

# Ireland and the Optional Protocol to the UN Convention against Torture

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Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas  
Irish Human Rights and Equality Commission



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This report was written by Professor Rachel Murray and Dr. Elina Steinerte of the Human Rights Implementation Centre (HRIC) at the University of Bristol Law School and commissioned by the Irish Human Rights and Equality Commission.

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# Glossary of Terms

## Civil Society Organisations (CSOs)

Non-governmental organisations which are not government or business bodies and who have a role to play in monitoring human rights.

## De facto detention

Where individuals are deprived of their liberty in practice.

## National Preventive Mechanism

One or more independent bodies appointed under OPCAT to visit places of detention.

## National Human Rights Institution

A body, usually appointed by government or parliament, but which operate independently, to promote and/or protect human rights in that country.

## Ombudsman

An individual usually appointed by government or parliament to investigate complaints by individuals against government authorities or others.

## Paris Principles

Guidelines adopted by the UN General Assembly in 1993 which are seen as the benchmark for national human rights institutions.

## Prevention of torture or ill-treatment/preventive

Taking steps to decrease the likelihood of torture or ill-treatment occurring.

## Visiting mandate

The powers given to a body to enter and inspect a place of detention.

## List of Abbreviations

<b>AI</b>	Amnesty International	<b>ICCL</b>	Irish Council of Civil Liberties
<b>AMA</b>	Health Information and Quality Authority's Monitoring Approach	<b>ICT</b>	Information and Communications Technology Unit, Garda Síochána Ombudsman Commission
<b>APT</b>	Association for the Prevention of Torture	<b>IHREC</b>	Irish Human Rights and Equality Commission
<b>CAT</b>	United Nations Committee against Torture	<b>IPRT</b>	Irish Penal Reform Trust
<b>CCTV</b>	Close Circuit Television	<b>IYJS</b>	Irish Youth Justice Service
<b>CIA</b>	Central Intelligence Agency	<b>MHC</b>	Mental Health Commission
<b>CPT</b>	European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment	<b>NATO</b>	North Atlantic Treaty Organisation
<b>CRC</b>	United Nations Committee on the Rights of the Child	<b>NGO</b>	Non-governmental organisation
<b>CRPD</b>	United Nations Convention on the Rights of Persons with Disabilities	<b>NHRI</b>	National Human Rights Institution
<b>CSO</b>	Civil Society Organisation	<b>NPM</b>	National Preventive Mechanism
<b>ECF</b>	Employment Control Framework figure	<b>OCO</b>	Office of the Children's Ombudsman
<b>GSI</b>	Garda Síochána Inspectorate	<b>OPCAT</b>	Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>GSOC</b>	Garda Síochána Ombudsman Commission	<b>PSEC</b>	Prison Service Escort Corp
<b>HIQA</b>	The Health Information and Quality Authority	<b>SAGE</b>	Support and Advocacy Service for Older People
<b>HMIP</b>	Her Majesty's Inspector of Prisons	<b>SPT</b>	Subcommittee on Prevention of Torture
<b>HSE</b>	Health Service Executive	<b>THS</b>	Trinity House School
<b>HRIC</b>	Human Rights Implementation Centre, University of Bristol	<b>UK</b>	United Kingdom of Great Britain and Northern Ireland
<b>IAN</b>	Irish Advocacy Network	<b>UN</b>	United Nations
<b>IAYPIC</b>	Irish Association of Young People in Care	<b>UNCAT</b>	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>ICC</b>	International Coordinating Committee (now known as the Global Alliance of National Human Rights Institutions (GANHRI))		

## Executive Summary

Unlike other United Nations human rights treaties which require States to submit reports for examination, the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)<sup>1</sup> paves the way 'for a new generation of international human rights treaties'.<sup>2</sup> The novel approach adopted in OPCAT is the requirement that the States parties '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'<sup>3</sup> which are known as National Preventive Mechanisms (NPMs). States parties are required to allow unfettered access to all places of deprivation of liberty by the Subcommittee on Prevention of Torture (SPT), which is OPCAT's treaty body, and by their own NPMs.<sup>4</sup> These visits by the SPT and the NPM (which are followed by reports with recommendations) are seen as key to preventing torture and other ill treatment. Every NPM should be allowed to carry out visits in the manner and with the frequency that the NPM itself decides, including unannounced visits.

Ireland signed OPCAT on 2<sup>nd</sup> October 2007 but has yet to ratify. There have been some discussions about the potential Irish NPM model but these have been limited.<sup>5</sup> This report was commissioned by the Irish Human Rights and Equality Commission (IHREC)

1 GA Res. 57/199 on the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/57/199, adopted on 18 December 2003 by 127 votes to 4, with 42 abstentions; came into force on 26 June 2006.

2 Olivier and Narvaez, 'OPCAT Challenges and the Way Forwards: The Ratification and Implementation of the Optional Protocol to the UN Convention against Torture' (2009) 6 Essex Human Rights Law Review 39 at 57; see also: Subcommittee on Prevention of Torture, Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; UN Doc CAT/C/42/2 (2009) at para 3.

3 OPCAT, Article 3.

4 OPCAT, Article 4.

5 E.g. Irish Council for Civil Liberties, 'Preventing Ill-treatment — Ireland and OPCAT', Dublin, September 2007; Irish Human Rights Commission, 'Roundtable Discussion on an appropriate National Preventive Mechanism under the Optional Protocol to the UN Convention Against Torture And All Forms of Cruel, Inhuman or Degrading Treatment or Punishment', Dublin, May 2008; Irish Penal Reform Trust, 'Securing Accountability: Building effective prison monitoring, inspection, and complaints systems' conference held on Friday 27th November 2015.

and the research carried out by Professor Rachel Murray and Dr Elina Steinerte of the Human Rights Implementation Centre (HRIC) at the University of Bristol Law School in the UK, from January until May 2016. Its aim is to provide an inventory of the existing visiting mechanisms in Ireland vis-à-vis OPCAT criteria. As a result of that exercise, the ultimate aim is to make evidence-based suggestions about the designation of the Irish NPM. Thus this report, a desk-based study which draws extensively upon interviews with a limited number of (albeit key) individuals from government departments, relevant statutory agencies, civil society organisations and academic experts, outlines the context of OPCAT in Ireland, the gaps in independent inspection of places of detention in Ireland, which existing bodies undertake some form of visiting, and the options for an NPM in Ireland.

Our research found a number of broad issues which are having an impact on the progress towards ratification of OPCAT and the choice of NPM in Ireland. Firstly, all interviewees noted the importance of ratifying OPCAT. However, many expressed frustration and embarrassment at the fact that ratification had so far not yet been achieved and were puzzled as to why this was the case. Secondly, we note discussions around the possible establishment of a criminal justice inspectorate. For some, this debate appears to have been conflated with OPCAT. This has caused confusion where some have been wondering how a criminal justice inspectorate can ensure coverage of places of deprivation of liberty outside the criminal justice sector.

Turning to the NPM mandate, Article 4 of OPCAT requires that the NPMs should be permitted to visit 'any place under [the State's] jurisdiction and control where persons are or may be deprived of their liberty' including 'any form of detention or imprisonment'. This is a broad approach which encompasses not only the more 'traditional' places of detention such as prisons, police cells, but also immigration detention facilities, psychiatric hospitals, care homes, secure accommodation for children, nursing homes, etc.



There are a number of gaps in Ireland where such places are not covered by independent monitors, as required by OPCAT. This is not unusual and in some countries while police facilities and prisons may be covered, places such as psychiatric institutions are often not. So overall, the gaps may be significant, but they are not insurmountable and not unusual when compared with other jurisdictions.

The most significant gap that was identified in terms of places of detention and deprivation of liberty which did not currently have any form of inspection were Garda stations. Other areas over which there is some uncertainty as to which body covers inspection, if there are any at all, include transport and transit between prisons and court; court cells; military detention; detention of individuals awaiting deportation; detention facilities at airports and ports and on flights; as well as de facto detention and in voluntary settings.

As for the types of NPMs that have already been designated, there is considerable variety among the type of institution(s) that other States have chosen for their NPM and it is clear that no one model fits all. Similarly, no NPM is perfect. Many, if not all NPMs, have been designated without, for example, all the requirements of OPCAT having been complied with, or all gaps in terms of places of deprivation of liberty and detention having been covered. Often pragmatic solutions have been found.

It is helpful to separate out the existing bodies in Ireland into two categories. Firstly, there are those that currently undertake some form of visiting function (whether or not they fully comply with OPCAT criteria). These include: the Inspector of Prisons; the Inspector of Mental Health Services; the Inspector of Social Services; and Prison Visiting Committees. Secondly, there are those that have a broader regulatory or preventive or human rights mandate which is of relevance to torture prevention for the purposes of OPCAT. These include the Ombudsman for Children; the Ombudsman; the Defence Forces Ombudsman; and judges. Finally, the report examines the potential role of the Irish Human Rights and Equality Commission. The vast majority of the interviewees we spoke to were clear that the IHREC must play some role in the NPM, although there were differing opinions on exactly what that role should be.

The report then sets out four options that Ireland could take with respect to its NPM. There was a lack of appetite from those we spoke to for the establishment of a new body as NPM given that a number of existing bodies in Ireland already have some inspection role and cover a diverse range of fields.<sup>6</sup> For this reason, the establishment of a new body is not explored as a specific option.

**Option 1** is an ‘Inspector of Prisons Plus’: this would take the existing Inspector of Prisons and give him enhanced powers and resources. It could also include expanding the remit of this office to include court cells and transit and transportation as well as Garda facilities, including at airports and ports. This is a relatively easy way of covering Garda stations and some, but certainly not all, of the other gaps that exist and has the benefit of drawing and building upon the existing reputation and expertise of the Inspector of Prisons. It would, however, require a considerable extension of the Inspector of Prisons’ mandate and an increase in resources in terms of finance and staffing and expertise of staffing and does not have the broader regulatory or preventive function OPCAT requires. There is therefore a risk that this option might not be adequately resourced.

**Option 2** is to designate the existing inspectorates collectively as the NPM, with minor amendments to their legislative frameworks.<sup>7</sup> These bodies are: the Inspector of Prisons, HIQA, the Mental Health Commission, and the Prison Visiting Committees. This option would build upon existing bodies’ experiences, expertise and reputation and enables a relatively comprehensive coverage of all places of detention/deprivation of liberty. This option would, however, need additional resources, such as more staff, financial and other resources, to be provided to the existing bodies in order to ensure the regularity and nature of visits required of OPCAT. A preventive approach may also be different from the inspections that some of the bodies have carried out to date. Additional training and a shift in approach may therefore

<sup>6</sup> See Appendices II – IX which set out the mandates of the following bodies: Inspector of Prisons; GSOC; Garda Síochána Inspectorate; Chief Inspector of Social Services; Inspectorate of Mental Health Services; Office of the Ombudsman for Children; Children’s Visiting Panels and Prison Visiting Committees.

<sup>7</sup> See Appendices II – IX below (pp. xx-xx).

also be required. Some bodies may need to juggle two roles: as national inspectors and as part of the NPM, which may require further discussion within the body itself. Some form of coordination may be required to bring these bodies together.

**Option 3** is to designate the existing inspectorates (as in Option 2) together with some or all of the following: the Ombudsman for Children, the Ombudsman, the Defence Forces Ombudsman, judges and the IHREC. This approach offers a more comprehensive view of OPCAT, including not only those bodies with an inspection mandate but also those with a broader overview of prevention and expertise in human rights within Ireland. It would include bodies with both visiting functions as well as those with the ability to provide advice, comment on legislation, etc. and may also help to identify more easily those gaps in coverage and inconsistencies between the different bodies in their methodologies and approaches. This option, however, will require a greater degree of coordination (though not necessarily the designation of a coordinating body). The greater the number of bodies involved, the more unwieldy it may become and the greater the risk of creating a sense of hierarchy among those bodies which are selected to be within the NPM and those which are not.

Options 1, 2 and 3 could operate without a body being designated as a coordinating body.<sup>8</sup>

**Option 4** would involve a coordinating body, as some degree of coordination has been found to have been useful in other States where there are a number of bodies making up the NPM. This body could play an oversight role, develop a strategy, identify gaps, set standards, and/or monitor the implementation of recommendations, among other functions. Depending on the degree of coordination, the body may require separate staff and budget. The coordinating body would need to have credibility and be perceived as having the potential to do this. Many saw the IHREC as playing this role as it was considered to be independent, respected and robust and considering its expertise in human rights. Others suggested the Inspector of Prisons given his day-to-day experience and understanding of conducting visits to places of detention.

<sup>8</sup> Interview B7.

A few suggested to us the possibility of the Office of the Ombudsman taking on the role of coordinator. Their involvement would move OPCAT beyond being just a criminal justice issue and, as a result, there may be some degree of independence from the various sectors.

Finally, one of the key sticking points with designation of the NPM in Ireland is the lack of an independent visiting body to Garda stations and other places of detention run by An Garda Síochána. The report identifies a number of options to rectify this gap. Firstly, the Inspector of Prisons mandate could be extended to cover the inspection of Garda stations. This could be a pragmatic solution: extension of an already existing mandate is relatively easy to achieve. The current Inspector of Prisons is an independent office holder and has a reputation for being independent and critical. Indeed, the Inspector of Prisons has himself suggested that he carry out this role. It would, however, among other things, potentially overload an already busy mandate and would inevitably require additional resources.

In the alternative, either the Garda Síochána Ombudsman Commission (GSOC) or Garda Síochána Inspectorate (GSI) could undertake the visits to Garda stations. The Garda Síochána Inspectorate, (which currently undertakes inspections and inquiries into the operation and administration of An Garda Síochána) could expand its mandate to visit Garda stations, such that a further layer of institutional monitoring of the police would not then be required. However, the GSI is not perceived by some we spoke to as independent and there would also need to be significant changes to its staffing, resources and approach in order for it to comply with OPCAT. Alternatively, GSOC’s mandate (currently confined to handling complaints against members of An Garda Síochána) could be expanded to include unannounced inspections on a more preventive basis. However, concerns from some interviews were raised in relation to the perceived lack of independence of GSOC and the fact that more than minor legislative amendments would be required. One other suggestion we heard was to use the Garda Commissioners’ Strategic Human Rights Advisory Committee as a forum to discuss the inspection of Garda stations specifically.<sup>9</sup>

<sup>9</sup> Interview B3.

The report concludes with suggestions for the next steps to move OPCAT ratification forward:

**Firstly**, there is the need to ensure that there is a consultation process on OPCAT specifically which is broad in its approach and is not coupled with that on the proposed criminal justice inspectorate.

**Secondly**, a pragmatic approach to designation of the NPM is recommended but recognising there are certain minimum requirements such as independence and transparency which are imperative.

**Thirdly**, some legislative amendments are likely to be required whichever model of NPM is chosen.

**Finally**, there needs to be an open process of designating the NPM and use could be made of Article 24 of OPCAT (which enables States to postpone the selection of the NPM for up to three years initially) to give the government some time to consider its options further.

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**Professor Rachel Murray**  
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*September 2016*

# Chapter 1

## Introduction

### Introduction

Unlike other United Nations human rights treaties which require States to submit reports for examination, the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)<sup>10</sup> paves the way ‘for a new generation of international human rights treaties’.<sup>11</sup> The novel approach adopted in OPCAT is the requirement that the States parties ‘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’<sup>12</sup> which are known as National Preventive Mechanisms (NPM). States parties are then required to allow unfettered access to the Subcommittee on Prevention of Torture (SPT), which is OPCAT’s treaty body, and their own NPMs to all places of deprivation of liberty.<sup>13</sup> These visits (which are followed by reports with recommendations) are seen as key to preventing torture and other ill treatment.

Ireland signed OPCAT on 2nd October 2007 but has yet to ratify. Various discussions have taken place aimed at advancing the ratification of OPCAT since 2007, including roundtables held by Irish Penal Reform Trust (IPRT), Irish Council for Civil Liberties (ICCL) and the former Irish Human Rights Commission.<sup>14</sup> The issue has arisen more recently in discussions around the establishment of a proposed criminal justice inspectorate.<sup>15</sup>

<sup>10</sup> GA Res. 57/199 on the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/57/199, adopted on 18 December 2003 by 127 votes to 4, with 42 abstentions; came into force on 26 June 2006.

<sup>11</sup> Olivier and Narvaez, ‘OPCAT Challenges and the Way Forwards: The Ratification and Implementation of the Optional Protocol to the UN Convention against Torture’ (2009) 6 Essex Human Rights Law Review 39 at 57; see also: Subcommittee on Prevention of Torture, Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; UN Doc CAT/C/42/2 (2009) at para 3.

<sup>12</sup> OPCAT, Article 3.

<sup>13</sup> OPCAT, Article 4.

<sup>14</sup> Irish Council for Civil Liberties, ‘Preventing Ill-treatment – Ireland and OPCAT’, Dublin, September 2007; Irish Human Rights Commission, ‘Roundtable Discussion on an appropriate National Preventive Mechanism under the Optional Protocol to the UN Convention Against Torture And All Forms of Cruel, Inhuman or Degrading Treatment or Punishment’, Dublin, May 2008; IPRT, ‘Securing Accountability: Building effective prison monitoring, inspection, and complaints systems’ on Friday 27th November 2015

<sup>15</sup> Department of Justice and Equality, Proposals for a Criminal Justice Inspectorate, 23 November 2015; IPRT, *IPRT Preliminary Submission to the Consultation on the Proposals for a Criminal Justice Inspectorate*, 23 November 2015

### (a) Research Methodology

This report was commissioned by the Irish Human Rights and Equality Commission (IHREC) and the research carried out by Professor Rachel Murray and Dr Elina Steinerte of the Human Rights Implementation Centre (HRIC) at the University of Bristol Law School in the UK, from January until May 2016. The HRIC has a long-standing reputation for work on OPCAT and has drawn upon this experience in the drafting of the report.

We undertook a desk-based review of (a) discussions that had already taken place around OPCAT in Ireland; and (b) the remit and powers of existing bodies that undertake some form of independent monitoring function in places of detention or where persons are deprived of their liberty in Ireland; and (c) a list of places where individuals are or may be detained or deprived of their liberty in the jurisdiction.

We then held a number of semi-structured interviews with individuals from as wide a range of organisations as possible who have a potential role or some expert opinion on OPCAT in the jurisdiction. Among those we spoke to included members of the bodies that currently undertake inspections to places of deprivation of liberty, government departments, civil society organisations and other experts. These interviews were held in confidence under ethical requirements of the University of Bristol.

### (b) Limitations of this study

This study is qualitative. We spoke to only a limited number of (albeit key) individuals from government departments, relevant statutory agencies, civil society organisations and academic experts. Interviews were undertaken not for the purpose of a survey but to garner views and perceptions on the challenges OPCAT raises in Ireland, the current gaps in independent inspections, and the forms that an NPM could take. Consequently the views of these individuals, and quotations given as part of this report, may be considered to be personal rather than representative of all or even similar stakeholders. Where comments have been factual, we have cross-referenced them with other data and evidence where appropriate.



There are a number of related issues which impact on consideration of OPCAT in Ireland. These include discussions around a proposed criminal justice inspectorate, the complaints mandate of the relevant inspectorates, and the concept of regulation vis-à-vis inspection, among others. We have referred to these where appropriate but this report does not intend to make a comment on them specifically. We do not attempt to make any assessment of these broader issues, other than to the extent to which they impact on OPCAT discussions.

OPCAT fatigue and obstacles to ratification

All interviewees noted the importance of ratifying OPCAT. This was in part because of the need to maintain Ireland’s international reputation and remain ‘on par with others’<sup>16</sup> and also ‘it puts pressures on other countries to ratify’.<sup>17</sup> Ratification was seen as strengthening Ireland’s human rights record<sup>18</sup> and provided ‘a great opportunity to bed down prevention’<sup>19</sup> and to ‘improve the conditions on the ground’.<sup>20</sup> Overall, it was important to have oversight mechanisms in the state.<sup>21</sup>

However, many expressed frustration and embarrassment at the fact that this had so far not yet been achieved, some being puzzled as to why this had not yet happened and with several saying ‘I don’t think there is any reason why Ireland should not’ and ‘let’s just get on with it’, and ‘we have nothing to fear’.<sup>22</sup> Some, however, did not have a clear vision of exactly what the NPM should look like and this, coupled with particular challenges around the coverage of detention in Garda custody, and we would conclude that this has resulted in an impasse as to how to take OPCAT ratification forward. OPCAT was therefore seen ‘as a bit of a pain’.<sup>23</sup>

16 Interview A5; Interview B1.

17 Interview A7.

18 Interview A4.

19 Interview A4.

20 Interview A7.

21 Interview A5; Interview A9.

22 Interview A6; Interview A7; Interview A1.

23 Interview B2.

Related to this, OPCAT and the designation of the NPM was often considered to be a complicated issue,<sup>24</sup> particularly if this was linked with discussions around the proposed criminal justice inspectorate. The importance of separating out regulation from inspection, and broadening out OPCAT to beyond the criminal justice field were seen as necessary steps to taking OPCAT forward.

Finally, parallels were also drawn by some we spoke to with the ratification process for the Convention on the Rights of Persons with Disabilities<sup>25</sup> on which progress is seen to be much quicker. Note was also made of a useful roadmap to ratification of the CRPD which provided a framework and timetable for ratification.<sup>26</sup>

Proposed Criminal Justice Inspectorate

The criminal justice inspectorate discussions appear to have been conflated with OPCAT for some of the interviewees.<sup>27</sup> However, while OPCAT is mentioned in this context, as IPRT note ‘a detailed discussion of the [OPCAT’s] requirements is largely absent from the current proposals’.<sup>28</sup> OPCAT appears to have been drawn into debates around the criminal justice inspectorate but has not necessarily been the focus of or integral to them. It is outside the remit of this report to conclude that a criminal justice inspectorate is necessary or not for the purposes of OPCAT. Indeed our options leave open the possibility that a criminal justice inspectorate could be adopted either before or post ratification of OPCAT and designation of the NPM.

In addition, OPCAT extends beyond criminal justice, and encompasses all places of detention or where individuals have or may be

24 Interview A1.

25 Interview A3. Interview A8.

26 Department of Justice and Equality, Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), <http://www.justice.ie/en/JELR/Roadmap%20to%20Ratification%20of%20CRPD.pdf/Files/Roadmap%20to%20Ratification%20of%20CRPD.pdf> See further below.

27 Interview B2.

28 IPRT, IPRT Preliminary Submission to the *Consultation on the Proposals for a Criminal Justice Inspectorate*, 23 November 2015.

deprived of their liberty.<sup>29</sup> It covers ‘traditional’ places such as prisons and police facilities, but also healthcare settings, psychiatric institutions, immigration detention, care and nursing homes, residential settings for those with disabilities, children’s detention facilities, among others.<sup>30</sup>

Because OPCAT discussions have sometimes, but not solely, arisen, in the context of debates about the criminal justice inspectorate, two issues have arisen. Firstly, confusion has arisen where some have been wondering how a criminal justice inspectorate can ensure coverage of places of deprivation of liberty outside the criminal justice sector.<sup>31</sup> Secondly, the focus upon criminal justice appears to have resulted in some key organisations outside this sector being omitted from the discussions.

Consequently we suggest that it might be helpful to de-couple debates around OPCAT and the criminal justice inspectorate. OPCAT focuses specifically on torture prevention and visiting a very broad range of places of deprivation of liberty as a principal tool to achieve this. Broader regulation of the criminal justice sector, for example, is of some relevance to OPCAT but is only likely to be so indirectly.

29 Article 4 OPCAT.

30 Interview A2. Interview A3.

31 Interview A2. Interview A3.

## Chapter 2

# Analysis of the legal requirements of OPCAT in relation to NPMs

### The content of the obligation to prevent torture and other ill-treatment

The aim behind requiring States to establish an NPM is so that it can assist in preventing torture and other ill-treatment that all States parties to OPCAT have undertaken through being parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).<sup>32</sup> Prevention of torture and ill-treatment is an 'obligation in its own right'.<sup>33</sup> Unlike UN treaty bodies like the UN Committee against Torture or regional bodies, such as the European Court of Human Rights, the SPT in its practice has not made a distinction between the obligation to prevent torture and the obligation to prevent other ill-treatment. It has focused instead on the 'prevention' rather than whether the action would lead to prevention of torture or ill-treatment or both.<sup>34</sup> Thus the SPT argues that:

'The Subcommittee's visits to States parties to the Optional Protocol focus on identifying factors that may contribute to, or avert, situations that could lead to ill-treatment. Beyond simply verifying whether torture and ill-treatment has occurred, the Subcommittee's ultimate goal is to anticipate such acts and prevent their occurrence in the future by encouraging States to improve their prevention system'.<sup>35</sup>

According to the SPT, the obligation to prevent therefore:

'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 also be paid

to the whole range of other factors relevant to the experience and treatment of persons deprived of their liberty and which by their very nature will be context specific'.<sup>36</sup>

### The mandate of the UN Subcommittee on Prevention of Torture<sup>37</sup>

Established in 2007 and composed of 25 members, the SPT is the largest UN treaty body. According to Article 11 of OPCAT, the SPT's mandate has three main strands: visits to places of deprivation of liberty of States parties with the aim of strengthening the implementation of the obligation to prevent torture and other ill-treatment; playing an advisory role in relation to NPMs; and cooperation on prevention of torture and other ill-treatment with other UN and regional agencies.

#### (a) Visits

The SPT carries out a range of visits to States. These include regular visits to places of detention<sup>38</sup> (resulting in a report of its observations and recommendations which the State can choose whether or not to make public<sup>39</sup>); and follow-up visits, to consider the observations and recommendations made during the initial visit.<sup>40</sup> It also undertakes advisory visits on NPMs, to give advice and technical assistance to the NPM. Lastly, OPCAT visits are taken 'to advise and

<sup>36</sup> Subcommittee on Prevention of Torture, The approach of the Subcommittee on Prevention of Torture to the concept of prevention of torture. UN Doc CAT/OP/12/6 (2010); at para 3. See also Subcommittee on Prevention of Torture, Prevention of torture and ill-treatment of women deprived of their liberty. UN Doc CAT/OP/27/1 (2016) at para 14.

<sup>37</sup> For detailed analysis of the SPT mandate see: Murray, R., Steinerte, E., Evans, M. and Hallo de Wolf, A. The Optional Protocol to the UN Convention against Torture Oxford University Press, 2011, Chapter 5; Steinerte, E. The Changing Nature of Relationship between the United Nations Subcommittee on Prevention of Torture and National Preventive Mechanisms: in Search for Equilibrium (2013) Netherlands Quarterly of Human Rights 31:2; pp. 129-155.

<sup>38</sup> Subcommittee on Prevention of Torture. Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to visits to States parties under article 11 (a) of the Optional Protocol. UN Doc CAT/OP/5 (2015), Guideline 1-1.

<sup>39</sup> Ibid, Guideline 7-33,34.

<sup>40</sup> Subcommittee on Prevention of Torture. Report on the follow-up visit to the Republic of Paraguay from 13 to 15 September 2010. UN Doc CAT/OP/PRY/2 (2011); at para 2.

<sup>32</sup> UNCAT, Article 2.

<sup>33</sup> Subcommittee on Prevention of Torture, The approach of the Subcommittee on Prevention of Torture to the concept of prevention of torture. UN Doc CAT/OP/12/6 (2010); at para 1.

<sup>34</sup> Subcommittee on Prevention of Torture, Report on the visit to Benin. UN Doc CAT/OP/BEN/1 (2011) at para 4.

<sup>35</sup> Subcommittee on Prevention of Torture, Report on the visit to Honduras. UN Doc CAT/OP/HND/1 (2010) at para 9.

assist States parties, when necessary, in the establishment of NPMs’ and ‘focus on meeting with the relevant authorities in the State party in order to assist them in fulfilling their obligations under part IV of the Optional Protocol in dialogue with the Subcommittee’.<sup>41</sup> The report of these visits also remains confidential unless the State consents to its publication.

(b) Other SPT activities

In addition to the different types of visits described above, the SPT also produces annual reports<sup>42</sup> as well as various materials for both States parties and NPMs. The latter include: guidelines for NPMs,<sup>43</sup> addressed to both the NPMs and States parties; a self-assessment tool for NPMs;<sup>44</sup> and advice issued to NPMs on an *ad hoc* basis which the SPT has recently compiled in a public document.<sup>45</sup> The SPT has also issued a number of thematic tools. These include: on the obligation of prevention of torture and other ill-treatment;<sup>46</sup> on women deprived of liberty;<sup>47</sup> on treatment without informed consent;<sup>48</sup> and on reprisals.<sup>49</sup>

There are other *ad hoc* arrangements employed by the SPT to further facilitate its advisory

role such as : meeting NPMs and State representatives during its sessions;<sup>50</sup> holding videoconferences with NPMs;<sup>51</sup> meetings with States parties;<sup>52</sup> as well as responding to a number of requests for interpretative assistance on the provision of OPCAT and the application of a preventive approach to specific situations.<sup>53</sup>

Requirements of OPCAT in relation to National Preventive Mechanisms<sup>54</sup>

Part IV of OPCAT deals with the obligation to designate the NPM at the national level, specifying both the constituent and operational features that the body must possess. Article 18(4) contains a reference to the Paris Principles<sup>55</sup> by requiring States parties to give this instrument due consideration when designating their NPMs. These Principles cover issues such as establishment, legal basis, guarantees for independence, appointment process as well as operational modalities including the scope of the mandate and powers. As to whether States should seek an approval from the SPT when choosing their NPM, this is not required by OPCAT and the SPT has made it clear that it ‘does not, nor does it intend to formally assess the extent to which NPMs conform to the Optional Protocol’s requirements’.<sup>56</sup>

50 Subcommittee on Prevention of Torture. Sixth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN Doc CAT/C/50/2 (2013), at para 23.

51 Subcommittee on Prevention of Torture, Ninth annual report. UN Doc CAT/OP/C/57/4 (2016), at para 24.

52 Ibid, at para 23.

53 Ibid, at para 26.

54 For detailed analysis of OPCAT requirements in relation to NPMs see: Murray, R., Steinerte, E., Evans, M. and Hallo de Wolf, A. The Optional Protocol to the UN Convention against Torture Oxford University Press, 2011, Chapter 6; Murray, R., ‘National Preventive Mechanisms under the Optional Protocol to the Torture Convention: One Size Does not Fit All’, Netherlands Quarterly of Human Rights, (2008) Vol. 26, No. 4, pp. 485-516.

55 Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (The Paris Principles), Resolution 1992/54, endorsed by the UN General Assembly Resolution 48/134, 20 December 1993.

56 Subcommittee on Prevention of Torture, Fourth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc CAT/C/46/2 (2011), at para 64; Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010) at para 2.

The constituent features of the NPMs

(a) Designation of the NPM at the National Level

Article 3 of OPCAT requires that NPM be set up, designated or maintained at the national level of each State party. This means that the State party is free to choose to establish an entirely new body for the purposes of its NPM or delegate the NPM mandate to an existing body, or indeed appoint a number of bodies to the role. This must be done within a year of the ratification of OPCAT,<sup>57</sup> unless a specific declaration is made to postpone ratification in accordance with the terms of Article 24 of OPCAT.<sup>58</sup>

The NPM must be identified by an open, transparent and inclusive process involving all relevant stakeholders, including civil society<sup>59</sup> and that the NPM should be publicly promulgated as the NPM at the national level.<sup>60</sup> The SPT has also required that it be notified promptly of the body which has been designated as the NPM.<sup>61</sup>

(b) Legal basis

Principle A (2) of the Paris Principles and the SPT’s Guidelines on NPMs<sup>62</sup> require that the mandate of the NPM should be provided in a constitutional or legislative text. A legal basis is ‘a prerequisite for its institutional stability and functional independence’.<sup>63</sup> The legislative text should specify the period of office of the NPM members and any grounds for dismissal.<sup>64</sup>

57 OPCAT, Article 17.

58 According to the United Nations Treaty Collection web site, seven states have made such declarations: Bosnia and Herzegovina, Germany, Kazakhstan, Hungary, Montenegro, Philippines and Romania. Available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9-b&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en).

59 Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010) at para 16.

60 Ibid, para 22.

61 Ibid, para 23.

62 Ibid, para 7.

63 Subcommittee on Prevention of Torture, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras, 10 February 2010, CAT/OP/HND/1, at para 262.

64 Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010) at para 9.

(c) Independence<sup>65</sup>

The requirement for the NPMs to be independent is central to OPCAT<sup>66</sup> and there are a number of aspects of independence.

(i) Functional Independence

NPMs must enjoy independence from the State authorities, especially the executive.<sup>67</sup> A clear legislative basis, setting out the structural independence of NPM from all government branches,<sup>68</sup> and the term of office and grounds for dismissal,<sup>69</sup> are required.

The State should not appoint NPM members to the position which could raise questions over the conflict of interest.<sup>70</sup> The NPM itself must in turn ensure that it carries out its mandate in a manner which avoids actual or perceived conflicts of interest.<sup>71</sup>

(ii) Operational Independence

An NPM cannot be subject to any orders or instructions by any State authority.<sup>72</sup> The Association for the Prevention of Torture (APT) notes:

‘In practice, independence means that the NPM must be capable of acting without interference from State authorities. This includes obviously not tolerating interference from authorities responsible for prisons, police stations and other places of detention, nor from the government, and the civil administration. They equally must not tolerate interference by political parties. The NPM also needs to be independent from the judiciary and from other actors in the

65 For detailed analysis of the independence requirement in relation to NPMs see: Steinerte, E., The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms Under the Optional Protocol to the UN Torture Convention Human Rights Law Review 14:1 (2014).

66 OPCAT, Articles 1, 17, 18.

67 Nowak and McArthur *The United Nations Convention Against Torture. A Commentary*. (Oxford: Oxford University Press, 2008), at 1074; Carver, *Performance & Legitimacy: National human rights institutions*, (Versoix, Switzerland: International Council on Human Rights Policy: 2004 (2nd ed)) at 58.

68 Ibid, at 1075.

69 Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010), at para 9.

70 Ibid, para 18.

71 Ibid, para 30.

72 Ibid, paras 8 and 12. Article 18 OPCAT. Nowak and McArthur *The United Nations Convention Against Torture. A Commentary*. (Oxford: Oxford University Press, 2008), at 1074-1075.

41 Subcommittee on Prevention of Torture. Seventh annual report of the SPT, UN Doc CAT/C/52/2 (2014), at para 45.

42 E.g. see in relation to pre-trial detention, Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN Doc CAT/C/54/ (2015) paras 73-96.

43 Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010).

44 Subcommittee on Prevention of Torture, Analytical assessment tool for national preventive mechanisms. UN Doc CAT/OP/1/Rev.1 (2016).

45 Subcommittee on Prevention of Torture. Compilation of SPT Advice in response to NPMs requests. Advance Unedited version. (2016). See also: Subcommittee on Prevention of Torture. Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,. UN Doc CAT/OP/C/57/4 (2016) Annex.

46 Subcommittee on Prevention of Torture, The approach of the Subcommittee on Prevention of Torture to the concept of prevention of torture and other cruel, inhuman or degrading treatment or punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN Doc CAT/OP/12/6 (2010).

47 Subcommittee on Prevention of Torture, Prevention of torture and ill-treatment of women deprived of their liberty. UN Doc CAT/OP/27/1 (2016).

48 Subcommittee on Prevention of Torture, Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding the rights of persons institutionalized and treated medically without informed consent. UN Doc CAT/OP/27/2 (2016).

49 Subcommittee on Prevention of Torture, Policy of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on reprisals in relation to its visiting mandate. UN Doc CAT/OP/6 (2015).



criminal justice system’.<sup>73</sup>

The NPM members should also be accorded the necessary privileges and immunities,<sup>74</sup> an aspect discussed in more detail below.

### (iii) Financial Independence

Whilst 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’.<sup>75</sup>

The source and level of funding is important, the latter having been a challenge for the vast majority, if not all, of NPMs around the world and across all different NPM models. The SPT has recommended that the State party should ensure ‘a specific allocation of funds to the NPM’.<sup>76</sup>

### (v) Independence of Personnel

The process for selecting individual members of the NPM should be open, transparent and inclusive of all the relevant stakeholders, including civil society.<sup>77</sup> There have been NPM selection processes which the SPT has praised as exemplary<sup>78</sup> and even named as ‘a model’ because they ensured ‘the open, transparent and inclusive participation of a wide range of stakeholders’.<sup>79</sup> These processes included the establishment of working groups of

government and civil society representatives to discuss OPCAT implementation and draft relevant legislation.

### (vi) Perceived Independence

OPCAT does not expressly mention the perceived independence of NPMs, but this is something which, according to the SPT, is important.<sup>80</sup> Issues such as the manner of selection, as noted above, will be relevant here, as are: how the NPM itself discharges its mandate;<sup>81</sup> the NPM’s ability to carry out its work publicly, in a transparent manner so as to command public confidence and enable other stakeholders, such as civil society, to engage with it. The State party should not impose any restrictions on the ability of the NPM to publish its findings or to take part in public discussions on issues of relevance to the NPM.

### (d) Composition

Article 18 (2) of OPCAT requires the States parties to ensure that the experts of their NPMs have the requisite capabilities and professional knowledge; gender balance and the adequate representation of ethnic and minority groups of the country must be also sought. The NPM as a collective should have the expertise and experience necessary for its effective functioning<sup>82</sup> and should particularly include, *inter alia*, relevant legal and healthcare expertise.<sup>83</sup>

In instances when the NPM performs other functions in addition to those under OPCAT, the SPT has required that the NPM functions be located within a separate unit or department, with its own staff and budget.<sup>84</sup>

### (e) Privileges and immunities

Article 35 of OPCAT specifies that the members of the NPMs must be accorded privileges and immunities as are necessary for

the independent exercise of their functions.<sup>85</sup> This also extends to any members of civil society organisations who are formally part of the NPM and taking part in the NPM tasks.<sup>86</sup> Information obtained in the course of performing NPM tasks should remain confidential.<sup>87</sup>

### (f) Financing the NPM

The level of funding provided to the NPM must enable it to operate effectively<sup>88</sup> and provide it with complete financial autonomy.<sup>89</sup>

## Operational powers of the NPMs

### (a) The NPM Visiting Mandate

Article 4(1) of OPCAT requires States parties to allow visits by both the SPT and NPMs to any place under their 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’. This is a very broad definition which means that the NPM should have the power to visit not only places such as prisons and police cells where persons are deprived of their liberty by virtue of an order given by a public authority, but also private custodial settings.<sup>90</sup> It also encompasses not only the more ‘traditional’ places of detention such as prisons and police cells, but also those which are sometimes considered to be less obvious including immigration detention facilities, psychiatric hospitals, care homes, secure accommodation for children, nursing homes, etc. In February 2016 the SPT gave further guidance on its understanding of the scope of Article 4 of OPCAT:

‘The Subcommittee therefore takes the view that any place in which persons are deprived of their liberty, in the sense of not being free to leave, or in which the Subcommittee considers that persons might be being deprived of their liberty, should fall within the scope of the Optional Protocol, if the deprivation of liberty relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function.’<sup>91</sup>

While there have been attempts by some States parties to limit the scope of places of deprivation of liberty that would be covered by the NPM mandate,<sup>92</sup> the practice of the SPT during its own in-country visits is to adopt the broadest possible understanding of the term including centres for children,<sup>93</sup> psychiatric hospitals,<sup>94</sup> naval base corrective cells,<sup>95</sup> airport immigration facilities,<sup>96</sup> accommodation centres for refugees and asylum seekers<sup>97</sup> and detoxification centres.<sup>98</sup>

The SPT has also emphasized that the NPM mandate must include visits to all existing and any suspected, potential places of deprivation of liberty;<sup>99</sup> extend to all parts of federal States without any limitations or exceptions;<sup>100</sup> and to all places over which State party exercises effective control.<sup>101</sup>

73 APT. Briefings. Membership of National Preventive Mechanisms: Standards and experiences. November 2013. Available at: <http://www.appt.ch/en/resources/membership-of-national-preventive-mechanisms-standards-and-experiences-2013/?cat=26>.

74 Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010), at para 26.

75 Paris Principles, Principle B-2.

76 Subcommittee on Prevention of Torture. Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN Doc CAT/OP/C/57/4 (2016) Annex, at para 12.

77 Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010), at para 16.

78 Subcommittee on Prevention of Torture, Report on the Visit to Honduras, 10 February 2010, CAT/OP/HND/1, at para 262.

79 Subcommittee on Prevention of Torture, Report on the Visit to Paraguay, 7 June 2010, CAT/OP/PRY/1, at para 56.

80 Subcommittee on Prevention of Torture, Report on the Visit to Benin, 15 March 2011, CAT/OP/BEN/1, at para 97; Subcommittee on Prevention of Torture, Report on the Visit to the Maldives, 26 February 2009, CAT/OP/MDV/1, at paras 64 and 125; Subcommittee on Prevention of Torture, Report on the Visit to Brazil, 5 July 2012, CAT/OP/BRA/1, at para 32.

81 Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010) at para 30.

82 Ibid, para 17.

83 Ibid, para 20.

84 Ibid, para 32.

85 Ibid, para 26. See also: APT and IIDH. Optional Protocol to the UN Convention against Torture. Implementation Manual. Revised Edition. 2010; at p. 125.

86 Ibid, p. 216.

87 Subcommittee on Prevention of Torture. Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN Doc CAT/OP/C/57/4 (2016) Annex.

88 Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010) at para 11.

89 Ibid, para 12.

90 See also: M Nowak and E McArthur ‘The United Nations Convention against Torture. A Commentary’, Oxford University Press, 2008; p. 931.

91 Subcommittee on Prevention of Torture. Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN Doc CAT/OP/C/57/4 (2016) Annex, at para 3.

92 Policy Paper ‘‘Deprivation of liberty’ as per Article 4 of OPCAT: the scope’, Human Rights Implementation Centre, Bristol, 2011. Available at: <http://www.bristol.ac.uk/law/research/centres-themes/hric/centreinformation/publications/policypapers.html>.

93 See: Report on the Visit of the Subcommittee on Prevention of Torture to the Maldives; UN Doc CAT/OP/MDV/1 of 26 February 2009, Annex I.

94 Report on the Visit of the Subcommittee on Prevention of Torture to Mexico; UN Doc CAT/OP/MEX/1 of 31 May 2010, Annex I; also Report on the Visit of the Subcommittee on Prevention of Torture to Paraguay; UN Doc CAT/OP/PRY/1, Annex II.

95 Subcommittee on Prevention of Torture. Report on the visit to New Zealand, UN Doc CAT/OP/NZL/1 (2014), Annex II.

96 Ibid.

97 Ibid.

98 Report on the Visit of the Subcommittee on Prevention of Torture to the Maldives; UN Doc CAT/OP/MDV/1 of 26 February 2009, Annex I.

99 Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010) at para 24.

100 OPCAT, Article 29.

101 Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010) at para 24.



Article 20 of OPCAT requires States parties to ensure that their NPMs have:

- free access to all information concerning the number of persons deprived of their liberty as well as of the places of deprivation of liberty;
- free access to all information relating to the treatment of those persons and their conditions of detention;
- free access to all places of deprivation of liberty and to their installations and facilities;
- the opportunity to conduct private interviews with those deprived of their liberty as well as with anyone else the NPM would consider relevant. This can be done either personally or with a translator;
- the freedom to choose which places of detention to visit and which persons to interview.

Every NPM should be allowed to carry out visits in the manner and with the frequency that the NPM itself decides, including unannounced visits.<sup>102</sup> NPMs should establish a work plan/ programme which, over time, would ensure that visits are carried out to all actual and/ or suspected places of detention<sup>103</sup> with the frequency required to prevent torture and other ill-treatment.<sup>104</sup> It is difficult to give an exact definition of what the requirements of ‘regular’ and ‘frequent’ visits as per OPCAT mean since the practice of various NPMs vary. Many NPMs have started their work with a thorough inventory of all the places of deprivation of liberty that exist within the jurisdiction. Depending on the number and type of places in the given State party, the NPMs have usually aimed to visit all places at least once every one or two years, with some NPMs considering annual visits to be more appropriate. Some NPMs also make special accommodation for places with reported challenges which may call for more frequent visits (or visits to which may need to be prioritised) as well as for any unplanned visits on the basis of urgent issues reported. Further to this, many NPMs have developed a programme for follow-up visits.

<sup>102</sup> Ibid, para 24.

<sup>103</sup> Ibid, para 33.

<sup>104</sup> Ibid, para 34.

## (b) Reporting and Recommendations

The NPM should have the power to ‘make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations’.<sup>105</sup> Every NPM must produce reports following their visits as well as annual reports and any other forms of reports it deems necessary.<sup>106</sup> Each individual NPM must also ensure that any confidential information acquired in the course of its work is fully protected.<sup>107</sup>

NPM reports should contain recommendations to the relevant authorities, when appropriate.<sup>108</sup> When making these recommendations NPMs should take into consideration the relevant norms of the United Nations as well as the comments and recommendations of the SPT.<sup>109</sup> The State should examine the NPM recommendations and enter into dialogue with it on possible implementation measures.<sup>110</sup>

States parties are required to publish and widely disseminate the NPM annual reports<sup>111</sup> and ensure that they are presented to, and discussed by, the national legislature. They should also be sent to the SPT.<sup>112</sup>

## (c) Other NPM activities

### (i) Comments on legislation

Article 19 (c) of OPCAT requires that the NPMs be able to submit proposals and observations concerning existing or draft legislation. States should inform their NPMs of any draft legislation relevant to the NPM mandate and allow the NPM to make proposals or observations on any existing or draft policy or legislation.<sup>113</sup> States must then consider

<sup>105</sup> Article 19(b) OPCAT.

<sup>106</sup> Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010) at para 36.

<sup>107</sup> Ibid, para 37.

<sup>108</sup> Ibid, para 35.

<sup>109</sup> Ibid, para 36.

<sup>110</sup> Article 22 OPCAT.

<sup>111</sup> Article 23.

<sup>112</sup> Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010) at para 29.

<sup>113</sup> Ibid, para 28.

such comments.<sup>114</sup> The NPM in turn should also make proposals and observations to the relevant authorities concerning existing and draft policy and legislation relevant to its mandate.<sup>115</sup> This may include, for example, ensuring that a system to consult the NPM is in place during the drafting process of legislation.

### (ii) Contacts with the SPT

Article 20 (f) of OPCAT requires NPMs to be able to maintain contacts with the SPT, to send information to it and meet with it. The SPT is willing to assist NPMs with a wide variety of issues.<sup>116</sup> In addition, the SPT has specifically requested that the NPMs are able and have capacity to engage with the SPT to actively seek follow-up on the implementation of any recommendations made by the SPT.<sup>117</sup>

### (iii) Contacts with other NPMs

NPMs should aim to establish and maintain contacts between themselves.<sup>118</sup> This can prove particularly useful when different NPMs may have overlapping mandates over some places of detention and may therefore need to work together to ensure the requisite visits.<sup>119</sup>

### (iv) Other activities

The Preamble to OPCAT notes that effective prevention ‘requires education and a combination of various legislative, administrative, judicial and other means’. Many NPMs engage in, for example, awareness-raising campaigns and training programmes for law enforcement officials.<sup>120</sup>

<sup>114</sup> Ibid, para 28.

<sup>115</sup> Ibid, para 35.

<sup>116</sup> Subcommittee on Prevention of Torture. Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN Doc CAT/OP/C/57/4 (2016) Annex.

<sup>117</sup> Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010) at para 38.

<sup>118</sup> Ibid, para 40.

<sup>119</sup> This is currently the case for the Dutch and Norwegian NPMs and the SPT issued an opinion on cross-border monitoring on 2 March 2015. Available at: <https://www.sivilombudsmannen.no/whats-new/the-un-subcommittee-on-prevention-of-torture-spt-has-issued-an-opinion-on-cross-border-monitoring-article3724-2945.html>.

<sup>120</sup> See e.g. Subcommittee on Prevention of Torture, Fifth Annual Report, 19 March 2012, CAT/C/48/3, at paras 65-76.

## (v) Guarantees against reprisals

Article 21 of OPCAT contains guarantees against reprisals which all States parties must implement. The SPT has confirmed:

‘[T]he State should not order, apply, permit or tolerate any sanction, reprisal or other disability to be suffered by any person or organisation for having communicated with the NPM or for having provided the NPM with any information, irrespective of its accuracy, and no such person or organisation should be prejudiced in any way’.<sup>121</sup>

The SPT has also adopted its own policy on reprisals which also asks NPMs to carry out follow-up visits to places of detention that have been visited by the SPT in order to provide assurances against reprisals.<sup>122</sup>

<sup>121</sup> Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010) at para 27.

<sup>122</sup> Subcommittee on Prevention of Torture, Policy of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on reprisals in relation to its visiting mandate, UN Doc CAT/OP/6 (2015), at para 7(e).

Chapter 3

Approaches to NPM designation

As of the end of September 2016, there are 81 States parties to OPCAT<sup>123</sup> and of those 57 have notified the SPT of their designated NPMs.<sup>124</sup> There is considerable variety in the type of institution(s) that States have chosen for their NPM and it is clear that no one model fits all. Similarly, no NPM is perfect. Many, if not all NPMs, have been designated without, for example, all the requirements of OPCAT having been complied with, or all gaps in terms of places of deprivation of liberty and detention having been covered. Often pragmatic solutions have been found. In addition, the SPT has said on numerous occasions that the effective operation of the NPM is an ongoing process and there is a need for regular evaluation.<sup>125</sup>

Types of NPMs

(a) New single-body NPMs

14 States have opted to establish entirely new institutions. These include include the General Inspector of Places of Deprivation of Liberty (**France**); the National Agency for the Prevention of Torture (**Germany**); the National Observer for the Prevention of Torture (**Burkina Faso**); the National Committee on Torture (**Nigeria**); the Service for the Prevention of Torture (**Bolivia**); and the National Committee for the Prevention Against Torture (**Honduras**). Establishing a new body as the NPM enables it to be tailored to the exact requirements of OPCAT and the specifics of the country thus, potentially, leading to an OPCAT-compliant NPM. In reality this has not been entirely straightforward for a number of reasons.<sup>126</sup> The newly created NPM is unknown to the stakeholders which may impact its ability to

operate effectively, especially immediately after the establishment, as there is unfamiliarity with the institution, its mandate and powers.<sup>127</sup> Furthermore, just because the body has been created specifically for this purpose does not mean that it will not face challenges. As the experiences of **Germany** and **Honduras** show,<sup>128</sup> it may not always be given the necessary funding, institutional structure, and staffing needed to carry out the work. In addition, it may also face challenges with fitting into the existing system of monitoring bodies with whom it will need to build a relationship. As has been noted, there was little enthusiasm for a new body to established in Ireland.

(b) Multi-agency NPMs and co-ordinating bodies

National Human Rights Institutions (NHRIs) or Ombuds Institutions play a role in 44 of the designated NPMs either alone or in tandem with other institutions.<sup>129</sup> In an (albeit) small number of jurisdictions (**Italy, Malta, Netherlands, New Zealand and the UK**) the NPM is a collective body formed from among existing bodies who already have some mandate to either carry out visits to places of detention or have a preventive or broader torture prevention focus.<sup>130</sup> The number of bodies included within these models varies.

**Italy** has a National Authority and then Local Authorities; **Malta** has two Boards of Visitors: one for Detained Persons and another for Prisons. In the **Netherlands** there are four institutions which carry out the NPM mandate: the Inspectorate of Security and Justice (also the coordinating body); the Health Care

123 In the Council of Europe, Andorra, Belarus, Latvia, Monaco, Russian Federation, San Marino and Slovakia have not yet signed; Belgium and Iceland have signed but not ratified.

124 United Nations Treaty Collection web site. Available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9-b&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en)

. For details of the designated NPMs see: HRIC, NPM Directory. Available at: <http://www.bristol.ac.uk/law/research/centres-themes/hric/resourcesreferences/npmdirectory/>

125 SPT, Guidelines on NPMs, para 15.

126 SPT, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Federal Republic of Germany. Report for the State Party. UN Doc CAT/OP/DEU/1 (2013) at para 24.

127 SPT, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Senegal. Report for the National Preventive Mechanism. UN Doc CAT/OP/SEN/2 (2013) at para 18; SPT, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of Honduras. Report for the National Preventive Mechanism. UN Doc CAT/OP/HND/3 (2013) at para 9.

128 Ibid, at para 9; SPT, Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Federal Republic of Germany. Report for the State Party. UN Doc CAT/OP/DEU/1 (2013) at paras 19-20.

129 APT, List of Designated NPMs by regions and countries. Available at: <http://www.apr.ch/en/list-of-designated-npm-by-regions-and-countries>

130 Note also in Argentina, Brazil and Germany where the NPMs are multi-agency bodies but mainly due to the federal structure of their countries.



Inspectorate; the Inspectorate for Youth Care; and the Council for the Administration of Criminal Justice and Protection of Juveniles.<sup>131</sup>

**New Zealand** has five bodies: the Office of the Ombudsman; the Independent Police Conduct Authority; the Office of the Children's Commissioner; the Inspector of Service Penal Establishments of the Office of the Judge Advocate General of the Armed Forces; and the Human Rights Commission (which acts as the coordinating body). In the **United Kingdom** there are 20 bodies across the four jurisdictions which all together make-up the NPM,<sup>132</sup> with Her Majesty's Inspectorate for Prisons being designated as the coordinating institution.

The benefits of a multi-agency NPM are that it draws upon existing monitoring experience, know-how, expertise and professionalism as well as building upon the established reputation. It enables a more comprehensive coverage of different types of places of detention by incorporating a number of bodies and uses the expertise gained in the range of different fields. In addition, not all bodies involved in this model will need to have the power to visit places of detention and some may be able to bring a broader preventive and promotional mandate. The challenge may be for this model, particularly if the number of bodies involved is considerable, is its ability to act as one entity, in a uniform manner, as an NPM. The appointment of a coordinating body from among those who are part of the NPM is aimed to address this. This model may bring in not only inspection bodies but also those whose focus is more preventive.

### (c) Civil society involvement in NPMs

Some countries have adopted a model which informally or formally (known as the 'Ombudsman Plus' model) includes civil society organisations (CSOs) as part of the NPM. In **Georgia** it is the Public Defender's office which is formally designated, although the legislation requires that he/she 'cooperate with

the respective bodies and mechanisms of the United Nations as well as international, regional and national institutions or organizations working on the protection of persons from torture and other cruel, inhuman or degrading treatment or punishment in the places of arrest, detention or other places of restriction of liberty.'<sup>133</sup> In practice, this was achieved through a public call for individual experts to serve in their personal capacity.

Civil society involvement in this Ombudsman Plus model can include a range of different type of organisations: 'humanitarian organisations' (**Slovenia**); human rights and academic organisations (**Croatia**);<sup>134</sup> 'representatives of various NGOs' (**Armenia**); specifically named organisations (e.g. RCT in **Denmark**); 'penitentiary experts, psychiatrists, psychologist, general physicians, etc.'. (as in **Georgia**); or 'experts in relevant fields'.<sup>135</sup>

The range of tasks performed by NGOs in this model varies significantly: in some instances they can carry out the visits with members of the ombudsman team (e.g. Croatia and Slovenia); in others, they simply have an advisory capacity. Funding is provided but in some instances has been seen as limited or insufficient. For example, it was noted by the SPT after it visited **Armenia** in 2013 that a lack of financial resources to the Human Rights Defender Office meant that it was unable to pay the expenses of the Expert Council and up until 2012 expenses had been paid for by the members themselves.<sup>136</sup> In **Croatia** a *per diem* (or daily allowance) is provided to NGO representatives for the work they undertake. Dignity, the NGO which is part of the **Danish NPM** receives core funding through the Finance Act, but its NPM work is funded through the Danish Parliament. This is a fixed annual sum, although we were informed that this does not cover all the activities and it is requesting an increase for this reason.

131 There are also three associate institutions: the Commission of oversight for penitentiaries; the Commission of oversight for the police cells and the Commission of oversight for military detention. The Dutch National Ombudsman also was designated as one of the associates but in September 2014, the National Ombudsperson's Office withdrew from the NPM, criticizing the functioning and structure of the mechanism and its insufficiently independent inspections. See: APT. OPCAT Database. The Netherlands. Available at: [http://www.apr.ch/en/opcat\\_pages/npm-designation-48/](http://www.apr.ch/en/opcat_pages/npm-designation-48/)

132 HMIP. National Preventive Mechanism. Available at: <https://www.justiceinspectorates.gov.uk/hmiprison/national-preventive-mechanism/>

133 9.03.2010 N 2711 enacted from 1 October 2010, Organic Law on Georgia Public Defender (as amended, 2009), Article 3(3).

134 Croatia, Act on National Preventive Mechanism, Article 2.

135 Montenegro, Law on Ombudsman, Article 25(2).

136 Subcommittee on Prevention of Torture, 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 Republic of Armenia. Report to the State Party, UN Doc CAT/OP/ARM/1, 22 May 2015, para 30.

The advantages of including CSOs formally within the designated NPM are that they can bring some breadth of expertise to the NPM and examples of good practice; and offer an external perspective and critical eye from within the NPM itself. Conversely, there can be a tension between the CSO acting in their capacity as the NPM and their independence and ability to critique the work of the statutory bodies. In addition, CSOs may not have the resources to be able to contribute in this way; and the pool of CSOs in Ireland is relatively small. Finally, this model may create a perceived hierarchy among CSOs in terms of who is in and out of the NPM.

### Legal basis<sup>137</sup>

When a new body has been established as the NPM, clearly it has been necessary to adopt new legislation.<sup>138</sup> When an existing institution, or institutions, has been designated as NPM, the current constitutional provisions or legislation has often been used as the legal basis. So an institution established by constitution (e.g. the Parliamentary Ombudsman of **Denmark**) may then be designated as NPM by a parliamentary resolution without the need to amend the constitution.<sup>139</sup> In **Hungary**, the designation of the NPM coincided with the passing of constitutional legislation on the Ombudsman.<sup>140</sup>

In some countries legislative amendments were required. In **Georgia**, for example, amendments to the Organic Law on the Public Defender were adopted. Aside from naming the institution as the NPM, the amendments also required that requisite funding to carry out the NPM mandate was provided and set

137 See Appendices II – IX below which outline the amendments that may be required to primary law in Ireland to bring it into compliance with OPCAT.

138 See, for example, Loi n° 2007-1545 du 30 octobre 2007 instituant un Contrôleur général des lieux de privation de liberté (1). NOR: JUSX0758488L Version consolidée au 21 janvier 2015 which established the General Controller of Places of Deprivation of Liberty in France, the French NPM.

139 The Danish Parliamentary Ombudsman *Annual Report 2009* (Denmark, Copenhagen, 2010), at 17-18. Article 55 of the Danish Constitution (1953) reads: 'Statutory provision shall be made for the appointment by the Folketing [the Danish Parliament] of one or two persons, who shall not be members of Folketing, to supervise the civil and military administration of the state'.

140 See: Act CHI of 2011 on the Commissioner for Fundamental Rights was adopted in accordance with Article 30 (5) of the Basic Law of Hungary.

out the powers of the NPM to have unimpeded access to all places of deprivation of liberty, to hold private interviews with persons the NPM chooses and examine any appropriate documentation.<sup>141</sup> Similarly, in **Finland** a new Chapter 1A was added to the Parliamentary Ombudsman Act.<sup>142</sup> This Chapter not only designated the Ombudsman Office as the Finnish NPM but also set out the NPM powers to freely visit all places of deprivation of liberty, freedom to access any documents and information, ability to carry out private interviews and issue recommendations. It also set out guarantees against reprisals.

### Resources

Several NPMs have noted challenges with adequate funding not being provided to undertake the role. For example, the **German NPM**, the National Agency for the Prevention of Torture, issued a specific Declaration at the start of its Second Annual Report in 2011 stating that it had been 'unable to carry out its statutory task under the Optional Protocol with the staffing and funding available. (...) A considerable increase in staff and funding is necessary'.<sup>143</sup>

The **Albanian NPM** reported difficulties in effectively fulfilling its mandate due to serious funding shortages in 2009<sup>144</sup> and the **Polish NPM** reported no funding allocated in 2010.<sup>145</sup>

At the time when **New Zealand's NPM** was designated, the government also considered the financial implications of designating a number of existing agencies as the NPM and concluded that these will be able to carry out OPCAT visits within the existing budgets with

141 HRIC, NPM Directory. Georgia. Available at: <http://www.bristol.ac.uk/law/research/centres-themes/hric/resourcesreferences/npmdirectory/georgia.html>

142 HRIC, NPM Directory. Finland. Available at: <http://www.bristol.ac.uk/law/research/centres-themes/hric/resourcesreferences/npmdirectory/finland/>

143 Federal Agency for the Prevention of Torture, *Annual Report 2010 / 2011* (Wiesbaden, 2011) at 9.

144 See Activity of the People's Advocate on the role of the National Mechanism on Prevention of Torture Compilation of Annual Reports 2008- 2010 (Tirana, 2011) at 22-23.

145 See Report of the Human Rights Defender on the activities of the National Preventive Mechanism in Poland in 2009. (Warsaw, 2010) at Section 4.

some minor adjustments.<sup>146</sup> The government did recognise, however, that the New Zealand Human Rights Commission as the central NPM body would require an additional staff member to be employed on a full-time basis for the first two years and once the systems/relationships are established the staff member need only be employed part-time. While the estimates in relation to the requisite funding for the New Zealand’s central NPM appear to have been realistic,<sup>147</sup> the funding for the other NPM organisations proved insufficient to meet the requirements of regular visiting by OPCAT.<sup>148</sup>

### Breadth of coverage

NPMs have been designated in many countries without having the breadth of coverage that OPCAT requires. Some NPMs do indeed have experience in covering the broad range of places of detention required by Article 4 of OPCAT. For example, in 2009 the **Estonian Chancellor of Justice**, the institution which was designated as the Estonian NPM, conducted visits not only to prisons and police detention facilities but also to psychiatric institutions, social welfare institutions, care homes, special schools for children with behavioural problems as well as rehabilitation centres for children with addiction problems.<sup>149</sup> The **UK NPM** in its 2014-15 Annual Report notes, *inter alia*, its visits to the customs custody (both at airports and ports), court custody, private hospitals and care homes.<sup>150</sup> The **New Zealand NPM** in 2013-14 reported, *inter alia*, visits to the corrective establishments of armed forces, children and youth care and protection residences, acute mental health

146 Office of the Minister of Justice (Hon Phil Goff) Administrative And Legislative Changes Required To Implement The Optional Protocol To The Convention Against Torture (2004) paras 57-60.

147 Human Rights Commission of New Zealand *OPCAT in New Zealand. 2007-2012. A review of OPCAT implementation by New Zealand’s National Preventive Mechanisms. July 2013* (Auckland, 2013), at p. 22.

148 Human Rights Commission of New Zealand *OPCAT in New Zealand. 2007-2012. A review of OPCAT implementation by New Zealand’s National Preventive Mechanisms. July 2013* (Auckland, 2013) at pp. 4, 10-11, 21-22, 29, 31.

149 ‘2009 Overview of the Chancellor of Justice. Activities for the Prevention of torture and other cruel, inhuman or degrading treatment or punishment. Statistics of Proceedings.’ Tallinn, 2009; pp. 38-47.

150 UK NPM Monitoring places of detention. Sixth Annual Report of the United Kingdom’s National Preventive Mechanism. 1 April 2014 – 31 March 2015. Available at: <http://www.nationalpreventivemechanism.org.uk/wp-content/uploads/2015/12/NPM-Annual-Report-2014-15-web.pdf>

facilities, intellectual disability centres and immigration detention.<sup>151</sup>

### Coordination

In some jurisdictions where multiple bodies have been designated as the NPM, one of these has also been selected to be a coordinating body. In the **Netherlands, New Zealand and the UK** a coordinating body has been chosen from among those designated. In the **Netherlands**, the Secretary of State designated the Inspectorate of Security and Justice as the coordinator and in the **UK** the Minister of Justice designated the members of the NPM in a Ministerial Statement and announced that Her Majesty’s Inspectorate of Prisons (HMIP) would act as the coordinating body.

In **New Zealand** the ‘central national preventive mechanism’ (the New Zealand Human Rights Commission) was chosen by the Minister on announcement in the Gazette.<sup>152</sup> A Cabinet Paper set out what changes were needed to implement OPCAT as well as the role of the New Zealand Human Rights Commission. This included reviewing reports made by the other bodies in the NPM; identifying systemic issues; coordinating recommendations to government; and being the point of contact for the SPT.<sup>153</sup> A further job description for the New Zealand Human Rights Commission added that as the central mechanism it should coordinate meetings of the NPM, submissions to international treaty bodies, and engagements with civil society; and provide expert advice to the NPM bodies.<sup>154</sup>

For the **UK**, the role of the coordinating body is set out on its website as promoting ‘cohesion and a shared understanding of OPCAT among NPM members’; encouraging ‘collaboration and sharing information’ as well as joint

151 Human Rights Commission of New Zealand. 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. Auckland, New Zealand, 2014.

152 Crimes of Torture Act, 1989, as amended, s.31. The Act also sets out the functions of the Central NPM.

153 Cabinet Paper, Administrative and Legislative Changes required to implement the Optional Protocol to the UN Convention Against Torture, November 2004, paras 4 and 44.

154 New Zealand, Central National Preventive Mechanism, Job Description, 23 February 2015, on file with authors.

activities. It should also liaise with the SPT and other bodies as well as government including preparing reports.<sup>155</sup> Each member of the NPM in the UK contributes a modest annual amount to the coordination of the NPM.

Both the **UK and New Zealand** have a part-time coordinating post and the **UK** also has an independent chair of the NPM (an unpaid position) held by an individual who is not from a member body, to steer NPM meetings; support NPMs in implementing OPCAT activities; and speak on behalf of the NPM at public meetings and to external actors. A steering committee is composed of one member from England, Northern Ireland, Scotland and Wales and an attempt to ensure different types of detention monitoring.

### Conclusion

As can be seen, there is no single NPM model which is considered better than others and the choice of NPM depends on the constitutional, political and social context of the particular jurisdiction, as well as the process by which the NPM is designated. This needs to be detailed and transparent, involving all relevant stakeholders. Moreover, once the NPM has been designated, through an appropriate process, it is important to note that:

‘[T]he effective operation of the NPM is a continuing obligation. 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’.<sup>156</sup>

155 <http://www.nationalpreventivemechanism.org.uk/about/governance-and-structure/npm-coordination/>

156 Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010) at para 15.



## Chapter 4

# Places of detention not currently monitored

NPMs need to be able to visit all places of detention and their facilities as defined by Article 4 of OPCAT. Appendix I lists current places of detention in Ireland. As noted in Appendix I there are a number of gaps in Ireland currently where such places are not covered by independent monitors, as required by OPCAT.

This is not unusual and many other States parties to OPCAT have been in a similar situation when designating their NPMs. While police facilities and prisons may be covered, places such as psychiatric institutions are often not, for example. So overall, the gaps may be significant, but they are not insurmountable and not unusual when compared with other jurisdictions. We would recommend that Ireland carries out a detailed inventory of all places of deprivation of liberty, noting the extensive definition as per Article 4 of OPCAT.

### Places of Detention under the Mandate of An Garda Síochána

The most significant gap in Ireland that was identified in terms of places of detention and deprivation of liberty which did not currently have any form of inspection were Garda stations. As the proposals for a Criminal Justice Inspectorate note, given that the existing inspectors do not cover those in the custody of the Garda Síochána or the Garda Síochána Ombudsman Commission ‘this has to be addressed in the context of OPCAT’.<sup>157</sup>

There are a number of bodies with some remit over the Garda Síochána: the Garda Síochána Inspectorate (GSI), the Garda Síochána Ombudsman Commission (GSOC); and the Policing Authority. Some interviewees we spoke to did not consider the relationship between these bodies to be particularly clear.<sup>158</sup> The roles of the respective bodies are explored in more detail in Chapter 5.

<sup>157</sup> Proposals for a Criminal Justice Inspectorate, para 1.3.5.

<sup>158</sup> Interview B7.

### Other places of detention

Beyond the Garda stations, there are other places in Ireland which OPCAT would consider to be places of detention or where individuals are deprived of their liberty and which are not currently subject to the required level of inspection.

#### (a) Transport and transit

Transport between prisons and court and transport of prisoners is the responsibility of the Gardaí. Interviewees noted that it was ‘not clear if CCTV’ was in the vehicles,<sup>159</sup> and it was ‘not clear that anyone monitors this’.<sup>160</sup>

Transport from courts to prisons appears to be under the responsibility of the Gardaí.<sup>161</sup> However, the Prison Service Escort Corp (PSEC) which is established within the Irish Prison Service, albeit on an independent basis, transports prisoners to and from court.<sup>162</sup> The PSEC is therefore theoretically, but not currently in practice, under the responsibility of the Inspector of Prisons. The Inspector of Prisons has said that he would inspect prison transport if the legislation were amended.<sup>163</sup>

#### (b) Court cells

Similarly, we were also told that court cells were ‘not covered’.<sup>164</sup> The Inspector of Prisons has said that he could cover cells in courthouses but this would require amendment to statute.<sup>165</sup>

<sup>159</sup> Interview B2.

<sup>160</sup> Interview B2.

<sup>161</sup> Interview B3; Interview A1; Interview A4; Interview A6. See also Office of the Inspector of Prisons. Annual Report 2013/2014, 26th August 2014, para 3.1.

<sup>162</sup> <http://www.irishprisons.ie/index.php/joomlaorg/prison-support-units/prison-service-escort-corp>

<sup>163</sup> Submission by Judge Michael Reilly, Inspector of Prisons on Proposals for a Criminal Justice Inspectorate, 23 November 2015, p.5. The Inspector of Prisons has produced a report on a death in a courthouse, see Inspector of Prisons, Report of an investigation into the circumstances surrounding the death of Shane Rogers at Cloverhill Courthouse on 20th December 2011.

<sup>164</sup> Interview B3; Interview A1; Interview A4. See also Office of the Inspector of Prisons. Annual Report 2013/2014, 26th August 2014, para 3.1.

<sup>165</sup> Submission by Judge Michael Reilly, Inspector of Prisons on Proposals for a Criminal Justice Inspectorate, 23 November 2015, p.5. The Inspector of Prisons has produced a report on a death in a courthouse, see Inspector of Prisons, Report of an investigation into the circumstances surrounding the death of Shane Rogers at Cloverhill Courthouse on 20th December 2011.

(c) Military detention

The Defence Forces Act<sup>166</sup> s.171 permits the arrest of ‘Any person subject to military law, who has committed, is found committing, is suspected of being about to commit, or is suspected of or charged under this Act with having committed an offence against military law’. Section 172 of the Defence Forces Act enables such a person to ‘be placed in service custody by or on the order of an officer, man or other person having authority to arrest him’. S.232(1) provides for the power of the Minister to ‘set apart any building or part of a building under the control of the Minister as a military prison or detention barrack and to declare that any such building or part of a building shall be a military prison or a detention barrack, as the case may be’.

It is not clear the extent to which there are military detention facilities (i.e. for members of the Irish Defence Forces) in Ireland. As one interviewee told us: ‘I am not sure if it exists’.<sup>167</sup> We heard from a number of interviewees the possibility that there may be detention facilities in the Curragh, or that there may be detention facilities in most military installations.<sup>168</sup>

Interviewees considered that such places of detention were likely to be relatively few and one potential may be to extend the remit of the Defence Forces Ombudsman to enable him or her to be informed if anyone were detained and to have the power to inspect such places at any time.<sup>169</sup>

With respect to detention extraterritorially or in the context of military bases overseas, some we interviewed said that whilst Ireland was involved in peacekeeping forces with UN and NATO abroad and had significant number of troops in Lebanon at the moment, they were not aware of any instances where individuals were detained by the Irish military outside of the Republic of Ireland.<sup>170</sup>

(d) Immigration detention

There are currently no separate immigration detention facilities in Ireland. Individuals who

166 Defence Forces Act 1954.

167 Interview B2.

168 Interview B3; Interview B7; interview B8. See Appendix I.

169 Interview B3

170 Interview B1; Interview A1.

are awaiting deportation would appear to be held in Garda stations for a short period and then transferred to a prison.<sup>171</sup> A person awaiting deportation can be held in places of detention as defined by the Aliens Order Art.5(4) as amended. Members of An Garda Síochána are appointed as immigration officers and work out of Dublin airport and other ports.

As part of an inquiry conducted by the former Irish Human Rights Commission in 2009, it was found that Garda stations were used or if it was longer than around two days, then prisons were preferable.<sup>172</sup> The IHRC also noted that Cloverhill Remand Prison was the ‘preferred place of detention for men following their refusal to leave to land have been deemed necessary to detain’, for women, they were detained in the Dóchas Centre, Mountjoy Prison or Limerick Prison’.<sup>173</sup> The former IHRC has recommended that decisions made by immigration officers on refusal of leave to land ‘be subject to oversight by an independent body with the authority to investigate complaints or to undertake own-motion investigations into all immigration-related practices’.<sup>174</sup>

One issue that arose in the course of the interviews were Direct Provision centres. Although individuals are free to leave these centres, some noted that in practice they had limited ability to do so and should therefore be considered as *de facto* detention.<sup>175</sup> The Ombudsman for Children has noted concerns in this context and its current inability to investigate in relation to asylum and immigration:

‘The Ombudsman for Children Act 2002 contains an exclusion that prevents the OCO from investigating the actions of public bodies where those actions involve the administration of the law regarding asylum, immigration, naturalisation and citizenship. The Department of Justice and Equality has interpreted this

171 Interview B3. See also Human Rights Consultants, *Immigration-Related Detention in Ireland. A Research Report for the Irish Refugee Council, Irish Penal Reform Trust and Immigrant Council of Ireland*, B3, Human Rights Consultants, November 2005.

172 IHRC, Report of an Enquiry into the treatment of a visitor refused leave to land in the State, January 2009, IHRC, Dublin, para 4.17.

173 Ibid, para 6.11.

174 Ibid, p.115.

175 Interview B6. Interview A4. Interview A6. Interview A7.

exclusion broadly and does not accept the jurisdiction of the OCO to investigate complaints from asylum seekers and protection applicants regarding the actions of the Reception and Integration Agency (RIA) and the private service providers contracted to provide accommodation to them. The OCO is strongly of the view that protection applicants should have access to an independent complaints-handling mechanism regarding the actions of these bodies and that the OCO’s investigatory remit should be clarified accordingly’.<sup>176</sup>

The UN Committee Against Torture in 2011 noted that it was ‘concerned at the placement of persons detained for immigration-related reasons in ordinary prison facilities together with convicted and remand prisoners (arts 11 and 16)’ and subsequently recommended ‘that the State party take measures to ensure that all persons detained for immigration-related reasons are held in facilities that are appropriate to their status’.<sup>177</sup>

The government has been discussing the possibility of creating a separate purpose built immigration detention facility in Thornton Hall.<sup>178</sup>

(e) Airports, ports, etc.

Detention facilities at airports and ports are run by the Garda National Immigration Bureau and therefore under the jurisdiction of the An Garda Síochána. In addition, in certain limited circumstances, Revenue Commissioners have powers of arrest and detention and customs officials can arrest without warrant a person if they have reasonable grounds

176 Report of the Ombudsman for Children to the UN Committee on the Rights of the Child on the occasion of the examination of Ireland’s consolidated Third and Fourth Report to the Committee. April 2015 at p.10. See also Ombudsman for Children. Annual Report 2014. At pp. 40-41. See also Ombudsman for Children. Annual Report 2013, pp.9, 39-40. The Government has since committed, in principle, to empowering the Ombudsman and the Ombudsman for Children to receive complaint from residents of Direct Provision Centres.

See Parliamentary debate of 20 July 2016 which reaffirms this commitment. As of that date, negotiations were ongoing, Ireland has accepted a recommendation under the UPR in this regard, see Recommendation 135.83 from Honduras to amend the law that impedes the Ombudsman for Children from investigating the claims of children that find themselves in a situation of irregular migration, Human Rights Council, Report of the Working Group on the Universal Periodic Review, 18 July 2016, A/HRC/33/17.

177 Committee against Torture, Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Ireland. UN Doc. CAT/C/IRL/CO/1 (2011), at para 17. See also IHREC Policy Statement on the System of Direct Provision in Ireland, 10 December 2014, pp.18-19.

178 Ibid.

for suspecting the person has committed an offence on the improper importation or exportation of goods.<sup>179</sup> These officials also have the power to detain individuals in order to search them.<sup>180</sup>With respect to deportation of individuals, we were told that flights would be monitored by Frontex<sup>181</sup> and that those deported would be accompanied by members of An Garda Síochána.<sup>182</sup> Recent concerns were raised, during discussions at the time of passage of the International Protection Act 2015, of detention of minors at ports and airports.<sup>183</sup>

As a result, the lack of an independent inspection regime for Garda stations, leads to a lack of an independent inspection regime over detention facilities at airports and ports.<sup>184</sup> Indeed, some we spoke to were ‘not aware if there are detention facilities’ at ports or airports,<sup>185</sup> and were not clear on who covered flights or repatriation.<sup>186</sup>

Independent monitoring of such facilities and of flights arose a number of years ago with respect to concerns over extraordinary rendition. As a result, the former Irish Human Rights Commission, called on the government to:

‘introduce an effective inspection regime as a matter of urgency, and, noting OPCAT, that ‘the inspection regime... should have effective monitoring and inspection components. It should be properly resourced and be overseen by an independent body (possibly a national preventive mechanism)’.<sup>187</sup>

In a Resolution by the European Parliament in February 2007, it recommended a ban on CIA aircraft landing in Ireland if no inspection

179 Customs Act 2015, s.32.

180 Customs Act 2015, ss.30(1), 30(5)

181 Frontex is the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. It ‘promotes, coordinates and develops European border management’ in line with the EU Charter on Fundamental Rights, see <http://frontex.europa.eu/about-frontex/mission-and-tasks/>

182 Interview B3.

183 Interview B2.

184 Interview A1; Interview A4.

185 Interview B3.

186 Interview A6.

187 IHRC, ‘Extraordinary Rendition’: A Review of Ireland’s Human Rights Obligations, IHRC, Dublin, December 2007, p.5.



regime were in place.<sup>188</sup>

The former IHRC also recommended in its 2007 report that ‘consideration should be given to establishing a Garda sub-station at Shannon airport’<sup>189</sup> and that there be a system of inspection of specific aircrafts that used Irish airports and which owned or operated by companies that Amnesty International had named.<sup>190</sup> The IHRC further recommended that any independent inspection regime, ‘would include the right to board any aircraft to ensure that it is being used in accordance with the stated purpose’.<sup>191</sup> The government in response to the IHRC’s report at that stage noted that ‘we do not believe that the introduction of such a regime is necessary, likely to be useful, or justified by any reasonable assessment of the facts and probabilities of the situation as they are known to us. Nor are we aware of any such regime in operation elsewhere’.<sup>192</sup>

The former IHRC also noted with respect to those situations where immigration officers accompany individuals onto an aircraft:

‘An Garda Síochána indicated that the power to detain a person on an aircraft was governed by the provisions of Article 7(9) of the Aliens Order. It advised that where Immigration Officers accompany a person refused leave to land onto an aircraft they do so at the behest of the captain by virtue of what An Garda Síochána referred to as “international custom and practice”. When subsequently asked what was meant by this term, An Garda Síochána advised that the term “refers to what actually occurs in these circumstances as a matter of fact”’.<sup>193</sup>

**(f) De facto detention and voluntary settings**

A further issue which has caused difficulties for NPMs and state obligations with respect to

188 European Parliament Resolution on ‘The alleged use of European countries by CIA for the transportation and illegal detention of prisoners’, 2006/2200(INI), 14 February 2007.

189 IHRC, ‘Extraordinary Rendition’: A Review of Ireland’s Human Rights Obligations, IHRC, Dublin, December 2007, p.5.

190 IHRC, ‘Extraordinary Rendition’: A Review of Ireland’s Human Rights Obligations, IHRC, Dublin, December 2007, p.5.

191 IHRC, ‘Extraordinary Rendition’: A Review of Ireland’s Human Rights Obligations, IHRC, Dublin, December 2007, p.43.

192 Response of the Department of Foreign Affairs to the Draft IHRC Review, IHRC, ‘Extraordinary Rendition’: A Review of Ireland’s Human Rights Obligations, IHRC, Dublin, December 2007, Appendix V, p.136.

193 IHRC, Report of an Enquiry into the treatment of a visitor refused leave to land in the State, January 2009, IHRC, Dublin, para 6.19.

Article 4 is *de facto* detention or detention in private settings.

In Ireland, the places we were informed may arise in this context were Direct Provision centres with respect to immigration<sup>194</sup> which has been discussed above, persons with disabilities in nursing homes where their doors were locked<sup>195</sup> and domicile and home care provision including supported living accommodation.<sup>196</sup>

In some instances, such as persons with disabilities in nursing homes, existing bodies, in that context the Health Information and Quality Authority (HIQA), already have some remit. HIQA<sup>197</sup> is an independent statutory body set up to set standards, regulate, monitor, inspect, investigate, assess and provide information on health and social care services across Ireland.<sup>198</sup> HIQA has the ability to inspect a range of places in the health and social care context where individuals are deprived of their liberty.

Visiting and inspecting *de facto* detention and detention in private settings has proved particularly challenging for other NPMs in other jurisdictions and for the SPT in terms of guidance that should be given to States and NPMs with respect to their independent monitoring. The SPT has said that the ‘preventive approach which underpins OPCAT means that as expansive an interpretation as possible should be taken in order to maximise the preventive impact of the work of the NPM’.<sup>199</sup> It therefore recommends:

‘The SPT therefore takes the view that any place in which a person is deprived of liberty (in the sense of not being free to leave), or where it considers that a person might be being deprived of their liberty, should fall within the scope of OPCAT if it relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function. In any situations, the NPM

194 See section 4 above.

195 Interview A8.

196 Interview B6; Interview A8; Interview A3.

197 Appendix V.

198 www.hiqa.ie.

199 Subcommittee on Prevention of Torture. Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN Doc CAT/OP/C/57/4 (2016) Annex, at para 2.

ought also to be mindful of the principle of proportionality when determining its priorities and the focus of its work’.<sup>200</sup>

**(g) Other places of deprivation of liberty or detention**

There are a number of other instances where individuals can be detained or deprived of their liberty which we were informed of in the course of this work and where there was not always clarity on whose responsibility it was to monitor:

**(i) Transfer of children outside of Ireland**

As was highlighted by the UN Committee on the Rights of the Child in 2016, there has been ‘insufficient alternative care services for children with special needs, which has resulted in the need for such children to be accommodated in alternative care institutions outside of the State party’.<sup>201</sup> It therefore recommended that Ireland ‘prioritise the development of its special care services to ensure that the needs of such children are addressed, that this takes place within the territory of the state party...’.<sup>202</sup> We were told that children were being sent to Scotland and other places in the UK.<sup>203</sup> It was not clear who monitored this.<sup>204</sup> Given the children were then being transferred outside of Ireland, bodies such as HIQA would not have jurisdiction, although we were informed of the potential,<sup>205</sup> which had not yet been explored, to use Part 8 of the Health Act 2007 in this context.

**(ii) Voluntary sector organisations offering services**

We were also informed of a number of voluntary sector organisations, sometimes under name of religion, that offered services which may in practice result in individuals being detained or deprived of their liberty. These included addiction services. For example, the Health Service Executive notes that

200 Ibid, para 3.

201 UN Committee on the Rights of the Child in its Concluding Observations on the combined third and fourth periodic reports of Ireland, CRC/C/IRL/CO/3-4, 29 January 2016, para 43(b).

202 Ibid, para 44(b).

203 Interview B2; UN Committee on the Rights of the Child in its Concluding Observations on the combined third and fourth periodic reports of Ireland, CRC/C/IRL/CO/3-4, (2016), para 43(b).

204 Interview B2.

205 Interview B6.

‘Voluntary organisations are the main providers of residential drug and alcohol services’.<sup>206</sup> It was not clear who currently inspects these.<sup>207</sup> However, there are also a number of organisations which provide independent volunteers giving advice and information to individuals in nursing homes and hospitals.<sup>208</sup>

With respect to asylum, the UN Committee on the Rights of the Child also noted its concern about children in asylum-seeking or refugee situations being accommodated in privately run centres and that inspections of such were being carried out by internal inspectors not those who were independent. It therefore ‘urges the State party to ensure independent inspections of all refugee accommodation centres’.<sup>209</sup> Other comments were raised by interviewees with respect to direct provision centres.<sup>210</sup>

**(iii) Mental health issues**

We were informed that there were hostels that may be involved in some form of treatment or intervention for individuals with personality disorders.<sup>211</sup> It was not clear who covered these, whether it was HIQA or the Inspectorate of Mental Health Services.<sup>212</sup>

We were informed of situations where children could be admitted to an adult unit because of the lack of availability for them in children’s facilities.<sup>213</sup>

206 Health Service Executive, Report of the HSE Working Group on Residential Treatment & Rehabilitation

(Substance Abuse), Dr Des Corrigan, Dr Aileen O’Gorman, on behalf of the Working Group, May 2007, <http://www.drugs.ie/resourcesfiles/reports/3966-42381118.pdf>, p.40.

207 Interview B6.

208 E.g. SAGE Nursing Homes and Hospitals. Available at: <http://www.thirdageireland.ie/sage/support-advocacy/NH-Hospital>. See also Age Friendly Ireland The Age Friendly Cities and Counties Programme. The Story So Far... A synopsis of key learnings gathered to date. 2009-2014 Dublin (2015) at pp. 84, 86, 90, 93, 102.

209 UN Committee on the Rights of the Child in its Concluding Observations on the combined third and fourth periodic reports of Ireland, CRC/C/IRL/CO/3-4, 29 January 2016, para 66.

210 See section (e) above.

211 Interview B6.

212 See Appendix VI.

213 Interview A7. See also IPRT, Children’s Rights Behind Bars. Human Rights of Children deprived of Liberty: Improving Monitoring Mechanisms. National Report: Ireland, August 2014, pp.30-31; Inspectorate of Mental Health Services, Child and Adolescent Mental Health Services 2013. Admissions of Children to Adult Units in 2013, Mental Health Commission, June 2014.

## Conclusion

There are some detention settings in Ireland, such as Garda stations and *de facto* detention places, which do not currently have any form of independent oversight. However, overall, there is a web of various inspecting bodies that carry out different types of oversight over the places of deprivation of liberty in Ireland. If examined against the criteria of OPCAT, some of these bodies lack the requisite degree of independence, some do not have the preventive focus and some yet are unable to carry out the visits with the requisite degree of regularity. These are issues that many other jurisdictions have faced when designating their NPMs. Consequently, for the Irish NPM it would be pragmatic to build on the existing mechanisms by expanding their mandates so as to ensure coverage of places of detention currently without an independent oversight and to bring their mandates in line with OPCAT criteria. This would build on the strength, expertise and reputation of the existing bodies.

## Chapter 5

### The existing bodies in Ireland and their potential role in the NPM



It is helpful to separate out the existing bodies in Ireland into two categories: those that currently undertake some form of visiting function (whether or not they fully comply with OPCAT criteria) and those that have a broader regulatory or preventive or human rights mandate which is of relevance to torture prevention for the purposes of OPCAT. This is not to suggest any hierarchy between the two sets of bodies, but rather, drawing upon the approach undertaken in other jurisdictions, to try to identify which bodies in Ireland may have a role in the NPM and for what purpose.

Existing bodies with a visiting mandate

There are a number of existing bodies in Ireland that already carry out visits and which have powers which fit, at least in part, OPCAT criteria. In this report, detailed appendices map out their respective powers against OPCAT provisions and the Guidelines on NPMs produced by the SPT.

It is worth identifying at this stage some common issues. Firstly, for most of these institutions, some of these powers are provided in practice, but not necessarily explicitly set out in legislation. Secondly, although it may appear that the body carries out OPCAT-type visits in practice, in some instances, the legislative basis or policy underpinning these visits is not clear. Thirdly, OPCAT requires that NPMs apply international standards in their work,<sup>214</sup> and again this does not tend to be set out explicitly in legislation or policy for many of the bodies in Ireland.

(a) Inspector of Prisons<sup>215</sup>

The Inspector of Prisons was established by the Prisons Act 2007 with the mandate to ‘carry out regular inspections of prisons’.<sup>216</sup> This includes the power to ‘at any time enter any prison or any part of a prison; request and obtain... a copy of any books, records,

214 See e.g. OPCAT, Article 19(b). See also Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010) at para 36.

215 See Appendix II.

216 Prisons Act 2007, s.31(1).

other documents... and ...bring any issues of concern....to the notice of the governor of the prison concerned, the Director-General of the Irish Prison Service or the Minister’.<sup>217</sup> The Inspector of Prisons is independent,<sup>218</sup> although appointed by the Minister.<sup>219</sup> The Inspector of Prisons is overall, among those we spoke to, considered to be critical and independent and acted with integrity.<sup>220</sup> As interviewees told us: he has been ‘much more vociferous over the years’;<sup>221</sup> he ‘uses his office well, is vocal’;<sup>222</sup> ‘they have a lot of integrity... they report on what they see and the reports have been damning, so they have been a critical voice’;<sup>223</sup> and he is ‘able to do what he wants in the way he wants to do it, but moderately effective and certainly independent’.<sup>224</sup> One interviewee considered that his reports were ‘very good’<sup>225</sup> and ‘very influential in changing things’.<sup>226</sup>

Although some aspects of his practice, for example, in terms of undertaking unannounced visits, complies with OPCAT, these and other powers are not always protected expressly in statute. For other issues, for example, the ability of the inspectorate to interview individuals in private, it is not always clear from the reports whether this takes place in practice in all instances and again the power to do so is not explicitly provided for in legislation. If a different individual were to be appointed as Inspector, there is therefore the risk of the practice changing.

Several interviewees we spoke to considered that the Inspector did not have sufficient resources to ensure the regularity of visits required by OPCAT<sup>227</sup> and raised concerns that reports on visits to places of detention had not been published regularly, questioning whether this meant that visits may not have actually taken place.<sup>228</sup> We were told: the

217 Prisons Act 2007, s.31(1)(a)–(c).

218 Prisons Act 2007, s.30(5)

219 Prisons Act 2007, s.30(1).

220 Interview A1; Interview A4.

221 Interview B8.

222 Interview A4.

223 Interview A4.

224 Interview B3.

225 Interview B2.

226 Interview B2.

227 Interview B9.

228 Interview A7; Interview B2.

Inspectorate is ‘chronically under-resourced’.<sup>229</sup> As the appendix on the Inspector of Prisons shows, the latest Inspector’s annual report, however, does not indicate any concerns with resources. The 2012 report noted ‘If my work load increases further the question of additional resources will have to be revisited. I am confident that, in such an event, a reasonable request would be sympathetically considered’.<sup>230</sup> In 2013 he stated that ‘My work is rapidly expanding. I found that I was unable with my present complement of staff to fulfil my expanded mandate. I explained my position to the Minister who gave me permission to engage a panel of experts to assist me in my work’.<sup>231</sup>

Some queried the independence in the Prisons Act 2007, noting that if the Inspector of Prisons were to become part of the NPM then amendments would be needed to the legislation to ensure that appointment of the Inspector was not by the Minister for Justice and Equality.<sup>232</sup> It was also commented upon that there was a lack of transparency over how the Inspector, his deputy and experts who assisted him were appointed.<sup>233</sup> Some interviewees also raised concerns that the Inspector did not have the power, in legislation, to publish reports independently.<sup>234</sup> One interviewee questioned whether his reports were sufficiently robust.<sup>235</sup>

In interviews, the Inspector of Prisons was often noted as one of the bodies that should be part of the NPM. Indeed, as one interviewee said to us: ‘it might be strange if he is not [part of the NPM]’.<sup>236</sup> However, many considered that he would need additional resources if he were to take on the role of NPM.<sup>237</sup> As another interviewee said it ‘is a very small office. So if [the NPM role] was to be taken on then that would be definitely an expanded role, there is no doubt about that, with expanded resources,

229 Interview B3; Interview B7; Interview A6.

230 Office of the Inspector of Prisons Annual Report 2012, 20 May 2013, paras 6.4–6.12.

231 Office of the Inspector of Prisons Annual Report 2012, 20 May 2013, para 6.7.

232 Interview A6; Interview B2.

233 Interview B2

234 Interview B2

235 Interview B2

236 Interview A7.

237 Interview A1

staffing, etc.’.<sup>238</sup> Additionally, ‘it may need to enhance its expertise and training to do [the NPM] role’.<sup>239</sup>

(b) Mental Health Commission (MHC)/ Inspector of Mental Health Services

The Mental Health Commission has a remit to ‘promote, encourage and foster the establishment and maintenance services and to take all reasonable steps to protect the interests of persons detained in approved centres under this Act’.<sup>240</sup> The MHC appoints an Inspectorate of Mental Health Services<sup>241</sup> which has the power ‘to visit and inspect every approved centre at least once in each year after the year in which the commencement of this section falls and to visit and inspect any other premises where mental health services are being provided as he or she thinks appropriate’.<sup>242</sup>

The Mental Health Act 2001 appears to satisfy OPCAT criteria with respect to independence and inspection of approved centres. Indeed, there is quite a lot of detail in the legislation<sup>243</sup> which might provide some useful examples for other inspectorates if amendments to their legislation are considered necessary and if there is an attempt to ensure consistency between the different inspectorates for purposes of OPCAT. However, some of the detail, for example, with respect to methodology of visits, the ability to interview individuals in private, and protections against conflict of interest, are not explicitly provided for in the legislation.

There is utility in having an OPCAT mechanism which falls under the auspices of this broader Mental Health Commission and therefore retains a close relationship with it.

Neither the Mental Health Commission nor the Inspectorate of Mental Health Services was mentioned a great deal in interviews when asked to list the bodies that people

238 Interview A1.

239 Interview B7.

240 S.33(1) of the Mental Health Act.

241 See Appendix VI.

242 S.51(1)(a) of the Mental Health Act.

243 E.g. Mental Health Act 2001, s.51(1) regarding frequency of visits; s.51(2) regarding inspection and assistance on visits; ss.51(2) and 52 outlining the powers to obtain information and to see individuals on the visits.

said should be in the NPM. In relation to the Inspectorate of Mental Health Services, one person said that they did: ‘not know much about it’, that it did ‘not have much of a profile’ and they were ‘not sure how effective it is’.<sup>244</sup> However, this was not always the case (for example, another, when asked if it should be part of the NPM, replied ‘good idea’<sup>245</sup>) and this relates to the comment made previously regarding the presumption that many have made is that OPCAT is about criminal justice principally. Those who knew the work of the MHC and its Inspectorate noted that ‘the inspector for mental health services is a good organisation’.<sup>246</sup> There has been some criticism of the MHC in the past, in particular that it has not been able to ensure the implementation of its recommendations.<sup>247</sup> Amnesty International Ireland have also suggested that it is ‘more focused on inpatient than community-based services. Accordingly, the statutory regulations and much of the rules and guidance published by the Commission focus on issues relating to inpatient care and treatment in approved centres’.<sup>248</sup> The government has suggested that the MHC could be extended to look at community based services too.<sup>249</sup>

If the MHC were to be part of the NPM, it was considered that it would need greater resources including more staffing to be able to provide the regularity of inspection that OPCAT requires.<sup>250</sup>

(c) HIQA/Inspector of Social Services

The Inspector of Social Services<sup>251</sup> falls under HIQA (it was HIQA that was mentioned by interviewees rather than the Inspectorate specifically). The Inspectorate, established by Part 7 of the Health Act 2007, has the mandate to ‘inspect the performance by the Executive of the Executive’s functions’ under the Child Care

244 Interview B9.

245 Interview B8.

246 Interview A6.

247 See for example C Murray, The role of the Mental Health Commission in Irish mental health law: interrogating the effectiveness of the statutory functions of the Commission (2011) *Medico-Legal Journal of Ireland* 93

248 Amnesty International, Mental Health Act 2011: A Review, at p.207.

249 ‘Mental Health Commission may be given “Hiqa-type” watchdog role’, *Irish Examiner*, 21 January 2015, <http://www.irishexaminer.com/ireland/mental-health-commission-may-be-given-hiqa-type-watchdog-role-308123.html>.

250 Interview [XX]

251 See Appendix V.

Act of 1991 and the Health (Nursing Homes) Act of 1990.<sup>252</sup> This includes inspection of designated centres, special care units and children detention schools.<sup>253</sup>

HIQA was noted as being a respected organisation: ‘it is independent’;<sup>254</sup> ‘a good body’;<sup>255</sup> and has ‘huge credibility among the public and the public agree with them’.<sup>256</sup> Its inspections were considered to be carried out through ‘a very robust process’.<sup>257</sup> As another noted to us: ‘HIQA are actually quite good, do a very good job and there are real consequences to monitoring work that they do’.<sup>258</sup>

The Health Act 2007 sets out expressly some aspects which OPCAT would require, including the ability to speak with individuals in private, for example.<sup>259</sup> In addition, because of the breadth of contexts there is a risk of inconsistency in approach. As the Inspector draws its authority from not only the Health Act but also other legislation, for example with respect to children, these need to be checked for consistency.<sup>260</sup>

One interviewee we spoke to questioned whether the breadth of HIQA’s remit enabled it to understand the specificities of all the contexts in which it operated.<sup>261</sup> Others considered that it needed ‘more resources, expertise and would have to rethink their standards’ if they were to become part of OPCAT.<sup>262</sup> In addition, others considered that the inspection reports were ‘not well grounded. Because HIQA inspects residential care, it does not necessarily understand the context of detention’.<sup>263</sup> Others criticised its ‘tick-list approach, rather than holistic’;<sup>264</sup> claimed that

252 Health Act 2007, s.41(1).

253 Health Act 2007, ss.41(1); Children Act 2001, s.185; Child Care Act 1991, s.69(2)

254 Interview A1.

255 Interview B8.

256 Interview B4.

257 Interview B4.

258 Interview B3.

259 Interview B6.

260 For example, the Children Act specifies appointment is for 5 years, in contrast to the more general approach of the Health Act. In addition conditions for removal in the Children Act are not as specific as in the Health Act.

261 Interview B4.

262 Interview B2; Interview B6.

263 Interview B4.

264 Interview B8.

it was ‘driven by standards’ rather than human rights;<sup>265</sup> and ‘they are more about standards and guidelines, it is not really oversight’.<sup>266</sup> HIQA’s publications do make reference to human rights and these are integrated in its reports and standards,<sup>267</sup> as well as in its inspection reports.<sup>268</sup> HIQA’s Corporate Plan 2016-2018 commits to focussing on human rights principles in the delivery of its regulation and monitoring programmes. Prospectively, HIQA recognises that its regulatory work ‘must ensure that the information available in respect of services enables inspections to be risk based and proportionate and based on the experience and human rights of people who use and are in receipt of services’.<sup>269</sup>

(d) Prison Visiting Committees<sup>270</sup>

Prison Visiting Committees are established by the Prisons (Visiting Committees) Act 1925. They are set up for each prison and are to visit ‘at frequent intervals’ and to ‘hear any complaints which may be made to them by any prisoner’.<sup>271</sup> Members are appointed by the Minister<sup>272</sup> but act in a voluntary capacity. They are not paid but are provided with expenses.

In theory Prison Visiting Committees have the benefit of offering lay visiting, and a regularity of visiting which a statutory body is unlikely to achieve.<sup>273</sup> Working in collaboration with the Inspector of Prisons may prove useful in the context of OPCAT. However, there are some concerns amongst civil society<sup>274</sup> with the current set-up and practice of Prison Visiting Committees which would need to be

265 Interview A8; Interview A5.

266 Interview A11.

267 See e.g. HIQA, *National Quality Standards for Residential Care Settings for Older People in Ireland*, [https://www.hiqa.ie/system/files/Residential\\_Care\\_Report\\_Older\\_People\\_20090309.pdf](https://www.hiqa.ie/system/files/Residential_Care_Report_Older_People_20090309.pdf), section 3; HIQA, *National Standards for Residential Services for Children and Adults with Disabilities*, file:///C:/Users/lwrhm/Chrome%20Local%20Downloads/Standards-Disabilities-Children-Adults%20(1).pdf,

268 HIQA, *Compliance Monitoring Inspection report Designated Centres under Health Act 2007, as amended*, Kilcolgan Nursing Home, file:///C:/Users/lwrhm/Chrome%20Local%20Downloads/351-Kilcolgan-Nursing-Home-18.02.2016.pdf, Outcome 03.

269 HIQA, *Corporate Plan 2016-2018*, p.22, <https://www.hiqa.ie/press-release/2016-04-04-hiqa-announces-new-three-year-corporate-plan>

270 See Appendix IX.

271 Prisons (Visiting Committees) Act 1925, s.3,

272 Prisons (Visiting Committees) Act 1925, s.2(2).

273 IRPT Preliminary Submission to the Consultation on the Proposals for a Criminal Justice Inspectorate, 23 November 2015, pp.6-7.

274 See Appendix IX.

considered if they were to be a formal part of the NPM in Ireland.

Firstly, there are concerns about the manner in which members of committees are appointed and the resulting perceived lack of independence.<sup>275</sup> Secondly, there does not appear to be regularity of visiting across the different prisons.<sup>276</sup> Some prisons therefore appear to have more active committees, or have more members on their visiting committee, than others. Reports vary in consistency and quality; as one person said to us: there is a ‘complete lack of consistent approach’.<sup>277</sup>

As a result, therefore, some expressed ‘serious concerns about Prison Visiting Committees and how effective this whole process is’.<sup>278</sup>

If Prison Visiting Committees were to remain as part of an overall system of monitoring and inspection and be considered as part of the NPM, there needs to be greater coordination with the Inspector of Prisons who may also be suitable to retain oversight of their work. One interviewee said they should only be seen as ‘supplementary’, and ‘would be very concerned’<sup>279</sup> if in their current form they were to be part of the NPM.<sup>280</sup>

(e) Other bodies which may have some role in visiting

There are other bodies which have some potential or do currently visit places of detention in Ireland which must be noted, but which would probably not, for reasons noted, be considered to be within the NPM.

The Children Act 2001 established Children’s Visiting Panels<sup>281</sup> with the responsibility to ‘visit each children detention school from time to time and at frequent intervals and there to hear any complaint which may be made to it by any child residing in the school and, if so requested by the child, to hear any such complaint in private’; report any ‘abuses or irregularities’ to

275 Interview B2.

276 Interview B2.

277 Interview B2.

278 Interview B4.

279 Interview B2.

280 Interview B2

281 See Appendix VIII.



the Minister; report any repairs or alterations that were needed to any school; or report on any other matter relating to the school.<sup>282</sup> The legislation is similar to that establishing the Prison Visiting Committees and therefore similar comments and criticisms apply with respect to benefits of the regularity of lay visiting, *vis a vis* a lack of independence and powers. Whilst these Panels could potentially play a role, in the same way that the Prison Visiting Committees could, in the NPM, the interviewees we spoke to did not think that they had ever been established. As one interviewee said to us: ‘never heard of them’.<sup>283</sup> HIQA’s Report on Trinity House Detention School notes:

‘The 2009 inspection report also recommended the development of a policy outlining the objectives and definition of roles for independent advocates. In response to this recommendation IYJS<sup>284</sup> planned to arrange for the appointment of a visiting panel in accordance with the requirement of the Children’s Act 2001, and entered into discussions with IAYPIC<sup>285</sup> in order to review the agreement made with THS<sup>286</sup> and explore the possibility of a campus-wide advocacy service. It is intended that the policy ensues from these discussions, but it had not been developed at the time of the inspection. Inspectors will assess progress in meeting this part of the recommendation in the follow-up inspection’.<sup>287</sup>

It then further recommended that ‘IYJS should arrange for the appointment of a visiting panel in accordance with the Children Act 2001’.<sup>288</sup> It is not clear the extent to which this happened.

Other bodies also have some role in visiting places of detention. The Ombudsman for Children produced a report in February 2015 which looked into the government inspection and monitoring of voluntary children’s

282 Children Act, 2001, s.191(1).

283 Interview B4.

284 The Irish Youth Justice Service.

285 The Irish Association of Young People in Care.

286 Trinity House School.

287 HIQA, Trinity House Children Detention School, Inspection Report ID Number 393, 4 November 2010, para 2.3.14.

288 Ibid, p.32.

residential centres<sup>289</sup>. Statutory children’s residential centres, which may raise issues of *de facto* deprivation of liberty, are inspected by HIQA; whereas Tusla (the Child and Family Agency) inspects children’s residential centres that are voluntary and private. It has been noted that there is no independent oversight of these voluntary settings and that the procedures and processes for monitoring were not the same as that for statutory centres.<sup>290</sup> The Ombudsman for Children has stated that there is ‘little evidence of unannounced visits’, no standardised process regarding procedures and layout and publication of the reports.<sup>291</sup> As a result, the OCO concludes:

‘A clear gap in the approach to inspections of these centres has developed between HIQA and the Child and Family Agency and it is recommended that the inspection of these centres and their registration should transfer to HIQA without delay’.<sup>292</sup>

These are not independent statutory bodies and we would not consider them to be appropriate to be part of the NPM.

**Bodies with a broader mandate of relevance to OPCAT**

In addition to these visiting and inspection bodies, there are also a number of other bodies which have some remit which is of relevance to OPCAT and torture prevention more generally. These may not necessarily have visiting powers.

**(a) Ombudsman for Children<sup>293</sup>**

The Ombudsman for Children was raised in a number of interviews as one body which could play a role in the NPM. Established under the Ombudsman for Children Act 2002, the

289 Office of the Children’s Ombudsman, Own Volition investigation into the HSE’s (now Tusla – the Child and Family Agency) registration, inspection and monitoring service for private and voluntary children’s residential centres, February 2015.

290 Ibid, p.5.

291 Ibid, p.15.

292 Office of the Children’s Ombudsman, Own Volition investigation into the HSE’s (now Tusla – the Child and Family Agency) registration, inspection and monitoring service for private and voluntary children’s residential centres, February 2015, p.27.

293 See Appendix VII.

Ombudsman’s role is to ‘promote the rights and welfare of children’ through provision of advice, encouragement of public bodies, collection of information, awareness raising and monitoring.<sup>294</sup> The office has an investigative power in relation to actions taken by or on behalf of a public body, schools and voluntary hospitals.<sup>295</sup> The Ombudsman is independent.<sup>296</sup>

It was seen as having ‘critical voices, they have come out and spoken about issues and injustices’; ‘good at raising critical issues’; and that it ‘has been effective to some degree’.<sup>297</sup> It was seen as independent, being appointed by the president.

The UN Committee on the Rights of the Child in its Concluding Observations on Ireland’s third and fourth periodic reports noted in January 2016 with respect to the funding arrangements for the Office of the Children’s Ombudsman that ‘the current funding arrangement via the Department of Children and Youth Affairs limits its full independence and autonomy’.<sup>298</sup>

The UN CRC has also noted with respect to the Children’s Ombudsman that it is ‘precluded from investigating actions of public bodies where those actions involve the administration of the law regarding asylum, immigration, naturalisation and citizenship’.<sup>299</sup>

As a result it recommended that:

‘the State Party ensure the independence of the Ombudsman for Children’s Office (OCO), including with regard to its funding and mandate and so as to ensure full compliance with the Paris Principles. In so doing, the State Party should further consider ways and means to directly provide the Office of the Ombudsman with financial resources rather than through the Department of Children and Youth Affairs. Furthermore, the Committee recommends that the State Party consider amending the provisions of the Ombudsman for Children Act of 2002 which preclude the OCO from investigating

294 Ombudsman for Children Act 2002, s.7.

295 Ombudsman for Children Act 2002, ss.8-9.

296 Ombudsman for Children Act 2002, s.6(1).

297 Interview A4.

298 UN Committee on the Rights of the Child in its Concluding Observations on the combined third and fourth periodic reports of Ireland, CRC/C/IRL/CO/3-4, 29 January 2016, para 19.

299 Ibid.

complaints from children in a refugee, asylum-seeking and/or irregular migration situation’.<sup>300</sup>

The Ombudsman for Children receives complaints and, as with other complaints-receiving institutions, this does not necessarily preclude it from undertaking the role of the NPM. Indeed, the oversight it has provides it with a strong background and experience to extend its role. If it were to be part of the NPM, however, there would need to be careful consideration of how it related to HIQA, whether any specific gaps with respect to children’s detention needed to be filled and who best should fill them,<sup>301</sup> and consequently whether additional resources would be required.

**(a) Ombudsman**

Several interviewees noted the potential involvement of the Ombudsman in the NPM. This was mentioned more in passing among a list of institutions which could play a role, noting that it was ‘good at raising critical issues’.<sup>302</sup> The role of the Ombudsman was raised also in the context of coordinating a multi-body NPM<sup>303</sup> and a April 2016 report of the Inspector of Prisons has recommended that the Ombudsman be the institution to take on complaints from prisoners.<sup>304</sup> This may be of particular relevance given recent discussions around the role of the Ombudsman, as an independent body, in considering complaints from prisoners.<sup>305</sup>

**(c) Defence Forces Ombudsman**

The Defence Forces Ombudsman is an independent body<sup>306</sup> and can investigate complaints of the Irish Defence Forces.<sup>307</sup> The Ombudsman is appointed by the President on recommendation of the government,<sup>308</sup> and

300 Ibid, para 20.

301 Interview A7.

302 Interview A4.

303 Interview B3.

304 Review, Evaluation and Analysis of the peration of the present Irish Prison Service Prisoner Complaints Procedure By Judge Michael Reilly Inspector of Prisons April 2016, chapter 8.

305 Office of the Ombudsman, Conference: ‘The Ombudsman behind Bars. The role of the Ombudsman in considering complaints from prisoners’, 12 May 2016

306 Ombudsman (Defence Forces) Act 2004, s.4.

307 Ombudsman (Defence Forces) Act 2004, s.5.

308 Ombudsman (Defence Forces) Act 2004, s.2(2).

in the course of his or her investigations may require the production of documents or the attendance of a person before them.<sup>309</sup> Some suggestions were made regarding a potential role for this Ombudsman in the monitoring of places of detention by the defence forces.<sup>310</sup>

(d) Judges

Section 192 of the Children’s Act 2001 provides for the power of judges to visit places of detention for children. A couple of interviewees noted this power with one not clear if it had happened at all<sup>311</sup> and another noting that it had occurred on some occasions.<sup>312</sup> With respect to the latter, the visits had been announced and were formalised, with the judges being shown around the facilities. It was considered, by the interviewee we spoke to be ‘all about reinforcing the connection between [the place of detention] and the rest of the criminal justice system’.<sup>313</sup>

Bodies with a role in relation to the operation of An Garda Síochána

(a) Garda Síochána Inspectorate<sup>314</sup>

The Garda Inspectorate conducts inspections and inquiries into the police. S.117(1) of the Garda Síochána Act 2005 (‘2005 Act’) provides that ‘subject to this Act, the Inspectorate shall be independent in the performance of its functions.’ In line with its legislative framework, the Inspectorate considers its office to be independent in the performance of its functions.<sup>315</sup>

Section 117(5) of the 2005 Act provides that ‘[t]he Minister may exclude from the copies of reports which are to be laid before the Houses of the Oireachtas any matter which, in his or her opinion— (a) would be prejudicial to the interests of national security, or (b) might facilitate the commission of an offence, prejudice a criminal

309 Ombudsman (Defence Forces) Act 2004, s.8(1)(a).

310 See Section D3 above.

311 Interview B8.

312 Interview B4.

313 Interview B4.

314 See Appendix IV.

315 <http://www.gsinsp.ie/en/GSINSP/Pages/whatwedo>

investigation or jeopardise the safety of any person.’

Some interviewees expressed concern at the potential role of the Inspectorate in a NPM, due to its perceived failure to fully meet the requirements of OPCAT, in particular with respect to it being answerable to the Minister for Justice and Equality.<sup>316</sup> In addition, others noted that ‘it is not about monitoring, they don’t have the expertise’.<sup>317</sup>

If the Inspectorate were to take on the role of NPM for places of detention under the jurisdiction of the Garda, then it is recognised that this would require changes to legislation and an increase in resources.<sup>318</sup> Much, however, would depend on what role the Inspectorate would be expected to undertake in the NPM and whether it would be undertaking visits or acting more in a regulatory capacity.

(b) Garda Síochána Ombudsman Commission (GSOC)<sup>319</sup>

The GSOC is established by the Garda Síochána Act 2005 and has the mandate to receive complaints from the public against members of the Garda.<sup>320</sup> It is independent in the performance of its functions,<sup>321</sup> composed of three members, appointed by the President.<sup>322</sup> The GSOC is principally a complaints body<sup>323</sup> and does not currently have the power to inspect places of detention. In other jurisdictions, ombudspersons and those with a complaints function have expanded their remit and taken on the role of the NPM. In theory, therefore, there is not necessarily a difficulty in designating a complaints-focused institution as part of the NPM. As was noted in interviews, ‘there are systems in place that can be improved as these are complaints based but it is oversight nevertheless’.<sup>324</sup> Having a body which has both a complaints and OPCAT visiting mandate can be

316 E.g. Interview B3

317 Interview A10.

318 Interview, A2. See also ICCL, Review of the effectiveness of the legislation relating to oversight of An Garda Síochána by the Oireachtas Joint Committee on Justice, Defence and Equality Submission by the Irish Council for Civil Liberties (ICCL), 16 April 2014, para7.

319 See Appendix III.

320 Garda Síochána Act 2005, s.67,

321 Garda Síochána Act 2005, s.67(4),

322 Garda Síochána Act 2005, s.65,

323 Interview A2.

324 Interview A5.

seen as beneficial as it allows one to feed into the other.

However, shifting from a complaints body to the preventive mandate that OPCAT requires can be problematic and generally requires a change in ethos.<sup>325</sup> The often reactive approach of an ombudsman or complaints institution may not sit easily with the more proactive and preventive approach that OPCAT requires.<sup>326</sup> The former Irish Human Rights Commission previously noted its concern ‘at the reliance by the State on complaint-reactive mechanisms in discharging its procedural obligations to inspect and monitor all places of detention in the State’ in recommending early ratification and implementation of OPCAT.<sup>327</sup> Indeed, some interviewees did not consider GSOC able to take on this preventive role.<sup>328</sup> Besides the necessary legislative changes, it is likely that additional resources will be required to conduct unannounced visits across the detention facilities in Ireland.<sup>329</sup>

Two interviewees had concerns with GSOC taking on the role of the NPM for the Garda inspections in Ireland. Although s.67(4) of the Garda Síochána Act 2005 states that ‘[s]ubject to this Act, the Ombudsman Commission shall be independent in the performance of its functions’, one interviewee believed that: ‘[w]e have the Garda Ombudsman but they are not independent as such, they still have Gardaí representation. So if I make complaint about Garda, it goes to a higher level and not to an independent institution’.<sup>330</sup> Another interviewee noted concerns with GSOC’s reputation: ‘they are very much damaged ... in reality it has been very much under attack, very poorly regarded, very attacked in the media’.<sup>331</sup>

The former IHRC in 2013 stated ‘[i]n relation to

325 See E. Steinerte and R. Murray, ‘Same but Different? National human rights commissions and ombudsman institutions as national preventive mechanisms under the Optional Protocol to the UN Convention against Torture’, Essex Human Rights Review, vol Special Issue 2009., pp. 54 – 72.

326 Ibid.

327 Irish Human Rights Commission Submission to the UN Human Rights Committee on the Examination of Ireland’s Fourth Periodic Report under the International Covenant on Civil and Political Rights June 2014, p.48.

328 Interview B3

329 Interview A2

330 Interview A4.

331 Interview A10. These comments are context-specific and should be interpreted as of their time.

police complaints, the IHRC continues to call on the State to strengthen the mandate of GSOC to allow it to investigate alleged human rights abuses perpetrated by An Garda Síochána, noting the degree of public trust in GSOC which has been developed in recent years. Specific attention should be paid to the protection of “whistle-blowers” within An Garda Síochána’.<sup>332</sup>

(c) Policing Authority

The Policing Authority was set up by the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015 and established in January 2016. It is composed of nine members appointed by government,<sup>333</sup> and its role is to: ‘oversee the performance by the Garda Síochána of its functions relating to policing services’ and ‘be responsible for— (i) nominating persons for appointment to the office of Garda Commissioner under section 9(1) or to the rank of Deputy Garda Commissioner under section 10(1), (ii) appointing persons, in accordance with section 13, to the ranks of Assistant Garda Commissioner, chief superintendent and superintendent in the Garda Síochána, and (iii) removing or recommending the removal, as the case may be, in accordance with section 11 of members of the Garda Síochána at the ranks referred to in subparagraphs (i) and (ii)’. It is also mandated to, among other things, establish codes of ethics, strategy statements and approve the annual policing plan; and ‘monitoring, assessing and reporting to the Minister on the measures taken by the Garda Síochána in relation to recommendations made in a report of the Garda Síochána Inspectorate’.<sup>334</sup> None of the interviewees mentioned the Policing Authority with respect to membership of the NPM.

The Inspector or Prisons has himself noted that he could potentially take on inspection of cells in Garda stations.<sup>335</sup>

332 Information presented by the Irish Human Rights Commission in response to the report of the Special Rapporteur on the situation of human rights defenders on her mission to Ireland presented to the Human Rights Council on 4 March 2013, 25 Feb 2013, A/HRC/22/Nl/1, at p.3.

333 Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015, s.44.

334 S.62H of the Garda Síochána Act, as amended by the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015.

335 Submission by Judge Michael Reilly, Inspector of Prisons on Proposals for a Criminal Justice Inspectorate, 23 November 2015, p.5.



Role of the IHREC

As noted above, NHRIs in some jurisdictions have been designated as the NPM either alone or with other bodies. Generalisations as to whether NHRIs are better suited to carry out this role when compared to other types of statutory bodies are not helpful,<sup>336</sup> and much will depend on the breadth of the existing mandate of the NHRI, the extent to which it already may have the ability to conduct visits to places of detention, and its credibility and independence within the jurisdiction. Their already established human rights ethos, however, is something that NHRIs can offer to the preventive NPM role.<sup>337</sup> The role that the NHRI will play in the NPM will also dictate whether any changes will need to be made to its internal structuring. For example, if the NHRI is to coordinate activities of other visiting bodies, and itself will not undertake any visits, this will require slightly different considerations to where the NHRI may itself be carrying out visits. In addition, where an NHRI has the ability to receive individual complaints and will be undertaking visits as part of the NPM mandate, some further thought needs to be given to how it will manage these quasi-judicial and proactive roles respectively.<sup>338</sup>

The vast majority of the interviewees we spoke to were clear that the IHREC must play some role in the NPM it being seen as an ‘honest broker’,<sup>339</sup> a ‘respected’ organisation,<sup>340</sup> helpful and outward looking;<sup>341</sup> Paris Principles compliant,<sup>342</sup> and seen as independent.<sup>343</sup> Its overarching human rights focus was seen as crucial and mentioned on numerous occasions as being a benefit;<sup>344</sup> as was its neutrality and

not being from one particular sector.<sup>345</sup> Several interviewees noted that the IHREC was a new organisation and that this should be taken into account when considering their role in the NPM and therefore some degree of caution may be necessary.<sup>346</sup>

There were differing opinions on exactly what the role of the IHREC should be. This varied from it taking on a ‘key’ or ‘lead’ role,<sup>347</sup> or one of oversight,<sup>348</sup> the coordinator,<sup>349</sup> or carrying out a ‘comparative analysis of different detention settings’.<sup>350</sup> Many also considered that the IHREC should play a role in the designation process of the NPM.

A couple of potential challenges were raised with the IHREC taking on such a role. This included whether it would be a conflict of interest with respect to other parts of its mandate, specifically the provision of legal assistance and acting as amicus; and whether this would be feasible in terms of resources if it is also to take on the Article 33(2) CRPD role.<sup>351</sup> In addition, the IHREC currently does not have an investigative/visiting mandate. There is some suggestion that members of the NPM should be principally those whose ‘bread and butter’ is the visits they undertake to places of detention and the importance of having a coordinating body which can speak to this and with experience.<sup>352</sup>

336 See Steinerte E. and Murray R., ‘Same but Different? National human rights commissions and ombudsman offices and national preventive mechanisms under the Optional Protocol to the UN Convention against Torture’. Essex Human Rights Review Vol. 6, No 1, 2009.

337 APT, National Human Rights Commissions and Ombudspersons’ Offices / Ombudsmen as National Preventive Mechanisms under the Optional Protocol to the Convention against Torture, January 2008, [http://www.apt.ch/content/files\\_res/opcat-nhris-ombudspersons-as-npms-en.pdf](http://www.apt.ch/content/files_res/opcat-nhris-ombudspersons-as-npms-en.pdf), p.4.

338 Ibid, p.5.

339 Interview A1.

340 Interview B2; Interview B1.

341 Interview A4; Interview A8.

342 Interview B3. Interview B2.

343 Interview B2, Interview A8.

344 Interview B7; Interview B10; Interview A1.

345 Interview B10; Interview A10; Interview A1.

346 Interview A11. Also Interview A8; Interview B1; Interview A4; A10, B2.

347 Interview A9; Interview A6.

348 Interview B7. Interview A3.

349 Interview B7; Interview B3.

350 Interview A2.

351 Interview A3

352 Interview B11; Interview A2.

Chapter 6  
NPM options  
for Ireland

In this section, we set out a number of options for the potential Irish NPM, drawing upon the desk-based research, the interviews and our own experience of OPCAT in other jurisdictions.

There was a lack of appetite from those we spoke to for the establishment of a new body as NPM given that a number of existing bodies in Ireland already have some inspection role and cover a diverse range of fields.<sup>353</sup>

Some civil society organisations were identified in the course of our work as potentially playing a role in the NPM. These included the Irish Advocacy Network (IAN),<sup>354</sup> the IPRT,<sup>355</sup> ICCL<sup>356</sup> and Support and Advocacy Service for Older People (SAGE),<sup>357</sup> and the Immigrant Council of Ireland,<sup>358</sup> although one interviewee considered that ‘we don’t have huge experience of civil society monitoring places of detention’.<sup>359</sup> As to what form this engagement should take there was no particular consensus from among those we spoke with and views were varied between those who considered this was ‘not a good idea’,<sup>360</sup> to recommending engagement on a ‘voluntary basis’,<sup>361</sup> that this was a way of increasing representation,<sup>362</sup> and stressing that any engagement needed to be ‘meaningful’.<sup>363</sup>

In any event, some we spoke to considered that CSOs should be involved when the government designated the NPM<sup>364</sup> and the NPM would need to engage with civil society when it started to carry out its work.<sup>365</sup>

In conclusion, this report proposes four options that Ireland could take with respect to its NPM.

353 Interview A5. Interview A6. Interview A5. Interview A8.

354 The Inspector of Mental Health Services has noted that ‘the IAN provided reports to the Acting Inspector, based on information and concerns from service users’, Report of the Inspector of Mental Health Services, Mental Health Commission, Annual Report 2014, p.61.

355 <http://www.iprt.ie/>

356 <http://www.iccl.ie/>

357 <http://www.thirdageireland.ie/sage>

358 <http://www.immigrantcouncil.ie/>

359 Interview A1.

360 Interview B3.

361 Interview A11.

362 Interview A6.

363 Interview A3.

364 E.g. Interview B8.

365 Interview A3.

OPTION 1:

An ‘Inspector of Prisons Plus’

This NPM model would take the existing Inspector of Prisons and give the Inspector enhanced powers and resources. Amendments to the Prisons Act 2007 could include explicit sections on: the transparency of the appointment process; the selection of experts to assist him in his work; the methodology of visits; and powers of the Inspector with respect to for example, his ability to take unannounced visits, interview individuals in private, etc. It could also include expanding his remit to court cells and transit and transportation as well as Garda facilities, including at airports and ports.

This is a relatively easy way of covering Garda stations and some of the other gaps that exist and has the benefit of drawing and building upon the existing reputation and expertise of the Inspector of Prisons. It could provide greater coherence between the monitoring of prisons and that of police, court cells and transportation and transit. It would, however, require a considerable extension of the Inspector of Prisons’ mandate and an increase in resources in terms of finance and staffing and expertise of staffing. There is therefore a risk that it might not be adequately resourced.

OPTION 2:

Designation of existing

inspectorates

This relatively straightforward NPM option, is to designate the bodies which already have some visiting mandate, with minor amendments to their legislative frameworks.<sup>366</sup> These bodies are: the Inspector of Prisons, HIQA, the Mental Health Commission, and the Prison Visiting Committees (The coverage of Garda stations could be considered as a separate process in parallel). This Option would build upon existing bodies’ experiences, expertise and reputation and enables a relatively comprehensive coverage of all places of detention/deprivation of liberty.

366 See Appendices II - IX below.

This Option would, however, need additional resources, such as more staff, financial and other resources, to be provided to the existing bodies in order to ensure the regularity and nature of visits required of OPCAT. A preventive approach may also be different from the inspections that some of the bodies have been carrying out. Additional training and a shift in approach may therefore also be required. Some bodies may need to juggle two roles: as national inspectors and as part of the NPM, which may require further discussion within the body itself. Some form of coordination may be required to bring these bodies together.

OPTION 3:

Designation of existing

inspectorates and others

This NPM Option takes the inspectorates (as in Option 2 above) together with some or all of the following: the Ombudsman for Children, the Ombudsman, the Defence Forces Ombudsman, judges and the IHREC. This approach offers a more comprehensive view of OPCAT, including not only those bodies with an inspection mandate but also those with a broader overview of prevention and expertise in human rights within Ireland. It would include bodies with both visiting functions as well as those with the ability to provide advice, comment on legislation, etc. and may also help to identify more easily those gaps in coverage and inconsistencies between the different bodies in their methodologies and approaches.

This Option, however, will require a greater degree of coordination (though not necessarily a through designation of a coordinating body, as discussed below). The greater the number of bodies involved, the more unwieldy it may become and the greater the risk of creating a sense of hierarchy among those bodies which are selected to be within the NPM and those who are not.

OPTION 4:

Coordinating Body

Options 1, 2 and 3 could operate without a body being designated as a coordinating body. As these are existing bodies and if they are sufficiently well resourced, then there may be no need for a coordinator.<sup>367</sup> Alternatively, some degree of coordination has been found to have been useful in the UK and New Zealand for example where there are a number of bodies making up the NPM. In addition, there is an expectation, including from the SPT, that the NPM will have some identity and that it will be more than just existing bodies continuing their work as previously.

Several we spoke to saw the need for a coordinating body to have an oversight role<sup>368</sup> able to pull the work of various bodies and their expertise together.<sup>369</sup> This could also involve developing a strategy for the NPM,<sup>370</sup> and give a ‘national focus to OPCAT’.<sup>371</sup> It could identify the overlap and gaps between the different bodies<sup>372</sup> as well as a ‘standard setting function’<sup>373</sup> and some form of ‘quality control’.<sup>374</sup> It could also follow-up the recommendations of NPM members to monitor their implementation by the authorities.<sup>375</sup>

Depending on the degree of coordination, the body may require separate staff and budget,<sup>376</sup> as well as a consideration of what other infrastructure within that organisation that could be drawn upon (e.g. media support, other staff who may be involved, human resources in terms of hiring, printing of documents, finance, etc.). This may change over time as organisations get to know each other, and understand their respective strengths and remits.<sup>377</sup>

367 Interview B7.

368 Interview A1.

369 Interview B6. Interview A1. Interview A2.

370 Interview B6.

371 Interview B6.

372 Interview A1.

373 Interview B3. Interview A2.

374 Interview A1.

375 Interview B3.

376 Interview A3.

377 Interview A12; Interview B11.

In order to do this the coordinating body will need the ‘credibility and mandate to ensure its recommendations get implemented’,<sup>378</sup> be independent from government<sup>379</sup> but have ‘a clear understanding of the responsibilities under the NPM and a link to government departments’.<sup>380</sup> Three bodies<sup>381</sup> were suggested as having the potential to do this. Many saw the IHREC as playing this role as it was considered to be independent, respected and robust.<sup>382</sup> Some saw it as ‘obvious’ and ‘natural fit’ and that it was an ‘honest broker’<sup>383</sup> and able to ‘influence central government’.<sup>384</sup> There was a benefit in the fact that ‘they sit outside all the inspectorates’<sup>385</sup> and had a specific expertise in human rights.<sup>386</sup> Others suggested the Inspector of Prisons: he would be core to the NPM anyway and has the day-to-day experience and understanding of conducting visits to places of detention. Her Majesty’s Inspector of Prisons (HMIP) is the coordinating body in the UK. However, appointment as the coordinating body may give the NPM an overall criminal justice flavour and adding coordination to his remit may be overloading an already extensive mandate. A few suggested to us the possibility of the Office of the Ombudsman taking on the role of coordinator.<sup>387</sup> Their involvement would move OPCAT beyond being just a criminal justice issue and, as a result, there may be some degree of independence from the various sectors. However, the Ombudsman is not a body often associated with OPCAT and does not currently undertake visits relevant to OPCAT functions.

378 Interview A4.

379 Interview A1; Interview A3; Interview A7; Interview A10.

380 Interview B6.

381 An additional option suggested by the Department of Justice and Equality was that: ‘Given the proposed scope of a criminal justice inspectorate, it may also have the resources to play a co-ordinating role for the bodies conducting inspections in line with OPCAT requirements’ Department of Justice and Equality, Proposals for a Criminal Justice Inspectorate, para 4.9.

382 Interview A7.

383 Interview B3; Interview A1. Interview A7.

384 Interview B6.

385 Interview A1.

386 Interview A5.

387 E.g. Interview B3.

## OPTION FOR THE INSPECTION OF GARDA STATIONS

One of the key sticking points with designation of the NPM in Ireland is the lack of an independent visiting body to Garda stations and other places of detention run by the Garda. This is seen by many we spoke to as a significant omission and one which needed to be addressed before OPCAT could be ratified. If this particular gap can be filled, then this, it is argued, will facilitate moves towards ratification of OPCAT. It is therefore worth exploring specifically what the options might be for the inspection of Garda stations.

### (a) The Inspector of Prisons mandate be extended to cover Garda

It was suggested to us that the Inspector of Prisons’ remit, as someone who already has experience in conducting visits in a custodial setting, could be extended to cover police cells, stations, and other places under the jurisdiction of the Garda. This could be a pragmatic solution: extension of an already existing mandate is relatively easy to achieve. It is not uncommon in other jurisdictions for one body to undertake visits to both prisons and police facilities. In addition, the Inspector of Prisons is an independent office holder and we were told that he has a reputation for being independent and critical. He has already shown himself willing and able to develop relevant standards for different contexts and so standards could be developed for police facilities too. Indeed, the Inspector of Prisons has himself suggested that he carry out this role.<sup>388</sup> This option also still permits ongoing discussion, if appropriate, on the broader regulation of criminal justice overall through, for example, a criminal justice inspectorate, or similar. It de-couples discussions on regulation of criminal justice from the visiting/inspection mandate to places of detention.

One of the difficulties with this option would be that it would considerably extend the remit of the Inspector of Prisons and increase the obligation to visit all prisons with the frequency that OPCAT requires, when several noted to us the challenges already in existence with

388 Submission by Judge Michael Reilly, Inspector of Prisons on Proposals for a Criminal Justice Inspectorate, 23 November 2015, p.5.

publishing reports regularly on prison visits. This would therefore require the Inspector of Prisons to be provided with significant extra resources both in terms of finance, staffing, expertise, among other. While these are custodial settings, it should not be presumed that the standards and methodology adopted in visiting prisons will necessarily map on to visiting police facilities. In addition, there would need to be some amendments to the existing legislation and practices of the Inspector of Prisons in order to satisfy OPCAT requirements (including, for example, increased robust procedures around transparency of appointment and functional independence).

### (b) GSOC or GSI undertake inspections

It has also been suggested that the GSOC or GSI could undertake OPCAT related visiting functions.<sup>389</sup> It is useful to consider the two separately.

#### (i) Garda Síochána Inspectorate

The Garda Síochána Inspectorate could expand its mandate to enable it to carry out visits as required by OPCAT. This would make use of an existing body which has knowledge of the police context. It would also not add a further layer of institutional monitoring to the police. However one interviewee told us: ‘the Garda inspectorate...is absolutely not an independent body and would not meet the requirements of the NPM’.<sup>390</sup> This aside, there would also need to be significant changes to its staffing, resources and approach in order for it to comply with OPCAT.<sup>391</sup>

#### (ii) GSOC

The GSOC’s mandate could be expanded to include unannounced inspections on a more preventive basis. As with the Garda Síochána Inspectorate, this would again draw upon an existing body operating in the policing context. The GSOC has a complaints mandate already which could be expanded to include a more preventive approach to monitoring. It is not unusual for ombuds institutions in other jurisdictions who have principally a complaints function to then take on the NPM role.

389 Interview B1.

390 Interview B3.

391 Interview A9; Interview B3.

However, we heard concerns from some interviewees of the perceived lack of independence of the GSOC.<sup>392</sup> Some also said that it would require more than minor legislative amendments to bring the NPM functions within the remit of either the GSOC or GSI as it would also require a fundamental shift in the ethos and approach of the organisations.

#### (iii) Further discussion

One option we heard would be to use the Garda Commissioners Strategic Human Rights Advisory Committee as a forum to discuss Garda inspection specifically.<sup>393</sup>

392 See Appendix III below.

393 Interview B3.



Chapter 7

Next steps

As noted at the start of this report, many we spoke to expressed frustration in how to move OPCAT forward. Some stressed the importance of simplifying the process, stating that it had become over complicated.<sup>394</sup> Several underlined the need for a pragmatic approach forward:<sup>395</sup> ‘we should not wait for a super-NPM’.<sup>396</sup>

Consultation Process on

OPCAT specifically

Although there have been a number of events held in the past around OPCAT, many we spoke to felt that these were not holistic and had reached only certain sectors.<sup>397</sup> It is crucial to have further national debate specifically on OPCAT which involves the full range of key stakeholders including civil society.<sup>398</sup> There needs to be ownership over this process by these various stakeholders as well as the Department of Justice and Equality.<sup>399</sup> A particular organisation may need to take the lead on discussions around designation,<sup>400</sup> and for some, this should be the IHREC.<sup>401</sup> The debate needs to be separate from the process for considering a criminal justice inspectorate.<sup>402</sup>

As OPCAT and the SPT require,<sup>403</sup> the designation process of an NPM should be transparent, and involve as broad a range of stakeholders as possible including civil

society.<sup>404</sup> We suggest that this conversation still needs to take place, and that the previous or indeed current debates around a proposed criminal justice inspectorate are not sufficient for the purposes of OPCAT.

As the Department of Justice and Equality has recognised, one of the key challenges with ratification of OPCAT appears to be how to address independent inspection of places of detention under the remit of An Garda Síochána.<sup>405</sup> We would suggest that finding a solution to the inspection of Garda stations does not necessarily require a definitive decision on a criminal justice inspectorate.

Minimum requirements

No NPM is perfect, but there are a number of key requirements that many considered were essential. The NPM must be independent.<sup>406</sup> The members of the NPM should be independent office holders with their appointments, as for the Ombudsman for Children and the IHREC, being by the Oireachtas.<sup>407</sup> This appointment process should be transparent, especially given that the Irish context is so small.<sup>408</sup> We were informed about some proposed amendments to the public appointments process which may address some concerns.<sup>409</sup>

For some, the need to sort out the position with the inspection of Garda stations was considered crucial before moving towards ratification.

394 Interview A1

395 Interview A1

396 Interview B3.

397 Interview A5.

398 Interview A5; Interview B3. Interview B6.

399 Interview B3

400 Interview A6.

401 Interview A1. Interview B3.

402 However, see Department of Justice and Equality, Proposals for Criminal Justice Inspectorate, para 4.6: ‘the open policy debate which follows from this discussion paper provides an opportunity to engage with interested parties in an environment of consultation where their views can be shared and considered’.

403 Subcommittee on Prevention of Torture, Guidelines on National Preventive Mechanisms, UN Doc CAT/OP/12/5 (2010) at, paras 16 and 22.

404 Department of Justice and Equality proposals on a criminal justice inspectorate recognise under ‘international inspection obligations’ that ‘a significant strand of this debate is consultation with civil society in relation to the development of Ireland’s engagement with inspections of places of detention in fulfilment of its present and future obligations under Council of Europe and United Nations instruments’. And furthermore, ‘one of the principal prerequisites for the ratification of OPCAT is effective consultation with civic society as part of the processes of the development of effective legislative proposals establishing national preventive mechanisms’, Proposals for a criminal justice inspectorate, paras 4.1 and 4.6.

405 Proposals for a criminal justice inspectorate, para 4.5.

406 Interview B1. Interview A10. Interview A5. Interview A9. Interview A3; Interview A7; Interview B3.

407 Interview B1. Interview A10. Interview A5. Interview A9. Interview A3; Interview A7; Interview B3. Interview A6. A new process of public appointments which is to be implemented soon may address some concerns.

408 Interview B2

409 Interview B10.

In addition, several interviewees considered that the NPM should also be adequately resourced, both in terms of personnel and funding.<sup>410</sup>

Legislative evaluation

Ratification of OPCAT and the selection of the NPM, whichever model is chosen, will require some legislative amendment, even if this is only limited. A roadmap of ratification of OPCAT, mirroring that produced for the CPRD,<sup>411</sup> may prove useful. Opportunities should be seized to insert OPCAT-related amendments where legislation is already under review for other reasons.<sup>412</sup> Some changes could also be achieved through secondary legislation or guidance<sup>413</sup> although this should be balanced against the benefits that legislative protection can provide.<sup>414</sup>

Designation process

The designation of the NPM needs to be ‘by an open, transparent and inclusive process which involves a wide range of stakeholders, including civil society’<sup>415</sup> and ‘the body designated as the NPM should be publicly promulgated as such at the national level’.<sup>416</sup>

As to when designation should take place, Article 24 of OPCAT provides that:

- 1 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.

- 2 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.

This Article enables States to ratify OPCAT and then have further time in which to designate their NPM. This has the benefit that the State will then formally be a State Party to OPCAT and therefore subject to the jurisdiction of the SPT and able to draw formally on its expertise and advice. A few States have made use of this facility.<sup>417</sup> In addition, some States have made amendments to the original NPM designated. Thus, for example, the initial UK NPM designation in 2009 involved 18 institutions but in 2013 the NPM was expanded to include 20 intuitions.<sup>418</sup>

Ireland could therefore ratify OPCAT and leave the designation of the entire NPM or that relating to the Garda stations, open for consideration and to take advice during this period. This approach may help move past the impasse that there has been on OPCAT and would provide a time limit in which to come to a decision on designation, particularly on the Garda stations. Ratification may focus all the stakeholders, be it government or others, on OPCAT, help to prioritise it and clarify what needs to be done in order to put the NPM in place. The difficulties of invoking Article 24 are, however, that the challenges that exist pre-ratification are unlikely to change post-ratification; and legislation will still need to be put in place pre-ratification.<sup>419</sup>

410 Interview B1. Interview A5. Interview A6.

411 Department of Justice and Equality, Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), <http://www.justice.ie/en/JELR/Roadmap%20to%20Ratification%20of%20CRPD.pdf/Files/Roadmap%20to%20Ratification%20of%20CRPD.pdf>.

412 Interview B10.

413 Interview B1.

414 Interview A10.

415 SPT Guidelines on NPMs, para 16.

416 SPT, Guidelines on NPMs, para 22.

417 E.g. Hungary, Romania and Kazakhstan.

418 HRIC. NPM Directory. United Kingdom. Available at: <http://www.bristol.ac.uk/law/research/centres-themes/hric/resourcesreferences/npmdirectory/unitedkingdom.html>

419 E.g. Interview B1.

Appendix I  
Places of detention  
or where individuals  
deprived of their  
liberty in Ireland and  
relevant visiting body

PLACE OF DETENTION/ DEPRIVATION OF LIBERTY	ORGANISATION WITH CURRENT REMIT TO CARRY OUT INSPECTION/VISIT	ORGANISATIONS THAT WERE SUGGESTED AS POTENTIAL TO COVER
<b>PRISONS</b>		
Prisons	Inspector of Prisons Prison Visiting Committees	
<b>GARDA</b>		
Garda stations and facilities	Not covered	Garda Inspectorate GSOC Inspector of Prisons
<b>OTHER CRIMINAL JUSTICE FACILITIES</b>		
Court holding cells	Not covered	Inspector of Prisons
Transport and transit	Not covered	Inspector of Prisons
<b>PSYCHIATRIC FACILITIES</b>		
Approved psychiatric centres	MHC: Inspector of Mental Health Services Irish Advocacy Network	
<b>CHILDREN'S FACILITIES</b>		
Children's residential units	HIQA: Inspector of Social Services	
Garda Stations	Not covered	As above, for Garda
Special care units (3 units in Ireland)	HIQA: Inspector of Social Services	
Children's detention schools : Trinity House School; Oberstown Boys School; Oberstown Girls School	HIQA: Inspector of Social Services [Children's Visiting Panels] Children Act 2001, s.192 'Any judge may visit any children detention school or any place provided under section 161 at any time'.	
St Patrick's Institution and Wheatfield Place of Detention	Inspector of Prisons Prison Visiting Committees Ombudsman for Children has also visited, albeit not as part of an inspection role	
Approved centres for psychiatric care	HIQA: Inspector of Mental Health Services	

PLACE OF DETENTION/ DEPRIVATION OF LIBERTY	ORGANISATION WITH CURRENT REMIT TO CARRY OUT INSPECTION/VISIT	ORGANISATIONS THAT WERE SUGGESTED AS POTENTIAL TO COVER
<b>MILITARY FACILITIES</b>		
Military facilities may have detention facilities  The Curragh may have detention facilities	Not covered	Defence Forces Ombudsman
<b>IMMIGRATION</b>		
No separate immigration detention facility  Garda sub-stations at airports and ports  Prisons  Direct Provision centres	Not covered unless in prisons, when Inspector of Prisons; Prison Visiting Committees	As above, for Garda
<b>SOCIAL CARE FACILITIES</b>		
Nursing homes	HIQA: Inspector of Social Services	
Community based services	HIQA: Inspector of Social Services	
Designated centre	HIQA: Inspector of Social Services	
Residential services for persons with disabilities	HIQA: Inspector of Social Services	
<b>BORDER FACILITIES</b>		
Garda sub-stations at airports and ports	Not covered	As above, for Garda
Flights and aircraft	Frontex Garda	As above, for Garda
<b>GEOGRAPHICAL COVERAGE</b>		
Irish defence forces operations abroad. No apparent detention situations		
Children unable to be held in secure accommodation in Ireland, because insufficient appropriate facilities, sent to Scotland and UK and Sweden.	Not covered	



## Appendix II

# Inspector of Prisons

### Basics

#### Website

<http://www.inspectorofprisons.gov.ie/>

### Legislative Aspects

#### Legal Framework/Basis

Prisons Act 2007 (hereinafter “2007 Act”).  
Inspector established under s.30 of the 2007 Act.

#### Mandate set out in constitutional or legislative text

2007 Act:

31.—(1) The Inspector of Prisons shall carry out regular inspections of prisons and for that purpose may—

- (a) at any time enter any prison or any part of a prison,
- (b) request and obtain from the governor a copy of any books, records, other documents (including documents stored in non-legible form) or extracts therefrom kept there, and
- (c) in the course of an inspection or arising out of an inspection bring any issues of concern to him or her to the notice of the governor of the prison concerned, the Director-General of the Irish Prison Service, or the Minister or of each one of them, as the Inspector considers appropriate.

(6) It is not a function of the Inspector to investigate or adjudicate on a complaint from an individual prisoner, but he or she may examine the circumstances relating to the complaint where necessary for performing his or her functions.

### Independence: Functional, operational and personnel

OPCAT requires:

- Period of office sufficient to foster independent functioning

2007 Act, s.30(5): ‘Subject to this Part, the Inspector of Prisons is independent in the performance of his or her functions’.

s.30(3) The term of office of a person appointed to be Inspector of Prisons shall be such term, not exceeding 5 years, as the Minister may determine at the time of the appointment.

S.31(4) ‘The Minister may omit any matter from any report so laid or published where he or she is of opinion—

- (a) that its disclosure may be prejudicial to the security of the prison or of the State, or
- (b) after consultation with the Secretary-General to the Government, that its disclosure— (i) would be contrary to the public interest, or (ii) may infringe the constitutional rights of any person.

(5) Where any matters are so omitted, a statement to that effect shall be attached to the report concerned on its being laid before each House of the Oireachtas and on its publication.

s.30(2): The Inspector of Prisons— (a) shall hold office on such terms and conditions, including remuneration, as the Minister may determine with the consent of the Minister for Finance.

### Financial Independence

2007 Act, s.3: The expenses incurred by the Minister in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

## Membership

### Composition of body:

OPCAT requires:

- Experts
- Collectively have the required capabilities and professional knowledge
- Strive for gender balance and adequate representation of ethnic and minority groups in the country

No mention in the 2007 Act regarding who to be appointed and composition of Inspectorate.

Judge Michael Reilly was appointed Inspector of Prisons on the 21st November 2007 to take effect from the 1st January 2008.

The Inspector's latest Annual Report refers to: 'In connection with my work programme I wish to point out that I now have available to me 12 experts who assist me in my work. They are experts who have been drawn from various fields including those with a background in academia, the law, medicine, investigations, addiction counselling and the caring professions'.

In one of his reports, he gives the names of two individuals from his panel of experts who assisted him and who also visited the place of detention.

### Appointment:

OPCAT requires:

- Open, transparent and inclusive process involving wide range of stakeholders as well as civil society
- Not appoint those with conflicts of interest/members of NPM ensure they do not hold such positions
- Members carry out work which avoid conflict of interest

2007 Act, s.30(1) 'The Minister may appoint a person (to be known as the Inspector of Prisons) to perform the functions conferred on him or her by this Part'.

## Legislation specifies period of office of members and grounds for dismissal

2007 Act, s.30(2) The Inspector of Prisons—

- (a) shall hold office on such terms and conditions, including remuneration, as the Minister may determine with the consent of the Minister for Finance,
  - (b) may at any time resign the office by letter addressed to the Minister, the resignation to take effect on and from the date of receipt of the letter, and
  - (c) may at any time be removed by the Minister from office for stated misbehaviour or if, in the Minister's opinion, he or she has become incapable through ill health of effectively performing his or her functions.
- (3) The term of office of a person appointed to be Inspector of Prisons shall be such term, not exceeding 5 years, as the Minister may determine at the time of the appointment.

(4) Subject to this Part, an Inspector of Prisons is eligible for reappointment.

### Staffing

OPCAT requires:

- NPM to ensure it has staff with diversity of background, capabilities, professional knowledge including relevant legal and health care expertise

As noted above (in composition), draws upon experts.

In relation to experts, the Inspector of Prisons noted in his 2012 report that he requested a panel of experts to assist him 'I advertised in the press for such persons. Out of approximately 50 applicants an interview board interviewed 23. The calibre of all applicants was exceptionally high. As a result of the interview process 12 of the applicants were invited to join the panel. All have accepted. Panel members will work on a part time basis and will be paid a per diem rate'. Furthermore, 'Panel members bring to their role expertise in fields relevant to my work such as – academic, human rights, health, education, investigation, prisons, general management and prisoner rights. I am satisfied that with the assistance of this panel of experts I will be in a position

to fulfil my mandate in all respects. All panel members will have the same right of access to prisons and to prison records as I enjoy'.

## Powers and resources

### Places visited where deprivation of liberty could be exercised:

OPCAT requires:

- All places of deprivation of liberty
- Suspected places of deprivation of liberty
- Ability to choose places want to visit and who want to interview

2007 Act, s31(1) 'The Inspector of Prisons shall carry out regular inspections of prisons and for that purpose may—

- (a) at any time enter any prison or any part of a prison'.

### Frequency of visits:

OPCAT requires:

- Regular examination
- frequency decided by the NPM

s.31(1) of the 2007 Act: 'regular inspections'.

His first annual report of 2008 notes that 'Immediately after my appointment I visited all the prisons for the purpose of familiarising myself with the layout, the design capacity, the educational facilities, the vocational training facilities, the recreational facilities and the general conditions under which prisoners are detained. These were announced visits. I have also during the course of the year carried out further announced and unannounced visits. These unannounced visits were carried out during the night, the day and at weekends'.

Some of the Inspector's reports note that the visits are 'numerous' and continual'. In relation to Mountjoy Prison, for example, in 2011 he noted that 'I have visited the Prison on numerous occasions over a six month period up to 11th March 2011 both during the day and

at night. The majority of these visits have been unannounced'. Similarly, 'It is important to note that this report does not reflect one particular point in time at Castlerea Prison; instead it is reflective of an ongoing inspection and consultative process over a number of months'. In this latter instance, he gave dates of the various inspections : unannounced inspection on 29/30th July 2008; announced follow-up inspection took place on the 24th and 25th September 2009; 'further unannounced inspections were undertaken on the 20th October 2008, the 10th December 2008, a night inspection on the 18th December 2008 with a final inspection on 12th February 2009'.

### Types of visits:

OPCAT requires:

- Ability to carry out unannounced visits

Not detailed in the legislation but the methodology for inspection was laid out by the Inspector in his first annual report in 2008. This was also reiterated in the Standards for the Inspection of Prisons in Ireland 2009, adopted by the Inspector.

The 2008 Annual report notes that visits would be announced and unannounced. Reports to prisons also note that his visits were announced and unannounced.

There will also be 'detailed inspections of a number of prisons each year', selected on a 'random basis'.

Most visits will be unannounced, and 'taking place not only in business hours but also in off peak hours.

'The Team will arrive at approximately 9 am and the inspection will last a minimum of two days. In depth analysis of all areas of the prison will be carried out. The Inspection Team will talk to prisoners and members of staff and will examine records as deemed appropriately. Immediately following this inspection the Inspector will bring to the notice of the Governor by letter, and the Irish Prison Service (if relevant), matters of concern (if any) detected during the inspection. The Inspector will give the Governor a period of time within which to comment on and deal with his concerns. The Governor will be asked

to complete a questionnaire which will give the Inspection Team technical information on the running of the prison.

In the weeks following the initial inspection the Inspection Team will work with management of the prison to ensure that their concerns are dealt with. If any concerns cannot be met by local management the Inspector will take up such matters with the appropriate authority. Full cooperation from management and the Irish Prison Service is expected in this regard. To date the Inspector has received this cooperation.

Approximately 2 or 3 months after the initial inspection the Inspection Team will carry out an announced inspection of the prison. The purpose of this inspection will be twofold:

- to again inspect all areas of the prison but will pay particular attention to those areas which initially caused concern, and
- to meet with the governor, prisoners, visitors, representatives of the visiting committee, senior management, branch officers of the Prison Officers Association, members of staff, chaplains, teachers, doctors, dentists, nurses, probation officers, addiction counsellors and others who wish to see the Inspector or who provide services to prisoners. These meetings will be structured with advance notice to all.

Between the initial unannounced inspection and the announced inspection and up to the submission of the report, the Inspector will make further announced and unannounced visits both during ‘working hours’ and ‘off peak hours’ as he deems appropriate.

The Report of the Inspector of Prisons will not reflect one particular point in time; instead they will be reflective of an ongoing inspection and consultative process over a number of months. They will offer an accurate representation of the conditions of each individual prison.

The general – broadly consultative – approach adopted by the Inspector will not be possible in all cases if it immediately becomes apparent that matters of very serious concern such as serious human rights abuses need to be addressed as a matter of urgency. If these occur the Inspector will bring these serious matters to the notice of the Minister

immediately and will take such further steps as deemed necessary’.

#### Private interviews:

OPCAT requires:

- Ability to have private interviews with those deprived of liberty and others

Not mentioned expressly in the legislation or the standards adopted by the Inspector.

In some of his reports he has noted that ‘During my visits I spoke to all members of the management team, to prison officers, to prisoners, to those who supply services to the Prison such as doctors, teachers, probation officers, to visitors to the prison and to others that I met. I also spoke to many people outside the Centre who had knowledge of, or an interest in, the workings of the Centre. Many people spoke to me in confidence’.

In another report, he notes that he ‘spoke with prisoners’ families and friends in the visiting area’. In his report on St Patrick’s in 2012, he also notes ‘I would like to thank the many people both in St. Patrick’s Institution and elsewhere who spoke openly to me, who shared their experiences with me and who outlined their concerns to me. For reasons that are obvious such names must remain anonymous’.

#### Access to information:

OPCAT requires:

- Access to all information on number of persons; places and location;
- Access to all information on treatment and conditions of detention;
- Access to all places of detention, installations and facilities

2007 Act s.31(1) ‘The Inspector of Prisons shall carry out regular inspections of prisons and for that purpose may—

- (a) at any time enter any prison or any part of a prison,

(b) request and obtain from the governor a copy of any books, records, other documents (including documents stored in non-legible form) or extracts therefrom kept there’.

s.31(7) ‘Governors and other prison officers, other persons employed in prisons and prisoners shall, as far as reasonably practicable, comply with any request for information that the Inspector may make in the performance of his or her functions’.

The 2007 Prison Rules s.79(1) also require with respect to ‘viewing the prison’ that ‘The Governor, shall, as far as reasonably practicable, comply with any request for information that the Inspector of Prisons may make in the performance of his or her functions’.

Furthermore, the Prison Rules s.85(8) note that ‘A prison officer shall, as far as reasonably practicable, comply with any request for information that the Inspector of Prisons may make in the performance of his or her functions’.

In his reports, the Inspector of Prisons has noted ‘I had unrestricted access to all parts of the Centre. I also had unrestricted access to all records held in the Centre’. In other places he noted, for example, that ‘Because of medical confidentiality issues I do not have access to the prisoner medical files’.

In addition, the Inspector of Prisons has noted in his report on St Patrick’s, ‘A small number of prison staff seems to resent being asked questions by me relating to matters that I am entitled to investigate. In one particular case I was told by a senior experienced officer that – “If you don’t ask the right question you won’t get the right answer”. A number of officers seem to be unaware of their obligations (referred to in the Prisons Act 2007 and the Irish Prison Rules 2007) to co-operate with me in my role as Inspector of Prisons’.

#### Publication of findings after visits:

OPCAT requires:

- Make recommendations to relevant authorities
- Annual reports
- Other reports
- Annual report presented to parliament
- Competent authorities to examine recommendations and enter into dialogue on implementation
- State to publish widely and disseminate annual reports

s.31(2) ‘The Inspector may, and shall if so requested by the Minister, investigate any matter arising out of the management or operation of a prison and shall submit to the Minister a report on any such investigation.

(3) As soon as practicable after receiving the report, the Minister shall, subject to subsection (4), cause a copy of it to be laid before each House of the Oireachtas and to be published.

(4) The Minister may omit any matter from any report so laid or published where he or she is of opinion—

- (a) that its disclosure may be prejudicial to the security of the prison or of the State, or
- (b) after consultation with the Secretary-General to the Government, that its disclosure— (i) would be contrary to the public interest, or (ii) may infringe the constitutional rights of any person.

(5) Where any matters are so omitted, a statement to that effect shall be attached to the report concerned on its being laid before each House of the Oireachtas and on its publication’.

2007 Act s.32(1) ‘The Inspector of Prisons shall, not later than 31 March in any year or such later date as may be specified by the Minister, submit to the Minister a report on the performance of the Inspector’s functions during the previous year and on such other related matters as the Minister may from time to time direct.

(2) A report under this section shall, in respect



of each prison inspected during the year in question, deal with, in particular—

- (a) its general management, including the level of its effectiveness and efficiency,
- (b) the conditions and general health and welfare of prisoners detained there,
- (c) the general conduct and effectiveness of persons working there,
- (d) compliance with national and international standards, including in particular the prison rules,
- (e) programmes and other facilities available and the extent to which prisoners participate in them,
- (f) security, and
- (g) discipline.

(3) As soon as practicable after receiving a report under this section, the Minister shall, subject to subsection (4), cause a copy of it to be laid before each House of the Oireachtas and to be published.

(4) Subsections (4) and (5) of section 31 apply in relation to a report under this section as they apply in relation to a report under that section.

The Inspector has produced a range of reports:

- Annual reports;
- Inspection reports into individual prisons or units;
- Other reports on particular themes or deaths in custody.

These are all published and available on the website of the Inspector of Prisons.

The last annual report (2013/2014) indicates that over 40 reports submitted to the Minister in that year. Those available on its website are:

- 2 in 2014 (Loughan House and overview of Mountjoy Prison)
- None in 2013
- 3 in 2012 (St Patrick's, Arbour Hill and Limerick)
- 1 in 2011 (Mountjoy)
- 2 in 2009 (Mountjoy and Castlerea)
- 1 in 2008 (Loughan House).

Earlier reports appear to be available on the Department of Justice and Equality's website: [www.justice.ie](http://www.justice.ie)

Other reports listed on the website are:

- 2015: deaths in custody and an omnibus report on investigations into the deaths of prisoners;
- 2014: deaths in custody; and handling of issues in relation to warrants in the case of Celyn Eadon
- 2011: guidance on physical healthcare in prison context; and guidance on best practice relating to investigation of deaths in prison custody;

4 reports in 2010 (relating to handling of sentencing, release; duties and obligations to prisoners; use of special cells; and best practice on prisoner complaints and discipline)

An interim report in 2009.

In his 2012 Annual Report, the Inspector of Prisons also refers to his undertaking 'a thorough investigation of Wheatfield Prison', although no report is subsequently published on this.

Of the reports available on these websites, reports have not been published on all visits and some have been combined into one report. Reports are not written on all establishments, even though they may have been visited. For example, in the 2010 Annual Report, the Inspector of Prisons noted that between September and December 2010 he 'visited all fourteen prisons unannounced' and '[a]part from my, then ongoing, investigation into Mountjoy Prison I only visited each prison once'. Brief details are given on each prison in this annual report.

#### Coordination of visits

No reference in 2007 Act regarding the relationship between Inspector of Prisons and the Prison Visiting Committees.

The Inspector of Prisons in one of his reports notes that he met with the chair of the Prison Visiting Committee for that particular establishment and they discussed a number of concerns which he then highlights in his report and also endorses. However, in respect of another establishment, he noted that

'From what I was told at my meeting with the representative of the Visiting Committee as outlined in paragraph 2.76 the committee does not carry out its mandate as laid out in the legislation'.

#### Submit proposals and observations on existing and draft legislation:

OPCAT requires:

- State to inform body of draft legislation and allow it to make observation
- State should take into consideration such proposals or observation

Not specifically mentioned in the 2007 Act, although:

s.31 (1) The Inspector of Prisons shall carry out regular inspections of prisons and for that purpose may—

(c) in the course of an inspection or arising out of an inspection bring any issues of concern to him or her to the notice of the governor of the prison concerned, the Director-General of the Irish Prison Service, or the Minister or of each one of them, as the Inspector considers appropriate'.

He has provided broader advice to the Minister on relevant issues and assisted in drafting protocols and policies. This also includes commentary on legislation.

#### Resources:

OPCAT requires:

- Necessary resources for effective operation

The latest annual report of the Inspector of Prisons does not make reference to issues of resources. However, the 2012 report noted that: 'In my first year as Inspector of Prisons I had the following staff:- A retired prison governor who acted as my advisor; A higher executive officer; A researcher; A duty officer. In year 2 my staff consisted of:- A higher executive officer; A researcher; A duty officer'. He notes that 'As of the moment I do not have sufficient work to justify the engagement of a researcher.

In the event that I do require a researcher I will seek the appropriate sanction from the Minister for the employment of such a person. I explained to the Minister in 2010 that I required additional office staff. In June 2010 a clerical officer was appointed. In January 2013 a further higher executive officer was appointed'. Furthermore, 'If my work load increases further the question of additional resources will have to be revisited. I am confident that, in such an event, a reasonable request would be sympathetically considered'.

In addition, 'My work is rapidly expanding. I found that I was unable with my present complement of staff to fulfil my expanded mandate. I explained my position to the Minister who gave me permission to engage a panel of experts to assist me in my work. I advertised in the press for such persons. Out of approximately 50 applicants an interview board interviewed 23. The calibre of all applicants was exceptionally high. As a result of the interview process 12 of the applicants were invited to join the panel. All have accepted. Panel members will work on a part time basis and will be paid a per diem rate'.

#### Privileges and immunities for members of NPM and staff

Not expressly mentioned in legislation. Unable to find further protocols or procedures to cover this.

#### Prohibition of sanctions against persons communicating with body

Not expressly mentioned in legislation. Unable to find further protocols or procedures to cover this.

The Inspector of Prisons does mention in one of his reports that 'I am satisfied that prisoners who have spoken to me since my appointment as Inspector of Prisons have been questioned by certain officers as to what was discussed. I have informed prison management of this and warned that any repercussions affecting prisoners who had spoken to me would be taken very seriously by me. I am satisfied that prison management took my warnings seriously but, unfortunately, I am satisfied that prisoners were questioned about their conversations with me subsequent to my bringing this matter to the attention of management'.

**Confidential information collected body should be privileged. Personal data should not be published without consent of individual.**

Not expressly mentioned in legislation. Unable to find further protocols or procedures to cover this.

## Standards

### Legal standards applied

Standards for the Inspection of Prisons in Ireland, 24 July 2009

01/02/2011 Standards for the Inspection of Prisons in Ireland - Women Prisoners' Supplement

01/09/2009 Standards for the Inspection of Prisons in Ireland - Juvenile Supplement

These standards draw upon domestic and international obligations as well as other non-binding instruments including UN and CPT reports, and previous prison inspection reports.

## Commentary

### Further comments and notes

**Resources:** Some we spoke to questioned whether the Inspector of Prisons currently had sufficient resources to carry out his existing mandate given that reports have not been published regularly and it was not always clear if visits had actually taken place. Several interviewees therefore commented that the Inspector of Prisons would need additional resources to become part of the NPM.

IPRT note 'States must also undertake to provide the necessary resources for the functioning of the NPM (Article 18(3)). In this connection we note that since 2008, full reports of inspections have been published on only 7 out of the 14 prison establishments in Ireland. While OPCAT does not define what is understood by 'regular' visits, the Association for the Prevention of Torture states that – depending on the nature of the prison (for example, remand/sentenced) and the nature of concerns raised about a particular establishment – in-depth visits should take place at least once a year for remand prisons and those holding vulnerable populations, and at least once every three years for other prisons'.

Hamilton and Kilkelly note in 2008 that 'Adequate resources must also be provided to the Inspector to carry out his/her functions'.

**Appointment:** Questions were also raised among some we spoke to about the transparency of appointments of the Inspector, the deputy Inspector and the experts as well as information on who these latter individuals were and how they were paid.

**Independence:** Many we spoke to considered the Inspector of Prisons to be critical, vocal, independent and acted with integrity.

Writing in 2008, Hamilton and Kilkelly note that 'some concern may be expressed about the powers of the Minister to censor his/her report, on the grounds of the "public interest" as well as security concerns. ...These concerns are quite real, given the situation that arose in Ireland some years ago, where the second annual report of the Inspector was delayed nine months owing to fears that some of the content might be defamatory'.

IPRT noted in 2009 that there had been some delays in the past in laying the reports before the Oireachtas and that the previous prisons inspector had noted some restrictions imposed on the content of his reports. As a result 'IPRT calls on the Government to introduce the necessary legislation empowering the Inspector of Prisons to publish his reports directly. IPRT also calls on the Government to give an undertaking that all of the Inspector's recommendations will be implemented without delay'.

**Composition:** IPRT note that prisons inspectorates in the UK 'are conducted with the help of highly skilled and experienced inspectors... We recognise that much expertise in this context will potentially be provided by the current staff of the Office of the Inspector of Prisons. However, we submit that in the context of the need for a multidisciplinary approach, more clarity is needed how this expertise will be supplemented to provide a holistic approach to inspections'.

**Coverage:** CPT note in November 2015: 'the Irish authorities should pursue their efforts to identify an appropriate independent body to undertake a fundamental review of health-care services in Irish prisons'. The government responded that the HIQA did not have the remit to look at this.

IPRT noted consequently that 'the need for thorough inspection of prison healthcare arrangements is clear, taking into consideration the comments made in the latest report of the European Committee for the Prevention of Torture on their visit to Ireland, published on 17 November 2015. In their report, the Committee raised concerns about the organisation and management of healthcare services at Midlands Prison and inadequate service provision in Limerick. We note that in response to the CPT's suggestion that the Health Information and Quality Authority (HIQA) reviews the provision of healthcare in all prisons, the Government responded that such a review would lie outside of HIQA's remit.

'We acknowledge that Inspector of Prisons includes reviews of healthcare provision in some of his prison inspection reports; not all of them, however, include a detailed examination. In light of the CPT's comments and the Government's response, it is clear that arrangements for prison inspections must provide for a robust mechanism to uncover and address concerns about healthcare provision. The CPT yet again stressed that healthcare services can and should make an important contribution to the prevention of ill-treatment of persons in prison custody. Any proposal for the creation of a new inspection regime should, therefore, take this into consideration, particularly if it was designed to be a part of the National Preventative Mechanism under OPCAT'.

Generally: IPRT writing in November 2015 note that 'While we acknowledge that the current powers of the Inspector of Prisons are very much in line with the requirements of OPCAT, we want to note some concerns regarding especially the resources that are provided to the Office and its ability to provide for a regime of regular inspections at a time when the Office performs a number of other functions, including investigations into all deaths in custody and on temporary release and well as examining thematic issues, for example the recent Report on Culture and Organisation in the Irish Prison Service'.

IPRT note that '[i]n the context of the above requirements, we submit that a discussion about the creation of any new Inspectorate should take those into close consideration. We acknowledge that much of the work done by the Inspector of Prisons is in line with OPCAT. However, we submit that it would be beneficial before any decision is taken on reconfiguration to take stock of the possible gaps in the current arrangements so these can be rectified before the establishment of any new Inspectorate. We reiterate that the debate on how the new arrangements will contribute to the fulfilment by Ireland of its obligations under OPCAT should form a separate strand of any discussions.'

## Appendix III

# GSOC

### Basics

#### Web site

<http://www.gardaombudsman.ie/>

### Constitutional Aspects

#### Legal Framework/Basis

Established under the Garda Síochána Act 2005, Part 3

Amendments to remit by Garda Síochána (Amendment) Act 2015 and the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015. Further amendments to the 2005 Act by the Criminal Justice Act 2007; Protected Disclosures Act 2014; and Court of Appeal Act 2014.

The Protected Disclosures Act 2014 permits the GSOC to investigate any disclosure reported to it by a prescribed person if it is in the public interest and even if the individual making the disclosure is a member of the Garda Síochána. The Court of Appeal Act 2014 with respect to judicial inquiries into the conduct of designated officers of the GSOC; and appointments of the GSOC of those holding judicial office.

#### Mandate set out in constitutional or legislative text

67.—(1) The objectives of the Ombudsman Commission are—

- (a) to ensure that its functions are performed in an efficient and effective manner and with full fairness to all persons involved in complaints and investigations under Part 4 concerning the conduct of members of the Garda Síochána, and
- (b) to promote public confidence in the process for resolving those complaints.

(2) The functions of the Ombudsman Commission are—

- (a) to receive complaints made by members of the public concerning the conduct of members of the Garda Síochána,

(b) to carry out the duties and exercise the powers assigned to it under Part 4 in relation to those complaints,

(c) to issue guidelines for the informal resolution under section 90 of certain categories of complaints and to make procedural rules for investigations under section 95,

(d) to report the results of its investigations under Part 4 to the Garda Commissioner and, in appropriate cases, to the Director of Public Prosecutions and, if it reports to the Director, to send him or her a copy of each investigation file,

(e) to conduct, in accordance with section 102, other investigations of matters concerning the conduct of members of the Garda Síochána,

(f) to examine practices, policies and procedures of the Garda Síochána in accordance with section 106,

(g) to draw up with the Garda Commissioner protocols in accordance with section 108, and

(h) to carry out any other duties and exercise any other powers assigned to it under this Act.

(3) The Ombudsman Commission has all powers that are necessary for, or incidental to, the performance of its functions under this Act.

The Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015 provides in s.45:

‘Section 67(1) of the Principal Act is amended by—

(a) in paragraph (a) by the substitution of “members of the Garda Síochána,” for “members of the Garda Síochána, and”, and

(b) the substitution of the following paragraphs for paragraph (b):

“(b) to promote and encourage the use of mediation and other informal means of resolving complaints that are suitable for resolution by such means, and

(c) to promote public confidence in the process for resolving complaints referred to in paragraph (a).”’



## Garda Síochána Act 2005:

s.83.—(1) Subject to section 84, a complaint concerning any conduct of a member of the Garda Síochána that is alleged to constitute misbehaviour may be made to the Ombudsman Commission—

(a) by a member of the public who is directly affected by, or who witnesses, the conduct, or

(b) on behalf of that member of the public, by any other person if the member of the public on whose behalf the complaint is being made consents in writing or orally to its being made or is, because of age or a mental or physical condition, incapable of giving consent.

(2) The complaint may be made directly to the Ombudsman Commission or by stating, giving or sending it—

(a) to the Garda Commissioner,

(b) to any member of the Garda Síochána at a Garda Síochána station, or

(c) to a member at or above the rank of chief superintendent at a place other than a Garda Síochána station for forwarding under section 85 to the Ombudsman Commission.

(3) A complaint may be made directly to the Ombudsman Commission by stating it to an officer of the Commission or by giving or sending it to an officer or member of the Commission.

91.—(1) If a complaint concerns the death of, or serious harm to, a person as a result of Garda operations or while in the custody or care of the Garda Síochána, the Ombudsman Commission shall immediately direct a designated officer to—

(a) examine the complaint for the purpose of recommending whether the complaint should be investigated under section 95 or 98, and

(b) report his or her recommendation to the Commission as soon as practicable.

(2) On receiving the designated officer's recommendation, the Ombudsman Commission shall either—

(a) conduct an investigation under section 95, or

(b) direct a designated officer of the Commission to investigate the complaint under section 98.

92.—If an admissible complaint is not resolved pursuant to the guidelines under section 90 or is a complaint referred to in paragraphs (a) to (c) of section 90(1), the Ombudsman Commission may, as it considers appropriate—

(a) refer the complaint to the Garda Commissioner to be dealt with in accordance with section 94,

(b) conduct an investigation under section 95, but, subject to section 95(2), only if the conduct alleged in the complaint does not appear to constitute an offence, or

(c) direct a designated officer of the Commission to investigate the complaint under section 98.

102.—(1) The Garda Commissioner shall refer to the Ombudsman Commission any matter that appears to the Garda Commissioner to indicate that the conduct of a member of the Garda Síochána may have resulted in the death of, or serious harm to, a person.

(2) The Ombudsman Commission shall ensure that the following matters are investigated:

(a) any matter referred to the Commission under subsection (1);

(b) any matter that appears to the Commission to indicate that the conduct of a member of the Garda Síochána may have resulted in the death of, or serious harm to, a person.

(3) The provisions of this Part relating to investigations and reports apply with the necessary modifications in relation to a matter referred to in subsection (2) of this section as if the matter were the subject of a complaint referred to in section 91.

(4) The Ombudsman Commission may, if it appears to it desirable in the public interest to do so and without receiving a complaint, investigate any matter that appears to it to indicate that a member of the Garda Síochána may have—

(a) committed an offence, or

(b) behaved in a manner that would justify disciplinary proceedings.

(5) The Minister may, if he or she considers it desirable in the public interest to do so, request the Ombudsman Commission to investigate any matter that appears to the Minister to indicate that a member of the Garda Síochána may have done anything referred to in subsection (4), and the Commission shall investigate the matter.

(6) The provisions of this Part relating to investigations and reports apply with the necessary modifications in relation to a matter referred to in subsection (4) or (5) of this section as though that matter were the subject of a complaint other than one referred to in section 91.

The Garda Síochána (Amendment) Act 2015 s.6, notes that:

'Section 102 of the Principal Act is amended—

(a) in subsection (5), by the substitution of "any matter that gives rise to a concern" for "any matter that appears to the Minister to indicate", and

(b) by the insertion of the following subsection after subsection (5):

"(5A) The Ombudsman Commission may investigate a matter under subsection (4) or (5) even if—

(a) the identity of the member of the Garda Síochána concerned may not be known when the investigation is undertaken, or (b) the offence or behaviour concerned may also involve or have involved a person who is not a member of the Garda Síochána."

In addition, s.7 of the Garda Síochána (Amendment) Act 2015 also adds:

'The Principal Act is amended by the insertion of the following section after section 102A (inserted by section 19 of the Protected Disclosures Act 2014):

"102B.(1)The Ombudsman Commission may, if it appears to it desirable in the public interest to do so and subject to the consent of the Minister given with the approval of the Government, investigate any matter that gives rise to a concern that the Garda Commissioner may have—

(a) committed an offence, or

(b) behaved in a manner that would constitute serious misconduct.

(2) The Minister may, with the approval of the Government and if he or she considers it desirable in the public interest to do so, request the Ombudsman Commission to investigate any matter that gives rise to a concern that the Garda Commissioner may have done anything referred to in subsection (1), and the Commission shall investigate that matter.

(3) The Minister may, with the approval of the Government, for stated reasons refuse to consent to an investigation by the Ombudsman Commission of any matter under subsection (2).

(4) The Ombudsman Commission may, for the purposes of an investigation of a matter under subsection (1) or (2), direct a designated officer of the Commission to investigate the matter under section 98 and, for that purpose, the reference in section 98(1) to section 91(2)(b), 92(c), 94(8)(a) or 94(11)(b) to investigate a complaint shall be read as a reference to this subsection to investigate a matter under subsection (1) or (2), as the case may be.

(5) Sections 95, 96, 99 and 101 shall apply to an investigation under subsection (1) or (2) by the Ombudsman Commission of a matter relating to the conduct of the Garda Commissioner as they apply to a matter that is the subject of a complaint concerning the conduct of a member of the Garda Síochána (other than the Garda Commissioner) with the following and any other necessary modifications:

(a) in section 95, the substitution of the following subsection for subsection (4):

“(4) As soon as practicable after the conclusion of an investigation under this section, the Ombudsman Commission shall report to the Minister on the investigation.”;

(b) in section 101(6), the substitution of “investigation under section 95, it may proceed in accordance with that section” for “investigation under section 94 or 95, it may proceed in accordance with either of those sections as appropriate.”;

Furthermore, the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015 provides in s.48:

‘Section 102 (as amended by section 6 of the Act of 2015) of the Principal Act is amended—

(a) by the insertion of the following subsection after subsection (4):

“(4A) The Authority may, if it appears to it desirable in the public interest to do so, request the Ombudsman Commission to investigate any matter relating to policing services that gives rise to a concern that a member of the Garda Síochána may have done anything referred to in subsection (4), and the Commission shall investigate that matter.”;

(b) in subsection (5A), by the substitution of “subsection (4), (4A) or (5)” for “subsection (4) or (5)”,

(c) in subsection (6), by the substitution of “subsection (4), (4A) or (5)” for “subsection (4) or (5)”, and

(d) by the addition of the following subsection after subsection (6):

“(7) Notwithstanding subsections (4A) and (5)—

(a) the Authority may refer to the Ombudsman Commission any matter relating to policing services, and

(b) the Minister may refer to the Ombudsman Commission any matter, that gives rise to a cause for concern that a member of the Garda Síochána may have done anything referred to in subsection (4) for the Commission to consider whether the matter is one that it should investigate under that subsection.”;

In addition:

‘Section 102B (inserted by section 7 of the Act of 2015) of the Principal Act is amended—

(a) by the insertion of the following subsection after subsection (1):

“(1A) The Authority may, if it appears to it desirable in the public interest to do so and subject to the consent of the Minister, request the Ombudsman Commission to investigate any matter that gives rise to a concern that the Garda Commissioner may, in the performance of his or her functions relating to policing services, have done anything referred to in subsection (1), and the Commission shall investigate that matter.”;

(b) in subsection (3), by the substitution of “any matter under subsection (1)” for “any matter under subsection (2)”,

(c) by the insertion of the following subsection after subsection (3):

“(3A) If the Minister refuses to consent to the Authority making a request for an investigation by the Ombudsman Commission under subsection (1A), he or she shall inform the Authority of his or her reasons for the refusal.”;

(d) by the insertion of the following subsections after subsection (3A) (inserted by paragraph (c)):

“(3B) The Minister shall issue a directive to a Deputy Garda Commissioner or an Assistant Garda Commissioner requiring him or her to take any lawful measures that appear to him or her to be necessary or expedient for the purposes of—

(i) preserving evidence relating to the conduct of the Garda Commissioner that is the subject of an investigation of a matter under subsection (1), (1A) or (2), and

(ii) facilitating the Ombudsman Commission to obtain that evidence.

(3C) A Deputy Garda Commissioner or an Assistant Garda Commissioner to whom a directive is issued under subsection (3B) shall comply with the directive.”;

(e) in subsection (4), by the substitution of “a matter under subsection (1), (1A) or (2)” for “a matter under subsection (1) or (2)” in both places where it occurs, and

(f) in subsection (5), by the substitution of “an investigation under subsection (1), (1A) or (2)” for “an investigation under subsection (1) or (2)”.

### **Independence: Functional, operational and personnel**

OPCAT requires:

- Period of office sufficient to foster independent functioning

s.67(4) Subject to this Act, the Ombudsman Commission shall be independent in the performance of its functions.

(5) The chairperson of the Ombudsman Commission shall manage and control generally the officers, administration and business of the Commission.

78.—(1) A member of the Ombudsman Commission nominated by it for the purpose shall, whenever required to do so by the Committee of Public Accounts, give evidence to that Committee on—

(a) the regularity and propriety of the transactions recorded, or required to be recorded, in any book or other record of account subject to audit by the Comptroller and Auditor General that the Commission is required by this Act to prepare,

(b) the economy and efficiency of the Commission in the use of its resources,

(c) the systems, procedures and practices employed by the Commission for the purpose of evaluating the effectiveness of its operations, and

(d) any matter affecting the Commission referred to in—

(i) a special report of the Comptroller and Auditor General under section 11(2) of the Comptroller and Auditor General (Amendment) Act 1993, or

(ii) any other report of the Comptroller and Auditor General that is laid before Dáil Éireann in so far as the report

relates to a matter specified in any of paragraphs (a) to (c).

(2) A member of the Ombudsman Commission who gives evidence under this section shall not—

(a) question or express an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits of the objectives of such policy, or

(b) provide information that might facilitate the commission of an offence, prejudice a criminal investigation or prosecution or jeopardise the safety of a person.

79.—(1) In this section “committee” means—

(a) a committee appointed by either House of the Oireachtas or jointly by both Houses of the Oireachtas (other than the Committee of Public Accounts, the Committee on Members’ Interests of Dáil Éireann or the Committee on Members’ Interests of Seanad Éireann), or

(b) a sub-committee of a committee as defined in paragraph (a).

(2) Subject to subsection (3), a member of the Ombudsman Commission nominated by it for the purpose shall, at the written request of a committee, attend before it to give account for the general administration of the Commission.

(3) The member of the Ombudsman Commission shall not be required to give account before a committee for any matter that is or is likely to be, the subject of proceedings before a court or tribunal in the State.

(4) The member of the Ombudsman Commission shall, if of the opinion that subsection (3) applies to a matter about which he or she is requested to give an account before a committee, inform the committee of that opinion and the reasons for the opinion.

(5) The information required under subsection (4) must be given to the committee in writing unless it is given when the member of the Ombudsman Commission is before the committee.

(6) If, on being informed of the member of the Ombudsman Commission’s opinion about the matter, the committee decides not to withdraw



its request relating to the matter, the High Court may, on application under subsection (7), determine whether subsection (3) applies to the matter.

(7) Either the Ombudsman Commission or the committee may apply in a summary manner to the High Court for a determination under subsection (6), but only if the application is made within 21 days after the date on which the member of the Commission is informed of the committee's decision not to withdraw its request.

(8) Pending the determination of an application under subsection (7), the member of the Ombudsman Commission shall not attend before the committee to give account for the matter that is the subject of the application.

(9) If the High Court determines that subsection (3) applies to the matter, the committee shall withdraw its request in so far as it relates to the matter, but if the Court determines that subsection (3) does not apply, the member of the Ombudsman Commission shall attend before the committee to give account for the matter.

(10) In carrying out duties under this section, a member of the Ombudsman Commission shall not—

(a) question or express an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits of the objectives of such policy, or

(b) provide information that might facilitate the commission of an offence, prejudice a criminal investigation or prosecution or jeopardise the safety of a person.

### Financial Independence

s.76. 'The Minister may, in each financial year, pay to the Ombudsman Commission, out of money provided by the Oireachtas, a grant of such amount as he or she, with the consent of the Minister for Finance, determines towards the expenses of the Commission in performing its functions'.

s.77(1) 'The Ombudsman Commission shall keep, in such form and in respect of such accounting periods as may be approved by the Minister with the consent of the Minister

for Finance, all proper and usual accounts of money received or expended by it, including an income and expenditure account and a balance sheet.

(2) Not later than 3 months after the end of the accounting period to which the accounts relate, the Ombudsman Commission shall submit accounts kept under this section to the Comptroller and Auditor General for audit.

(3) Immediately after the audit, the Ombudsman Commission shall present to the Minister copies of—

- (a) the audited accounts, including the income and expenditure account, the balance sheet and such other (if any) accounts kept under this section as the Minister, after consulting with the Minister for Finance, may direct, and
- (b) the Comptroller and Auditor General's report on the accounts.

(4) As soon as practicable after presentation of the audited accounts and the Comptroller and Auditor General's report, the Minister shall cause copies of them to be laid before each House of the Oireachtas'.

78.—(1) A member of the Ombudsman Commission nominated by it for the purpose shall, whenever required to do so by the Committee of Public Accounts, give evidence to that Committee on—

- (a) the regularity and propriety of the transactions recorded, or required to be recorded, in any book or other record of account subject to audit by the Comptroller and Auditor General that the Commission is required by this Act to prepare,
- (b) the economy and efficiency of the Commission in the use of its resources,
- (c) the systems, procedures and practices employed by the Commission for the purpose of evaluating the effectiveness of its operations, and
- (d) any matter affecting the Commission referred to in—
  - (i) a special report of the Comptroller and Auditor General under section 11(2) of the Comptroller and Auditor General (Amendment) Act 1993, or

(ii) any other report of the Comptroller and Auditor General that is laid before Dáil Éireann in so far as the report relates to a matter specified in any of paragraphs (a) to (c).

(2) A member of the Ombudsman Commission who gives evidence under this section shall not—

- (a) question or express an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits of the objectives of such policy, or
- (b) provide information that might facilitate the commission of an offence, prejudice a criminal investigation or prosecution or jeopardise the safety of a person.

## Membership

### Composition of body:

- OPCAT requires:
- Experts
  - Collectively have the required capabilities and professional knowledge
  - Strive for gender balance and adequate representation of ethnic and minority groups in the country

Garda Síochána Act 2005,

s.65 '(1) The Ombudsman Commission is to consist of 3 members, all of whom are to be appointed by the President on—

- (a) the nomination of the Government, and
- (b) the passage of resolutions by Dáil Éireann and Seanad Éireann recommending their appointment.

(2) One of the members shall be appointed as chairperson.

(3) At least one of the 3 members shall be a woman and at least one of them shall be a man.

(4) In considering the nomination of a person to be a member of the Ombudsman Commission, the Government shall satisfy themselves that the person has the appropriate experience,

qualifications, training or expertise for appointment to a body having the functions of the Commission'.

Headed by Judge Mary Ellen Ring, who is the Commissioner.

The Criminal Justice Act 2007 amended the Garda Síochána Act 2005 by inserting a new chapter providing for a Garda Síochána Executive Management Board composed of the Commissioner, Deputy Commissioners and a member of the civilian staff of the Garda Síochána as well as non-executive members appointed by government on nomination of the Minister. The role of the board is to keep under review the performance of the Garda Síochána including mechanisms for measuring its accountability. The Criminal Justice Act also sets up the ability of the Minister to appoint an individual to conduct a special inquiry into the Garda or its members.

### Appointment:

- OPCAT requires:
- Open, transparent and inclusive process involving wide range of stakeholders as well as civil society
  - Not appoint those with conflicts of interest/members of NPM ensure they do not hold such positions
  - Members carry out work which avoid conflict of interest

Garda Síochána Act 2005,

s.65 '(1) The Ombudsman Commission is to consist of 3 members, all of whom are to be appointed by the President on—

- (a) the nomination of the Government, and
- (b) the passage of resolutions by Dáil Éireann and Seanad Éireann recommending their appointment'.

S.65(5) 'A person who holds judicial office in a superior court may, without relinquishing that office, be appointed, with his or her consent, as the chairperson of the Ombudsman Commission, but, unless otherwise provided by the terms of the appointment, he or she shall not, while a member, be required to carry out duties under statute as the holder of that



judicial office.

(6) Schedule 4 has effect if a person who holds judicial office in a superior court is appointed as the chairperson of the Ombudsman Commission.

(7) A person is not eligible to be nominated or appointed under this section if he or she—

- (a) is a member of either House of the Oireachtas,
- (b) is entitled under the rules of procedure of the European Parliament to sit in that Parliament,
- (c) is a member of a local authority, or
- (d) is or has been a member of the Garda Síochána’.

s.66 ‘(1) Subject to section 68, a member of the Ombudsman Commission holds office for the period, exceeding 3 years but not exceeding 6 years, that the Government may determine at the time of appointment.

(2) A member is eligible for reappointment for a second term.

(3) A member holds office on the terms and conditions relating to remuneration (including allowances for expenses, benefits in kind and superannuation) or other matters that may be determined by the Government at the time of appointment or reappointment.

(4) The Ombudsman Commission may act notwithstanding one or more than one vacancy among its members, including a vacancy that results in section 65(3) not being complied with.

(5) Whenever a vacancy occurs in the membership of the Ombudsman Commission caused by the resignation, removal from office or the death of a member, the vacancy is to be filled by appointment in the manner specified in section 65.

(6) A member who is appointed to fill a vacancy caused by the resignation, removal from office or the death of a member holds office for the remainder of the term of office of the replaced member’.

#### **Legislation specifies period of office of members and grounds for dismissal**

s.68 ‘(1) A member of the Ombudsman Commission may resign from office at any time by letter addressed to the President and copied to the Minister, and the resignation takes effect on the date the President receives the letter.

(2) The President may remove a member of the Ombudsman Commission from office, but only for stated misbehaviour or for incapacity and then only on resolutions passed by Dáil Éireann and Seanad Éireann calling for the member’s removal.

(3) A person ceases to be a member of the Ombudsman Commission as soon as he or she—

- (a) is nominated as a member of Seanad Éireann,
- (b) is elected as a member of either House of the Oireachtas or of the European Parliament,
- (c) is regarded pursuant to Part XIII of the Second Schedule to the European Parliament Elections Act 1997 as having been elected to the European Parliament to fill a vacancy, or
- (d) becomes a member of a local authority’.

#### **Staffing**

OPCAT requires:

- NPM to ensure it has staff with diversity of background, capabilities, professional knowledge including relevant legal and health care expertise

s.71 ‘(1) The Ombudsman Commission may appoint such numbers of persons as its officers as may be approved by the Minister with the consent of the Minister for Finance.

(2) The Ombudsman Commission shall determine the grades of its officers and the numbers of officers in each grade, as may be approved by the Minister with the consent of the Minister for Finance.

(3) Officers of the Ombudsman Commission are civil servants in the Civil Service of the State.

(4) The Ombudsman Commission is the appropriate authority (within the meaning of

the Civil Service Commissioners Act 1956 and the Civil Service Regulation Acts 1956 to 1996) in relation to its officers.

72.—(1) Any member of the staff of the Department of Justice, Equality and Law Reform who on the establishment day is engaged in duties in the Garda Síochána Complaints Board may be designated by order of the Minister and shall, on being so designated, be transferred to and become an officer of the Ombudsman Commission.

(2) Before making an order for the purpose of subsection (1), the Minister shall—

- (a) notify in writing any recognised trade union or staff association concerned of the Minister’s intention to do so, and
- (b) consider, within the time that may be specified in the notification, any representations made by that trade union or staff association in relation to the matter.

(3) Schedule 2 has effect in relation to staff transferred under this section’.

The organisation’s Employment Control Framework figure (ECF) - or sanctioned workforce - is 86 people, which does not include the Commissioners, any staff seconded from the Garda Síochána, or any contractors.

The organisation has a Director of Administration and a Director of Operations.

At the start of 2015, GSOC had 74 staff, of which 20 were employed in its Administration Directorate and 54 in the Operations Directorate. It also had one superintendent seconded from the Garda Síochána and two ICT contractors.

#### **Powers and resources**

##### **Places visited where deprivation of liberty could be exercised:**

OPCAT requires:

- All places of deprivation of liberty
- Suspected places of deprivation of liberty

- Ability to choose places want to visit and who want to interview

N/A

##### **Frequency of visits:**

OPCAT requires:

- Regular examination
- frequency decided by the NPM

N/A

##### **Types of visits:**

OPCAT requires:

- Ability to carry out unannounced visits

N/A

##### **Private interviews:**

OPCAT requires:

- Ability to have private interviews with those deprived of liberty and others

N/A

##### **Access to information:**

OPCAT requires:

- Access to all information on number of persons; places and location;
- Access to all information on treatment and conditions of detention;
- Access to all places of detention, installations and facilities

96.—(1) For the purpose of an investigation under section 95, the Ombudsman Commission—

- (a) may require a person who, in its opinion, possesses information or has a document or thing in his or her power or control that is relevant to the investigation, to provide that information, document or thing to the

Commission, and

(b) where appropriate, may require that person to attend before the Commission for that purpose, and the person shall, subject to subsection (4), comply with the requirement.

(2) A requirement under subsection (1) shall specify—

(a) a period within which the person is to comply with the requirement, and

(b) as appropriate—

(i) the place at which the person shall attend to give the information concerned or to which the person shall deliver the document or thing concerned, or

(ii) the place to which the person shall send the information, document or thing concerned.

(3) A person required to attend before the Ombudsman Commission under subsection (1)—

(a) shall answer fully and truthfully any question put to him or her by the Commission, and

(b) if so requested by the Commission, shall sign a declaration of the truth of his or her answer to the question.

(4) A person may not be required under subsection (1)(a) or

(3)(a) to provide any information, document or thing that is designated, or is of a class designated, under section 126 as relating to the security of the State, except in accordance with a direction of the Minister.

(5) If a person required under subsection (1)(a) or (3)(a) to provide any information, document or thing claims that subsection (4) applies in relation to the matter, the Ombudsman Commission shall refer the matter to the Minister.

(6) If the Minister determines that the disclosure of all or part of the information, document or thing specified in the requirement would not be prejudicial to the security of the State or that its disclosure is necessary for the proper investigation of a matter concerning the death of, or serious harm to, a person as a

result of Garda operations or while in the care or custody of the Garda Síochána, the Minister may issue a direction—

(a) specifying that all or part, as the case may be, of the document, information or thing be disclosed, and

(b) imposing any conditions or restrictions relating to the security of the State that the Minister considers appropriate.

(7) If it appears to the Ombudsman Commission that a person has failed to comply with a requirement under subsection (1)(a) or (3)(a) for any reason other than one relating to the security of the State, the Commission may apply to the Circuit Court for an order under subsection (8).

(8) If satisfied after hearing the application about the person's failure to comply with the requirement in question, the Circuit Court may, subject to subsection (9), make an order requiring that person to comply with the requirement.

(9) If the Circuit Court is of opinion that the requirement in question purports to require the person concerned to provide any information, document or thing—

(a) in respect of which he or she is entitled to claim legal professional privilege, or

(b) the disclosure of which would—

(i) jeopardise a person's safety, or

(ii) for any other reason not be in the public interest, the Court shall, to that extent, set aside, vary or attach conditions to the requirement.

(10) Any information, document or thing provided by a person in accordance with a requirement under subsection (1)(a) or (3)(a) or with a direction under subsection (6) is not admissible against that person in criminal proceedings and this shall be explained to the person in ordinary language by the Ombudsman Commission.

(11) A person who fails to comply with a direction under subsection (6) or an order under subsection (8) is guilty of an offence and is liable on summary conviction to a fine not exceeding €2,500 or imprisonment for a term not exceeding 6 months or both.

(12) An application under subsection (7) to the Circuit Court shall be made to a judge of the Circuit Court for—

(a) the circuit in which the respondent resides or ordinarily carries on any profession, business or occupation, or

(b) if the respondent is a member of the Garda Síochána, the circuit in which that member is stationed.

(13) For the purpose of subsection (10), "criminal proceedings" does not include disciplinary proceedings.

99.—(1) Subject to this section, a designated officer directed by the Ombudsman Commission to investigate a complaint under section 98 may carry out a search of a Garda Síochána station in accordance with an authorisation issued in the prescribed form by the Commission.

(2) Subject to subsection (3), the Ombudsman Commission may issue to a designated officer an authorisation to search a Garda Síochána station, if the Commission is satisfied that the officer—

(a) with reasonable cause, suspects the member under investigation to be guilty of an offence, and

(b) has reasonable grounds for suspecting that evidence of, or relating to, the commission of the offence is to be found in the station or in the possession of any person to be found there.

(3) Before issuing an authorisation to search a Garda Síochána station designated by regulation under section 126 as one that, for reasons relating to the security of the State, may not be searched except to the extent specified in a direction of the Minister, the Ombudsman Commission shall notify the Garda Commissioner and the Minister of its intention to issue the authorisation.

(4) If, on being informed of the intention to issue the authorisation, the Garda Commissioner informs the Ombudsman Commission that he or she objects to the search of the designated Garda Síochána station on grounds relating to the security of the State, the Garda Commissioner shall immediately request the Minister to consider

the objection.

(5) If satisfied, after considering the objection and any submission made by the Ombudsman Commission concerning the objection, that the search of a document storage facility in the designated Garda Síochána station or of a part of that station would not be prejudicial to the security of the State or that such search is necessary for the proper investigation of a matter concerning the death of, or serious harm to, a person as a result of Garda operations or while in the care or custody of the Garda Síochána, the Minister shall issue directions specifying the part of the document storage facility or the part of the station that may be searched.

(6) A direction under subsection (5) may contain any conditions or restrictions relating to the search that the Minister considers necessary in the interests of the security of the State.

(7) Subject to any directions under subsection (5), an authorisation issued under this section permits a designated officer, accompanied by any other designated officer, to—

(a) enter, within one week after the date specified on the authorisation, the Garda Síochána station specified on the authorisation,

(b) search that station and any persons found there, and

(c) seize anything found in that station, or found in the possession of a person present in the station at the time of the search, that the designated officer reasonably believes to be evidence of, or relating to, the commission of the offence in question.

(8) A designated officer acting under an authorisation issued under this section may—

(a) require any person present at the Garda Síochána station where the search is carried out to give to the officer his or her name and address, and

(b) arrest without warrant any person who—  
(i) obstructs or attempts to obstruct the officer, or any other designated officer accompanying the officer, in carrying out his or her duties,

(ii) fails to comply with a requirement under paragraph (a), or



(iii) gives a name or address that the officer has reasonable cause for believing is false or misleading.

(9) A person who—

- (a) obstructs or attempts to obstruct a designated officer acting under an authorisation issued under this section,
- (b) fails to comply with a requirement under subsection (8)(a), or
- (c) gives a false name or address to that officer, is guilty of an offence and is liable on summary conviction to a fine not exceeding €2,500 or imprisonment for a period not exceeding 6 months or both.

(10) In this section—

“commission”, in relation to an offence, includes an attempt to commit the offence;

“document storage facility” means any place or thing or part of a place in which documents are held or stored manually, mechanically or electronically;

“Garda Síochána station” means any premises where a member of the Garda Síochána is stationed.

Reports

OPCAT requires:

- Annual reports
- Reports following the visits
- Other reports
- Competent authorities to examine the recommendations and enter into a dialogue on implementation measures
- Process of follow up
- State to publish and widely disseminate annual reports
- Annual report presented to parliament

s.80 ‘(1) Not later than March 31 in each year, the Ombudsman Commission shall submit to the Minister a report on its activities in the immediately preceding year.

(2) The Ombudsman Commission shall, within 2 years from the date of its establishment,

submit to the Minister a report on—

- (a) the effectiveness of the Commission, and
- (b) the adequacy of the functions assigned to it by this Act.

(3) The report submitted under subsection (2) may contain recommendations for improving the effectiveness of the Ombudsman Commission.

(4) At the end of each 5 year period commencing with the date of its establishment, the Ombudsman Commission shall submit to the Minister a report reviewing the general performance of its functions in the preceding 5 years.

(5) The Ombudsman Commission may make any other reports that it considers appropriate for drawing to the Minister’s attention matters that have come to its notice and that, in its opinion, should, because of their gravity or other exceptional circumstances, be the subject of a special report to the Minister.

(6) As soon as practicable after receiving a report under this section, the Minister shall cause a copy of the report to be laid before each House of the Oireachtas.

s.97 (1) The Ombudsman Commission shall include in its report under section 94(7) or 95(4) to the Garda Commissioner—

- (a) a statement of the facts established by the investigation under section 94 or 95 into the conduct of the member of the Garda Síochána who is the subject of the report,
- (b) a recommendation about whether or not disciplinary proceedings should be instituted under the Disciplinary Regulations against that member,
- (c) a statement of the reasons for the recommendation, and
- (d) if the Commission recommends that those proceedings should be instituted, the particulars relating to the proceedings that the Commission considers appropriate.

(2) In any disciplinary proceedings instituted in accordance with a recommendation in a report referred to in subsection (1), a document that purports to be that report—

- (a) is evidence of the facts stated in the document unless the contrary is proved, and
- (b) is deemed to be such document unless the contrary is proved.

(3) The Ombudsman Commission is entitled to be notified of a decision made under the Disciplinary Regulations concerning the member of the Garda Síochána who is the subject of the report’.

101.—(1) On completing an investigation under section 98, the designated officer concerned shall report in writing to the Ombudsman

Commission the results of the investigation.

(2) If the Ombudsman Commission, after considering the designated officer’s report, is of the opinion that the conduct under investigation may constitute an offence by the member of the Garda Síochána concerned, it shall—

- (a) send a copy of the report and of the investigation file to the Director of Public Prosecutions together with any recommendations that appear to the Commission to be appropriate, and
- (b) at the Director’s request, provide him or her with any other information relating to the investigation that appears to the Director to be necessary for performing his or her functions under the Prosecution of Offences Act 1974.

(3) The Director of Public Prosecutions shall inform the Ombudsman Commission of—

- (a) a decision of the Director about whether or not to institute a prosecution in relation to the conduct that is the subject of a report received from the Commission under subsection (2), and
- (b) if a prosecution is instituted, the progress of the prosecution and whether it results in the conviction or acquittal of the member of the Garda Síochána whose conduct was the subject of the report.

(4) Subsection (2) is not to be taken to limit the power of the Ombudsman Commission to forward to the Director of Public Prosecutions at any time a report on a complaint that, in its opinion, discloses the commission of an offence.

(5) If a member of the Garda Síochána is convicted of an offence in respect of a matter reported to the Director of Public Prosecutions under this section or if the Director decides not to institute a prosecution in relation to that matter, the Ombudsman Commission is not precluded from conducting or continuing an investigation into the matter under section 95 by reason only that the conduct under investigation is in substance the same as the conduct constituting the offence of which the member is convicted or in respect of which no prosecution is instituted.

(6) If, after considering the designated officer’s report, the Ombudsman Commission is not of the opinion referred to in subsection (2) but it considers that the complaint warrants investigation under section 94 or 95, it may proceed in accordance with either of those sections as appropriate.

(7) If, after considering the designated officer’s report, the Ombudsman Commission is of the opinion that it discloses no misbehaviour by the member of the Garda Síochána concerned, the Commission shall take no further action in relation to the complaint.

Reports published include annual reports, ‘special reports’, and ‘other investigation reports’.

Coordination of visits

N/A re visits

With respect to complaints:

s.74 ‘(1) The Ombudsman Commission may, for the purposes of performing its functions under this Act, enter into arrangements as follows:

- (a) with the Garda Commissioner for the engagement of members of the Garda Síochána below the rank of Garda Commissioner who have applied to the Commissioner to be considered for service under such arrangement;



(b) with any police service outside the State for the engagement of police officers from that service;

(c) with any other body for the engagement of other persons.

(2) Arrangements under subsection (1) may provide for the persons concerned to be engaged (on contract or otherwise) for a period of temporary service with the Ombudsman Commission.

(3) If designated by the Ombudsman Commission for the purpose of conducting an investigation under section 98 or under that section as applied by section 102, a person who is a member of the Garda Síochána or another police service and who is engaged under this in relation to that investigation, only the powers, immunities and privileges conferred and the duties imposed under sections 98 and 99.

(4) During a period of temporary service with the Ombudsman Commission, a member of the Garda Síochána is not subject to the direction or control of the Garda Commissioner, but—

(a) the member is entitled to continue to be paid as a member of the Garda Síochána,

(b) the member's service with the Commission is considered to be service with the Garda Síochána for pension, seniority and promotion purposes, and

(c) the member is entitled to claim compensation under the Garda Síochána Compensation Acts 1941 and 1945 for malicious injuries received in the course of, or in relation to, the carrying out of duties with the Commission'.

#### Submit proposals and observations on existing and draft legislation:

OPCAT requires:

- State to inform body of draft legislation and allow it to make observation
- State should take into consideration such proposals or observation

Does not appear to be in the legislation.

#### Resources:

OPCAT requires:

- Necessary resources for effective operation

GSOC's 2013 Annual Report noted 'For 2013, the allocated annual budget was €8,011,415. This was subsequently reduced, in line with Departmental budgetary adjustments, to an actual budget of €7,970,675. In 2013, as with previous years, we demonstrated GSOC's commitment to value for money and maintenance of tight fiscal controls. We recognise the difficult financial climate within which State organisations operate and we will continue to use the resources at our disposal carefully. ... In common with many other public service organisations, GSOC operated with reduced resources. We are now operating with staff numbers well below the original planned workforce targets'.

Similarly, the 2014 Annual Report notes 'This staffing figure of 74 is well under the organisation's Employment Control Framework figure (ECF) of 86. Difficulties have been encountered as a consequence of time delays incurred in receiving sanction to recruit and recruitment mechanisms imposed, such as redeployment panels. Even with the full sanctioned staff complement of 86, GSOC would be under-resourced to achieve its objectives of functioning efficiently and to a high level of quality. This is without taking into consideration the marked increase in complaints over the last year; and the increase in workload that is likely to result from the new responsibilities accorded by the already enacted Protected Disclosures Act 2014; and the impending amendments to the Garda Síochána Act 2005. To enable GSOC to function effectively and efficiently, it is the Commission's opinion that it is imperative that the organisation's ECF be increased to better match its remit, and that the capacity to fill vacancies when they arise be devolved to the organisation'.

**Confidential information collected by body should be privileged. Personal data should not be published without consent of individual.**

81.—(1) A person who is or was a member or

officer of the Ombudsman Commission or who is or was engaged under contract or other arrangement by the Commission shall not disclose, in or outside the State, information obtained in carrying out the duties of that person's office or of his or her contract or other arrangement with the Commission if the disclosure is likely to have a harmful effect.

(2) For the purpose of this section, the disclosure of information referred to in subsection (1) does not have a harmful effect unless it—

(a) impedes an investigation under Part 4 or otherwise prejudices the effective performance of the Ombudsman Commission's functions,

(b) results in the identification of a person—

(i) who is a complainant or the subject of a complaint, and

(ii) whose identity is not at the time of the disclosure a matter of public knowledge,

(c) results in the publication of information that—

(i) relates to a person who is a complainant or the subject of a complaint or who has given evidence to the Ombudsman Commission, and

(ii) is of such a nature that its publication would be likely to discourage the person to whom the information relates or any other person from reporting a complaint or giving evidence to the Ombudsman Commission, or

(d) results in the publication of personal information (as defined in the Freedom of Information Act 1997) obtained in the course of an investigation and constitutes an unwarranted and serious infringement of a person's right to privacy.

(3) For the purpose of this section, a person is presumed, unless the contrary is proved, to know that disclosure of information referred to in subsection (1) is likely to have a harmful effect if a reasonable person would, in all the circumstances, be aware that its disclosure could have that effect.

(4) Subsection (1) does not prohibit a person referred to in that subsection from disclosing

information if the disclosure—

(a) is made to—

(i) the Garda Commissioner,

(ii) the Minister,

(iii) the Attorney General,

(iv) the Director of Public Prosecutions,

(v) the Chief State Solicitor,

(vi) the Criminal Assets Bureau,

(vii) the Comptroller and Auditor General,

(viii) the Garda Síochána Inspectorate or an officer of the Inspectorate,

(ix) the Revenue Commissioners, or

(x) a member of either of the Houses of the Oireachtas where relevant to the proper discharge of that member's functions,

(b) is made under Part 4 to a person in relation to—

(i) a complaint made by the person, or

(ii) an investigation concerning the person,

(c) is made to a court,

(d) is made to a tribunal appointed under the Tribunals of Inquiry (Evidence) Acts 1921 to 2002 or a commission of investigation established under the Commissions of Investigation Act 2004,

(e) is made in the course of, and in accordance with, the duties of that person's office or employment or of his or her duties under a contract or other arrangement to work with or for the Ombudsman Commission,

(f) is authorised by the Ombudsman Commission, or

(g) is otherwise authorised by law.

(5) A person who contravenes subsection (1) is guilty of an offence and is liable—

(a) on summary conviction, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

(6) A person who contravenes subsection (1) and who receives any gift, consideration or advantage as an inducement to disclose the information to which the contravention relates or as a reward for, or otherwise on account of, the disclosure of that information is guilty of an offence and is liable—

(a) on summary conviction, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment, to a fine not exceeding €75,000 or imprisonment for a term not exceeding 7 years or both.

(7) The provisions of this section are in addition to, and not in substitution for, the provisions of the Official Secrets Act 1963.

### Further Comments and Notes

Independence and reputation: Some interviewees considered the GSOC to have a poor reputation, as well as lacking independence because of the presence of a Garda representative.

In 2014 the UN Human Rights Committee noted its ‘concern at the ability of the Garda Síochána Ombudsman Commission to function independently and effectively, and at the requirement for approval from the Minister of Justice to examine police practices, policies and procedures, and the length of time taken to complete investigations due to lack of cooperation by the police (arts. 7 and 10). The State party should proceed with the timely adoption of the general Scheme of the Garda Síochána (Amendment) Bill 2014 to strengthen the independence and effectiveness of the Garda Síochána Ombudsman Commission. It should also ensure that the proposed establishment of the Garda Síochána Authority does not encroach upon or undermine the work of the Commission, but rather complements and supports it.’

Relationship with other agencies: Some told us that there is a lack of clarity on the relationship between the GSOC, Garda Síochána Inspectorate and Policing Authority.

The UN Committee Against Torture noted in 2011 the following:

‘The Committee welcomes the establishment of the Garda Síochána Ombudsman Commission (GSOC) in 2005, the members of which cannot be serving members or former members of the Garda Síochána (Police Force). GSOC is empowered to investigate complaints of torture and ill-treatment against members of the Garda Síochána. However, the Committee regrets that GSOC can also refer complaints to the Garda (Police) Commissioner, who can proceed with the investigations independently or under the supervision of GSOC, except complaints concerning the death of or serious harm to a person in police custody. The Committee is also concerned at the information that GSOC has submitted proposals for the amendment of the Garda Síochána Act of 2005 in a number of areas, including the power to allow GSOC to refer investigations back to the Garda Síochána, thereby allowing the police to investigate itself (arts. 2, 12, 13 and 16).

The Committee recommends that the State party ensure by law that all allegations of torture and ill-treatment by the police are directly investigated by the Garda Síochána Ombudsman Commission and that sufficient funds are allocated to the Commission so as to enable it to carry out its duties promptly and impartially and to deal with the backlog of complaints and investigations which has accumulated. The Committee also requests the State party to provide it with statistical data on (a) the number of complaints of torture and ill-treatment filed against prison officers, the number of investigations instituted, and the number of prosecutions and convictions imposed; and (b) the number of cases that have been referred to the Garda Síochána’.

Other commentary: Other criticisms in the media have been directed towards the GSOC with respect to its handling of complaints, and with some questioning its independence. Its investigations have also been criticised. There have been recent allegations that the GSOC was using its 2015 enhanced powers to access telephone records of journalists and whether the legal basis for doing so was sound.

## Appendix IV Garda Síochána Inspectorate



## Basics

### Website

<http://www.gsinsp.ie/>

## Legislative Aspects

### Legal Framework/Basis

Garda Síochána Act 2005 (hereinafter ‘2005 Act’) (as amended), Part 5, establishes the Inspectorate and sets out its functions, remit and manner of appointment.

### Mandate set out in constitutional or legislative text

2005 Act, s.117(1) ‘The objective of the Garda Síochána Inspectorate is to ensure that the resources available to the Garda Síochána are used so as to achieve and maintain the highest levels of efficiency and effectiveness in its operation and administration, as measured by reference to the best standards of comparable police services.

(2) The functions of the Inspectorate are—

- (a) in furtherance of its objective to carry out, at the request or with the consent of the Minister, inspections or inquiries in relation to any particular aspects of the operation and administration of the Garda Síochána,
- (b) to submit to the Minister—
  - (i) a report on those inspections or inquiries, and
  - (ii) if required by the Minister, a report on the operation and administration of the Garda Síochána during a specified period and on any significant developments in that regard during that period, and
- (c) to provide advice to the Minister with regard to best policing practice.

(3) Any report prepared under subsection (2)(b) shall, where appropriate, contain recommendations for any action that the Inspectorate considers necessary.

(4) Subject to subsection (5), the Minister shall cause copies of any reports received by him or her under subsection (2)(b) to be laid before the Houses of the Oireachtas.

(5) The Minister may exclude from the copies of reports which are to be laid before the Houses of the Oireachtas any matter which, in his or her opinion—

- (a) would be prejudicial to the interests of national security, or
- (b) might facilitate the commission of an offence, prejudice a criminal investigation or jeopardise the safety of any person.

(6) The Inspectorate, with the approval of the Minister, may arrange—

- (a) with any police service outside the State for the engagement of police officers from that service, or
- (b) with any other body for the engagement of other persons, for the provision of consultancy or advisory services in connection with the performance of its functions.

The Garda Síochána (Amendment) Act 2015 provides in s.11: ‘Section 117(2) of the Principal Act is amended by the substitution of the following paragraph for paragraph (a):

“(a) in furtherance of its objective to carry out, if it considers it appropriate to do so or at the request of the Minister, inspections or inquiries in relation to any particular aspects of the operation and administration of the Garda Síochána.”’

Further Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015 also provides in s.53:

‘Section 117 of the Principal Act is amended—

- (a) by the substitution of the following subsection for subsection (2) (as amended by section 11 of the Act of 2015):

“(2) The functions of the Inspectorate are—

- (a) in furtherance of its objective to carry out, if it considers it appropriate to do so or at the request of—
  - (i) the Authority in respect of a matter

relating to policing services, or

(ii) the Minister, inspections or inquiries in relation to any particular aspects of the operation and administration of the Garda Síochána,

(b) to submit to the Authority or the Minister, as the case may be—

- (i) a report on those inspections or inquiries, and
- (ii) if required by—
  - (I) the Authority in relation to policing services, or
  - (II) the Minister,

as the case may be, a report on the operation and administration of the Garda Síochána during a specified period and on any significant developments in that regard during that period, and

(c) to provide advice to the Authority and the Minister with regard to best policing practice.”,

(b) by the insertion of the following subsections after subsection (3):

“(3A) The Authority shall notify the Minister of a request made by it under subsection (2)(a) and shall, as soon as practicable, provide the Minister with a copy of any report received by it under subsection (2)(b).

(3B) The Minister shall notify the Authority of a request made by him or her under subsection (2)(a) and may, if he or she considers it appropriate having regard to the functions of the Authority under this Act, provide the Authority with a copy of any report received by him or her under subsection (2)(b).”,

and

(c) in subsection (4), by the substitution of “subsection (2)(b) or (3A)” for “subsection (2)(b)”.

### Independence: Functional, operational and personnel

OPCAT requires:

- Period of office sufficient to foster independent functioning

Members appointed by government (s.115(1)).

2005 Act, s.117:

‘(5) The Minister may exclude from the copies of reports which are to be laid before the Houses of the Oireachtas any matter which, in his or her opinion—

- (a) would be prejudicial to the interests of national security, or
- (b) might facilitate the commission of an offence, prejudice a criminal investigation or jeopardise the safety of any person.’

(7) Subject to this Act, the Inspectorate shall be independent in the performance of its functions.’

120(1) ‘The Chief Inspector shall, at the written request of a committee of either or both of the Houses of the Oireachtas (other than the Committee of Public Accounts) in connection with the subject matter of any report of which copies were laid before those Houses under section 117(4), attend before it in relation to any aspect of that matter.

(2) In carrying out his or her duties under this section, the Chief Inspector shall not—

- (a) question or express an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits or objectives of such policy, or
- (b) provide information that might facilitate the commission of an offence, prejudice a criminal investigation or jeopardise the safety of any person’.

The Inspectorate states that ‘The values that the Inspectorate uses in carrying out its work are:

Independence: we aim to be objective, fair and impartial basing reports on a thorough and rigorous evaluation of considered evidence;

Integrity: we will act with honesty, reliability and fairness at all times;

Timeliness: we aim to carry out our responsibilities in a timely manner;

Courtesy and respect: we aim to deal with all persons and organisations in a polite, transparent and professional manner. Subject to



the 2005 Act, the Inspectorate is independent in the performance of its functions.'

### Financial Independence

2005 Act, s.119(1) 'Such funds, premises, facilities, services and staff as may be necessary for the proper functioning of the Garda Síochána Inspectorate shall be provided to it by the Minister with the consent of the Minister for Finance'.

## Membership

### Composition of body:

OPCAT requires:

- Experts
- Collectively have the required capabilities and professional knowledge
- Strive for gender balance and adequate representation of ethnic and minority groups in the country

2005 Act, s.115(1) 'The Garda Síochána Inspectorate shall consist of 3 members, to be appointed by the Government.

(2) One of the members shall be appointed as Chief Inspector.

(3) At least one of the members shall be a woman and at least one of them shall be a man'.

Currently Robert K Olson formerly a Deputy Chief Inspector with the Inspectorate; and two Deputy Chief Inspectors (Mark Toland formerly of the Metropolitan Police Service; and one vacancy.

### Appointment:

OPCAT requires:

- Open, transparent and inclusive process involving wide range of stakeholders as well as civil society
- Not appoint those with conflicts of interest/members of NPM ensure they do not hold such positions
- Members carry out work which avoid conflict of interest

2005 Act, s.115(1): appointment by government.

s.115(4) 'A person shall not be appointed as a member unless it appears to the Government that the person is suitable for the appointment by reason of—

- (a) his or her service as a senior officer or retired such officer in the police service of another state, or
- (b) having otherwise obtained such relevant experience, qualifications, training or expertise as, in the opinion of the Government, is or are appropriate having regard, in particular, to the functions of the Inspectorate.

(5) A person is not eligible to be appointed under this section if he or she is or has been a member of the Garda Síochána'.

Legislation specifies period of office of members and grounds for dismissal

2005 Act, s.116(1) 'A member of the Garda Síochána Inspectorate holds office for the period determined by the Government at the time of appointment.

(2) A member is eligible for reappointment.

(3) A member holds office on the terms and conditions relating to remuneration (including allowances for expenses, benefits in kind and superannuation) or other matters that may be determined by the Minister, with the consent of the Minister for Finance, at the time of appointment or reappointment.

(4) A member may at any time resign his or her office by letter addressed to the Minister, and the resignation takes effect on the date of receipt of the letter.

(5) A member may be removed from office by the Government for stated misbehaviour or if, in its opinion, the member has become incapable through ill-health of effectively performing the duties of the office.

(6) Whenever a vacancy occurs in the membership of the Inspectorate caused by the resignation, removal from office or death of a member, the vacancy is to be filled by appointment in accordance with section 115.

(7) A member who is appointed to fill any such

vacancy holds office for the remainder of the term of office of the replaced member.

(8) The Inspectorate may act notwithstanding any such vacancy or any resulting non-compliance with section 115(3)'.

### Staffing

OPCAT requires:

- NPM to ensure it has staff with diversity of background, capabilities, professional knowledge including relevant legal and health care expertise

2005 Act, s.119(2) 'The Minister may appoint such and so many persons to be members of the staff of the Inspectorate as he or she considers necessary to assist the Inspectorate in the performance of its functions.

(3) Such persons shall be appointed on such terms and subject to such conditions and shall receive such remuneration as the Minister may, with the consent of the Minister for Finance, determine'.

## Powers and resources

### Places visited where deprivation of liberty could be exercised:

OPCAT requires:

- All places of deprivation of liberty
- Suspected places of deprivation of liberty
- Ability to choose places want to visit and who want to interview

No current power to visit places of Garda detention

### Frequency of visits:

OPCAT requires:

- Regular examination
- frequency decided by the NPM

N/A

### Types of visits:

OPCAT requires:

- Ability to carry out unannounced visits

N/A

### Private interviews:

OPCAT requires:

- Ability to have private interviews with those deprived of liberty and others

N/A

### Access to information:

OPCAT requires:

- Access to all information on number of persons; places and location;
- Access to all information on treatment and conditions of detention;
- Access to all places of detention, installations and facilities

2005 Act, s.118(1) 'As soon as practicable after the commencement of this section the Inspectorate and the Garda Commissioner shall by written protocols, make arrangements to ensure that the Inspectorate receives any information requested by it which is in the possession of the Garda Síochána and which, in the opinion of the Inspectorate, is necessary for the performance of its functions.

(2) Nothing in any other enactment prohibits disclosure of relevant factual information either to or by the Inspectorate'.

### Reports

OPCAT requires:

- Annual reports
- Reports following the visits
- Other reports
- Competent authorities to examine the

recommendations and enter into a dialogue on implementation measures

- Process of follow up
- State to publish and widely disseminate annual reports
- Annual report presented to parliament

2005 Act, s.117(2): ‘(2) The functions of the Inspectorate are—

(b) to submit to the Minister—

- (i) a report on those inspections or inquiries, and
- (ii) if required by the Minister, a report on the operation and administration of the Garda Síochána during a specified period and on any significant developments in that regard during that period, and

(c) to provide advice to the Minister with regard to best policing practice.

(3) Any report prepared under subsection (2)(b) shall, where appropriate, contain recommendations for any action that the Inspectorate considers necessary.

(4) Subject to subsection (5), the Minister shall cause copies of any reports received by him or her under subsection (2)(b) to be laid before the Houses of the Oireachtas.

(5) The Minister may exclude from the copies of reports which are to be laid before the Houses of the Oireachtas any matter which, in his or her opinion—

- (a) would be prejudicial to the interests of national security, or (b) might facilitate the commission of an offence, prejudice a criminal investigation or jeopardise the safety of any person’.

2005 Act, s.120(1) ‘The Chief Inspector shall, at the written request of a committee of either or both of the Houses of the Oireachtas (other than the Committee of Public Accounts) in connection with the subject matter of any report of which copies were laid before those Houses under section 117(4), attend before it in relation to any aspect of that matter.

(2) In carrying out his or her duties under this section, the Chief Inspector shall not—

(a) question or express an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits or objectives of such policy, or

(b) provide information that might facilitate the commission of an offence, prejudice a criminal investigation or jeopardise the safety of any person’.

The Inspectorate has produced a number of reports on particular themes, and which are available on its website.

s.54 of the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015 provides:

‘The Principal Act is amended by the insertion of the following section after section 117:

“117A.(1)The Minister or the Authority, as may be appropriate, may monitor and assess the measures taken by the Garda Síochána in relation to the recommendations contained in a report prepared by the Garda Síochána Inspectorate and submitted to the Minister or the Authority under section 117(2)(b).

(2) Without prejudice to subsection (1), the Minister may request the Authority to monitor and assess the measures taken by the Garda Síochána in relation to such of the recommendations contained in a report prepared by the Garda Síochána Inspectorate, and submitted to the Minister or the Authority under section 117(2)(b), as the Minister may specify in the request.

(3) The Garda Commissioner shall supply the Minister and the Authority with such information and documents as the Minister or the Authority, as the case may be, may require for the purposes of this section.

(4) The Authority shall, as soon as practicable after a request to it under subsection (2), submit to the Minister a report on the matter the subject of the request and may include in the report any other matter connected with the subject matter of the request that it considers should be brought to the attention of the Minister.”’

#### Coordination of visits

N/A

#### Submit proposals and observations on existing and draft legislation:

OPCAT requires:

- State to inform body of draft legislation and allow it to make observation
- State should take into consideration such proposals or observation

s.117(2): ‘(2) The functions of the Inspectorate are— (c) to provide advice to the Minister with regard to best policing practice’.

s.53 of the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015 amends s.117 of the 2005 Act to require that the Inspectorate ‘provide advice to the Authority and the Minister with regard to best policing practice’.

No information on its website on comments on specific draft or existing legislation.

#### Resources:

OPCAT requires:

- Necessary resources for effective operation

2005 Act, s.119(1) ‘Such funds, premises, facilities, services and staff as may be necessary for the proper functioning of the Garda Síochána Inspectorate shall be provided to it by the Minister with the consent of the Minister for Finance.

(2) The Minister may appoint such and so many persons to be members of the staff of the Inspectorate as he or she considers necessary to assist the Inspectorate in the performance of its functions.

(3) Such persons shall be appointed on such terms and subject to such conditions and shall receive such remuneration as the Minister may, with the consent of the Minister for Finance, determine’.

#### Privileges and immunities for members of NPM and staff

Not expressly provided for in legislation

#### Prohibition of sanctions against persons communicating with body

Not expressly provided for in legislation

#### Confidential information collected by body should be privileged. Personal data should not be published without consent of individual

2005 Act, s.118(3) ‘The Inspectorate, members of its staff, or any persons providing consultancy or other services to it shall not disclose, in or outside the State, other than in accordance with this Act, any information obtained by it or by such members or persons.

(4) A person who contravenes subsection (3) is guilty of an offence and is liable—

(a) on summary conviction, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

(5) Subsection (3) is in addition to, and not in substitution for, the relevant provisions of the Official Secrets Act 1963’.

#### Further Comments and Notes

ICCL in 2014 queried whether there remained a need for an inspectorate as well as the GSOC. It wrote that ‘Although the Inspectorate has produced some very useful reports, it is not an independent body with the requisite powers to compel compliance with its recommendations on best practice’.

Several we spoke to noted the overall complexity of the relationship between the GSOC, Garda Síochána Inspectorate, the Policing Authority and the Department of Justice.

Several we spoke to considered that the Garda Síochána Inspectorate was not perceived to be independent. However, as noted above, the Inspectorate itself has always stressed its operational and reporting independence in line with s.117 of the 2005 Act (as amended).

## Appendix V

# Chief Inspector of Social Services

### Basics

#### Website

www.hiqa.ie

### Constitutional Aspects

#### Legal Framework/Basis

Within the Health Information and Quality Authority (HIQA).

Part 7 of the Health Act 2007 establishes the Chief Inspector of Social Services.

#### Mandate set out in constitutional or legislative text

Health Act 2007: s.41(1) 'The functions of the chief inspector are to— (a) inspect the performance by the Executive of the Executive's functions under— (i) sections 39 to 42 and 53 of the Child Care Act 1991, and (ii) section 10 of the Health (Nursing Homes) Act 1990,

(b) establish and maintain one or more registers of designated centres,

(c) register and inspect designated centres to assess whether the registered provider is in compliance with the— (i) regulations, and (ii) standards, if any, set by the Authority under section 8(1)(b),

(d) inspect special care units to assess whether the operator is in compliance with the— (i) regulations respecting special care units under the Child Care Acts 1991 and 2001, and (ii) standards, if any, set by the Authority under section 8(1)(b), and

(e) subject to written agreement between the Minister and the Minister for Justice, Equality and Law Reform, act as an authorised person for the purposes of section 185 of the Children Act 2001, as amended by the Criminal Justice Act 2006.

ss.39-42 of the Child Care Act 1991 set out that the Minister may make regulations relating to those in foster care, residential care, placement with relatives and children in care; and that these regulations may fix the grounds on which they can go into such care and

'supervision and visiting by a health board' of these issues.

s.53 provides that 'A health board shall cause to be visited from time to time each pre-school service in its area in order to ensure that the person carrying on the service is fulfilling the duties imposed on him under section 52'.

The Children Act 2001 provides in s.185 that the minister shall appoint a person 'as Inspector of children detention schools'. The Inspector of Social Services undertakes this function. The appointment and mandate of the inspector of children detention schools is set out in the Children Act 2001.

Section 69(2) of the Child Care Act, 1991 as amended by the Child Care (Amendment) Act 2011, with respect to special care units for children. S.69:

'(1) The Minister may give general directions to a health board in relation to the performance of the functions assigned to it by or under this Act and the health board shall comply with any such direction.

(2) The Minister may cause to be inspected any service provided or premises maintained by the Health Service Executive under this Act.

(3) An inspection under this section shall be conducted by a person authorised in that behalf by the Minister (in this section referred to as an authorised person).

(4) An authorised person conducting an inspection under this section may—

(a) enter any premises maintained by the Health Service Executive under this Act and make such examination into the state and management of the premises and the treatment of children therein as he thinks fit, and

(b) examine such records and interview such employees of the Health Service Executive as he thinks fit.

(5) The Minister may direct a health board to supply him with such reports and statistics in relation to the performance of the functions assigned to it by or under this Act as he may require and a health board shall comply with any such direction'.



s.10 of the Health (Nursing Homes) Act 1990 provides:

‘(1) A health board may in accordance with regulations under this section make and carry out an arrangement for the boarding out in a private dwelling, whether situated within or outside the functional area of the board, of a person to whom this section applies and the arrangement may provide for the payment of all or part of the costs of the boarding out by the board.

(2) (a) The Minister may make regulations for the purposes of this section and the regulations may, without prejudice to the generality of the foregoing, provide for—

(i) the inspection of dwellings used or proposed to be used for boarding out persons under this section, and otherwise for the enforcement and execution of the regulations, by the health boards concerned and their officers,

(ii) the supervision by the health boards concerned and their officers of the maintenance, care and welfare of persons boarded out under this section,

(iii) the making of payments, and the amounts thereof, by health boards to persons in respect of the boarding out with them of persons under this section,

(iv) the fixing of the maximum number of persons who may be boarded out in a single dwelling under this section, and

(v) the holding and conduct of interviews (including interviews in private) of persons in a dwelling (including any persons employed in the dwelling) if the health board concerned has reasonable cause to believe that a person boarded out by it under this section in the dwelling is not receiving proper maintenance or care or that due consideration for his welfare is not being given by the person in whose dwelling he is being boarded out.

(b) A person who wilfully obstructs or interferes with a health board or an officer of a health board in the performance of functions under regulations under this section or who fails or refuses to comply with a requirement of a health board or an officer of a health board under such regulations shall be guilty of an offence.

### **Independence: Functional, operational and personnel**

OPCAT requires:

- Period of office sufficient to foster independent functioning

Health Act 2007, s.42:

(2) ‘subject to subsection (3), the chief inspector, at the request in writing of a [Oireachtas] Committee, shall attend before the Committee to give a general account of the activities of the Office of the Chief Inspector.

(3) The chief inspector shall not be required to give an account before a Committee of any matter which is or has been or may at a future time be the subject of proceedings before a court or tribunal in the State.

(4) Where the chief inspector is of the opinion that a matter in respect of which he or she is requested to give an account before a Committee is a matter to which subsection (3) applies, he or she shall inform the Committee of that opinion and the reasons for the opinion and, unless the information is conveyed to the Committee at a time when the chief inspector is before it, the information shall be so conveyed in writing.

(5) Where the chief inspector has informed a Committee of the chief inspector’s opinion in accordance with subsection (4) and the Committee does not withdraw the request referred to in subsection (2) in so far as it relates to a matter the subject of that opinion—

(a) the chief inspector, not later than 21 days after being informed by the Committee of its decision not to withdraw the request, may apply to the High Court in a summary manner for determination of the question whether the matter is one to which subsection (3) applies, or

(b) the chairperson of the Committee, on behalf of the Committee, may make such an application, and the High Court shall determine the matter.

(6) Pending the determination of an application under subsection (5), the chief inspector shall not attend before the Committee to give an account of the matter to which the application relates

(7) If the High Court determines that the matter concerned is one to which subsection (3) applies, the Committee shall withdraw the request referred to in subsection (2), but if the High Court determines that subsection (3) does not apply, the chief inspector shall attend before the Committee to give an account of the matter.

(8) In the performance of the chief inspector’s duties under this section, the chief inspector shall not question or express an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits of the objectives of such a policy’.

s.8 of the Health Act 2007 also sets out the functions of HIQA generally which include settings standards on safety and quality in relation to services provided by the Executive or service provider under the relevant Health Acts, Child Care Acts 1991 and 2001 and Children Act 2001, as well as services provided by a nursing home. In these contexts, the Authority is required to ‘monitor compliance with (c) to monitor compliance with [these standards] except any standards in relation to designated centres, special care units and the performance of the Executive’s functions referred to in section 41(a) and to advise the Minister and the Executive accordingly’. Under paragraph (d) and s.9 the Authority is also mandated to undertake investigations, on its own volition or at the request of the Minister, on the safety, quality and standards of services if ‘(a) there is a serious risk to the health or welfare of a person receiving those services, and (b) the risk may be the result of any act, failure to act or negligence on the part of—

- (i) the Executive,
- (ii) a service provider,
- (iii) the registered provider of a designated centre, or (iv) the person in charge of a designated centre if other than its registered provider’.

The Children Act 2001 with respect to the inspector of children detention schools, s.185(3): ‘The appointment of the Inspector shall be for a term of 5 years, which may be renewed, and shall be subject to such other terms and conditions (including terms and conditions relating to remuneration) as may be determined by the Minister with the consent of the Minister for Finance’.

### **Financial Independence**

Health Act 2007,

s. 35.—(1) The Authority shall cause to be kept all proper and usual books or other records of account of—

- (a) all income and expenditure of the Authority,
- (b) the source of the income and the subject matter of the expenditure, and
- (c) the property, assets and liabilities of the Authority.

(2) Without limiting subsection (1), the Authority shall also keep any special accounts as the Minister may direct.

(3) The books, records and special accounts kept under this section shall be—

- (a) kept in the form, and
- (b) for the accounting periods, as the Minister may specify, with the consent of the Minister for Finance.

(4) The accounts of the Authority approved by the Board shall be submitted to the Comptroller and Auditor General for audit as soon as practicable and not later than 3 months after the end of the financial year to which the accounts relate.

(5) Within one month after the Comptroller and Auditor General issues an audit certificate for the accounts of the Authority a copy of the accounts and of the report of the Comptroller and Auditor General on the accounts shall be presented to the Minister who, within 2 months after their receipt, shall cause copies to be laid before each House of the Oireachtas.

(6) If required by the Minister, the Authority shall furnish to the Minister the information the Minister may require in respect of any balance sheet, account or report of the Authority.

(7) The Authority, chief executive officer and other employees of the Authority—

- (a) whenever so requested by the Minister, shall permit any person appointed by the Minister to examine the books or other records of account of the Authority in respect of any financial year or other period, and

(b) shall facilitate the examination, and the Authority shall pay such fee as may be fixed by the Minister for the examination.

36.—(1) The Authority may accept gifts of money, land or other property upon the trusts or conditions (if any) as may be specified by the donor.

(2) The Authority shall not accept a gift if the trusts or conditions attaching to it would be inconsistent with the Authority's—

- (a) functions, or
- (b) obligations, under this Act or any other enactment'.

## Membership

### Composition of body:

OPCAT requires:

- Experts
- Collectively have the required capabilities and professional knowledge
- Strive for gender balance and adequate representation of ethnic and minority groups in the country

A chief inspector (s.40(2) Health Act 2007) and assistant inspectors (s.43(1)): 'the number of persons as it may determine to assist the chief inspector in the performance of the chief inspector's functions'.

Children Act 2001 with respect to inspector of children's detention schools, s.186(6) 'In carrying out an inspection or an investigation under this section, the Inspector may, with the consent of the Minister, avail himself or herself of the services of any person who has, in the Inspector's opinion, particular experience or knowledge (including medical, legal, academic or other experience or knowledge) of matters relevant to the inspection or investigation'.

Reports indicate the names of the inspectors carrying out the inspection.

### Appointment:

OPCAT requires:

- Open, transparent and inclusive process involving wide range of stakeholders as well as civil society
- Not appoint those with conflicts of interest/members of NPM ensure they do not hold such positions
- Members carry out work which avoid conflict of interest

Health Act 2007:

s.40(2) 'Subject to subsection (3) and in accordance with section 26, the [HIQA] shall appoint a person to be the chief inspector.

(3) Notwithstanding section 26 and with the approval of the Minister, the Authority may appoint the first chief inspector'.

Children Act 2001, with respect to appointment of inspector for children detention schools: '185(1) The Minister shall appoint a person as Inspector of children detention schools.

(2) The Inspector shall hold office under a written contract of service'.

### Legislation specifies period of office of members and grounds for dismissal

Health Act 2007, s.40:

'(5) The chief inspector holds office for the period and upon the terms and conditions that the Authority may determine with the approval of the Minister given with the consent of the Minister for Finance.

(6) The Authority may dismiss the chief inspector from his or her office if satisfied that the chief inspector—

- (a) has become incapable through ill health of effectively performing the functions of the office,
- (b) is adjudicated bankrupt,
- (c) is convicted of a criminal offence,
- (d) has without reasonable excuse failed to discharge his or her functions for a continuous period of 3 months beginning not earlier than 6 months before the day of

dismissal, or

(e) should be dismissed for any other stated reason.

(7) The person appointed as chief inspector under this section shall be given, by the Authority, a certificate of his or her appointment and, when exercising any power duly conferred on the chief inspector under this Act, shall produce, on request by any person affected, the certificate or a copy of the certificate, together with a form of personal identification.

Children Act 2001 with respect to inspector of children's detention centres:

s.185(3) 'The appointment of the Inspector shall be for a term of 5 years, which may be renewed, and shall be subject to such other terms and conditions (including terms and conditions relating to remuneration) as may be determined by the Minister with the consent of the Minister for Finance.

(4) The Minister may at any time remove the Inspector from office where it appears to the Minister that the removal of the Inspector is necessary for the effective performance of the functions of Inspector under this Part'.

### Staffing

OPCAT requires:

- NPM to ensure it has staff with diversity of background, capabilities, professional knowledge including relevant legal and health care expertise

Health Act 2007, s.43(1) 'The Authority, in accordance with section 26, may appoint the number of persons as it may determine to assist the chief inspector in the performance of the chief inspector's functions and—

- (a) the persons appointed shall be known as Inspectors of Social Services, and
- (b) are referred to in this Act as "inspectors"."

s.72 '(1) At the request of the chief inspector, the Authority may appoint, with the approval of the Minister, one or more persons, with expertise relevant to an inspection referred to

in section 41, to—

(a) accompany the chief inspector or inspector during the inspection, and

(b) assist and advise the chief inspector or an inspector on matters related to the purpose of the inspection that are within the expertise of the person or persons so appointed.

(2) A person appointed under this section shall be paid the remuneration and allowances for expenses that the Authority may determine with the approval of the Minister given with the consent of the Minister for Finance'.

s.70 '(1) The Authority shall appoint, with the approval of the Minister given with the consent of the Minister for Finance, one or more persons with appropriate qualifications and experience for the purposes of—

- (a) monitoring compliance with standards in accordance with section 8(1)(c), or
- (b) an investigation referred to in section 8(1)(d) undertaken by the Authority, and a person so appointed shall be known as an authorised person.

(2) At the request of an authorised person, the Authority may appoint such other number of persons that the Authority may determine, to assist that authorised person in the performance of the authorised person's functions and the persons appointed shall be authorised persons for the purposes of—

- (a) monitoring compliance with standards in accordance with section 8(1)(c), or
- (b) an investigation referred to in section 8(1)(d).

(3) An authorised person shall be paid the remuneration and allowances for expenses that the Authority may determine with the approval of the Minister given with the consent of the Minister for Finance'.

Inspection reports note that the number of inspectors conducting the visits varies, with some being conducted by two, three, four or five.



## Powers and resources

### Places visited where deprivation of liberty could be exercised:

OPCAT requires:

- All places of deprivation of liberty
- Suspected places of deprivation of liberty
- Ability to choose places want to visit and who want to interview

Health Act, s.45 '(1) The Minister, by written direction, may require the [Health Service] Executive to carry out inspections of—

- (a) children's residential centres, as defined in section 2(1) of the Child Care Act 1991, which are provided in accordance with section 38(1) of that Act, or
- (b) nursing homes as defined in section 2 of the Health (Nursing Homes) Act 1990.

(2) The Executive in acting under this section acts on behalf of the chief inspector and in acting on that behalf has the same powers and duties as the chief inspector has in carrying out inspections under this Act.

(3) An inspection under this section must be carried out by the Executive in the manner specified by the chief inspector and in accordance with the regulations and any standards which may be set by the Authority.

(4) The chief inspector may require the Executive to provide the chief inspector with any information the chief inspector needs in relation to an inspection or proposed inspection under this section'.

s.71 '(1) For the purpose of assessing compliance with the terms and conditions, regulations and standards and other statutory obligations referred to in subsection (2), the Executive may appoint persons to examine any premises of a service provider in which the business of a designated centre is being carried on.

(3) A person appointed under subsection (1) may—

- (a) enter any designated centre maintained

by a service provider and examine, as he or she thinks fit, the state and management of the premises and the care or treatment of residents of the centre, and

(b) examine any records in relation to the centre and interview—

- (i) any employee of the centre, or
- (ii) any resident of the centre with the resident's consent.

(4) The person in charge of a designated centre, whether that person is the registered provider or another person, shall—

- (a) allow a person appointed under subsection (1) to enter the designated centre for the purpose of any examination under subsection (2), and
- (b) co-operate with that person throughout the course of the examination'.

These designated centres now include those for children and adults with disabilities.

s.73(1) If an authorised person considers it necessary or expedient for the purposes of—

- (a) monitoring compliance with standards in accordance with section 8(1)(c), or
- (b) an investigation referred to in section 8(1)(d), the authorised person may enter and inspect at any time any premises—
  - (i) owned or controlled by the Executive or a service provider, or
  - (ii) used or proposed to be used, for any purpose connected with the provision of services described in section 8(1)(b).

(2) If the chief inspector considers it necessary or expedient for the purposes of an inspection referred to in section 41, the chief inspector may enter and inspect at any time any premises—

- (a) owned or controlled by the Executive,
- (b) used, or proposed to be used, for any purpose connected with the provision of a service under sections 39 to 42 and 53 of the Child Care Act 1991 or section 10 of the Health (Nursing Homes) Act 1990 by the Executive or a service provider, or (c) used or proposed to be used as a designated centre or special care unit.

s.74(1) In this section "dwelling" includes any part of a designated centre occupied as a private residence by the registered provider of the designated centre or by a member of the staff of the registered provider.

(2) Notwithstanding section 73, an authorised person or the chief inspector, in the performance of functions under that section, may not enter a dwelling other than—

- (a) with the consent of the occupier, or
- (b) in accordance with a warrant from the District Court issued under section 75(2) authorising the entry.

s.75(1) Where—

(a) in relation to any premises referred to in section 73(1), an authorised person monitoring compliance with the standards in accordance with section 8(1)(c) or conducting an investigation referred to in section 8(1)(d), or

(b) in relation to any premises referred to in section 73(2), the chief inspector conducting an inspection referred to in section 41, is prevented or has reasonable cause to believe there is a likelihood that he or she will be prevented from entering the premises, an application may be made to the District Court for a warrant under subsection (2) authorising the entry.

(2) If a judge of the District Court is satisfied on the sworn information of an authorised person or the chief inspector that there are reasonable grounds for believing—

- (a) that there are any records (including records stored in a non-legible form) relating to a service or to a registered provider, designated centre or special care unit, or that there is anything being used at the premises referred to in section 73(1) or (2), which—
  - (i) the authorised person considers it necessary to inspect for the purposes of monitoring compliance with standards in accordance with section 8(1)(c) or an investigation referred to in section 8(1)(d), or
  - (ii) the chief inspector considers it necessary to inspect for the purposes of an inspection referred to in section

41, or (b) that there is, or such an inspection is likely to disclose, evidence of a contravention of this Act or the regulations or, in the case of an inspection referred to in paragraph (a)(ii), a contravention of—

- (i) this Act or the regulations, (ii) the provisions, specified in section 41(a), of this Act, of the other Acts referred to in section 41(a), or (iii) the regulations or standards referred to in section 41(c) or (d), the judge may issue a warrant permitting the authorised person or the chief inspector or an inspector, accompanied by other persons with appropriate qualifications, or by members of the Garda Síochána as may be necessary, at any time or times, within one month after the date of issue of the warrant, on production of the warrant if requested, to enter the premises, if need be by reasonable force, and to perform the functions conferred by or under section 73.

76.—If an authorised person or the chief inspector—

(a) has reasonable cause to expect any serious obstruction in the performance of functions under this Act, and

(b) is in possession of a warrant under section 75(2), the authorised person or chief inspector, when performing those functions, may be accompanied by a member of the Garda Síochána.

77.—A person shall not—

(a) refuse to allow a person who under section 73 is monitoring compliance with standards, or conducting an investigation or inspection—

- (i) to enter any premises other than a dwelling in accordance with that section or in accordance with a warrant issued by the District Court, or
- (ii) to enter any dwelling in accordance with that section under and in accordance with a warrant issued by the District Court, or

(b) obstruct or impede a person conducting



an investigation or inspection under section 73 in the exercise of functions under that section, or

(c) give to a person conducting an investigation or inspection under section 73 information that the person giving the information knows, or should reasonably know, to be false or misleading.

Children Act 2001 with respect to inspector of children detention centres, s.186(1) ‘The Inspector shall carry out regular inspections (which shall be at least once every 6 months) of each children detention school and place provided under section 161, paying particular attention to the conditions prevailing in them, the treatment of children detained there, the facilities available to the children and such other matters as the Minister may direct.

(2) In carrying out an inspection of any such school or place, the Inspector shall also have regard to such matters as—

- (a) the morale of the staff and child detainees,
  - (b) the condition of the facilities provided, including recreational, educational, cultural and linguistic facilities, and of the buildings, and
  - (c) any general pattern of complaint that may indicate possible inadequacies in the operation or administration of the school or place.
- (3) The Inspector may carry out an investigation into any specific aspect of, or any specific issue or incident, connected with, the operation or administration of any such school or place or any specific issue or incident, as he or she thinks appropriate’.

187.—The Inspector may—

- (a) enter any children detention school or place provided under section 161 for the purposes of his or her inspection, and
- (b) for those purposes examine such records of the school or place and interview such members of its staff as he or she thinks necessary.

**Frequency of visits:**

OPCAT requires:

- Regular examination
- frequency decided by the NPM

This is not defined in the Health Act 2007.

HIQA Guidance for Designated Centres. The Inspection process 2013 provides:

‘5.1 Registration-related inspections Every centre receives an 18-outcome inspection visit as part of the registration process. The inspection will take place, at a minimum, once in a three-year cycle. There are a minimum of two inspections in each three-year cycle.

**5.2 Additional inspections**

**5.2.1 Scheduled**

Scheduled inspections will take place during the three-year registration cycle. How often these inspections take place is informed by your level of compliance with the standards and regulations, demonstrated on the previous inspection, and any information the Authority receives about your centre in the intervening time’.

**5.2.2 Follow-up inspections**

Follow-up inspections will often be carried out following a scheduled inspection to check on specific matters arising from a previous inspection and to ensure that the action required by you has been taken’.

For thematic and single-issue inspections no frequency is provided.

Children Act 2001 with respect to inspector of children detention school, s.186(1) ‘The Inspector shall carry out regular inspections (which shall be at least once every 6 months) of each children detention school and place provided under section 161’.

**Types of visits:**

OPCAT requires:

- Ability to carry out unannounced visits

HIQA’s Guidance for Designated Centres. The Inspection Process November 2013, provides that:

‘The purpose of inspection is to monitor a provider’s compliance with regulations and standards, to gather evidence on which to make judgments on the fitness of the

registered provider and to report on the quality of the service. Through inspection, inspectors ensure that centres are operated strictly in accordance with the statement of purpose and that providers are complying with the requirements and conditions of their registration.

Inspections can be announced (where you are told in advance about the inspection) or unannounced (where you are not told in advance) and can take place at any time, day or night, on any day of the week: § to monitor continuing compliance with regulations and standards

- following a change in circumstances; for example, following a notification to the Authority that a provider has appointed a new person in charge
- arising from a number of events including information affecting the safety or wellbeing of residents.’

‘The Authority’s monitoring approach (referred to by the Authority as AMA) is a framework that applies to all regulatory activities carried out by the Authority and it ensures:

- the consistent and timely assessment and monitoring of compliance with regulations and standard
- a consistent and proportionate approach to regulation and risk. Inspections carried out under the AMA framework are done under ‘Themes’ and ‘Outcomes’.

**5.1 Registration-related inspections**

Every centre receives an 18-outcome inspection visit as part of the registration process. The inspection will take place, at a minimum, once in a three-year cycle. Its primary purpose is to inform a registration or registration renewal decision. However, an 18-outcome inspection can also be carried out at other times during the three year cycle as informed by the centre’s risk profile. During a registration-related inspection, an inspector will assess your understanding of, and capacity to comply with, the requirements of the regulations and National Standards. A registration inspection will always be announced.

**5.2 Additional inspections**

**5.2.1 Scheduled**

Scheduled inspections will take place during the three-year registration cycle. How often these inspections take place is informed by your level of compliance with the standards and regulations, demonstrated on the previous inspection, and any information the Authority receives about your centre in the intervening time. These inspections will generally be unannounced and inspectors may look at some or all of the 18 outcomes.

**5.2.2 Follow-up inspections**

Follow-up inspections will often be carried out following a scheduled inspection to check on specific matters arising from a previous inspection and to ensure that the action required by you has been taken. Follow-up inspections will take place: § when direct observation or communication is required in order to verify that an action has been undertaken and improvement has taken place. For example, that staff members’ understanding of the policy on the prevention and detection of abuse has improved.

- when full triangulation is necessary in order to be assured that the required actions have been taken. For example, that residents have meaningful occupation during the day, that the activity schedule is being implemented and that residents and relatives are satisfied with it.
- when the history of the centre is such that the inspector believes that only an inspection can verify that the required actions have been taken. For example, where there has been a previous inspection which found continued noncompliance.
- when an action plan update has already been received and has been judged unsatisfactory by the inspector. For example, where the actions taken have been vague and/or improvements have not been made despite discussions between the inspector and the provider.

**5.2.3 Thematic inspections**

The Authority has also recently introduced a themed approach whereby the inspection focuses on specific issues. For example, the themes chosen for nursing homes in 2013 were ‘Food and Nutrition’ and ‘End of Life Care’.

As part of thematic inspections, the Authority has produced self-assessment questionnaires and regulatory guidance which are available on [www.hiqa.ie](http://www.hiqa.ie).

5.2.4 Single-issue inspections

In some instances an inspection will be required to focus on a single or specific issue. Single-issue inspections arise from a number of events including receipt of a complaint, concern or notification to HIQA of a significant event affecting the safety or well-being of residents. This inspection allows the inspector to focus (but not exclusively) on the area of concern indicated by the information the Authority has received. As part of the single-issue inspection, the inspector may also look at a number of the 18 outcomes. For any inspection type, the inspection visit is only part of the inspection process. The process starts with the submission of data/information about the centre and concludes when you receive the inspection report.’

‘All inspections, with the exception of the registration-related inspection which will always be announced, can be announced or unannounced and may take place at any time of day or night.’

For announced inspections, the notice given is usually two weeks. ‘However, sometimes the Authority may give you short notice or undertake an unannounced inspection. Inspectors want to see your service running as normally as possible on any given day without special arrangements.’

HIQA’s Annual Report 2014 notes the Inspectorate carried out in 2014 inspections to 97% of the registered older persons centres, 603 out of the 920 designated centres for adults and children with disabilities (this was the first year of regulation of these centres), among others.

Private interviews:

OPCAT requires:

- Ability to have private interviews with those deprived of liberty and others

Health Act s.73(4) ‘An authorised person, in respect of premises referred to in subsection (1), or the chief inspector, in respect of premises

referred to in subsection (2), may—

- (c) inspect any other item and remove it from the premises—
  - (i) if an authorised person considers it necessary or expedient for the purposes of monitoring compliance with standards in accordance with section 8(1)(c), or of an investigation referred to in section 8(1)(d), or (ii) the chief inspector considers it necessary or expedient for the purposes of an inspection referred to in section 41,
- (d) interview in private any person—
  - (i) working at the premises concerned, or
  - (ii) who at any time was or is in receipt of a service at the premises and who consents to be interviewed, and
- (e) make any other examination into the state and management of the premises or the standard of any services provided at the premises’.

Health (Nursing Homes) Act 1990:

s.10(2)(a) ‘The Minister may make regulations for the purposes of this section and the regulations may, without prejudice to the generality of the foregoing, provide for— ...

(v) the holding and conduct of interviews (including interviews in private) of persons in a dwelling (including any persons employed in the dwelling) if the health board concerned has reasonable cause to believe that a person boarded out by it under this section in the dwelling is not receiving proper maintenance or care or that due consideration for his welfare is not being given by the person in whose dwelling he is being boarded out’.

The Children Act 2001 with respect to inspector of children detention centres, s.187 provides that ‘The Inspector may (b) for those purposes ... interview such members of staff as he or she thinks necessary’. It does not provide specifically for those interviews to be in private. Neither does it provide for the ability to interview detainees.

Access to information:

OPCAT requires:

- Access to all information on number of persons; places and location;
- Access to all information on treatment and conditions of detention;
- Access to all places of detention, installations and facilities

Health Act 2007:

s.71.—(1) For the purpose of assessing compliance with the terms and conditions, regulations and standards and other statutory obligations referred to in subsection (2), the Executive may appoint persons to examine any premises of a service provider in which the business of a designated centre is being carried on.

(3) A person appointed under subsection (1) may—

- (a) enter any designated centre maintained by a service provider and examine, as he or she thinks fit, the state and management of the premises and the care or treatment of residents of the centre, and
- (b) examine any records in relation to the centre and interview—
  - (i) any employee of the centre, or
  - (ii) any resident of the centre with the resident’s consent.

(4) The person in charge of a designated centre, whether that person is the registered provider or another person, shall—

- (a) allow a person appointed under subsection (1) to enter the designated centre for the purpose of any examination under subsection (2), and
- (b) co-operate with that person throughout the course of the examination.

73(3) If an authorised person considers it necessary or expedient for the purposes of monitoring compliance with standards in accordance with section 8(1)(c), or of an investigation referred to in section 8(1)(d), or the chief inspector considers it necessary or expedient for the purposes of an inspection

referred to in section 41—

- (a) the authorised person, at any time, may carry out the functions conferred on the authorised person under this section and sections 75 and 76 to the extent that the functions relate to any premises referred to in subsection (1), and
- (b) the chief inspector, at any time, may carry out the functions conferred on the chief inspector under this section and sections 75 and 76 to the extent that the functions relate to any premises referred to in subsection (2).

(4) An authorised person, in respect of premises referred to in subsection (1), or the chief inspector, in respect of premises referred to in subsection (2), may—

- (a) inspect, take copies of or extracts from and remove from the premises any documents or records (including personal records) relating to the discharge of its functions by the Executive, or to the services provided by a service provider or at a designated centre or a special care unit,
- (b) inspect the operation of any computer and any associated apparatus or material which is or has been in use in connection with the records in question
- (c) inspect any other item and remove it from the premises—
  - (i) if an authorised person considers it necessary or expedient for the purposes of monitoring compliance with standards in accordance with section 8(1)(c), or of an investigation referred to in section 8(1)(d), or
  - (ii) the chief inspector considers it necessary or expedient for the purposes of an inspection referred to in section 41,
- (d) interview in private any person—
  - (i) working at the premises concerned, or
  - (ii) who at any time was or is in receipt of a service at the premises and who consents to be interviewed, and
- (e) make any other examination into the state and management of the premises or the standard of any services provided at the premises.

(5) At any time, an authorised person, in



respect of premises referred to in subsection (1) or the chief inspector, in respect of premises referred to in subsection (2), may require any person who—

- (a) is in charge of the premises or of services provided at the premises, or
- (b) possesses or is in charge of any records held at the premises or in respect of any services provided at the premises, even if the records are held elsewhere, to furnish the authorised person or the chief inspector, as the case may be, with the information—
  - (i) the authorised person reasonably requires for the purposes of monitoring compliance with standards in accordance with section 8(1)(c), or of an investigation referred to in section 8(1)(d), or
  - (ii) the chief inspector reasonably requires for the purposes of an inspection referred to in section 41, and to make available to the authorised person or chief inspector any document or record in the power or control of the person described in paragraph (a) or (b) of this subsection that, in the opinion of the authorised person, is relevant to the monitoring of compliance with the standards or to the investigation or, in the opinion of the chief inspector, is relevant to the inspection.

(6) If a person is required under this section to produce a document or record and that document or record is kept by means of a computer, the authorised person, for premises referred to in subsection (1), or the chief inspector, for premises referred to in subsection (2), may require the person who is required to produce that document or record to produce it in a form which is legible and can be taken away.

(7) If an authorised person, in respect of premises referred to in subsection (1), considers an explanation necessary and expedient for the purposes of—

- (a) monitoring compliance with standards in accordance with section 8(1)(c), or
- (b) an investigation referred to in section 8(1)(d), the authorised person may require a person who is in charge of the premises or possesses or is in charge of any relevant

documents or records to provide an explanation of any—

- (i) document or record inspected, copied or provided in accordance with this section,
- (ii) other information provided in the course of the investigation, or (iii) other matters which are the subject of the functions being exercised by the authorised person under this section.

(8) If the chief inspector, in respect of premises referred to in subsection (2), considers an explanation necessary and expedient for the purposes of conducting an inspection under this section, the chief inspector may require a person who is in charge of the premises or a person who possesses or is in charge of any documents or records which are the subject of the inspection to provide an explanation of any—

- (a) documents or records inspected, copied or provided in accordance with this section,
- (b) other information provided in the course of the inspection, or
- (c) other matters which are the subject of the functions being exercised by the chief inspector under this section.

Health (Nursing Homes) Act 1990:

s.10(2) (b) ‘A person who wilfully obstructs or interferes with a health board or an officer of a health board in the performance of functions under regulations under this section or who fails or refuses to comply with a requirement of a health board or an officer of a health board under such regulations shall be guilty of an offence’.

With respect to the inspector of children detention schools, the Children Act 2001 s.187 provides that ‘The Inspector may— (a) enter any children detention school or place provided under section 161 for the purposes of his or her inspection, and (b) for those purposes examine such records of the school or place and interview such members of its staff as he or she thinks necessary’.

### Reports

- OPCAT requires:
- Annual reports
  - Reports following the visits
  - Other reports
  - Competent authorities to examine the recommendations and enter into a dialogue on implementation measures
  - Process of follow up
  - State to publish and widely disseminate annual reports
  - Annual report presented to parliament

Health Act 2007, s.78 ‘The Authority, an authorised person, the chief inspector, an inspector or a person appointed under section 72 is not liable in damages arising from any— (a) report or other document prepared, or (b) communication made, in good faith, for the purposes of, or in connection with, the performance of the functions— (i) under section 70 of an authorised person appointed under that section, (ii) under section 41 of the chief inspector, or (iii) performed under section 43 by an inspector appointed under that section’.

The HIQA Guidance for Designated Centres provides:

‘An inspection report is drafted and sent to you within approximately 28 days of the inspection visit. The inspection report informs the reader of the findings of the inspection, and provides a formal record of any requirements and/or recommendations. It is compiled from information and evidence gained about the centre prior to the inspection and findings from the inspection. In order to provide a balanced picture, the report will contain evidence of what is done well in your centre as well as what needs to be improved. The inspection report is set out under ‘Themes’ and ‘Outcomes’ and will have the following sections: § Summary of findings § Outstanding actions since the previous inspection § Findings and evidence from this inspection § The action plan you have completed’.

Children Act 2001 with respect to inspector of children detention schools:

s.186 ‘(4) The Minister may request the Inspector to investigate and to report to him or her on any such specific aspect, issue or incident.

(5) The Inspector may raise issues of concern to him or her arising out of an inspection or investigation under this section with the Director of the school or managers of the place concerned, the chairperson of the board of management of the school or the Minister’.

s.188(1) The Inspector shall submit a report to the Minister in relation to any inspection or investigation carried out by him or her under section 186.

(2) Each such report shall, where appropriate, contain recommendations which in the Inspector’s opinion require to be implemented.

(3) A copy of any such report shall be laid by the Minister before each House of the Oireachtas.

(4) Before laying a report before each House of the Oireachtas pursuant to subsection (3), the Minister may omit material from it where the omission is necessary to avoid the identification of any person.

s.44(2) Health Act 2007: ‘The chief inspector shall prepare a report on the performance of his or her functions under section 41 for the preceding year to be included in the relevant annual report prepared by the Authority under section 37.

(3) Whenever requested by the Authority, the chief inspector shall furnish information in relation to such matters as the Authority may specify’.

Reports produced include by the Inspector of Social Services include:

- Disability services inspection reports;
- Nursing home inspection reports;
- Children’s residential centres;
- Children’s special care units;
- Children’s foster care;
- Children’s detention schools (Oberstown);
- Child protection and welfare.

These are available on its website: <https://>



www.hiqa.ie/social-care/find-a-centre

Health Act s.37 ‘(1) Not later than 30 April in each year, the Authority shall prepare and adopt an annual report in relation to the performance of the Authority’s functions during the immediately preceding calendar year.

- (2) An annual report shall include—
- (b) the report of the Office of the Chief Inspector of Social Services on its activities’.

Children Act 2001 with respect to inspector of children detention centres: s.189 ‘(1) The Inspector shall submit annually, not later than 6 months following the end of the year to which it relates, a report to the Minister on the performance of his or her functions during that year.

(2) The annual report of the Inspector shall be laid by the Minister before each House of the Oireachtas.

(3) Before laying the annual report before each House of the Oireachtas, the Minister may omit material from it where the omission is necessary to avoid the identification of any person’.

Coordination of visits

Submit proposals and observations on existing and draft legislation:

- OPCAT requires:
- State to inform body of draft legislation and allow it to make observation
  - State should take into consideration such proposals or observation

Does not appear to be within the remit of the Inspector, but part of HIQA’s broader functions: see HIQA’s Corporate Strategy which states that it will adopt ‘Better Decisions We provide information and advice to inform decisions about services’ where recommendations on legislative reform and development of standards can influence policy change.

Resources:

- OPCAT requires:
- Necessary resources for effective operation

Health Act, s.31 ‘(1) Subject to subsection (2), the Minister, for a financial year of the Authority, shall—

- (a) determine the maximum amount of net expenditure that may be incurred by the Authority for that financial year, and
- (b) notify the Authority in writing of the amount so determined not more than 21 days after the publication by the Government of the Estimates for Supply Services for that financial year.

(2) If the Minister considers it appropriate in any particular case, a determination under this section may relate to the period (other than the financial year of the Authority) as the Minister may specify in the relevant notification under this section.

(3) The Minister may amend a determination under subsection (1) by varying the maximum amount of net expenditure that the Authority may incur for a particular financial year and, if the Minister varies that amount, the Minister shall notify the Authority in writing of the amendment as soon as may be and the determination applies and has effect as so amended.

32.—The Minister may, with the consent of the Minister for Finance, advance to the Authority out of money provided by the Oireachtas such sum as the Minister may determine’.

s.40(4) ‘The chief inspector shall be paid the remuneration and any allowances for expenses that the Authority may determine with the approval of the Minister given with the consent of the Minister for Finance’.

s.45(5) Health Act 2007 with respect to inspection of children’s residential centres, and nursing homes: ‘Expenses incurred by the Executive in carrying out functions in accordance with this section shall be paid from money provided by the Oireachtas to the Executive’.

**Confidential information collected by body should be privileged. Personal data should not be published without consent of individual**

Preventive activities

s.51 of the Health Act 2007 enables the Chief

Inspector at any time to cancel registration of a designated centre, or vary, remove or add conditions to registration if it is considered there are one or more of the following grounds:

‘2(a) that the registered provider, or any other person who participates in the management of the designated centre has been convicted of one or more of the following:

- (i) an offence under this Act;
- (ii) an offence under an enactment cited by the chief inspector in accordance with section 50(1)(b)(iii) and noted in accordance with section 50(3) on the registered provider’s certificate of registration;
- (iii) an offence under the Child Care Act 1991;
- (iv) an offence against the person;

(b) that, in the opinion of the chief inspector, the registered provider or any other person who participates in the management of the centre is not a fit person to be the registered provider of the centre or to participate in its management;

(c) that the designated centre is being, or has at any time been, carried on otherwise than in accordance with—

- (i) any requirements or conditions imposed by or under this Act, or
- (ii) any other statutory provision which the chief inspector considers to be relevant’.

Standards

Legal standards applied

- National Standards for Safer Better Healthcare
- Prevention and Control of Healthcare Associated Infections
- National Quality Standards for Residential Care Settings for Older People
- National Standards for the Protection and Welfare of Children
- National Standards for Children’s Residential Centres
- Draft National Standards for Special Care Units

National Standards for Foster Care

Standards and Criteria for Children Detention Schools

National Standards for Residential Services for Children with Disabilities

Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013

Health Act 2007 (Registration of Designated Centres for Older People) Regulations 2015

Compliance with the Health Act 2007 (Care and Support of Residents in Designated Centres for Persons (Children And Adults) With Disabilities) Regulations 2013

Health Act 2007 (Registration of Designated Centres for Persons (Children and Adults with Disabilities) Regulations 2013

Further Comments and Notes

Some of those we spoke to noted HIQA had a good reputation and was seen as independent. Others queried whether it had a human rights focus specifically and instead was more of a regulatory body and driven by standards. As a result, this led one interviewee to question whether they were suitable to conduct independent oversight and monitoring in the context of the NPM. This is despite similar bodies being designated in other jurisdictions (such as the Healthcare Inspectorate (IGZ) in the Netherlands) as the NPM.

It has a broad mandate across range of different settings. Some we spoke to questioned whether HIQA was able to deal, or deal consistently, with specialisms that particular contexts may require.

Some gaps exist, for example, with respect to domicile and home care provision and de facto detention.

There are some inconsistencies between different Acts and settings regarding the powers given to Inspector (for example, Children Act and Health Act re term of appointment and conditions for removal).

## Appendix VI

# Inspectorate of Mental Health Services

### Basics

#### Website

Mental Health Commission:  
<http://www.mhcirl.ie/>

Inspectorate of Mental Health Services:  
[http://www.mhcirl.ie/Inspectorate\\_of\\_Mental\\_Health\\_Services/](http://www.mhcirl.ie/Inspectorate_of_Mental_Health_Services/)

### Constitutional Aspects

#### Legal Framework/Basis

S.50 of the MHA establishes an Inspector of Mental Health Services.

Mental Health Act 2001 (Approved Centres) Regulations 2006

#### Mandate set out in constitutional or legislative text

Inspector of Mental Health Services:

51.—(1) The principal functions of the Inspector shall be—

- (a) to visit and inspect every approved centre at least once in each year after the year in which the commencement of this section falls and to visit and inspect any other premises where mental health services are being provided as he or she thinks appropriate, and
- (b) in each year, after the year in which the commencement of this section falls, to carry out a review of mental health services in the State and to furnish a report in writing to the Commission on—
  - (i) the quality of care and treatment given to persons in receipt of mental health services,
  - (ii) what he or she has ascertained pursuant to any inspections carried out by him or her of approved centres or other premises where mental health services are being provided,
  - (iii) the degree and extent of compliance by approved centres with any code of practice prepared by the Commission under section 33(3)(e), and

(iv) such other matters as he or she considers appropriate to report on arising from his or her review.

55.—(1) The Commission may, and shall if so requested by the Minister, cause the Inspector or such other person as may be specified by the Commission, to inquire into—

- (a) the carrying on of any approved centre or other premises in the State where mental health services are provided,
- (b) the care and treatment provided to a specified patient or a specified voluntary patient by the Commission,
- (c) any other matter in respect of which an inquiry is appropriate having regard to the provisions of this Act or any regulations or rules made thereunder or any other enactment.

(2) Where a person carries out an inquiry under this section, he or she shall, as soon as may be, prepare a report in writing of the results of the inquiry and shall submit the report to the Commission.

(3) A report under subsection (2) shall be absolutely privileged wherever and however published.

In addition,

16.—(1) ‘Where a consultant psychiatrist makes an admission order or a renewal order, he or she shall, not later than 24 hours thereafter—

- (a) send a copy of the order to the Commission, and
- (b) give notice in writing of the making of the order to the patient.

(2) A notice under this section shall include a statement in writing to the effect that the patient—

... (d) is entitled to communicate with the Inspector’.

Re the Mental Health Commission:

Mental Health Commission set up in 2002, under the Mental Health Act 2001, s.32.

‘33(1) The principal functions of the Commission shall be to promote, encourage

and foster the establishment and maintenance services and to take all reasonable steps to protect the interests of persons detained in approved centres under this Act.’

s.33(3) Mental health Act 2001:

‘(3) Without prejudice to the generality of the foregoing, the Commission shall—

- (a) appoint persons to be members of tribunals and provide staff and facilities for the tribunals,
- (b) establish a panel of consultant psychiatrists to carry out independent medical examinations under section 17,
- (c) make or arrange for the making, with the consent of the Minister and the Minister for Finance, of a scheme or schemes for the granting by the Commission of legal aid to patients,
- (d) furnish, whenever it so thinks fit or is so requested by the Minister, advice to the Minister in relation to any matter connected with the functions or activities of the Commission,
- (e) prepare and review periodically, after consultation with such bodies as it considers appropriate, a code or codes of practice for the guidance of persons working in the mental health services.

(4) The Commission shall have all such powers as are necessary or expedient for the purposes of its functions.’

The Mental Health Commission appoints the Inspector of Mental Health Services.

Under s. 33(3) Mental Health Act 2001 the Commission is also required to:

- (a) appoint persons to be members of tribunals and provide staff and facilities for the tribunals.
- (b) establish a panel of consultant psychiatrists to carry out independent medical examinations under section 17.

The Commission has eight committees made up of both Commission members and external members:

- Audit Committee
- World Mental Health Day Committee
- Child and Adolescent Mental Health Services Committee
- Forensic Mental Health Services Committee
- Research Committee
- Assisted Admissions Committee
- Mental Health Services Committee
- Review of Mental Health Act 2001 Committee

The Commission is divided into six divisions

**Independence: Functional, operational and personnel**

- OPCAT requires:
- Period of office sufficient to foster independent functioning

Inspector: Appointment by Mental Health Commission, s.50(2).

s.50(4) ‘The Inspector shall hold office for such period and upon and subject to such terms and conditions as the Commission may determine’.

Similar provision with respect to assistant inspectors, s.54(1).

Although Part 3 of the MHA establishing the Mental Health Commission is entitled ‘independent review of detention’ (and this is also the part under which the Inspectorate is established), and although s.32(3) states that ‘The Commission shall, subject to the provisions of this Act, be independent in the exercise of its functions’, an equivalent provision is not provided with respect to the Inspector or Assistant Inspectors themselves.

With respect to the Mental Health Commission:

‘The Commission shall, subject to the provisions of this Act, be independent in the exercise of its functions.’, s.31(3) of the Mental

Health Act 2001.

43(1) Where a member of the Commission is—

- (a) nominated as a member of Seanad Eireann, or
- (b) elected as a member of either House of the Oireachtas or to the European Parliament, or
- (c) regarded, pursuant to section 19 of the European Parliament Elections Act, 1997, as having been elected to the European Parliament to fill a vacancy,

he or she shall thereupon cease to be a member of the Commission.

**Financial Independence**

With respect to the Inspectorate: s.50(3) Mental Health Act:

‘The Inspector shall be paid such remuneration and allowances for expenses as the Commission may, with the consent of the Minister and the Minister for Finance, from time to time determine’. Similar provision with respect to assistant inspectors, s.54(4).

With respect to the Mental Health Commission generally:

44. The Minister may, in each financial year, after consultation with the Commission in relation to its proposed work programme and expenditure for that year, make grants of such amount as may be sanctioned by the Minister for Finance out of moneys provided by the Oireachtas towards the expenditure incurred by the Commission in the performance of its functions.

47(1) The Commission shall submit estimates of income and expenditure to the Minister in such form, in respect of such periods, and at such times as may be required by him or her and shall furnish to the Minister any information which he or she may require in relation to such estimates.

The budget for the Commission in 2011 was 15 million EUROS. The Commission received a state grant of €13,168,329 for 2011 (£10,541,103 at the current exchange rate).

**Membership**

**Composition of body:**

- OPCAT requires:
- Experts
  - Collectively have the required capabilities and professional knowledge
  - Strive for gender balance and adequate representation of ethnic and minority groups in the country

With regard to the Inspectorate:

An Inspector, who is a consultant psychiatrist (s.50(2) Mental Health Act). In addition, s.54:

‘(1) The Commission may as occasion requires appoint such, and such number of, persons (who shall be known as Assistant Inspectors of Mental Health Services and are referred to in this Act as “Assistant Inspectors”) as it may determine to assist the Inspector in the performance of his or her functions.

(2) An Assistant Inspector shall perform such functions of the Inspector, to such extent, as the Inspector may determine, subject to any directions that may be given to the Inspector by the Commission.

(3) An Assistant Inspector shall perform his or her functions subject to the general direction of the Inspector and a function of the Inspector performed pursuant to this Act by an Assistant Inspector shall be deemed, for the purposes of this Act, to have been performed by the Inspector.

The website notes that ‘The team includes professionals from the following backgrounds:

- Psychiatry
- Occupational Therapy
- Clinical Psychology
- Social Work
- Nursing
- Service User Experience’.

The Report of the Inspector of Mental Health Services notes that Inspections were carried



out by the Acting Inspector and Assistant Inspectors which constitutes the Inspection Team. The team of Assistant Inspectors included a social worker, a mental health nurse, a service user, an occupational therapist and psychiatrists’.

See also s.51(2)(a):

‘(2) The Inspector shall have all such powers as are necessary or expedient for the performance of his or her functions under this Act including but without prejudice to the generality of the foregoing, the following powers:

- (a) to visit and inspect at any time any approved centre or other premises where mental health services are being provided and to be accompanied on such visit by such consultants or advisors as he or she may consider necessary or expedient for the performance of his or her functions’.

With regard to the Mental Health Commission:

s.35 Mental Health Act 2001:

‘35(1) The Commission shall consist of 13 members who shall be appointed to be members of the Commission by the Minister.

(2) Of the members of the Commission—

- (a) one shall be a person who has had not less than 10 years’ experience as a practising barrister or solicitor in the State ending immediately before his or her appointment to the Commission,
- (b) 3 shall be representative of registered medical practitioners (of which 2 shall be consultant psychiatrists) with a special interest in or expertise in relation to the provision of mental health services,
- (c) 2 shall be representative of registered nurses whose names are entered in the division applicable to psychiatric nurses in the register of nurses maintained by An Bord Altranais under section 27 of the Nurses Act, 1985,
- (d) one shall be representative of social workers with a special interest in or expertise in relation to the provision of mental health services,
- (e) one shall be representative of psychologists with a special interest in

- or expertise in relation to the provision of mental health services,
- (f) one shall be representative of the interest of the general public,
- (g) 3 shall be representative of voluntary bodies promoting the interest of persons suffering from mental illness (at least 2 of whom shall be a person who is suffering from or has suffered from mental illness),
- (h) one shall be representative of the chief executives of the health boards,
- (i) not less than 4 shall be women and not less than 4 shall be men.

(3) The members of the Commission appointed pursuant to subsection (2)(b) shall be persons nominated for appointment thereto by such organisation or organisations as the Minister considers to be representative of such medical practitioners.

(4) The members of the Commission appointed pursuant to subsection (2)(c) shall be persons nominated for appointment thereto by such organisation or organisations as the Minister considers to be representative of such nurses.

(5) The member of the Commission appointed pursuant to subsection (2)(d) shall be a person nominated for appointment thereto by such organisation or organisations as the Minister considers to be representative of such social workers.

(6) The member of the Commission appointed pursuant to subsection (2)(e) shall be a person nominated for appointment thereto by such organisation or organisations as the Minister considers to be representative of such psychologists.

(7) The members of the Commission appointed pursuant to subsection (2)(g) shall be persons nominated for appointment thereto by such organisation or organisations as the Minister considers to be representative of such voluntary bodies.’

The Chair of the Commission is Mr John Saunders. - See more at: [http://www.mhcirl.ie/About\\_Us/Commission\\_Members/#sthash.3kymHSB7.dpuf](http://www.mhcirl.ie/About_Us/Commission_Members/#sthash.3kymHSB7.dpuf).

**Appointment:**

OPCAT requires:

- Open, transparent and inclusive process involving wide range of stakeholders as well as civil society
- Not appoint those with conflicts of interest/members of NPM ensure they do not hold such positions
- Members carry out work which avoid conflict of interest

Inspectorate: s.50 MHA 2001:

(2) The [Mental Health] Commission shall from time to time appoint a consultant psychiatrist to be the Inspector.

(4) The Inspector shall hold office for such period and upon and subject to such terms and conditions as the Commission may determine.

54(1) The Commission may as occasion requires appoint such, and such number of, persons (who shall be known as Assistant Inspectors of Mental Health Services and are referred to in this Act as “Assistant Inspectors”) as it may determine to assist the Inspector in the performance of his or her functions.

Mental Health Commission:

Appointment by the Minister, s.35(1) MHA 2001.

36(1) A member of the Commission shall hold office for such period not exceeding 5 years and on such other terms as the Minister may determine.

(2) A member of the Commission may resign his or her membership by letter addressed to the Minister and the resignation shall take effect from the date specified therein or upon receipt of the letter by the Minister, whichever is the later.

(4) A member of the Commission may at any time be removed from membership of the Commission by the Minister if, in the Minister’s opinion, the member has become incapable of performing his or her functions, or has committed stated misbehaviour, or his or her removal appears to the Minister to be

necessary for the effective performance by the Commission of its functions.

37(1) The Minister shall appoint a member of the Commission to be chairperson of the Commission.

The Commission appoints its Chief Executive (s.38(1) MHA) and staff (s.39(1)) although removal of the former is with the consent of the minister (s.38(2) s.MHA)

**Legislation specifies period of office of members and grounds for dismissal**

s.50(4) The Inspector shall hold office for such period and upon and subject to such terms and conditions as the Commission may determine.

s.54(5) An Assistant Inspector shall hold office for such period and upon and subject to such terms and conditions as the Commission may, with the consent of the Minister and the Minister for Finance, determine.

**Staffing**

OPCAT requires:

- NPM to ensure it has staff with diversity of background, capabilities, professional knowledge including relevant legal and health care expertise

s.54(1) The Commission may as occasion requires appoint such, and such number of, persons (who shall be known as Assistant Inspectors of Mental Health Services and are referred to in this Act as “Assistant Inspectors”) as it may determine to assist the Inspector in the performance of his or her functions.

The website notes that ‘The team includes professionals from the following backgrounds:

- Psychiatry
- Occupational Therapy
- Clinical Psychology
- Social Work
- Nursing
- Service User Experience’.

## Powers and resources

### Places visited where deprivation of liberty could be exercised:

- OPCAT requires:
- All places of deprivation of liberty
  - Suspected places of deprivation of liberty
  - Ability to choose places want to visit and who want to interview

s.51(2) Mental Health Act 2001:

‘(2) The Inspector shall have all such powers as are necessary or expedient for the performance of his or her functions under this Act including but without prejudice to the generality of the foregoing, the following powers:

to visit and inspect at any time any approved centre or other premises where mental health services are being provided and to be accompanied on such visit by such consultants or advisors as he or she may consider necessary or expedient for the performance of his or her functions.

‘Approved centre’ defined in the Act as:

s. 63.—(1) A person shall not carry on a centre unless the centre is registered and the person is the registered proprietor thereof and a centre which is so registered shall be known, and is referred to in this Act, as “an approved centre”.

In addition, ‘64.—(1) The Commission shall establish and maintain a register which shall be known as “the Register of Approved Centres” and is referred to subsequently in this Act as “the Register”.’

The Inspector has the mandate to inspect children and adolescent inpatient services where they are detained in an approved centre under s.25 of the Mental Health Act.

Amnesty in 2011 noted that the Inspectorate appeared to be ‘more focused on inpatient than community-based services. ...Accordingly, the statutory regulations and much of the rules and guidance published by the Commission focus on issues relating to inpatient care and treatment in approved centres’.

There has been inspection of some community-based services, but most inspections are on approved centres.

This issue has been recognised in part by the government in January 2015 with the suggestion that the MHC would be extended to look at community based services too.

### Frequency of visits:

- OPCAT requires:
- Regular examination
  - frequency decided by the NPM

51’(1) The principal functions of the Inspector shall be—

- (a) to visit and inspect every approved centre at least once in each year after the year in which the commencement of this section falls and to visit and inspect any other premises where mental health services are being provided as he or she thinks appropriate, and
- (b) in each year, after the year in which the commencement of this section falls, to carry out a review of mental health services in the State and to furnish a report in writing to the Commission’.

The Inspector’s 2014 report notes that ‘In 2014, sixty-three approved centres were inspected with regard to compliance with the Regulations, Rules and Codes of Practice, and also with regard to compliance with the Quality Framework. All inspections of approved centres were unannounced. All reports of inspections of approved centres are published on the Mental Health Commission website. The Inspection Team also inspected ten 24-hour nurse supervised residences; these inspections were also unannounced. The reports of the inspections of these residences are also published on the website’.

### Types of visits:

- OPCAT requires:
- Ability to carry out unannounced visits

Once a year to each approved centre.

‘Targeted intervention reports’, which the website says is ‘A Targeted Intervention is an outcomes focused, quality improvement process’. This is carried out under the Mental Health Commission Policy on Handling Complaints or Concerns about Quality, Safety or Welfare in Mental Health Services, 2009. Criteria for carrying out a targeted intervention are:

‘where an assessment of the prima facie evidence indicates that there may have been or there may be:

1. Quality, safety or welfare issues in the carrying on of an Approved Centre or other premises where mental health services were provided that have posed, were posing or were likely to pose a serious risk to service users; or
2. Quality, safety or welfare issues in the care and treatment provided to a specified service user that have posed, were posing or were likely to pose a serious risk to the specified service user; or
3. Compliance concerns with the provisions of the 2001 Act, the Approved Centre Regulations 2006 or the various Rules and Codes of Practice that have been issued by the Commission that have posed, were posing or were likely to pose a serious risk to service users in a specified mental health service’.

### Private interviews:

- OPCAT requires:
- Ability to have private interviews with those deprived of liberty and others

52. When making an inspection under section 51, the Inspector shall—

- (a) see every resident (within the meaning of Part 5) whom he or she has been requested to examine by the resident himself or herself or by any other person,
- (b) see every patient the propriety of whose detention he or she has reason to doubt,
- (c) ascertain whether or not due regard is being had, in the carrying on of an approved centre or other premises where mental health services are being provided, to this Act and the provisions made thereunder, and

(d) ascertain whether any regulations made under section 66, any rules made under sections 59 and 69 and the provisions of Part 4 are being complied with, and the Inspector shall make a report in writing to the Commission in relation to any of the matters aforesaid as he or she considers appropriate.

### Access to information:

- OPCAT requires:
- Access to all information on number of persons; places and location;
  - Access to all information on treatment and conditions of detention;
  - Access to all places of detention, installations and facilities

s.51(2) The Inspector shall have all such powers as are necessary or expedient for the performance of his or her functions under this Act including but without prejudice to the generality of the foregoing, the following powers:

- (b) to require any person in such an approved centre or other premises to furnish him or her with such information in possession of the person as he or she may reasonably require for the purposes of his or her functions and to make available to the Inspector any record or other document in his or her power or control that in the opinion of the Inspector, is relevant to his or her functions,
- (c) to examine and take copies of, or of extracts from, any record or other document made available to him or her as aforesaid or found on the premises,
- (d) to require any person who, in the opinion of the Inspector, is in possession of information, or has a record in his or her power or control, that, in the opinion of the Inspector, is relevant to the purposes aforesaid to furnish to the Inspector any such information or record and, where appropriate, require the person to attend before him or her for that purpose,
- (e) to examine and take copies in any form of, or of extracts from any record that, in the opinion of the Inspector, is relevant to



the review or investigation and for those purposes take possession of any such record, remove it from the premises and retain it in his or her possession for a reasonable period, and

(f) to take evidence on oath and for that purpose to administer oaths.

(3) Subject to subsection (4), no enactment or rule of law prohibiting or restricting the disclosure or communication of information shall preclude a person from furnishing to the Inspector any such information or record, as aforesaid.

s.53 A person who—

(a) obstructs or interferes with the Inspector while he or she is exercising any power conferred by or under this Act, or

(b) fails to give any information within his or her knowledge reasonably required by the Inspector in the course of carrying out his or her duties, shall be guilty of an offence under this section and shall be liable on summary conviction thereof to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both.

s.66(5) ‘A person who wilfully obstructs or interferes with the Inspector in the performance of functions under the regulations or who fails or refuses to comply with a requirement of the Inspector under such regulations shall be guilty of an offence’.

Reports

OPCAT requires:

- Annual reports
- Reports following the visits
- Other reports
- Competent authorities to examine the recommendations and enter into a dialogue on implementation measures
- Process of follow up
- State to publish and widely disseminate annual reports
- Annual report presented to parliament

Inspectorate:

S.52. When making an inspection under section 51, the Inspector shall—

(d) ascertain whether any regulations made under section 66, any rules made under sections 59 and 69 and the provisions of Part 4 are being complied with, and the Inspector shall make a report in writing to the Commission in relation to any of the matters aforesaid as he or she considers appropriate.

s.51(1) (b) in each year, after the year in which the commencement of this section falls, to carry out a review of mental health services in the State and to furnish a report in writing to the Commission.

Reports produced by the Inspector and available on its website of:

- approved centres;
- Other mental health services;
- Targeted intervention reports;
- Whole service evaluations;
- National overview reports;
- Themed reports; and
- Super Catchment/Local Catchment Area Reports.

With respect to the Mental Health Commission:

42(1) As soon as may be after the end of each year beginning with the year in which the establishment day falls, but not later than 6 months thereafter, the Commission shall prepare and submit a report in writing to the Minister of its activities during that year and not later than one month after such submission, the Minister shall cause copies thereof to be laid before each House of the Oireachtas.

(2) A report under subsection (1) shall include the report of the Inspector under section 51 and other information in such form and regarding such matters as the Minister may direct.

(3) The Commission shall, whenever so requested by the Minister, furnish to the Minister information in relation to such matters as he or she may specify concerning or relating to the scope of its activities, or in respect of any account prepared by the Commission or any report specified in subsection (1) or in section 55.

(4) The Commission shall, not later than 18 months after the commencement of Part 2, prepare and submit a report in writing to the Minister on the operation of that Part together with any findings, conclusions or recommendations concerning such operation as it considers appropriate.

(5) The Commission may publish such other reports on matters related to its activities and functions, as it may from time to time consider relevant and appropriate.

Coordination of visits

Submit proposals and observations on existing and draft legislation:

- State to inform body of draft legislation and allow it to make observation
- State should take into consideration such proposals or observation

The Mental Health Commission has the power to comment on draft legislation and other policies. See for example, Submission on Assisted Decision Making (Capacity) Bill 2013; and Mental Health Commission Response to the Public Consultation on the Draft Scheme for Advance Healthcare Directives.

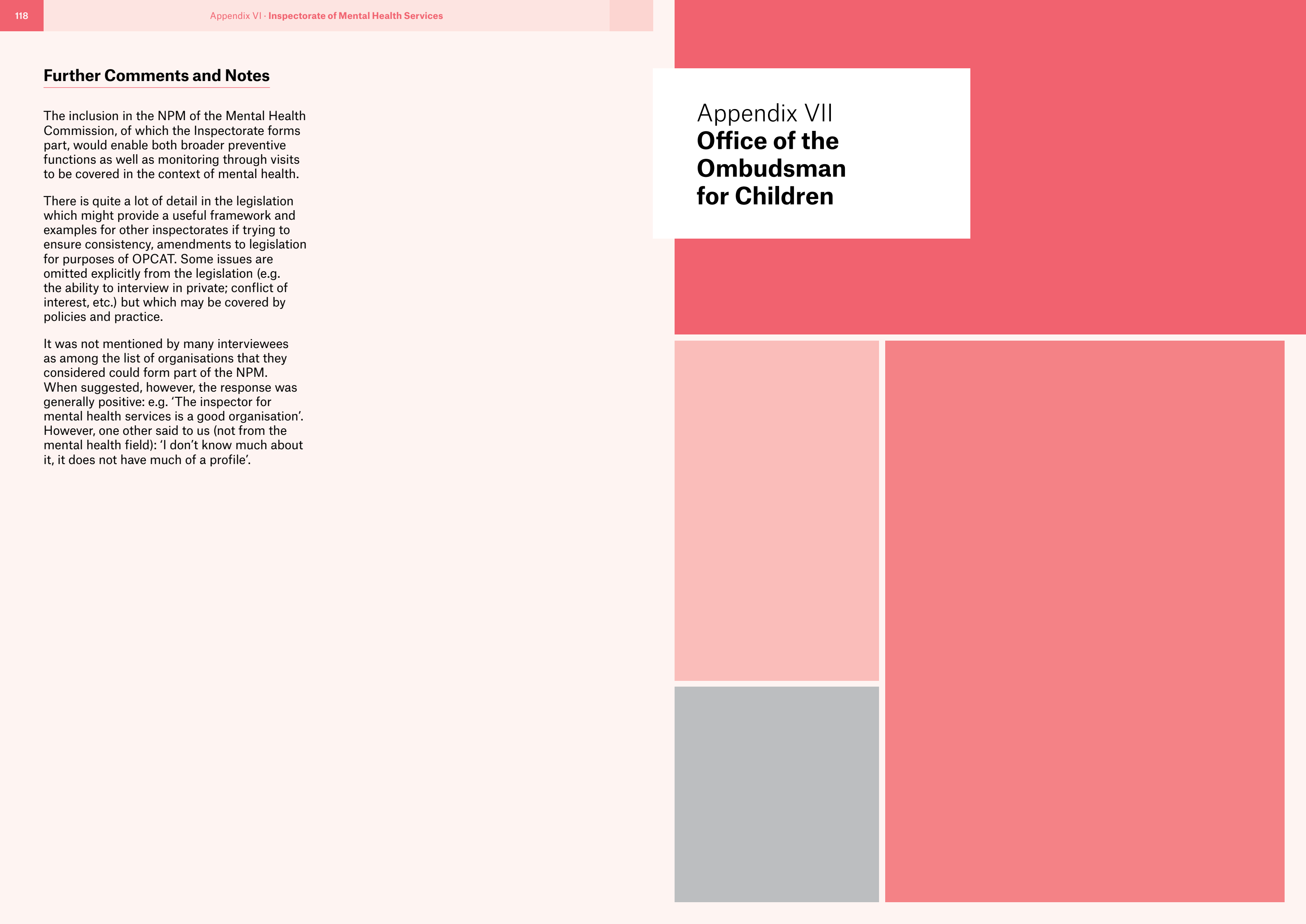
Standards

Legal standards applied

The Inspectorate’s reports note that each approved centre ‘is assessed against all regulations, rules and codes of practice and Section 4 of the Mental Health Act 2001. A Judgement Support Framework has been developed as a guidance document to legislative requirements for Approved Centres. The Framework incorporates national and international best practice under each relevant section of the legislative requirements. In addition, the Inspectorate may inspect any mental health service.’

- The Judgement Support Framework also includes Codes of Practice.
- In addition inspections are carried out to measure compliance with:
- Mental Health Act 2001 (Approved Centres) Regulations 2006 (SI No.551 of 2006)
- Rules Governing the Use of Seclusion and Mechanical means of Bodily Restraint, Mental Health Commission
- Rules Governing the Use of Electro-Convulsive Therapy (ECT), Mental Health Commission
- Code of Practice relating to Admission of Children under the Mental Health Act 2001. Mental Health Commission Code of Practice for Mental Health Services on Notification of Deaths and Incident Reporting. Mental Health Commission Code of Practice on Admission, Transfer and Discharge to and from an approved centre. Mental Health Commission. Code of Practice: Guidance for Persons working in Mental Health Services with People with Intellectual Disabilities. Mental Health Commission Code of Practice on the Use of ECT for Voluntary Patients. Mental Health Commission Code of Practice on the Use of Physical Restraint. Mental Health Commission





**Further Comments and Notes**

The inclusion in the NPM of the Mental Health Commission, of which the Inspectorate forms part, would enable both broader preventive functions as well as monitoring through visits to be covered in the context of mental health.

There is quite a lot of detail in the legislation which might provide a useful framework and examples for other inspectorates if trying to ensure consistency, amendments to legislation for purposes of OPCAT. Some issues are omitted explicitly from the legislation (e.g. the ability to interview in private; conflict of interest, etc.) but which may be covered by policies and practice.

It was not mentioned by many interviewees as among the list of organisations that they considered could form part of the NPM. When suggested, however, the response was generally positive: e.g. ‘The inspector for mental health services is a good organisation’. However, one other said to us (not from the mental health field): ‘I don’t know much about it, it does not have much of a profile’.

Appendix VII  
**Office of the  
Ombudsman  
for Children**

## Basics

### Website

<http://www.oco.ie/>

## Legislative Aspects

### Legal Framework/Basis

Ombudsman for Children Act 2002 (as amended by the Ombudsman (Amendment) Act 2012)

### Mandate set out in constitutional or legislative text

Ombudsman for Children Act 2002:

s. 7(1) The Ombudsman for Children shall promote the rights and welfare of children and, without prejudice to the generality of the foregoing, he or she shall—

(a) advise the Minister or any other Minister of the Government, as may be appropriate, on the development and co-ordination of policy relating to children,

(b) encourage public bodies, schools and voluntary hospitals to develop policies, practices and procedures designed to promote the rights and welfare of children,

(c) collect and disseminate information on matters relating to the rights and welfare of children,

(d) promote awareness among members of the public (including children of such age or ages as he or she considers appropriate) of matters (including the principles and provisions of the Convention) relating to the rights and welfare of children and how those rights can be enforced,

(e) highlight issues relating to the rights and welfare of children that are of concern to children,

(f) exchange information and co-operate with the Ombudsman for Children (by whatever name called) of other states,

(g) monitor and review generally the operation of legislation concerning matters that relate to the rights and welfare of children, and

(h) monitor and review the operation of this Act and, whenever he or she thinks it necessary, make recommendations to the Minister or in a report under section 13(7) or both for amending this Act.

(2)(a) The Ombudsman for Children shall establish structures to consult regularly with groups of children that he or she considers to be representative of children for the purposes of his or her functions under this section.

(b) In consultations under this subsection, the views of a child shall be given due weight in accordance with the age and understanding of the child.

(3) The Ombudsman for Children may undertake, promote or publish research into any matter relating to the rights and welfare of children.

(4) The Ombudsman for Children may, on his or her own initiative, and shall, at the request of the Minister or any other Minister of the Government, give advice to the Minister of the Government concerned on any matter (including the probable effect on children of the implementation of any proposals for legislation) relating to the rights and welfare of children.

s. 8 Subject to this Act, the Ombudsman for Children may investigate any action taken (being an action taken in the performance of administrative functions) by or on behalf of a public body where, upon having carried out a preliminary examination of the matter, it appears to the Ombudsman for Children that—

(a) the action has or may have adversely affected a child, and

(b) the action was or may have been—

(i) taken without proper authority,

(ii) taken on irrelevant grounds,

(iii) the result of negligence or carelessness,

(iv) based on erroneous or incomplete information,

(v) improperly discriminatory,

(vi) based on an undesirable administrative practice, or

(vii) otherwise contrary to fair or sound administration.

s. 9(1) Subject to this Act, the Ombudsman for Children may investigate any action taken (being an action taken in the performance of administrative functions) by or on behalf of—

(a) a school in connection with the performance of its functions under section 9 of the Act of 1998, or

(b) a voluntary hospital in connection with the provision by it of health and personal social services within the meaning of the Health Act 2004 in accordance with an arrangement made by it under section 38 of that Act with the Health Service Executive, where, upon having carried out a preliminary examination of the matter, it appears to the Ombudsman for Children that—

(i) the action has or may have adversely affected a child, and

(ii) the action was or may have been—

(I) taken without proper authority,

(II) taken on irrelevant grounds,

(III) the result of negligence or carelessness,

(IV) based on erroneous or incomplete information,

(V) improperly discriminatory,

(VI) based on an undesirable administrative practice, or

(VII) otherwise contrary to fair or sound administration.

(2) The Ombudsman for Children may investigate an action under subsection (1)(a) only where the procedures prescribed pursuant to section 28 of the Act of 1998 have been resorted to and exhausted in relation to the action.

(3) The references to a voluntary hospital in paragraphs (b) and (c) of subsection (1) do not include references to—

(a) persons when acting on behalf of the voluntary hospital concerned and (in the opinion of the Ombudsman for Children) solely in the exercise of clinical judgement in connection with the diagnosis of illness or the care or treatment of a patient, whether formed by the person taking the action or by any other person, or

(b) the voluntary hospital concerned

when acting on the advice of persons acting as aforesaid, being actions of the voluntary hospital that, in the opinion of the Ombudsman for Children, were taken solely on such advice.

s.10 (1) (a) The Ombudsman for Children shall not investigate an action under section 8 or 9 unless—

(i) a complaint has been made to him or her in relation to the action by or on behalf of a child, or

(ii) it appears to him or her, having regard to all the circumstances, that an investigation under this section into the action would be warranted.

(b) A complaint may be made to the Ombudsman for Children on behalf of a child by—

(i) a parent of the child, or

(ii) any other person who, by reason of that person's relationship (including professional relationship) with the child and his or her interest in the rights and welfare of the child, is considered by the Ombudsman for Children to be a suitable person to represent the child.

(c) If a complaint is made to the Ombudsman for Children by a child or on behalf of a child by a person other than a parent of the child, the Ombudsman for Children shall, before investigating the complaint, inform a parent of the child of the complaint.

(d) In this subsection "parent", in relation to a child, means the mother or father of the child or, where the child has been adopted under the Adoption Acts, 1952 to 1998, or outside of the State, the adopter or surviving adopter of the child, a foster parent of the child, a guardian of the child appointed under the Guardianship of Children Acts, 1964 to 1997, or other person acting in loco parentis to the child pursuant to a statutory power or order of a Court.

(2) The Ombudsman for Children may—

(a) having carried out a preliminary examination of the matter, decide not to carry out an investigation under this Act into an action in relation to which a

complaint is made, or

(b) discontinue an investigation under this Act into such an action, if he or she becomes of opinion that—

- (i) the complaint is trivial or vexatious,
- (ii) the child making the complaint, or on whose behalf the complaint is made, has an insufficient interest in the matter,
- (iii) the child making the complaint, or on whose behalf the complaint is made, has not taken reasonable steps to seek redress in respect of the subject matter of the complaint or, if he or she has, has not been refused redress, or
- (iv) the lapse of time since the occurrence of the matter complained of makes effective redress impossible or impracticable.

(3) It shall not be necessary for the Ombudsman for Children to investigate an action under this Act if he or she is of opinion that the subject matter concerned has been, is being or will be sufficiently investigated in another investigation by him or her under this Act.

(4) A preliminary examination or investigation by the Ombudsman for Children shall not affect the validity of the action examined or investigated or any power or duty of the person who took the action to take further action with respect to any matters the subject of the examination or investigation.

(5) In determining whether to initiate, continue or discontinue an investigation under this Act, the Ombudsman for Children shall, subject to this Act, act in accordance with his or her own discretion.

(6) Nothing in section 8(a) or 9(1)(i) or subsection (1)(a) shall be construed as prohibiting the investigation by the Ombudsman for Children of—

- (a) an action that, in the opinion of the Ombudsman for Children, has or may have affected any child other than in an official capacity, or
- (b) an action the subject of a complaint to him or her by an individual acting other than in an official capacity.

s.11(1) The Ombudsman for Children shall not investigate any action taken by or on behalf of a public body, school or voluntary hospital—

(a) if the action is one in relation to which—

- (i) civil legal proceedings in any court have been initiated on behalf of the child affected by the action and the proceedings have not been dismissed for failure to disclose a cause of action or a complaint justiciable by that court whether the proceedings have been otherwise concluded or have not been concluded,
- (ii) the child affected by the action has a right, conferred by or under statute (within the meaning of section 3 of the Interpretation Act, 1937) of appeal, reference or review to or before a court in the State (not being an appeal, reference or review in relation to a decision of a court), or
- (iii) the child affected by the action has a right of appeal, reference or review to or before a person other than a public body or, if appropriate, the school or voluntary hospital concerned,

(b) if the action relates to or affects national security or military activity or (in the opinion of the Ombudsman for Children) arrangements regarding participation in organisations of states or governments,

(c) relating to recruitment or appointment to any office or employment in a Department of State or by any other public body, school or voluntary hospital,

(d) relating to or affecting the terms or conditions—

(i) upon and subject to which a person—

- (I) holds any office, or
- (II) is employed in a Department of State or by any other public body, school or voluntary hospital,

(ii) of a contract for services, (including the terms and conditions upon and subject to which pensions, gratuities or other superannuation benefits are payable to or in respect of the person or under the contract),

(f) if the action relates to the results of an examination (within the meaning of section 49 of the Act of 1998),

(g) in—

- (i) a case where a complaint is made to the Ombudsman for Children in relation to the action, if the complaint is not made before the expiration of two years from the time of the action or the time the child making the complaint, or on whose behalf the complaint is made, became aware of the action, whichever is the later,
- (ii) any other case, if the investigation is not commenced before the expiration of two years from the time of the action, or

(h) if the action—

- (i) is taken before the commencement of this Act, and
- (ii) is not one that may be the subject of a complaint to the Ombudsman under the Act of 1980.

(2) (a) Subsection (1)(e)(iii) shall cease to have effect on and after such date as may be specified in an order made by the Minister with the consent of the Minister for Justice, Equality and Law Reform.

(b) An order made under this subsection shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the order is passed by either such House within the next 21 days on which that House has sat after the order is laid before it, the order shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

(3) Notwithstanding subsection (1), the Ombudsman for Children may investigate—

- (a) an action to which paragraph (a) of that subsection relates if it appears to him or her that special circumstances make it proper to do so,
- (b) an action that would contravene paragraph (g) of that subsection if it appears to him or her that special circumstances make it proper to do so, or
- (c) insurability and entitlement to benefit under the Social Welfare Acts.

(4) Where a Minister of the Government so requests in writing (and attaches to the request a statement in writing setting out in full the reasons for the request), the Ombudsman for Children shall not investigate, or shall cease to investigate, an action specified in the request, being an action of—

- (a) a Department of State whose functions are assigned to that Minister of the Government, or
- (b) a public body (other than a Department of State) whose business and functions are comprised in such a Department of State or in relation to which functions are performed by such a Department of State, (whether or not all or any of the functions of that Minister of the Government stand delegated to a Minister of State at that Department of State).

s.12(1) Section 5(1) of the Act of 1980 is amended by—

- (a) the deletion of “or” after paragraph (f),
- (b) the substitution in paragraph (g) of “this Act, or” for “this Act;”, and
- (c) the insertion of the following paragraph after paragraph (g): “(gg) if the action is one to which section 8 of the Ombudsman for Children Act, 2002, applies, being an action that could otherwise be investigated by the Ombudsman under this Act;”.

(2) Notwithstanding the amendment effected by subsection (1), anything commenced but not completed by the Ombudsman under the Act of 1980 before the commencement of this section may be carried on and completed by the Ombudsman after such commencement as if this section had not been enacted.

s.13(1) In any case where a complaint is made to the Ombudsman for Children in relation to an action and he or she decides not to carry out an investigation under this Act into the action or to discontinue such an investigation, he or she shall send to the child who made the complaint, or to the person who made the complaint on behalf of the child—

- (a) a statement in writing of his or her reasons for the decision, and
- (b) if the decision follows the receipt by the Ombudsman for Children of a request



under section 11(4), a copy of the request and of the statement in writing of the reasons for the request attached to the request, and he or she shall send to such other (if any) person as he or she considers appropriate such statement in writing in relation to the matter as he or she considers appropriate.

(2) In any case where the Ombudsman for Children conducts an investigation under this Act, he or she shall send a statement in writing of the result of the investigation—

- (a) to the public body, school or voluntary hospital concerned,
- (b) (i) to the Department of State in which are comprised the business and functions of, or which performs functions in relation to, any public body (other than a Department of State) to whom a statement is sent under paragraph (a),  
(ii) where the investigation relates to an action taken by or on behalf of a school, to the Department of Education and Science, or
- (c) any other person who has or, in a case where a complaint in relation to the action the subject of the investigation has been made to the Ombudsman for Children, is alleged in the complaint to have taken or authorised the action, and
- (d) any other person to whom he or she considers it appropriate to send the statement.

(3) Where, following an investigation under this Act into an action, it appears to the Ombudsman for Children that the action adversely affected a child and fell within paragraph (b) of section 8 or paragraph (ii) of section 9(1), as the case may be, he or she may recommend to the public body, school or voluntary hospital concerned—

- (a) that the matter in relation to which the action was taken be further considered,
- (b) that measures or specified measures be taken to remedy, mitigate or alter the adverse effect of the action, or
- (c) that the reasons for taking the action be given to the Ombudsman for Children, and, if the Ombudsman for Children thinks

fit to do so, he or she may request the public body, school or voluntary hospital concerned to notify him or her within a specified time of its, his or her response to the recommendation.

(4) Where the Ombudsman for Children carries out an investigation under this Act into an action the subject of a complaint to him or her, he or she shall notify the child who made the complaint, or the person who made the complaint on behalf of the child, of the result of the investigation, the recommendation (if any) made by him or her under subsection (3) in relation to the matter and the response (if any) made to it by the public body, school or voluntary hospital to whom it was given.

(5) Where it appears to the Ombudsman for Children that the measures taken or proposed to be taken in response to a recommendation under subsection (3) are not satisfactory, he or she may, if he or she so thinks fit, cause a special report on the case to be included in a report under subsection (7).

(6) The Ombudsman for Children shall not make a finding or criticism adverse to a person in a statement under subsection (1) or (2), or in a recommendation or report under subsection (3) or (5), without having afforded to the person an opportunity to consider the finding or criticism and to make representations in relation to it to him or her.

(7) The Ombudsman for Children shall cause a report on the performance of his or her functions under this Act to be laid before each House of the Oireachtas annually and may from time to time cause to be laid before each such House such other reports with respect to those functions as he or she thinks fit. The terms of a request under section 11(4) and of the statement in writing of the reasons for the request attached to the request shall be included in a report under this section.

(8) For the purposes of the law of defamation, any such publication as is hereinafter mentioned shall be absolutely privileged, that is to say—

- (a) the publication of any matter by the Ombudsman for Children in making a report to either House of the Oireachtas for the purpose of this Act,

(b) the publication by the Ombudsman for Children—

- (i) to a person mentioned in subsection (1) of a statement sent to such person in pursuance of that subsection,
- (ii) to a person mentioned in subsection (2) of a statement sent to such person in pursuance of that subsection,
- (iii) to a person mentioned in subsection (3) of a recommendation made to such person by the Ombudsman for Children in pursuance of that subsection,
- (iv) to a person mentioned in subsection (4) of a notification given to such person pursuant to that subsection.

The OCO’s own A Guide to Investigations and a Guide to Complaint Handling by the Ombudsman for Children’s Office sets out the methodology for processing complaints.

**Independence: Functional, operational and personnel**

OPCAT requires:

- Period of office sufficient to foster independent functioning

Ombudsman for Children Act 2002:

Section 6(1) ‘The Ombudsman for Children shall be independent in the performance of his or her functions under this Act.

(2) The Ombudsman for Children shall, in the performance of his or her functions under sections 8 and 9, have regard to the best interests of the child concerned and shall, in so far as practicable, give due consideration, having regard to the age and understanding of the child, to his or her wishes’.

Section 4

(4) Subject to this section, a person appointed to be the Ombudsman for Children shall hold the office of Ombudsman for Children for a term of 6 years and may be reappointed once only to that office for a second term.

**Financial Independence**

Ombudsman for Children Act 2002:

Section 17(1) The Ombudsman for Children shall keep in such form as may be approved of by the Minister, with the consent of the Minister for Finance, all proper and usual accounts of moneys received or expended by him or her in the performance of his or her functions under this Act, including an income and expenditure account and a balance sheet and, in particular, shall keep all such special accounts as the Minister may from time to time direct.

(2) Accounts kept in pursuance of this section shall be submitted, not later than 3 months after the end of the financial year to which they relate, by the Ombudsman for Children to the Comptroller and Auditor General for audit and, immediately after the audit, a copy of the income and expenditure account, the balance sheet and of any other (if any) accounts kept pursuant to this section as the Minister, after consultation with the Minister for Finance, may direct and a copy of the report of the Comptroller and Auditor General on the accounts shall be presented to the Minister who shall cause copies thereof to be laid before each House of the Oireachtas.

Section 18(1) The Ombudsman for Children shall, whenever required to do so by the Committee of Dail Eireann established under the Standing Orders of Dail Eireann to examine and report to Dail Eireann on the appropriation accounts and reports of the Comptroller and Auditor General, give evidence to that Committee on—

- (a) the regularity and propriety of the transactions recorded or required to be recorded in any book or other record of account subject to audit by the Comptroller and Auditor General which the Ombudsman for Children is required to prepare under this Act, (b) the economy and efficiency of the Ombudsman for Children in the use of resources,
- (c) the systems, procedures and practices employed by the Ombudsman for Children for the purposes of evaluating the effectiveness of the operation of the office of the Ombudsman for Children, and
- (d) any matter affecting the Ombudsman for Children referred to in a special report of the Comptroller and Auditor General under section 11(2) of the Comptroller and Auditor

General (Amendment) Act, 1993, or in any other report of the Comptroller and Auditor General (in so far as it relates to a matter specified in paragraph (a), (b) or (c)) that is laid before Dail Eireann.

(2) In the performance of his or her duties under this section, the Ombudsman for Children shall not question or express an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits of the objectives of such a policy.

The 2014 Annual Report of the Ombudsman noted that ‘At present, the OCO receives its funding through the Department of Children and Youth Affairs. In practical terms, the control of the OCO’s budget by the Department has not proven to be problematic. However, it is inappropriate for an independent human rights institution to receive its funding through a public body that it can investigate. As noted in this report, complaints relating to services in or under the aegis of the Department of Children and Youth Affairs amounted to 25% of the total in 2014. I believe that the situation should be remedied by providing for the OCO’s funding to come directly from the Oireachtas. This has also been a long standing recommendation from the UN Committee on the Rights of the Child’.

Membership

Composition of body:

OPCAT requires:

- Experts
- Collectively have the required capabilities and professional knowledge
- Strive for gender balance and adequate representation of ethnic and minority groups in the country

An individual appointed as Ombudsman. Currently Dr. Niall Muldoon.

Staff of the Ombudsman’s office as listed on its website include:

- PA to the Ombudsman for Children –

Maria Malone

- Director of Investigations – Nuala Ward
- Investigator – Páraic Walsh
- Investigator – Siobhan Young
- Casework Manager – Barbara Page
- Acting Casework Manager – Aidan Hunt
- Head of Policy – Róisín Webb
- Policy Officer – Ciara Gill
- Head of Participation and Education – Dr Karen McAuley
- Head of Corporate Services – Frank Honan
- Corporate Services – Audrey Harwood.

Appointment:

OPCAT requires:

- Open, transparent and inclusive process involving wide range of stakeholders as well as civil society
- Not appoint those with conflicts of interest/members of NPM ensure they do not hold such positions
- Members carry out work which avoid conflict of interest

Ombudsman for Children Act 2002, Section 4(2): appointment by the ‘President upon resolution passed by Dail Eireann and by Seanad Eireann recommending the appointment of the person.’

We were informed that children were involved in the recruitment process.

Section 18(1) The Ombudsman for Children shall, whenever required to do so by the Committee of who holds the office of Ombudsman for Children is—

- (i) nominated as a member of Seanad Eireann or elected as a member of either House of the Oireachtas,
- (ii) elected to be a representative in the European Parliament or is regarded pursuant to section 19 of the European Parliament Elections Act, 1997, as having been elected to that Parliament, or
- (iii) becomes a member of a local authority, he or she shall thereupon

cease to hold the office of Ombudsman for Children.

- (b) A person who is for the time being—
  - (i) entitled under the Standing Orders of either House of the Oireachtas to sit therein,
  - (ii) a representative in the European Parliament, or
  - (iii) entitled under the standing orders of a local authority to sit as a member thereof, shall, while he or she is so entitled under subparagraph (i) or (iii) or is such a representative under subparagraph (ii), be disqualified for holding the office of Ombudsman for Children.

(6) A person who holds the office of Ombudsman for Children shall not hold any other office or employment in respect of which emoluments are payable or be a member of the Reserve Defence Force.

Legislation specifies period of office of members and grounds for dismissal

Section 4(3) ‘A person appointed to be the Ombudsman for Children—

- (a) may at his or her own request be relieved of office by the President,
- (b) may be removed from office by the President but shall not be removed from office except where—
  - (i) he or she has become incapable through ill health of effectively performing the functions of the office,
  - (ii) he or she is adjudicated bankrupt,
  - (iii) he or she is convicted on indictment by a court of competent jurisdiction and sentenced to imprisonment,
  - (iv) he or she has failed without reasonable excuse to discharge the functions of the office for a continuous period of 3 months beginning not earlier than 6 months before the day of removal, or
  - (v) for any other stated reason, he or she should be removed, and then only upon resolution passed by Dáil Éireann and Seanad Éireann calling for his or her removal,

(c) shall in any case vacate the office on attaining the age of 67 years but where he or she is a new entrant (within the meaning of the Public Service Superannuation (Miscellaneous Provisions) Act 2004) appointed on or after 1 April 2004, then the requirement to vacate office on the grounds of age shall not apply.

Staffing

OPCAT requires:

- NPM to ensure it has staff with diversity of background, capabilities, professional knowledge including relevant legal and health care expertise

Ombudsman for Children Act:

Section 21.—(1) The Minister may, with the consent of the Minister for Finance, appoint such and so many persons to be members of the staff of the Ombudsman for Children as the Minister may determine.

(2) A member of the staff of the Ombudsman for Children shall be a civil servant in the Civil Service of the State.

(3) The Ombudsman for Children may delegate to any member of his or her staff any of his or her functions under this Act except those conferred by subsections (5) and (7) of section 13, section 18 or by this section.

(4) The Minister may delegate to the Ombudsman for Children the powers exercisable by him or her under the Civil Service Commissioners Act, 1956, and the Civil Service Regulation Acts, 1956 to 1996, as the appropriate authority in relation to members of the staff of the Ombudsman for Children, and, if he or she does so, then, so long as the delegation remains in force—

- (a) those powers shall, in lieu of being exercisable by the Minister, be exercisable by the Ombudsman for Children, and
- (b) the Ombudsman for Children shall, in lieu of the Minister, be, for the purposes of this Act, the appropriate authority in relation to members of the staff of the Ombudsman for Children.

A panel of investigators are appointed for their expertise in certain areas.



**Powers and resources**

**Places visited where deprivation of liberty could be exercised:**

- OPCAT requires:
- All places of deprivation of liberty
  - Suspected places of deprivation of liberty
  - Ability to choose places want to visit and who want to interview

Ombudsman for Children Act

s.11

(1) The Ombudsman for Children shall not investigate any action taken by or on behalf of a public body, school or voluntary hospital—

- (e) if the action is one—
  - (i) taken in the administration of the law relating to asylum, immigration, naturalisation or citizenship’.
  - ...
  - (iii) taken in the administration of the prisons or other places for the custody or detention of children committed to custody or detention by the Courts other than reformatory schools, or industrial schools, certified under Part IV of the Children Act, 1908.

Dr Muldoon informed us that “the Minister for Justice has agreed in principle to allow the OCO and Ombudsman to engage in complaint handling within the Direct Provision System. However, discussions are only beginning on how that will be activated and what legislation is necessary to bring it about”.

It is not considered that protection applicants should be held in places where they would be deprived of their liberty.

Until July 2012, the Ombudsman was excluded from investigating any action taken in the administration of prisons or other places for the custody or detention of children by Section 11(1)(e)(iii) of the Act. The OCO has visited, however, St Patricks Institution in accordance with the OCO’s statutory obligations under Section 7 of the 2002 Act.

Under Section 7, the OCO has the authority to consult with any group of children and young people; to highlight matters of concern to children and young people themselves; and to encourage public bodies to respect children’s rights.

Since July 2012, the OCO has seen its investigative remit extended as Section 11(1) (e)(iii) of the Act was repealed. Since that date the Ombudsman has visited Wheatfield Prison and Oberstown Project (National Children Detention Facility).

Under Sections 8 and 9 of the Ombudsman for Children Act the OCO has the powers outlined in Section 14 of the Act.

Section 14 of the Ombudsman for Children Act

14.—The Ombudsman for Children shall, in respect of preliminary examinations, or investigations, by him or her under this Act in relation to any action taken by or on behalf of a public body, school or voluntary hospital, have all the powers of the Ombudsman under section 7 of the Act of 1980 in respect of preliminary examinations, or investigations, by him or her under that Act, and that section shall apply to such examinations, or investigations, under this Act as it applies to such examinations, or investigations, under that Act with the following modifications—

- (a) the reference in subsection (5) of that section to the Minister shall be construed as a reference to the Minister for Health and Children, with the consent of the Minister for Finance,
- (b) the reference in subsection (7) of that section to section 4(7) of that Act shall be construed as a reference to section 10(4), and any other necessary modifications.

The OCO cannot investigate complaints relating to a child detained in a cell by An Garda Síochána.

**Frequency of visits:**

- OPCAT requires:
- Regular examination
  - frequency decided by the NPM

The Ombudsman has visited places of detention in the context of its remit on investigations and complaints.

The OCO does not undertake regular visits to places where deprivation of liberty is exercised. These visits might take place under Section 7 of the Act (as referred above) or in the context of an examination and investigation of a complaint under Sections 8-13 of the Act (since July 2012).

**Types of visits:**

- OPCAT requires:
- Ability to carry out unannounced visits

Places of deprivation of liberty for children that the OCO can visit include: prisons, detention school, mental health facilities run by the HSE or commissioned by the HSE and TUSLA special care units. The OCO can also examine suspected places whereby children may have their liberty restricted, for example, residential centres.

**Private interviews:**

- OPCAT requires:
- Ability to have private interviews with those deprived of liberty and others

The OCO relies on s.14 of the Ombudsman for Children Act:

14.—The Ombudsman for Children shall, in respect of preliminary examinations, or investigations, by him or her under this Act in relation to any action taken by or on behalf of a public body, school or voluntary hospital, have all the powers of the Ombudsman under section 7 of the Act of 1980 in respect of preliminary examinations, or investigations, by him or her under that Act, and that section shall apply to such examinations, or investigations, under this Act as it applies to such examinations, or investigations, under that Act with the following modifications—

- (a) the reference in subsection (5) of that section to the Minister shall be construed as a reference to the Minister for Health and Children, with the consent of the Minister

for Finance,

(b) the reference in subsection (7) of that section to section 4(7) of that Act shall be construed as a reference to section 10(4), and any other necessary modifications.

**Access to information:**

- OPCAT requires:
- Access to all information on number of persons; places and location;
  - Access to all information on treatment and conditions of detention;
  - Access to all places of detention, installations and facilities

The OCO relies on s.14 of the Ombudsman for Children Act

**Reports**

- OPCAT requires:
- Annual reports
  - Reports following the visits
  - Other reports
  - Competent authorities to examine the recommendations and enter into a dialogue on implementation measures
  - Process of follow up
  - State to publish and widely disseminate annual reports
  - Annual report presented to parliament

Ombudsman for Children Act, 2002:

Section 13.—(1) In any case where a complaint is made to the Ombudsman for Children in relation to an action and he or she decides not to carry out an investigation under this Act into the action or to discontinue such an investigation, he or she shall send to the child who made the complaint, or to the person who made the complaint on behalf of the child—

- (a) a statement in writing of his or her reasons for the decision, and
- (b) if the decision follows the receipt by the Ombudsman for Children of a request



under section 11(4), a copy of the request and of the statement in writing of the reasons for the request attached to the request, and he or she shall send to such other (if any) person as he or she considers appropriate such statement in writing in relation to the matter as he or she considers appropriate.

(2) In any case where the Ombudsman for Children conducts an investigation under this Act, he or she shall send a statement in writing of the results of the investigation—

- (a) to the public body, school or voluntary hospital concerned,
- (b) (i) to the Department of State in which are comprised the business and functions of, or which performs functions in relation to, any public body (other than a Department of State) to whom a statement is sent under paragraph (a),  
(ii) where the investigation relates to an action taken by or on behalf of a school, to the Department of Education and Science, or  
(iii) where the investigation relates to an action taken by or on behalf of a voluntary hospital, to the Health Service Executive,
- (c) any other person who has or, in a case where a complaint in relation to the action the subject of the investigation has been made to the Ombudsman for Children, is alleged in the complaint to have taken or authorised the action, and
- (d) any other person to whom he or she considers it appropriate to send the statement.

(3) Where, following an investigation under this Act into an action, it appears to the Ombudsman for Children that the action adversely affected a child and fell within paragraph (b) of section 8 or paragraph (ii) of section 9(1), as the case may be, he or she may recommend to the public body, school or voluntary hospital concerned—

- (a) that the matter in relation to which the action was taken be further considered,
- (b) that measures or specified measures be taken to remedy, mitigate or alter the

adverse effect of the action, or  
(c) that the reasons for taking the action be given to the Ombudsman for Children, and, if the Ombudsman for Children thinks fit to do so, he or she may request the public body, school or voluntary hospital concerned to notify him or her within a specified time of its, his or her response to the recommendation.

(4) Where the Ombudsman for Children carries out an investigation under this Act into an action the subject of a complaint to him or her, he or she shall notify the child who made the complaint, or the person who made the complaint on behalf of the child, of the result of the investigation, the recommendation (if any) made by him or her under subsection (3) in relation to the matter and the response (if any) made to it by the public body, school or voluntary hospital to whom it was given.

(5) Where it appears to the Ombudsman for Children that the measures taken or proposed to be taken in response to a recommendation under subsection (3) are not satisfactory, he or she may, if he or she so thinks fit, cause a special report on the case to be included in a report under subsection (7).

(6) The Ombudsman for Children shall not make a finding or criticism adverse to a person in a statement under subsection (1) or (2), or in a recommendation or report under subsection (3) or (5), without having afforded to the person an opportunity to consider the finding or criticism and to make representations in relation to it to him or her.

(7) The Ombudsman for Children shall cause a report on the performance of his or her functions under this Act to be laid before each House of the Oireachtas annually and may from time to time cause to be laid before each such House such other reports with respect to those functions as he or she thinks fit. The terms of a request under section 11(4) and of the statement in writing of the reasons for the request attached to the request shall be included in a report under this section.

(8) For the purposes of the law of defamation, any such publication as is hereinafter mentioned shall be absolutely privileged, that is to say—

- (a) the publication of any matter by the Ombudsman for Children in making a report to either House of the Oireachtas for the purpose of this Act,
- (b) the publication by the Ombudsman for Children—
  - (i) to a person mentioned in subsection (1) of a statement sent to such person in pursuance of that subsection,
  - (ii) to a person mentioned in subsection (2) of a statement sent to such person in pursuance of that subsection,
  - (iii) to a person mentioned in subsection (3) of a recommendation made to such person by the Ombudsman for Children in pursuance of that subsection,
  - (iv) to a person mentioned in subsection (4) of a notification given to such person pursuant to that subsection.

Examples of annual reports are provided on its website:

<https://www.oco.ie/publications/annual-reportsfinancial-statements/>

Other reports include:

<https://www.oco.ie/publications/direct-work-with-children-and-young-people/young-people-in-st-patricks-institution/>

<https://www.oco.ie/publications/reports-to-the-un/>

<https://www.oco.ie/publications/government-advice-oireachtas-submissionsreports/>

**Coordination of visits**

There are other bodies that provide oversight of places where children’s liberty is restricted such as the Inspectorate of Mental Health Services, Inspector of Prisons, HIQA and GSOC. The OCO has told us that they would not co-ordinate visits as that would be inappropriate in light of its role as an Ombudsman but that it does engage with other bodies.

**Submit proposals and observations on existing and draft legislation:**

- OPCAT requires:
- State to inform body of draft legislation and allow it to make observation
  - State should take into consideration such proposals or observation

Section 7 of the Ombudsman for Children Act.

The OCO has submitted advice on draft legislation, including a submission to extend our remit to places of detention as referred to above.

**Resources:**

- OPCAT requires:
- Necessary resources for effective operation

Section 5(1) There shall be paid to the holder of the office of Ombudsman for Children such remuneration and allowances for expenses as the Minister may from time to time, with the consent of the Minister for Finance, determine.

- (2) (a) The Minister shall, with the consent of the Minister for Finance, make and carry out, in accordance with its terms, a scheme or schemes for the granting of superannuation benefits to or in respect of persons who have held the office of Ombudsman for Children.
- (b) A scheme under paragraph (a) shall fix the conditions for payment of superannuation benefits under it and different conditions may be fixed by reference to the different circumstances pertaining to the particular officeholder concerned or his or her dependants at or before the time the question of eligibility for such payment falls to be Pt.2 S.5 considered.
- (c) The Minister may at any time, with the consent of the Minister for Finance, make and carry out, in accordance with its terms, a scheme or schemes amending or revoking a scheme under this subsection, including a scheme under this paragraph.
- (d) No superannuation benefit shall be

granted by the Minister, nor shall any other arrangement be entered into by the Minister for the provision of such a benefit, to or in respect of persons who have held the office of Ombudsman for Children except in accordance with a scheme under this subsection or, if the Minister, with the consent of the Minister for Finance, sanctions the granting of such a benefit, in accordance with that sanction.

(e) Any dispute that arises as to the claim of any person to, or the amount of, any superannuation benefit payable pursuant to a scheme under this subsection shall be submitted to the Minister who shall refer such dispute to the Minister for Finance, whose decision shall be final.

(f) A scheme under this subsection shall be laid before each House of the Oireachtas as soon as may be after it is made and if either such House, within the next 21 days on which that House has sat after the scheme is laid before it, passes a resolution annulling the scheme, the scheme shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

(g) In this subsection “superannuation benefits” means pensions, gratuities or other allowances payable on resignation, retirement or death.

**Confidential information collected by body should be privileged. Personal data should not be published without consent of individual**

Ombudsman for Children Act

Section 16: ‘Section 9 of the Act of 1980 shall apply to information, documents or things obtained by the Ombudsman for Children or members of his or her staff under this Act as it applies to information, documents or things obtained by the Ombudsman or his or her officers under that Act with any necessary modifications’.

Section 9 of the Ombudsman Act provides that information obtained “in the course of, or for the purpose of, a preliminary examination, or investigation, under this Act, shall not be disclosed except for the purposes of:

(a) the examination or investigation and of

any statement, report or notification to be made thereof under this Act, or;

(b) any proceedings for an offence under the Official Secrets Act 1963, alleged to have been committed in respect of information or a document of thing obtained by the Ombudsman or any of his officers by virtue of this Act”.

Although Section 4 of the Data Protection Act 1988-2003 confers a right of access to personal data, the Data Protection Act 1988 (Restriction of Section 4) Regulations 1989 provides that the restrictions on the disclosure of information under the Ombudsman Act 1980 will continue to apply notwithstanding the right of access to personal data conferred by Section 4 of the Data Protection Act 1988.

As a result, records that relate to the examination and investigation of complaints by this Office are excluded from the provisions of Data Protection Acts 1988-2003 and the Freedom of Information Act 2014.

‘The OCO is obliged to conduct investigations “otherwise than in public”. Records that relate to the examination and investigation of complaints by this Office are exempt from the provisions of Data Protection Acts 1988-2003 and the Freedom of Information Acts 1997-2003. The Office is therefore precluded from releasing information that is obtained during the examination and investigation of a complaint. All information received by the Office in the context of an examination and investigation of a complaint is stored securely in order to protect the confidentiality of all concerned’.

**Preventive activities**

- Education and Participation activities;
- Policy activities and comments on draft legislation;
- Recommendations from investigations to prevent reoccurrence of administrative actions that may have adverse effects;
- Undertaking own volition investigations;
- Submission to relevant consultations, such as The Irish Prison Strategic Plan;
- Representations following visits to relevant Government Departments

**Standards**

**Legal standards applied**

Sections 6, 7, 8 and 9 of the Ombudsman for Children Act.

Standards depend on the settings, for example, requirement for Detention School to comply with Standards and Criteria for Special Schools, Children First: Guidelines, Prison rules, etc.

**Further Comments and Notes**

The Ombudsman for Children was seen by some we spoke to as principally a complaints body.

Several of those we spoke to saw the Ombudsman as independent and a critical voice.

## Appendix VIII

# Children's Visiting Panels

### Basics

#### Website

No specific website.

### Legislative Aspects

#### Legal Framework/Basis

Children Act 2001.

However, writing in 2004, the IHRC said that these visiting panels had yet to be established.

#### Mandate set out in constitutional or legislative text

Children Act 2001: 190.—(1) A visiting panel for children detention schools shall be established as soon as may be after the commencement of this section.

(5) The Minister may make rules setting out the duties and powers of visiting panels and the manner in which they shall perform the duties and exercise the powers imposed or conferred on them by this Part or by the rules.

#### Independence: Functional, operational and personnel

OPCAT requires:

- Period of office sufficient to foster independent functioning

Appointment by minister, s.190 Childrens Act 2001. No mention in the legislation of independence.

s.153 Children Act 2001: (3)

(a) The Minister may appoint a person who is a member of a visiting panel to a children detention school to be a member of a visiting panel to a children detention centre.

(b) An appointment under paragraph (a) shall be with the agreement of the Minister for Education and Science and the member so appointed.

### Financial Independence

No specific mention of financial resources within the legislation

### Membership

#### Composition of body:

OPCAT requires:

- Experts
- Collectively have the required capabilities and professional knowledge
- Strive for gender balance and adequate representation of ethnic and minority groups in the country

190.—(1) A visiting panel for children detention schools shall be established as soon as may be after the commencement of this section and shall consist of such number of persons, not being more than 8 or less than 6, as the Minister shall think proper.

(3) In appointing members of the visiting panel, the Minister shall ensure that persons with knowledge or experience of matters relating to the welfare of children including their cultural and linguistic needs are adequately represented on it.

(4) The Minister may establish at any future time or times one or more than one additional visiting panel should the geographical situation of any of the schools justify such a course.

(5) The Minister may make rules setting out the duties and powers of visiting panels and the manner in which they shall perform the duties and exercise the powers imposed or conferred on them by this Part or by the rules.

#### Appointment:

OPCAT requires:

- Open, transparent and inclusive process involving wide range of stakeholders as well as civil society
- Not appoint those with conflicts of interest/members of NPM ensure they do not hold such positions



- Members carry out work which avoid conflict of interest

s.190 Children Act:

(2) The members of the visiting panel shall be appointed by the Minister, and every member so appointed shall hold office as such member for such period not exceeding 3 years as the Minister shall think proper and specifies when appointing the member.

**Legislation specifies period of office of members and grounds for dismissal**

No mention in the legislation

**Powers and resources**

**Places visited where deprivation of liberty could be exercised:**

- OPCAT requires:
- All places of deprivation of liberty
  - Suspected places of deprivation of liberty
  - Ability to choose places want to visit and who want to interview

191.—(1) A visiting panel appointed under section 190 shall observe such of the rules made by the Minister under that section as apply to it, and, subject to those rules, it shall be the duty of a visiting panel—

(a) to visit each children detention school from time to time and at frequent intervals and there to hear any complaint which may be made to it by any child residing in the school and, if so requested by the child, to hear any such complaint in private,

(2) A visiting panel and every member thereof shall be entitled at all times to visit either collectively or individually a children detention school in respect of which it is appointed and shall at all times have free access either collectively or individually to every such school and every part of it.

**Frequency of visits:**

- OPCAT requires:
- Regular examination
  - frequency decided by the NPM

s.190(1)(a) ‘to visit each children detention school from time to time and at frequent intervals’.

**Types of visits:**

- Ability to carry out unannounced visits

s.191(2) A visiting panel and every member thereof shall be entitled at all times to visit either collectively or individually a children detention school in respect of which it is appointed and shall at all times have free access either collectively or individually to every such school and every part of it.

**Private interviews:**

- Ability to have private interviews with those deprived of liberty and others

s.190(1)(a) ‘there to hear any complaint which may be made to it by any child residing in the school and, if so requested by the child, to hear any such complaint in private’

**Access to information:**

- Access to all information on number of persons; places and location;
- Access to all information on treatment and conditions of detention;
- Access to all places of detention, installations and facilities

S.191(2) A visiting panel and every member thereof shall be entitled ... at all times have free access either collectively or individually to every such school and every part of it.

**Reports**

- OPCAT requires:
- Annual reports
  - Reports following the visits
  - Other reports
  - Competent authorities to examine the recommendations and enter into a dialogue on implementation measures
  - Process of follow up
  - State to publish and widely disseminate annual reports
  - Annual report presented to parliament

s.191(1) the visiting panel

(b) to report to the Minister any abuses or irregularities observed or found by it in any school,

(c) to report to the Minister in relation to any repairs or structural alterations to any school which may appear to it to be needed, and

(d) to report to the Minister in relation to any other matter relating to any school either as instructed by the Minister or on its own initiative.

s.191(3) The Minister may request the board of management of a children detention school to instruct the visiting panel to report to that board on any matter relating to the school.

(4) The board of management of such a school shall forward to the Minister any report made to it under this section, together with its views on the report.

(5) Copies of any such report and of the board of management’s views on it shall be laid by the Minister before each House of the Oireachtas.

(6) Before laying a report before each House of the Oireachtas, the Minister may omit material from it where the omission is necessary to avoid the identification of any person.

**Coordination of visits**

**Submit proposals and observations on existing and draft legislation:**

- OPCAT requires:
- State to inform body of draft legislation and allow it to make observation
  - State should take into consideration such proposals or observation

No specific mention in the legislation

**Resources:**

- OPCAT requires:
- Necessary resources for effective operation

Not expressly mentioned in the legislation

**Privileges and immunities for members of NPM and staff**

Not expressly mentioned in the legislation

**Prohibition of sanctions against persons communicating with body**

Not expressly mentioned in the legislation

**Confidential information collected by body should be privileged. Personal data should not be published without consent of individual**

Not expressly mentioned in the legislation

**Further Comments and Notes**

There is very limited information available on these panels. No one we interviewed when asked about these thought they had been established.

‘Children in Detention Schools: Learning from International Best Practice’ Kilkelly, U.; (2003) ‘Children in Detention Schools: Learning from International Best Practice’. Irish Criminal Law Journal, 13 (2):15-19.

## Appendix IX

# Prison Visiting Committees

### Basics

#### Website

No specific website, but some information available through the Irish Prison Service website: <http://www.irishprisons.ie/index.php/information-centre/publications/vc-reports>.

The committee reports are available on the department of justice website: <http://www.justice.ie/en/JELR/Pages/PB15000153>

### Legislative Aspects

#### Legal Framework/Basis

Prisons (Visiting Committees) Act 1925

Prisons (Visiting Committees) Order 1925 sets out Rules for each committee.

#### Mandate set out in constitutional or legislative text

‘The function of Prison Visiting Committees is to visit at frequent intervals the prison to which they are appointed and hear any complaints which may be made to them by any prisoner. They report to the Minister for Justice, Equality and Defence any abuses observed or found by them in the prison and any repairs which they think may be urgently needed. The Visiting Committee members have free access either collectively or individually to every part of their prison.’

Prisons (Visiting Committees) Act, s2(1): a visiting committee is set up ‘for every general prison, every convict prison, and every prison or part of a prison set apart for the confinement of persons undergoing preventive detention, and every such visiting committee shall consist of such number of responsible persons, not being more than twelve nor less than six, as the Minister shall think proper’.

3(1) Every visiting committee appointed under this Act shall conform to and observe such of the rules made by the Minister under this Act as shall apply to them, and, subject to such rules, it shall be the duty of every such visiting committee—

(a) from time to time and at frequent intervals to visit the prison in respect of which they are appointed and there to hear any complaints which may be made to them by any prisoner confined in such prison and, if so requested by the prisoner, to hear such complaint in private; and

(b) to report to the Minister any abuses observed or found by them in such prison; and

(c) to report to the Minister any repairs to such prison which may appear to them to be urgently needed; and

(d) to report to the Minister on any matter relating to such prison on which the committee shall think it expedient or shall have been requested by the Minister so to report.

(2) Every such visiting committee and every member thereof shall be entitled at all times to visit either collectively or individually the prison in respect of which they are appointed and shall at all times have free access either collectively or individually to every part of such prison.

Prison (Visiting Committee) Order: (5) They shall investigate any report which they may receive as to the mind or body of any prisoner being likely to be injured by the discipline or treatment to which he is subjected, and if necessary shall communicate their opinion thereon to the Board.

Although the Prisons (Visiting Committees) Act 1925 provided for Prisons Visiting Committees to adjudicate on disciplinary issues, after the Prisons Act and Prisons Rules 2007 this is now the responsibility of the Governor. The Committees are also required to inspect the diets of prisoners; work with the Governor with respect to classification of prisoners; and work with the Board to promote the efficiency of the prison service, the choice of library books, conditions of prison labour; organise lectures; and work with those about to be discharged to assist their reintegration into the community. They are also required under Rule 14 to ‘report to the Minister and to the Board any abuses observed or found by them in the prison, and any repairs to the prison which appear to them to be urgently needed’.

## Independence: Functional, operational and personnel

OPCAT requires:

- Period of office sufficient to foster independent functioning

Prisons (Visiting Committees) Act 1925:

s.2(2) ‘The members of every such visiting committee as aforesaid shall be appointed by the Minister and every member so appointed shall hold office as such member for such period not exceeding three years as the Minister shall think proper and shall specify when appointing him’.

S.3(1) also provides that the committees report to the Minister.

There is no reference in the legislation for the need for them to operate independently.

Their reports are published on the Department of Justice website: <http://www.justice.ie/en/JELR/Pages/PB15000153>

An Irish Times report in 2012 noted that in previous years there was a ‘lot of negative media attention because many of their members were seen as being too close to Fianna Fail. Individuals were often appointed by the minister of justice of the day to committees in jails very far from their homes. This led to much comment that such appointments were made as a favour to those linked to the party and as a means of maximising mileage payments for travelling to and from any given jail’.

IPRT writing in 2009 argued that these committees are not independent as they are appointed by government.

### Financial Independence

There is no reference in the legislation to how the committees are to be financed. The position of committee member is voluntary.

## Membership

### Composition of body:

OPCAT requires:

- Experts
- Collectively have the required capabilities and professional knowledge
- Strive for gender balance and adequate representation of ethnic and minority groups in the country

Prisons (Visiting Committees) Act 1925:

2(1) There shall be constituted in manner provided by this section a visiting committee for every general prison, every convict prison, and every prison or part of a prison set apart for the confinement of persons undergoing preventive detention, and every such visiting committee shall consist of such number of responsible persons, not being more than twelve nor less than six, as the Minister shall think proper.

s.2(2) The members of every such visiting committee as aforesaid shall be appointed by the Minister and every member so appointed shall hold office as such member for such period not exceeding three years as the Minister shall think proper and shall specify when appointing him.

(3) No person other than a member of Dáil Eireann or of Seanad Eireann who is in receipt of salary paid out of the Central Fund or money provided by the Oireachtas shall be eligible for appointment as a member of any such visiting committee as aforesaid.

(4) Every such visiting committee as aforesaid appointed for any prison in which female prisoners may be confined shall include amongst its members at least two women.

Information from the Committees’ reports often lists the number of individuals on the Committee. These vary from, for example, 3, 4 to 6. One report notes that ‘there are only 4 members on the committee and we need a minimum of 3 members to form a quorum. The chairman has requested more members for the committee’.

Their reports indicate that they meet often once a month and in some cases two members may conduct the visits.

### Appointment:

OPCAT requires:

- Open, transparent and inclusive process involving wide range of stakeholders as well as civil society
- Not appoint those with conflicts of interest/members of NPM ensure they do not hold such positions
- Members carry out work which avoid conflict of interest

‘A Visiting Committee is appointed to each prison under the Prisons (Visiting Committees) Act, 1925 and Prisons (Visiting Committees) Order, 1925. Members of the 14 Visiting Committees are appointed by the Minister for a term not exceeding three years.’

Rogan notes that ‘Members are appointed by a Minister on foot of representations either from individuals nominating themselves or by local representatives nominating their constituents. In such circumstances, it is difficult to avoid the perception such a system is open to abuse and political patronage at the very least’.

A newspaper report in January 2012 noted criticism that many committee members had not been reappointed or replaced and that this had impacted on the number of times committees had been able to visit jails and investigate complaints.

### Legislation specifies period of office of members and grounds for dismissal

Prisons (Visiting Committees) Act, s.2(2) ‘The members of every such visiting committee as aforesaid shall be appointed by the Minister and every member so appointed shall hold office as such member for such period not exceeding three years as the Minister shall think proper and shall specify when appointing him’.

No other detail is provided in the Act or Order on grounds for dismissal.

## Powers and resources

### Places visited where deprivation of liberty could be exercised:

OPCAT requires:

- All places of deprivation of liberty
- Suspected places of deprivation of liberty
- Ability to choose places want to visit and who want to interview

Prisons (Visiting Committees) Act 1925: s.2(1) ‘There shall be constituted in manner provided by this section a visiting committee for every general prison, every convict prison, and every prison or part of a prison set apart for the confinement of persons undergoing preventive detention, and every such visiting committee shall consist of such number of responsible persons, not being more than twelve nor less than six, as the Minister shall think proper’.

S.3(2) Prisons (Visiting Committees) Act 1925: ‘Every such visiting committee and every member thereof shall be entitled at all times to visit either collectively or individually the prison in respect of which they are appointed and shall at all times have free access either collectively or individually to every part of such prison’.

The reports of the Prison Visiting Committees sometimes give information on the methodology of their visits. For example, in Castlerea in 2013 two members of the Committee ‘conduct detailed and comprehensive tours of the prison. They visit different areas each month’.

In addition, ‘two members of the committee each month conducted unannounced visits to the prison to ensure that the prison continues to be run in a safe, humanitarian and efficient way. During these monthly visits the members made a point of conducting comprehensive tours of the prison to all areas’.

A further example: ‘The committee has visited every area of the prison. Visits have been unplanned and areas are picked at random’.



Frequency of visits:

- OPCAT requires:
- Regular examination
  - frequency decided by the NPM

Prisons (Visiting Committees) Act 1925:

s.3(1)(a) ‘it shall be the duty of every visiting committee (a) from time to time and at frequent intervals to visit the prison’.

Prison (Visiting Committees) Order 1925 notes:

(2) They shall meet as a Committee at the prison once in each month, or, if the Committee pass a resolution that, for reasons specified in the resolution, less frequent meetings are sufficient, not less than six times in each year. At such meetings three members shall constitute a quorum. Minutes of all meetings shall be recorded in a book which shall be kept for that purpose.

(4) They shall, either collectively or individually at frequent intervals, visit the prison, and shall hear and investigate any complaint which any prisoner may desire to make to them, and if so requested by the prisoner they shall hear such complaint in private. If necessary they shall report the same to the Board with their opinion thereon.

The 2014 Annual Report of the Visiting Committee to Cloverhill Prison notes that ‘on a rota basis two members of the Committee each month conducted unannounced visits to the prison to ensure that the prison continues to be run in a safe, humanitarian and efficient way’.

The Inspector of Prisons’ report on St Patricks notes that ‘The Visiting Committee meets once a month and also visits the prison on at least one further day each month’.

Visiting Committee Reports note that the frequency of visits can be ‘each month’, or ‘approximately six times per year’, or ‘many unannounced visits during the past year’. For Cork Prison in 2014, ‘The Cork Prison Visiting Committee met on a monthly basis during 2014, and visited the prison on interim visits between meetings’.

Rogan notes that ‘Not all of the Committees account for the number of meetings held during the year or the attendance at these meetings. Nor are the numbers of visits to the prisons or the number of prisoners met by each Committee reported consistently. The number of night visits to prisons would also be a very useful statistic to provide and is included in the Report of the Inspector of Prisons. The inclusion of this information is imperative to ascertain whether individual Committees are fulfilling their duties adequately and indeed justifying State expenditure’.

Types of visits:

- OPCAT requires:
- Ability to carry out unannounced visits

Prison (Visiting Committees) Order 1925 s.3(3) ‘They shall be entitled at all times to visit either collectively or individually the prison in respect of which they have been appointed and shall have free access to every part of such prison, and shall be entitled to inspect the books of the prison’.

Private interviews:

- OPCAT requires:
- Ability to have private interviews with those deprived of liberty and others

Prisons (Visiting Committee) Act 1925: s.3(a) ‘it shall be the duty of every such visiting committee... to visit the prison in respect of which they are appointed and there to hear any complaints which may be made to them by any prisoner confined to such prison and, if so requested by the prisoner, to hear such complaint in private’.

The 2014 Annual Report of the Visiting committee a Cloverhill Prison notes ‘During these monthly visits the members made a point of conducting comprehensive tours of the prison to all areas. We continue with our practice of talking to internal and external staff working in these areas whom we encountered, and any prisoners in the vicinity. We agreed and set out at the start of the year an agenda of issues that we wished to monitor, and explore. We set an objective for ourselves to meet both

professional non prison service staff, and in house staff who work in specific areas in the prison to gain a better understanding of the need to consider both security, and prison sub cultural issues in the prison context’.

In addition, the Visiting Committees themselves have noted ‘In order to ensure we see as many prisoners as possible when we visit, we endeavour to make ourselves readily available, so that there is little time delay in actually seeing the prisoners from the date of their actual request. On monthly meeting days any prisoner who wishes to see us was facilitated by two members meeting him before the meeting. In Cloverhill Prison the committee members actually go down to the division of the prisoner to see them in their environment’.

Other Committees have noted ‘if a prisoner wishes to meet the Committee, the Committee are informed of this and they visit each prisoner. All cases were discussed at length and the relevant course of action taken’.

In addition, ‘we continue with our practice of talking to internal and external staff working in these areas whom we encountered, and any prisoners in the vicinity. ...We set an objective for ourselves to meet both professional and non prison service staff, and in house staff who work in specific areas in the prison to gain a better understanding of the need to consider both security, and prison sub cultural issues in the prison context. During the year we as a committee continue to see a large number of prisoners. There were numerous prisoners who requested to see the visiting committee in 2014, with some of those prisoners requesting a visit on more than 1 occasion. ...In order to ensure we see as many prisoners as possible when we visit, we endeavour to make ourselves readily available, so that there is little time delay in actually seeing the prisoners from the date of their actual request. On monthly meeting days any prisoner who wishes to see us was facilitated by two members meeting him before the meeting. In Cloverhill Prison the committee members actually go down to the division of the prisoner to see them in their environment’.

‘On our many visits during the year of 2013 we listened to prisoner complaints, concerns and requests privately and in confidence’.

In others, ‘the members of the Committee have made themselves accessible both formally at the monthly meeting; and informally during twice monthly prison visits to deal with any issue presented to them by the prison population’.

Access to information:

- OPCAT requires:
- Access to all information on number of persons; places and location;
  - Access to all information on treatment and conditions of detention;
  - Access to all places of detention, installations and facilities

Prisons (Visiting Committees) Act s.3(2): Every such visiting committee and every member thereof shall be entitled at all times to visit either collectively or individually the prison in respect of which they are appointed and shall at all times have free access either collectively or individually to every part of such prison.

No further information is provided in the Act or Order.

Reports

- OPCAT requires:
- Annual reports
  - Reports following the visits
  - Other reports
  - Competent authorities to examine the recommendations and enter into a dialogue on implementation measures
  - Process of follow up
  - State to publish and widely disseminate annual reports
  - Annual report presented to parliament

Prisons (Visiting Committees) Act:

s.3(1)(b) each committee ‘to report to the Minister any abuses observed or found by them in such prison; and

(c) to report to the Minister any repairs to such prison which may appear to them to be urgently needed; and

(d) to report to the Minister on any matter relating to such prison on which the committee shall think it expedient or shall have been requested by the Minister so to report’.

s.3(4): ‘Every report made by a visiting committee to the Minister shall be open to inspection, without charge, at any reasonable time, by any person who makes application to the Minister for that purpose’.

Prisons (Visiting Committees) Order:

18. ‘Every Visiting Committee shall, in the month of December in each year, make an annual report to the Minister with regard to all or any of the matters referred to in these rules or to any other matter appertaining to the prison that they may deem expedient, and they shall from time to time make such reports to the Minister or to the Board as they may consider necessary, concerning any matter in relation to the prison to which, in their opinion, attention should be called’.

Annual reports have been published by each Prison Visiting Committee and are available on the Department of Justice and Equality’s website. Some years all Committees have produced a report, other years, only some reports are available. Reports are available on this website from 2003 and then sporadically before this.

Reports vary in length from e.g. one page to up to 16.

IPRT has noted that it ‘remains concerned that the Prison Visiting Committee system does not adopt a standard approach to reporting, and that the level of detail and thoroughness in reports are inconsistent between Committees’.

In addition, ‘Despite some recognition of the fact that the Visiting Committees currently report on some important issues such as overcrowding in prisons, the function and effectiveness of the Visiting Committees has been questioned in the past, particularly as their annual reports are seen as providing very few details of the visits undertaken and rarely outlining the nature of complaints made by the prisoners and the outcomes of such complaints’.

As Rogan noted in 2009, the reports of the Visiting Committees do not indicate whether the relevant government bodies have been influenced by their recommendations.

**Coordination of visits**

Some reports mention meetings with or attempts to meet with the Inspector of Prisons.

In relation to Castlerea and Loughan, the Inspector of Prisons noted that he spoke with the visiting committee on one of his visits.

**Submit proposals and observations on existing and draft legislation:**

OPCAT requires:

— State to inform body of draft legislation and allow it to make observation

— State should take into consideration such proposals or observation

Prisons (Visiting Committees) Act 1925:

s.3(1)(d) the Committee should ‘report to the Minister on any matter relating to such prison on which the committee shall think it expedient or shall have been requested by the Minister so to report’.

In addition, the Prisons (Visiting Committees) Order 1925 provides for the committees to:

‘(8) They shall co-operate with the Board in promoting the efficiency of the Prisons Service, and shall make enquiry into any matter specially referred to them by the Minister or the Board, and report their opinion thereon’; and

(18) Every Visiting Committee shall, in the month of December in each year, make an annual report to the Minister with regard to all or any of the matters referred to in these rules or to any other matter appertaining to the prison that they may deem expedient, and they shall from time to time make such reports to the Minister or to the Board as they may consider necessary, concerning any matter in relation to the prison to which, in their opinion, attention should be called’.

The Annual Reports of the Visiting Committees in some instances note recommendations by the committees which relate to policies beyond the needs of the specific prison itself.

**Resources:**

OPCAT requires:

— Necessary resources for effective operation

No reference is made in the Act or Order regarding resources to the committees.

The IPRT have noted that ‘Members of the Visiting Committees themselves have also brought it to the attention of the Minister for Justice in recent years that they view their training as insufficient to perform their functions as an independent monitoring mechanism. IPRT calls on the Government to make resources available to ensure that all members of the Visiting Committees are appropriately trained, including in international human rights standards pertaining to the situation of people in any form of detention’.

**Privileges and immunities for members of NPM and staff**

These are not mentioned in the legislation.

**Prohibition of sanctions against persons communicating with body**

This is not specifically mentioned in the legislation.

**Confidential information collected by body should be privileged. Personal data should not be published without consent of individual**

This is not specifically mentioned in the legislation.

**Standards**

**Legal standards applied**

Not identified in legislation nor in Visiting Committee reports.

**Further Comments and Notes**

There is a regularity of reporting since 2004. Reports vary in length and content.

**Fulfilment of mandate:**

The Inspector of Prisons notes in one report ‘The Visiting Committee appointed to St. Patricks appears to be carrying out its mandate in accordance with the Prisons (Visiting Committees) Act 1925 and Prisons (Visiting Committees) Order 1925’.

In relation to Limerick prison, the Inspector of Prisons noted ‘I met with a representative of the Visiting Committee on 10th October 2011. I was informed that the committee meets once a month and conducts an interim visit every second month. They meet in the conference room of the prison. They meet prisoners who have expressed a wish to see them in this room. The representative that I met explained that the committee does not walk the landings. Concerns regarding overcrowding and healthcare were raised with me. The representative did not wish to elaborate on these concerns’. As a result, he concludes: ‘From what I was told at my meeting with the representative of the Visiting Committee as outlined in paragraph 2.76 the committee does not carry out its mandate as laid out in the legislation’.

There are concerns over inconsistencies in approach: Hamilton and Kilkelly writing in 2008 note that ‘while some committees have taken their role extremely seriously (such as the reports of the Mountjoy Committee), others have been less rigorous, and displayed a tendency to view prison life through what O’Mahony has termed “a pair of pleasantly rose-tinted spectacles”, and indeed on occasion to lapse into “Pollyanna language”’. One interviewee considered the model of prison visiting committees to be outdated.

There are also concerns over what is perceived to be a lack of independent appointment:





# Notes



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