Justice Committee
Police and Fire Reform (Scotland) Bill
Written submission from the UK National Preventive Mechanism

Chapter 16

1. The National Preventive Mechanism (NPM) is a group of 18 organisations which monitor places of detention across the United Kingdom in accordance with the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The NPM would like to comment on Chapter 16 of the Bill concerning independent custody visiting. We welcome Chapter 16 and the placing of independent custody visiting in Scotland on a statutory footing and are pleased to see OPCAT and its requirements so explicitly referenced in the Bill. We have some concerns about section 91(4).

Background

2. The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is an international human rights treaty designed to strengthen the protection of people deprived of their liberty. It acknowledges that such people are particularly vulnerable to ill-treatment, and advocates that efforts to end ill-treatment focus on prevention through a system of regular visits to places of detention.

3. OPCAT requires States Parties to have in place a ‘national preventive mechanism’ (NPM), the role of which is to visit places of detention, including prisons, and monitor the treatment of and conditions for detainees. At a minimum, OPCAT requires that NPMs have the power to:
   - regularly examine the treatment of people deprived of their liberty in places of detention;
   - make recommendations to the relevant authorities with the aim of improving the treatment and conditions of detainees; and
   - submit proposals and observations concerning existing or draft legislation.

4. To enable NPMs to exercise these powers, they should have:
   - access to information concerning the number of people deprived of their liberty, the number of places of detention and their location;
   - access to information about the treatment and conditions of detainees;
   - access to all places of detention;
   - the opportunity to conduct private interviews with detainees and any other relevant person; and
   - freedom to choose which places they want to visit and who they want to interview.

5. OPCAT sets out certain key criteria that NPMs should meet. Perhaps the most important of these is that NPMs should be independent. The NPM must also be adequately resourced to carry out its role and its personnel should have the
necessary capabilities and expertise. There should also be a gender balance among the personnel and they should be representative of ethnic and minority groups.

6. The UK ratified OPCAT in December 2003 and designated its NPM in March 2009. Instead of designating one body as the NPM, the UK government chose to designate 18 existing inspecting and visiting bodies which already carried out roles similar to that of the NPM as envisaged in OPCAT. The NPM is coordinated by HM Inspectorate of Prisons. A list of the members of the UK’s NPM is appended to this letter. Further information about the UK’s NPM can be found in its annual reports.¹

**Custody visiting in Scotland**

7. Throughout the UK, visits to police custody are carried out by independent custody visitors. Their role fits well with the spirit of OPCAT – that independent and regular visits to places of detention are carried out for the purpose of monitoring the treatment of and conditions for detainees. When designating the NPM, the UK Government designated the Independent Custody Visiting Association (ICVA) for England and Wales, and the Northern Ireland Policing Board Independent Custody Visiting Scheme. No separate designation was made in respect of independent custody visitors in Scotland. Custody visitors in Scotland are, however, members of ICVA and so they have been treated as part of the NPM.

8. For the sake of clarity, however, for the independent custody visitors in Scotland themselves, for the other members of the NPM and for external stakeholders, it would be advantageous for the custody visitors in Scotland to be designated separately as a member of the UK’s NPM. The current situation, whereby custody visitors in Scotland perform much the same role as those in England, Wales and Northern Ireland but are not designated in their own right, is anomalous. There appears to be no objection in principle among relevant stakeholders to the custody visitors in Scotland being designated as the 19th member of the NPM.

9. OPCAT itself and best practice guidance does, however, dictate that NPMs have a statutory basis. This guarantees their right of access to places of detention and to detainees. Article 18(4) of OPCAT requires that, when designating NPMs, States should give due consideration to the Principles relating to the Status of National Institutions (the Paris Principles). Principle 2 states that, “A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.” In addition, guidelines published by the Subcommittee on Prevention of Torture, the treaty body established by OPCAT, state that, “The mandate and powers of the NPM should be clearly set out in a constitutional or legislative text.”

10. Although custody visiting in Scotland enjoys Scottish Government support at present, and multiple visiting schemes are in operation, to ensure compliance with OPCAT and the SPT’s guidelines, custody visiting in Scotland should be placed on a statutory footing.

¹ Available online at [http://www.justice.gov.uk/about/hmi-prisons/preventive-mechanism.htm](http://www.justice.gov.uk/about/hmi-prisons/preventive-mechanism.htm).
11. The NPM is therefore pleased that Chapter 16 of the Police and Fire Reform (Scotland) Bill does exactly this. Moreover, we are pleased that OPCAT and its requirements are replicated in the Bill and are explicitly referenced. This will provide a solid foundation for a strengthened custody visiting scheme in Scotland. In particular, the emphasis on independence in section 91(2) is welcome. We anticipate that once the Bill is passed, custody visitors in Scotland will be designated as a separate member of the NPM by the UK government.

12. We are concerned at section 91(4) and the possibility that custody visitors may be refused access to detainees. This provision is not reflected in OPCAT which instead envisions unfettered access for NPMs. It is worth noting for example, that other NPM members have no equivalent provision in their statutory remit. While we appreciate that there may be, in exceptional circumstances, grounds for refusing access to a particular detainee, such grounds should be very narrowly drawn and the refusal should be made of someone of higher rank than currently suggested. Section 91(4) can be compared unfavourably to section 92(4) which provides for access to a detainee to be denied to the SPT only in narrowly prescribed circumstances and with Ministerial authority. We therefore suggest that custody visitors’ access to detainees should only be denied in similar circumstances and that further consideration be given to the appropriate rank of the person authorised to refuse access (e.g. superintendent). The exceptional nature of any refusal of access should be made clear in guidance and there should be a memorandum of understanding between custody visitors and the police service regarding how operational issues will be dealt with and how necessary security measures will be taken.

Implementing the Bill

13. In implementing Chapter 16, regard should be had to OPCAT itself as well as guidelines on NPMs published by the SPT. In particular, governance arrangements for custody visiting in Scotland should ensure that independence, both actual and perceived, is maintained. The following points should be addressed to ensure the effective operation of independent custody visiting:

- custody visiting must be adequately resourced as required by Article 18 of OPCAT and set out in paragraph 11 of the SPT Guidelines;
- the terms of office of custody visitors should be specified (paragraph 9, SPT Guidelines);
- custody visiting should enjoy financial and operational autonomy (paragraph 12, SPT Guidelines);
- there should be a follow-up process between the police authorities and/or government and custody visitors to ensure recommendations are addressed (paragraph 13); and
- custody visitors should take into account human rights standards when carrying out visits (paragraph 36, SPT Guidelines).

Should the Committee require any further information about OPCAT and the role of the NPM, please do not hesitate to contact me.

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2 SPT, *Guidelines on national preventive mechanisms* CAT/OP/12/5 (9 December 2010).
Nick Hardwick CBE
HM Chief Inspector of Prisons, on behalf of the UK’s National Preventive Mechanism
6 March 2012

Members of the UK NPM

England and Wales
- Her Majesty’s Inspectorate of Prisons
- Independent Monitoring Boards
- Independent Custody Visiting Association\(^3\)
- Her Majesty’s Inspectorate of Constabulary
- Care Quality Commission
- Healthcare Inspectorate Wales
- Children’s Commissioner for England
- Care and Social Services Inspectorate Wales
- Office for Standards in Education

Scotland
- Her Majesty’s Inspectorate of Prisons for Scotland
- Her Majesty’s Inspectorate of Constabulary for Scotland
- Scottish Human Rights Commission
- Mental Welfare Commission for Scotland
- Scottish Commission for the Regulation of Care (now the Care Inspectorate)

Northern Ireland
- Independent Monitoring Boards (Northern Ireland)
- Criminal Justice Inspection Northern Ireland
- Regulation and Quality Improvement Authority
- Northern Ireland Policing Board Independent Custody Visiting Scheme

\(^3\) Although the Independent Custody Visiting Association is listed as an organisation operating in England and Wales, its membership includes independent custody visitors who operate in Scotland.