foreign nationals held at those centres in the last year. We did not purposively sample records relating to other protected characteristics either because the characteristics had not been recorded or because we were less confident that the data had been recorded accurately. We reviewed 145 custody records in total.’

PUBLICLY AVAILABLE INFORMATION

The Inspectorate should conduct a review of the publicly available information relating to the detention site, including findings and decisions in matters before the court (such as civil litigation or coronial inquests) and media coverage.

The APT has recommended that in preparation of monitoring police custody, the monitoring body should look to sources including:

- reports and recommendations from the media, NGOs, universal or regional bodies (in particular recommendations made to the authorities), and the official reports the visiting team has access to. Careful notes should be made of patterns of abuse, particular locations within the establishment where ill-treatment is alleged to have taken place, the methods of ill-treatment allegedly used and, if the alleged ill-treatment is physical, the types of instruments or implements utilised.

For example, HMIP looks to media reporting.

---

1206 Ibid Rule 32(2A), Rule 32(2B).
1207 Ibid Rule 48[1], 49(3A)-[3C].
1208 Ibid Rule 32(2D)-[2J], 49(3D)-[3K].
1209 Ibid Rule 47[1] and [4].
1210 Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of custody centres across Scotland (October 2018) 8.
1211 See also Her Majesty’s Inspectorate of Constabulary in Scotland, Inspection of custody centres in Greater Glasgow Division (June 2019) 4: ‘In advance of our visits, we analysed a sample of custody records relating to 75 detainees.’
INFORMATION FROM OTHER NPMS, STATUTORY BODIES AND CIVIL SOCIETY ORGANISATIONS

The APT also notes that:

[preparatory research should ideally not be restricted to a passive reading of reports. It can be very useful to meet with other actors, such as NGOs, lawyers who represent detainees, relatives, members of internal affairs and professional standards units, hospital staff, judges, community police forums and medical practitioners who may have had dealings with detainees. Anyone who has regular dealings with the [detaining authority] may have useful information.1213

As discussed above (under Inspectorate’s relationship with civil society), it is important that the Inspectorate build relationships with civil society, particularly ACCOs and the Aboriginal community, in order to enable the Inspectorate to obtain the necessary information to maximise the efficacy of its inspections, as well as the accuracy and appropriateness of its findings and recommendations.

HMICS – ENGAGING WITH OTHER NPMS

‘In addition to inspecting custody centres, we sought the views and experiences of independent custody visitors and consulted with other stakeholders.’1214

‘Under the Police and Fire Reform (Scotland) Act 2012, the SPA is required to make arrangements for independent custody visitors (ICVs) to monitor the welfare of people detained in police custody. Regular visits to custody centres are carried out by volunteers from the local community. Like HMICS, the independent custody visitors in Scotland are members of the UK’s NPM. During our inspection, we engaged with local custody visitors regarding any recent issues they had identified at custody centres in Greater Glasgow. This information was used to inform our inspection.’1215

HMIPS – ENGAGING WITH OTHER STATUTORY BODIES

‘The Inspectorate will contact the Prisons and Probation Ombudsman (PPO) before the inspection to gather information about any deaths in custody since the last inspection. This information should be shared with the inspectors looking at suicide and self-harm, and health.’1216

See also Association for the Prevention of Torture, Monitoring places of detention: a practical guide (2004) 75: ‘Plan any contacts to be made outside the place of detention: political and administrative authorities; judicial authorities; State services working with the place of detention, for example, medical, social services, education; any other players working with the place of detention.’
1214 Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of custody centres across Scotland (October 2018) 4.
1215 Her Majesty’s Inspectorate of Constabulary in Scotland, Inspection of custody centres in Greater Glasgow Division (June 2019) 8.
The Inspectorate should be responsive to the information it receives/accesses in relation to the place of detention, adapting its inspection methodology where it is appropriate to do so. For example, if there are particularly concerning allegations of human rights violations, the Inspectorate may choose to increase the duration of the inspection or the number of staff partaking in the inspection, in order to collect more extensive evidence.

HMIP - ENHANCED INSPECTION METHODOLOGY WHERE THERE ARE HEIGHTENED CONCERNS

In September 2017 the BBC broadcast a programme on Brook House, an immigration removal centre (IRC) next to Gatwick Airport, run by the contractor G4S on behalf of the Home Office. The programme showed apparent ill-treatment of detainees, including violent and threatening behaviour by some staff towards detainees... NPM members raised concerns about whether such treatment could be occurring in other centres. HMI Prisons therefore employed an enhanced inspection methodology at a subsequent inspection of Harmondsworth immigration removal centre, including offering an interview to all detainees and providing all staff the opportunity to complete a confidential online survey. HMI Prisons will continue to use similar enhanced methodologies where it has heightened concerns about the safety of those held in immigration detention.¹¹²¹⁷

RECOMMENDATION: The Inspectorate should be responsive to the information it receives/accesses in relation to the detention site(s), adapting its inspection methodology where it is appropriate to do so.

THE INSPECTION TEAM

IDENTIFY EXPERTISE THAT WILL BE REQUIRED FOR THE VISIT AND ENSURE INSPECTION TEAM HAS THE RELEVANT EXPERTISE

The Inspectorate should identify the expertise that will be required for the visit and ensure that the inspection team has the relevant expertise (engaging external consultants where necessary). Staffing is discussed in greater detail above (under Structure and staffing of Inspectorate).

The SPT recommends that subject areas for the inspection be allocated to team members, in order to:

- avoid duplication of work, allow the efficient execution of the planned activities, enable members to cover all necessary areas and make better use of... resources. The mechanism should divide tasks and clearly attribute roles among the members of team. The tasks to be carried out during visits should be assigned on the basis of the professional qualifications of the mechanism’s members.1218

- The SPT recommends that subject areas for the inspection be allocated to team members, in order to:

  - avoid duplication of work, allow the efficient execution of the planned activities, enable members to cover all necessary areas and make better use of... resources. The mechanism should divide tasks and clearly attribute roles among the members of team. The tasks to be carried out during visits should be assigned on the basis of the professional qualifications of the mechanism’s members.1218

HMIP – ALLOCATION OF SUBJECT MATTER

‘Following consultation with the team leader, the coordinating inspector should allocate subject areas to inspectors. Subject areas are allocated in line with the current Expectations document. You should distribute the number of areas evenly, taking into account the size of the inspection tasks and whether there are particular concerns about the establishment.’1219

HMIPS –THEMATIC REVIEW ON MENTAL HEALTH
SHORT LIFE STEERING GROUP AND WORKING GROUPS

‘We put together a short life steering group (the Roundtable) to: Agree the scope of the review, terms of reference, and timescales for completion; assess the scope for other Inspectorate/Agency involvement; agree required input, information-sharing, and involvement going forward; and invite members to share their experience of recent reviews and taskforce activity that could inform this Expert Review on Mental Health and Young Offenders.’1220

‘Three multi-agency short life working groups were then established, reporting into the Roundtable.1221

Short life working group 1: ‘To critically review the process and information sharing on admission to HMP YOI Polmont, and subsequently on liberation from the prison into the community.’1222

Short life working group 2: ‘To critically review the clinical and wellbeing support that young people receive in custody.’1223

1218 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to Armenia undertaken from 3 to 6 September 2013: observations and recommendations addressed to the national preventive mechanism, UN Doc CAT/OP/ARM/2 (22 February 2017) [41].


1221 Ibid.

1222 Ibid.

1223 Ibid.
Short life working group 3: 'To critically review the current Death in Prison Learning Audit and Review... process for deaths in custody in HMP YOI Polmont.'

'These three groups operated independently of one another, but had some common members for continuity and sharing of information.'

**RECOMMENDATION:** The inspection team should be comprised of staff (and consultants, where necessary) with the requisite subject matter expertise.

Responsibilities for the inspection should be allocated according to expertise, to ensure complete coverage of subject matter areas, to avoid duplication of work, and to ensure staff expertise is being appropriately utilised.

For thematic inspections, the Inspectorate could create advisory steering groups and/or working groups to ensure it has the relevant expertise. As when engaging consultants, the Inspectorate should ensure members of any advisory groups do not have an actual or perceived conflict of interest.

It should make efforts to engage Aboriginal people (or where not possible, individuals who work for ACCOs) as consultants and members of advisory groups.

---

1224 Ibid 19.
1225 Ibid 19.
CONDUCTING THE INSPECTION
INSPECTIONS SHOULD GENERALLY BE UNANNOUNCED

The SPT has noted in one of its reports that visits should ‘be primarily unannounced in order to assist it ascertain the real situation of persons deprived of their liberty.’ The APT recommends that visits to police custody are unannounced, recognising that at police stations ‘risks of ill-treatment and removal of detainees are greater than in other custodial settings. Police stations are usually relatively small places with few detainees compared with prisons and a high turnover. Therefore, the ‘surprise effect’ is particularly potent, especially in relation to the risk that detainees will be removed prior to the visit if it is announced.’ HMIP’s Inspection Framework requires that an ‘establishment will be given no more than 30 minutes notice prior to an unannounced inspection. All areas of the establishment will be visited soon after arrival.’

RECOMMENDATION: Inspections should generally be unannounced.

INSPECTIONS SHOULD BE OF SUFFICIENT LENGTH, WITH VISITS CONDUCTED ON DIFFERENT DAYS OF THE WEEK, AT DIFFERENT TIMES OF THE DAY

In one of its reports, the SPT has suggested that ‘the NPM... ensures that the time it spends conducting a visit to a place of detention is commensurate to the size, character and complexity of the place concerned.’ Similarly, the APT has recommended that ‘visits should be as long as necessary to do a professional job. They should be long enough for the visiting team to be able to talk with the individuals in charge, their subordinates, and a representative sample of the persons held there, and to examine the facilities and living conditions.’ The Inspectorate should also ensure that its visits are of sufficient length and frequency to enable it to assess the culture of the places of detention.

The SPT has recommended ‘that the visits be carried out at various times, including during the hours of night.’ This is echoed by the APT’s recommendation that inspections be undertaken ‘at different times of the day, week and month. A visit to a police station on a Tuesday at 11am will be different to one carried out at midnight on a weekend or during public holidays.’ The APT lists the sort of issues that might be identified if visits take place at different times and on different days, such as ‘there being no female officers on night shifts, the medical room being kept locked with the keys not readily accessible, or the fact that the staff working night shifts have different attitudes to detainees.’

1226 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Federal Republic of Germany, UN Doc CAT/OP/DEU/2 (29 October 2013) [45].
1229 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Federal Republic of Germany, UN Doc CAT/OP/DEU/2 (29 October 2013) [38-39].
1231 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Federal Republic of Germany, UN Doc CAT/OP/DEU/2 (29 October 2013) [45].
1233 Ibid.
HMIP - INSPECTION FRAMEWORK

‘An inspection normally spans a period of two weeks. The first inspection week involves a coordinating inspector and one other inspector (at a minimum) attending the establishment for two days. A full detainee survey is conducted by a team of HM Inspectorate of Prisons researchers.’\textsuperscript{1234} ‘The purpose of the first inspection week is to meet the governor/manager of the establishment and the appointed liaison officer for the inspection, ensure they fully understand the inspection process and offer reassurance... to make arrangements for the inspection, using the preparatory inspection pack to guide what documentation will be requested and when it will be required.’\textsuperscript{1235}

‘The second week of the inspection involves the team leader and a team of inspectors, including specialists and partner inspectorates, and lasts a week.’\textsuperscript{1236}

In its Guide for inspectors, HMIP refers to night duty inspections.\textsuperscript{1237}

HMICS – VISITS ON DIFFERENT DAYS OF THE WEEK, DIFFERENT TIMES OF THE DAY

‘Our visits commenced at various times of the day including early morning and late evening, and several took place at weekends when custody centres are typically busier. We visited some centres on more than one day in order to assess how the centres operated at different times, to speak to staff on different shifts, and to speak to and observe how detainees were managed where there had been no detainees present on our initial visit. Three of the centres were not holding detainees at the time of any of our visits. Several of the centres we visited were located in island or rural locations and typically have a low throughput of detainees.’\textsuperscript{1238}

ICV - DIFFERENT TIMES OF THE DAY

‘Independent Custody Visitors (ICVs) are members of the local community who visit police custody centres to observe, comment and report on the conditions under which persons are detained. All visits are carried out in pairs, and are always unannounced. They can take place at any time of the day or night.’\textsuperscript{1239}

ICV (NIPB) - VISITS ON DIFFERENT DAYS OF THE WEEK, DIFFERENT TIMES OF THE DAY

‘Visits took place across all seven days of the week and at all times of the night and day. Of the 483 visits carried out, almost a fifth were carried out on Wednesdays (92, 19%). The least amount of visits were carried out on Mondays (56, 12%). Almost nine in ten of all visits (430, 89%) were made in the 12 hour period between 9 a.m. to 9 p.m. Over two in five of all visits (222, 46%) were carried out between 6 p.m. and 9 p.m. There is a requirement for 10% of custody visits to be undertaken during unsociable hours.’\textsuperscript{1240}

\textsuperscript{1234} Her Majesty’s Inspectorate of Prisons, Inspection framework (2017) 12.
\textsuperscript{1235} Ibid 13.
\textsuperscript{1236} Ibid 12.
\textsuperscript{1238} Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of custody centres across Scotland (October 2018) 4.
\textsuperscript{1239} See also Her Majesty’s Inspectorate of Constabulary for Scotland, Thematic Inspection of the Care and Welfare of persons detained in police custody in Scotland (January 2013) 8-9.
\textsuperscript{1240} Northern Ireland Policing Board, Northern Ireland Independent Custody Visiting Scheme Annual Report 2015/2016 (October 2016) 8.
The Authority has ensured that its visits... captured both urban and rural sites. The Authority also conducted visits at different times of the day, including late nights and early morning visits.\textsuperscript{1241}

**RECOMMENDATION:** Inspections should be of sufficient length, conducted on different days of the week (including weekends) and at different times of the day (including evening, night and during shift changes).

---

**INITIAL BRIEFING WITH DETAINING AUTHORITY**

---

**HMIP – BRIEFING**

The second week will normally begin with a formal briefing from the governor/manager about the establishment... The inspection team leader will introduce the team and brief the governor/manager about the process of inspection. This will include a short description of key methodologies; the use of Expectations, and events which will take place during the week such as inspector feedback on emerging findings, the night visit, and the Chief/Deputy Chief Inspector’s arrival and requirements... Arrangements are also made to ensure full engagement with the Independent Monitoring Board, including a meeting and participation in the inspection debrief. The team will also offer to meet with staff associations.\textsuperscript{1242}

---

**HMIP – UNFETTERED ACCESS**

All inspectors carry keys and require unfettered access to all parts of an establishment, relevant documents and detainees. Inspectors will communicate with detainees in private, and in confidence, when required.\textsuperscript{1243} Unfettered access requires staff being ‘aware of any risks, threats, fire evacuation procedures and other health and safety matters at the establishment.’\textsuperscript{1244}

**RECOMMENDATION:** The inspection should include an initial meeting with the manager of the detention site, to enable the detaining authority and Inspectorate to brief each other. This should include a briefing on any facility security issues and safety procedures, to support the Inspectorate’s unfettered access to all parts of the facility.

---

\textsuperscript{1241} Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2009 to 30 June 2010 (November 2010), 8.
\textsuperscript{1242} Her Majesty’s Inspectorate of Prisons, Inspection framework (2017) 14.
\textsuperscript{1243} Ibid 12.
\textsuperscript{1244} Ibid 13.
CONDUCTING INSPECTIONS THAT ARE TRAUMA-INFORMED AND RESPECTFUL OF DETAINEES’ DIGNITY

INSPECTORATE STAFF SHOULD CONDUCT INSPECTIONS IN A TRAUMA-INFORMED MANNER

In Monitoring places of detention: a practical guide, the APT’s advice is particularly valuable:

For a person who has been subjected to torture or ill-treatment it is often difficult to talk about this extremely humiliating experience. The collecting of information about ill treatment is therefore an especially sensitive task for visitors. Visitors should receive special training in handling allegations of torture, to develop a fine sense of how far they can go with their questions or indeed whether instead specialist intervention is necessary. It is particularly difficult to strike a balance between obtaining the information… and avoiding the possibility of retraumatisation. For the protection of the detainee, it is crucial that you ask if and how you can use the allegation (whether you can mention personal data, use the information only in a general way or not use it at all).  

One means (identified by both the APT1247 and SPT1248) by which detainees’ confidence in the Inspectorate can be quickly undermined is if Inspectorate staff are perceived as being friendly with or colluding with detention staff. The Inspectorate should be mindful of the adverse impact that witnessing overly friendly behaviour with detention staff can have on detainees who have divulged sensitive information to Inspectorate staff about their poor treatment by detention staff.

In shadowing oversight bodies as part of the Fellowship, I observed the different methods of recording the evidence provided by detainees. Writing notes was the most common means of recording the conversation, but taking an audio recording was another means. There are benefits and disadvantages to both approaches, and it is recommended that the detainee(s) be given an opportunity to identify their preference. The accuracy of an audio recording is an advantage over written notes, and it also enables the inspector to better connect with the detainee during the engagement, without the interruptions or distraction inherent to taking written notes. It is also an effective means of capturing the testimonials of detainees, recording direct quotes (see Presentation of findings in the report). On the other hand, recording the interview may make the detainee feel intimidated or add to their distress when they are discussing sensitive issues.

See also Association for the Prevention of Torture, Monitoring Police Custody – A practical guide (January 2013) 96.
1246 Her Majesty’s inspectorate of Prisons, Ethical principles for research activities (2015) 4.
1247 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to Armenia undertaken from 3 to 6 September 2013: observations and recommendations addressed to the national preventive mechanism, UN Doc CAT/OP/ARM/2 (22 February 2017) [50].
1248 Ibid [51].
OCC – AGE APPROPRIATE ENGAGEMENTS

‘Over the last year we have developed a set of cards, based on the Mana Mokopuna principles, for use during our interviews with children and young people. The cards, which contain simple words and phrases, act as conversation starters during our interviews. They have been popular with children and young people, resulting in interviews that are longer and more comprehensive. They have also enabled us to work in ways that are purposeful and consistent without being tightly structured.’\(^{1249}\)

---

**RECOMMENDATION:** Inspectorate staff and consultants should conduct the inspection in a trauma-informed way, that respects the dignity of the detainees.

Inspectorate staff and consultants should incorporate learnings from the training on trauma-informed practice that they have received, recognising the risk of retraumatising survivors of torture and ill-treatment when gathering evidence.

---

**RECOMMENDATION:** Inspectorate staff and consultants should ensure that they do not (and are not perceived to) collude with or behave in an overly friendly manner with detention staff when conducting the inspection, recognising the adverse impact this may have on detainees.

---

**RECOMMENDATION:** The Inspectorate should include in its procedures a requirement that the Inspectorate ask detainees how the Inspectorate can record and use the information it is provided; for example, whether the information can be used in a deidentified manner or not at all, and whether the detainee prefers that the inspector take written notes or audio recordings during the interview.

---

**TRAUMA INFORMED AND CULTURALLY-APPROPRIATE**

As already addressed above (Expectations/standards and frameworks for culturally competent inspections), what constitutes torture or ill-treatment may differ across cultures.

The Istanbul Protocol has identified that the:

- unique cultural, social and political implications that torture has for each individual influence his or her ability to describe and speak about it. These are important factors that contribute to the impact that torture inflicts psychologically and socially and that must be considered when performing an evaluation of an individual from another culture.\(^{1250}\)

---


Although the Protocol focuses on physicians and psychologists investigating and documenting torture and ill-treatment, Inspectorate staff also ‘should attempt to relate to mental suffering in the context of the individual’s beliefs and cultural norms... [including] respect for the political context as well as cultural and religious beliefs.’ They should be aware of ‘culture-specific syndromes and native language-bound idioms of distress through which symptoms are communicated.’ It is a given that where the detainee does not speak English, or prefers to speak in another language, an independent interpreter should be used.

The Final Report of the ILAP review noted that:

‘[t]rauma-informed approaches acknowledge and address both current and historical, ongoing intergenerational trauma experienced by Aboriginal and Torres Strait Islander people due to the adverse impacts of colonisation... trauma-informed approaches are critical for effective and respectful engagement between Aboriginal and Torres Strait Islander people and service providers.’

Some of the principles to a trauma-informed approach recognised by the ALRC include ‘[understanding] trauma and its impact on individuals, families and communal groups... [ensuring] cultural competence.’

**RECOMMENDATION:** Inspectorate staff should ensure that the trauma-informed approach employed is effective cross-culturally. This includes recognising the impact of intergenerational trauma when engaging with Aboriginal detainees. When speaking with detainees, the inspectors should recognise that the cultural implications of ill-treatment can affect survivors’ ability to discuss their experiences.

**THE INSPECTION SHOULD “DO NO HARM”**

The APT guide to monitoring places of detention states that, during visits, ‘confidentiality, security and sensitivity should be kept in mind. Poorly planned or prepared visits... can actually do more harm than good.’ It states that detainees’ ‘safety should always be kept in mind by visitors, who should not take any action or measure which could endanger an individual or a group,’ and that visitors should ‘take the necessary steps to protect [detainees’] security.’ This should include choosing the locations for interviews to ‘ensure that the contents of the interview remain confidential and that the “do no harm” principle is applied, without exception.’

---

1251 Ibid 46.
1252 Ibid 50.
1253 Ibid 52.
1257 Ibid.
1258 Ibid 32.
1259 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Hungary undertaken from 21 to 30 March 2017: observations and recommendations addressed to the national preventive mechanism*, UN Doc CAT/OP/HUN/2 [46].
The APT makes a particular note in relation to conducting private interviews in police custody, recommending that a monitor interview all of the detainees or none, with there being a ‘heightened risk of sanctions and reprisals.’ It notes that the ‘safety of detainees should take priority during visits to police stations and must not be subordinated to the need/desire to collect information. Monitors should weigh all decisions with respect to the central principle of human rights monitoring: ‘do no harm’. 

**HMIP – GUIDE FOR INSPECTORS**

‘DO NO HARM’ PRINCIPLE

‘Inspectors should always keep in mind the principle of confidentiality, security and sensitivity when interviewing detainees. All individual interviews with persons deprived of their liberty should be conducted out of hearing of others, except in exceptional circumstances. Inspectors should keep in mind the safety of the people who provide information. At a minimum, the action or inaction of inspectors should not jeopardise the safety of victims, witnesses, or other individuals with whom they come into contact, or the sound functioning of the human rights operation.’

**HMIP – TRIANGULATING EVIDENCE**

HMIP makes a particularly important point, identifying that poor methodology can lead to inaccurate findings and inappropriate recommendations, which if implemented, can actually have harmful effects on detainees.

‘HMI Prisons has a responsibility to ensure that methodology is robust and conclusions drawn using data collected are valid. This is to protect individuals from any adverse effects of policy/practice changes based on incorrect findings.’

**MANDATORY REPORTING**

Of note, in the NT there are mandatory reporting obligations under the Care and Protection of Children Act NT (2007), with reporting to be made to either Territory Families or NT Police. These laws go beyond (and predate) the recommendation of the Commonwealth Royal Commission into Institutional Responses to Child Sex Abuse on mandatory reporters of child sexual abuse (the list of those who should be mandatory reporters does not include staff of oversight bodies).

---

1261 Ibid.
1263 Her Majesty’s Inspectorate of Prisons, Ethical principles for research activities (2015) 4.
1264 Care and Protection of Children Act 2007 (NT) s26(1): ‘A person is guilty of an offence if the person: (a) believes, on reasonable grounds, any of the following: (i) a child has suffered or is likely to suffer harm or exploitation; (ii) a child aged less than 14 years has been or is likely to be a victim of a sexual offence; (iii) a child has been or is likely to be a victim of an offence against section 128 of the Criminal Code; and Sexual intercourse or gross indecency involving child over 16yo under special care and (b) does not, as soon as possible after forming that belief, report (orally or in writing) to the CEO or a police officer.’

Also at s26(2): ‘A person is guilty of an offence if the person: (a) is a health practitioner or someone who performs work of a kind that is prescribed by regulation; and (b) believes, on reasonable grounds: (i) that a child has suffered or is likely to suffer harm or exploitation; (ii) a child aged less than 14 years has been or is likely to be a victim of a sexual offence; and (iii) a child has been or is likely to be a victim of an offence against section 128 of the Criminal Code; and Sexual intercourse or gross indecency involving child over 16yo under special care and (b) does not, as soon as possible after forming that belief, report (orally or in writing) to the CEO or a police officer.’

1265 Commonwealth Royal Commission into Institutional Responses to Child Sex Abuse, Final Report Recommendations, vol 7, Recommendation 7.3: ‘State and territory governments should amend laws concerning mandatory reporting to child protection authorities to achieve national consistency in reporter groups. At a minimum, state and territory governments should also include the following groups of individuals as mandatory reporters in every
As the Inspectorate will be subject to mandatory reporting obligations, staff should disclose to detained children who it interviews that it must make a mandatory report under certain circumstances. If it does not, then this could undermine the trust of detainees, who would otherwise expect that the confidentiality promised by the Inspectorate would be maintained in all circumstances.

Additionally, the Inspectorate should be mindful of the conflict of interest that would arise in instances where the detaining authority (Territory Families or NT Police) is also the recipient of a mandatory report relating to a detention site over which it has authority (such as the youth detention facility/bail supported accommodation or police cell/police vehicles respectively). If the Inspectorate must make a report, then it should ensure to make a report to the agency that is not responsible for the place of detention where the alleged ill-treatment occurred. If it were to make a report to the same agency responsible for the detention site, then this may contravene the “do no harm” principle, by potentially exposing detainees to reprisals. Of course, as discussed below, there exists an obligation on detaining authorities to not order, apply, permit or tolerate reprisals for those who communicate with the Inspectorate, but this does not absolve the Inspectorate of responsibility to also take measures to minimise the risk of reprisals.

**HMIP - ETHICAL PRINCIPLES FOR RESEARCH ACTIVITIES**

‘Information obtained from research activities will remain confidential and will be protected from loss or theft and unauthorised access, use, disclosure or modification by others. Individuals will remain anonymous and the information they provide will not be used in a way that leads to their identification. However, the Inspectorate has a duty to pass on safeguarding and child protection concerns. All staff are trained in child protection procedures and adhere to child protection legislation and guidance.’

There also may be instances where a police complaint might be necessary, as the alleged conduct reaches a threshold that warrants a criminal investigation. The Inspectorate should have a robust internal policy around how it will respond to allegations of criminal offending against detained children, recalling that the impunity of staff increases the risk of further ill-treatment or torture of children in detention.

**RECOMMENDATION:** The inspection should be conducted in compliance with the “do no harm” principle, recognising that confidentiality, security and sensitivity are essential to not endangering individuals or groups.

The Inspectorate should advise detainees of its mandatory reporting obligations, and comply with these obligations in a manner that minimises the risk of conflict of interest (eg. the detaining authority subject of the report should not also be the recipient of the mandatory report).

The Inspectorate should have a robust internal policy around how it will respond to allegations of criminal offending against detained children.
NO REPRISALS FOR INDIVIDUALS OR ORGANISATIONS THAT COMMUNICATE WITH THE INSPECTORATE

OPCAT states that ‘[n]o authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.’

The SPT has recommended that NPMs ‘strengthen the protection from intimidation, sanctions or reprisals of persons whom it interviewed or met with by... conducting follow-up visits... It should clearly warn the authorities of the visited detention facilities that any kind of reprisal is inadmissible and will be reported and sanctioned. The mechanism needs to adopt a strategy for dealing with reprisals and the threat of reprisals,’

including receiving information via ‘contacts with family members.’

RECOMMENDATION: There must be no reprisals against individuals or organisations that communicate with the Inspectorate. This should be legislated for, and the Inspectorate should have a strategy to address both actual reprisals and threats of reprisals.

THE DETAINEE’S EXPERIENCE IS CENTRAL

The detainee’s experience should be central to the Inspectorate’s work, recognising that legislation, policies and procedures are not always successful in securing positive outcomes for detainees. That is not to say that triangulating evidence gathered from detainees is unimportant, but rather that the detainees’ experience must be prioritised if the Inspectorate is to effectively exercise its mandate.

OCI – FOCUS ON WHETHER THE APPLICATION OF GLADUE PRINCIPLES IS ACHIEVING OUTCOMES FOR ABORIGINAL PRISONERS

A persistent shortcoming that the OCI has identified is that consideration of Gladue principles/ASH in decision-making processes has not translated to outcomes for Aboriginal prisoners. Although in 2014, CSC’s Research Branch stated that it was assessing ‘the impact of using [Aboriginal Social History] in case management and decision-making, in response to a recommendation from the OCI,’ the OCI has continued to raise its ongoing concerns.

‘Although CSC has a National Aboriginal Advisory Committee, it is not clear how impactful it is in influencing CSC’s overall strategic direction. The last publicly released Strategic Plan for Aboriginal Corrections is dated 2006-07 to 2010-11. CSC’s

\[\text{\textsuperscript{1267}}\text{ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 21(1).}\]

\[\text{\textsuperscript{1268}}\text{ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to Armenia undertaken from 3 to 6 September 2013: observations and recommendations addressed to the national preventive mechanism, UN Doc CAT/OP/ARM/2 (22 February 2017) [55].}\]

\[\text{\textsuperscript{1269}}\text{ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Federal Republic of Germany, UN Doc CAT/OP/DEU/2 (29 October 2013) [68].}\]

See also Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to Hungary undertaken from 21 to 30 March 2017: observations and recommendations addressed to the national preventive mechanism, UN Doc CAT/OP/HUN/2 [47].

\[\text{\textsuperscript{1270}}\text{ Lisa Allgaier, Aboriginal Social History and Corrections at Violence and Aggression Symposium (June 15-17, 2014) 16.}\]
latest 2014-15 mid-year report of its Aboriginal Corrections Accountability Plan acknowledges that despite nominal gains made in accessing and completing correctional programs “Aboriginal offenders are still being released far less than their non Aboriginal counterparts and their return to custody based on technical violation of their conditions of release far supersede the non Aboriginal offender’s rate of return to custody.”

‘Bowden Institution also provided a comprehensive analysis and evidence as to how the Gladue report impacted a decision, something my Office has identified as missing in most purportedly Gladue-informed correctional decisions to date. In correspondence from the Service, the Office learned that CSC is in the process of training Regional Management Committee members on the consideration of Aboriginal Social History... While initiatives such as the above are important, it is clear that more dedicated Gladue training, support and resources are required to ensure that meaningful Gladue analysis informs CSC decisions at all levels where the retained liberty and security interests of Indigenous offenders are involved.’

OCC - MANA MOKOPUNA

The OCC exemplifies good practice in centring the experience of the young person. It has shifted from being ‘focused on the views and perceptions of adults,’ to “[putting] the voices of children and young people at the centre,” recognising that “[u]nderstanding their experiences, needs, challenges, successes, goals and aspirations can help strengthen policies and practices.”

‘Our previous monitoring framework focused strongly on organisational performance. It assumed that if the organisation was performing well, the needs of the children and young people would be met. Over time, we realised that this was not necessarily the case... We needed to rethink our monitoring approach, placing children and young people, and their family, whānau, hapū, iwi and family group, at the centre.”

“This means that even if Oranga Tamariki is exceeding policy or practice requirements, unless this translates into good experiences for children and young people, the organisation will most likely rate poorly. This shift challenges Oranga Tamariki to be more child-centred and strongly focussed on outcomes for the children and young people it supports. Mana Mokopuna has also resulted in the strengthening of our practice as required by Article 12 of United Nations Convention on the Rights of the Child... This convention gives children the right to have their views taken into account in all matters affecting them. Putting children and young people’s experiences at the centre of our monitoring practice has led to the development of tools and processes that strengthen our engagement with children and young people and those who support them. Our use of Mana Mokopuna has also strengthened our commitment to ensuring that the views of children and young people are listened to, and where appropriate, acted on.”

Carver and Handley, in their research into whether torture prevention works, concluded that:

[o]ne of [their] most significant observations is the enormous divergence between law and practice, especially with respect to the two most important sets of preventive measures, detention safeguards and prosecutions... it is usually the case that legal reform is a precondition for improved practice... Aiming for the best possible changes in law is obviously a wholly appropriate first objective of any campaign to prevent torture. However,
the important point is that reforming law is only a means to an end – namely to change practice. The precise relationship of law and practice will naturally be subject to a series of local and contextual influences.1278

HMIP – INSPECTION FRAMEWORK

HMIP’s Inspection Framework states that one of its values is that the ‘experience of the detainee is at the heart of our inspections.’1279

PROTOCOL BETWEEN HMIP, IMBs AND PRISONS AND PROBATION OMBUDSMAN

‘The protocol reflects the inspectorates’ commitment to placing the experience of the detainee at the heart of police custody inspections.’1280

IMB – MONITORING FRAMEWORK

The IMB similarly notes that the ‘Board’s duty is not only to report on how well an establishment is measuring up to accepted standards but to look with clear and fresh eyes at the prisoner’s or detainee’s total experience of custody or detention and preparation for release or removal.’1281

CJINI – INSPECTION FRAMEWORK

‘A focus on outcomes, which means considering service delivery to the end users of the services rather than concentrating on internal management arrangements… Inspection should be delivered with a clear focus on the experience of those for whom the service is provided, as well as on internal management arrangements. Inspection should encourage innovation and diversity and not be solely compliance-based.’1282

HMIP - SURVEYS

‘Before the inspection takes place (or at the beginning of an unannounced inspection), researchers visit the prison and carry out a confidential survey with a randomly selected number of prisoners: sufficient to provide a statistically significant sample. The survey asks over 100 questions, about all aspects of prison life. There is now an extensive database of such surveys, so that prisoners’ answers can be compared with those from prisoners in prisons of the same type, and also with the answers that were received from the same prison at its last inspection. The survey results can also be split out, for example, to compare the responses of white prisoners with those of prisoners of black or minority ethnic (BME) origin, or those of prisoners with disabilities with those without. It is of some concern that BME and disabled prisoners routinely report worse treatment than white or able-bodied prisoners, over a whole range of areas of prison life.’1283

Surveys are ‘a key source of evidence, gathering detainee perceptions…. Researchers talk to each selected detainee to explain the purpose of the survey, and go back to each cell to collect the survey later that day or the following morning. Distribution and collection of the survey takes up to two days… In very small facilities, such as short-term holding facilities, or in places where the population is transient, such as police stations, arrangements such as individual interviews or

1280 Her Majesty’s Inspectorate of Prisons and Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services, Protocol between Her Majesty’s Chief Inspector of Prisons and Her Majesty’s Chief Inspector of Constabulary and Fire & Rescue Services 5.
1282 Criminal Justice Inspection Northern Ireland, Inspection Framework, 1.
sampling by other means are used to ascertain detainee views... Survey findings are an essential part of the triangulated evidence base for inspection and provide a robust and representative ‘customer’ view of the treatment and conditions in custodial establishments. Survey questions are based directly on the relevant version of Expectations.\(^{1284}\)

**HMIP - INSPECTION REPORT**

‘HM Inspectorate of Prisons (HMI Prisons) researchers have developed a self-completion questionnaire to support HMI Prisons’ Expectations. The questionnaire consists of structured questions covering the prisoner ‘journey’ from reception to release, together with demographic and background questions which enable us to compare responses from different sub-groups of the prisoner population. There are also three open questions at the end of the questionnaire which allow prisoners to express, in their own words, what they find most positive and negative about the prison. The questionnaire is available in 14 languages and can also be administered via a telephone translation service if necessary. The questionnaire was revised during 2016–17, in consultation with both inspectors and prisoners... On the day of the survey a stratified random sample is drawn by HMI Prisons researchers from a PNomis prisoner population printout ordered by cell location. Using a robust statistical formula, HMI Prisons researchers calculate the minimum sample size required to ensure that the survey findings can be generalised to the entire population of the establishment. In smaller establishments, we may offer a questionnaire to the entire population... At the time of the survey on 25 March 2019, the prisoner population at HMP Ashfield was 399... questionnaires were distributed to 178 prisoners. We received a total of 165 completed questionnaires, a response rate of 93%.\(^{1285}\)

The results were presented in a survey summary:\(^{1286}\) “[s]urvey responses compared with those from other HMIP surveys of category C training prisons and with those from the previous survey,\(^{1287}\) [c]omparison of survey responses between sub-populations of prisoners... responses of prisoners from black and minority ethnic groups are compared with those of white prisoners,’\(^{1288}\) ‘responses of prisoners who reported that they had mental health problems compared with those who did not; responses of prisoners who reported that they had a disability compared with those who did not,’\(^{1289}\) ‘responses of prisoners aged 70 and over are compared with those of prisoners under 70.’\(^{1290}\)

**HMIP - ANALYSIS OF CHILDREN’S PERCEPTIONS OF EXPERIENCES IN CUSTODY**

‘This independent report by HM Inspectorate of Prisons... presents the findings from 686 surveys completed by children detained at every secure training centre (STC)... and young offender institution (YOI)... between 1 April 2017 and 31 March 2018. All surveys were conducted to support unannounced inspections of each establishment. The surveys enable comparisons to be made with the results from 2016–17 and between children with different characteristics or experiences.’\(^{1291}\)

\(^{1285}\) Ibid 69-82.
\(^{1286}\) Ibid 83-90.
\(^{1287}\) Ibid 91-93.
\(^{1288}\) Ibid 94-96.
\(^{1289}\) Ibid 97-99.
\(^{1290}\) Ibid 97-99.
HMIPS – THEMATIC REVIEW ON MENTAL HEALTH

USER VOICE

“We were clear from the outset that a key focus of our review should be to draw directly on the views and lived experiences of staff, young people and their families.”

User Voice: Organised focus group discussions with volunteer young people in HMP YOI Grampian (for those who had previously been in HMP YOI Polmont) to hear directly from those with lived experience. The groups included young men and young women who were serving a sentence or were being held on remand. Young people across the full age range held in HMP YOI Polmont were consulted throughout the review where possible. Standardised questions were developed to support the focus group process and ensure consistency of approach… [HMIPS] gathered information from focus groups with nominated NHS and SPS staff. SPS staff who attended were drawn from all operational areas of the establishment, representing the interests of the full range of population groups; held one-to-one discussions with families of young people... and interviewed staff from representative agencies working within HMP YOI Polmont.”

RECOMMENDATION: The detainee’s experience of detention is central, and the focus of evidence-gathering should be on outcomes, rather than legislation, policies and procedures.

COMPARING ABORIGINAL AND NON-ABORIGINAL DETAINEES’ EXPERIENCES

HMIP conducts detainee surveys which enable it to compare the responses across different groups, for example comparing the experiences of white prisoners and black and minority ethnic prisoners. The Inspectorate should collaborate with the generalist NT NPM that will be responsible for conducting inspections of places of detention within the criminal justice system to ensure consistency of the questions included in the surveys used by the NT NPMs. This will, in turn, facilitate comparisons of experiences across detainee groups. This will assist the Inspectorate to identify which aspects of detention have a disproportionate or different impact on Aboriginal detainees, better enabling it to make targeted and accurate recommendations.

HMIP – COMPARISONS OF EXPERIENCES OF DETAINEES WITH PROTECTED CHARACTERISTICS

For example, in its thematic review of transfers and escorts, HMIP analysed the data collected from surveys of 12,991 adult prisoners across 80 prisons from April 2012 to January 2014. The surveys enabled data analysis of responses across different groups, including:
- black and minority ethnic prisoners and white prisoners
- Muslim and non-Muslim prisoners
- prisoners who considered themselves to be Gypsy, Romany or Traveller and those who did not
- prisoners who considered themselves to have a disability and those who did not

1293 Ibid 20.
- gay/bisexual prisoners and straight prisoners. 1294

Similarly, in its 2018-2019 annual report, HMIP highlighted prisoner survey responses across groups including black and minority ethnic men and white men, 1295 adult male prisoners with a disability, those over 50 and under 25, 1296 and men and women. 1297

CJINI - COMPARISONS OF EXPERIENCES ACROSS DETAINEE GROUPS

CJINI compares the experiences of Protestant and Catholic prisoners in its survey results. 1298

RECOMMENDATION: The Inspectorate should collaborate with other relevant NT NPM(s) to ensure consistency of survey questions, to enable a comparison of the experiences of Aboriginal and non-Aboriginal detainees in the same place of detention.

SOURCES OF EVIDENCE AND TRIANGULATING EVIDENCE

OBJECTIVE ASSESSMENT OF EVIDENCE

In its practical guide to monitoring places of detention, the APT has stated that ‘[v]isitors must strive to record actual facts, and to deal with both staff and prisoners in a manner that is not coloured by feelings or preconceived opinions,’ 1299 ‘[collecting] sound and precise information in order to be able to draft well documented reports and relevant recommendations.’ 1300

If the Inspectorate does not objectively assess the evidence that it gathers (evidence that has been properly triangulated), then it risks making inaccurate findings and inappropriate recommendations. This will render the Inspectorate ineffective, not only in terms of the findings and recommendations themselves, but in terms of maintaining confidence in its objectivity, independence and competency among the detaining authorities, civil society and detainees.

RECOMMENDATION: The Inspectorate should objectively assess the evidence that it collects.

1294 Her Majesty’s Inspectorate of Prisons, A thematic review by HM Inspectorate of Prisons: Transfers and escorts within the criminal justice system (December 2014) 22-23.
1297 Ibid 116-121.
1300 Ibid 32.
SOURCES OF EVIDENCE

OPCAT requires States grant NPMs:

[access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location; [access to all information referring to the treatment of those persons as well as their conditions of detention; [the opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information.]

The SPT has recommended that the NPM ‘seek prompt, regular and unhindered access to information on detainees during its visits, including the incident registers and medical records which should be kept at every place of detention, in addition to the personal files of each detainee.’

Outlined below are some of the sources of evidence used by NPMs visited as part of this Fellowship. Although not explicitly mentioned below, the Inspectorate should also have access to CCTV footage, upon request.

HMIP – INSPECTION FRAMEWORK

DOCUMENTS
‘The inspection team will ask the establishment to make available a range of information to assist the inspection process. The documents should be delivered to the team’s base room for the first day of the inspection... The documents will be checked before further information is requested from the establishment.’

In addition to the documentary evidence provided at the start of the inspection, inspectors will look at detainee records such as observation books... Prison Service IT system... daily wing entries, care plans and detention and training order/sentence plans, to corroborate their findings. Some documentary evidence, including complaints forms... lends itself to numeric analysis, which will allow patterns to emerge.

DETAINEES – INDIVIDUALLY
‘[I]n addition to the survey and the groups, inspectors will speak to detainees on the accommodation unit, either informally on the wings or in one-to-one interviews, to gain a sense about what really happens in the areas being inspected.

DETAINEES – FOCUS GROUPS
‘Focus groups: Inspectors will meet with a series of detainee groups which are broadly representative of a population of the establishment. Groups usually comprise up to 10 randomly selected detainees, and involve a structured but open

1301 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 20(a), (b), (d)
1302 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Federal Republic of Germany, UN Doc CAT/OP/DEU/2 (29 October 2013) [41].
1304 Ibid 15.
1305 Ibid.
discussion about detainee views on their treatment and conditions. The views of the groups are collated by the team leader and form part of the evidence base to be triangulated during the inspection.1306

STAFF
‘[I]nspectors will speak to staff as they walk around the establishment informally and in individual interviews. They will ask staff what they think really happens, about policies and procedures, and their individual role. Inspectors will talk to a range of staff, including senior managers, wing staff, and specialist staff.’1307

RELEVANT THIRD PARTIES
‘[I]nspectors will speak to both statutory and non-statutory providers, for example representatives from the Youth Justice Board, Independent Monitoring Board, voluntary groups and solicitors, about their experiences and the experiences of the detainees they represent. Visitors can also be a good source of information.’1308

INSPECTORS’ OBSERVATIONS
‘[I]nspectors will make observations at different locations and different times of the day (including evening association times). This is also a good time for inspectors to observe interactions and assess the quality of staff-detainee relationships. Observations will include a night visit by inspectors and a full assessment of night procedures.’1309

HMIP & HMICFRS - UNANNOUNCED VISIT TO POLICY CUSTODY SUITES

METHODOLOGY: DOCUMENT AND DATA REVIEW, CUSTODY RECORD ANALYSIS, CASE AUDITS

DOCUMENT REVIEW
‘[T]he custody policy and/or any supporting policies, such as the use of force; health provision policies; joint protocols with local authorities; staff training information, including officer safety training; minutes of any strategic and operational meetings for custody; partnership meeting minutes; equality action plans; complaints relating to custody in the six months before the inspection; and performance management information. Key documents, including performance data, are also requested from commissioners and providers of health services in the custody suites and providers of in-reach health services in custody suites, such as crisis mental health and substance misuse services.’1310

DATA REVIEW
‘Forces are asked to complete a data collection template, based on police custody data for the previous 36 months. The template requests a range of information, including: custody population and throughput; demographic information; the number of voluntary attendees; the average time in detention; children; and detainees with mental ill health. This information is analysed and used to provide contextual information and help assess how well the force performs against some key areas of activity.’1311

CUSTODY RECORD ANALYSIS
‘A documentary analysis of custody records is carried out on a representative sample of the custody records opened in the week preceding the inspection across all the suites in the force area. Records analysed are chosen at random, and a

1306 Ibid 14.
1307 Ibid 15.
1308 Ibid.
1309 Ibid.
1311 Ibid.
robust statistical formula provided by a government department statistician is used to calculate the sample size required to ensure that our records analysis reflects the throughput of the force’s custody suites during that week. The analysis focuses on the legal rights and treatment and conditions of the detainee. Where comparisons between groups or with other forces are included in the report, these differences are statistically significant."1312

CASE AUDITS
‘We carry out in-depth audits of approximately 40 case records (the number may increase depending on the size and throughput of the force inspected) to assess how well the force manages vulnerable detainees and specific elements of the custody process. These include looking at records for children, vulnerable people, individuals with mental ill health, and where force has been used on a detainee. The audits examine a range of issues to assess how well detainees are treated and cared for in custody. For example, the quality of the risk assessments, whether observation levels are met, the quality and timeliness of Police and Criminal Evidence Act (PACE) reviews, if children and vulnerable adults receive timely support from appropriate adults, and whether detainees are released safely. Where force is used against a detainee, we assess whether it is properly recorded and if it is proportionate and justified.’1313

HMIP - RESEARCHER’S EXPERIENCE

During its thematic inspection of transfers and escorts, HMIP staff undertook a journey in an escort vehicle. This approach can be useful to complement the information collected from detainees, and should not replace collecting evidence directly from detainees.

‘[A]n HM Inspectorate of Prisons researcher undertook a journey in an escort van between one of the van depots and a court. The researcher was held in a cell for the duration of the journey, as a detainee on escort or transfer would be. The insights and observations gleaned from this have been presented throughout this report.’1314

Researcher’s experience: ‘Even with my driver under strict instruction to ‘keep me safe’ and brake as carefully as possible (an indication that staff were very aware of the issue a lack of seat belts causes), the journey was not a smooth one. Every time the van slowed down or stopped, I found myself sliding forward on the plastic seat, a few times banging my knees on the wall in front. When the van turned a corner, I was thrown to one side, and if I leant my head back on the hard plastic headrest it banged against it continuously. I was told that many detainees choose to take off their jumper, if they are wearing one, to use as a headrest. I was on the van for 1.5 hours. The seat, although initially satisfactory, became uncomfortable after about an hour – in our prisoner survey 37% said they had spent more than two hours in the van, although this varied by functional type... Add to this the fact that I could not comfortably lean back and that I had to right myself and prepare to brace frequently, the last half hour of my journey became very uncomfortable.’1315

1312 Ibid.
1313 Ibid 45-46.
1314 Her Majesty’s Inspectorate of Prisons, A thematic review by HM Inspectorate of Prisons: Transfers and escorts within the criminal justice system (December 2014) 24.
1315 Ibid 30.
CJIN – INSPECTION METHODOLOGY

PRISON

‘Five key sources of evidence are used by Inspectors: observation; prisoner surveys; discussions with prisoners; discussions with staff and relevant third parties; and documentation. During inspections we use a mixed-method approach to data gathering and analysis, applying both qualitative and quantitative methodologies.’

PRISONER ESCORT AND CUSTODY ARRANGEMENTS

‘The inspection process consisted of general observation, a physical examination of the escort vans and the custody suites, interviews with… management and staff… and interviews with other providers. Structured interviews with prisoners were carried out along with a review of surveys conducted during inspections of the [Northern Ireland Prison Service] establishments and surveys in this inspection using questionnaires based on those developed for inspections of police custody in England and Wales.’

POLICE CUSTODY

SELF-ASSESSMENT

‘Each of the eight police Districts and PSNI Operational Policy headquarters department were asked to complete a self-assessment template. This was a revised version of the inspection framework. The results of these were reviewed in order to provide evidence for the inspection and areas to follow-up in the fieldwork.’

DOCUMENT REVIEW

‘Copies of all policies, procedures and other documentation relating to custody issues were requested and received from the PSNI... This was used to inform interview questions during the fieldwork phase.’

FIELDWORK

‘One-to-one and focus groups interviews were conducted in two police Districts... Interviews were also conducted with stakeholders who had an interest in custody issues.’ Interviews were conducted with district staff (including cleaners and human resources), headquarters staff (including occupational health and welfare), and other stakeholders (such as defence solicitors, nurses from addiction and mental health services, Independent Custody Visitors and the Northern Ireland Human Rights Commission).
OMBUDSMAN – INSPECTION METHODOLOGY

DOCUMENTS
‘My Inspectors gathered and assessed a range of information, resulting in the evidence-based findings presented in this report, using a variety of techniques including: obtaining information and documents from the Department of Corrections and the Prison… reviewing policies, procedures and performance reports produced both by the Prison and by the Department of Corrections.’

PRISONER SURVEY; FOCUS GROUPS WITH DETAINEES AND STAFF
‘On the first day of the inspection, the Team distributed a voluntary, confidential and anonymous survey to prisoners. The survey is designed to capture their experiences and perceptions of the Prison. The Team spoke with prisoners individually and in groups to explain the purpose of the survey. The survey results are just one of several sources of evidence used and triangulated by Inspectors to help me form views about the Prison. Five-hundred and sixty-five survey forms were distributed and 407 were returned (72 percent)... On the sixth and seventh days of the inspection, six focus groups were facilitated by Inspectors to explore prisoners’ experiences in the Prison. Sixty-two prisoners participated (approximately 10 percent of the prison population). Four focus groups were conducted with staff to explore the experience, challenges and achievements of their role.’

OBSERVATIONS
‘[S]hadowing and observing Corrections Officers and other specialist staff as they performed their duties within the Prison... Observing the range of services delivered within the Prison at the point of delivery; inspecting a wide range of facilities impacting on both prisoners and staff; attending and observing relevant meetings, the results of which impact on both the management of the Prison and the future of the prisoners, such as case conferences... observing early morning, evening, and weekend routines.’

HMICS – METHODOLOGY OF INSPECTIONS ACROSS MULTIPLE SITES/THEMATIC INSPECTIONS

DOCUMENTS
‘We reviewed documents relating to custody provided by Police Scotland and observed a range of meetings regarding custody.’
‘We also reviewed the custody records of 145 people who had been detained in police custody across the 17 centres.’
‘310 custody records were also sampled to ensure that effective recording mechanisms are in place and auditable records kept.’
‘A ‘desk-top review of the National Custody Manual of Guidance, force standard operating procedures, current staffing models, healthcare provision... a dip-sample of vulnerability assessments carried out as part of the admission process for persons brought into custody.’

---

1325 Ibid 6.
1326 Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of the strategic arrangements for the delivery of police custody (June 2019) 3.
1327 Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of custody centres across Scotland (October 2018) 4.
1328 Her Majesty’s Inspectorate of Constabulary in Scotland, Thematic Inspection of Police Custody Arrangements in Scotland (August 2014) 94.
1329 Her Majesty’s Inspectorate of Constabulary for Scotland, Thematic Inspection of the Care and Welfare of persons detained in police custody in Scotland (January 2013) 8-9.
INTERVIEWS AND FOCUS GROUPS, INCLUDING FROM PREVIOUS INSPECTIONS

“We carried out almost 60 interviews and focus groups with officers and staff working in Criminal Justice Services Division, and with a range of people with an interest in custody, including internal Police Scotland stakeholders and external partner organisations. We also drew on evidence gathered during our inspection of custody centres across Scotland in 2018 and our inspection of custody centres located in Greater Glasgow Division in January 2019, particularly our discussions with frontline personnel.”

Fieldwork including unannounced visits to 22 custody centres across Scotland and interviews with staff and with 94 detainees. 

“We interviewed other professionals working in the custody centre (such as solicitors or doctors).”

“We spoke with independent custody visitors and key partners. We also interviewed senior managers in Police Scotland and in Custody Division.”

OBSERVATIONS

“Visits included observation of the facilities and key processes.”

“Observations of each of the 17 custody centres were unannounced and took place in May and June 2018. During our visits, we assessed the physical environment... and observed key processes such as detainees being booked into or released from custody and shift handovers.”

“We observed a number of shift handovers taking place and saw the effective use of a handover checklist defining a set of issues to be covered during the process.”

HMIP – PRIMARY DATA COLLECTION FOR THEMATIC INSPECTIONS

Thematic reports should not rely solely on data and findings from previous reports.

“Primary fieldwork was conducted in two under-18 YOIs, two young adult YOIs, and one STC... Semi-structured interviews with young people... were carried out... We conducted analysis of case files for each of the young people interviewed, aimed at investigating how their behaviour was managed by their current establishment and how this management was recorded, including the setting of behaviour targets... Semi-structured interviews with staff who were involved in the behaviour management of the young people interviewed were conducted... The interviews were aimed at understanding experiences of staff in implementing behaviour management systems and their perceptions of the effectiveness of these systems... We also examined policies and talked to senior managers.”

RECOMMENDATION: Sources of evidence should include detainees (individual discussions, focus groups, survey responses), documents, staff, other relevant third parties, and inspectors’ observations of facilities and operations.

1330 Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of the strategic arrangements for the delivery of police custody (June 2019) 3.
1331 Her Majesty’s Inspectorate of Constabulary in Scotland, Thematic Inspection of Police Custody Arrangements in Scotland (August 2014) 94.
1332 Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of custody centres across Scotland (October 2018) 4.
1334 Ibid 94.
1335 Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of custody centres across Scotland (October 2018) 4.
1337 Her Majesty’s Inspectorate of Prisons, Incentivising and promoting good behaviour A thematic review by HM Inspectorate of Prisons (March 2018) 18.
OBTAINING EVIDENCE REGARDING POLICE CUSTODY

In its practical guide to monitoring police custody, the APT noted that:

some detainees may not be willing to make allegations immediately, either as a result of the trauma they have suffered or for fear of sanctions or reprisals. Instead, monitors will often receive allegations relating to torture or other ill-treatment that occurred in police custody once the detainee has been released or transferred to another facility.\textsuperscript{1338}

Potential obstacles to the Inspectorate obtaining evidence from detainees in police custody include there being no people in custody at the time of the Inspectorate’s visit, detainees being under the influence of alcohol or drugs when they are taken into custody, detainees being highly stressed at the time of being taken into custody, with their attention on potential criminal charges and getting bail rather than speaking with Inspectorate staff, and a reluctance among detainees to engage with the Inspectorate for fear of being identified as sources of information (given the relatively lower numbers in police custody).

RECOMMENDATION: The Inspectorate should consider whether it might be beneficial to speak with detainees formerly in police custody once they have been released or have been transferred to prison (either individually or in focus groups).

OBTAINING EVIDENCE REGARDING PRISONERS/DETAINEES WHO ARE IN HOSPITAL

There will be occasions when the Inspectorate visits a facility and detainees have been transferred to the hospital. The Inspectorate should respond to this by attending the hospital to assess the treatment of the detainee receiving medical treatment, looking at issues including the use of restraints and the protection of the detainee’s privacy. There is a risk that detainees who are receiving medical treatment offsite will be subjected to torture or ill-treatment during their transfer or at the hospital itself, and it falls within the Inspectorate’s mandate to inspect these aspects of detention. This approach can also be a safeguard should there be occasions where detaining authorities move detainees offsite once the Inspectorate has commenced one of their visits, in an attempt to impede access to detainees. Hopefully this would not occur, but it is conceivable that such tactics may be deployed by detaining authorities.

It should be noted that there are relevant international standards the Inspectorate should refer to, with such as the ‘use of instruments of restraint on women during labour, during birth and immediately after birth... [is] prohibited explicitly... by the UN Bangkok Rules and... reiterated by the revised Standard Minimum Rules.’\textsuperscript{1339}

The CPT has also provided guidance in relation to detainees visiting or located at hospitals.\textsuperscript{1340}

\textsuperscript{1338} Association for the Prevention of Torture, Monitoring Police Custody - A practical guide (January 2013) 96.


\textsuperscript{1340} European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Extract from the 3rd General Report of the CPT: Health care services in prisons (1993) [36]: ‘If recourse is had to a civil hospital, the question of security arrangements will arise. In this respect, the CPT wishes to stress that prisoners sent to hospital to receive treatment should not be physically attached to their hospital beds or other items of furniture for custodial reasons. Other means of meeting security needs satisfactorily can and should be found; the creation of a custodial unit in such hospitals is one possible solution.’

309
TRIANGULATION OF EVIDENCE

The APT has stated that:

[p]reventive monitoring requires the triangulation of all relevant, available information in order to arrive at a clear understanding of the prevailing situation, and especially the main risks of torture and other ill-treatment, in a specific place of detention. No information should be taken at face value. Moreover, a variety of activities should be carried out during visits in order to get as clear a picture as possible. The information received from police officers, registers and interviews with detainees should all be compared to identify areas of agreement and/or disparity.¹³⁴¹

HMIP – INSPECTION FRAMEWORK

‘Inspectors will, wherever possible, base all inspection findings/judgements on the triangulation of multiple evidence sources. Triangulation, in this case, merely describes the corroboration of an evidence source with at least two other different sources (although sometimes an incident/perception will be important enough to stand alone). Where possible, a balance will be sought of both quantitative data, such as those which show a pattern over a period of, for example, at least six months, and qualitative evidence sources, such as interviews and groups, which can provide the reason for the pattern. Inspectors will always attempt to seek supporting evidence from alternative but relevant sources.’¹³⁴²

HMIP – GUIDE FOR INSPECTORS

‘Having gathered evidence from a range of documentation, managers, staff and relevant third parties, you should, wherever possible, check your judgements with detainees. A strong evidence base will allow you to test the validity of what you have found and to assess whether it has an impact on the wider population, rather than being an isolated experience. You should: constantly test your assertions and be open to new evidence and what it may reveal – if the evidence is contradictory, it should be investigated further rather than ignored; gather sufficient relevant evidence before making a judgement; question whether the evidence will withstand scrutiny; probe more deeply where there are concerns; consider all relevant evidence before coming to a judgement – do not be persuaded by what appears to be one influential piece of evidence; share your findings with other inspectors. Daily feedback and the Thursday deliberation meeting are essential in testing and validating judgements. Other inspectors may have further key evidence which is relevant to the area of inspection. The indicators section in Expectations will highlight where this is essential to create a fuller evidence source.’¹³⁴³

See also at [37]: ‘Whenever prisoners need to be hospitalised or examined by a specialist in a hospital, they should be transported with the promptness and in the manner required by their state of health.’

¹³⁴¹ Association for the Prevention of Torture, Monitoring Police Custody - A practical guide (January 2013) 34.


DAILY DEBRIEFS

‘Team debriefs are scheduled by the team leader daily. Debriefs are essential in formulating a coherent picture of the establishment... Each member of the team has an individual responsibility to feed back their findings in a confidential forum with colleagues and be open to challenge, as well as to challenge others. Testing, defending and validating evidence against others will ensure a robust validation process throughout the inspection.’

DELIBERATION MEETING

‘The deliberation meeting is chaired by the team leader and used to agree the main findings that will be fed back to the governor/director and to assess the establishment’s performance against the four healthy establishment areas... A draft debrief is constructed by the team leader from the written information provided by inspectors on Wednesday. Under each healthy establishment heading the team leader should write a summary. The final judgement should be left blank until the deliberation is complete. This summary is followed by detail for each area written by inspectors. You should be prepared to explain your judgements when challenged but also to consider other views. It is important that all inspectors contribute to the discussion and decision-making for the whole inspection, not just the areas you have been inspecting. A healthy process of constructive challenge should be encouraged and managed by the team leader.’

HMIPS – THEMATIC REVIEW ON MENTAL HEALTH

TRIANGULATING EVIDENCE

‘Throughout the review, care was taken to ensure that practice was examined by those members best suited with the required technical and professional expertise. Evidence gathering processes were standardised for consistency. Evidence collated was triangulated and review members worked together wherever possible to cross check information and understanding. Learning from the review was compared with recent inspection outcomes... A further Roundtable discussion was held at the end of the review to test the emerging conclusions and recommendations with the wider review group, and the full draft report was also circulated to a selection of review team members and an editing panel made up of representatives from the Roundtable, for comment and a factual accuracy check.’

HMIP – ANALYSIS OF DATA FOR THEMATIC REPORT

‘All data from interviews with children, caseworkers and senior managers were summarised in a spreadsheet from interview notes and coded. The summarised data was analysed thematically to draw out the range of experiences and views, allowing us to identify similarities and differences between cases and explain emergent patterns and findings.’

RECOMMENDATION: Evidence should be triangulated (corroborated across different sources). The Inspection team should collect sufficient evidence to support findings, be responsive where contradictory evidence arises, and challenge each other as necessary.

1344 Ibid 21-22.
1345 Ibid 23.
1347 Her Majesty’s Inspectorate of Prisons, Incentivising and promoting good behaviour: A thematic review by HM Inspectorate of Prisons (March 2018) 18.
Making Referrals of Complaints

The SPT has encouraged NPMs to have:

- clear guidelines for reporting individual cases of deliberate ill-treatment and requesting inquiries, as well as for maintaining the confidentiality of the detainee concerned and any other source of relevant information and protecting such persons against reprisals. 1348

For example, on an NPM advisory visit, the SPT reported that it had observed NPM staff had ‘focused on specific complaints made by inmates and tried to resolve the situation… recalling that the [NPM’s] mandate differs from those of other bodies that work to combat torture… in that it focuses on prevention, on identifying causal factors and on detecting cases in which a systemic risk of torture exists. The Subcommittee recommends that the [NPM] develop clear guidelines for reporting… and for requesting, with the consent of the interviewee in question, that investigations be opened.’ 1349 On another visit, the SPT recommended that the NPM staff ‘should advise detainees on how to formulate individual complaints and to whom they should address them and should seek to ensure the effectiveness of the complaints mechanism as a means of prevention.’ 1350

The APT similarly recommends that ‘[f]or the protection of victims, it is crucial that monitors ask if and how they can use allegations and/or other information… Preventive monitoring bodies should generally refer such cases to other structures (such as the relevant ombudsman’s office) that have a specific mandate to deal with individual allegations.’ 1351 Birk et al also suggest that an NPM may then follow up on whether the detainee was subjected to reprisals as a result of the complaint. 1352

Additional to the fact that the Inspectorate’s focus should be on prevention, the Inspectorate should not become involved in making complaints because it may not agree with the policies and procedures relating to the complaints process itself, or the legislation or policy which has been breached and is the subject of the complaint, an issue identified by HMIP (see text box below). Birk et al note that individual issues raised by detainees can be used, however, to ‘assess implementation of recommendations… as evidence to support recommendations, and promote their implementation in the dialogue with the authorities, as well as the communication and cooperation with other actors and the NPM’s public relations.’ 1353

1348 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [29].
1349 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Honduras, UN Doc CAT/OP/HND/3 (25 January 2013) [27].
1350 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to Armenia undertaken from 3 to 6 September 2013: observations and recommendations addressed to the national preventive mechanism, UN Doc CAT/OP/ARM/2 (22 February 2017) [53].
1352 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 61.
1353 Ibid 60-61.
HMIP - INSPECTION FRAMEWORK

‘Inspectors are responsible for inspecting the treatment of and conditions for the total detainee population. While individual grievances may contribute to a judgement about the conditions for the whole population, inspectors will not agree to pursue a particular case on a detainee’s behalf, nor volunteer anyone else to do so. In addition their focus is on outcomes for detainees which may or may not be promoted by adherence to existing policies or management targets. The Inspectorate may choose to disagree with policies that are not serving detainees’ best interests and may make recommendations for change as a result.’

ICV - HANDBOOK

‘Independent Custody Visitors must not involve themselves in individual cases or make representations on behalf of detainees. Remand or sentenced prisoners held in custody centres who seek to complain about their conditions or treatment in prison should be advised that Independent Custody Visitors cannot involve themselves in such matters and that there are recognised procedures open to them such as writing to or petitioning the Home Secretary or writing to their solicitor or Member of Parliament.’

**RECOMMENDATION:** The role of the Inspectorate is a preventative one, and it should not assist detainees make complaints or take individual requests. The Inspectorate may, however, use information from complaints/requests in identifying root causes and systemic issues, and in monitoring the implementation of its recommendations.

**RECOMMENDATION:** The Inspectorate should develop guidelines for reporting incidents of torture and ill-treatment and requesting that investigations or inquiries be conducted in individual cases. These guidelines should include the requirement that the consent of the detainee is obtained before such action is taken.

---

CONDUCTING AN INSPECTION IN A CULTURALLY APPROPRIATE MANNER
ABORIGINAL LANGUAGES ARE WIDELY SPOKEN IN THE NT

Numerous Aboriginal languages are spoken throughout the NT, and for the Inspectorate to be able to conduct inspections it is essential that if effectively use interpreters in its work.

The NT Ombudsman wrote a report on NTG interpreter use, identifying challenges to effective interpreter use in the NT including that, with over 100 Aboriginal languages spoken in the NT, and 30% of the population being Aboriginal, ‘meeting the linguistic needs of such a diverse Aboriginal population is a task of some enormity,’ particularly in light of the overrepresentation of Aboriginal people in the criminal justice system.1356

The NT Plain English Legal Dictionary notes that the ’2011 census identified that 65% of Aboriginal Territorians speak an Aboriginal language at home.... Over 85% of the Northern Territory prison population is Aboriginal. Based on these numbers, it is likely that over 50% of the Northern Territory prison population speak an Aboriginal language as their primary language.’1357

USING INTERPRETERS DURING INSPECTIONS AND INDEPENDENCE OF INTERPRETERS

As already discussed above (under Strategy regarding locations and frequency of visits), the detaining authorities should regularly provide information in relation to the preferred language of detainees, to enable the Inspectorate to conduct unannounced visits and book the appropriate interpreters for the detainee population at the particular detention site.

In its report, the Ombudsman listed some best practice principles for interpreter use, that can be of assistance to the Inspectorate, including ‘[developing] a clear and comprehensive policy on the use of interpreters,’ ensuring the independence of interpreters (eg they should not be family members of the detainee), and that where the offer of an interpreter is declined, this is recorded.1358

TRAINING ON WORKING WITH INTERPRETERS AND ADHERENCE TO AIS GUIDELINES

The Ombudsman also suggested that agency staff receive training on working with interpreters.1359 The AIS offers Working With Interpreters Training, which should be mandatory for all Inspectorate staff.1360 Inspectorate staff should also follow the AIS tips with regard to using interpreters, such as avoiding using multiple clauses in a sentence.1361

1356 Ombudsman for the Northern Territory, Strangers in their own land: Use of Aboriginal Interpreters by NT public authorities (August 2018) 28.
1358 Ombudsman for the Northern Territory, Strangers in their own land: Use of Aboriginal Interpreters by NT public authorities (August 2018) 9.
1359 ibid.
1361 Northern Territory Government, Aboriginal Interpreter Service, Aboriginal language and plain English guide <https://nt.gov.au/community/interpreting-and-translating-services/aboriginal-interpreter-service/aboriginal-language-and-plain-english-guide> (1 February 2019): this includes ‘Use active voice, avoid passives; Avoid abstract nouns; Avoid negative questions; Define unfamiliar words; Put ideas in
SUBJECT MATTER DICTIONARIES AND GLOSSARIES

The Commonwealth Department of the Prime Minister and Cabinet Protocol on Indigenous Language Interpreting suggests that agencies ‘should provide briefings to interpreters in advance to enable them to become more familiar with the subject area and enable collaboration on terms and concepts which may need to be considered further.’1362 It also suggests that they ‘develop simple plain English materials, in consultation with interpreter services, for the purposes of briefing interpreters in advance and where possible, for translation into language products. Where possible, subject matter dictionaries should be developed in consultation with Indigenous language interpreter services.’1363

In The NT, The Plain English Legal Dictionary: Northern Territory Criminal Law (a ‘resource for Judicial Officers, Aboriginal Interpreters and Legal Professionals working with speakers of Aboriginal languages’1364) explains the reason why it is important to have such a resource:

There are major differences between English and Aboriginal languages at several levels. English and Aboriginal languages come from vastly different language families. They have completely different grammatical systems, and particularly in the area of abstract concepts, there are rarely equivalent words... The way that Judicial Officers, legal practitioners, police officers and other professionals speak will directly affect the quality of interpreting that an interpreter can provide. If an interpreter cannot understand the meaning of what is being said, they cannot interpret accurately. Good communication within the legal system is a joint responsibility between Judicial Officers, legal professionals and interpreters. This dictionary is an attempt to share that responsibility and put Aboriginal interpreters and legal professionals ‘on the same page’ about the difficulties involved in communicating commonly used legal terms.1365

chronological order; Avoid multiple clauses in a sentence (one idea, one sentence); Avoid if, but and hypothetical events; Place cause before effect; Indicate when you change topic; Avoid relying heavily on prepositions to talk about time; Avoid figurative language.’

1363 ibid.
1365 ibid 4.
The Plain English Legal Dictionary helpfully describes the difference between plain and simple English:

This dictionary is not an attempt to simplify or ‘dumb-down’ legal terms. Plain English is about better understanding your intended audience, and speaking in a way that most accurately and clearly communicates to that audience. Plain English attempts to avoid words that will cause confusion or ambiguity, and to express concepts in a way that makes the most logical sense to the audience. For most legally trained native speakers of English, speaking in plain English will be far more difficult than using complex legal terminology. Using plain English, however, is a skill that can be learnt and developed.\textsuperscript{1366}

There will be some technical terms that the Inspectorate will use that are already included in this dictionary (such as bail) and Inspectorate staff should refer to it as appropriate. However, there will be some terms and complex concepts that will not be included (such as inspection, torture, degrading treatment) and should be included in an “NPM” subject matter dictionary. This approach is supported by the APT’s suggestion in its practical guide, that ‘[i]t will improve the work of the interpreter if a glossary of specific terms is made available in advance.’\textsuperscript{1367} Just as the Plain English Legal Dictionary was subsequently translated into Yolngu Matha,\textsuperscript{1368} so too can the Inspectorate’s dictionary be translated into Aboriginal languages.

**RECOMMENDATION:** The Inspectorate should use existing subject matter dictionaries and plain English resources in its work, as appropriate.

The Inspectorate should, in consultation with the AIS, develop an “NPM” plain English subject matter dictionary and/or a glossary of terms.

The Inspectorate should consider translating (parts of) some of these resources into Aboriginal languages.

**TRAINING INTERPRETERS**

The NT Ombudsman included in its recommendations that ‘the development of interpreters’ be encouraged.\textsuperscript{1369} The Inspectorate should provide technical training to AIS interpreters on its mandate and how it conducts its inspections, similar to the technical training delivered by NAAJA’s CLE team to the AIS on topics such as criminal process, bail and sentencing.

**RECOMMENDATION:** The Inspectorate should provide technical training to AIS interpreters on its mandate and how it conducts its inspections.

\textsuperscript{1366} Ibid 5.
\textsuperscript{1368} Aboriginal Resource and Development Services, Dhuwal Wäyukpuy-Rom Dhärük Ga Mayali’ (2015).
\textsuperscript{1369} Ombudsman for the Northern Territory, Strangers in their own land: Use of Aboriginal Interpreters by NT public authorities (August 2018) 9.
The Inspectorate should create plain English resources for dissemination at the places of detention, translated into Aboriginal languages. In Honduras, for example, ‘the NPM organised translation of the texts of CAT and OPCAT into two [I]ndigenous languages.’\(^\text{1370}\) Although it is not suggested that this needs to be replicated in the NT (although it certainly could), it could be useful to have, at the very least, a brief outline of the Inspectorate’s mandate. This is recommended by the SPT, with resources including the NPM’s ‘mandate and working methods, the concept of informed consent and... contact information. It should also indicate that any type of reprisal should be reported to the national preventive mechanism.’\(^\text{1371}\) This could be translated into a number of Aboriginal languages.

**RECOMMENDATION:** The Inspectorate should create plain English resources for dissemination in places of detention (both during inspections and to be made available in between inspections). These resources should include a brief outline of the Inspectorate’s mandate. These should also be translated into Aboriginal languages.

---

**USING FOCUS GROUPS TO OBTAIN THE INFORMATION OBTAINED VIA SURVEYS IN JURISDICTIONS OVERSEAS**

A DIFFERENT APPROACH IS REQUIRED FOR THE NT CONTEXT TO SECURE THE BENEFITS OF SURVEYS

As discussed above, surveys are a particularly useful means, employed by NPMs in other jurisdictions, of collecting data and information on detainees’ experiences of detention. Recalling that the detainees’ experience should be central to the work of the Inspectorate, there is a strong argument to be made that a similar approach of using surveys should be adopted by the NT Inspectorate. This report has recommended above that the Inspectorate collaborate with the generalist NPM to ensure that the questions asked in surveys are the same, to enable comparisons of survey responses between Aboriginal and non-Aboriginal detainees.

In light of the fact that many of the detainees in the NT speak a language other than English, with the further obstacle of low literacy levels, distributing the surveys to detainees for them to complete and return, as HMIP and the New Zealand Ombudsman do, will not produce comparable results in the NT. Reflecting on HMIP’s *Ethical principles for research activities*, it is clear that a different approach will be required in the NT if surveys are to be a useful source of information.

\(^\text{1370}\) Association for the Prevention of Torture, *Preventing torture, a shared responsibility: Regional Forum on the OPCAT in Latin America Outcome Report* (2014) 64.

\(^\text{1371}\) Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Honduras*, UN Doc CAT/OP/HND/3 (25 January 2013) [22].
ETHICAL PRINCIPLES FOR RESEARCH ACTIVITIES

‘Every effort will be made to respect and accommodate the needs of individuals in terms of language, accessibility, availability and any other equality and diversity considerations, to ensure that they are included in HMI Prison’s research activities.’

INSPECTIONS

‘We make arrangements to administer the questionnaire via a face-to-face interview for respondents who disclose literacy difficulties.’

HMIP researchers offered to administer the questionnaire via an interview with any children who said they needed assistance... who said they needed help due to literacy or language difficulties.

EDUCATION SESSIONS ON THE MANDATE OF THE INSPECTORATE AND ITS EXPECTATIONS/STANDARDS

This report recommends that the Inspectorate hold small focus groups in the first week of its inspection, during which it explains its mandate and the purpose of the survey. It should conduct an education session on its expectations/standards, linking them to the survey questions. This education session would not be dissimilar to the legal education sessions that I used to run as part of NAAJA’s community legal education program. In that context, a session in a youth detention facility would involve a discussion on the children’s rights and obligations in detention under the legislation and regulations, followed by an activity such as a debate. In the prison, a similar program was run. These sessions aimed to empower detainees with information about their existing rights, enabling them to identify any breaches of those rights and request the assistance of a lawyer if they wished. In the context of the Inspectorate’s work, the focus would shift away from existing legislation, regulations, policies and procedures to the Inspectorate’s expectations/standards and the prevention of ill-treatment and torture.

The education sessions should be run in a culturally competent manner. Grimes’ and Crawford’s caution should be heeded when conducting these focus groups:

most educational initiatives will rely on a set of assumed knowledge and attitudes that may or may not exist.

Information that is simply presented, or dumped, on an audience can have very little learning impact, or worse still, be misinterpreted and misapplied with significant negative consequences.

Some have cautioned against the Inspectorate taking this approach, questioning whether it constitutes ‘mission creep’. However, given the unique context of the NT, where there is significant divergence in Western and Aboriginal worldviews and legal systems, where many have little appreciation of their existing rights, and where there are barriers such as language and a mistrust of the justice system generally (also noting that the Inspectorate’s functions will be new and unfamiliar in the NT), simply handing out surveys will almost certainly

1372 Her Majesty’s Inspectorate of Prisons, Ethical principles for research activities (2015) 4.

See also Criminal Justice inspection Northern Ireland, Report on an unannounced inspection of Maghaberry Prison 9-19 April 2018 (November 2018) 66: ‘We got an overall response rate of 85%. This included five questionnaires completed via face-to-face Interview.’
1375 Ben Grimes and Will Crawford, Strong foundations for community based legal education in remote Aboriginal communities (October 2011) 2.
fail as a strategy to accurately capture detainees’ experiences of detention. If the Inspectorate is to execute its mandate in an effective and culturally competent manner, then it cannot simply cut and paste approaches used in other jurisdictions, even if they are successful in those other contexts. To do so will be limiting and it will certainly be a lost opportunity to achieve those benefits that other NPMs gain through the use of surveys.

Although the proposed approach might be more time consuming, it should be recalled (as noted above) that HMIP researchers do take the time to explain the purpose of the survey to detainees, and that the ‘distribution and collection of surveys can take up to two days.’\(^{1376}\) The Inspectorate will simply need to ensure that its inspection is of sufficient length to facilitate this aspect of the visit.

**OPPORTUNITY TO OBTAIN GENUINE INFORMED CONSENT**

The SPT has recommended that NPMs:

introduce themselves to persons being held in custody and tell them their name, profession and the position they occupy in the national preventive mechanism. The interviewer should explain what the mandate of the national preventive mechanism is, placing particular emphasis on its preventive nature. The interviewer should also obtain the consent of the interviewee and make it clear that the interview is confidential, voluntary and can be interrupted at any time at the interviewee’s request... It should also indicate that any type of reprisal should be reported to the national preventive mechanism.\(^{1377}\)

The proposed focus groups will also provide the Inspectorate with an opportunity to explain its mandate and obtain informed consent where detainees choose to engage with it by way of survey completion.

---

**HMIP – INFORMED CONSENT**

‘Full informed consent will be obtained from individuals approached to take part in research activities. Individuals will be provided with information about: the nature and purpose of the research activity; how they have been selected; what is involved; how much time is required; confidentiality, anonymity and how the information they provide will be used.’\(^{1378}\)

‘Voluntary participation: Participation in research activities is voluntary. Individuals have the right to withdraw at any time until a report has been published and can choose not to answer questions without repercussions.’\(^{1379}\)

**FEEDBACK DURING THE SESSIONS AND COMPLETION OF SURVEYS**

Any information that is provided by detainees in this forum can be recorded as it would be in any focus group session. Detainees who feel confident filling out the form during the session will be provided the opportunity to do so (with assistance where requested). Detainees’ requests for assistance filling out the form at a later time or to fill out the form on their own after the session will also be accommodated.

---


\(^{1377}\) Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Honduras, UN Doc CAT/OP/HND/3 (25 January 2013) [22].

\(^{1378}\) Her Majesty’s Inspectorate of Prisons, Ethical principles for research activities (2015) 3.

\(^{1379}\) Ibid 4.
CJINI – COMPLETION OF SURVEYS IN A GROUP SETTING OR WITH THE ASSISTANCE OF AN INSPECTOR

‘Prisoner Survey: A questionnaire survey was conducted with 48 individuals who had been remanded or sentenced into custody at one of four establishments. The survey was completed either alone or in a group, depending on the circumstances. Detainees completed the survey themselves with Inspectors assisting in cases of comprehension or literacy difficulties.’

Of course, the Inspectorate should take heed of the SPT’s advice that ‘before deciding to hold a group interview, the national preventive mechanism [should] seriously evaluate the circumstances in which it would be held, the usefulness and relevance of such an interview and the possible security implications.’

HUMAN RIGHTS EDUCATION AND PREVENTION

Holding these focus groups is directly linked to obtaining evidence during inspections, and thus firmly within the Inspectorate’s mandate. It should be noted that conducting the focus groups also has the additional benefit of educating detainees on human rights in detention, and thus has a useful preventative role in this respect as well. As the SPT has noted in its annual report, ‘[h]uman rights education and training must embrace persons who have been deprived of their liberty or whose liberty is restricted and their families.’

RECOMMENDATION: The Inspectorate should use detainee focus groups to conduct information sessions, with the assistance of interpreters, on its mandate and expectations/standards, in order to facilitate obtaining informed consent from detainees, to enable detainees to complete the surveys either during the session or afterwards (with the assistance of Inspectorate staff if requested) and to utilise human rights education as a preventative strategy.
PRESENTATION OF FINDINGS IN THE REPORT
STRUCTURE OF THE REPORT

In their project, Birk et al noted the importance of consistency in the style and formatting of reports, and that there be ‘clear guidelines and protocols to ensure inspectors are working to the same template, and the process for preparing each report meets the protocols agreed with inspected bodies.’ Having consistency in reports produced by the Inspectorate would facilitate comparisons between reports from different inspections at the same site, and between reports of different detention sites.

HMIP - GUIDE FOR INSPECTORS

The Guide prescribes the format of the inspection reports and editorial guidelines, and includes a glossary of abbreviations and terms used in HMIP’s reports.

THE REPORT SHOULD FACILITATE CONSTRUCTIVE DIALOGUE

The OHCHR identifies engaging in ‘constructive dialogue with relevant authorities, including the directors or managers of the places of detention and the supervising authorities of places visited, as well as other relevant institutions’ as a key criterion for an effective NPM. In considering what constructive dialogue should achieve, it is useful to refer to the following: ‘constructive dialogue offers an opportunity for States parties to receive expert advice on compliance with their international human rights commitments, which assists them in their implementation of the treaties at the national level.’

The Inspectorate’s report should facilitate constructive discussions with the detaining authorities. Discussed further below (under Recommendations), providing examples of best practice in other places of detention supports a practice of having solutions-driven recommendations. Highlighting good practice at the detention site that is the subject of the Inspectorate’s report is also important, not only in identifying practices that should be continued and developed (and potentially replicated at other detention sites), but also in

1383 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 33-34.
1387 Ibid 32-45.
1389 Report of the Chairs of the human rights treaty bodies on their twenty-sixth meeting – Note by The Secretary-General, UN GAOR, 69th sess, Item 69(a), UN Doc A/69/285 (11 August 2014) Annex I (‘Guidance note for States parties on the constructive dialogue with the human rights treaty bodies’). 23.
establishing the Inspectorate as both impartial and evidence-driven in its work. Adopting this approach would reflect ‘the practice in the concluding observations of international treaty bodies.’

As Birk et al explain, the ‘preventive approach implies that NPMs need to seek dialogue with the authorities in a cooperative spirit rather than one of condemnation and confrontation… criticism should always be constructive and accompanied with the offer of advice on how improvements could be made. Best practices potentially identified should be commended.’

### HMIP – EXAMPLES OF GOOD PRACTICE

‘The prisoner intervention plan process provided continuous support for prisoners who had previously self-harmed, irrespective of whether they were in crisis or on an assessment… This process identified issues at the earliest point, enabling staff intervention and potentially reducing instances of self-harm… Prisoners could, with appropriate clinical oversight, purchase over-the-counter health care items such as paracetamol and antiseptic cream… The monthly social care drop-in service was an excellent initiative, allowing prisoners to discuss issues with a social worker, occupational therapist and health care worker… Prisoners had a degree of control over the activities that they completed each week. This contributed to a calm and ordered environment, and a less institutional aspect to daily life at the prison.’

### CJINI - EXAMPLES OF GOOD PRACTICE

‘[I]mpressive practice that not only meets or exceeds our expectations, but could be followed by other similar establishments to achieve positive outcomes for prisoners…’

‘The monthly oversight meeting ensured that segregated prisoners were reviewed in-depth by appropriate departments and the right support offered to meet their individual needs… The Families Matter unit provided an opportunity for men to identify and practise parenting skills and experience in-depth engagement with their families… Risk assessed men on the Braid House Unit could use skype which enhanced regular contact with their children.’


1391 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 29.


1394 Ibid 57.
HMIPS – GOOD PRACTICE

Summary of good practice:

<table>
<thead>
<tr>
<th>QUALITY INDICATOR</th>
<th>GOOD PRACTICE</th>
<th>RELEVANT AGENCY</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1</td>
<td>The construction of the CCU is such that access by wheelchair or by persons of restricted mobility is not possible. The process put in place by the CCU staff in collaboration with SCTS to accommodate such prisoners at locations in another part of the building is effective and appropriate given the circumstances</td>
<td>GEOAmey/SCTS</td>
</tr>
<tr>
<td>6.2</td>
<td>By subscribing to Language Line and allowing all CCU’s access to this service will ensure foreign nationals and possibly other vulnerable groups, have a better understanding of the court process and in turn increase their access to human rights</td>
<td>GEOAmey</td>
</tr>
</tbody>
</table>

(SCTS is the Scottish Courts and Tribunal Service, GEOAmey is the contracted service provider.)

RECOMMENDATION: The Inspectorate’s report should facilitate constructive dialogue with the detaining authorities, by ensuring that its findings are evidence-based and balanced, highlighting both poor and good practices at the detention site.

ENSURING THE REPORTS “DO NO HARM”

As already noted above, OPCAT provides that ‘[c]onfidential information collected by the national preventive mechanism shall be privileged. No personal data shall be published without the express consent of the person concerned.’ Dixon additionally warns of the potential ‘chilling effect’ should sources of evidence be revealed and confidence in the NPM be compromised.

RECOMMENDATION: The Inspectorate’s report should include no personal data without the consent of the person concerned, in accordance with obligations under OPCAT and a ‘do no harm’ approach. The Inspectorate should not reveal sources of the evidence which supports its findings, explicitly or otherwise, without the individuals’ consent. This is to ensure continuing confidence in its operations and willingness of detainees, staff and other stakeholders to engage with it.

1395 Her Majesty’s Inspectorate of Prisons Scotland, Inspection of Court Custody Provision, Paisley Sheriff Court 4 March 2019 (May 2019) 17.
1396 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 21(2).
INCLUDING EVIDENCE TO SUPPORT THE INSPECTORATE’S FINDINGS

NPMs in other jurisdictions include in their report direct quotes from detainees, case studies and photographs, approaches which the Inspectorate should also adopt. Including direct quotes from detainees is a particularly effective means of conveying the experience of detainees, which, as discussed above (under Conducting the inspection), should be central to the work of the Inspectorate. It removes the intervening step of Inspectorate staff evaluating and interpreting the meaning behind the detainee’s words in the process of summarising or paraphrasing that evidence. Incorporating direct quotes is also a means of humanising detainees for the report’s audience, assisting them to be perceived as individuals who continue to be deserving of human rights while they are involved in the criminal justice system. Direct quotes from staff also add value in outlining the risk factors for ill-treatment of detainees, and supporting the conclusions of the Inspectorate.

Including photographs in the report can assist the report’s audience to better understand the conditions and treatment in detention than a written description, particularly for those who have not been inside detention before (the general public), or have not been at the particular detention site ever or in recent times (eg supervisory authorities). Additionally, better understanding among the public can in turn lead to greater pressure on the detaining authorities to implement the Inspectorate’s recommendations. Photographs also convey messages powerfully and quickly for those, such as sections of the general public, not committed to reading an entire report.

Case studies demonstrate how the Inspectorate reaches its findings, with the narrative form having the potential to better resonate with the audience than statistics and descriptions, and as with direct quotes, can assist in humanising detainees.

DIRECT QUOTES FROM DETAINEES

```
(Name of staff member) is quite dodgy. Like one of the girls punched me in the yard and he saw it and didn’t do anything and just laughed. He lets the girls fight. If it comes down to him, he will just sit there and watches first and then does something.  

There is tagging everywhere – kids scratch their name out, tag on the walls – it feels like a mental unit.
```

A particularly powerful approach used by the OCC to convey the experience of young people in detention was the creation of a ‘composite first person narrative’: ‘We have combined these young people’s voices to form a ‘composite first person narrative’ of a young person’s typical daily experiences in a youth justice residence. The description is written as one young person’s account of his experiences in a youth justice residence. We have called this young person ‘Harley’, but he is not a real young person. He represents the voices of many children and young people who have described their common experiences to us.’

---

1399 Ibid.
1400 Ibid 12.
OMBUDSMAN

‘There are no programmes/courses for people on remand that want to change and get help for offending, it also looks bad for the Judge when going for sentencing.’¹⁴⁰¹

‘I really wanted to get help in here and can’t do it all on my own. No support.’¹⁴⁰²

HMIP

‘I felt very unsafe with no seat belt on. I have been in many vans when the brakes have been slammed on and in the back you can’t see so you don’t know what is coming. It can be very scary when you are just thrown against the wall in front of you.’¹⁴⁰³

‘When you are constantly on basic, you do not really care what you are losing – you have nothing to lose anyway.’ Child, under-18 YOI.¹⁴⁰⁴

‘When two prisoners got into a fight in the gym, the officer made the black prisoner go back to the unit while allowing the white boy to remain.’¹⁴⁰⁵

‘One black prisoner mentioned that he had asked to see a Listener, but that the officer had said that he was “not the type” to be on a suicide watch and did not allow it.’¹⁴⁰⁶

‘Black prisoners are watched more closely on visits because of stereotyped expectations that they will bring in drugs.’¹⁴⁰⁷

HMIPS

‘[P]ractical support like an admission pack mattered and made you feel better. Admission was often difficult to remember because of being under the influence. Being given clothes of poor quality or that did not fit you properly affected how you felt about yourself.’¹⁴⁰⁸

PHOTOGRAPHS

HMIP

INSPECTION FRAMEWORK

‘The inspection team may also gather photographic evidence to illustrate conditions that cannot be adequately described or to emphasise a finding, governed by protocols agreed with HMPPS.’¹⁴⁰⁹

¹⁴⁰² Ibid.
¹⁴⁰³ Her Majesty’s Inspectorate of Prisons, A thematic review by HM Inspectorate of Prisons: Transfers and escorts within the criminal justice system (December 2014) 29.
¹⁴⁰⁴ Her Majesty’s Inspectorate of Prisons, Incentivising and promoting good behaviour A thematic review by HM Inspectorate of Prisons (March 2018) 49.
¹⁴⁰⁵ Her Majesty’s Inspectorate of Prisons, Parallel worlds: A thematic review of race relations in prisons (December 2005) 17.
¹⁴⁰⁶ Ibid.
¹⁴⁰⁷ Ibid.
GUIDE FOR INSPECTORS

‘You can also gather photographic evidence to illustrate conditions that cannot be adequately described, to emphasise a finding, or to provide evidence for disputed findings. This may include the physical state of the cells, internal and external communal areas, cleanliness, notices and communal facilities. Photographs should not identify any individual and care should be taken to reassure prisoners and staff about this. Photographs can be included in the inspection report.’1410

GUIDE FOR WRITING INSPECTION REPORTS

‘The following protocols have been agreed with HMPPS:

• Accuracy – Any photographs taken should be a true representation of the situation they are meant to highlight and not be inadvertently misleading.
• Identity – Photographs will not be taken that might identify any individual prisoners or members of staff, without obtaining prior written consent from the individual concerned.
• Decency – Photographs will not be taken of anyone (staff or prisoner) in a vulnerable state where the individual may not be fully able to give their consent to being photographed. No photographs should be published of notorious offenders and no pictures that might cause undue upset to any victims should be published.
• Security – Photographs are not published showing keys, details of locking arrangements or any other establishment security measure that would not be obvious to prisoners...
• Governors will be asked to comment on the suitability of pictures before they appear in the published report. HMPPS will convey any objections to individual pictures being published as part of the factual accuracy checking process.’1411

OMBDUSMAN – PHOTOGRAPH IN REPORT

‘Figure 9: Tie-down bed—Auckland Prison’1412

‘Photograph shows a tie-down bed in a cell—the bed takes up most of the cell.
Description of the cell: Cream walls, with a small barred window at the end of the room.
Description of the bed: shows a low bed with a vinyl mattress, covered with a blanket. There is a towel at the end of the bed, to act as a head rest. There are two sets of restraints, one near the top of the bed for arms, and one near the bottom for legs. Each lot of restraints is belted around the bed, with the bed used as an anchor. The restraints where arms and legs would fit, have buckles to secure them.’1413

1413 Ibid 49.
**CASE STUDIES**

**HMIP DETAINEE CASE STUDY**

‘One boy on crutches had finished at court by 1pm but was held in court custody until 6.45pm waiting transfer to a YOI. He was transported in a van with two adult detainees who had to be dropped off on the way at a police station. This lengthened the time his journey took and he did not arrive back at the YOI until 9.20pm – almost eight and a half hours after his court hearing had finished. Records reviewed at the YOI indicated that in the previous six months a third of the children had arrived in reception from court after 7pm.’

**STAFF CASE STUDY**

‘Mr A is an officer of mixed race working in a predominantly white area, who had never previously thought of himself as being ‘different’ from white people. As far as he knew, his almost exclusively white colleagues also thought of him as being white English. These perceptions changed when he was verbally abused by a white officer who used the term; ‘Paki bastard’; and said to him: ‘Get a shop like the rest of the twats’. He said he was in shock and didn’t understand what had just happened and why. He was new to the job and did not want to draw attention to himself by making a formal complaint. Consequently, he challenged the perpetrator himself the next day, but the latter did not accept that he was in the wrong. He then took the matter to the RRLO for advice. He in turn took the matter straight to the governor, who immediately suspended the officer and initiated an investigation that led ultimately to the perpetrator’s dismissal. Some friends of the dismissed officer felt that he had ‘overreacted’ and started malicious gossip. Another officer was subsequently disciplined by the governor, given a written warning and compulsorily transferred to prevent any further victimisation. Although other officers were very supportive of the victim, he felt ostracised and found it difficult to go to work. He had no idea how to handle racism and said that racists were ‘like worms in the wood’: he never knew where they were and where they came from. Despite support from managers and other staff, two years later the repercussions were still being felt and this officer was isolated, depressed and anxious.’

**RECOMMENDATION:** The Inspectorate’s report should include direct quotes from detainees and staff, case studies, and photographs.

---

1414 Her Majesty’s Inspectorate of Prisons, *A thematic review by HM Inspectorate of Prisons: Transfers and escorts within the criminal justice system* (December 2014) 43.

1415 Her Majesty’s Inspectorate of Prisons, *Parallel worlds: A thematic review of race relations in prisons* (December 2005) 22.
RECOMMENDATIONS
THE CHALLENGE OF HAVING NON-BINDING RECOMMENDATIONS

OPCAT requires that the State ‘examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures.’\(^{1416}\) There is no obligation on the State to implement the recommendations, and the Inspectorate will instead have to rely on persuasion. Some of the above sections have already addressed Inspectorate characteristics and procedures that would assist the Inspectorate to successfully persuade the detaining authority to implement its recommendations. These include the Inspectorate maintaining independence from civil society while retaining civil society’s confidence in it (particularly ACCOs and the NT Aboriginal community), having staff with expertise on relevant subject matter, transparency in relation to the expectations/standards being used and the manner in which the Inspectorate conducts its inspections and ensuring that its findings are based on properly triangulated evidence.

Carver and Handley note that a ‘monitoring body has impact by observing how a system works and making recommendations for improving law and practice. How far its recommendations are implemented is largely out of its hands.’\(^{1417}\) Despite this, Nowak and McArthur highlight that, although NPM recommendations are not binding, ‘it follows from the objective and purpose of [OPCAT] and the general principle of cooperation that States shall take the recommendations... seriously and make bona fide attempts to implement them.’\(^{1418}\)

THE APT’S SMART MODEL

In its annual report, the SPT has noted that the purpose of NPMs’ recommendations ‘is not only to bring about compliance with international obligations and standards but to offer practical advice and suggestions as to how to reduce the likelihood or risk of torture or ill-treatment occurring and will be firmly based on, and informed by, the facts found and circumstances encountered during the visits undertaken.’\(^{1419}\) It has stated that recommendations ‘should be directed towards developing preventive measures to deal with shortcomings in systems and practices, and should be practicable.’\(^{1420}\)

The APT advises that ‘[w]ithout recommendations, a report has reduced chances of achieving change; Recommendations are often the part of detention monitoring reports that are read most closely... They should make a constructive contribution to national problem-solving and to provide a structured framework for dialogue with the authorities.’\(^{1421}\)

\(^{1416}\) Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 22.


\(^{1419}\) Fourth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, 46th sess, UN Doc CAT/C/46/2 (3 February 2011) [106].

\(^{1420}\) Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Federal Republic of Germany, UN Doc CAT/OP/DEU/2 (29 October 2013) [70].

\(^{1421}\) Association for the Prevention of Torture, Briefing N°1 Making Effective Recommendations (November 2018) 1.
This report recommends that the Inspectorate be guided by the APT’s SMART model, outlined below, in formulating its recommendations. Additionally, the Inspectorate should take heed of the APT’s suggestion that monitors ‘analyse risks that may arise from implementation in terms of a negative impact on the enjoyment of human rights by persons deprived of their liberty or others. Unforeseen negative consequences of implementation will discredit both the preventive monitoring initiative and the implementing authorities.’

### APT - THE DOUBLE SMART MODEL

**SPECIFIC**: ‘Each recommendation should address only one specific issue.’

**MEASURABLE**: ‘In the future, the authorities and monitoring organisation(s) should be able to assess unequivocally whether or not and to what extent a recommendation has been implemented. The recommendation should be designed in such a way as to make this evaluation as easy as possible.’

**ACHIEVABLE**: ‘Any recommendation should seek to be feasible in operative terms. However, this criterion does not contemplate the issue of financial resource availability. Being based on international standards, recommendations should highlight what must be done within reason. It is the responsibility of the State to find and assign the resources to do it.’

**RESULTS-ORIENTED**: ‘The actions suggested should lead to concrete results.’

**TIME-BOUND**: ‘Each recommendation should mention a realistic timeframe for implementation.’

**SOLUTION-SUGGESTIVE**: ‘Recommendations that simply call for ‘change’ or ‘improvement’ will require further study by the authorities before a solution can be identified, let alone implemented. This reduces significantly the strategic possibilities for achieving concrete results. A multidisciplinary monitoring team applies the professional, analytical and other expertise of its members to the specific issue of detention and should, wherever possible, try not just to identify problems but also to propose credible solutions. Recommended actions should be concrete and concise but include the relevant technical details to avoid misimplementation.’

**MINDFUL OF PRIORITISATION, SEQUENCING & RISKS**: ‘Monitoring bodies may identify many issues that require action. As preventive monitoring is an ongoing process, reserving less pressing recommendations may be useful in enabling the

---


1424 Ibid.

1425 Ibid.

1426 Ibid.

1427 Ibid.

1428 Ibid.

1429 Ibid.


1431 Ibid 34.
implementing authorities to focus on more urgent ones. Secondly, some recommendations may be more successfully made in later reports with others implemented earlier.\textsuperscript{1432} ARGUED: ‘Recommendations should be based on high-quality, objective evidence and analysis. They should refer to relevant standards.’\textsuperscript{1433} As Birk et al have noted, ‘functional independence implies that the findings of the NPM are based on factual evidence and the recommendations made are justifiable, credible, reliable and legitimate. These are crucial factors that can influence the overall impact of the recommendations made by NPMs.’\textsuperscript{1434} ROOT-CAUSE RESPONSIVE: ‘Recommendations should address the causes of problems, rather than the symptoms,’\textsuperscript{1435} ‘or the systems and processes that need to be put in place or modified to mitigate risk factors.’\textsuperscript{1436} TARGETED: ‘Recommendations should be directed to specific institutions and/or actors rather than to ‘the authorities’ so that responsibility for implementing them is clear.’\textsuperscript{1437} ‘The government’ and ‘the state’ should not be considered as monolithic entities. The particular actors/institutions that can legally and practically implement the recommendation must be correctly identified. This will assist the government in assigning responsibilities, increase accountability and facilitate follow-up by monitors and the larger society. At the same time, however, monitors should be aware of institutional protocol and ensure that hierarchies are adequately observed both in the recommendations themselves and when presenting the report. Some reports group recommendations by target sector (e.g. judiciary, penitentiary system, interior ministry).\textsuperscript{1438}

SOLUTIONS SUGGESTIVE – GOOD PRACTICE

HMIP – GUIDE FOR WRITING INSPECTION REPORTS

GOOD PRACTICE

‘Examples of good practice are listed at the end of the relevant section following any recommendations. Good practice is defined as: an example of impressive practice found during an inspection that not only meets or exceeds our expectations but could also assist other establishments of the same type to achieve positive outcomes.’\textsuperscript{1439}

NPM ANNUAL REPORT – HIGHLIGHTING GOOD PRACTICE

‘Good practices at the prisons visited: All prisoners at Rolleston Prison are unlocked for more than 12 hours a day. The majority of prisoners are involved in meaningful activity, including employment, training or rehabilitation programmes; Otago Corrections Facility operates a clear prisoner progression system. Prisoners can see a pathway through the prison from high-security units through to self-care units. This pathway incentivises pro-social behaviour and engagement in rehabilitation opportunities; At Invercargill Prison, two of the prison’s four units are unlocked for more than nine hours

\textsuperscript{1432} Ibid.
\textsuperscript{1433} Association for the Prevention of Torture, Monitoring Police Custody - A practical guide (January 2013) 85.
\textsuperscript{1434} Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 29.
\textsuperscript{1435} Association for the Prevention of Torture, Monitoring Police Custody - A practical guide (January 2013) 85.
\textsuperscript{1436} Association for the Prevention of Torture, Briefing N°1 Making Effective Recommendations (November 2018) 5.
\textsuperscript{1437} Association for the Prevention of Torture, Monitoring Police Custody - A practical guide (January 2013) 85.
\textsuperscript{1438} Association for the Prevention of Torture, Briefing N°1 Making Effective Recommendations (November 2018) 6.
\textsuperscript{1439} Her Majesty’s Inspectorate of Prisons, Guide for writing inspection reports (2018) 15.
a day; Good staff-prisoner relationships were evident at Arohata Prison. Prisoners were complimentary about staff and felt there was a member of staff they could turn to if they had a problem.\footnote{\textsuperscript{1440}}

**CJINI – GOOD PRACTICE**

‘[W]here appropriate benchmarking and identification of best practice within and outside Northern Ireland.’\footnote{\textsuperscript{1441}}

---

**RECOMMENDATION:** The Inspectorate should employ the APT’s double SMART model in formulating its recommendations:
- **Specific**, **Measurable**, **Achievable**, **Results-oriented**, **Time-bound**;
- **Solution-suggestive**, **Mindful of prioritisation**, **sequencing \\& risks**, **Argued**, **Root-cause responsive**, **Targeted**.

**RECOMMENDATION:** The Inspectorate should ensure that its recommendations are measurable, to enable it to properly assess whether the detaining authority has implemented them.

**RECOMMENDATION:** The Inspectorate should make reference to good practice in other places of detention in making solutions-suggestive recommendations.

**RECOMMENDATION:** The Inspectorate should ensure that in formulating its recommendations, it carefully considers whether there may be negative consequences resulting from recommendation implementation.

---

**BALANCING WHAT IS PRACTICALLY ACHIEVABLE VS SUPPOSED BUDGETARY CONSTRAINTS**

The Council of Europe has stated that ‘[p]rison conditions that infringe prisoners’ human rights are not justified by lack of resources... The [European Court of Human Rights] has also held that it is incumbent on States to organise their penitentiary systems in a way that ensure respect for the dignity of prisoners, regardless of financial or logistic difficulties.'\footnote{\textsuperscript{1442}} Dame Owers, the former Chief Inspector of HMIP has also cautioned against accepting budgetary constraints as an excuse for poor conditions and treatment in detention, asserting that ‘it is an important function of the Inspectorate to continue to say [it is not right], or else what is normal may become normative.’\footnote{\textsuperscript{1443}} Coyle has suggested that ‘[a]t a more pragmatic level, the shortage of public funds may well be a reason for the state to make sure that prison is used only for the most dangerous criminals and...’

---

\textsuperscript{1440} Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2015 to 30 June 2016 (February 2017) 19.

\textsuperscript{1441} Criminal Justice inspection Northern Ireland, The Safety of prisoners held by the Northern Ireland Prison Service: A joint inspection by Criminal Justice Inspection Northern Ireland and the Regulation and Quality Improvement Authority (October 2014) 55.

\textsuperscript{1442} Council of Europe, Revised Commentary to recommendation CM/REC(2006)2 of the Committee of Ministers to Member States on the European Prison Rules (May 2018) 7.

is not used as a way of removing marginalised individuals from society.’¹⁴⁴⁴ The Inspectorate should not accept budgetary constraints as a justification for the torture or ill-treatment of detainees, just as its expectations/standards should not be bound by existing legislation/policies. Its role is to identify risks for torture and ill-treatment, and making recommendations to mitigate those risks, as per its preventive mandate.

Birk et al also acknowledge the APT’s and various NPMs’ positions that budgetary constraints should not be taken into account in making recommendations, (the ‘UK NPM’s own evaluation of its work revealed that only a ‘minority’ of the bodies in the NPM take the budget into account, although some ‘were conscious of resources’¹⁴⁴⁵), but do note that ‘in practice... this may be problematic when trying to draft achievable recommendations, and in part depend upon to whom the recommendation is addressed.’¹⁴⁴⁶

The APT has provided some particularly useful advice with regards to obtaining information on the detaining authorities’ budgets:

given that a lack of resources is often raised as an obstacle to implementation, torture prevention bodies should obtain information on the budgets of relevant institutions and analyze these. This should inform recommendations regarding budget allocation, made to the right bodies (e.g. the parliament, the relevant ministry) at the right time (i.e. when budgets are being set). Furthermore, there are often recommendations that do not require extra resources and some that can be implemented step by step.¹⁴⁴⁷

**OCI - RECOMMENDATION THAT DETENTION FACILITY BE CLOSED DOWN**

The OCI has recommended that an entirely inappropriate facility be closed down (an expensive recommendation to implement).

The OCI conducted ‘a review of BCC’s infrastructure and functionality through a human rights lens.’¹⁴⁴⁸ It concluded that ‘[t]his report is consistent with numerous previous internal and external reports on BCC. The report confirms that BCC is past its best before date, and needs to be closed and replaced by a new facility or facilities. BCC physical infrastructure is not safe for either staff or inmates, and hinders the ability of NU Corrections to fulfil its legal mandate of humane custody and rehabilitation.’¹⁴⁴⁹

**RECOMMENDATION:** The Inspectorate’s recommendations should not be influenced by the detaining authority’s budgetary constraints.

The Inspectorate should obtain information about the detaining authorities’ budgets. This will provide it with a clearer view of what current budgetary constraints might impede the implementation of its recommendations, and will assist it to make recommendations relating to budget allocations at the appropriate times to the appropriate bodies.

---

¹⁴⁴⁵ Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 38.
¹⁴⁴⁶ Ibid.
¹⁴⁴⁹ Ibid 16.
TIME FRAMES FOR IMPLEMENTATION OF RECOMMENDATIONS

The APT’s double SMART model suggests that recommendations are time-bound, that they ‘be prioritised in terms of which need to be implemented first and for which there can be incremental implementation,’ and that the monitoring body consider consulting with the detaining authority regarding timeframes. Birk et al similarly note that the ‘phrasing of the recommendations should be adapted to the urgency required for its implementation.’

Some NPMs have a system by which:

- urgent/immediate recommendations... are issued within a few days after a visit and regular recommendations... are published in a report at a later stage addressed to the relevant institutions. It was found that the issuance of immediate recommendations to the place of deprivation of liberty helps to keep the momentum for change and to also conclude the visit with an immediate summary of findings. Other recommendations are addressed to governmental authorities and may be issued at a later stage... Other practices include issuing urgent recommendations that are published in the Official Gazette.

RECOMMENDATION: The Inspectorate should provide timeframes for implementation of recommendations, reflecting how urgent the implementation is.

The Inspectorate should ensure to make its urgent recommendations promptly known.

IDENTIFYING THE CAUSE(S) OF DETAINING AUTHORITY’S DEPARTURE FROM EXPECTATIONS/STANDARDS

The SPT’s analytical assessment tool states that ‘[i]n general, recommendations should have a preventive focus, addressing systematic gaps and practices (root causes), and be feasible in practice.’ The APT has suggested that ‘the visiting mechanism analyses whether the conditions of detention are in conformity with the relevant national and international standards. The visiting mechanism should not limit itself to noting whether the aspects examined are in conformity with the standards: (i.e., what actually is, compared with what should be) but try to explain, at least in part, the causes of any deviations from the standards.’

RECOMMENDATION: The Inspectorate should identify the causes for detaining authorities’ departures from its expectations/standards.

---

1451 Ibid.
1452 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 37.
1454 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [31].
RECOMMENDATIONS TARGETED TO APPROPRIATE INDIVIDUAL, DEPARTMENT OR CONTRACTOR

The APT asserts that monitoring bodies ‘should always respect the functioning of the authorities and try to identify the hierarchic levels and their responsibilities so as to be able to address any problem at the right level.’ However, Birk et al do note that ‘NPMs should… have flexibility to decide for themselves who are the competent authorities to receive particular recommendations at any one time.’

Birk et al conclude that, for many NPMs:

the implementation of recommendations should follow a ‘subsidiarity principle’: the practical issues under the direct control of the staff or the director should be resolved by the institution immediately and only the issues requiring an intervention at a higher level, such as the ministry, should be taken up with the governmental authorities. In terms of the latter, the NPM can offer itself to promote the development of prompt solutions with the higher level administrative authorities.

The Inspectorate should identify who is responsible for the aspects of detention that are the subject of their recommendation, and direct its recommendations accordingly. It should be guided by the hierarchies and delegation of/within authorities, but it should not be constrained by these, should it form the view that its recommendations should, in fact, be directed elsewhere. Of course, such a decision should be guided by which approach will most likely result in the recommendation being accepted and successfully implemented.

HMIP – GUIDE FOR WRITING INSPECTION REPORTS

‘Recommendations should be ascribed to the relevant recipient where possible. If the recommendation concerns a local issue over which the governor has influence it should be ascribed to the governor/director of the establishment. If the recommendation concerns national issues, including some contracts, it should be directed to HMPPS. We cannot make recommendations to organisations outside our remit, although we can call on establishments to enter into discussions with third parties to effect changes. The following should be used as a guide.

Ministry of Justice – only if a recommendation involves a national issue requiring a political decision, such as legislative change or bid to the Treasury for large-scale national resources.

HMPPS – only if the recommendation is about a national HMPPS policy issue (e.g. indeterminate sentences/lifer policy and management) or an HMPPS nationally managed service (e.g. escorts).

Deputy Director of Custody – if the recommendation is about regional issues, such as local delivery partnerships or operational pressures; or about the high security estate, close supervision centre system or managing challenging behaviour strategy.

Governor/director – if the recommendation relates to delivery of services to prisoners. This will be the focus of most recommendations...

Recommendations made in reports on children and young people establishments on matters of national policy should be ascribed to the Youth Custody Service (where there are significant funding implications, the recommendation will also usually be made to the Youth Justice Board)...

1456 Ibid 30.
1457 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 41.
1458 Ibid 50.
Recommendations made in police custody suite reports should be ascribed to the relevant police force or Police and Crime Commissioner (outside the Metropolitan Police area) or to the Metropolitan Police service or relevant borough operational command unit within the Metropolitan Police area and to the Mayor’s office.\textsuperscript{1459}

\textbf{IMB (ENG) – MONITORING FRAMEWORK}

‘Knowing how, when and with whom Boards should raise their concerns is crucial to their ultimate effectiveness. Where Boards are critical, the matter should be raised as soon as it arises with those to whom authority for that aspect of the regime has been delegated.’\textsuperscript{1460}

\textbf{HMIP – THEMATIC REVIEW OF TRANSFERS AND ESCORTS
TARGETED RECOMMENDATIONS}

‘To Ministers: All women should be transported in separate vehicles to men.
To the YJB: All children should be transported in separate vehicles to adults. Arrangements should be made to ensure children are not ‘parked’ in police custody because escorts are not available to take them from court to an STC before the court closes. The practice of children being asked about their escort experience on arrival to YOIs/STCs should be routinely done for all arrivals.
To HM Courts and Tribunals Service (HMCTS): There should be increased use of video-enabled court hearings, when appropriate, while ensuring there are no adverse consequences for the detainee or criminal justice procedures. Safeguards should ensure that the detainee is able to appropriately consult with their solicitor prior to their hearing. Information on how to make a complaint about escorts should be visibly available in court custody areas.
To PECS with HMCTS, local police forces, National Offender Management service (NOMS) and the YJB: PECS should lead multi-agency work in new or existing forums to ensure detainees do not spend unnecessary time in police or court custody due to escort service availability or procedures; those remanded or returning to prison/YOI custody are processed and collected in time to prevent them being ‘locked out’ or arriving any later than 7pm; detainees have suitable access to secure toilet breaks, particularly where it is known that a detainee will be experiencing a long journey; detainees are given appropriate information on where they are going prior to their transfer; all relevant staff are trained in completing PER forms, including how information will be used by other criminal justice agencies. The working group should discuss and address any cross agency issues in the quality of PER forms.
To PECS: Information on how to make a complaint about escorts should be visibly available in escort vehicles. As previously recommended, PECS should commission and publish the findings of independent research to determine the health and safety implications of installing seatbelts in cellular vehicles. PECS should ensure better coordination between escort contractors and prisons/YOIs to prevent lengthy waits to disembark on arrival to a prison.
To NOMS and the YJB: In addition to what is already recorded, monitoring of individual escort journeys should include full details of the waiting time for collection; time of departure and arrival; waiting time to disembark; and for journeys to court, the time a detainee arrived and the time they were required by the court. Recording by contractors should be subject to robust quality assurance. Information on how to make a complaint about escorts should be visibly available in prison/YOI/STC reception areas and included in induction materials.’\textsuperscript{1461}

\textsuperscript{1459} Her Majesty’s Inspectorate of Prisons, \textit{Guide for writing inspection reports} (2018) 15.
\textsuperscript{1461} Her Majesty’s Inspectorate of Prisons, \textit{A thematic review by HM Inspectorate of Prisons: Transfers and escorts within the criminal justice system} (December 2014) 13-14.
CJINI - THEMATIC REVIEW OF ESCORT AND COURT CUSTODY

Recommendations were made at the strategic level, and then to particular agencies: To the Northern Ireland Prison Service, the Police Service of Northern Ireland, the Northern Ireland Courts and Tribunals Service, the Northern Ireland Prison Service and Northern Ireland Courts and Tribunals Service.1464

---

1462 Her Majesty’s Inspectorate of Prisons Scotland, Inspection of Court Custody Provision, Paisley Sheriff Court 4 March 2019 (May 2019) 4.
1463 Ibid 6.
1464 Criminal Justice inspection Northern Ireland, An inspection of Prisoner Escort and Court Custody arrangements in Northern Ireland (October 2010) x-xi.
RECOMMENDATIONS THAT WILL ALSO ASSIST THE INSPECTORATE TO FULFIL ITS MANDATE

There may be instances where it will be appropriate for the Inspectorate to make recommendations that would assist it to better carry out its mandate.

For example, the SPT has recommended that the NPM:

- systematically examine... institutions’ records and files so that they can be cross-checked with information from other sources. If records are unavailable, then the national preventive mechanism should recommend changes in existing practices that will make it possible to check inmate records and files.\textsuperscript{1465}

\[\text{\textsuperscript{1465} Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Honduras, UN Doc CAT/OP/HND/3 (25 January 2013) [25].}\]

\[\text{\textsuperscript{1466} Office of the Children’s Commissioner, State of Care 2017: A Focus on Oranga Tamariki’s Secure Residences (May 2017) 7.}\]

OCC – INSPECTION OF SECURE RESIDENCES FUNDING

‘Recommendation 3: The Government commits to increased independent monitoring of Oranga Tamariki residences, particularly during this period of change. Conditions within a residence can change quickly, especially from the perspective of a child or young person. We believe that residences should be independently monitored more frequently – at least once every six months, with the flexibility to monitor more frequently if necessary. The majority of the residence monitoring should be ‘unannounced’ random visits. Experience overseas is clear that more realistic information and assessments arise from these inspections rather than prearranged ‘announced’ visits. Increased funding will be required to do this. Current funding does not allow monitoring that is sufficiently regular or detailed.\textsuperscript{1466}\]
HMIPS – NPM STANDARD THAT RELATES TO NPM RECOMMENDATION IMPLEMENTATION

‘8.2 Appropriate action has been taken in response to recommendations of oversight and scrutiny authorities that have reported on the performance of the prison.

Features: Implementation plan in place; Robust consideration of previous reports; Staff awareness of plan.

Specification:
Previous HMIPS reports for inspection and monitoring, as well as other bodies which report on the establishment, are taken into due consideration and the prison indicates that they will endeavour to address the issues raised. There is evidence of implementation of recommendations. This evidence may include an action plan, business review meetings, and demonstrable change in conditions or approach in response. The implementation is communicated to staff. Staff know what the action plan entails, which areas are to be focused on and are aware of their role to play.1467

RECOMMENDATION: The Inspectorate may make recommendations that will assist it to properly carry out its mandate.

MANAGING INCONSISTENCIES WITH PREVIOUS RECOMMENDATIONS

Birk et al explain that:

[s]ome NPMs recognised that they have issued contradictory recommendations over the years, [prompting] a reflection over the consistency and the long-term changes and the values an NPM wants to promote… most NPMs agreed that a sound justification for the recommendation was necessary in such cases. An up to date database can obviously assist in ensuring consistency of the recommendations issued not only in relation to specific places of detention but also across different institutions.1468

RECOMMENDATION: The Inspectorate should ensure consistency in its recommendations at the same detention site over time, and across similar detention sites (where appropriate).

When the Inspectorate makes a recommendation that contradicts an earlier one or one made at another similar site, then this should be justified and clearly explained.

ENGAGING WITH DETAINING AUTHORITIES AT THE END OF THE INSPECTION

The SPT states that there ‘should be a policy that provides for an immediate debriefing with the representatives of the place of detention at the end of a visit.’1469

---

1468 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 37.
1469 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [27].
Birk et al’s study found that most NPMs meet with:

the person in charge of the institution at the end of every visit. This not only gives the delegation the opportunity to transmit urgent observations and recommendations but also provides for an immediate exchange of views and direct communication with relevant personnel. A frank and cooperative discussion on the preliminary findings and recommendations can further strengthen the trust and cooperation between both sides and makes it possible to directly identify those recommendations which the institution itself can implement.1470

Adopting this approach will give the NPM the opportunity to explain the findings and recommendations and avoid misunderstandings and more generally build a trustful and cooperative relationship increasing the willingness to implement the NPM’s recommendations.1471

As discussed above (under Preparing for the inspection), there may be organisations (as opposed to government agencies) providing services in places of detention. The Inspectorate should conduct a debrief with at least some of these organisations. This approach would be consistent with the above recommendation that the Inspectorate ensure that recommendations are targeted to the appropriate contractor (in addition to the contract manager, NTG), not only in the written report, but also through in-person dialogue. There may be some service providers which are not funded by the NTG, but by the Commonwealth Government and other sources. In these circumstances, raising recommendations with the NTG in debrief meetings will be of limited value, as the responsibility of recommendation implementation will not lie with them. This makes meeting with those organisations particularly important.

The Inspectorate should particularly focus on meeting with ACCOs delivering services in detention, as it should prioritise maintaining respectful and constructive (albeit independent) relationships with this section of civil society.

HMIP INSPECTION FRAMEWORK

DEBRIEFS DURING THE PRISON INSPECTION
The HMIP Inspection Framework recommends that daily feedback be provided to the person in charge of the detention site.

‘Inspection is a transparent process. Managers will be kept up to date with emerging findings throughout the inspection, and inspectors will provide evidence for their findings and will encourage legitimate evidence-based challenge... The team leader will also feed back key findings to the Governor/Director or Chief Executive of the establishment on at least a daily basis.’1472 “By the end of the process, inspectors will ensure the manager understands what has been found, has no further rebuttals and knows what they are likely to hear in the debrief at the end of the inspection. However, final conclusions are at the discretion of the Chief or Deputy Chief Inspector.”1473

1470 Moritz Birk et al, Enhancing the impact of national preventive mechanisms — Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 50.
1471 Ibid 55.
1472 Her Majesty’s Inspectorate of Prisons, Inspection framework (2017) 16.
1473 Ibid.
GUIDE FOR INSPECTORS
FORMAL DEBRIEF AT THE END OF THE PRISON INSPECTION

‘The assessments are discussed collectively as each healthy establishment area encompasses numerous subject areas… It is important that these assessments are supported by evidence, as not only will they be fed back during the debrief… and appear in the published inspection report, they will also be used to identify the ‘risk’ level of the establishment and consequently the timing of a subsequent inspection. The debrief should make clear that these are provisional assessments. Where the assessment is very finely balanced, and there is some disagreement or ongoing discussion, the team should usually opt for the lower assessment, as subsequent changes upwards are less contentious. When the debrief and judgements have been agreed the team leader will contact the governor/director to inform them of the decisions. The coordinating inspector should print a copy of the debrief to give to staff at the establishment after the formal feedback and a copy for each team member to be used at the feedback.’

‘On Friday morning, usually at 9am, a formal presentation of the debrief is held. Each team member present is allocated a section to read out. The presentation begins with an introduction from the Chief or Deputy Chief Inspector… Feedback is given under each of the healthy establishment areas; the team leader provides a brief summary of each healthy establishment test with a provisional assessment, followed by feedback from individual inspectors on their subject areas, with a brief opportunity for the governor/director to make factual accuracy comment. Inspectors should note that descriptive feedback material should be kept to a minimum unless it is necessary to support a specific point or to provide a telling example. There is no opportunity at this stage for the governor/director or other staff to make comments, as the feedback should comprise the settled view of the inspection team and reflect feedback given during of the inspection. Not all inspected areas or all findings need to be covered. There is no need for the team to feedback to establishment staff what they already know… Given the limited time available, it is important for inspectors not to labour any failings, while making them clear… The purpose of a debrief is to ensure that establishment staff know what the inspection has found, the key issues they need to deal with, and what the report is likely to say. It is not an opportunity for establishment staff to further clarify or raise issues. A written debrief note will be provided summarising the main findings and will be left with establishment staff on the last day of the inspection or emailed to the establishment the following week.’

RECOMMENDATION: The Inspectorate should engage with the detaining authorities at the end of the inspection. This will give the Inspectorate an opportunity to minimise the risk of misunderstandings by explaining its findings and recommendations in person, to identify the recommendations that can be implemented at site level by the detaining authority, and to foster a respectful relationship built on constructive dialogue. The Inspectorate should also meet with the non-government organisations and businesses providing services at the detention site. It should prioritise having debrief meetings with ACCOs providing services in detention.

1475 Ibid 24.
THE DETAINING AUTHORITY’S RESPONSE
THE OBLIGATION TO ENTER INTO DIALOGUE WITH THE INSPECTORATE

As already outlined above, OPCAT states that the ‘competent authorities of the State Party concerned shall examine the recommendations of the [NPM] and enter into a dialogue with it on possible implementation measures.’ Murray et al’s view is that this creates both an obligation on the State to respond to the NPM (similar to the obligation the State has to respond to the SPT) and an obligation on the NPM to follow up on recommendation implementation (discussed below, under Following up recommendations). The SPT has recommended in one of its NPM advisory visit reports that legislation ‘should make explicit mention of this obligation in order to lay the foundations for a regulated, effective procedure for follow-up to recommendations made by the [NPM].’

ESTABLISHING A TIMEFRAME FOR THE DETAINING AUTHORITY’S RESPONSE (AND A REPORT PUBLICATION TIMELINE)

In its OPCAT in Australia Interim Report, the AHRC recommended that there ‘be a timeframe mandating a response from government to recommendations made by the local or national NPM body.’ This echoes the recommendation of Birk et al that ‘the NPMs have a clear legal basis to demand discussions on implementation measures with [the authorities]. Having a specific time frame in which to respond can also prove useful in prompting a reply from the authorities.’ In the OSCE region, ‘[s]everal NPMs explained that their recommendations are always accompanied by a 30-day deadline for a response by the relevant institution.'

If the detaining authorities are expected to provide a response within a certain timeframe, then the Inspectorate must also commit to completing its report and providing a draft to the detaining authorities within a specified timeframe. For example, in 2017-2018, the New Zealand Ombudsman ‘reported back to all 12 places of detention within eight weeks of concluding the inspection.’ In one of its reports, the SPT ‘[commended] the [NPM] for having set up a protocol for the preparation of visit reports which includes deadlines for submission of the reports to the authorities.'

---

1476 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 22.
1479 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the national preventive mechanism advisory visit to Ecuador made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/OP/ECU/2 (16 July 2015) [16].
1481 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 47.
In another of its reports, the SPT referred to information it received that:

the process of drafting and publishing the mechanism’s reports could be lengthy, owing to a desire to ensure a high-quality and comprehensive end product. The Subcommittee highlights that extended delays in drafting and publication of visit reports can have a negative impact on the timely follow-up to the visit report recommendations and, eventually, on the overall conditions of detention of persons deprived of their liberty.  

**HMIP – INSPECTION FRAMEWORK**

**TIMELINESS OF REPORT**

‘A key feature of an effective inspection process is the timeliness of published reports. All inspection reports should be finalised and published within 18 weeks of the end of the inspection.’

---

**RECOMMENDATION:** Reports should be published in a timely manner. This requires the Inspectorate to provide a draft report to the detaining authority within a specified timeframe, an obligation which should be prescribed by legislation.

---

**RECOMMENDATION:** Legislation should prescribe a timeframe for the detaining authority’s response (and subsequent publication of the report by the Inspectorate).

*If the detaining authority fails to respond, the Inspectorate should proceed to publication, noting the detaining authority’s failure to provide a response.*

---

**FACTUAL ACCURACY CHECKS BY DETAINING AUTHORITY**

**HMIP – MOU BETWEEN HMIP AND DETAINING AUTHORITY**

‘The content of inspection reports and the decision to publish are entirely matters for HMIP. However, HMIP will send a draft report to NOMS’ Regulation Team for factual accuracy checks within nine weeks of the completion of an inspection. A covering letter will specify an indicative publication date approximately nine weeks later. Regulation Team will ensure that factual accuracy checks are undertaken within three weeks. During this time Regulation Team will indicate whether NOMS is content for publication to go ahead on the indicative date, although HMIP reserves the right to move to publication if NOMS does not meet this deadline. HMIP will respond to any factual accuracy points within two weeks. Matters of judgement will remain entirely for HMIP. HMIP will publish within a further four weeks; this will include printing, circulation to Ministers, media handling and ensuring the availability of relevant senior staff.’

---

1484 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Hungary undertaken from 21 to 30 March 2017: observations and recommendations addressed to the national preventive mechanism*, UN Doc CAT/OP/HUN/2 [37].


‘All HMIP reports will be preceded by a press notice. HMIP’s press officer will produce a draft press notice five working days before publication and seek a quote from the Chief Executive of NOMS to insert into this notice. HMIP and NOMS will independently manage their own media relations.’

---

**CJINI – INSPECTION PROCESS**

‘The report is... shared with the inspected organisation/s for factual accuracy and comment.’

**CJINI - OPERATIONAL GUIDELINES FOR INSPECTION**

‘The draft inspection report is shared with inspected agency/agencies for factual accuracy and updated based on their feedback. Where appropriate the CI will discuss and review amendments made to the draft at this stage. To maintain a record of factual accuracy issues raised by the agency/agencies, the lead inspector should notate the margin of the agency response correspondence to indicate whether the specific point(s) raised by the agency as factually inaccurate has (have) been accepted or not accepted. A copy of the correspondence with the handwritten annotations should be signed-off by the Chief Inspector/Deputy Chief Inspector.’

---

**RECOMMENDATION:** The detaining authority should be given an opportunity to conduct checks on the factual accuracy of the draft reports’ findings and to provide a response to the findings and recommendations. The Inspectorate should, however, retain discretion in relation to the content of its reports, protecting its independence.

---

**THE DETAINING AUTHORITY’S RESPONSE – ACCEPT/PARTIALLY ACCEPT/REJECT RECOMMENDATIONS**

In its submission to the AHRC *OPCAT in Australia* consultation, NATSILS raised concerns:

as to whether findings and recommendations of NPMs will be met with government inaction and resistance. At the very least, government stakeholders should be required to respond to the recommendations of NPMs, a requirement which could be embodied in legislation or a formal agreement.

NATSILS noted that ‘the effectiveness of [Office of the Inspector of Custodial Services in Western Australia] as an oversight body, is currently limited due to an inability of OICS to ensure that the Western Australian Government respond to recommendations made in OICS Reports. The NATSILS submit that enabling legislation giving effect to OPCAT should require a mandatory response by Governments concerned, where the NPMs have identified issues or made recommendations.

This report supports NATSILS’ recommendation, also taking the view that the detaining authorities must publicly respond to the Inspectorate’s recommendations, clearly stating which recommendations are

---

1487 Ibid 17.
1490 National Aboriginal and Torres Strait Islander Legal Services, Submission No 47 to Australian Human Rights Commission, *OPCAT in Australia Consultation*, July 2017, 17.
1491 Ibid 3.

347
accepted, partially accepted or rejected, and the reasons for this decision. It is recommended that this obligation be provided for in legislation.

**UK NPMS**

Birk et al reference ‘legislative provisions for particular state authorities to respond to NPM recommendations... in England and Wales the local policing bodies must prepare comments and invite the Chief Constable to submit comments on the published report of Her Majesty’s Inspectorate of Constabulary (HMIC). The policing bodies are also responsible for publishing these comments as they think ‘appropriate’ and for sending a copy of their comments to the Secretary of State... Similarly, in many other countries... the authorities are required in domestic law to respond to the recommendations within a stated timeframe or a ‘suitable period’.”

**OMBUDSMAN - RECOMMENDATIONS THAT ARE ACCEPTED BY THE DETAINING AUTHORITY**

In best practice, the Ombudsman’s reports include the detaining authority’s comments on the recommendations that have been accepted.

For example, the Ombudsman made the recommendation in one of its reports that ‘Relationships with Ngāti Rangi be re-established as a first step towards implementing a step change in the development and delivery of culturally appropriate services in the Prison.’

The Department of Corrections accepted this recommendation and made the following comments: Northland Regional Corrections Facility is ‘actively working to re-establish relationships with Ngāti Rangi as the local iwi and in order to progress culturally appropriate services on site. In the last 12 months, NRCF have welcomed members of the Ngāti Rangi Marae Komiti on site to engage in blessings, karakias and for the provision of cultural advice. NRCF have been regularly meeting with Ngāti Rangi since November 2018. Topics of discussions and outcomes from these discussions have included providing access to NRCF facilities and office space to Ngāti Rangi and ongoing engagement on the MOP. NRCF also have a relationship with Ngati Rangi Ahuwhenau Trust and are currently working through some options to offer opportunities to prisoners through this trust, for example, the introduction of Manuka/Kanuka oil studies. NRCF are working to build and strengthen their Kaiwhakamana group and are also working to further support prisoner ethnicity and affiliations through determining iwi, hapu and marae. NRCF staff have been attending hui to encourage kamatua/kuia to participate in this group. NRCF run the Tikanga and Mauri Tu Pae programmes throughout the year. NRCF also offer Whakairo (carving) workshops. NRCF are embarking on a cultural change programme to support the Te Ara Poutama framework and instil the Toko Rima a Maui values in preparation for the Paheretia Te Muka o Tangata (Maori Pathway). NRCF are currently preparing for a Maori Network Noho Wananga in August 2019 as well as organising a separate leaders Wananga for August 2019.  "

---


1494 Ibid 22.

1495 Ibid 48.
OMBUDSMAN – RECOMMENDATIONS THAT ARE PARTIALLY ACCEPTED

Similarly, the detaining authority’s response in relation to partially accepted recommendations were included in the Ombudsman’s report.

For example, the Ombudsman recommended that ‘[t]he privacy of prisoners in the ISU is ensured when they are naked, partially naked, or undertaking their ablutions; Prisoners in the ISU, and those on directed segregation should attend their reviews and be provided with copies of their management plans.’1496 Corrections partially accepted recommendation 1a and stated: ‘Corrections acknowledge that balancing the dignity and privacy of prisoners in Intervention and Support Units (ISUs) with the preservation of life presents a unique challenge. As acknowledged by your office, a piece of work is underway in this area, which has been led by the Chief Custodial Officer. This work has looked at research and international practices to support future actions and includes consideration of international practices, legislative instruments and identifying potential options for enhancing privacy for prisoners in ISUs. We have provided your office with a copy of the completed review regarding this work, for consultation. It is expected that initial plans will be established by the end of July 2019. Once received, any feedback from your office will be considered as part of the planning process.’1497 Corrections partially accepted recommendation 1b and stated: ‘Where appropriate, Corrections agree that prisoners in the ISU are offered the opportunity to have greater involvement in their management, which can also mean attending the weekly Multi-Disciplinary team meeting. However, there are cases where prisoners have been deemed too unwell by mental health professionals, to be engaged in their management plans. The aim is to remove this barrier through appropriate treatment of the prisoner to allow them more autonomy in their management. Prisoner involvement is considered on a case by case basis and is an ongoing priority for staff in the ISU. NRCF disagree that prisoners on directed segregation are not provided with their management plans and do not attend their reviews. NRCF have assured that individuals on directed segregation are provided with the opportunity to attend their reviews and contribute to their management plans. The only exception to this is if prisoners are extremely unwell and it is not appropriate to provide them with management plans which is a decision made by the Multi-Disciplinary team. No further action will be undertaken.’1498

In turn, the Ombudsman responded that he is ‘concerned that prisoners considered too unwell to attend their review are cared for in a custodial setting as opposed to a hospital one.’1499

The degree of transparency in the report around NPM recommendations, detaining authority responses, and NPM replies to those responses is exemplary.

**RECOMMENDATION:** The detaining authority (or contractor) must publicly respond to the Inspectorate’s recommendations (through the Inspectorate, so that the detaining authority’s response can be included in the Inspectorate’s report). The detaining authority should clearly state which recommendations are accepted, partially accepted or rejected, and the reasons for each of these decisions. This obligation be provided for in legislation.

---

1499 Ibid.
DETAINING AUTHORITY’S ACTION PLAN FOR RECOMMENDATION IMPLEMENTATION

The SPT has recommended that:

[...]those to whom the recommendations are addressed should, on request from the mechanism, develop a concrete policy or plan of action to commence reform where needed. In particular cases it may be appropriate to recommend that authorities immediately put an end to certain practices and initiate a criminal investigation.\textsuperscript{1500}

Birk et al have also noted that:

[...]requesting the authorities to develop action plans detailing their plan for implementation can be a particularly effective tool for follow-up. An action plan, if developed on the basis of NPM recommendations and taken as a practical tool to advance their implementation, can be a very useful way to strengthen a strategic follow-up process, by setting clear goals, responsibilities and timeframes, providing a framework for support and advice by the NPM, as well as the monitoring and evaluation of state action.\textsuperscript{1501}

\textbf{HMIP - INSPECTION FRAMEWORK}

‘In line with agreed protocols, inspected bodies should produce an initial action plan in response to Inspectorate recommendations two months after publication of the report. The action plan should set out whether the establishment has accepted, partially accepted/accepted in principle or rejected the recommendations, and the consequent action taken or planned. Team leaders will check and challenge the content of the initial action plan if necessary, following discussions with the Chief or Deputy Chief Inspector. Action plans form part of the intelligence database the Inspectorate uses to inform subsequent inspections. Inspectors are therefore expected to refer to action plans and other documentary and electronic evidence in order to monitor the establishment’s progress and prepare for inspection.’\textsuperscript{1502}

\textbf{HMIP – MOU WITH DETAINING AUTHORITY}

‘NOMS will ensure that, within three months of report publication, the establishment puts in place an action plan setting out whether recommendations are accepted and the consequential action taken or planned. The Regulation Team will quality assure these plans, clear them with the Chief Executive and Ministers, and pass them to HMIP no later than six months after the publication of the report. Establishments will keep their action plan up to date and a revised version will be sought by HMIP as part of its next inspection.’\textsuperscript{1503}

\textbf{HMIP – LESS PRESCRIPTIVE RECOMMENDATIONS INCREASING DETAINING AUTHORITY ACCOUNTABILITY VIA ITS ACTION PLANS}

‘We hope these revisions will lead to more concise reports with fewer prescriptive recommendations and, where appropriate, will allow young offender institutions (YOIs) to be more flexible in how they respond to the needs of the...’

\textsuperscript{1500} Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, \textit{Analytical assessment tool for national preventive mechanisms}, UN Doc CAT/OP/1/Rev.1 (25 January 2016) \textsuperscript{[34]}.  
\textsuperscript{1501} Moritz Birk et al, \textit{Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward}, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 54.  
\textsuperscript{1502} Her Majesty’s Inspectorate of Prisons, \textit{Inspection framework} (2017) 17.  
children they hold. We expect this to lead to greater local accountability for the action plans that YOIs draw up in response to our reports and clear evidence of improvement when we return for our follow-up inspections.1504

**HMPPS – EXAMPLE OF A DETAINING AUTHORITY ACTION PLAN**

The action plan confirms whether recommendations are agreed, partly agreed or not agreed... Where a recommendation is agreed or partly agreed, the action plans provides specific steps and actions to address these. Actions are clear, measurable, achievable and relevant with the owner and timescale of each step clearly identified. Action plans are sent to HMIP... Progress against the implementation and delivery of the action plans will also be monitored and reported on.1505

For example, in this action plan, for the agreed to recommendation that ‘Prisoners with disabilities should be identified on arrival and provided with reasonable adjustments, care plans and evacuation plans as necessary,’ the response actions taken/planned are listed as: ‘Prisoners with disabilities will continue to be identified in reception by healthcare staff. The information sharing protocol will be reviewed to ensure that this information is then appropriately shared with key individuals; Once reasonable adjustments have been identified as necessary, these needs will be met as far as is practically possible within the provision available at the establishment. Where further investment or structural work is required to meet an individual’s needs, and these reasonable adjustments cannot be fulfilled at the prison, transfer to another appropriate prison will be arranged to enable those needs to be met; Once information sharing procedures are addressed, all prisoners who require one will have an evacuation plan and care plan.’ The “responsible owner” for the “response action taken/planned” is the Governor, with a target date of September 2019. 1506

**CJINI – INVITATION TO DEVELOP AN ACTION PLAN**

‘The Chief Inspector will invite [the detaining authority] to complete an action plan within six weeks to address the recommendations. If the plan has been agreed and is available it will be published as part of the final inspection report. The inspection report will be shared, under embargo, in advance of the publication date with the [the detaining authority].’1507

**CJINI - OPERATIONAL GUIDELINES FOR INSPECTION**

‘If provided by the agency/agencies the action plan is checked by the lead inspector to ensure all recommendations have been considered. If available the action plan is included with the final version of the report as an appendix. If the action plan is not available the schedule for publication should continue.’1508

**NORTHERN IRELAND PRISON SERVICE – EXAMPLE OF ACTION PLAN AND UPDATE**

The Action Plan includes the report recommendations, NIPS’ response, actions required, the lead for the action and the completion date.1509 For example, the recommendation that ‘[t]he prison should investigate and address the reasons for the poorer outcomes of Catholic prisoners, put in place arrangements for the effective and credible investigation of discrimination complaints and consult with prisoners with disabilities and other minority groups to ensure their needs...

---

1506 Ibid 7-8.
1507 Criminal Justice inspection Northern Ireland, *The Safety of prisoner held by the Northern Ireland Prison Service: A joint inspection by Criminal Justice Inspection Northern Ireland and the Regulation and Quality Improvement Authority* (October 2014) 55
were understood and met was accepted by NIPS,’ and the NIPS responded that it would ‘[c]ommission independent and external research to investigate and address the reasons why Catholic prisoners are more likely to experience poorer outcomes,’ with the lead for this work to be the Governor, and a completion date included.1510

NIPS provides updates on the action plans, including where the action is not yet complete, but is being actioned and is on track to be delivered within the target date.1511 For example, in relation to issues around discrimination, the NIPS provided the following comment: ‘Meeting held at Maghaberry on 1 March 2016 with the Chief Executive of the NI Equality Commission for guidance on how to proceed with research project. Governor convening a meeting with Michelle Butler, the author of the independent report “Discipline and Disparity”, and the Maghaberry senior team to understand fully the findings and recommendations made in the 2012 report. Following this meeting, an establishment Action Plan in response to the research report will be developed in collaboration with Michelle Butler. Further consideration to be given as to whether or not there is a need for an independent small-scale piece of secondary research to examine up to date equality and diversity data for Maghaberry. All Section 75 complaints including discrimination are reviewed by the Equality and Diversity Senior Officer to check quality of entries and the concerns raised. The findings are discussed as a standing agenda item at the monthly strategic Equality and Diversity meeting. There is consultation with all prisoner groups through the prisoner fora held quarterly.’1512

HMICS – DETAINING AUTHORITY ACTION PLAN

‘In response to our inspection, Police Scotland will be asked to create an action plan so that our recommendations can be addressed. We will monitor progress against this plan, and will continue to monitor progress against outstanding custody recommendations.’1513

LOUKIDELIS REPORT

RECOMMENDATIONS AND RESPONSES

The Government of Yukon responded to the Loukidelis Report, identifying whether the recommendations were accepted, the department and secondary leads for recommendation implementation, current work and next steps, as well as making some general comments.1514 The principle of action was to ‘[c]onsult with Yukon First Nations to ensure, where possible, the remedies include or consider culturally-relevant content and application.’1515

WORKING GROUP ESTABLISHED

‘The Government of Yukon has confirmed key members of the implementation working group that will support and provide input on how to fulfill the Whitehorse Correctional Centre inspection report recommendations. The implementation working group will be chaired by Assistant Deputy Minister of Justice Allan Lucier. The group will include core representation from senior officials in the departments of Justice and Health and Social Services, the Investigations and Standards Office, the Council of Yukon First Nations and the Kwanlin Dün First Nation. Additional representation from

1512 Ibid 18-19.
1513 Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of the strategic arrangements for the delivery of police custody (June 2019) 3.
1514 Yukon Department of Justice, Whitehorse Correctional Centre Inspection 2018 Report Recommendations: Matrix of Recommendations and Responses Department of Justice working document for purposes of planning and implementation (13 August 2018).
1515 Ibid 2.
Yukon First Nations governments is anticipated but not yet confirmed. Local experts, statutory bodies and groups will also be invited to support and provide advice to the implementation working group on issue-specific recommendations. The implementation working group will have its first meeting in September to develop a work plan, including timelines for publicly reporting progress. The group will use the Matrix of Report Recommendations and Responses document prepared by the Department of Justice as a foundation to identify implementation priorities and advance discussions with partners in areas where work is underway.\(^{1516}\)

The Implementation Working Group creates letters of report, including information such as its continued engagement, work to date, and future work.\(^{1517}\) For example, the group met with Loukidelis to ‘discuss in more depth his work behind the recommendations’\(^{1518}\) and with Howard Sapers (former Correctional Investigator with the OCI), whose ‘expert voice on matters such as purpose of corrections, conditions of confinement, human rights considerations and pending outcomes of legal actions have provided the working group, and supporting policy analysts, with solid considerations to make necessary changes in this area.’\(^{1519}\)

**RECOMMENDATION:** The detaining authority should publish an action plan outlining what steps it will be taking to implement the Inspectorate’s recommendations. Assessment of the detaining authority’s progress against these action plans will form part of the Inspectorate’s follow up of recommendation implementation.

---

\(^{1516}\) Yukon Department of Justice, ‘Implementation working group formed to advance Whitehorse Correctional Centre inspection recommendations’ (News Release, 18-181, 28 August 2018).


REASONS FOR HAVING A PUBLICLY AVAILABLE REPORT

The SPT has stated that:

[v]isit reports, including recommendations, should, in principle, be published. Exceptions may exist where the [NPM] considers it inappropriate to do so or where there is a legal impediment.1520

In its visit report, the SPT has recommended that ‘publication of the NPM’s visit reports should be a matter of course, and that reports should be deemed to be confidential in exceptional cases only.’1521 The Special Rapporteur, when discussing inspections, has also recommended that the ‘team should... report publicly on its findings.’1522 It should be recalled, however, that what can be published is limited by OPCAT: ‘[c]onfidential information collected by the [NPM] shall be privileged. No personal data shall be published without the express consent of the person concerned.’1523

HMICS – LEGISLATION

‘The inspectors of constabulary must... publish the report in such manner as they consider appropriate (having regard to the desirability of it being accessible to those whom the inspectors of constabulary consider likely to have an interest in it).’1524

Publishing reports will assist the Inspectorate in promoting its role to the detaining authorities, the detainees and the public, ‘generat[ing] more awareness and support for the work of the NPM, its findings and recommendations,’1525 a function that has been discussed above (under Function of the Inspectorate: beyond inspection). In its submission to the AHRC OPCAT in Australia consultation, NAAJA identified the publication of reports as facilitating ‘[a]ccountability and transparency... key to involving civil society organisations in the OPCAT process.’1526 Additionally, Birk et al note that increasing the Inspectorate’s ‘visibility, credibility, and authority... can be beneficial when holding a dialogue with authorities on the implementation of recommendations.’1527

1520 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [35]. See also Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/3/Rev.1 (25 January 2016) [32].
1521 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the national preventive mechanism advisory visit to Ecuador made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/OP/ECU/2 (16 July 2015) [36]. See also Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to Armenia undertaken from 3 to 6 September 2013: observations and recommendations addressed to the national preventive mechanism, UN Doc CAT/OP/ARM/2 (22 February 2017) [59].
1523 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 21(2).
1524 Police and Fire Reform (Scotland) Act 2012 (Scot) s79(2)(ii).
1525 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 82.
1527 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 31.
The Inspectorate’s reports, targeting (among others) the general public, can also increase awareness of and support for the prevention of torture and ill-treatment, with report content informing this powerful external factor, which in turn influences and shapes the culture of places of detention (discussed in more detail above, under *Expectations/standards for inspections — general*). Public reporting can address the issue identified by the Special Rapporteur, that often ‘society is prevented from knowing the truth about life behind bars.’

Dixon also concludes that ‘[a]lthough they are independent institutions set up under OPCAT, NPMs perform a public function similar to other state institutions and hold information useful to society.’ The New Zealand Ombudsman has described both its ‘reactive and proactive interventions’ as providing for greater transparency of government operations, enabling democratic participation of the public.

Dixon asserts that ‘[i]n the face of... resource constraints, publishing visit reports is a cost-effective way to increase NPM effectiveness by enhancing the deterrence and dialogue effects underlying OPCAT.’ Public reporting will create opportunities, for example, for opposition parties to bring attention to negative aspects of visit reports. Publishing reports can also prompt detaining authorities to implement recommendations ‘to avoid social disapproval’ as ‘publication... can increase the social pressure to comply with the prevailing anti-ill-treatment norms in society.’

Grant, ‘rely[ing] on recommendation, persuasion and publicity to effect change’ in ‘a political climate that encourages calls for harsher measures against prisoners’ will be challenging, but ultimately the Inspectorate has a ‘responsibility to counter false perceptions about insecurity, simplistic messages about detainees and demands for more repressive policies.’

And as Anne Owers, former HMIP Chief Inspector, has noted:

> inspection is a key part of the public accountability for prisons... Published reports alert Parliament and the public to what is actually happening in their prisons. Prison reform is not a popular issue, but the sense of outrage and concern provoked by some of the worst inspection reports creates a political space in which Ministers can, and sometimes must, improve prison conditions.

---

**RECOMMENDATION:** The Inspectorate should make its reports publicly available, tabling its reports in Parliament. Making reports publicly available will promote the work of the Inspectorate to detaining authorities, detainees and the public (fulfilling one of the Inspectorate’s functions); improve the Inspectorate’s visibility and credibility and thus potential to successfully persuade detaining authorities to accept findings and implement recommendations; be a cost-effective way of supporting the Inspectorate’s preventive work through increased transparency and accountability of the detaining authority to the public and Parliament.

No personal data should be published without the express consent of the person concerned.

---

1528 Manfred Nowak, *Special rapporteur on the question of torture, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms: Torture and other cruel, inhuman or degrading treatment*, UN Doc A/64/215 (3 August 2009) [46].


1531 *Ibid* 564.

1532 *Ibid* 567.

1533 *Ibid* 568.


THE INTENDED AUDIENCE FOR THE REPORT

DETAINING AUTHORITIES AND CONTRACTORS (BOTH MANAGEMENT AND FRONTLINE STAFF)

The audience for the Inspectorate’s report will be both the detaining authority and contractors; the person in charge of the place of detention, detention site management and frontline staff. It is essential that the Inspectorate’s report is actively disseminated among all staff at the place of detention, to ensure that recommendations are universally understood, supported and implemented.

The reports can also be of relevance to other similar detention sites in the NT, for example, across different police custody sites.

HMICS – RELEVANCE OF REPORTS TO OTHER DETENTION SITES

‘Many of our comments in relation to custody centres in Greater Glasgow will be equally applicable to other custody centres across Scotland and should be taken into account in improvement planning by Police Scotland’s Criminal Justice Services Division.’

SUPERVISORY AUTHORITIES

The SPT has identified supervisory authorities as relevant stakeholders for constructive dialogue. These may include the relevant Minister and Departmental CEO in the NTG or Commonwealth Government contract managers.

RECOMMENDATION: The audience for inspection reports includes those in charge of the detention site, the detention site management and the frontline staff (of both the detaining authority and contractors). The Inspectorate’s report should be disseminated among all staff at the place of detention, to ensure that recommendations are universally understood, supported and implemented.

Comparable detention facilities can also benefit from the Inspectorate’s site-specific reports.

Supervisory authorities should also be provided the Inspectorate’s report.

---

1537 Her Majesty’s Inspectorate of Constabulary in Scotland, Inspection of custody centres in Greater Glasgow Division (June 2019) 3.

1538 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [34]. See also Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 51.
DETAINEES

Birk et al have suggested that ‘one might expect the [NPM’s] annual report to have a broad readership and interest among not just the state authorities but also the legislature, detainees, civil society and others.’1539 The Inspectorate should ensure that detainees also have access to its inspection reports, particularly given that the detainees provided (often sensitive) information to the Inspectorate and should have the opportunity to review the Inspectorate’s findings and recommendations. Access to reports can also facilitate increased detainee confidence in the Inspectorate, as detainees are able to see how the Inspectorate utilises the information provided to it and how it operates.

The Inspectorate will need to ensure that it makes an inspection report, ‘particularly if it contains a significant amount of detail, more user-friendly and accessible... [to] increase the likelihood that its contents will be read.’1540 This advice will be relevant to not only in relation to the detainee audience, but also for the general public.

INSIDE TIME

During my Fellowship, the Penal Reform Trust informed me of ‘Inside Time’, the UK’s national newspaper for prisoners and detainees. This publication is available to detainees and regularly includes information relating to HMIP’s work.

HMIP’s Chief Inspector’s feedback on the publication has been included in one of the ‘Inside Time’ issues: “I think Inside Time is wonderful,” he says. Every prison I go to, prisoners come up to me and say, “I’ve been reading your reports in Inside Time.” He says he’s impressed by the deep and wide penetration of the paper. “The number of prisoners who come up to me and say ‘thank you’ because they’ve read what we’re saying in Inside Time. It’s usually the only conduit they’ve got.""1541

In ‘Inside Time’, there is a regular segment, ‘The Inspector Calls’ which provide summaries of HMIP’s inspection reports,1542 as well as civil society organisations’ (such as Prison Reform Trust and INQUEST1543) comments on the reports. ‘Inside Time’ highlights good and bad practice in detention, as well as providing a summary of prisoner survey responses.1544 It addresses detaining authority failures to implement HMIP recommendations,1545 and includes

---

1539 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 33.

1540 Ibid.


Information in relation to HMIP’s Independent Review of Progress1 and Urgent Notification Protocol1 (processes discussed in greater detail below, under Following up recommendations and Escalation strategy).

It advises when urgent notifications are issued for prisons, such as HMP Nottingham,1 HMP Bedford,1 HMP Exeter.1 In relation to the Urgent Notification issues for HMP Birmingham, Inside Time included the following: Concluding his referral letter Mr Clarke said: “I was astounded that HMP Birmingham had been allowed to deteriorate so dramatically over the 18 months since the previous inspection. A factor in my decision to invoke the Urgent Notification Protocol is that at present I can have no confidence in the ability of the prison to make improvements. There has clearly been an abject failure of contract management and delivery... the inertia that seems to have gripped both those monitoring the contract and delivering it on the ground has led to one of Britain’s leading jails slipping into a state of crisis.”1

‘Inside Time’ includes information on HMIP’s Annual Reports (including CSO comments, such as the Howard League for Penal Reform’s: ‘Prisons for children should be closed forthwith. For decades, children have been subjected to abuse and neglect by the state. Now the official watchdog has confirmed what the Howard League has been saying for years – there is not a single prison in the country where a child is safe.’1). It also includes particular issues from HMIP’s thematic reports1 and interviews with the Chief Inspector of HMIP.1

HMIPS - INDEPENDENT PRISON MONITORING BULLETIN

‘This report is aimed at prisoners and is placed on noticeboards within the prison. It is drawn from reporting and discussion at quarterly meetings at establishments.”1

1555 Her Majesty’s Inspectorate of Prisons Scotland, Prison Monitoring Summary - HMP YOI Polmont - January to March 2019 (June 2019).
**RECOMMENDATION:** The Inspectorate should ensure that its reports are available and accessible to detainees.

The Inspectorate should have both plain English and child-friendly one-page summaries of its inspection findings and recommendations, and it should translate this information into the main Aboriginal languages spoken by the detainees at the detention site.

Given low literacy levels among detainees, the Inspectorate should also create visual aids and audio recordings of the summaries in English and Aboriginal languages.

These summaries should be disseminated widely among detainees, and the reports in their entirety should also be accessible.

---

**THE GENERAL PUBLIC**

As discussed above, the Inspectorate should create one page plain English and child-friendly summaries of its findings and recommendations, in both written and audio format, in English and Aboriginal languages. The written versions of its plain English and child-friendly summaries should be included in the beginning of its inspection reports. The Inspectorate should present its findings and recommendations in an easily accessible and understandable way.

---

**HMIP – ASSESSMENT VIA NUMERIC RATING SYSTEM**

4 Outcomes for prisoners are good. There is no evidence that outcomes for detainees are being adversely affected in any significant areas.

3 Outcomes for prisoners are reasonably good. There is evidence of adverse outcomes for detainees in only a small number of areas. For the majority there are no significant concerns.

2 Outcomes for prisoners are not sufficiently good. There is evidence that outcomes for detainees are being adversely affected in many areas or particularly in those areas of greatest importance to the well being of detainees. Problems/concerns, if left unattended, are likely to become areas of serious concern.

1 Outcomes for prisoners are poor. There is evidence that the outcomes for detainees are seriously affected by current practice. There is a failure to ensure even adequate treatment of and/or conditions for detainees. Immediate remedial action is required.\(^{1556}\)

---

In relation to each Standard and QI, Inspectors record their evaluation in two forms...

A colour coded assessment marker.
Indicates good performance which may constitute a practice worthy of sharing...
overall satisfactory performance... generally acceptable performance though some improvements are required....
poor performance and will be accompanied by a statement of what requires to be addressed....
Unacceptable performance that requires immediate attention.¹⁵⁵⁸

There are four possible judgements: In some cases, this performance will be affected by matters outside the establishment’s direct control, which need to be addressed by the NIPS.

• Outcomes for prisoners are good. There is no evidence that outcomes for prisoners are being adversely affected in any significant areas.
• Outcomes for prisoners are reasonably good. There is evidence of adverse outcomes for prisoners in only a small number of areas. For the majority, there are no significant concerns. Procedures to safeguard outcomes are in place.
• Outcomes for prisoners are not sufficiently good. There is evidence that outcomes for prisoners are being adversely affected in many areas or particularly in those areas of greatest importance to the well-being of prisoners. Problems/concerns, if left unattended, are likely to become areas of serious concern.
• Outcomes for prisoners are poor. There is evidence that the outcomes for prisoners are seriously affected by current practice. There is a failure to ensure even adequate treatment of and/or conditions for prisoners. Immediate remedial action is required.¹⁵⁶⁰

HMIP’s practice of using visual representation for the comparison between the last inspection and the inspection being currently reported on presents the information in an accessible way.

HMIPS produces a summary report and an evidence report. The ‘Summary Report’... is a narrative commentary highlighting the findings under each of the nine standards. A separate ‘Evidence Report’ has also been produced, which provides the supporting detailed findings under each of the 85 quality indicators, and includes a human rights based approach overview provided by our colleagues at SHRC which details their findings.

The Evidence Report ‘provides the commentary and overall ratings for each of the quality indicators. A summary of the inspection findings, the overviews for each of the standards and the overall rating against each of the nine standards area can be found in the ‘Summary Report’.

In writing the report, the Inspectorate should not assume the readers’ knowledge of technical terms or procedures relating to detention.

What are waist restraints?
Waist restraints restrict the movement of an individual’s arms and hands by securing their wrists in handcuffs to a belt around their waists. Their hands can be attached in two positions; together in front of the body (one set of handcuffs) and at the sides of their body (two sets of handcuffs). Handcuffs can be applied behind the prisoner’s back, but not in conjunction with a waist restraint, as demonstrated in figures 10 and 11.
The SPT has advised that:

[i]n addition to conducting visits, the mandate of a national preventive mechanism should include... Publicizing its opinions, findings and other relevant information in order to increase public awareness, especially through education and by making use of a broad range of media.\textsuperscript{1565}

The Inspectorate should disseminate its findings and recommendations using a range of approaches and platforms, as part of a comprehensive communications strategy. From the 2014 NPM symposium, the APT recorded the following strategies for engagement with the media: ‘Holding press conferences... Organising regular meetings with selected journalists; Issuing press releases following visits to places of detention; Giving interviews; Participating in public debates on issues related to children deprived of their liberty; Publishing articles in specialised journals; Developing the NPM’s website.’\textsuperscript{1566} From the meeting of the OSCE State NPMs, the APT and OSCE ODIHR add to this list engaging with the general public through the use of social media, including Facebook and Twitter.\textsuperscript{1567}

\begin{quote}
**DISSEMINATION VIA MEDIA RELEASES**
\end{quote}

\textbf{HMIP – GENERAL}

‘We issued nearly 70 media releases on inspection and thematic reports during the year. Many attracted broadcast and newspaper interest – both at regional and national level. In the case of HMP Birmingham, the Chief Inspector’s Urgent Notification (UN) generated international media interest. The two other UNs in 2018–19, at HMPs Exeter and Bedford, also brought a significant focus on the Inspectorate’s work. Our evidence informed debate and comment across the whole media spectrum, from the Financial Times and Daily Mail to the Morning Star, and increasingly in the ‘Twittersphere’.\textsuperscript{1568}

\textbf{OMBUDSMAN – BREACH OF CAT BY DETAINING AUTHORITY}

‘The Department of Corrections has breached the Convention against Torture as well as its own legislation, in the way it manages some at-risk prisoners in New Zealand prisons, the Chief Ombudsman says... Judge Boshier acknowledges the difficulty of managing prisoners with complex behaviour but says ‘tying an individual to a bed for up to 16 hours each day as a way to manage resourcing pressures is not appropriate’.\textsuperscript{1569}

\textbf{ICVA – BREACH OF HUMAN RIGHTS BY THE DETAINING AUTHORITY}

‘We are publishing an independent legal opinion by barristers... provided to the Home Secretary. Counsel consider that a continuing failure to ensure access to safe and adequate sanitary protection in police stations is likely to breach human rights standards... leaving women and girls in the cells without access to a pad or tampon may also amount to degrading

\textsuperscript{1565} Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [9b].


\textsuperscript{1567} OSCE Office for Democratic Institutions and Human Rights and Association for the Prevention of Torture, 2016 Annual Meeting of National Preventive Mechanisms from the OSCE region Outcome report (2016) 22.

\textsuperscript{1568} Her Majesty’s Inspectorate of Prisons, HM Chief Inspector of Prisons for England and Wales Annual Report 2018–19 (9 July 2019) 85.

\textsuperscript{1569} Office of the Ombudsman, ‘Corrections breaches UN Convention’ (Media Release, 1 March 2017).
treatment under international human rights law. The Home Secretary and individual forces risk judicial review and some women may have a right to compensation.”

OMBUDSMAN – DETAINING AUTHORITY ACCEPTING RECOMMENDATIONS

‘While he was pleased with the decision, Boshier was critical of the time taken to make it. "I was disappointed by the initial push-back. Since that time, I think there has been an acceptance that we were right. With our prison reports, we make recommendations. We don’t just walk away. We go back, we revisit and we say, ‘of the recommendations we made, these have not been taken up. Why not?’ And if they haven’t and that’s unjustifiable, we kick up a fuss.”’

ICVA – IMPROVEMENTS ACTIONED BY DETAINING AUTHORITY

ICVA detailed the background to its involvement in the changes to the menstrual care provided in police custody, and then vocalised its support for the changes.

‘The Independent Custody Visiting Association welcomes proposed ground breaking reforms to legislation that will require police forces to respect the dignity of female detainees and deliver appropriate care to menstruating detainees... The changes to legislation complement new guidance from the College of Policing and National Police Chiefs’ Council, published earlier this month. Together, the reforms to legislation and guidance safeguard the needs of female detainees who may feel too intimidated to request menstrual products and will ensure that they can change them privately and hygienically.’

HMIP - DISSEMINATION VIA RADIO PROGRAMS

‘The Chief Inspector was invited on a number of occasions to talk about prisons on the Radio Four Today programme – as well as on a wide range of other national and regional programmes.’

HMIP – DISSEMINATION VIA TWITTER

‘Our Twitter feed attracted new followers each month, rising from just under 9,500 at the end of March 2018 to well over 11,500 by the end of the year. There were high levels of engagement with some tweets and the feed continued to enable us to highlight the publication of new reports, advertise jobs within the Inspectorate and tell people which establishments our teams were inspecting each week.’

1573 Ibid.
1575 Ibid.
ICVA – DISSEMINATION VIA BLOGGING AND YOUTUBE

‘ICVA has successfully expanded its communication work over the year, launching a new website that delivers modern insight into the organisation’s values. Furthermore, ICVA’s blog and YouTube channel have delivered immediate content on hot topics. These mediums deliver commentary, advice and guidance to stakeholders and ICVs. They also provide a direct link between ICVA and others interested in police custody, giving up to the minute advice and feedback on how we use ICV data.’

‘ICVA’s Chief Operating Officer blogged on the problem, sparking a cascade of interest. ICVA’s Chief Executive spoke of the problem on BBC Woman’s Hour. This further led to media and legal interest... complemented by... in-depth articles on Buzzfeed, widespread national coverage and a prime time interview on Radio Four’s flagship Today programme. Two MPs asked the Home Secretary about ICVA’s work during Home Department questions and the Home Secretary committed to examining PACE Code C, to formalise appropriate menstrual care as a legal requirement.’

CJINI – DISSEMINATION VIA ONLINE VIDEO

CJINI has posted a video of the Chief Inspector briefly discussing inspection findings, which can be accessed here: http://www.cjini.org/TheInspections/Inspection-Reports/2018/October-December/Maghaberry.

THE GENERAL PUBLIC – THE NT ABORIGINAL COMMUNITY

The Inspectorate should ensure that its findings and recommendations are accessible to the NT Aboriginal community, including people living in remote Aboriginal communities. In light of the overrepresentation of Aboriginal people in the NT criminal justice system, and in detention, the Inspectorate must make targeted efforts to inform the Aboriginal community, beyond a general dissemination strategy for the NT public. This is essential not only for promoting the work of the Inspectorate and facilitating the accountability of both the Inspectorate and the detaining authorities to the Aboriginal community, but also to adopting an inclusive and culturally appropriate approach to OPCAT implementation. If the Inspectorate were to not prioritise ensuring that Aboriginal people have access to the same information as non-Aboriginal people, its approach would effectively amount to exclusion, perpetuating Aboriginal people’s marginalisation and disempowerment in a criminal justice system that disproportionately impacts on their lives and communities.

Already discussed above is the importance of translating inspection report summaries into Aboriginal languages and creating audio versions of the content for detainees. These recordings could also be repurposed to inform Aboriginal people in the general public who may not speak English or have lower literacy levels. The recordings could be uploaded the Inspectorate’s website and played on radio stations (including Aboriginal radio services and local radio stations in remote communities, such as Central Australian Aboriginal Media Association radio, Radio Larrakia, Top End Aboriginal Bush Broadcasting Association and Yolngu Radio).

1577 Ibid 5-6.
1578 Criminal Justice inspection Northern Ireland, Chief Inspector Brendan McGuigan CBE discusses Maghaberry 2018 inspection findings at <http://www.cjini.org/TheInspections/Inspection-Reports/2018/October-December/Maghaberry>
The distribution strategy for the written versions of the summary should not be limited to uploading the report on the Inspectorate’s website, Twitter account and Facebook account. The Inspectorate should instead ensure that it uses avenues and platforms which are most likely to reach the target audience. For example, it could seek permission to upload links to remote Aboriginal communities’ Facebook pages.

**RECOMMENDATION:** The audience for inspection reports includes the general public, and specifically the NT Aboriginal community. The Inspectorate should include the plain English and child friendly one-page summaries of its findings and recommendations, in English and the most widely spoken Aboriginal languages in the NT, at the beginning of its inspection reports. The Inspectorate’s distribution strategy for reports should include dissemination via platforms that will most likely reach the target audience (eg seeking permission to post on remote Aboriginal communities’ Facebook pages). The Inspectorate should present its assessment of the conditions and treatment in detention in an easily accessible and understandable way. The Inspectorate should not assume the readers’ knowledge of technical terms or procedures relating to detention.

**RECOMMENDATION:** The Inspectorate should disseminate its findings and recommendations using a range of approaches, as part of a comprehensive communications strategy. This may include media releases, short videos and radio segments (including on Aboriginal radio services, translated into Aboriginal languages), and the use of social media.

**CIVIL SOCIETY**

If a report is made publicly available, then there will be opportunities for civil society to further disseminate the findings and recommendations and to utilise the reports in its own work (using statistics and survey results, findings and recommendations in research, reports and advocacy). For example, the APT and OSCE ODIHR report notes good practice whereby some NPMs provide CSOs “‘embargoed’ (before publication) NPM reports prior to publication in order to enable CSOs to prepare related press statements.” Birk et al found that NPM communication with CSOs ‘has not often been specifically or systematically used to strengthen the implementation of recommendations of the NPM’ and that the NPM/CSO ‘interaction could be strengthened, to benefit from their specific expertise as well as their leverage in promoting NPM recommendations.”

---

1580 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 70.
Again, given the overrepresentation of Aboriginal people in the criminal justice system, and the mandate of the Inspectorate, it should particularly focus on engaging with ACCOs. Taking this approach would be consistent with the recommendations outlined above, including that the Inspectorate should prioritise consulting with ACCOs in developing its multi-year and annual strategic visit plans, and developing and testing its inspection framework, expectations/standards and surveys, and that the Inspectorate should ensure that it recognises the Aboriginal community as a priority target audience. However, it should be made clear that the Inspectorate is not consulting with ACCOs in relation to the contents of the report, and it must maintain its independence in this respect.

PRISON REFORM TRUST - USE OF HMIP REPORTS

‘We conducted our own analysis of information from recent HM Inspectorate of Prisons (HMIP) reports from women’s prisons. The prisoner surveys in seven reports published since February 2014 were analysed to compare the responses of women from minority ethnic groups to those of white women.’

PRT has also noted that HMIP survey responses indicated significantly higher numbers of Gypsy, Roma and Traveller women in prison (7%) than official prison records (0.3%). It went on to reflect on the fact that the ‘HMIP report on Gypsies, Romany and Travellers found that this group were more likely to feel victimised, more likely to be experiencing mental health problems and less likely to feel safe in custody. There is limited research in this area, particularly considering both the overrepresentation and increase in numbers of GRT women going into custody.’

RECOMMENDATION: The Inspectorate should have a strategy for engaging civil society, particularly ACCOs, in relation to its inspection reports.

LAWYERS AND THE JUDICIARY

The APT has noted that:

[r]ecommendations are more likely to be implemented if they are mutually reinforced by other bodies at the national, regional and international levels, including by... courts and human rights mechanisms. This experience was highlighted in the Council of Europe, where the European Court of Human Rights has referred to reports of the European Committee for the Prevention of Torture in at least 88 judgments.

---

1583 ibid 11.
1584 ibid 25.
See also OSCE Office for Democratic Institutions and Human Rights and Association for the Prevention of Torture, 2016 Annual Meeting of National Preventive Mechanisms from the OSCE region Outcome report (2016) 6: ‘the findings of NPMs have also been used for proceedings before national and regional courts.’
Carver and Handley, in their study, noted that, in torture prevention, ‘consistent prosecution of torturers is probably required.’\(^{1586}\) Although the Inspectorate is not an investigatory body and its focus is not on making recommendations that prosecution or civil litigation be pursued, making publicly available findings in relation to conditions and treatment of detention (including evaluating whether there have been breaches of either domestic or international law) may result in other stakeholders pursuing these actions, to better fulfil their roles in the prevention of torture and ill-treatment (including through, for example, civil litigation and bail and sentencing hearings).

HMIP – INSPECTION FINDINGS USED IN LITIGATION

Anne Owers, former Chief Inspector of HMIP, provides an example of where findings of inspections have been utilised in litigation.

‘Inspections of juvenile prisons brought to light practices that were not compatible with international or domestic law on the protection and safeguarding of children; indeed, in some cases they specifically said that the involved establishments would have been closed down had they operated outside the prison system, or that some individual children within them were at risk of significant harm. Those reports, and others, were put before the court when a case was taken to determine whether children in prison came within the ambit of the Children Act, an act which imports into UK law the principles of the UN Convention on the Rights of the Child. The court held that the Act did apply to children in prison, even though it did not bind the Prison Service itself. That moved forward a process of change and reform that had already begun to happen—though there is still some way to go.’\(^{1587}\)

OCI - REPORTS USED IN CIVIL LITIGATION BY THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

THE CASE – SEGREGATION

‘Segregation has been described as “the most onerous and depriving experience that the state can legally administer in Canada”: Annual Report of the Office of the Correctional Investigator 2014-2015... The British Columbia Civil Liberties Association and the John Howard Society of Canada ask the Court to end administrative segregation as it is presently practised in federal penitentiaries in Canada.’\(^{1588}\) Two intervenors also participated in these proceedings. West Coast LEAF’s submissions focussed on what it says is the disproportionate impact of administrative segregation on individuals with intersecting characteristics of disadvantage, namely, Aboriginal women with mental illness.’\(^{1589}\)

THE DECISION – ABORIGINAL INMATES AND SEGREGATION

‘On the basis of the evidence presented to the Court, I am satisfied that the impugned laws fail to respond to the needs of Aboriginal inmates and instead impose burdens or deny benefits in a manner that has the effect of perpetuating their disadvantage and thus violating s. 15.’\(^{1590}\) ‘On the basis of the findings made in these Reasons, I am prepared to make


\(^{1588}\) British Columbia Civil Liberties Association v. Canada (Attorney General), 2018 BCSC 62 [1]

See also at [2].

\(^{1589}\) Ibid [7].

\(^{1590}\) Ibid [489].

See also at [490].
the following s. 52 declaration... The impugned laws are invalid pursuant to s. 15 of the Charter to the extent that the impugned laws authorize and effect any period of administrative segregation for the mentally ill and/or disabled; and also to the extent that the impugned laws authorize and effect a procedure that results in discrimination against Aboriginal inmates.\textsuperscript{1591}

EVIDENCE – OCI REPORTS

Evidence, from the OCI’s thematic reports, in relation to segregation of Aboriginal inmates was before the court (‘Spirit Matters: Aboriginal people and the Corrections and Conditional Release Act’,\textsuperscript{1592} ‘Good Intentions, disappointing results: A progress report on Federal Aboriginal Corrections’,\textsuperscript{1593} ‘Administrative Segregation in Federal Corrections: 10 Year Trends’\textsuperscript{1594}). Evidence from the OCI’s Annual Report was also presented to a witness.\textsuperscript{1595}

The decision noted that ‘reference to Gladue factors relates to the Supreme Court’s direction... that courts take into account the systemic disadvantages of Aboriginal peoples in reaching sentencing decisions. CSC has extended the application of Gladue factors (what CSC refers to as “Aboriginal social history”) to correctional decision-making, including with respect to administrative segregation,’\textsuperscript{1596} Evidence in relation to CSC’s shortcomings when considering Gladue/Aboriginal Social History from OCI reports was put before the court,\textsuperscript{1597} demonstrating that in this case similar issues arose.\textsuperscript{1598} The Court found that ‘CSC has not done a good job of using Aboriginal social history to reduce the impact of administrative segregation on Aboriginal inmates. There is a box to be ticked on a form and it is ticked. Meaningful results have not followed.’\textsuperscript{1599}

\textbf{R v SHARMA – REFERENCE TO OCI REPORT}

‘It has been identified that the history of disadvantage follows Aboriginal peoples into federal prisons with such offenders “more likely to be classified as maximum security, spend more time in segregation and serve more of their sentence behind bars compared to non-Aboriginal inmates”: Annual Report of the Office of the Correctional Investigator 2015-2016, at p. 43.’\textsuperscript{1600}

Already in the NT, courts have taken into consideration the conditions of detention in making bail and sentencing decisions.\textsuperscript{1601} The Inspectorate’s reports, being publicly available, will enable the courts to make better informed decisions, having access to relevant information on conditions and treatment in detention.

\textsuperscript{1591} Ibid [609].
\textsuperscript{1592} Ibid [476].
\textsuperscript{1593} Ibid [487].
\textsuperscript{1594} Ibid [64], [467], [468].
\textsuperscript{1595} Ibid [474], [488].
\textsuperscript{1596} Ibid [477].
\textsuperscript{1597} Ibid [478].
\textsuperscript{1598} Ibid [479], [480], [481].
\textsuperscript{1599} Ibid [483].
\textsuperscript{1600} R. v. Sharma, 2018 ONSC 1141, 2018 CarswellOnt 2566 [121].
\textsuperscript{1601} Alex Barwick and Emily Smith, ‘Judge invited to tour Alice Springs Correctional Facility after sentencing comments’ <https://www.abc.net.au/news/2019-02-15/judge-dean-mildren-invited-alice-springs-prison-scott-mcnairn/10813718> (15 February 2019): ‘A judge who considered the “appalling” conditions at an outback jail when sentencing an attempted child rapist has been invited to tour the facility with the Territory’s Corrections Commissioner. On Sunday the NT News reported that Justice Dean Mildren gave the Alice Springs Correctional Centre’s conditions “some weight” when he sentenced a man to five years and six months in jail for three attempted child rapes dating back to the 1980s. “The conditions are appalling, overcrowded and without any significant ventilation, more like those commonly found in Third World countries rather than in a country like Australia,” Justice Mildren was reported saying. It followed an incident in July last year when a juvenile offender who admitted to stabbing a man in the neck was released on bail by Judge Greg Smith, who said the Don Dale Youth Detention Centre was “not fit for purpose” and the boy was better off at home. The concerning state of the Alice Springs prison made headlines recently, with inmates tear-gassed in December due to a riot sparked by the baking heat in the overcrowded cells as temperatures passed 40 degrees Celsius.’
OTHER

The reports may also be used in the future by various inquiries or commissions, and research papers.

HMIP – REPORTS USED IN LAMY REVIEW

‘Each year the prison inspectorate surveys prisoners to build up a picture, alongside the inspectors’ own observations, of how prisoners are treated and snapshot survey data are published. In 2015/16, the difference in the responses provided by BAME [black, Asian and minority ethnic] and White adult male prisoners was striking. On some important measures, BAME adult male prisoners reported reduced access to opportunities and interventions that support rehabilitation… Both men and women prisoners from BAME backgrounds who responded to the survey were consistently less likely than White prisoners to report positive relationships with prison staff. A lower proportion of BAME respondents believed staff treated them with respect, recalled staff members checking on their well-being or having a member of staff they felt they could turn to for help… The picture worsens with questions about whether prisoners are actively mistreated.’\textsuperscript{1602}

OCI – REPORTS USED IN RESEARCH

‘The Supreme Court of Canada recognized that there are historical and social circumstances unique to Indigenous individuals that should be considered in sentencing decisions (i.e., the Gladue principle). However, in Spirit Matters, the OCI found that since 2005-2006, the Indigenous prisoner population has increased by 43% and that incarcerated Indigenous individuals are overrepresented in segregation populations… Research shows that the number of Indigenous admissions to segregation has continued to increase over the last 10 years.’\textsuperscript{1603}

INSPECTORATE’S STRATEGY FOR ENGAGING WITH THE MEDIA

Birk et al’s project identified concerns among NPMs that:

- public opinion is often unfavourable to rights of criminal detainees and that publicising certain findings may even create a backlash. Another challenge is that the media are often rather focused on individual cases and scandals.
- Media reports will rarely be able to represent the detailed analysis contained in the NPM’s reports but tend to address issues selectively according to what appears most interesting to the public. Thus, it was mentioned by several NPMs that publicity not only has potential for strengthening the NPM’s work but can also misrepresent the NPM, damaging its reputation as a neutral and objective actor.\textsuperscript{1604}

The APT noted similar concerns, asserting that to positively influence public opinion on how detainees should be treated, NPMs must ‘develop relationships with the media… an important ally in raising awareness about the work of NPMs.’\textsuperscript{1605} It did, however, caution against compromising the NPM’s ability to engage in

\begin{itemize}
  \item Rachelle Larocque, \textit{Segregation Literature Review} (January 2017) 25.
  \item Moritz Birk et al, \textit{Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward}, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 84.
\end{itemize}
constructive dialogue with detaining authorities, highlighting the risk of ‘instrumentalisation’ and misconstruction of the NPM’s message.\textsuperscript{1606}

Birk et al’s study participants suggested that an NPM mitigate risks by ‘conducting a stakeholder analysis and thus identifying journalists ‘friendly’ to the NPM and its topic as well as being proactive in public and media relations and dedicating specific resources for public relations work.’\textsuperscript{1607} This could include forwarding an embargoed report to journalists prior to its release and conducting a press briefing or interviews.\textsuperscript{1608}

OCI - ENGAGEMENT WITH THE MEDIA

Included below are a couple of examples of successful engagement with the media in securing outcomes for detainees: an examination of the detaining authority’s internal review process and removal of external exercise pens at a detention facility.

‘Canada’s prison watchdog is sounding the alarm over the Correctional Service of Canada’s internal investigations after concluding the agency’s probe into the deadly riot at the Saskatchewan Penitentiary lacked transparency and credibility... “The moment you say something is random and spontaneous and you cannot prevent it from happening, that means you don’t have to look at anything in terms of area of improvement,” Zinger told CBC Saskatchewan Afternoon Edition host Garth Materie... The watchdog also said the internal report — which did not identify food issues as a factor in the riot — differed from the account provided publicly, with the report calling that discrepancy “an exercise in public relations and damage control.” In response to the watchdog’s report, Public Safety Minister Ralph Goodale said in a statement to CBC that an examination of CSC’s internal review process is underway and the findings are expected this fall.’\textsuperscript{1609}

‘When correctional investigator Ivan Zinger first saw the outdoor exercise pens at the Edmonton Institution, he said he thought they were a “real affront on human dignity”... The exercise pens were removed over the weekend. The decision to remove the small exercise yards was made as part of the ongoing segregation policy reviews and the realization that CSC could manage the population without them,” said Correctional Services Canada in an email to CBC on Tuesday... Edmonton criminal defence lawyer Tom Engel said he had clients who were put in the pens for outdoor exercise while in segregation... Engel was surprised the pens were removed so quickly, but it made sense given “the heat that is being brought to bear on Correctional Services Canada in relation to all of the conditions of solitary confinement,” he said. “They must have realized that this was going to be unacceptable to the reasonable Canadian. There’s no justifiable basis for it, it’s indefensible,” said Engel.’\textsuperscript{1610}

\textsuperscript{1606} Ibid.

See also Association for the Prevention of Torture, \textit{The Global Forum on OPCAT, Preventing Torture, Upholding Dignity: From Pledges to Actions, Outcome Report} (2012) 32: ‘It is important to build public awareness of the NPM’s work. The media can be a good partner for NPMs, but NPMs need to define a communication strategy in order not to be instrumentalised... There needs to be a balance between publicity and maintaining cooperative relationships with authorities.’

\textsuperscript{1607} Moritz Birk et al, \textit{Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward}, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 81.

See also OSCE Office for Democratic Institutions and Human Rights and Association for the Prevention of Torture, \textit{2016 Annual Meeting of National Preventive Mechanisms from the OSCE region Outcome report} (2016) 22.

\textsuperscript{1608} Moritz Birk et al, \textit{Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward}, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 82.


**RECOMMENDATION:*** The Inspectorate should establish a strategy for its engagement with the media, given such engagement can either support the Inspectorate’s preventative work, or can lead to unintended negative consequences. The Inspectorate should recognise that the general public’s perceptions of those involved in the criminal justice system may be unfavourable and that there is a risk of selective reporting and misconstruction by the media. It must also recall that it must maintain a position whereby it can continue to engage in constructive dialogue with the detaining authorities. The Inspectorate should ensure it engages with Aboriginal media platforms, including radio stations and tv (eg NITV).
ESCALATION STRATEGY
The Inspectorate should ensure it has a strategy for escalation, in instances where it encounters conditions and treatment in detention which create a situation of high risk of torture and/or ill-treatment of detainees. Outlined below are some strategies of the oversight bodies visited as part of the Fellowship.

**HMIP - URGENT NOTIFICATION PROCESS**

**ESCALATING TO SECRETARY OF STATE**

**PROTOCOL BETWEEN MINISTRY OF JUSTICE & HMCIP**

‘During the inspection of prisons, young offender institutions and secure training centres... HMCIP may identify significant concerns with regard to the treatment and conditions of those detained. HMCIP will write to the Secretary of State within seven calendar days of the end of the inspection providing notification of the significant concerns and the reasons for those concerns. The notification will summarise the judgements and identify issues that require improvement. As part of the inspection process the Governor of the institutions will have been briefed concerning [HMCIP’s] intent. HMCIP will publish an urgent notification letter to the Secretary of State, and will place this information in the public domain.

Any decision to give urgent notification to the Secretary of State of significant concerns will be determined by the judgement of HMCIP. The judgement will be informed by relevant factors evidenced during the inspection and may include: Poor healthy prison assessments... The pattern of the healthy prison test judgements; Repeated poor assessments; The type of prison and the risks presented; The vulnerability of those detained; The failure to achieve recommendations; The Inspectorate’s confidence in the prison’s capacity for change and improvement.

Having received such a notification, the Secretary of State commits to publicly respond to the concerns raised within 28 calendar days. The response will explain how outcomes for prisoners in the institution will be improved in both the immediate and longer term. HMCIP will re-inspect the institution in due course at a date determined by the risk-based scheduling process. The inspection will report on progress made since the previous inspection.’1611

**HMIP NEWS RELEASE**

‘This has the potential to be an important outcome of prison inspections, and to strengthen the role of HM Inspectorate of Prisons... In particular, I welcome the principle of transparency and accountability underpinning this new protocol. The Secretary of State has accepted that he and his successors will be held publicly accountable for delivering an urgent, robust and effective response when HMIP assesses that treatment or conditions in a jail raise such significant concerns that urgent action is required... The test will be whether an inspection raises significant concerns that in the judgement of the Chief Inspector need to be brought to the attention of the Secretary of State. That judgement will be made after the conclusion of an inspection, and formal notification made to the Secretary of State within 7 days. 24 hours after the letter has been sent privately, it will be published on the HMIP website and distributed to the media and through social media. The letter will be supported by the end-of-inspection briefing material shared with the prison. These notes will also be made public.’1612

**URGENT NOTIFICATION: HMYOI FELTHAM A**

‘An announced inspection of HMP/YOI Feltham took place between 4 July and 19 July 2019. I decided to return to Feltham so soon after the last inspection of the young offender institution, in January 2019, in response to deeply concerning information received by HM Inspectorate of Prisons from a number of sources. Our inspection last week identified a...”

---

1611 The Ministry of Justice and HM Chief Inspector of Prisons, Protocol between The Ministry of Justice as the Department and HM Chief Inspector of Prisons (1 April 2019) 11-12.
1612 Her Majesty’s Inspectorate of Prisons, HM Chief Inspector of Prisons welcomes new ‘Urgent Notification’ agreement with potential to strengthen the impact of inspections in failing jails (News Release, 30 November 2017).

374
dramatic decline across many aspects of the YOI’s performance, and numerous significant concerns about the treatment and conditions of children being held in the establishment. My decision to invoke the UN process relates solely to the young offender institution (Feltham A) and not to the prison holding young adults (Feltham B). I613 As required by the Protocol, in this letter I set out the key evidence underpinning my decision to invoke the UN process and the rationale for why I believe it is necessary. In addition, I attach a summary note which details all the main judgements from the inspection. The summary note is drawn from a similar document provided to the Governor at the end of the inspection last week. The Governor, the Executive Director of the Youth Custody Service and officials of the MoJ have been informed of my intention to invoke the UN process. I shall, as usual, publish a full inspection report in due course. I614 The findings of this announced inspection were such that I believe it essential to bring them directly to your attention through the UN process. We found that in the six months since the last inspection there had been what can only be described as a collapse in performance and outcomes for the children being held in Feltham A. There had been a decline in each of our tests, and in three of them our grades were now at the lowest possible level. The speed of this decline has been extraordinary, and is particularly disturbing when one takes into account the overall scale of deterioration in the 18 months since the January 2018 inspection. I believe that such a severe fall in standards is especially concerning given the young age of those being held at Feltham A. I615 I was invited to moderate my response to what inspectors found at Feltham A on the basis of some very recent improvements, which had apparently taken place since this latest inspection was announced a few weeks ago. I could not do so: the pattern and level of our healthy prison test judgements, together with the vulnerability of those detained, demand decisive action. The Urgent Notification process was developed precisely for this kind of situation, where the personal authority of the Secretary of State can be brought to bear and strategic intervention can be provided to support a failing establishment. The problems at Feltham A are deep-seated, and to recover from the current appalling situation I believe that significant and enduring support from HMPPS and the Youth Custody Service will be needed. I616

HMIPS

ESCALATING TO DETAINING AUTHORITY AND SERVICE PROVIDER MANAGEMENT

‘When HM Inspectorate of Prisons for Scotland (HMIPS) undertook a full inspection of HMP Perth between 14 and 25 May 2018, a number of serious concerns were raised in relation to the provision of healthcare within the establishment. These concerns were such that Standard 9, Health & Wellbeing was graded as ‘poor performance’. At the time of the inspection, HMIPS deemed it necessary and appropriate to escalate these concerns to local SPS management and the external management structures of Perth and Kinross Integrated Joint Board Health and Social Care Partnership (the Partnership). These actions were undertaken to seek assurance that immediate steps would be taken to address these concerns.’ I617

INCREASED FREQUENCY OF FOLLOW UP VISITS, FOCUSING ON PARTICULAR ASPECTS OF DETENTION

‘As a result of the return visit on 31 May and 1 June, and further discussions with senior managers that took place in the establishment on 8 June, HMIPS were reassured that the SPS and the Partnership were taking appropriate actions in response to the concerns raised. HMIPS supported by colleagues from HiS, subsequently returned to HMP Perth between the 26 and 28 November 2018 to undertake a further inspection of the healthcare provision, and will return again in late 2019 to undertake a further inspection of the healthcare provision. This report is based on our findings during the return visit, which was undertaken between 26 and 28 November 2018. The report focusses solely on the healthcare services

1613 Her Majesty’s Inspectorate of Prisons, Urgent Notification: HMYOI Feltham A (22 July 2019) 1.
1614 Ibid 1-2.
1615 Ibid 3-4.
1616 Ibid 7-8.
provided by the Partnership within the establishment.\textsuperscript{1618} ‘HMIPS and HIS recognise that it will take time to embed the improved practices, recruit the new staffing model and determine the impact on patient care of the revised working practices. The Inspectorate will return in late 2019 to allow the partnership to continue to work towards achieving their own action plan and confirm continued progress.’\textsuperscript{1619}

‘Whilst it is concerning that it was necessary to take these unusual and unprecedented actions, it was reassuring to note that remedial actions were taken quickly and that our concerns were taken seriously.’\textsuperscript{1620}

\section*{CJINI

RECOMMENDATIONS TO THE MINISTER AND DEPARTMENT OF JUSTICE RATHER THAN THE GOVERNOR

‘Main Recommendations To the Minister/Department of Justice

Urgent and decisive action should be taken to strengthen the leadership of the prison. The leadership of the prison must: provide visible reassurance and authority to staff and prisoners; reduce staff absenteeism; ensure basic safety processes are in place to address the concerns outlined in this report; ensure a security strategy relevant to the needs of the prison is developed and implemented in a co-ordinated way across all relevant departments; prioritise the delivery of a predictable and decent regime; and take robust steps to reduce availability of illicit drugs, to prevent the abuse of divertible medication and ensure the administration of prescribed medicines is carried out to Nursing and Midwifery Council standards and is fully supported by the SEHSC'T’s and NIPS' operations and regimes... The Department of Justice should commission an independent inquiry into the causes and management of the fire at Erne House and what lessons can be learnt for the future. The inquiry should identify any misconduct or neglect by responsible individuals and action should be taken accordingly.’\textsuperscript{1621}

\section*{INTERIM REPORTS

‘On the 24 February 2016 we published an interim report which provided our initial findings from the January 2016 follow-up inspection. This is a more detailed report of what we found and our assessment as to the state of progress at Maghaberry since May 2015. However, we made clear to the authorities responsible for the prison that we consider the recommendations we made in 2015 to still be extant requiring ongoing followup review. We have made a few additions to these recommendations where we found significant new failing.’\textsuperscript{1622}

\section*{FOLLOW UP ANNOUNCED, LOW IMPACT INSPECTIONS

‘Given the extent of the problems we found... We also made the unprecedented decision to return to the prison for a follow-up inspection in January 2016. This not only indicated the depth of our concerns about what we had found, but was also intended to communicate the urgency of much of what we felt needed to be done, and by making the inspection announced, provided a clear timeframe and focus for senior managers to start the process of transformation that in our view was needed. Given the short timescale since the previous full inspection, we decided not to re-visit our healthy prison assessments from May 2015, but to instead concentrate on whether progress was being made, or was planned, to address our nine recommendations.’\textsuperscript{1623}

‘We have advised senior NIPS managers of our intention to work with them to review the nine substantive recommendations through a series of announced, low impact visits to the prison. We commend the seriousness with which the NIPS has taken our recommendations made in May 2015, and the urgent action taken to date making a start


\textsuperscript{1619} Ibid 3.


\textsuperscript{1622} Criminal Justice inspection Northern Ireland, Report on an unannounced inspection of Maghaberry Prison 4-15 January 2016 (July 2016) 6.

\textsuperscript{1623} Ibid.
in addressing our concerns, but this early momentum now needs to be maintained in order for the significant progress still needed, to be achieved.  

OCI

ESCALATION - SITE LEVEL, TO REGIONAL OR NATIONAL HEADQUARTERS & TO THE COMMISSIONER

Although the below refers to the OCI’s escalation of complaints, the Inspectorate may consider similarly escalating concerns identified during its visits. This is the practice of a number of NPMs, as outlined above.

‘The Office addresses the vast majority of inmates’ complaints at the institutional level, through discussion and negotiation. When a resolution is not reached at the institution, the matter is referred to regional or national headquarters, depending upon the area of concern, with a specific recommendation for further review and corrective action. Whenever a matter has not been adequately addressed, the Office’s findings and recommendations are presented to the Commissioner of Corrections. That report provides comprehensive information supporting the Office’s conclusions and recommendations. If at this level the Commissioner, in the opinion of the Correctional Investigator, fails to address the matter in a reasonable and timely fashion, it is referred to the Minister of Public Safety.’

RAISING CONCERNS WITH MINISTER WHEN DETAINING AUTHORITY’S RESPONSE IS INADEQUATE

‘I expected a meaningful and comprehensive response, consistent with the extraordinary measures that were taken to have Spirit Matters laid before Parliament... In correspondence sent to the Commissioner... I stated that CSC’s response lacked “substance, meaning and clarity.” On some matters, for example my recommendation to appoint a Deputy Commissioner for Aboriginal Corrections, the response simply recycled previously held CSC positions. My conclusion then, as it is now, is that CSC’s response did not meet the urgency, immediacy or importance of the issues that my Special Report to Parliament warranted. My concerns about CSC’s response were subsequently shared with the Minister.’

RECOMMENDATION: The Inspectorate should ensure it has a strategy for escalation, in instances where it encounters conditions and treatment in detention which create a situation of high risk of torture and/or ill-treatment of detainees and/or its recommendations are not being implemented. This strategy may include escalating concerns to the supervisory authorities and responsible Minister; or scheduling an announced follow up inspection within a shorter timeframe, focusing solely on the areas of concern and monitoring recommendation implementation.

---

1624 Ibid 8.
FOLLOW-UP STRATEGY FOR RECOMMENDATION IMPLEMENTATION

Following up the implementation of recommendations entails both encouraging implementation and evaluating implementation.\textsuperscript{1627} Assessing the implementation of recommendations assists NPMs to ‘measure their own impact, legitimise their role to the public and other stakeholders,’\textsuperscript{1628} to evaluate whether their recommendations ‘contribute to accomplishing the change they want to achieve’.\textsuperscript{1629} It also enables an NPM to identify which areas it should focus on during future visits.\textsuperscript{1630} As former HMCIP Owers has stated, ‘[i]nspection would simply be penal voyeurism if its recommendations and insights were not then acted on by those running those institutions.’\textsuperscript{1631}

The SPT has recommended that NPMs:
regularly verify the implementation of recommendations, primarily through follow-up visits to problematic institutions, but also based on relevant information from... others... In order to facilitate effective follow-up, the mechanism should put in place a follow-up strategy that is clear and impact-oriented and develop the practices and tools necessary to implement the strategy.\textsuperscript{1632}

The Inspectorate should ensure that it allocates sufficient resources to this function, and that the Inspectorate’s other functions, such as conducting inspections and drafting reports do not eclipse this essential component of its work.\textsuperscript{1633}

The Inspectorate could engage other stakeholders to follow-up recommendation implementation, sharing the responsibility. This could involve an advisory body,\textsuperscript{1634} proactively sending ‘reports to NGOs encouraging them to follow-up on its recommendations and to provide feedback on the implementation,\textsuperscript{1635} or engaging with ‘relevant committees or representatives of Parliament.’\textsuperscript{1636} The Inspectorate need not even make a specific request of NGOs to follow up on recommendations, but instead engage in informal information sharing, recognising that they are, as the SPT has noted, ‘a valuable source of information which the [NPM] could take advantage of in order to... determine the extent to which its earlier recommendations have been implemented.’\textsuperscript{1637}

\textsuperscript{1627} Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 22-23.
\textsuperscript{1628} Ibid 27.
\textsuperscript{1629} OSCE Office for Democratic Institutions and Human Rights and Association for the Prevention of Torture, 2016 Annual Meeting of National Preventive Mechanisms from the OSCE region Outcome report (2016) 19.
\textsuperscript{1630} Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 27.
\textsuperscript{1632} Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [33].
\textsuperscript{1634} Ibid 20.
\textsuperscript{1635} Ibid 22.
\textsuperscript{1636} Ibid 21.
\textsuperscript{1637} Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the national preventive mechanism advisory visit to Ecuador made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/OP/ECU/2 (16 July 2015) 11 [43].
Additionally, the Inspectorate should track implementation through the use of its own database, recording both formal written and verbal recommendations, noting the timeframes and priorities for implementation and the complexity and nature of the recommendations (eg whether implementation involves multiple stakeholders, or material changes vs legislative and policy changes). Such a database would come with the added benefit of assisting the Inspectorate to identify thematic or systemic issues across places of detention, useful for both its detention visits and its broader work, such as submissions to inquiries.

OCI – EVALUATION OF WHAT CONSTITUTES IMPLEMENTATION OF A RECOMMENDATION

‘In response to a recommendation made in my last Annual Report, CSC is conducting research examining Aboriginal social history (“Gladue Factors”) in case management and their influence on decision outcomes for Aboriginal offenders. The research was compiled into a report and published March 2015. While the research may prove useful, this situation calls for more than just issuing more reports. There needs to be applied and sustained focus to effect meaningful improvement in this area of correctional practice. I recommend that CSC publicly release its study of the impact of Aboriginal social history (Gladue factors) on case management and its influence on correctional decision outcomes for Aboriginal offenders. This study should be accompanied by a Management Action Plan. The Office reviewed the minutes of CSC Senior Executive Committee meetings for the reporting period and found few specific references to Aboriginal offenders or Aboriginal corrections.’

HMICS - REVIEW OF PREVIOUS RECOMMENDATIONS
OPEN/CLOSED (COMPLETED/NOT RELEVANT)

‘The aim of the review of recommendations was to assess all outstanding recommendations from HMICS thematic inspections relating to custody, conducted since 2008, to ensure all relevant improvement activity has been captured and taken forward by Police Scotland. This review provides a full list of legacy recommendations relating to custody made by HMICS to the eight legacy police forces and the Association of Chief Police Officers in Scotland (ACPOS), including those which had not been completed prior to the creation of Police Scotland. It provides a definitive assessment of the progress made in relation to these recommendations and gives greater clarity to Police Scotland in terms of what, if any, outstanding action may still be required... We have reviewed each of our legacy recommendations. This entailed an examination of Police Scotland’s current position with respect to each recommendation, discussions with the relevant service lead and, where appropriate, an examination of relevant policies and standing operating procedures. We used this information to assess whether the recommendation still required further action (‘open’) or whether there was sufficient evidence to conclude that it had been fully completed or was no longer relevant (‘closed’). Where any legacy recommendations were still considered relevant, these have been reframed to reflect the current policing landscape and refreshed into new recommendations in this report.’

---

1639 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 42-43.
1640 Ibid 43.
1642 Her Majesty’s Inspectorate of Constabulary in Scotland, Thematic Inspection of Police Custody Arrangements in Scotland (August 2014) 96-104.
CJINI – FOLLOWING UP RECOMMENDATIONS THAT ARE NOT ACHIEVABLE IN THE SHORT-TERM

‘Recommendations: will require significant change and/or new or redirected resources, so are not immediately achievable, and will be reviewed for implementation at future inspections.’\textsuperscript{1643}

HMIP – FOLLOWING UP ON RECOMMENDATIONS THAT WERE NOT ACCEPTED

‘We last inspected HMYOI Wetherby and Keppel in 2018 and made 55 recommendations overall. The prison fully accepted 41 of the recommendations and partially (or subject to resources) accepted 10. It rejected four of the recommendations. At this follow up inspection we found that the prison had achieved 29 of those recommendations, partially achieved four recommendations and not achieved 22 recommendations.’\textsuperscript{1644}

OCI – REPEATED RECOMMENDATION THAT THERE BE A DEPUTY COMMISSIONER FOR ABORIGINAL OFFENDERS

‘These problems demand focused and sustained attention and a real commitment to change and reform. The appointment of a Deputy Commissioner for Aboriginal offenders is required to ensure an Indigenous perspective and presence in correctional decision-making. Though CSC claims that this measure would lead to more bureaucracy and increased cost, I would simply point out that since I first made this recommendation more than a decade ago now, the Service has made little discernible or meaningful progress in narrowing the gap in key areas and outcomes that matter to Aboriginal offenders and Canadians. This commitment goes to corporate focus and establishing some political direction for federal corrections in light of the year-on-year increases in the national rate of incarceration of Canada’s Indigenous Peoples. This addition to the executive management of the Service would demonstrate commitment to progress on this troubling file and support government of Canada commitments to fully respond to the work of the Truth and Reconciliation Commission.’\textsuperscript{1645}

OMBUDSMAN – REPEATING RECOMMENDATIONS NOT ACCEPTED AT ONE SITE ACROSS OTHER DETENTION SITES

‘Of the 15 recommendations not accepted by the Department of Corrections... eleven concerned three common matters that were repeated across several sites, namely: The standardising of meal times... The use of cameras and prisoners’ right to privacy... Segregated prisoners being placed in noncompliant cells.’\textsuperscript{1646}

RECOMMENDATION: The Inspectorate should have a follow-up strategy to encourage and evaluate the extent of recommendation implementation, through follow-up visits and other means (eg. obtaining information from other stakeholders, such as statutory bodies and civil society organisations).

\textsuperscript{1643} Criminal Justice inspection Northern Ireland, Report on an unannounced inspection of Maghaberry Prison 9-19 April 2018 (November 2018) 56-57.
\textsuperscript{1645} The Correctional Investigator Canada, Annual Report 2015-2016 (30 June 2016) 44.
\textsuperscript{1646} Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2013 to 30 June 2014 (December 2014) 21.
THE INSPECTORATE SHOULD NOT BE INVOLVED IN RECOMMENDATION IMPLEMENTATION

Implementation can be described as ‘the process by which states, their authorities and agencies, take steps to address recommendations of torture monitoring bodies.’ Murray et al note that implementation is not the role of the NPMs, but the role of the State. The NPM’s role is to follow-up by monitoring the State’s implementation of its recommendations. Given that part of the role of an NPM is to independently monitor implementation, if it were to also become involved in the implementation process, a conflict of interest would arise. The Inspectorate must thus maintain its independence and not become involved in any aspect of the governance, management or operations of the detaining authority. This constraint extends to taking on a consultative role.

However, Birk et al’s project found that the ‘extent to which the NPM should provide practical advice to the authorities on how to implement the recommendations is not always clear, and NPMs vary in their approach in this regard.’ Providing solutions-driven recommendations is best practice, as discussed above (under Recommendations), but determining the appropriate level of detail to include in recommendations can be challenging. The line between making a recommendation and providing guidance on recommendation implementation is not always clear.

In Birk et al’s study, some NPMs ‘cautioned against giving concrete solutions in the process of advising the state... going into the ‘management of institution’ and underlined the need for the authorities to have ownership over the implementation process,’ whereas others were of the view that providing relatively detailed solutions was essential ‘to make sure that authorities were indeed taking steps towards implementation and changing sometimes long-held practices.’

---

1647 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 23.
1648 Rachel Murray, Elina Steinerte, Malcolm Evans, and Antenor Hallo de Wolf, ‘The Role of NPMs’ in The Optional Protocol to the UN Convention Against Torture (Oxford University Press 2011) 133.
1649 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 24.
1650 Ibid 38.
‘It is for Corrections to develop policies, strategies and best practice on how they manage prisoners at risk of self-harm and suicide in a way that ensures they receive optimal care and treatment and are managed in a safe and humane manner. It is hoped that our findings and observations will help Corrections to make advances in this challenging area and to desist from practices that breach Article 16 of the Convention Against Torture.’

**RECOMMENDATION:** The Inspectorate must maintain its independence and should not be involved in the detaining authority’s implementation of inspectorate recommendations.

**FOLLOW-UP STRATEGIES IN OTHER JURISDICTIONS**

**THE DETAINING AUTHORITY PROACTIVELY PROVIDES UPDATES ON IMPLEMENTATION**

Although it can be useful to have regular updates from the detaining authority, the Inspectorate should not be overly reliant on the detaining authority’s self-assessment. The information provided on the progress of implementation may be inaccurate, as a result of either the detaining authority’s genuine errors in evaluation or the inherent conflict of interest in such an assessment.

**HMICS**

‘Police Scotland regularly provides updates on the implementation of Recommendations and Improvement Actions.’

**HMIP – DETAINING AUTHORITY PROVIDING INACCURATE INFORMATION ON RECOMMENDATION IMPLEMENTATION**

‘In January 2018, the Justice Select Committee held an enquiry following publication of our report into the inspection of HMP Liverpool in September 2017. The prison had deteriorated to such an extent that living conditions were among the worst inspectors had ever seen. During the evidence session it emerged that the prison was reporting through line management that 66% of the recommendations we had made at our previous inspection were on track to be implemented. The true picture was very different. During the inspection we found that only 25% of our recommendations had been achieved. The Select Committee expressed concern that HMPPS was effectively ‘marking its own homework’ and concluded there should be an injection of independence in the follow up to inspection reports – something that at
that time HMI Prisons was simply not resourced to do. The Committee therefore recommended that we should be provided with additional funding, which was subsequently agreed by government.\footnote{1653}

**FOLLOWING UP ON IMPLEMENTATION DURING THE NEXT REGULAR INSPECTION**

The Inspectorate should always evaluate, on any subsequent inspection visits, the detaining authority’s progress in implementing recommendations made during previous inspections. Recommendations can then be closed (due to completion or lack of ongoing relevancy), repeated or amended by the Inspectorate as appropriate.

\[\text{HMIP INSPECTION FRAMEWORK}\]

‘HM Inspectorate of Prisons operates an almost entirely unannounced inspection programme (other than in exceptional circumstances), with all inspections following up recommendations from the last full inspection.’\footnote{1654}

\[\text{GUIDE FOR WRITING INSPECTION REPORTS}\]

‘Inspections follow up the recommendations of the previous inspection to see if they have been achieved. Inspectors should note whether each original recommendation is: achieved, not achieved, partially achieved, no longer relevant (because the context of the original recommendation has changed). If an original recommendation, including a main recommendation, has not been achieved or, in some cases, has been only partially achieved, it can be repeated, as long as it is still relevant and important. In some cases, it might be suitable to link together two previous recommendations covering the same area and repeat them as one recommendation. If the desired outcome is relevant, but could be better described, you should include a new recommendation rather than repeat the previous recommendation. If a recommendation is to be repeated, the justification for this should be given in the appropriate section of the report. The repeated recommendation should then be listed… with a reference to its previous report recommendation number… Inspectors should not feel obliged to repeat recommendations if they no longer consider them necessary.’\footnote{1655}

\[\text{INSPECTION REPORT}\]

‘Appendix II: Progress on recommendations from the last report
The following is a summary of the main findings from the last report and a list of all the recommendations made, organised under the four tests of a healthy prison. The reference numbers at the end of each recommendation refer to the paragraph location in the previous report. If a recommendation has been repeated in the main report, its new paragraph number is also provided.’\footnote{1656}
During our inspection, we reviewed outstanding custody recommendations and closed 11 recommendations and 18 improvement actions. Appendix 1 – Status of custody recommendations

Since Police Scotland was established in 2013, HMICS has published seven police custody inspection reports. These reports included 34 recommendations and 47 improvement actions. Many recommendations were reviewed and closed prior to our current inspection... [the report] includes all outstanding recommendations and actions... It sets out whether the recommendations and improvement actions remain open or whether sufficient evidence has been received by HMICS to justify closure. It should be noted that where a recommendation remains open, progress towards its implementation may well be underway. Of the 34 recommendations, 23 have now been closed. Of the 47 improvement actions, 44 have been closed.

RECOMMENDATION: The Inspectorate should follow up, during its regular inspection visits, on the detaining authority’s progress implementing recommendations from previous inspections. Recommendations can be closed (due to completion or lack of ongoing relevancy), repeated or amended, as appropriate.

FOLLOWING UP ON IMPLEMENTATION DURING A SPECIFIC FOLLOW-UP VISIT

The Inspectorate could also conduct specific follow up visits, particularly where it would not be appropriate to allow too much time to lapse before the next visit, as per the Inspectorate’s schedule of regular visits (see Strategy regarding locations and frequency of visits above). Taking the approach of having specific follow up visits can allow the Inspectorate to focus on issues that are of particular concern, rather than conducting a full inspection (thus requiring fewer resources).

NPM FOLLOW-UP VISITS TO HIGH AND LOW RISK INSTITUTIONS & FOLLOW-UP VISITS FOCUSING ON THEMATIC AREAS

‘In the UK, some of the bodies in the NPM undertake unannounced visits on the basis of a risk assessment. For example the HMIP undertakes full follow-up inspections for ‘those establishments that are deemed “high risk” on the basis of their previous healthy prison assessments and any further intelligence,’ where the follow-up visit focuses on all the recommendations made in the previous visit and looks again at the areas most at risk. In addition, there are short follow-

---

1657 Her Majesty’s Inspectorate of Constabulary Scotland, Inspection of the strategic arrangements for the delivery of police custody (June 2019) 3.
1659 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 51.
up inspections which are done in ‘low-risk’ institutions and which look at the progress made on recommendations in the last report. For other bodies in the UK NPM structure some of the follow-up visits may be focused on thematic areas.\textsuperscript{1660}

**CJINI – FOLLOW-UP ON ACTION PLAN AND RECOMMENDATIONS**

‘Between one and two years after the inspection report has been published, CJI will return to the organisation/s involved and undertake an action plan review/inspection followup review. Inspectors will review the original inspection report and carry out research to assess the progress made towards completing either the agency’s action plan or carrying forward CJI’s recommendations. A report is published on the findings and, depending on the outcome, the action plan will either be signed off as completed or CJI may decide to return to the agency after a period of time to review progress against incomplete actions.\textsuperscript{1661}

**CJINI - ANNOUNCED LOW IMPACT VISITS**

2018 VISIT

‘At our inspection in 2012, we saw encouraging signs of improvement, but at our next visit in May 2015, we were deeply concerned about the deterioration we observed and judged the prison to be unsafe, unstable and disrespectful... We... made the unprecedented decision to return to the prison in January 2016, announcing the inspection in advance to provide a focus and catalyst for positive change... To support the process of continuing change and progression, in September 2016 and April 2017 we carried out ‘light touch’ follow-up review inspections, again focused on the... recommendations made in May 2015. It was pleasing to see that the progress first seen in January 2016 was being sustained. At this unannounced inspection, we made the decision to move beyond the findings in 2015, and to take a fresh look at all areas of the prison.\textsuperscript{1662}

2017 VISIT

‘To support the momentum and changes that were required at Maghaberry, I undertook to review progress against the recommendations through a series of low-impact visits to the prison... This report reviews the progress that the prison has made to date against the nine recommendations. Our intention was not to re-inspect all areas of the prison, nor to deal with the issues in the same level of detail that is associated with a full unannounced inspection. This was a light touch review of progress and should be seen as a partial picture of what was happening at the prison and the experience of the men being held there.’\textsuperscript{1663} The purpose of this approach was to provide Inspectors with a sense of how the prison was progressing the nine inspection recommendations made following the 2015 inspection; to... identify any emerging difficulties or slippage in progress at an early stage, so leadership within the prison can take prompt remedial action.'\textsuperscript{1664}

\textsuperscript{1660} Ibid 49.
\textsuperscript{1662} Criminal Justice Inspection Northern Ireland, Report on an unannounced inspection of Maghaberry Prison 9-19 April 2018 (November 2018) 5.
\textsuperscript{1663} See also Criminal Justice Inspection Northern Ireland, Report on an unannounced visit to Maghaberry Prison 5 – 7 September 2016 to review progress against the nine inspection recommendations made in 2015 (November 2016); Criminal Justice Inspection Northern Ireland, Report on an announced visit to Maghaberry Prison 3-4 April 2017 to review progress against the nine inspection recommendations made in 2015 (August 2017).
\textsuperscript{1664} Criminal Justice Inspection Northern Ireland, Report on an announced visit to Maghaberry Prison 3-4 April 2017 to review progress against the nine inspection recommendations made in 2015 (August 2017) 5.
\textsuperscript{1664} Ibid 9.
HMICS – FOLLOW-UP VISIT FOLLOWING SIGNIFICANT CONCERNS

‘Our inspections of the three custody centres in Tayside Division were unannounced and took place in September 2017. We had significant concerns about cleanliness and hygiene at the Dundee custody centre and recommended that Police Scotland take immediate action. We revisited Dundee in November 2017 and noted that progress had been made.’\(^{1665}\)

OMBUDSMAN – FOLLOW-UP VISIT

‘During the follow up inspection from 8 to 12 April 2019, my Inspectors visited all units and spoke with a selection of managers and staff across the site. The team looked for progress in implementing the recommendations made in 2016, and identified any additional issues that need addressing.’\(^{1666}\) ‘Seven repeat and two new recommendations have been made as a consequence of the January 2019 follow up inspection.’\(^{1667}\)

EXAMPLE OF FOLLOW-UP ON A RECOMMENDATION– TREATMENT

RECOMMENDATIONS 2016
a. Cameras in the At Risk cells and Basement Unit should not cover the toilet area. Furthermore, all toilets should have privacy screening.\(^{1668}\) ‘Prison response: Rejected.’\(^{1669}\)

FINDINGS 2019
‘Follow up finding 2019: Not achieved’\(^{1670}\)
‘Cameras were still operating in the Intervention and Support Unit (ISU) cells. My Inspectors observed prisoners via CCTV, when they were naked, partially naked, or undertaking their ablutions. Cameras were still operating in certain cells in the Basement Unit. Prisoners allocated to these cells covered the cameras and staff permitted them to remain obscured. The Prison had not introduced any specific measures to address these privacy issues since my 2016 inspection. My Inspectors note that some prisons and court cells have recently implemented technology that ‘blacks out’ the toilet area in camera feeds. Invercargill Prison has yet to introduce such technology. I remain of the opinion that the ability to observe prisoners, either directly or via CCTV, undertaking their ablutions or in various stages of undress is degrading treatment or punishment and a breach of Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). I continue to engage with the Department of Corrections on this issue.’\(^{1671}\)

FOLLOW-UP RECOMMENDATIONS 2019
‘I recommend that... Cameras in the ISU cells and Basement Unit not cover the toilet area. Furthermore, all toilets should have privacy screening. This is a repeat recommendation.’\(^{1672}\)

\(^{1669}\) Ibid 15.
\(^{1670}\) Ibid.
\(^{1671}\) Ibid 6.
\(^{1672}\) Ibid 14.
CORRECTIONS’ RESPONSE TO 2019 FOLLOW-UP FINDINGS AND RECOMMENDATIONS

The Department of Corrections partially accepted this recommendation, and commented: ‘Corrections acknowledge that balancing the dignity and privacy of prisoners in Intervention and Support Units (ISUs) with the preservation of life presents a unique challenge. As acknowledged by your office, a piece of work has been underway in this area, which has been led by the Chief Custodial Officer. This work has looked at research and international practices to support future actions and includes consideration of international practices, legislative instruments and identifying potential options for enhancing privacy for prisoners in ISUs. Your office has been provided a copy of the completed review regarding this work, for consultation. It is expected that initial plans will be established by the end of July 2019. Once received any feedback from your office will be considered as part of the planning process.’

HMIP - INDEPENDENT REVIEWS OF PROGRESS

GUIDE TO INDEPENDENT REVIEWS OF PROGRESS FOR PRISON STAFF/ANNUAL REPORT

‘In 2018 the Justice Select Committee recommended that HMI Prisons provide ministers with an independent assessment of the progress made in implementing recommendations resulting from particularly concerning prison inspections. The Ministry of Justice has funded this work and HMI Prisons has developed the IRP methodology.’

PURPOSE OF IRPS

To ‘provide an independent, evidence-based assessment of how the prison is progressing against the key concerns and recommendations identified at the previous inspection, assess progress in terms of outcomes for prisoners in the areas of main concern; support improvement; identify any emerging difficulties or slippage in progress at an early stage; assess the sufficiency of the leadership and management response to the main concerns from the previous inspection... The purpose of an IRP is distinct from an inspection. The purpose of an inspection is to assess the treatment of prisoners and the conditions of detention in relation to our expectations and the four healthy prison tests (HPTs), and to make recommendations designed to promote improvement.’

STRATEGY

‘Selected recommendations are followed up; Focus on assessing degree of improvement since the previous inspection; Use of ‘key questions’ to make judgements about progress against the recommendations. There is funding for 15–20 site visits per year – usually struggling prisons – eight to 12 months post inspection. New recommendations are unlikely to be made.’ IRPs ‘will be focused on prisons subject to an Urgent Notification or where there are other causes for serious concern. They will concentrate on progress in implementing key recommendations, and will look to see if action plans are properly focused, resourced, and with clear timelines and lines of accountability for improvement. As with Urgent Notifications, IRPs will be published, affording a higher level of both political and public accountability than has hitherto been the case.’

METHODOLOGY

‘HMICIP will write to the governor/director of the prison, usually two to three months in advance of the visit, confirming the date of the visit and which recommendations will be followed up (usually a maximum of 15). The list may include recommendations that were rejected or only partly accepted by HM Prison and Probation Service (HMPPS)... HMI Prisons

---

1673 Ibid 25.
1674 Her Majesty’s Inspectorate of Prisons, Guide to Independent Reviews of Progress (IRPs) for prison staff (June 2019) 4.
1675 Ibid.
1676 Ibid.
will copy this letter to the Chair of the Independent Monitoring Board (IMB) and invite him/her to meet the team/team leader during the visit.\textsuperscript{1678}

REPORTING

‘There will be no overall judgement. HMI Prisons will make judgements on progress, relating to each individual recommendation that is being followed up. Progress is defined as activities that have the potential, in time, to lead to improved outcomes. HMI Prisons follows up using the following definitions:

No meaningful progress: Managers had not formulated, resourced or begun to implement a realistic improvement strategy for this recommendation.

Insufficient progress: Managers had begun to implement a realistic improvement strategy for this recommendation, but the actions taken had not resulted in any discernible evidence of progress (for example, better systems and processes) or improved outcomes for prisoners.

Reasonable progress: Managers are implementing a realistic improvement strategy for this recommendation and there was evidence of progress (for example, better systems and processes) and/or early evidence of some improving outcomes for prisoners.

Good progress: Managers had implemented a realistic improvement strategy for this and had delivered a clear improvement in outcomes for prisoners.\textsuperscript{1679}

EXAMPLE OF AN IRP

METHODOLOGY

‘IRPs will be announced at least three months in advance and will take place eight to 12 months after the full inspection. When we announce an IRP, we will identify which recommendations we intend to follow up (usually no more than 15). Depending on the recommendations to be followed up, IRP visits may be conducted jointly with Ofsted (England), Estyn (Wales), the Care Quality Commission and the General Pharmaceutical Council. This joint work ensures expert knowledge is deployed and avoids multiple inspection visits.\textsuperscript{1680}

KEY FINDINGS

‘At this IRP visit, we followed up 12 recommendations from our most recent inspection and Ofsted followed up three themes. HMI Prisons judged that there was reasonable progress in four recommendations, insufficient progress in three recommendations and no meaningful progress in five recommendations.\textsuperscript{1681}

FOLLOWING UP ON IMPLEMENTATION – THEMATIC REPORTS

CJNI - FOLLOWING UP THEMATIC REPORT RECOMMENDATIONS

‘This is the second full inspection of police custody in Northern Ireland, which will consider the strategy, governance and delivery of custody by the PSNI. CJI and RQIA published the first full inspection in 2009 and a subsequent follow-up review in 2012. These inspections identified issues which still required resolution including the governance and management of

\textsuperscript{1678} Her Majesty’s Inspectorate of Prisons, Guide to Independent Reviews of Progress (IRPs) for prison staff (June 2019) 6. See also at 10-11, for ‘Useful questions generally to ask regarding implementation.’

\textsuperscript{1679} Ibid 9.

\textsuperscript{1680} Her Majesty’s Inspectorate of Prisons, Report on an independent review of progress at HMP Manchester 3-5 June 2019 (2019) 5-6.

\textsuperscript{1681} Ibid 7.
the custody suites and the approach to healthcare in custody. As a result CJI decided to undertake a further full inspection.\textsuperscript{1682}

**FOLLOWING UP ON IMPLEMENTATION - MEETINGS WITH SUPERVISORY AUTHORITIES**

The Inspectorate should consider adopting the approach of holding ‘a dedicated meeting once a year with all the relevant ministries, discussing the NPM’s annual report.’\textsuperscript{1683} It should also consider holding meetings with department CEOs and Ministers in relation to recommendations it has made in its inspection reports, and progress of recommendation implementation.

**ICVA - QUARTERLY MEETINGS WITH HOME OFFICE**

Functions include: ‘[P]resenting questions, issues or challenges from members, attaining appropriate responses and communicating this with members in order to ensure that custody visiting is appropriately represented with the Home Office.’\textsuperscript{1684}

**IMB (ENG)**

‘We regularly meet with officials from the Ministry of Justice (MoJ), HM Prisons and Probation Service (HMPPS), and Home Office Detention and Escorting Services to share information and raise issues emerging from IMBs’ work.’\textsuperscript{1685}

**RECOMMENDATION:** The Inspectorate should consider including in its follow-up strategy approaches such as conducting specific follow up visits focused on the progress of implementation (these may be announced, alerting the detaining authority that it will be subject to increased scrutiny) and engaging with Ministers/government department CEOs.

\textsuperscript{1682} Criminal Justice inspection Northern Ireland and The Regulation and Quality Improvement Authority, Police custody: The detention of persons in police custody in Northern Ireland (March 2016) 79.


\textsuperscript{1684} Independent Custody Visiting Association, ICVA Business Plan 2018/19, 12.

\textsuperscript{1685} Independent Monitoring Boards, IMB National Annual Report 2017/18 (June 2019) 43.
PURPOSE AND CONTENTS OF THE REPORT

PURPOSE

Birk et al identify that annual reports function as ‘tools for dialogue with the authorities… [which] may contribute to the process of evaluating implementation and informing any policy reform,’ as well as improving transparency and ‘act[ing] as a further safeguard for the independence of the NPM.’ An NPM’s annual report can also be used, for example, by UN bodies.

UN COMMITTEE AGAINST TORTURE – REFERENCE TO NPM ANNUAL REPORT & SCOTTISH GOVERNMENT RESPONSE

In its 2014-2015 Annual Report, the UK NPM wrote: ‘Although high numbers of children continued to be detained overnight in police cells, and people from black and minority ethnic groups continued to be overrepresented in police custody, there was still no systematic collection of data that could provide an authoritative national view on police custody, vulnerability and discrimination. Improvements in the collection and monitoring of information on the use of force and strip searches were needed, as well as in the quality and quality assurance of custody records, risk assessments and transfer of information about detainees.’

The UN Committee Against Torture subsequently asked for ‘comment on reports indicating that there are inconsistencies in the use of isolation and solitary confinement, and on the assertion in the sixth annual report of the National Preventive Mechanism entitled “Monitoring places of detention” (2015) that “improvements in the collection and monitoring of information on the use of force and strip searches were needed, as well as in the quality and quality assurance of custody records, risk assessments and transfer of information about detainees.”’

The Scottish Government response to the Committee Against Torture stated that: ‘Strip searches conducted within the environs of a police station are recorded on the National Custody System and will also include the rationale and authorisation for the strip search taking place. In January 2017 Police Scotland introduced a National Custody System. Information relating to detainees in police custody can be accessed across the country so that quality assurance checks can be carried out. Custody cluster inspectors from the Criminal Justice Services Division carry out dip sampling of custody records to ensure there is consistency of approach to completing the records.’

1686 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 31.
1687 Ibid 33.
1689 Committee against Torture, List of issues prior to submission of the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, 57th sess, UN Doc CAT/C/GBR/QPR/6 (7 June 2016) [23].
1690 Scottish Government, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Position statement in response to list of issues (February 2019) 50.
The SPT states that the annual reports should include:

in addition to recommendations for change, the outcome of the dialogue with authorities, i.e., follow-up on recommendations mentioned in previous annual reports.\textsuperscript{1691} Accounts of current challenges to the protection of the rights of persons deprived of their liberty and to the effective execution of the mechanism’s mandate, and strategic short-term and longer term plans, including with respect to setting priorities... Consideration of thematic issues... Accounts of cooperation with other actors on the prevention of torture...

Nowak and McArthur suggest that NPMs include:

a substantive analysis of their findings and recommendations in relation to the conditions of detention... Since the examination of the treatment of detainees constitutes the first task of NPMs under Article 19 [OPCAT], any findings of torture and ill-treatment in detention shall be included in their annual reports. In other words, apart from personal data (unless the person concerned has given informed consent) and other information received confidentially, the annual report shall provide a realistic picture of the situation in the country concerned.\textsuperscript{1693}

\begin{tabular}{|c|c|}
\hline
\textbf{OCC’S CONTRIBUTION TO THE NPM’S ANNUAL REPORT} & \\
\hline
\textbf{FINDINGS - HIGHLIGHTING ISSUES AROUND CULTURALLY APPROPRIATE SERVICES FOR MĀORI CHILDREN} & \\
\hline
‘One area of development in most residences is a lack of vision, cultural capability, and partnerships with local iwi to address the needs of mokopuna Māori. There is significant variation in cultural capability building, cultural mentoring, and cultural practices across the residences. This is a significant concern given that up to 70% of young people in residences are Māori. For mokopuna Māori, culture is a key element of identity. When cultural needs are met, young people’s sense of belonging and connectedness is enhanced. When young people are disconnected from their culture, the opposite is true. Māori cultural competence is therefore crucial to meet young people’s needs. Two of the six residences we visited are committed to upholding Māori culture and values, and have plans in place to build cultural capability. One of these has plans to develop a kaupapa Māori unit (by Māori, for Māori), which aims to enable young Māori to engage with their culture by immersing themselves in cultural activities and learning. At the second of these residences, young people have the opportunity to meet regularly with a kaumatua (Māori elder) to enhance cultural connectedness. However, even at these residences, such plans and practices are vulnerable to competing organisational and financial priorities and rely on limited numbers of skilled staff to implement. We expect to see further development in this area across all residences in the next year.’\textsuperscript{1694} \\
\hline
\end{tabular}

\textsuperscript{1691} Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [35].


See also Manfred Nowak and Elizabeth McArthur, Part IV National Preventive Mechanisms, Art.23 Annual Report of the National Preventive Mechanism in The United Nations Convention Against Torture: A Commentary (Oxford University Press 2015) 1100: ‘Annual reports shall further include the NPMs’ recommendations aimed at improving conditions of detention and the treatment of detainees and at preventing torture and ill-treatment in the future, as well as the respective measures taken by the governments to implement such recommendations.’

\textsuperscript{1692} Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [47].


\textsuperscript{1694} Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2015 to 30 June 2016 (February 2017) 12.
While CYF has given considerable attention to building Māori cultural capability in recent years, and some residences do an exceptional job of this, the OCC’s overall finding is that at most residences cultural capability is still not given sufficient priority. The OCC has come across only a couple of residences that are well set up to attract and support Māori staff. Māori practitioners are often called on to support their colleagues to engage with mokopuna Māori and their whānau, without being allocated any extra time or resources or being acknowledged by management for doing so. Formal cultural supervision is limited at the residences and dedicated training opportunities for staff to develop expertise in culturally appropriate practice are rare. The current implementation of a newly developed [[N|Indigenous and bicultural framework is promising but will need a high degree of sustained commitment and leadership from CYF national office. It will also need dedicated investment in building Māori cultural capability across the whole organisation, to make a positive difference for mokopuna Māori.

OCC PRACTICE – MONITORING FRAMEWORK AND MĀORI CHILDREN

The revised rubric includes more content about best practice in residences and prioritises both the voices of children and young people and responsiveness to Māori, to assess how well CYF is improving outcomes for children and young people.

PRESENTATION OF FINDINGS

As discussed above (under Presentation of findings in the report) findings can be presented through quotes, case studies or photographs as appropriate.

NPM OPCAT REPORT - QUOTES FROM CHILDREN

‘I want to learn more te reo (Māori language)... learn more about the culture itself... don’t get much of that unless we in [Māori focus unit].’

‘They don’t do nothing for my culture.’

‘I speak Māori and play the guitar. They should do more cultural programmes like hangi, music, diving and hunting.’

RECOMMENDATION: The Inspectorate’s annual report should include its main findings on conditions and treatment in detention in the NT, the recommendations that it has made to improve conditions and prevent torture and ill-treatment, the detaining authorities’ responses and the progress of recommendation implementation.

The annual report should also outline the Inspectorate’s activities ‘beyond inspection’ for the year, such as submissions to inquiries.

The report should include the challenges the Inspectorate faces and its future strategies.

See also Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2013 to 30 June 2014 (December 2014) 17, 18.


1699 Ibid 11.

394
POTENTIALLY COULD INCLUDE MINISTERIAL/DETAINING AUTHORITY RESPONSE TO THE ANNUAL REPORT

The Inspectorate could consider including a response from the Minister (or the detaining authorities) to its annual report.

IMB (ENG) - MINISTERIAL RESPONSE

The response included the following, in relation to overcrowding: ‘Prisons are not expected to operate above their operational capacity and this is under constant review taking into account population fluctuations and capacity across the entire estate. We ensure that the level is set to reflect the provision of safe and decent accommodation, the operation of suitable regimes, and that levels of crowding in prisons are carefully managed... Cells will only be shared whereby... assessed... to be of adequate size and condition.’ 1700

RECOMMENDATION: Ministerial responses to the contents of the Inspectorate’s annual report could complement the detaining authorities’ responses to inspection reports.

REPORTS SHOULD BE WIDELY DISSEMINATED

OPCAT requires that States ‘publish and disseminate the annual reports of the national preventive mechanisms.’ 1701

The SPT’s position is that the:

State should publish and widely disseminate the Annual Reports of the NPM. It should also ensure that it is presented to, and discussed in, by the national legislative assembly, or Parliament. The Annual Reports of the NPM should also be transmitted to the SPT which will arrange for their publication on its website. 1702

The Inspectorate should have its annual report tabled in the NT Parliament, and there should be opportunities for its contents to be discussed in Aboriginal languages in Parliament. The Inspectorate should use similar dissemination strategies for its annual report as those used for its inspection reports, including recognising that it should have a targeted approach to reach the NT Aboriginal community, as discussed above (under A publicly available report).

1702 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Guidelines on national preventive mechanisms, UN Doc CAT/OP/12/5 (9 December 2010) [29].
See also Fourth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, 46th sess, UN Doc CAT/C/46/2 (3 February 2011) [91].
The annual report of the Australian NPM (with all its constituent units) should be coordinated and drafted by the Commonwealth Ombudsman. The Inspectorate should contribute to this report, which should then be tabled in the Australian Parliament and transmitted to the SPT.

**OMBUDSMAN**

‘Under Section 27 and 36 of the Crimes of Torture Act 1989, I will present a copy of my final report to Parliament before publication on my website.’

**RECOMMENDATION:** The Inspectorate’s annual report should be tabled in the NT Parliament and widely disseminated, particularly in the NT (and to the NT Aboriginal community).

There should be opportunities to discuss the contents of the report in Parliament (including in Aboriginal languages).

The Inspectorate should use similar dissemination strategies for its annual report as those used for its inspection reports.

The Inspectorate should also contribute to the Commonwealth Ombudsman’s Australian NPM Annual Report, to be tabled in the Australian Parliament and provided to the SPT.

---


See also Briefing to the Justice Committee on the Optional Protocol to the Convention against Torture, Parliament of New Zealand, Wellington, 11 September 2019, (Paul Hunt, Chief Human Rights Commissioner; Peter Boshier, Ombudsman; Christine Stevenson, CEO Department of Corrections) <https://m.facebook.com/story.php?story_fbid=1536032613203924&id=1871068362906301&_rdr>
THE INSPECTORATE’S OPCAT COMPLIANCE AND EFFICACY SHOULD BE EVALUATED
EVALUATING WHETHER THE INSPECTORATE IS SUCCESSFULLY ACHIEVING ITS GOAL OF CONTRIBUTING TO THE PREVENTION OF TORTURE AND ILL-TREATMENT

The SPT’s position is clear: ‘[t]he effective operation of the NPM is a continuing obligation.’1704 The Inspectorate’s efficacy must be evaluated, in order to ascertain whether its objective under OPCAT is being realised. After all, as Deitch notes, ‘oversight is not a goal in and of itself. Rather, oversight is a means of achieving the twin objectives of transparency of public institutions and accountability for the operation of safe and humane prisons and jails.’1705 Evaluating the effectiveness of prevention may, however, be challenging.

HRC REVIEW OF OPCAT IMPLEMENTATION IN NEW ZEALAND

‘The difficulties of assessing the impact of human rights initiatives are not unique to New Zealand. In the outline of an APT research project on the effectiveness of torture prevention, some of the difficulties noted as inherent in evaluating human rights initiatives include:

1 The difficulties entailed in evaluating prevention. By definition we are interested in the non-occurrence of certain events and the reasons for this.
2 The difficulties inherent in the fact that the issue being investigated is torture – the nature of the violation is that there are no generally accepted figures for its incidence and the secrecy in which it occurs makes reliable data almost impossible to obtain.
3 The problem of measuring risk. The main danger here is that many of the indicators often proposed to suggest reduced risk are the very same preventive interventions that are the subject of the inquiry.’1706

Carver and Handley’s study demonstrated the effectiveness of torture prevention (of note, the study did not assess the impact of monitoring bodies in preventing cruel, inhuman or degrading treatment not amounting to torture, thus excluding, for example, improvements to detention conditions1707 and it focused on the incidence of torture, as opposed to whether monitoring bodies’ recommendations impact on law or practice1708).

The APT, which commissioned this research, summarised the study as follows:

For the first time, a team of researchers under the lead of Dr Richard Carver and Dr Lisa Handley studied the impact of torture prevention measures over three decades. The results, published in 2016, include 14 country studies. The research confirms for the first time in a global quantitative and qualitative study that torture prevention works, and provides us with a better understanding of which measures are the most effective in reducing the risks of torture.1709

1704 Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Guidelines on national preventive mechanisms, UN Doc CAT/OP/12/5 (9 December 2010) [15].
1708 Association for the Prevention of Torture, “Yes, torture prevention works”: Insights from a global research study on 30 years of torture prevention (September 2016) 8.
The study found that:

[d]omestic monitoring practices... have less impact in reducing the incidence of torture than detention safeguards, somewhat less than the prosecution of torturers, but distinctly more than complaints mechanisms.\footnote{Richard Carver and Lisa Handley, ‘Identifying What Preventive Mechanisms Work’ in Does Torture Prevention Work? (Liverpool University Press 2016) 95.}

Outgoing HMIP Chief Inspector stated that in adult prisons ‘the reality is [that] things have got worse, and I think they would have been even worse were it not for us... That’s probably not a great claim to make, is it?’\footnote{Simon Hattenstone and Eric Allison, ‘Prisons inspector Nick Hardwick: ‘You shouldn’t do this job for long because you get used to things you shouldn’t’’, The Guardian <https://www.theguardian.com/society/2016/jan/29/prisons-inspector-nick-hardwick-interview.> (30 January 2016).}

The Inspectorate’s work would ideally contribute to overall improvements in detention conditions and treatment of detainees, not only slow down or minimise deterioration. But it should be noted that there are many factors impacting on detention conditions and treatment that are entirely outside the control of an NPM. Prevention work at times might entail maintaining the status quo by identifying how to mitigate developing risks in order to prevent further decline in conditions and treatment (and accompanying increase in ill-treatment and/or torture) or to minimise the degree and extent of that decline. The Inspectorate’s preventative work in such circumstances might involve minimising how many detainees are impacted by ill-treatment, or the frequency or severity of that ill-treatment. Securing such outcomes should not be perceived as a failure on the part of an NPM. Of course, in such a scenario, the outcomes of the NPM’s work might not match its aspirations, but it would be playing an essential role in the prevention of torture and ill-treatment of detainees. This is not to say that an NPM should not continuously evaluate its efficacy and implement the requisite changes to its strategy and operations to enable it to achieve better outcomes.

**RECOMMENDATION:** The Inspectorate should regularly evaluate whether it is achieving its objective under OPCAT to advance the prevention of torture and ill-treatment of detainees.

**THE INSPECTORATE’S SELF-ASSESSMENT**

The SPT’s guidelines on NPMs state that the:

NPM, its members and its staff should be required to regularly review their working methods and undertake training in order to enhance their ability to exercise their responsibilities under the Optional Protocol.\footnote{Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Guidelines on national preventive mechanisms, UN Doc CAT/OP/12/5 (9 December 2010) [31].}

The SPT’s analytical assessment tool for NPMs states that NPM

[a]ctivities and their outcomes should be monitored and assessed on an ongoing basis and the lessons learned should be used to develop the practices of the mechanism. Such an assessment could be based on a framework, starting with existing challenges, such as resourcing issues, and an assessment of activities currently being undertaken, moving through a range of additional factors and activities.\footnote{Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016) [18].}
RECOMMENDATION: The Inspectorate should regularly conduct self-assessment with the view to measure and improve its efficacy, in order to continually improve its operations.

IMPROVED CONDITIONS AND TREATMENT IN DETENTION

IMPROVED TREATMENT AND CONDITIONS IN CUSTODY

‘Although effective implementation of OPCAT is important in terms of New Zealand’s standing in the international community, the ultimate measure of its success is the impact it has on people who are detained… There are many examples of the positive difference OPCAT has made to the treatment and conditions experienced by those in custody. For instance: A facility was upgraded to meet minimum health and safety standards, and stopped using substandard cells; A prison exercise area was altered to allow greater access to the outdoors; Children and young people have been provided with feedback boxes so they can have a say in how residences could be improved; Following careful monitoring, input has been provided on how a Behaviour Management System in residences could be improved; Improvements have been made to the way certain orders (which involve both a sentence of imprisonment and compulsory treatment) are recorded and monitored to ensure timely access to parole hearings; Police policies and training have been changed in order to better identify and manage risks and prevent deaths in custody; Cases of prolonged seclusion and restraint have been identified resulting in better management of those concerned, and their placement in more suitable facilities; Child, Youth and Family have implemented an analysis system to track their ‘use of force’ and ‘search’ procedures, strengthened the individual care planning processes for young people, improved mattresses for all young people, put curtains on bedroom windows for privacy, made nutritional food audits standard practice.’

RECOMMENDATION: Evaluation should include an assessment of whether conditions and treatment in detention have improved. The Inspectorate’s evidence-based findings during repeat inspections of detention sites can assist to measure outcomes from previous inspections, and thus, the Inspectorate’s impact.

DETAINING AUTHORITY ACCEPTING AND IMPLEMENTING RECOMMENDATIONS

Another means by which the Inspectorate could measure its efficacy is the detaining authority’s acceptance and implementation of its recommendations. The Inspectorate’s ability to measure its impact would be assisted by ensuring that recommendations, and their acceptance/implementation are ‘recorded in a systematic and standardised manner, to analyse the reasons for partial or non-implementation.’

1715 Moritz Birk et al, Enhancing the impact of national preventive mechanisms – Strengthening the follow-up on NPM recommendations in the EU: Strategic development, current practices and the way forward, Ludwig Boltzmann Institute of Human Rights and Human Rights Implementation Centre (May 2015) 37.
Birk et al do note, however, that whether an NPM ‘considers an authority to have implemented its recommendation may be just as much to do with making a judgment call, based on a multidisciplinary approach, its own experience and knowledge of the context and engaging with various experts, than any simplistic categorisation can hope to capture.’

HMIP – ANNUAL REPORT, RECOMMENDATIONS ACCEPTED AND ACHIEVED

‘Recommendations accepted in action plans received 1 April 2018 to 31 March 2019.’

‘Recommendations achieved in inspection reports published 1 April 2018 to 31 March 2019.’

HMICS – RECOMMENDATION IMPLEMENTATION

‘An inspection does not end with the publication of a report. It is important that we ensure that our work adds value and assists in driving improvement. We proactively monitor the recommendations made and assess the extent to which they have been implemented. Monitoring progress in this way also helps us to assess whether a follow-up inspection is required to address any residual risk.’

IPCA – DETAINING AUTHORITY’S SOLUTIONS IN RESPONSE TO RECOMMENDATIONS

‘Quality performance measures will include… conducting quarterly reviews of the police’s implementation of Authority recommendations… With regard to timeliness, the Authority has undertaken to: report findings and/or recommendations to NZ Police National Headquarters and District Commanders within 20 working days of the visit(s); seek solutions from police to issues raised in Authority findings and/or recommendations within two months of police district receipt of the Authority’s visit report.’

OCC & OMBUDSMAN - MEASURING ACCEPTANCE AND IMPLEMENTATION OF RECOMMENDATIONS

‘For a small agency we primarily measure our impact according to the extent our advice is valued and acted upon. Measures include the numbers of our recommendations that are agreed and implemented and the extent to which our advice resulted in changes to policy, legislation, and service design or service delivery.’

---

1718 Ibid 94-96.
‘[T]he Ombudsman records the recommendations made in each visit, and whether they were accepted, partially accepted, or rejected by the agency concerned. The Ombudsman has made 121 recommendations regarding prisons. Of these 77 were accepted, 17 were partially accepted and 21 rejected by the prison authorities. In 2011-12, the Children’s Commissioner made 74 recommendations regarding six residences. Of these, 39 recommendations had been implemented (27 of these were ongoing), 23 were in progress, 10 were planned for implementation, and only two were considered by CYF to be current ‘business as usual’.1722

RECOMMENDATION: The Inspectorate should develop an appropriate set of KPIs for measuring whether the detaining and supervisory authorities are responsive to its work. The KPIs could include whether the detaining authorities accept and/or implement its recommendations from its inspections (indicating both its impact and whether the Inspectorate is successfully engaging in constructive dialogue with the authorities).

KPIs could also include an assessment of the impact of its functions beyond inspection, such as measuring NTG acceptance of recommendations included in submissions to inquiries or on proposed legislative reform.

THE INSPECTORATE’S OUTPUTS

The Inspectorate should also assess whether it is proactive in creating opportunities and is responsive to existing and developing opportunities in exercising its mandate beyond inspection. For example, it should reflect on whether it has made submissions to relevant inquiries or on proposed legislative reform. This analysis of its outputs, rather than outcomes, will enable the Inspectorate to evaluate whether it is adequately engaging in broader preventative work (as discussed under Function of the Inspectorate: beyond inspection).

OCC – OUTPUTS VS OUTCOMES

‘Our outputs: Oranga Tamariki sites and residences and a sample of non-government care provider services are visited and assessed and quality reports with robust findings and recommendations are provided to Oranga Tamariki and non-government providers for action.

Our impacts: Our recommendations for improving Oranga Tamariki systems and other Oranga Tamariki contracted agencies providing care services are agreed and implemented.’1723

RECOMMENDATION: The Inspectorate should reflect on its outputs, as well as its outcomes/impact. This will assist it to evaluate whether it is adequately engaging in broader preventative work (‘beyond inspection’).

---

EXTERNAL EVALUATION OF THE INSPECTORATE

THE SPT (AND NTG)

In its Guidelines, the SPT states that the:

- effectiveness of the NPM should be subject to regular appraisal by both the State and the NPM itself, taking into account the views of the SPT, with a view to its being reinforced and strengthened as and when necessary.\(^\text{1724}\)

Under Article 11(1)(b) of OPCAT, the SPT may:

- [i]n regard to the [NPMs]... Maintain direct, and if necessary confidential, contact with the [NPMs] and offer them training and technical assistance with a view to strengthening their capacities; Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty... Make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the [NPMs].\(^\text{1725}\)

The SPT may conduct either a regular visit to a State\(^\text{1726}\) (a visit to Australia already having been announced\(^\text{1727}\)) or an advisory visit, focusing on NPMs.\(^\text{1728}\)

RECOMMENDATION: The Inspectorate’s efficacy should also be subject to external evaluation and feedback, including by and from the SPT and the NTG.

PEER REVIEW: THE COMMONWEALTH OMBUDSMAN (COORDINATING NPM) AND OTHER NPMS

Murray et al identify an opportunity for an NPM’s coordinating body to act as the expert on OPCAT nationally and to monitor the other bodies and their compliance with OPCAT. In a way, it could be argued that coordinating bodies should be undertaking activities

---

\(^{1724}\) Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Guidelines on national preventive mechanisms, UN Doc CAT/OP/12/5 (0 December 2010) [15].

\(^{1725}\) Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006).

\(^{1726}\) Office of the High Commissioner for Human Rights, Regular SPT Visit, <https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/Outline.aspx>: ‘The SPT delegation also meets with the NPM(s), if already set up, and discusses all aspects of the establishment and functioning of the NPM(s). If the process of setting up the NPM(s) is still occurring, the delegation meets with persons involved in its establishment. The SPT takes the view NPM development is an on-going process which the SPT will continue to monitor... At the end of the visit, the SPT delegation has a final meeting with senior officials of the relevant ministries and bodies. The meeting is an opportunity for the SPT delegation to present its preliminary observations and for a confidential discussion concerning the visit, including issues related to the national preventive mechanism(s).’


\(^{1728}\) Office of the High Commissioner for Human Rights, Outline of SPT advisory visits to NPMs, <https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NoteSPTAdvisoryvisitstoNPMs.aspx>: ‘During its Advisory Visits to NPMs, the SPT seeks to support and reinforce NPM’s mandate by assisting the NPM and the State Party through the provision of technical advice and assistance regarding its effective functioning and through practical capacity building activities. Generally, Advisory Visits to NPMs allow the SPT to focus on the legal and practical framework within which the NPM is working and enables the SPT to engage directly both with the NPM, as well as other national institutions and civil society to learn more about its work in practice. Such visits usually include meetings with a broad range of governmental and civil society groups as well as with the NPM itself and may also include visits to places of detention in the company of the NPM.’
which move the collective NPM towards a more coherent ‘system’ with regard to their methodologies and standards.\textsuperscript{1729}

As a part of the AHRC’s \textit{OPCAT in Australia} consultation, it ‘invited the Commonwealth Ombudsman’s office to comment on its likely role under OPCAT’.\textsuperscript{1730} The Commonwealth Ombudsman stated that it would: promote a collegiate approach between the NPM and other agencies including the Commission, to identify systemic issues and highlight areas of concern. Working with these agencies the Commonwealth Ombudsman will contribute to a shift... to a nationally consistent preventative inspection methodology, constructed on best practice both domestically and abroad.\textsuperscript{1731} The Commonwealth Ombudsman will also facilitate regular discussions within States and Territories and between them to share knowledge, increase rapport between these agencies and identify themes for ongoing research and consultation.\textsuperscript{1732}

In its baseline assessment of Australia’s OPCAT readiness report, the Commonwealth Ombudsman stated that in its role as the NPM Coordinator it:

[does] not have authority over other inspectorates and [does] not intend to engage in secondary inspections. The Office’s intention is that its coordination role will be undertaken in a collaborative and cooperative manner, with a focus on research, sharing expertise and developing communities of practice focused on areas of vulnerability or concern.\textsuperscript{1733}

Although the Commonwealth Ombudsman will not have authority over the Inspectorate, it will be in a position to provide and facilitate information-sharing among Australian NPMs on practices and issues of concern. The Australian NPMs could conduct informal peer reviews of each other, to improve both OPCAT compliance and the quality of their prevention work.

\begin{center}
\textbf{NPM - ASSESSMENT OF OPCAT COMPLIANCE}
\end{center}

‘The NPM’s coordinating activities and the promotion of the OPCAT mandate have expanded significantly since it was first established. All members complete an annual self-assessment of their OPCAT compliance, using a questionnaire based on Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) guidance. This process has informed joint work around areas requiring greater attention and members have peer-reviewed each other’s assessments with a view to learning from good practice. For example, several NPM members have adopted policies or improved practices around potential sanctions or reprisals that detainees report during or after their visits.’\textsuperscript{1734}

\textsuperscript{1729} Rachel Murray, Elina Steinerte, Malcolm Evans, and Antenor Hallo de Wolf, ‘The Scope of OPCAT’ in \textit{The Optional Protocol to the UN Convention Against Torture} (Oxford University Press 2011) 86.

\textsuperscript{1730} Australian Human Rights Commission, \textit{OPCAT in Australia Consultation Paper} (May 2017) [35].

\textsuperscript{1731} \textit{ibid} [36].

\textsuperscript{1732} \textit{ibid} [37].

\textsuperscript{1733} Commonwealth Ombudsman, \textit{Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT): Baseline assessment of Australia’s OPCAT readiness} (September 2019) 1-2.

\textsuperscript{1734} United Kingdom National Preventive Mechanism, \textit{United Kingdom National Preventive Mechanism submission to the 66th session of the Committee against Torture} (2019) 7.
ICVA – PEER REVIEWS AMONG SCHEMES

‘ICVA worked with all schemes to develop a Quality Assurance Framework (QAF). This performance framework articulates what a code compliant, good, excellent and outstanding scheme looks like and invites schemes to achieve these levels. The Framework assists schemes by guiding them on what high performance looks like. It encourages cross-pollination of good practice as schemes must publish examples of their good work and peer assess each other. Furthermore, it recognises and rewards good work.’\textsuperscript{1735}

‘Schemes have different ways of delivering things, and different ideas on how to best meet the criteria. ICVA has suggested some possible evidence sources to meet criteria but this is by no means set in stone. I am really confident that by assessing each other, schemes will come across new ideas that they might wish to incorporate in their own practice.’\textsuperscript{1736}

\textbf{RECOMMENDATION:} The Inspectorate, the Commonwealth Ombudsman (as coordinating NPM), and other NPMs in the NT and other Australian jurisdictions could consider conducting informal peer reviews to build capacity and improve practices across Australian NPMs (both in terms of OPCAT compliance and conducting effective prevention work).

CIVIL SOCIETY, PARTICULARLY ABORIGINAL COMMUNITY CONTROLLED ORGANISATIONS

The report from the meeting of NPMs organised by the OSCE ODIHR and APT notes that:

- interactions between NPMs and CSOs are not limited to cooperation. CSOs also play an important watchdog role and can ensure the accountability of NPMs through their monitoring and critical evaluations of NPMs and their activities... it is important that NPMs are fully aware of any critical assessments by CSOs and take them into account to reinforce their mandate and activities.\textsuperscript{1737}

As the APT wrote in its submission to the AHRC \textit{OPCAT in Australia} consultation, ‘[f]ollowing ratification and NPM designation, civil society engagement will be no less important in pushing implementation forward and helping existing bodies to avoid the “business as usual” scenario.’\textsuperscript{1738} For example, lawyers will be well-placed to ‘[comment] on the legislation setting up or designating monitoring bodies, as well as their working methods, functional independence, findings and reports.’\textsuperscript{1739}

CSOs, under the proposed model, will play an important role in evaluating the efficacy of the Inspectorate. As already discussed above, CSOs (particularly ACCOs) should be consulted during the development of the Inspectorate’s inspection framework and the expectations/standards. As these are tested and reviewed, there

\textsuperscript{1736} Independent Custody Visiting Association, \textit{Going for, going for...GOLD} <https://icva.org.uk/going-for-going-forgold/> (3 October 2018).
\textsuperscript{1739} Association for the Prevention of Torture, \textit{The role of lawyers in the prevention of torture} (January 2008) 8.
should be further opportunities for CSOs and ACCOs to provide feedback. However, it is essential that throughout these evaluation processes, the Inspectorate maintains its independence and CSO feedback is accepted and applied at the Inspectorate’s discretion. Where a CSO delivering services at a detention site provides feedback on how the Inspectorate conducts its inspections in relation to that same detention site, the Inspectorate should be mindful of an inherent conflict of interest.

It is particularly important that the Inspectorate be provided feedback on whether it is a culturally appropriate body, in terms of all aspects of its governance, structure and operations. Again, the Inspectorate cannot be directed to accept feedback and make changes accordingly, but it should place significant weight on ACCO evaluations of its cultural appropriateness, particularly by those operating in the NT.

**RECOMMENDATION:** Feedback from civil society organisations should be invited and given serious consideration. The Inspectorate should note the source of the feedback, as potential conflicts of interest may influence that feedback. The Inspectorate must maintain its independence and cannot be directed to accept advice.

**RECOMMENDATION:** The Inspectorate should invite and be responsive to evaluation by ACCOs (particularly NT ACCOs) of whether its structure, governance and operations are culturally appropriate. The Inspectorate should be respectful of the obligations that may arise and governance structures that may be developed through the AJA and future Treaty/Treaties when engaging with ACCOs and the NT Aboriginal community.

**PUBLIC SCRUTINY, PARTICULARLY BY THE NT ABORIGINAL COMMUNITY**

**CJINI - COMPLAINTS**

‘Inspectors should be open about their processes, willing to take any complaints seriously, and able to demonstrate a robust quality assurance process.’

**RECOMMENDATION:** The Inspectorate should have a system by which suggestions and complaints regarding its operations can be made by detainees, their families and the general public. This should be widely publicised, including in places of detention and in remote Aboriginal communities, in plain English format and translated into Aboriginal languages. Where an individual contacting the Inspectorate prefers to speak in an Aboriginal language, an interpreter should be used.

---

DETAINING AUTHORITY STAFF AND CONTRACTORS

The Inspectorate should also consider obtaining anonymous feedback from detaining authority staff and contractors after inspections, as this can similarly provide opportunities for improvement.

**HMIP – INSPECTION FRAMEWORK**

‘On the last day of the inspection, exit surveys are sent to the prison... police force and court custody suites inspected. The exit survey gathers opinions from establishment staff about how they feel the inspection was conducted; this allows the Inspectorate to monitor and improve how it inspects each type of establishment. Weekly exit surveys are amalgamated at the end of each business year to provide an annual analysis of responses.’\(^{1741}\)

---

**RECOMMENDATION:** The inspectorate could also invite feedback from detaining authority staff and contractors.

---

**ICAC**

ICAC’s functions include identifying and investigating improper conduct\(^{1742}\) engaged in by a public body (which includes ‘a body, whether incorporated or not, established under an Act’\(^{1743}\)).\(^{1744}\) Improper conduct includes corrupt conduct, misconduct, unsatisfactory conduct and anti-democratic conduct.\(^{1745}\) Should there be concerns that the Inspectorate is engaging in improper conduct, referrals can be made to ICAC.

---

**RECOMMENDATION:** Where there are concerns that the Inspectorate is engaging in improper conduct, referrals can be made to ICAC.

---

**EVALUATION OF THE NTG’S COMPLIANCE WITH ITS OBLIGATIONS UNDER OPCAT**

Evaluating the extent of the NTG’s compliance with its obligations under OPCAT is an essential consideration in assessing whether the Inspectorate is able to conduct its work effectively.

Carver and Handley’s study found that:

> the protection of monitors from threats and sanctions and their ability to conduct unannounced visits and have interviews in private with detainees are the key factors for effectiveness (reducing the incidence of torture). The

\(^{1741}\) Her Majesty’s Inspectorate of Prisons, Inspection framework (2017) 17.

\(^{1742}\) Independent Commissioner Against Corruption Act 2017 (NT) s18(1).

\(^{1743}\) Ibid s16(1)(f).

\(^{1744}\) Ibid s8(2): ‘A body engages in such conduct if the conduct is engaged in by a person or body with the authority to act on behalf of the public body; or the conduct occurs and a person or body with the authority to act on behalf of the public body expressly, tacitly or impliedly authorises or permits it to occur; or the conduct occurs and a corporate culture exists in the public body that directs, encourages, tolerates or leads to it occurring; or the conduct occurs and the public body has failed to create and maintain a corporate culture to deter or prevent it occurring.’

\(^{1745}\) Ibid s9.
research also highlights the importance of immunity for inmates who communicate with a monitoring body to mitigate the risk of reprisals.\textsuperscript{1746}

The NTG must fulfil its role in facilitating the success of the Inspectorate in preventing torture and ill-treatment. This will include, for example, granting Inspectorate staff immunity\textsuperscript{1747} and providing for protections against reprisals for those who engage with the Inspectorate.\textsuperscript{1748} Thus, an evaluation of the Inspectorate’s efficacy entails an assessment of the degree to which the NTG has met its obligations under OPCAT, in turn enabling the Inspectorate to operate as intended under OPCAT.

**RECOMMENDATION:** An evaluation of the Inspectorate’s efficacy must include an assessment of the degree to which the NTG has met its obligations under OPCAT, in turn enabling the Inspectorate to operate as intended under OPCAT. These obligations include guaranteeing Inspectorate staff immunity and protecting those who provide information to the Inspectorate from reprisals.

---

\textsuperscript{1746} Association for the Prevention of Torture, “Yes, torture prevention works”: Insights from a global research study on 30 years of torture prevention (September 2016) 8.

See also Richard Carver and Lisa Handley, ‘Identifying What Preventive Mechanisms Work’ in Does Torture Prevention Work? (Liverpool University Press 2016) 95-96: “[It] is notable that the strongest predictor of an effective monitoring mechanism (one likely to cause a reduction in the incidence of torture) is the ability of monitors to do their work without threats or sanctions against them. While formal legal immunity does not emerge in our study as being of any importance, the capacity to conduct business without interference is significant. Something not commonly provided, but potentially very important, is immunity for inmates who communicate with the monitoring body. Interviews indicate that informants’ fear of reprisals is a major obstacle to effective monitoring work. Among the other variables, monitors’ ability to conduct interviews with inmates of prisons and detention centres privately also has an impact on the incidence of torture. Again, this can presumably be understood as a measure of how far these institutions are able to conduct their activities unimpeded by the authorities.’

\textsuperscript{1747} Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 35: ‘Members of the… national preventive mechanisms shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions.’

\textsuperscript{1748} Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) Art 21(1): ‘No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way.’
CONCLUSION
With the ratification of OPCAT, the Northern Territory has an important and unique opportunity to strengthen the protections available for Aboriginal detainees, and to prevent their torture and ill-treatment. I encourage the NTG and relevant stakeholders to dedicate the time and resources that setting up a robust system of torture prevention requires. An ineffective NPM could very well engender a false sense of confidence that additional protections are in place. With that confidence, attention may be diverted elsewhere, only increasing the vulnerability of those detained and the risk of their ill-treatment. Failing to realise the objectives of OPCAT will result in the further suffering of detained Aboriginal people, an already marginalised and disempowered group.

This report presents a proposal that the NTG could consider when formulating the necessary measures to achieve OPCAT compliance. However the NTG chooses to address the issue of torture prevention, it should aim high. Rather than asking what steps need to be taken in order to guarantee it is never again the subject of a news story entitled *Australia’s shame*, the NTG should aim for the NT being a jurisdiction that exemplifies best practice OPCAT implementation, with effective prevention of the torture and ill-treatment of detained Aboriginal people. It should aspire to be a jurisdiction to which researchers will travel in order to investigate how to establish effective NPMs in their own countries, just as I have done in my Fellowship.
AUSTRALIA

OPCAT
1. Association for the Prevention of Torture, Submission No 26 to Australian Human Rights Commission, *OPCAT in Australia Consultation*, July 2017
5. National Aboriginal and Torres Strait Islander Legal Services, Submission No 47 to Australian Human Rights Commission, *OPCAT in Australia Consultation*, July 2017
7. Sisters Inside, Submission No 42 to Australian Human Rights Commission, *OPCAT in Australia Consultation*, July 2017

OTHER


NORTHERN TERRITORY

OPCAT
29. Criminal Lawyers Association of the Northern Territory, Submission No 21 to Australian Human Rights Commission, *OPCAT in Australia Consultation*, July 2017
31. Northern Territory Anti-Discrimination Commission, Submission No 1 to Australian Human Rights Commission, *OPCAT in Australia Consultation*, June 2017
33. Social Policy Scrutiny Committee, Legislative Assembly of the Northern Territory, *Inquiry into the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2018*

ROYAL COMMISSION INTO THE DETENTION AND PROTECTION OF CHILDREN IN THE NORTHERN TERRITORY
34. Aboriginal Peak Organisations Northern Territory, APO NT Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory (31 July 2017)

DEPARTMENT OF ATTORNEY-GENERAL AND JUSTICE

LOCAL COURT

POLICE
49. Northern Territory Police, ‘Assessment Guidelines for Recruiting staff and the Integrity Committee’

PRISON

YOUTH DETENTION
60. Youth Justice Advisory Committee, Annual Report 2016-17
61. Youth Justice Advisory Committee, Annual Report 2017-18

OMBUDSMAN
62. Ombudsman for the Northern Territory, Strangers in their own land: Use of Aboriginal Interpreters by NT public authorities (August 2018)

CHILDREN’S COMMISSIONER
ABORIGINAL CULTURE AND LAW

LEGISLATION AND BILLS
NORTHERN TERRITORY
87. Alcohol Mandatory Treatment Act 2013 (NT)
88. Alcohol Protection Orders Act 2013 (NT)
89. Children’s Commissioner Act 2013 (NT)
90. Correctional Services Act 2014 (NT)
91. Criminal Code Act 1983 (NT)
92. Independent Commissioner Against Corruption Act 2017 (NT)
93. Mental Health and Related Services Act 1998 (NT)
94. Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018 (NT)
95. Ombudsman Act 2009 (NT)
96. Police Administration Act 1978 (NT)
97. Serious Sex Offenders Act 2013 (NT)
98. Youth Justice Act 2005 (NT)
99. Youth Justice Amendment Bill 2019 (NT)
100. Youth Justice Regulations 2006 (NT)

COMMONWEALTH GOVERNMENT
101. Crimes Act 1914 (Cth)
102. Northern Territory National Emergency Response Act 2007 (Cth)
103. Stronger Futures in the Northern Territory Act 2012 (Cth)

OTHER
107. Ben Grimes and Will Crawford, Strong foundations for community based legal education in remote Aboriginal communities (October 2011)
110. Northern Territory, Parliamentary Estimates, 13 June 2019, 66-67


AOTEAROA NEW ZEALAND

SUBCOMMITTEE ON PREVENTION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

117. Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand, UN Doc CAT/OP/NZL/1 (28 July 2014)

NATIONAL PREVENTIVE MECHANISM

ANNUAL REPORTS

118. Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2009 to 30 June 2010 (November 2010)

119. Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2013 to 30 June 2014 (December 2014)

120. Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2014 to 30 June 2015 (December 2015)

121. Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2015 to 30 June 2016 (February 2017)

122. Human Rights Commission, Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention against Torture (OPCAT) 1 July 2016 to 30 June 2017 (June 2018)


REPORTS (OTHER)


126. Sharon Shalev, A Review of Seclusion and Restraint practices in New Zealand (28 April 2017)

SUBMISSIONS TO BILLS

127. Explanatory Note, Corrections Amendment Bill 2018 (NZ)

128. OPCAT National Preventive Mechanisms, Submission to the Justice Committee on the Corrections Amendment Bill (February 2019)

SUBMISSIONS TO INTERNATIONAL BODIES

129. OPCAT National Preventive Mechanism, New Zealand’s 6th periodic review under the Convention against Torture (February 2015)

BRIEFING TO JUSTICE COMMITTEE


132. Office of the Ombudsman, Strategic intentions for the period 1 July 2019 to 30 June 2023 (28 June 2019)

INSPECTION REPORTS

133. Office of the Ombudsman, OPCAT Findings Report A question of restraint Care and management for prisoners considered to be at risk of suicide and self-harm: observations and findings from OPCAT inspectors (1 March 2017)


MEDIA RELEASE

137. Office of the Ombudsman, ‘Corrections breaches UN Convention’ (Media Release, 1 March 2017)

MEDIA


OFFICE OF THE CHILDREN’S COMMISSIONER

FRAMEWORKS, STATEMENT OF INTENT, PRIORITIES AND ANNUAL REPORT

140. Office of the Children’s Commissioner, Mana Mokopuna (September 2018)
141. Office of the Children’s Commissioner, Monitoring Framework (August 2015)
142. Office of the Children’s Commissioner, Statement of Intent 2017-2021 (June 2017)

REPORTS AND SUBMISSIONS
145. Office of the Children’s Commissioner, What does the Mana Mokopuna lens mean to tamariki and rangatahi Māori? (December 2017)

MEDIA RELEASE
146. Office of the Children’s Commissioner and Just Speak, ‘Young people speak up on crime, police and justice issues’ (8 October 2012)

INDEPENDENT POLICE CONDUCT AUTHORITY

ANNUAL REPORTS
147. Independent Police Conduct Authority, Annual Report 2010-2011 (November 2011)

THEMATIC REPORTS

OTHER

NPM JOINT THEMATIC REPORTS
150. Independent Police Conduct Authority and Office of the Children’s Commissioner, Joint thematic review of young persons in Police detention (October 2012)

OPCAT RELEVANT LEGISLATION AND GAZETTES
151. Crimes of Torture Act 1989 (NZ)
153. Independent Police Conduct Authority Act 1988 (NZ)

TREATY OF WAITANGI

OTHER

CANADA

OFFICE OF THE CORRECTIONAL INVESTIGATOR

ANNUAL REPORTS
158. The Correctional Investigator Canada, Annual Report 2012-2013 (28 June 2013)

VISIT AND THEMATIC REPORTS

EVIDENCE AT INQUIRIES
164. House of Commons, Standing Committee on Public Safety and National Security, Indigenous people in the federal correctional system (June 2018)

CIVIL SOCIETY USE OF OCI REPORTS
165. British Columbia Civil Liberties Association v. Canada (Attorney General), 2018 BCSC 62

MEDIA

OTHER

CORRECTIONAL SERVICE CANADA
169. Correctional Service Canada, Background – Aboriginal Healing Lodges (2013)
174. Lisa Allgaier, Aboriginal Social History and Corrections at Violence and Aggression Symposium (June 15-17, 2014)
LOUKIDELIS REPORT


COUNCIL OF YUKON FIRST NATIONS


IMPLEMENTATION OF RECOMMENDATIONS

183. Yukon Department of Justice, ‘Implementation working group formed to advance Whitehorse Correctional Centre inspection recommendations’ (News Release, 18-181, 28 August 2018)
184. Yukon Department of Justice, Whitehorse Correctional Centre Inspection 2018 Report Recommendations: Matrix of Recommendations and Responses Department of Justice working document for purposes of planning and implementation (13 August 2018)

INVESTIGATIONS AND STANDARDS OFFICE


BRITISH COLUMBIA INSPECTIONS & QUEBEC OMBUDSMAN, ONTARIO

186. Independent Review of Ontario Corrections, Corrections in Ontario: Directions for Reform (September 2017)
188. Independent Review of Ontario Corrections, Segregation in Ontario (March 2017)
189. Le Protecteur du Citoyen, Assessment of follow-up to the recommendations from the special report by the Quebec Ombudsman Detention conditions, administration of justice and crime prevention in Nunavik (2016) (15 June 2018)
190. Le Protecteur du Citoyen, Special Report by the Quebec Ombudsman: Detention conditions, administration of justice and crime prevention in Nunavik (18 February 2016)

OPCAT PROJECT


YUKON HUMAN RIGHTS COMMISSION


NATIVE WOMEN’S ASSOCIATION OF CANADA

194. Native Women’s Association of Canada, Federally Sentenced Aboriginal Women Offenders (June 2017)
195. Native Women’s Association of Canada and West Coast Legal Education and Action Fund, Notice of Motion in British Columbia Civil Liberties Association and The John Howard Society of Canada v Attorney General of Canada (31 May 2018)

THE ROYAL COMMISSION ON ABORIGINAL PEOPLES


TREATIES AND RELATED DOCUMENTS

205. Yukon Indian People, Together today for our children tomorrow: a statement of grievances and an approach to settlement (January 1973)

GLADUE: CANADA AND AUSTRALIA

CANADA

206. Criminal Code, RSC 1985, c C 46, s171.2(1e)
208. Ewert v. Canada [2018] 2 SCR 165
216. R. v. Sharma, 2018 ONSC 1141, 2018 CarswellOnt 2566

AUSTRALIA
220. Australian Law Reform Commission, Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Report No 133 (2017)

CHARTER AND LEGISLATION
222. Bill C-83 An Act to amend the Corrections and Conditional Release Act and another Act 2019 (Canada)
223. Canadian Charter of Rights and Freedoms 1982 (Canada)

OTHER
226. Rachelle Larocque, Segregation Literature Review (January 2017)

UK NPM

GUIDANCE

NPM ANNUAL REPORT


SUBMISSIONS TO UK CONSULTATIONS AND INQUIRIES
231. United Kingdom National Preventive Mechanism, Response to the Ministry of Justice Consultation ‘Transforming Youth Custody’ (April 2013)
232. United Kingdom National Preventive Mechanism, UK National Preventive Mechanism Submission to Joint Committee on Human Rights Inquiry: Mental Health and Deaths in Prison (02 March 2017)

SUBMISSION AND RESPONSE TO UN COMMITTEE AGAINST TORTURE, UN HUMAN RIGHTS COMMITTEE
233. United Kingdom National Preventive Mechanism, Response of the UK National Preventive Mechanism to the CAT Committee Concluding Observations on the fifth periodic report of the United Kingdom (5 March 2014)
234. United Kingdom National Preventive Mechanism, Submission to the UN Human Rights Committee’s Seventh Periodic Review of the United Kingdom at the Committee’s 114th session (2015)
235. United Kingdom National Preventive Mechanism, United Kingdom National Preventive Mechanism submission to the 66th session of the Committee against Torture (2019)

ENGLAND

HER MAJESTY’S INSPECTORATE OF PRISONS

GUIDES, FRAMEWORKS AND PROTOCOLS
236. Her Majesty’s Inspectorate of Prisons, Ethical principles for research activities (2015)
240. Her Majesty’s Inspectorate of Prisons, Guide to Independent Reviews of Progress (IRPs) for prison staff (June 2019)
242. Her Majesty’s Inspectorate of Prisons and Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services, Protocol between Her Majesty’s Chief Inspector of Prisons and Her Majesty’s Chief Inspector of Constabulary and Fire & Rescue Services
244. The Ministry of Justice and HM Chief Inspector of Prisons, Protocol between The Ministry of Justice as the Department and HM Chief Inspector of Prisons (1 April 2019)
NOTIFICATIONS

252. Her Majesty’s Inspectorate of Prisons, A thematic review by HM Inspectorate of Prisons: Transfers and escorts within the criminal justice system (December 2014)


255. Her Majesty’s Inspectorate of Prisons, Incentivising and promoting good behaviour A thematic review by HM Inspectorate of Prisons (March 2018)

256. Her Majesty’s Inspectorate of Prisons, Parallel worlds: A thematic review of race relations in prisons (December 2005)


258. Her Majesty’s Inspectorate of Prisons, Report on an inspection visit to court custody facilities in Devon, Cornwall and Dorset 11–21 March 2019 (May 2019)


262. Her Majesty’s Inspectorate of Prisons, Thematic report by HM Inspectorate of Prisons: Report of a review of the implementation of the Zahid Mubarek Inquiry recommendations (June 2014)

263. Her Majesty’s Inspectorate of Prisons, Urgent Notification: HMYOI Feltham A (22 July 2019)

EXPECTATIONS

245. Her Majesty’s Inspectorate of Prisons, Expectations Criteria for assessing the treatment of children and young people and conditions in prisons (2012)


248. Her Majesty’s Inspectorate of Prisons, Expectations Criteria for assessing the treatment of and conditions for women in prison (2014)


INCENTIVISING AND PROMOTING GOOD BEHAVIOUR


265. Her Majesty’s Inspectorate of Prisons, HM Chief Inspector of Prisons welcomes new ‘Urgent Notification’ agreement with potential to strengthen the impact of inspections in failing jails (News Release, 30 November 2017)


INDEPENDENT MONITORING BOARD

MONITORING FRAMEWORK, ANNUAL REPORTS


EVIDENCE TO PARLIAMENTARY COMMITTEES

272. Independent Monitoring Boards, Written evidence to the Justice Select Committee inquiry on prison governance: Written evidence from Independent Monitoring Boards (IMBs) (PPG0031) (June 2019)

273. Independent Monitoring Boards, Written evidence to the Justice Select Committee inquiry on the prison population: Written evidence from the Independent Monitoring Boards (IMBs) (ppp0059) (September 2018)

ASSOCIATION OF MEMBERS OF INDEPENDENT MONITORING BOARDS


INDEPENDENT CUSTODY VISITING ASSOCIATION

REPORTS, BUSINESS PLAN, TERMS OF REFERENCE AND BLOG

277. Independent Custody Visiting Association, Going for, going for...GOLD < https://icva.org.uk/going-for-going-gold> (3 October 2018)

278. Independent Custody Visiting Association, ICVA Business Plan 2018/19

279. The Independent Custody Visiting Association, Annual Report 2017/18

280. Independent Custody Visiting Association, Become an independent custody visitor FAQ <https://icva.org.uk/purpose/>

MEDIA


305. David Anderson, ‘is anyone listening to your privileged and confidential access calls?’, Inside Time <https://insidetime.org/anyone-listening-privileged-confidential-access-calls/> (1 February 2015)
SCOTLAND

HER MAJESTY’S INSPECTORATE OF PRISONS FOR SCOTLAND

STRATEGY
323. Her Majesty’s Inspectorate of Prisons for Scotland, HM Chief Inspector’s Strategic Plan 2019-2022 (May 2019)

STANDARDS
324. Her Majesty’s Inspectorate of Prisons for Scotland, Standards for Inspecting and Monitoring Prisons in Scotland Standard 1: lawful and transparent custody (April 2018)
327. Her Majesty’s Inspectorate of Prisons for Scotland, Standards for Inspecting Court Custody Provision in Scotland (March 2017)

FULL INSPECTION, FOLLOW UP INSPECTION, THEMATIC, MONITORING AND ANNUAL REPORTS
328. Her Majesty’s Inspectorate of Prisons for Scotland, Inspection of Court Custody Provision, Paisley Sheriff Court 4 March 2019 (May 2019)
331. Her Majesty’s Inspectorate of Prisons for Scotland, HM Chief Inspector’s Annual Report 2017-2018 (September 2018)

OTHER

HER MAJESTY’S INSPECTORATE OF CONSTABULARY IN SCOTLAND

SCRUTINY PLAN AND FRAMEWORKS
341. Her Majesty’s Inspectorate of Constabulary in Scotland, HMICS Inspection Framework (11 May 2018)

INSPECTION, THEMATIC AND ANNUAL REPORTS
343. Her Majesty’s Inspectorate of Constabulary in Scotland, Inspection of custody centres across Scotland (October 2018)
344. Her Majesty’s Inspectorate of Constabulary in Scotland, Inspection of custody centres in Greater Glasgow Division (June 2019)
345. Her Majesty’s Inspectorate of Constabulary in Scotland, Inspection of the strategic arrangements for the delivery of police custody (June 2019)
346. Her Majesty’s Inspectorate of Constabulary in Scotland, Thematic Inspection of Police Custody Arrangements in Scotland (August 2014)
347. Her Majesty’s Inspectorate of Constabulary in Scotland, Thematic Inspection of the Care and Welfare of persons detained in police custody in Scotland (January 2013)

OTHER
348. Audit Scotland and Her Majesty’s Inspectorate of Constabulary Scotland, Memorandum of understanding: For cooperation between Audit Scotland, on behalf of the Auditor General for Scotland, and HM Inspectorate of Constabulary in Scotland (HMICS) (September 2014)

INDEPENDENT CUSTODY VISITING SCOTLAND

ANNUAL REVIEW
351. Independent Custody Visiting Scotland, Annual Review 2016-2017
352. Independent Custody Visiting Scotland, Annual Review 2017-2018

SCOTTISH HUMAN RIGHTS COMMISSION
353. Scottish Commission for Human Rights Act 2006 (Scot) asp 16
354. The Scottish Human Rights Commission, Consultation Submission to the Scottish Government: The Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014 (October 2014)

OTHER RELEVANT LEGISLATION AND REPORTS
355. Andrew Coyne, Review of Proposals to Improve Arrangements for Independent Monitoring of Prisons (January 2013)
356. Police and Fire Reform (Scotland) Act 2012 (Scot)
357. Public Services Reform (Scotland) Act 2010 (Scot)
358. Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order (No 39) 2015 (Scot)
359. The Scottish Parliament Justice Committee, 1st Report, 2014 [Session 4]: Proposed draft Public Services Reform
Report and Accounts Northern Ireland

custody: The detention of persons in police custody in
Regulation and Quality Improvement Authority, (October 2014)
and the Regulation and Quality Improvement Authority
inspection by Criminal Justice Inspection Northern Ireland
Criminal Justice
2014)
A follow
escort and court custody arrangements in
Criminal Justice
Northern Ireland
Custody The detention of persons in police custody in
Criminal Justice
Northern Ireland
Northern Ireland Prison Service,
(September 2016)
Northern Ireland Prison Service,
(2015)
unannounced inspection of Maghaberry Prison 9
Criminal Justice
2018
unannounced visit to Maghaberry Prison 5
Criminal Justice
recommendations made in 2015
review progress against the nine inspection
Criminal Justice
r
2016 to review progress against the nine inspection
recommendations made in 2015 (November 2016)
Criminal Justice Inspection Northern Ireland, Report on an unannounced inspection of Maghaberry Prison 4-15 January 2016 (July 2016)
Criminal Justice Inspection Northern Ireland, Report on an announced visit to Maghaberry Prison 3-4 April 2017 to review progress against the nine inspection recommendations made in 2015 (August 2017)
Criminal Justice Inspection Northern Ireland, Report on an announced visit to Maghaberry Prison 5 - 7 September 2016 to review progress against the nine inspection recommendations made in 2015 (November 2016)
Criminal Justice Inspection Northern Ireland, Report on an unannounced inspection of Maghaberry Prison 9-19 April 2018 (November 2018)

ACTION PLAN


THEMATIC INSPECTION REPORTS

368. Criminal Justice Inspection Northern Ireland, An inspection of Prisoner Escort and Court Custody arrangements in Northern Ireland (October 2010)
369. Criminal Justice Inspection Northern Ireland, Police Custody The detention of persons in police custody in Northern Ireland (June 2009)
370. Criminal Justice Inspection Northern Ireland, Prisoner escort and court custody arrangements in Northern Ireland: A follow-up review of inspection recommendations (April 2014)
371. Criminal Justice Inspection Northern Ireland, The Safety of prisoner held by the Northern Ireland Prison Service: A joint inspection by Criminal Justice Inspection Northern Ireland and the Regulation and Quality Improvement Authority (October 2014)
372. Criminal Justice Inspection Northern Ireland and The Regulation and Quality Improvement Authority, Police custody: The detention of persons in police custody in Northern Ireland (March 2016)

ASSOCIATION FOR THE PREVENTION OF TORTURE

388. Association for the Prevention of Torture, Briefing N°1 Making Effective Recommendations (November 2018)
391. Association for the Prevention of Torture, Preventing torture, a shared responsibility: Regional Forum on the OPCAT in Latin America Outcome Report, 2014
394. Association for the Prevention of Torture, The role of lawyers in the prevention of torture (January 2008)
395. Association for the Prevention of Torture, Third Jean-Jacques Gautier Symposium on monitoring psychiatric institutions (September 2014)
396. Association for the Prevention of Torture, “Yes, torture prevention works”: Insights from a global research study on 30 years of torture prevention (September 2016)

PENAL REFORM INTERNATIONAL AND ASSOCIATION FOR THE PREVENTION OF TORTURE

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS AND ASSOCIATION FOR THE PREVENTION OF TORTURE

UNITED NATIONS

CAT & OPCAT
405. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987)
406. Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006)

SUBCOMMITTEE ON PREVENTION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

ANNUAL REPORTS
407. Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture 54th sess, UN Doc CAT/C/54/2 (26 March 2015)
408. Eleventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture 63rd sess, UN Doc CAT/C/63/4 (26 March 2018)
409. Fifth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, 48th sess, UN Doc CAT/C/48/3 (19 March 2012)
410. Fourth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, 46th sess, UN Doc CAT/C/46/2 (3 February 2011)
411. Seventh annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture, 52nd sess, UN Doc CAT/C/52/2 (20 March 2014)
412. Sixth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee against Torture 50th sess, UN Doc CAT/C/50/2 (23 April 2013)

VISITS
413. Office of the High Commissioner for Human Rights, Outline of SPT advisory visits to NPMs, <https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/Outline.aspx>
415. Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the national preventive mechanism advisory visit to Ecuador made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/OP/ECU/2 (16 July 2015)
416. Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Federal Republic of Germany, UN Doc CAT/OP/DEU/2 (29 October 2013)
417. Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Honduras, UN Doc CAT/OP/HND/3 (25 January 2013)
418. Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to Hungary undertaken from 21 to 30 March 2017: observations and recommendations addressed to the national preventive mechanism, UN Doc CAT/OP/HUN/2
419. Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Visit to Armenia undertaken from 3 to 6 September 2013: observations and recommendations addressed to the national preventive mechanism, UN Doc CAT/OP/ARM/2 (22 February 2017)

420. Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Argentina, UN Doc CAT/OP/ARG/1 (27 November 2013)

AUSTRALIA


MATRIX GUIDELINES

422. Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Analytical assessment tool for national preventive mechanisms, UN Doc CAT/OP/1/Rev.1 (25 January 2016)

423. Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Guidelines on national preventive mechanisms, UN Doc CAT/OP/12/5 (9 December 2010)

OPCAT SPECIAL FUND

424. Projects implemented with the support of the OPCAT Special Fund, 2012-2016, <https://www.ohchr.org/Documents/HRBodies/OPCATFund/AwardedGrants.pdf>-

COMMITTEE AGAINST TORTURE- UK


426. Committee against Torture, List of issues prior to submission of the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, 57th sess, UN Doc CAT/C/GBR/QPR/6 (7 June 2016)

427. Human Rights Implementation Centre of the University of Bristol, Submission to the UN Committee against Torture (CAT) 66th Session on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland on compliance with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (March 2019)

428. Scottish Government, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Position statement in response to list of issues (February 2019)

SPECIAL RAPPORTEUR ON THE QUESTION OF TORTURE


430. Nils Melzer, Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/HRC/36/46/Add.2 (20 July 2018)

431. Manfred Nowak, Special rapporteur on the question of torture, Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/62/221 (13 August 2007)

432. Manfred Nowak, Special rapporteur on the question of torture, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms: Torture and other cruel, inhuman or degrading treatment, UN Doc A/64/215 (3 August 2009)

433. Manfred Nowak, Special rapporteur on the question of torture, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Addendum: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention, UN Doc A/HRC/13/39/Add.5 (5 February 2010)

434. Nigel Rodley, Special Rapporteur of the Commission on Human Rights, Civil and political rights, including the question of detention and torture, UN Doc E/CN.4/2002/76 (27 December 2001)

435. Nigel Rodley, Special Rapporteur of the Commission on Human Rights, Question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/55/290, 55th session (11 August 2000)

436. Theo van Boven, Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/59/324 (1 September 2004)

UNITED NATIONS GENERAL ASSEMBLY

437. General Assembly Res 63/166, Torture and other cruel, inhuman or degrading treatment or punishment, 63rd sess, Agenda item 64(a), UN Doc A/RES/63/166 (19 February 2009)

438. Report of the Chairs of the human rights treaty bodies on their twenty-sixth meeting – Note by The Secretary-General, UN GAOR, 69th sess, Item 69(a), UN Doc A/69/285 (11 August 2014) Annex I (‘Guidance note for States parties on the constructive dialogue with the human rights treaty bodies’)

INDIGENOUS (DECLARATION, EXPERT MECHANISM, SPECIAL RAPPORTEUR)

439. Access to justice in the promotion and protection of the rights of indigenous peoples Study by the Expert Mechanism on the Rights of Indigenous Peoples UN GAOR, 24th sess, Agenda Item 5, UN Doc A/HRC/24/50 (30 July 2013)

440. Report of the Special Rapporteur on the rights of Indigenous peoples on her visit to Australia, UN GAOR 36th sess, Agenda Item 3, UN Doc A/HRC/36/46/Add.2 8 (August 2017)


OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

446. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN GAOR, 13th sess, UN Doc A/RES/34/52(XXX) (9 December 1975)
448. Standard Minimum Rules for the Treatment of Prisoners, GA Res 70/175, UN GAOR, 70th sess, Agenda Item 106, UN Doc A/RES/70/175 (17 December 2015)

CAT AND OPCAT

460. Dejo Olowu, ‘Calibrating the Promise of the Optional Protocol to the Convention against Torture, and Other Cruel, Inhuman, and Degrading Treatment or Punishment’ (2007) 18 Stellenbosch Law Review

CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT


PRISON OVERSIGHT


OVERINCARCERATION OF INDIGENOUS PEOPLE


TORTURE AND TRAUMA ACROSS CULTURES


OTHER


JOURNAL ARTICLES
**BOOKS**

**CAT AND OPCAT**

475. Jim Murdoch and Vaclav Jiricka, *Combating ill-treatment in prisons: A handbook for prison staff with focus on the prevention of ill-treatment in prison* (Council of Europe 2016)

**INDIGENOUS INCARCERATION**


**DATA SOVEREIGNTY**


**OTHER**

