

Submission on the General Scheme of the Inspection of Places of Detention Bill

Irish Human Rights and Equality Commission

October 2022



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

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The Irish Human Rights and Equality Commission was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.

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Contents

Recommendations	1
Introduction	11
Relevant human rights and equality standards.....	15
Specific observations	17
Interpretation (Head 2).....	17
Expenses (Head 3).....	17
Interpretation for Part 1 (Head 4).....	18
Chief Inspector of Places of Detention (Head 5)	20
Provision of Services to the Inspectorate of Places of Detention (Head 6).....	21
Appointment of Senior Inspectors (Head 7).....	22
Functions of the Chief Inspector of Places of Detention in relation to inspection of prisons (Head 8).....	23
Serious Adverse Incidents (Head 9)	25
Investigation of Deaths in Custody of Prisoners (Head 10).....	26
Accountability to Oireachtas Committees (Head 11)	28
Publication of Annual and other Reports (Head 12).....	29
Prison Visiting Committees (Head 13)	30
Interpretation for Part 3 (Head 14).....	33
Inspections of places of detention by International bodies (Head 15)	35
Co-ordinating National Preventive Mechanism (Head 16).....	37
The functions of a National Preventive Mechanism (Head 17).....	40
Designation of National Preventive Mechanism (Head 18)	42
Chief Inspector of Places of Detention as National Preventive Mechanism in the Justice Sector (Head 19)	45
Personal Data (Head 20)	47

Protection from sanctions (Head 21).....47

Recommendations

The Commission makes the following recommendations on the General Scheme:

Interpretation (Head 2)

A more extensive list of those Ministers who have responsibility for places of detention should be included under this Head.

Expenses (Head 3)

Head 3 must expressly reflect the obligation on the State to provide the necessary, ring-fenced resources to permit the effective operation of the NPMs and the co-ordinating body.

Head 3 should expressly include an obligation on the State to provide the necessary, ring-fenced resources to places of detention so that they can fully engage with the NPMs and the co-ordinating body, including establishment of data systems, staff training programmes and provision of confidential meeting space.

Interpretation for Part 1 (Head 4)

The definition of ‘prison’ should be clarified to include holding places within court buildings and the environs of such buildings.

Consideration should be given to the use of ‘people in prison’ or ‘imprisoned people’ in the legislation instead of ‘prisoner’.

The definition of serious adverse incidents should include a significant breach of discipline by prison officers or prison staff and clarify that the list of incidents referred to is non-exhaustive.

All adverse incidents are reported to the Chief Inspector as a matter of course, or a detailed definition of “*serious injury*” and “*significant breach*” should be included to ensure transparency and accountability within the Prison Service.

Chief Inspector of Places of Detention (Head 5)

The grounds for dismissal of the Chief Inspector should be clearly defined in compliance with the Paris Principles.

Provision of Services to the Inspectorate of Places of Detention (Head 6)

It should be clearly set out in the Bill that the resourcing of the Chief Inspector to carry out its NPM functions is separate to its resourcing for its non-NPM functions.

Appointment of Senior Inspectors (Head 7)

There should be an open recruitment process for Senior Inspectors and express reference should be made to the principles in Article 18(2) OPCAT in the recruitment process under this Head.

Head 7 should clearly set out that inspections carried out by Senior Inspectors comply with the requirements of OPCAT.

Functions of the Chief Inspector of Places of Detention in relation to inspection of prisons (Head 8)

The Chief Inspector should be required to investigate all serious adverse incidents and deaths in prisons and the report on any such investigation should be published, with appropriate redaction if necessary.

Head 8(4) should provide that the Chief Inspector may also bring any issues of concern arising out of an inspection to the attention of IHREC as the NPM co-ordinating body.

Head (8)(5)(a) should specify that the Chief Inspector may engage external experts and can be accompanied by them on any visit to a prison.

Head 8(5)(b) should provide that the Chief Inspector is entitled to obtain information relating to the management and operation of a prison, prisons or the Irish Prison System.

Head 8(5)(c) should provide that personal and medical records of a deceased individual can be obtained without the consent of any other party.

Head 8(8) should include a requirement that the information provided to the Minister shall be published and that the Chief Inspector shall engage with IHREC as the NPM co-ordinating body in this regard.

The reference to ‘due cause’ under Head 8(6) should be removed or clarified in detail.

It should be specified that failure to comply with the Chief Inspector under Head 8 may be a criminal offence.

Serious Adverse Incidents (Head 9)

The General Scheme should be amended to require notification of serious adverse incidents, and deaths, in all places of detention to the relevant NPM.

An appropriate data system should be established for the recording of serious adverse incidents and deaths to which IHREC as the co-ordinating NPM has access.

The Chief Inspector’s role and responsibilities, in the investigation of every report made under Head 9, should be specifically set out.

Incidents relating to the harm of persons in prison should be investigated by the Chief Inspectorate, and not delegated to the IPS.

Clarification should be made on the delineation between the Chief Inspector’s NPM and non-NPM functions.

Investigation of Deaths in Custody of Prisoners (Head 10)

Head 10(1) should specify that notification of a death should occur as soon as possible and within a maximum period of 24 hours.

Release from detention should expressly include release on bail.

All deaths in detention, and deaths within a month of release from detention, are to be investigated by the Chief Inspector, and cannot be delegated to the IPS.

The Chief Inspector have a role in the public phase of any investigation into a death in custody of a prisoner and is empowered to ask questions of the relevant institution to ensure future incidents are mitigated against.

Accountability to Oireachtas Committees (Head 11)

Restriction on freedom of expression should be removed from Head 11.

The distinction between the Chief Inspector's NPM and non-NPM roles should be clarified under this Head.

Publication of Annual and other Reports (Head 12)

The Chief Inspector should be independent from executive influence and control, and Head 12 should reflect this independence.

It should be made clear under Head 12 that the Chief Inspector has the power to lay its general inspection reports before the Oireachtas.

Head 12(3) should be amended to provide that any report should be submitted to Oireachtas at the same time as to the Minister.

Provision should be made under Head 12 to allow the Chief Inspector to publish all such reports after they are laid before the Oireachtas and to simultaneously send all reports relating to the NPM functions of the Chief Inspector to IHREC as the co-ordinating body.

The Chief Inspector's reports must include information relating to its decision not to investigate matters referred to it under Heads 9 and 10.

The distinction between the Chief Inspector's NPM and non-NPM roles should be clarified under this Head.

Prison Visiting Committees (Head 13)

Visiting Committees should be established for all places of detention.

No provision should be made to vary the statutory basis of PVCs until the Department's review is complete.

Notwithstanding the above, the relationship between PVCs and the NPM network should be clarified, and the NPM co-ordinating body should be included as a consultant under Head 13(5) if it is intended for PVCs to be designated as NPMs.

Precautions must be taken to protect against discrimination on the basis of previous convictions in the appointment process

Those with previous convictions, and those who have come into contact with the criminal justice system, are actively encouraged to apply to become members of the PVCs.

Under Head 13(10) PVCs should have access to external staff, including education and health staff.

Under Head 13(12) & (13), timelines should be set for the publication of the relevant reports.

Interpretation for Part 3 (Head 14)

The definition of ‘places of detention’ should reflect the precise wording, and the broad scope, of Article 4 OPCAT.

The term ‘detainee’ should not be used in the General Scheme. This does not cover the full scope of persons protected by OPCAT, which extends to persons who ‘may’ be deprived of their liberty.

The Commission recommends that the phrase ‘including, but not limited to’ is added to the list of examples in Head 14, and that it is extended to represent examples of *de facto* detention where deprivation of liberty or detention may occur, such as the transfer of children outside of Ireland, voluntary organisations offering addiction services, Direct Provision and asylum-seeking children accommodated in privately run centres.

A comprehensive list of all places of detention within the State should be compiled and published at the same time as the Bill for the purpose of enabling NPMs and the SPT to fulfil their mandates.

Inspections of places of detention by International bodies (Head 15)

Protective provisions for the conduct of interviews in line with section 30(4) of the New Zealand Crimes of Torture Act 1989 should be included under Heads 15 and 17.

The powers and discretion of international bodies and NPMs to conduct interviews and inspect places of detention, as established under Articles 14 and 20 OPCAT, should be expressly set out in Heads 15 and 17.

Heads 15 and 17 should include the State's obligation under Articles 12 and 22 OPCAT to enter into a dialogue with international bodies and NPMs.

Co-ordinating National Preventive Mechanism (Head 16)

The functions and role of the co-ordinating NPM be strengthened and set out with clarity under Head 16.

The co-ordinating body's mandate should be extended to include the co-ordination of the NPM's activities, and further clarity on this function should be provided.

The relationship between PVCs, civil society, and the NPM framework should be set out in clarity.

The co-ordinating body's functions under Head 16 (2) should include: to raise awareness and organise training in relation to OPCAT, to facilitate peer-to-peer assistance and reviews amongst NPMs, and to facilitate a forum for the development of good practices for OPCAT type inspections amongst NPMs.

Head 16(2)(f) should provide that the Commission may publish its reports to the Minister and any responses received.

Head 16 should provide that the Commission may prepare thematic reports and provide information on OPCAT and the co-ordinating body to the public.

The co-ordinating body should be provided with the same data access as NPMs, as proposed and recommended under Head 17.

Head 16 should also provide that that the co-ordinating body receives the resources required for it to carry out its functions.

The functions of a National Preventive Mechanism (NPM) (Head 17)

Head 17(3) should be broadened to include access for experts accompanying NPM representatives.

NPMs power to make proposals and observations on existing and draft legislation, as per Article 19(c) OPCAT, should be expressly set out.

NPMs should create reports following each visit and inspection, in line with SPT guidelines.

Head 17(9) should be amended to provide that the relevant reports should be submitted to IHREC as the co-ordinating body at the same time as their submission to the Houses of the Oireachtas and relevant Minister under Head 17(2)(e).

Engagement with the NPM co-ordinating body should be inserted as an additional function of NPMs in Head 17(1).

NPMs mandates should include the function of monitoring to ensure that sanctions have not taken place against persons that provide information to NPMs or international bodies.

The information to be provided under Head 17(5) should be disaggregated according to the protected grounds in the Equality Acts.

NPMs should be granted access to personal data of those in places of detention, in line with the powers of the Chief Inspector under Head 8(5).

The response of the Minister or relevant Minister under Head 17(8) should be provided within a specified time frame and should also be sent to IHREC as the co-ordinating body at the same time.

Designation of National Preventive Mechanisms (Head 18)

Provision should be made in the legislation to stipulate that when a NPM is designated, its primary legislation should be amended accordingly with OPCAT read into it.

A consultation process should be required for the designation of NPMs, including with civil society.

Provision should be made for the engagement of civil society organisations with NPMs once established.

Designated NPMs should be given a broad remit in relation to the scope of their powers of inspection.

The obligations of the State under Article 18(2) should be expressly set out under Head 18 to ensure that NPM experts have the required capabilities and professional knowledge required to perform their function effectively.

The obligations of the State under Article 18(1) and (2) OPCAT should be expressly set out under Head 18. Further provision should be made for the continuing obligation to strive for a gender balance and adequate representation of ethnic and minority groups in the recruitment process for NPMs.

Chief Inspector of Places of Detention as National Preventive Mechanism in the Justice Sector (Head 19)

The remit of the NPM under this Head should be broadened to ensure that it may address any gaps in inspection, either through focusing on the types of deprivation of liberty, or through a flexibility in the scope of the inspection function.

Clarity should be provided as to what role the prospective Policing and Community Safety Authority may have in inspections of Garda detention.

Clarity should be provided as to which jurisdiction NPM airports, including airports used for extraordinary rendition, and ports as places of detention fall under.

Consideration should be given to the consequences of extending the remit of the Inspector of Prisons to include the entirety of the criminal justice sector.

There should be clarification with regard to the distinct investigative and preventive functions of the Chief Inspector.

There should be clarification with regard to how the existing duties of the Inspector of Prisons that are not referenced in the legislation are to be carried out.

In establishing the Chief Inspector of Places of Detention as the NPM for the entire Justice Sector, there should be an accompanying public information campaign regarding the scope of the Chief Inspector's role.

Personal Data (Head 20)

Head 20 should be amended to specify that personal data gathered by an NPM or international body in the course of an inspection is confidential and privileged.

Protection from sanctions (Head 21)

Consideration should be given to strengthening Head 21 in line with the New Zealand *Crimes of Torture Act 1989*.

Introduction

The Irish Human Rights and Equality Commission ('the Commission/IHREC') is both the national human rights institution and the national equality body for Ireland, established under the Irish Human Rights and Equality Commission Act 2014 ('the 2014 Act'). The Commission has a statutory mandate to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality, and to examine any legislative proposal and report its views on any implications for human rights or equality.¹

The Commission welcomes the opportunity to provide its submission on the *General Scheme of the Inspection of Places of Detention Bill*. The predominant function of the Bill is to provide for the designation of National Preventive Mechanisms ('NPMs') for the purpose of ratifying the Optional Protocol to the UN Convention against Torture ('OPCAT'). The General Scheme places the Council of Europe inspections on a statutory footing, and additionally creates the role of Chief Inspector of Places of Detention. This extends and transforms the statutory role of Inspector of Prisons, to be designated as NPM for the justice sector.

OPCAT is a human rights instrument uniquely grounded in the prevention of abuse, rather than in response to reports of abuse. The Protocol focuses on identifying emerging and systemic issues relating to torture and ill-treatment of people deprived of their liberty, and addressing them at an early stage. This is conducted through the infrastructure of independent and regular inspections to all places of detention, and recommendations to the State. As the Commission has previously submitted, the ratification and implementation of OPCAT is fundamental for Ireland's compliance with international human rights standards in this area.²

The Commission and its predecessor, the Irish Human Rights Commission ('the IHRC'), have previously made submissions and recommendations for the ratification of OPCAT and the

¹ Section 10(2)(c) of the Irish Human Rights and Equality Commission Act 2014.

² IHREC, Ireland and OPCAT - Submission to the Criminal Law Reform Division of the Department of Justice and Equality (February 2017) p. 3.

creation of NPMs.³ In 2016, IHREC commissioned research from the Human Rights Implementation Centre at the University of Bristol Law School. This was published in January 2017 in a report titled: *Ireland and the Optional Protocol to the UN Convention against Torture*.⁴

In order for the General Scheme to fully comply with OPCAT, a number of provisions require amendment and clarification.

The predominant matter to be clarified is the precise form of NPM network created by the Bill. It appears that the General Scheme is based on the New Zealand model of a co-ordinating body overseeing a number of separate NPMs. However, the Prison Visiting Committees of Head 13 do not clearly fall into this network, and the Bill has not stated what role, if any, civil society will have in the conduct of NPM functions.

It is worth noting that the preventive functions of NPMs must be distinct from any other roles already held by an NPM body. This distinction is not adequately set out in the case of the Chief Inspector, who holds inspection powers under Head 8(5) for prisons, which do not apply to other inspections conducted in the role of NPM. As such, per Head 8(6) it would not be lawful for a person to refuse to co-operate with the Chief Inspector in the exercise of their powers under Head 8(5). However, the General Scheme is silent as to the consequences of a person's failure to co-operate with the Chief Inspector in the exercise of their duties under Head 17, as an NPM.

There is no provision for according NPMs or international bodies "*such privileges and immunities*" that are necessary for their functions under Articles 35 and 36 of OPCAT. This should include immunity for representatives of NPMs and international bodies, during the

³ IHRC, Submission to UNCAT on the Examination of Ireland's First National Report (April 2011); IHRC, Submission for the Twelfth Session of the Working Group on the Universal Periodic Review: Ireland (March 2011); IHREC, Submission to UNCAT on Ireland's second periodic report (July 2017); IHREC, Submission to the Commission on the Future of Policing (February 2018); IHREC, Submission to the UN Committee against Torture on Ireland's one year follow-up to its second periodic report under CAT (November 2018); IHREC, Submission to the UNCAT on the List of Issues for the Third Examination of Ireland (January 2020); IHREC, Observations on the General Scheme of the Garda Síochána (Powers) Bill (April 2022); IHREC, Submission to the Human Rights Committee on Ireland's fifth periodic report (June 2022).

⁴ Professor Rachel Murray and Dr Elina Steinerte, *Ireland and the Optional Protocol to the UN Convention against Torture* (January 2017).

exercise of their mandates, from body searches and pat downs,⁵ arrest and detention, seizure of baggage and papers, and from interference with communication.⁶ During and after the exercise of their mandates, such persons should have immunity from legal action in respect of words and actions taken in performance of their duties under OPCAT.⁷

There is additionally no provision for creating agreements with other countries to allow NPM inspections for situations in which Ireland transfers persons in detention to other jurisdictions.

Finally, the requirements of NPMs should be set out in greater detail under the General Scheme, and should fully comply with the obligations of OPCAT. Article 18 in particular is insufficiently reflected in the Bill, and its requirements of independence are not adequately set out or followed for the provisions of either the Chief Inspector, or for NPMs generally.

The Commission reiterates that there is no impediment to the State ratifying OPCAT immediately.⁸ Whilst the Commission welcomes the publication of the General Scheme, it notes the repeated delays that have preceded same and considers that ratification of the Protocol is now urgent.

The urgency of ratification stems from the fact that Ireland has no independent inspection system at the domestic level for Garda stations,⁹ prison transit, court detention, military detention, or for certain types of *de facto* detention in voluntary settings.¹⁰ This gap in oversight must be addressed to assist in preventing ill-treatment and torture.¹¹

⁵ UN Committee against Torture, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Advices to NPMS (March 2016) p. 22.

⁶ OHCHR, PREVENTING TORTURE: The Role of National Preventive Mechanisms – A PRACTICAL GUIDE (2018) p. 25.

⁷ OHCHR, PREVENTING TORTURE: The Role of National Preventive Mechanisms – A PRACTICAL GUIDE (2018) p. 25.

⁸ IHREC, *Submission to the Human Rights Committee on Ireland's fifth periodic report* (June 2022) p. 63. Upon ratification, States have one year to establish NPMs for the purpose of complying with the Protocol (Article 17). Under Article 24 OPCAT, States may make a declaration to postpone the implementation of those obligations for three years.

⁹ It is noted that the Garda Síochána Inspectorate recently agreed a protocol with the Garda Síochána to make unannounced visits to Garda stations for the first time. This power is not set down in statute. Report of the Garda Síochána Inspectorate, *Delivering Custody Services A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations* (July 2021) p. 3.

¹⁰ IHREC, Ireland and OPCAT - Submission to the Criminal Law Reform Division of the Department of Justice and Equality (February 2017) p. 10.

¹¹ IHREC, Submission to the Commission on the Future of Policing (February 2018) p. 28.

As noted by the UN Committee against Torture, regardless of whether torture or ill-treatment occurs within the State:¹²

“there is always a need for States to be vigilant in order to guard against the risk of it occurring and to put in place and maintain effective and comprehensive safeguards to protect persons deprived of their liberty. It is the role of preventive mechanisms to ensure that such safeguards are actually in place and operating effectively and to make recommendations to improve the system of safeguards, both in law and in practice, and thereby the situations of persons deprived of their liberty.”

The Commission recommends that Ireland ratifies OPCAT immediately. The State could then benefit from the assistance of the Subcommittee on the Prevention of Torture (‘SPT’) in the creation of its NPM infrastructure.¹³ The Commission recommends that this is complemented by an extensive consultation exercise with all agencies and bodies that are potentially affected by the ratification and implementation of OPCAT.¹⁴

¹² UN Committee against Torture, Third annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/44/2, (March 2010) p. 8.

¹³ As per Article 11(1)(b) of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁴ IHREC, Ireland and OPCAT - Submission to the Criminal Law Reform Division of the Department of Justice and Equality (February 2017) p. 11.

Relevant human rights and equality standards

The General Scheme raises the following human rights and equality issues:

- The prohibition against torture and cruel, inhuman or degrading treatment or punishment;¹⁵
- The right to an effective investigation;¹⁶
- The right to freedom of expression;¹⁷ and

¹⁵ There is an absolute prohibition on torture in international law, with no exceptions. Ireland is a party to the *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('UNCAT'). Under Article 2 UNCAT, the State is obliged to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". Under Articles 10 and 16 UNCAT, the State must ensure that persons involved in the process of detention of individuals are fully trained and educated in the prohibition against torture and cruel, inhuman or degrading treatment or punishment. Additionally under Articles 13 and 16 UNCAT, the State must take steps to examine complaints of torture, inhuman or degrading treatment or punishment, and must ensure that complainants and witnesses are protected from retaliation resulting from the complaint. The prohibition against torture is also set out in Article 7 of the *International Covenant on Civil and Political Rights* ('ICCPR'). Article 10 ICCPR goes on to state that all persons deprived of their liberty "shall be treated with humanity and with respect for the inherent dignity of the human person." The prohibition is similarly set out in Article 3 of the *European Convention on Human Rights* ('ECHR').

¹⁶ The right to life under Article 2 ECHR, and the prohibition on torture under Article 3, require the State to take steps to prevent such human rights abuses, and to undertake an effective investigation into any potential violations. These rights have been guaranteed in the jurisprudence of the European Court of Human Rights ('ECtHR'). See *McCann v United Kingdom* App. No. 18984/91 (ECtHR Grand Chamber, 27 September 1995); *Renolde v France* App. No. 5608/05 (ECtHR, 16 October 2008); *X and Others v. Bulgaria* App. No. 22457/16 (ECtHR Grand Chamber, 2 February 2021). The requirements for an effective investigation under Article 2, and consequently Article 3, was consolidated in the case of *Hugh Jordan v. the United Kingdom* App. No. 24746/94 (ECtHR, 4 May 2001) at [107]. Further to the above, Article 13 ECHR guarantees the right to an effective remedy.

¹⁷ The right to freedom of expression is protected by Article 40.6.1^o of the Constitution, Article 10 ECHR, and Article 19 ICCPR. Article 40.6.1^o of the Constitution provides specifically for "criticism of Government policy" within the right to freedom of expression, in addition to the expression of convictions and opinions. See *With the right to communicate facts in addition to commenting on them*, as noted in *The Irish Times v Ireland* [1998] 1 IR 359, p. 405. However, any curtailment of this right must be proportionate, and any statutory restrictions on the freedom of expression must satisfy the principle of proportionality. The ECtHR has held that freedom of expression constitutes one of the essential foundations of a democratic society. Under Article 10(2), this qualified right may be subject to conditions or restrictions as prescribed by law and necessary in a democratic society, for a number of stated interests, which include "national security" and "public safety". In relation to the restricting criticism of the Government, the ECtHR noted in *Castells v Spain* that restrictions may be permissible in the interests of preserving public order; however: "The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion." The ECtHR has noted further protections provided to those in expressing opinions as part of a public debate on a political question of general interest. See *Prager and Oberschlick v Austria* App. No. 15974/90 (ECtHR, 26 April 1995). Freedom of expression additionally interlinks with the responsibilities of national institutions under the *Principles relating to the Status of National*

- Non-discrimination, and equality before and under the law.¹⁸

Institutions ('the Paris Principles'). A national institution is responsible for drawing the Government's attention to human rights violations and making proposals for solutions. It may be responsible, where necessary, for "expressing an opinion on the positions and reactions of the Government". See General Assembly resolution 48/134, 'Principles relating to the Status of National Institutions (The Paris Principles)' (20 December 1993).

¹⁸ Under section 42 of the *Irish Human Rights and Equality Commission Act 2014*, public bodies are required to have regard to the need to eliminate discrimination, to promote equality of opportunity and treatment for their staff and service users, and to protect the human rights of their staff, their members, and of those availing of their services. A public body must set out a strategic plan that assesses the human rights and equality issues relevant to its function, and include the plans or actions, either in place or proposed, to address those issues. The public body shall report on developments and achievements in this area in an annual report. The definition of public body under the 2014 Act includes a person, body, or organisation established under statute. See the *Irish Human Rights and Equality Commission Act 2014*.

Specific observations

Interpretation (Head 2)

The Commission notes that ‘Minister’ means the Minister for Justice, unless otherwise stated, and ‘relevant Minister’ includes the Minister for Health, the Minister for Children, Equality, Disability, Integration and Youth, and the Minister for Defence, in certain specified cases. However, the Commission considers that a more extensive list of those Ministers who have responsibility for places of detention, including *de facto* places of detention, should be included under this Head.

The Commission recommends that a more extensive list of those Ministers who have responsibility for places of detention should be included under this Head.

Expenses (Head 3)

Head 3 states that expenses incurred in the administration of the Act shall be paid by the Oireachtas:

“to such extent as may be sanctioned by the Minister.”

The interpretation note acknowledges that sufficient resources should be provided under OPCAT and that these should be independent.

The note states that the Inspector of Prisons recommended that her office should remain within the Department of Justice, and it is proposed that the Chief Inspector will have a dedicated budget under the Department.

Whilst the interpretative note states that sufficient resources should be provided under OPCAT, this is not reflected in the Draft Bill itself. Under Article 18(3) OPCAT, States Parties must “undertake to make available the necessary resources for the functioning” of NPMs. This obligation must be clearly set out in the legislation.

It should be clarified that existing bodies, carrying out other functions, which have been designated as NPMs are provided with funds specifically to fulfil their NPM role. For example, the Draft Bill does not set out that resources will be provided to the co-ordinating body for NPMs in order for it to carry out this function.

The Commission recommends that Head 3 must expressly reflect the obligation on the State to provide the necessary ring-fenced resources to permit the effective operation of the NPMs and the co-ordinating body.

The Commission recommends that Head 3 expressly includes an obligation on the State to provide the necessary ring-fenced resources to places of detention so that they can fully engage with the NPMs and the co-ordinating body, including establishment of data systems, staff training programmes and provision of confidential meeting space.

Interpretation for Part 1 (Head 4)

Head 4 sets out interpretation of terms used for the first part of the Bill.

‘Prison’ is defined as:

“a place of custody administered by or on behalf of the Minister (other than a Garda Síochána station) and includes—

- (a) a place provided under section 2 of the Prisons Act 1970,
- (b) a place specified under section 3 of the Prisons Act 1972,
- (c) any vehicle used to transport a prisoner from one location to another,
- (d) a holding area other than a court where a prisoner is being held immediately prior to or immediately after his or her production in court.”

Part (d) does not clearly set out that holding cells within court buildings are covered by the definition of ‘prison’. Head 14 includes a definition of places of detention which provides the following clarification:

“(h) Any place or vehicle where a person is detained in custody immediately before and after the production of the person to a court (including a place within the environs of the court concerned).”

[Emphasis added]

It is recommended that a clarification in line with the above example is included within the definition of ‘prison’.

The Commission notes the use of the word ‘prisoner’ to describe those detained in a prison and the observations by the Irish Penal Reform Trust of the dehumanising effect that such a

word can have, and how alternative terms such as ‘people in prison’ or ‘imprisoned people’ could be used in the legislation to avoid the over identification of people with their status as persons caught up in the criminal justice system.¹⁹

The definition of ‘serious adverse incident’:

“may include any of the following:

- (a) serious injury to a person in custody;
- (b) a serious injury to a member of staff or a person interacting with the Irish Prison Service;
- (c) escape or significant attempted escape from lawful custody;
- (d) significant breach of security including physical and information security;
- (e) significant operational delivery issues.”

Given that the importance of the term ‘serious adverse incident’ in determining what events are reported to the Chief Inspector, further clarification is required on when an incident constitutes a ‘serious’ injury, or a ‘significant’ breach. In its current form, this Draft Head allows a significant level of discretion in reporting incidents to an accountability body. The definition should also include a significant breach of discipline by prison officers or prison staff and clarify that the list of incidents referred to is non-exhaustive.

The Commission recommends that the definition of ‘prison’ is clarified to include holding places within court buildings and the environs of such buildings.

The Commission recommends that consideration be given to the use of ‘people in prison’ or ‘imprisoned people’ in the legislation instead of ‘prisoner’.

The Commission recommends that the definition of serious adverse incidents should include a significant breach of discipline by prison officers or prison staff and clarify that the list of incidents referred to is non-exhaustive.

¹⁹ Irish Penal Reform Trust, Submission to the Joint Committee on Justice on the General Scheme of the Inspection of Places of Detention Bill 2022, at p.19.

The Commission recommends that either all adverse incidents are reported to the Chief Inspector as a matter of course, or that a detailed definition of ‘serious injury’ and ‘significant breach’ are included to ensure transparency and accountability within the Prison Service.

Chief Inspector of Places of Detention (Head 5)

Head 5 creates the role of Chief Inspector of Places of Detention, which will be appointed by the Minister. The Minister shall appoint the Chief Inspector on the recommendation of the Public Appointments Service (PAS), following an open competition for the role.

This role will be held:

“on such terms and conditions, including remuneration, as the Minister may determine with the consent of the Minister for Public Expenditure and Reform”.

The Chief Inspector may be removed from office by the Minister:

“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.”

In relation to the appointment of the Chief Inspector, the Commission notes international guidance on NPMs and the Paris Principles, which state that NPMs should not be under the institutional control of the executive. It is imperative to ensure independence in the role, and to promote public perception of that independence.

Although there may be the safeguards of the PAS system and an open competition, the Commission expresses concern that this is not sufficient to meet the criteria of independence for NPMs under the Protocol. The Commission recommends that the appointment process of the Chief Inspector could mirror the procedures used in the appointment of the Members of the Irish Human Rights and Equality Commission, the Ombudsman and the Ombudsman for Children who are appointed by the President following an independent appointments process and approval by both Houses of the Oireachtas.

In relation to the procedure for removing the Chief Inspector for the role, issues of independence again arise. As the Global Alliance of National Human Rights Institutions (‘GANHRI’) Sub-Committee notes, the grounds for dismissal must be:

“clearly defined and appropriately confined to only those actions which impact adversely on the capacity of the member to fulfil their mandate... Dismissal should not be allowed based solely on the discretion of appointing authorities.”²⁰

The ground of ‘stated misbehaviour’ is insufficiently clear to meet the above guidance, and risks the public perception of allowing dismissal on the discretion of the appointing authority.

The Commission recommends that the appointment process of the Chief Inspector could mirror the procedures used in the appointment of the Members of the Irish Human Rights and Equality Commission, the Ombudsman, and the Ombudsman for Children, who are appointed by the President following an independent appointments process and approval by both Houses of the Oireachtas.

The Commission recommends that the grounds for dismissal of the Chief Inspector are clearly defined in compliance with the Paris Principles.

Provision of Services to the Inspectorate of Places of Detention (Head 6)

The Commission notes the wording of Head 6(2), which states:

“Such funds, premises, facilities, services and staff as may be necessary for the proper functioning of the Inspectorate of Places of Detention shall be provided to it by the Minister with the consent of the Minister for Public Expenditure and Reform.”

Under Head 6(3) the Chief Inspector may appoint staff with the consent of the Minister and the Minister for Public Expenditure. Head 6(4) provides that the terms and conditions of such staff shall be determined by the Chief Inspector with the consent of both Ministers. Under OPCAT, the Chief Inspector must be sufficiently resourced to carry out the NPM function.

The Commission recommends that it should be clearly set out in the Bill that the resourcing of the Chief Inspector to carry out its NPM functions is separate to its resourcing for its non-NPM functions.

²⁰ [Accreditation - GANHRI](#)

Appointment of Senior Inspectors (Head 7)

The interpretative guidance for Head 7 states that it is considered that recruitment to Senior Inspector roles should be subject to open external recruitment, with the ultimate decision made by the Chief Inspector. This element of transparent recruitment complies with the Paris Principles and is welcomed. However this should be specifically reflected in Head 7.

The interpretive guidance states that inspections carried out by Senior Inspectors should comply with OPCAT.

However the text of Head 7(3) simply states that it is the Senior Inspector's duty to:

“have regard to the Protocol”.

As the Chief Inspector is to be designated as a NPM, the recruitment process for this office should comply with the requirements of OPCAT.

Under Article 18(2) OPCAT, in the composition of its NPMs, States must:

“strive for a gender balance and the adequate representation of ethnic and minority groups in the country.”

The requirement to have regard to this principle in the recruitment of Senior Inspectors complements the Chief Inspector's other equality duties.

As the Chief Inspector role is created by Statute, it is covered by the definition of ‘public body’ under section 2 of the 2014 Act. As such, the Chief Inspector is required to have regard to its Public Sector Equality and Human Rights Duty obligations, under section 42 of the 2014 Act, in the fulfilment of its functions under the Bill.

The Commission recommends that there should be an open recruitment process for Senior Inspectors and that express reference is made to the principles in Article 18(2) OPCAT in the recruitment process under this Head.

The Commission recommends that Head 7 clearly sets out that inspections carried out by Senior Inspectors comply with the requirements of OPCAT.

Functions of the Chief Inspector of Places of Detention in relation to inspection of prisons (Head 8)

The Commission considers that the frequency of the regular inspections required to be carried out by the Chief Inspector under Head 8(1) should be specified and should be, at a minimum, one per year for each prison in the State. The Commission also considers that all inspections should be carried out with due regard to OPCAT and this should be included in Head 8(2).

Head 8(3) sets out that the Chief Inspector:

“may, and shall if so requested by the Minister, investigate any matter arising out of the management or operation of a prison including a serious adverse incident under Head 9 or death in custody of a prisoner under Head 10”.

Insofar as the terminology of ‘serious adverse incident’ is maintained in the Bill, it is recommended that the Chief Inspector is required to investigate such incidents. Similarly, the Chief Inspector should be required to investigate deaths in custody, and this should not be a matter of discretion or request from the Minister. The report on any such investigation should be published, with appropriate redaction if necessary, and not only submitted to the Minister and Director General of the Irish Prison Service (‘IPS’). Head 8(4) should also provide that the Chief Inspector may also bring any issues of concern arising out of an inspection to the attention of IHREC as the NPM co-ordinating body.

Head (8)(5)(a) should specify that the Chief Inspector may engage external experts and can be accompanied by them on any visit to a prison.

Head 8(5)(b) should provide that the Chief Inspector is entitled to obtain information relating to the management and operation of a prisons, prisons or the Irish Prison System. It should also be specified in Head 8(5)(c) that personal and medical records of a deceased individual can be obtained without the consent of any other party.

Under Head 8(6) it will not be lawful to refuse to co-operate with the Chief Inspector in the exercise of their powers of Head 8(5) ‘without due cause’. The interpretative note explains that, as a ‘compromise approach’, it will not be a criminal offence to refuse to co-operate. Instead, the provision allows for the possibility of civil action ‘including court injunctions’

against those refusing to co-operate. No reason is given as to why a ‘compromise’ was necessary for this provision. As acknowledged in the interpretation note, it may be a criminal offence to not co-operate with Mental Health and HIQA inspections.²¹ Given the importance of the Chief Inspector’s role generally, and particularly in relation to the prevention of torture and ill-treatment, it should not be left for the civil litigation system to ensure compliance with the Bill.

Although this section does not relate to the Chief Inspector’s NPM functions, it is relevant to note that a key function of the role is to conduct unannounced inspections. If prison staff can refuse to comply with an inspection, and the only resolution available is through the potentially lengthy court process, the purpose of the role is significantly undermined.

Further, no guidance or clarification has been provided on what ‘due cause’ may be to justify non-compliance.

The Commission recommends that the Chief Inspector is required to investigate all serious adverse incidents and deaths in prisons and the report on any such investigation should be published, with appropriate redaction if necessary.

The Commission recommends that Head 8(4) should provide that the Chief Inspector may also bring any issues of concern arising out of an inspection to the attention of IHREC as the NPM co-ordinating body.

The Commission recommends that Head (8)(5)(a) should specify that the Chief Inspector may engage external experts and can be accompanied by them on any visit to a prison.

The Commission recommends that Head 8(5)(b) should provide that the Chief Inspector is entitled to obtain information relating to the management and operation of a prisons, prisons or the Irish Prison System.

The Commission recommends that Head 8(5)(c) should provide that personal and medical records of a deceased individual can be obtained without the consent of any other party.

²¹ Section 53 of the *Mental Health Act, 2001*; Sections 65 and 79 of the *Health Act 2007*.

The Commission recommends that Head 8(8) should include a requirement that the information provided to the Minister shall be published and that the Chief Inspector shall engage with IHREC as the NPM co-ordinating body in this regard.

The Commission recommends that the reference to ‘due cause’ under Head 8(6) is either removed or clarified in detail.

The Commission recommends that failure to comply with the Chief Inspector under Head 8 may be a criminal offence.

Serious Adverse Incidents (Head 9)

Head 9 sets out that the Director General of the IPS shall notify the Chief Inspector of ‘serious adverse incidents’ that have occurred with the prison system. The Commission reiterates its submissions in relation to the definition of ‘serious adverse incidents’ and the reporting criteria to the Chief Inspector. Head 9(1) should specify that any such incident should be reported by the Director General as soon as possible and no later than 24 hours from the occurrence of the incident, and in accordance with the format required by the Chief Inspector. However, the Commission is concerned that the General Scheme does not contain provision for the reporting of serious adverse incidents, or deaths, that occur in places of detention other than prisons and the General Scheme should be amended to require notification to the relevant NPM. There should also be an appropriate data system established for the recording of serious adverse incidents and deaths to which IHREC as the co-ordinating NPM has access.

Head 9(3) provides that the Chief Inspector may investigate such incidents if they consider appropriate, or may refer the matter back to the Director General or to another authority. The interpretive note states that the Chief Inspector would assess which body is best placed to carry out an investigation. The Inspectorate would take on responsibility for the investigation into all serious adverse incidents and, where an investigation is delegated to the IPS, the Chief Inspector would maintain an oversight role. It is recommended that this guidance is reflected on the face of the Bill.

Where a serious adverse incident relates to harm to an imprisoned person, it is recommended that the Chief Inspector must investigate the matter and cannot delegate the

investigation to the IPS. The consequences of a delegated investigation are discussed further under Head 10.

It is important to note that this investigation role is completely separate to the preventive NPM inspection function. This distinction must be made clear, both in the legislation underpinning this role and in the carrying out of the Chief Inspector's functions.

The Commission recommends that the General Scheme is amended to require notification of serious adverse incidents, and deaths, in all places of detention to the relevant NPM.

The Commission recommends that an appropriate data system should be established for the recording of serious adverse incidents and deaths to which IHREC as the co-ordinating NPM has access.

The Commission recommends that the Chief Inspector's role and responsibilities, in the investigation of every report made under Head 9, are specifically set out.

The Commission recommends that incidents relating to the harm of persons in prison are investigated by the Chief Inspectorate, and not delegated to the IPS.

The Commission recommends that clarification is made on the delineation between the Chief Inspector's NPM and non-NPM functions.

Investigation of Deaths in Custody of Prisoners (Head 10)

Under Head 10, the Director General of the IPS shall notify the Chief Inspector of the deaths of those in prison, and the deaths of those who died within four weeks of release from detention. Head 10(1) should specify that notification should occur as soon as possible and within a maximum period of 24 hours.

This provision notes that release from detention includes "temporary release or otherwise", but does not explicitly note the situation of release on bail.

Head 10(2) allows the Chief Inspector to decide whether to conduct an investigation into the death, or to refer the matter to the Director General of the IPS or to another authority. This marks a change from the current practice of the Inspector of Prisons, which, by Ministerial instruction, investigates every death in prison and deaths within a month of release.

The interpretive note refers to the obligation of Article 2 of the European Convention on Human Rights ('ECHR') on States to conduct effective investigations of deaths in a range of circumstances, including of persons detained by the State. The note clarifies that the existing investigations of the Inspector of Prisons on deaths in prison do not purport to answer all questions surrounding a death, and that they can form a part of a broader investigative process, which may include the Gardaí and a Coroner's Inquest.

The State has a positive obligation under Articles 2 and 3 to investigate potential breaches of the ECHR. Where persons die or are seriously harmed in prison detention, the State may seek to discharge its Article 2 and 3 obligations in a number of ways, in particular with a Garda investigation. However, if the State intends to use the Chief Inspector as an additional mechanism through which it can meet its investigation obligations, it is imperative that such investigations cannot be delegated to the IPS.

The investigating body of Article 2 and 3 violations must be 'sufficiently independent' of the persons and structures under investigation. Independence means both a lack of hierarchical or institutional connection to those under investigation, and practical independence.²² The independence of an investigation under Article 2 or 3 does not have to be absolute. However, the investigators must be "sufficiently independent of the persons and structures" under investigation.²³ The adequacy of the degree of this independence is to be assessed in light of the specific circumstances of the case.²⁴

Further, a burden of proof may rest on the IPS to provide a satisfactory answer for potential ECHR violations in circumstances where the events under investigation lie largely within the exclusive knowledge of the prison authorities.²⁵ As such, allowing such investigations to be carried out by the IPS would result in a lack of independence as required by Article 2 and 3 jurisprudence.

²² *Armani Da Silva v. the United Kingdom* App. No. 5878/08 (ECtHR General Chamber, 28 September 2010).

²³ *Tunç and another v Turkey* App. No. 24014/05 (ECtHR Grand Chamber, 14 April 2015) at [223].

²⁴ *Tunç and another v Turkey* App. No. 24014/05 (ECtHR Grand Chamber, 14 April 2015) at [223].

²⁵ *Salman v Turkey* App. No. 21986/93 (ECtHR, 27 June 2000) at [100]; Also, in the context of detention, the ECtHR held in *Kats v Ukraine* that, where a detainee died as the result of a health problem, the State had to offer an explanation as to the cause of death and the treatment administered prior to death. As a general rule, "the mere fact that an individual dies in suspicious circumstances while in custody should raise an issue as to whether the State has complied with its obligation to protect that person's right to life" *Kats v Ukraine* App. No. 29971/04 (ECtHR, 18 December 2008) at [102].

The Commission considers it important that the Chief Inspector also has a role in the public phase of any investigation into a death in custody of a prisoner, and that they be empowered to ask questions of the relevant institution to ensure future incidents are mitigated against.

The Commission recommends that Head 10(1) should specify that notification of a death should occur as soon as possible and within a maximum period of 24 hours.

The Commission recommends that release from detention expressly includes release on bail.

The Commission recommends that all deaths in detention, and deaths within a month of release from detention, are to be investigated by the Chief Inspector, and cannot be delegated to the IPS.

The Commission recommends that the Chief Inspector has a role in the public phase of any investigation into a death in custody of a prisoner and is empowered to ask questions of the relevant institution to ensure future incidents are mitigated against.

Accountability to Oireachtas Committees (Head 11)

Under Head 11, the Chief Inspector may be required to give an account of the general administration of the Inspectorate of Places of Detention to an Oireachtas committee or sub-committee.

Head 11(10) prevents the Chief Inspector from questioning or expressing an opinion on the merits of any government or ministerial policy. This is a restriction on the freedom of expression of the Chief Inspector, and in order for it to be permissible, the restriction must be necessary and proportionate.

The interpretive note simply states that:

“the Chief Inspector shall not question government policy”.

It does not provide a reason for this restriction. In order for the Chief Inspector to be compliant in its role as an NPM under OPCAT this restriction should be removed; it is not compatible with Article 19 of OPCAT which requires that NPMS be granted the power to submit observations on existing and draft Government legislation and policy. As noted

above, the limits of acceptable criticism are wider for Government policy under Article 10 ECHR. The State must be specific in showing that the purpose of the restriction is necessary, before a proportionality analysis can be undertaken. In this provision, there does not appear to be any justification for the restriction on freedom of speech. As such, it is neither necessary nor proportionate. Head 11 additionally infringes the Paris Principles, as it restricts the ability of a national institution to express an opinion on the positions and reactions of the Government.

The Commission recommends that restriction on freedom of expression is removed from Head 11.

The Commission recommends the distinction between the Chief Inspector's NPM and non-NPM roles is clarified under this Head.

Publication of Annual and other Reports (Head 12)

Head 12 sets out the various reports of the Chief Inspector to be provided to the Minister and to the Oireachtas. It is notable that the reports relate to the prisons inspected and the investigations taken by the Chief Inspector. As such, this provision does not relate to the preventive NPM functions of the Chief Inspector. This must be clarified, as the interpretive note for this Head refers directly to SPT guidance for the accountability of NPMs, and it should be made clear under Head 12 that the Chief Inspector has the power to lay its general inspection reports before the Oireachtas. Head 12(3) should be amended to provide that any report should be submitted to Oireachtas at the same time as to the Minister.

Under Head 12(4), reports into investigations made under Heads 9 and 10 should be laid before the houses of the Oireachtas. Additionally, reports of investigations not made under Heads 9 and 10 should be laid before the Oireachtas, in addition to reports requested by the Minister.

Provision should be made under Head 12 to allow the Chief Inspector to publish all such reports after they are laid before the Oireachtas and to simultaneously send all reports relating to the NPM functions of the Chief Inspector to IHREC as the co-ordinating body.

The Commission reiterates its submissions regarding the need for independence in the office of the Chief Inspector and issues around Ministerial influence.

It is not clear as to whether the incidents reported to the Chief Inspector, but referred to another body under Heads 9 and 10, must be included in this reporting. For the purpose of accountability, it should be clear as to when and in what circumstances the Chief Inspector has refused to investigate, or delegated investigation to the IPS.

Under Head 12(5) the Chief Inspector may amend or redact any part of a report that would be prejudicial to, *inter alia*, the interests of national security. The Commission considers that a detailed definition of national security should be provided.

The Commission reiterates its recommendations regarding the independence of the Chief Inspector from executive influence and control, and notes that Head 12 should reflect this independence.

The Commission recommends that it should be made clear under Head 12 that the Chief Inspector has the power to lay its general inspection reports before the Oireachtas.

The Commission recommends that Head 12(3) should be amended to provide that any report should be submitted to Oireachtas at the same time as to the Minister.

Provision should be made under Head 12 to allow the Chief Inspector to publish all such reports after they are laid before the Oireachtas and to simultaneously send all reports relating to the NPM functions of the Chief Inspector to IHREC as the co-ordinating body.

The Commission recommends that the Chief Inspector's reports must include information relating to its decision not to investigate matters referred to it under Heads 9 and 10.

The Commission recommends the distinction between the Chief Inspector's NPM and non-NPM roles is clarified under this Head.

The Commission recommends that a detailed definition of national security should be provided under Head 12(5).

Prison Visiting Committees (Head 13)

Head 13 sets out the statutory basis for Prison Visiting Committees ('PVCs'), and states that the Chief Inspector shall establish a PVC for each prison in the State. The Commission

considers that Visiting Committees should be established for all places of detention, not just prisons.

It is not clear as to whether or how PVCs are intended to form a part of the NPM network. If PVCs are to be designated as NPMs, issues arise as to whether they meet the requirements of independence and expertise.

In relation to independence, although appointments are made on the recommendation of PAS, and with the agreement of the Chief Inspector, the final decision on appointment is to be made by the Minister.

In relation to expertise, as there are no requirements for knowledge or experience of the prison system in the appointment process, the body would not meet the requirements of expertise under OPCAT. Further, each member must undergo Garda vetting and must provide information on previous convictions, prior to appointment. This may have the effect of both discriminating against persons with previous convictions, and removing an important pool of candidates from the appointment system. Those with lived experience in the prison system may provide an invaluable perspective in the inspections of prisons, and the inclusion of such persons on PVCs may assist in meeting the requirements of Article 18 OPCAT. The Commission is of the view that such persons should be actively encouraged to apply to become members of the PVCs.

Under Head 13(5), the criteria for recommendations and appointments to PVCs should be agreed between PAS and the Chief Inspector. The Chief Inspector shall consult the Minister, the Irish Prisons Service, and the Probation Services in relation to these criteria. If it is intended that PVCs are to be included in the NPM network, it is recommended that the coordinating body of NPMs is included as a consultant.

The Commission considers that under Head 13(10) PVCs should have access to external staff, including education and health staff.

Under Head 13(12) & (13), timelines should be set for the publication of the relevant reports.

Although there could be no designation of PVCs as NPMs in their current state under Head 13, the interpretive note states that PVC visits shall be “OPCAT compliant”. The precise relationship between PVCs and the NPM network must be clarified.

Regardless of the above, the Commission notes that the Department of Justice is conducting a review into PVCs. This review and its recommendations are due to be delivered to Government in Q4 2022.²⁶ It is therefore submitted that the General Scheme should not make statutory changes to the PVC appointment scheme whilst a review on the PVCs is currently underway.

The Commission considers that Visiting Committees should be established for all places of detention.

The Commission recommends that no provision is made to vary the statutory basis of PVCs until the Department’s review is complete.

Notwithstanding the above, the Commission recommends that the relationship between PVCs and the NPM network is clarified, and that the co-ordinating body is included as a consultant under Head 13(5) if it is intended for PVCs to be designated as NPMs.

The Commission recommends that precautions are taken to protect against discrimination on the basis of previous convictions in the appointment process.

The Commission further recommends that those with previous convictions, and those who have come into contact with the criminal justice system, are actively encouraged to apply to become members of the PVCs.

The Commission recommends that under Head 13(10) PVCs should have access to external staff, including education and health staff.

The Commission recommends that under Head 13(12) & (13), timelines should be set for the publication of the relevant reports.

²⁶ Department of Justice, Review of Policy Options for Prison and Penal Reform 2022-2024 (August 2022), p. 26.

Interpretation for Part 3 (Head 14)

Head 14 sets out the definitions and interpretations of terms used in Part 3 of the General Scheme.

Under this head, 'detainee' is defined as:

“a person in a place of detention who is deprived of his or her liberty”.

Deprivation of liberty is not defined under the Head.

It is worthwhile to reproduce the text of Article 4 OPCAT again for clarity:

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

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

Notably, OPCAT does not use the term 'detainee'. Instead, it uses the phrase 'persons... deprived of their liberty'. This phrase is fundamentally linked with the definition of 'places of detention', which applies to places where persons:

“are or may be deprived of their liberty”.

As such, OPCAT expressly protects persons that might be at risk of a deprivation of liberty. The definition provided in Head 14 is unnecessarily restrictive and does not reflect the meaning of OPCAT. As deprivation of liberty is not defined, this Head additionally lacks the clarification that a person may be detained in a public or private setting.

Under Head 14, 'places of detention' is defined as:

“any place where a person or persons may be detained by a court or under any enactment”.

The Head then sets out 14 types of detention that are noted to be included in the definition. Article 4(1) OPCAT expressly states that places of detention refers to places where persons are, or may be, deprived of liberty:

“either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence”.

[Emphasis added]

It is pertinent to note the SPT’s clear guidance that a wide interpretation must be given to Article 4 OPCAT in the spirit of the Protocol and UNCAT. The SPT takes the view that the scope of Article 4 includes:

“place[s] in which persons are deprived of their liberty, in the sense of not being free to leave... if the deprivation of liberty relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function.”

The restriction of places of detention to detention ‘by a court or under any enactment’ is inadequate to meet the obligations of the State under Article 4 OPCAT. It appears to only relate to situations of an express deprivation of liberty, based in law, stemming directly from a court or State authority. This is exceptionally limited and it does not cover places of secret detention, *de facto* detention, or situations with deprivation of liberty where the State is expected to intervene, but acquiesces to the situation through inaction.

In relation to the list of 14 examples of deprivation of liberty included in the definition, it is recommended that the phrase ‘including, but not limited to’ is included to signify that the list is not comprehensive. It is submitted that the examples of places of detention in Head 14 should additionally include places of *de facto* detention, addressed above, where deprivation of liberty or detention may occur, such as the transfer of children outside of Ireland, voluntary organisations offering addiction services, Direct Provision and asylum-seeking children accommodated in privately run centres, and state procured services.²⁷

²⁷ Professor Rachel Murray and Dr Elina Steinerte, [Ireland and the Optional Protocol to the UN Convention against Torture \(IHREC 2017\)](#) at pp. 31-36

The Commission has previously recommended that the State create an inventory of all places of deprivation of liberty in the State.²⁸ This should be published at the same time as the Bill and will assist in determining which bodies already have oversight of the places of detention and will ensure that there are no gaps in the inspection functions of NPMs.

The Commission recommends that the definition of ‘places of detention’ reflects the precise wording, and the broad scope, of Article 4 OPCAT.

The Commission recommends that the term ‘detainee’ is not used in the General Scheme. This does not cover the full scope of persons protected by OPCAT, which extends to persons who ‘may’ be deprived of their liberty.

The Commission recommends that the phrase ‘including, but not limited to’ is added to the list of examples in Head 14, and that it is extended to represent examples of *de facto* detention where deprivation of liberty or detention may occur, such as the transfer of children outside of Ireland, voluntary organisations offering addiction services, Direct Provision and asylum-seeking children accommodated in privately run centres.

It is further recommended that a comprehensive list of all places of detention within the State is compiled and published at the same time as the Bill for the purpose of enabling NPMs and the SPT to fulfil their mandates.

Inspections of places of detention by International bodies (Head 15)

Head 15 relates to the State’s obligations in enabling international bodies to carry out their functions.

Subhead (6) states that international bodies and accompanying experts are provided with all reasonable assistance to interview persons.

It is recommended that, in relation to conducting interviews with persons who may pose a risk to the safety of NPM representatives, the State consider a provision in line with section 30(4) of the New Zealand *Crimes of Torture Act 1989*:

²⁸ IHREC, Ireland and OPCAT - Submission to the Criminal Law Reform Division of the Department of Justice and Equality (February 2017) p. 11.

“If requested by the National Preventive Mechanism, the person in charge of a place of detention must provide a safe and secure environment for the National Preventive Mechanism to conduct an interview with any detainee who is considered likely to behave in a manner that is—

(a) offensive, threatening, abusive, or intimidating to any person; or

(b) threatening or disruptive to the security and order of the place of detention.”

Similar protections could be set out for the interviews of NPMs under Head 17.

This subhead continues that international bodies may interview any ‘detainee’ or ‘any other person at the place of detention’ that they choose. This power to interview should be extended to “*any other person [the body] believes may supply relevant information*”, in line with Article 14(d) OPCAT, which is broader than the restriction to persons ‘at the place of detention’. The international body’s liberty to choose the places they want to visit, under Article 14(e), should be expressly set out. It should be clear that international bodies have the power to make unannounced visits to places of detention.

It is notable that Head 17(6) contains the same restrictions for NPMs conducting interviews and visits. The same changes must be made under that Head for compliance with Articles 20(d) and (e) OPCAT.

Under subhead (7), the Minister will ‘consider’ the recommendations of international bodies and ‘respond... as soon as may be.’

This provision is insufficient to meet the requirements of Article 12 OPCAT that the State:

“[examines] the recommendations of the Subcommittee on Prevention and enter[s] into dialogue with it on possible implementation measures.”

This is a stronger and more active obligation than considering and responding to recommendations. This should also be done within a specified time frame and details of the outcome of any dialogue should be published.

A similar issue arises under Head 17(8) for NPMs, and the State is obligated to enter into the same dialogue with NPMs under Article 22 OPCAT.

The Commission considers that the information that may be provided under Head 15(5) should be disaggregated on the grounds protected under the Equality Acts.

The Commission recommends that protective provisions for the conduct of interviews in line with section 30(4) of the New Zealand *Crimes of Torture Act 1989* is included under Heads 15 and 17.

The Commission recommends that the powers and discretion of international bodies and NPMs to conduct interviews and inspect places of detention, as established under Articles 14 and 20 OPCAT, is expressly set out in Heads 15 and 17.

The Commission recommends that Heads 15 and 17 include the State's obligation under Articles 12 and 22 OPCAT to enter into a dialogue with international bodies and NPMs, and within a specified time frame and the details of the outcome of any dialogue should be published.

The Commission recommends that the information that may be provided under Head 15(5) should be disaggregated on the grounds protected under the Equality Acts.

Co-ordinating National Preventive Mechanism (Head 16)

Head 16 sets out six functions of the Commission as the co-ordinating NPM.²⁹ The functions of the co-ordinating body will depend on the type of NPM network chosen by the State. It appears from the interpretive note that the General Scheme is based on the New Zealand model, whereby a number of designated NPMs are co-ordinated by one body. However, clarification is required on the role of PVCs and whether or not civil society is to be included in the network. On the basis that the New Zealand model has been chosen, and that the Commission would be co-ordinating body for designated NPMs, it is submitted that further clarification should be included in this section.

²⁹ These are to liaise with international bodies in relation to visits to places of detention, to consult and liaise with National Preventive Mechanisms, to review the reports prepared by the NPMs under Head 17(1) and advise the NPMs of any systemic issues arising from those reports, coordinate the submission of the reports prepared by the NPMs under Head 17(1) to the international body, to provide guidance to NPMs in the carrying out of their obligations under OPCAT, and to make, in consultation with all relevant NPMs, any recommendations to the Minister or relevant Minister that it considers appropriate on any matter relating to the prevention of torture and other cruel, inhuman or degrading treatment or punishment in places of detention in the State.

Under section 32 of the New Zealand *Crimes of Torture Act 1989*, as amended, the first function of the Central NPM is to:

“coordinate the activities of the National Preventive Mechanisms.”

This provision is not included in Head 16 of the General Scheme. The Commission notes that this function may allow for the co-ordinating body to play an oversight role of the NPM network, and to develop a strategy for the network, identify gaps in inspections, and to set standards for the conduct of NPM inspections.³⁰ It is important that there is a level of consistency in the inspections carried out across places of detention, and that the experience and knowledge of each NPM can be used to build a general set of guidelines and assist in the provision of training and peer to peer assistance for the network as a whole. The creation of strategies for the NPM network would better facilitate the monitoring of the State’s implementation of the network’s recommendations.

This approach is reflected in the Australian approach to NPM networks, in which the Commonwealth Ombudsman is intended to act as a co-ordinating body. The Ombudsman will not oversee inspections or conduct any secondary inspections. Instead, it will coordinate interactions with the SPT and:

“work with existing bodies to share experience, undertake research, identify gaps and overlaps.”³¹

It is recommended that these specific functions, as well as the provision of training and the co-ordination of peer to peer assistance, form part of the co-ordinating body’s mandate under Head 16. It may additionally be useful to clarify that the co-ordinating body does not hold an inspection function.

Although not expressly set out in the *Crimes of Torture Act*, the New Zealand co-ordinating body additionally convenes regular roundtable meetings of NPMs, and holds meetings with civil society.³² It is recommended that these functions and objectives are set down in the

³⁰ Professor Rachel Murray and Dr Elina Steinerte, *Ireland and the Optional Protocol to the UN Convention against Torture* (January 2017) p. 6.

³¹ Australian Human Rights Commission, *Implementing OPCAT in Australia 2020* (June 2020) p. 24.

³² Human Rights Commission, Te Kāhui Tika Tangata, *OPCAT in New Zealand 2007-2012: A review of OPCAT implementation by New Zealand’s National Preventive Mechanisms* (July 2013) p. 9.

General Scheme, and that they are clarified in the context of the PVCs' and civil society's role in the type of NPM network chosen.

Under Head 16(2)(d) the Commission would have the function to:

“co-ordinate the submission of the reports... to the international body.”

It is not clear if this provision is intended to meet the requirements of Article 23 OPCAT, which sets out that States Parties undertake to publish and disseminate the annual reports of NPMs. It is important that the State engages with the obligations of Article 23 and that this dissemination is made through State bodies.

It should also be made clear under Head 16(f) that the Commission may publish its reports to the Minister and any responses received. It should also be stipulated under this Head that the Commission may prepare thematic reports and provide information on OPCAT and the co-ordinating body to the public.

This Head should also ensure that the co-ordinating body receives the resources required for it to carry out its functions.

In relation to the information required by the co-ordinating body in order to carry out its functions, it is noted that the body will require access to the information set out under Article 20 OPCAT, in addition to the personal data of those deprived of their liberty. This submission is further set out under Head 17.

The Commission recommends that the functions and role of the co-ordinating NPM be strengthened and set out with clarity under Head 16.

The Commission recommends that the co-ordinating body's mandate is extended to include the co-ordination of the NPM's activities, and that further clarity on this function is provided.

The Commission recommends that the relationship between PVCs, civil society, and the NPM framework is set out in clarity.

The Commission recommends that the co-ordinating body's functions under Head 16 (2) should include: to raise awareness and organise training in relation to OPCAT, to facilitate

peer-to-peer assistance and reviews amongst NPMs, and to facilitate a forum for the development of good practices for OPCAT type inspections amongst NPMs.

The Commission recommends that Head 16(2)(f) should provide that the Commission may publish its reports to the Minister and any responses received.

The Commission recommends that Head 16 should provide that the Commission may prepare thematic reports and provide information on OPCAT and the co-ordinating body to the public.

The Commission recommends that the co-ordinating body is provided with the same data access as NPMs, as proposed and recommended under Head 17.

The Commission recommends that this Head should also provide that that the co-ordinating body receives the resources required for it to carry out its functions.

The functions of a National Preventive Mechanism (Head 17)

Head 17 sets out the mandate of NPMs, and the steps that the State must take to enable them to fulfil their functions.

Under Head 17(3), access to places of detention by representatives of NPMs shall be facilitated by the relevant authority. This should be broadened to reflect the corresponding provision for international body visits under Head 15(3), including access for experts accompanying the NPM representative.

Provision should be made under Head 17 for NPMs to make proposals and observations on existing and draft legislation, as per Article 19(c) OPCAT. The method by which this takes place should be expressly set out.

The Commission notes that the NPMs obligation to publish annual reports is reflected in Head 17. However, it is submitted that the functions of NPMs should be extended to include the creation of reports following each visit, as per SPT guidelines.³³ Provision should also be made for the preparation and publication of thematic reports and commentary as relevant. Head 17(9) should be amended to provide that the reports should be submitted to IHREC as

³³ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (12th Session), *Guidelines on National Preventative Mechanisms* (November 2010) at [36].

the co-ordinating body at the same time as their submission to the Houses of the Oireachtas and relevant Minister under Head 17(2)(e).

The Commission considers that engagement with the NPM co-ordinating body should be inserted as an additional function of NPMs in Head 17(1).

It is recommended that the mandates of NPMs include a reference to the State's obligation under Head 21 and Articles 15 and 21(1) OPCAT regarding protection from sanctions. NPMs inspection functions can be used as a tool to ensure that sanctions have not taken place against persons that provided information to NMPs or international bodies.

Under subheads (4) and (5), NPMs are granted access to information as required under Article 20 OPCAT. The Commission considers that the information to be provided under Head 17(5) should be disaggregated according to the protected grounds in the Equality Acts. In addition, the Commission recommends that NPMs are provided with access to data of persons in places of detention under their remit, as per Office of the United Nations High Commissioner for Human Rights guidance. This would mirror the extensive data access provided to the Chief Inspector under Head 8(5). Similarly, a provision should be included on the consequences of non-compliance with the NPM's inspection.

The response of the Minister or relevant Minister under Head 17(8) should be provided within a specified time frame and should also be sent to IHREC as the co-ordinating body at the same time.

The Commission recommends that Head 17(3) is broadened to include access for experts accompanying NPM representatives.

The Commission recommends that NPMs power to make proposals and observations on existing and draft legislation, as per Article 19(c) OPCAT, is expressly set out.

The Commission recommends that NPMs should create reports following each visit and inspection, in line with SPT guidelines.

The Commission recommends that Head 17(9) should be amended to provide that the relevant reports should be submitted to IHREC as the co-ordinating body at the same time

as their submission to the Houses of the Oireachtas and relevant Minister under Head 17(2)(e).

The Commission recommends that engagement with the NPM co-ordinating body should be inserted as an additional function of NPMs in Head 17(1).

The Commission recommends that NPMs mandates include the function of monitoring to ensure that sanctions have not taken place against persons that provide information to NPMs or international bodies.

The Commission recommends that the information to be provided under Head 17(5) should be disaggregated according to the protected grounds in the Equality Acts.

The Commission recommends that NPMs are granted access to personal data of those in places of detention, in line with the powers of the Chief Inspector under Head 8(5).

The Commission recommends that the response of the Minister or relevant Minister under Head 17(8) should be provided within a specified time frame and should also be sent to IHREC as the co-ordinating body at the same time.

Designation of National Preventive Mechanism (Head 18)

Under Head 18, the Minister may designate NPMs. The Commission considers that when a NPM is designated, its primary legislation should be amended accordingly with OPCAT read into it.

It is noted that there are no requirements for the Minister to conduct a consultation process prior to the designation of NPMs. SPT guidance states that this process should be:

“open, transparent and inclusive”,

and should involve:

“a wide range of stakeholders, including civil society”.³⁴

³⁴ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (12th Session), *Guidelines on National Preventative Mechanisms* (November 2010) at [16].

The Commission also considers that provision should be made for the engagement of civil society organisations with NPMs once established.

Head 18(1) empowers the Minister to set the remit of the places of detention for each designated NPM. As NPMs should be able to visit places of suspected detention, as per SPT guidance, and that one recommended function of the co-ordinating body is to identify gaps in inspections, it is submitted that the remit set down by the Minister should be broad. If designations confine the powers of NPMs to specific places of detention, gaps in inspections may become apparent and subsequently require Ministerial intervention to correct.

Under subhead (2), the Minister must be satisfied that it is appropriate to make a designation, having regard to the:

- “(a) nature of the body or person concerned,
- (b) the manner of appointment of persons to such bodies,
- (c) the qualifications necessary for members of such bodies...”

Subhead (4) further states that:

“[a] body designated under this Section shall be independent in the performance of its functions under this Part of this Act.”

These provisions are not sufficient to meet the requirements of Article 18(1) OPCAT, which indicates that the State must ensure the functional independence of NPMs and the independence of their personnel. This must be expressly stated in Head 18, and it is an absolute requirement for designation. Not only must the NPM act independently in its functions, it must also have the institutional independence necessary to meet the standards of operational independence.

Article 18(2) OPCAT obligates the state to ensure that the NPM’s experts have the ‘required capabilities and professional knowledge’. This is of particular importance in order to safeguard structurally vulnerable persons who may be deprived of their liberty. In order to comply with this provision, NPM members should receive ongoing training in human rights, and specific training and education in relation to the needs of structurally vulnerable

persons deprived of their liberty.³⁵ Such needs can differ dramatically depending on the type of detention faced, and the particular group of persons in detention. This must be set down explicitly in the General Scheme, in lieu of the vague wording of subhead (2)(c).

In creating and designating NPMs, States are further required to:

“strive for a gender balance and the adequate representation of ethnic and minority groups in the country.”

This must be a requirement to consider in the designation of NPMs under this head, and should be a continuing requirement for each NPM to consider in the recruitment of members for the purpose of carrying out NPM functions.

The Commission recommends that provision should be made in the legislation to stipulate that when a NPM is designated, its primary legislation should be amended accordingly with OPCAT read into it.

The Commission recommends that a consultation process should be required for the designation of NPMs, including with civil society.

The Commission recommends that provision should be made for the engagement of civil society organisations with NPMs once established.

The Commission recommends that designated NPMs are given a broad remit in relation to the scope of their powers of inspection.

The Commission recommends that the obligations of the State under Article 18(2) are expressly set out under Head 18 to ensure that NPM experts have the required capabilities and professional knowledge required to perform their function effectively.

The Commission recommends that the obligations of the State under Article 18(1) and (2) OPCAT are expressly set out under Head 18. Further provision should be made for the continuing obligation to strive for a gender balance and adequate representation of ethnic and minority groups in the recruitment process for NPMs.

³⁵ As recommended by the Australian Human Rights Commission in *Implementing OPCAT in Australia 2020* (June 2020) p. 10.

Chief Inspector of Places of Detention as National Preventive Mechanism in the Justice Sector (Head 19)

Head 19 designates the Chief Inspector as an NPM for the following places of detention:

- “a) Prisons;
- (b) Garda Síochána Stations;
- (c) any vehicle used by An Garda Síochána or the Irish Prison Service to transport a detainee from one location to another;
- (d) Any place where a person is detained in custody immediately before and after the production of the person to a court (including a place within the environs of the court concerned).”

As submitted in relation to Head 18, it is recommended that designations are made in relation to broad types of detention, which may include specific examples. This will allow for the NPM network and the co-ordinating body to assess and identify possible gaps in inspections, and to ensure that they are filled.

For example, when persons are detained in airports by the Garda National Immigration Bureau (‘GNIB’), it does not appear that the Chief Inspector has jurisdiction to inspect such places of detention. It may be intended that airports and ports are to fall under the jurisdiction of an immigration-focused NPM; however, this would result in different types of Garda detention being inspected by different bodies. Further, airports and ports may be used as places of detention by the Revenue Commissioners. The fact that the prospective Policing and Community Safety Authority is another body which may have an inspection function over Garda detention is a matter that must be addressed. Designations must be made in a way that reduces overlap, and encourages consistency, in terms of inspection functions by different bodies, but allows for flexibility in the parameters of this scope.

As noted above, NPMs must be able to have access to unofficial places of detention. For example, if Irish airports are used for the purpose of extraordinary rendition, the planes that land in the State’s jurisdiction are places of detention within the control of the State, and the deprivation of liberty is maintained either with the consent or acquiescence of the State.

The remit of each NPM must be sufficiently broad to allow for inspection in unofficial and suspected places of detention.

However, noting the above and the significant expansion of the remit of the Inspector of Prisons to include the inspection of all places of detention in the criminal justice sphere, the Commission is of the view that careful consideration should be given as to whether the Chief Inspector has the required resources and operational and financial independence to undertake and carry out effectively this additional mandate. The Commission also considers that clarification needs to be given as to the distinct roles of the Chief Inspector with regard to investigative and preventive functions. Clarity is also required as to how the existing duties of the Inspector of Prisons that are not referenced in the legislation, such as oversight of the prison complaints system, are to be carried out. In addition, given the significant change in role of the Chief Inspector, the Commission considers it essential to communicate this change in role publically to affected groups.

The Commission recommends that the remit of the NPM under this Head is broadened to ensure that it may address any gaps in inspection, either through focusing on the types of deprivation of liberty, or through a flexibility in the scope of the inspection function.

The Commission recommends that clarity should be provided as to what role the prospective Policing and Community Safety Authority may have in inspections of Garda detention.

The Commission recommends that clarity should be provided as to which jurisdiction NPM airports, including airports used for extraordinary rendition, and ports as places of detention fall under.

The Commission recommends that consideration should be given to the consequences of extending the remit of the Inspector of Prisons to include the entirety of the criminal justice sector.

The Commission recommends that there should be clarification with regard to the distinct investigative and preventive functions of the Chief Inspector.

The Commission recommends that there should be clarification with regard to how the existing duties of the Inspector of Prisons that are not referenced in the legislation are to be carried out.

The Commission recommends that in establishing the Chief Inspector of Places of Detention as the NPM for the entire Justice Sector, there should be an accompanying public information campaign regarding the scope of the Chief Inspector’s role.

Personal Data (Head 20)

This head sets out that personal data gathered by an NPM or international body in the course of an inspection is confidential and protected by the *Data Protection Acts*.

Article 21 OPCAT states that confidential information collected by NPMs shall be privileged.

Further:

“[n]o personal data shall be published without the express consent of the person concerned.”

For this provision to comply with OPCAT, Head 20 must expressly state that this information is privileged.

The Commission recommends that Head 20 is amended to specify that personal data gathered by an NPM or international body in the course of an inspection is confidential and privileged.

Protection from sanctions (Head 21)

This head sets out that persons providing information to NPMs or international bodies shall be protected from sanctions and other disciplinary procedure.

The Commission recommends that the State considers strengthening this provision in line with the New Zealand *Crimes of Torture Act 1989*.

Section 30(2) of the Act states:

“No person or agency who has provided information in good faith to a National Preventive Mechanism may, in respect of the provision of that information, be subject to any—

(a) criminal liability:

- (b) civil liability:
- (c) disciplinary process:
- (d) change in detention conditions:
- (e) other disadvantage or prejudice of any kind.”

The Commission recommends that consideration is given to strengthening Head 21 in line with the New Zealand *Crimes of Torture Act 1989*.



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