

The United Kingdom's National Preventive Mechanism: Five Years On

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The National Preventive Mechanism's response to diversifying models of detention: challenges for inspection and monitoring

**Introductory notes by
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Some of us here will remember all the efforts at the turn of the century to get the Optional Protocol to the Convention against Torture (OPCAT) through the United Nations processes. For so many years it had seemed highly unlikely that this would ever happen and then, with almost indecent suddenness, it did. We took great pride at the time that the United Kingdom was one of the first states to ratify the Protocol in December 2003 and that it then put great effort into securing the 20 signatures necessary for activation which was achieved in June 2006.

The states which ratified early fell into two groups. Many of them were countries which did not have mechanisms for independent inspection and which wished to use ratification as a means to establish these. Most of the countries in Western Europe used a different tactic; delaying ratification until they had the appropriate mechanism in place.

The UK, as one of the main protagonists, took a slightly different route. It was at the time one of the world leaders on independent inspection of places of detention. But it took some considerable time to agree the details of what would constitute its National Preventive Mechanism (NPM). I remember early meetings at the Ministry of Justice in the summer of 2006 when details were hammered out. It took three years before the United Kingdom was able to advise the UN that it had formally established its NPM, based on the existing inspection bodies. At that time there were 18 members and this has subsequently been increased to its current number of 20.

In the five years since 2009 there have been a number of significant developments both in respect of types and places of detention and also in the methods used by the UK state party to implement detention.

It is now timely to consider:

- whether all the situations in which persons can now be deprived of liberty in the United Kingdom are subject to regular independent monitoring by member bodies of the NPM and specifically whether any new models of detention are covered by the NPM; and
- whether the practice of the State Party (the UK Government) of delegating the actual deprivation of liberty to a variety of third parties has affected its obligations under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and whether this practice has any implications for monitoring carried out by members of the NPM.

Traditionally the state has taken direct responsibility for depriving people of their liberty but over the last 20 years there has been a growing tendency in the UK to delegate this responsibility to a wide variety of what are known as “providers”. In this workshop we are asked to consider the implications of these developments for the work of the NPM as a body and for its constituent members.

1. In its recently published 4th Annual Report the NPM confirms that it is alert to the need to keep its work under constant review. It mentions:
 - a case where preventive mechanisms failed to identify “horrific abuse”
 - the recent development of court custody inspections and monitoring of overseas escorts
 - its intention to identify any other type of detention that is not subject to independent statutory visiting, making particular reference to ‘de facto’ detention.
2. In the month of March there were three official reports which are relevant to these matters:

- The House of Lords Committee on the Mental Capacity Act 2005 found that the Deprivation of Liberty Safeguards contained in the Act are not fit for purpose. It noted,

“The intention of the safeguards is to provide legal protection for people who are being deprived of their liberty for their own safety. The evidence suggests that tens of thousands of people are being deprived of their liberty without the protection of the law, and without the protection that Parliament intended. The Government needs to go back to the drawing board to draft replacement provisions that are easy to understand and implement, and in keeping with the style and ethos of the Mental Capacity Act.”

The Committee recommended, among other things, that inspection needs to be given a higher profile.

- The Prisons and Probation Ombudsman published a bulletin warning immigration removal centres that they risk the health, wellbeing and safety of detainees with poor responses to emergency incidents, pointing out that of the 15 deaths which he has investigated in immigration detention since 2004 eight were deemed to be of concern due to a poor emergency response. He made recommendations to the Home Office for immediate action.
- The Public Accounts Committee strongly criticised the government’s lack of ability to negotiate and manage outsourcing contracts, drawing particular attention to the lack of openness surrounding security contracts.

Responding to the Committee’s report Paymaster General Francis Maude said, “We are turning the supertanker around but a lot of this is about change of attitude and culture and mindset, and that does take time.” He also said it was the government’s intention to get to a point where most contracts are published.

Discussion points for the Group:

- 1. To what extent have existing models of detention changed since 2009 and what new models have been introduced?**

In the last 13 years many countries, including the UK, have developed new forms of detention, arguing that there is a need for these in a world which is allegedly increasingly insecure and unsafe.

“Detention” is no longer as clear cut as it once was. Perhaps it was never clear cut but we are now increasingly aware of this fact.

OPCAT requires each NPM to regularly visit all places where people are deprived of their liberty. At this juncture it is appropriate that the UK NPM should satisfy itself that it is still able to exercise that obligation.

2. Do these developments have any implications for the way that the government fulfils its obligations under the Convention against Torture? To what extent, if any, can these obligations be delegated to third parties?

It is the state party which has taken on the legal obligations which are contained in the OPCAT and which must answer for any breaches of its treaty obligations. The UK state party has outsourced or contracted out the actual deprivation of liberty in a variety of settings.

The question we are asked to consider is how the NPM can ensure that the UK government continues to honour its obligations in an environment where it has ceded the actual deprivation of liberty to a number of third parties.

3. What are the implications of these developments for the NPM as a body and for its members as they carry out their inspection and monitoring functions? Specifically, what are the implications for NPM member organisations and agencies as they inspect, monitor and report on situations where detention of individuals is contracted or outsourced to non-state bodies?

One of the duties of the NPM is to “make recommendations based on human rights norms to relevant authorities”. The issue we are asked to consider here is, who is to be considered as a “relevant authority”.

In practice the NPM and its constituent members make recommendations at a number of levels, for example at local, regional and national levels. How is the NPM to interact with the different actors and who ultimately should it hold accountable?