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## GDP Webinar, 5.9.22

### Will cover:

- Some general points on NPM functions and powers
- Promise of NPMs and the challenges
- General comments rather than detail and examples - other speakers will say how they exercise those powers and the extent to which they are meeting the promise.

### 1. Powers and functions

- Most important point is that while states that ratify OPCAT have the responsibility for setting up NPMs, from then on NPMs are intended to be functionally independent bodies, which can help states to meet their human rights obligations.
- OPCAT sets out requirements for NPMs, including:
  - o Enough resources to carry out their monitoring function – that means a separate guaranteed budget.
  - o This then supports NPMs to have staff with the expertise they need to monitor detention properly.
  - o The state should give them access to information on numbers of detainees and their locations, and any relevant data on their treatment, and the conditions of detention.
  - o NPMs should not be obstructed from entering sites of detention, and once there they should be able to have private interviews with detainees, going wherever they want and speaking to whoever they want.
  - o The state is then obliged to consider the NPM's recommendations, engage in discussion about implementation, and, very important, ensure publication, at least of their annual report.
  - o Publicising findings and providing some transparency about what happens in detention is a critical part of the NPM's role.
  - o NPMs can also review and comment on existing or draft laws relating to deprivation of liberty – and that means they have a chance to influence policy before it's implemented.
- NPMs are meant to achieve all of this through encouraging and cooperative means. To be clear, that doesn't mean they can't be very critical of states if they need to be - but the starting point is an attempt at constructive discussion and influencing.
- Taken together, this means that in theory at least, NPMs have a powerful mandate, which can genuinely help them to expose what is happening in places of detention and push the authorities to make changes.
- Not surprisingly, these powers can lead to some tensions between NPMs and governments – in effect, OPCAT requires states to fund an organization which is then allowed to be critical of them. This means that NPMs have to be agile in working out how to get their recommendations implemented.

- But challenging the state's decision to detain in the first place is difficult territory for an NPM and not clearly within its remit. Unless they have a particularly receptive and sympathetic government, they won't therefore be dealing directly with the main priority of many campaigning organisations, which is to stop immigration detention.

## 2. Value of NPMs

- In this context, NPMs may be criticized for endorsing more use of detention
  - o encouraging small and insignificant improvements in detention conditions that don't reach the threshold of what could be considered acceptable against human rights standards such as those of the CPT.
  - o At worst can be accused of providing human rights 'window dressing' for states that have no intention of implementing their recommendations
  - o In either case, argument may be that they delay deeper reform.

A few points on this:

- NPMs occupy a unique position between the state and civil society, and they need both to understand and to push the limits of that role. But they should not in my view go beyond it and start to campaign against detention; in the same way that they shouldn't allow themselves to be fully absorbed by government and compromise their independence as a result.
- There are already plenty of groups filling the campaigning space, and to lose the distinct contribution of NPMs would be short-sighted.
- Instead, NPMs should look to occupy that 'in-between' space with energy.
- More power and potential influence there, than on either side of it, which is already crowded with NGOs and state audit mechanisms.
- While governments can't provide independent oversight of detention, NGOs don't have the access to detention that would allow them to understand what is happening inside.
- So by providing detailed evidence, NPMs provide crucial data both for governments that want to improve conditions, and also for NGOs that want to challenge detention.
- And they make sure that the public knows what is happening in their name.
- But independence doesn't mean detachment. In the same way that they can engage government in constructive and challenging dialogue, NPMs can also learn from NGOs that may have far more experience and expertise than they do, and use the intelligence that they provide.
- And where there is a dovetailing of the objectives of NPMs and NGOs, this can create concerted pressure towards positive change.
- E.g. positive changes in children's detention in UK as a result of reports that provided evidence that was used by lawyers and NGOs to campaign for reform. Eventually led to greatly reduced detention of families and better conditions.

## 3. Concluding points

- In theory, NPMs have a lot of influence in promoting positive change and can redress to an extent the power imbalance between detainees and the state.
- Even more important in immigration detention than prisons, because it's often the case across the world, that immigration detention is more hidden from view than criminal detention, is in worse facilities and with very limited regulation. Also, limited public concern or knowledge about conditions.
- The degree to which they can succeed depends on political willingness to listen to NPMs, and to their own commitment to exercising their powers.
- The argument that they might delay deeper reform is weak, in my view, partly because it's only by knowing what's happening inside detention in the first place that we can get into debates about the legitimacy of detention.
- And partly because telling the story of what happens on the inside by giving voice to detainees and gathering empirical evidence, is such an important way to confront the objectification of detainees and injustices that can occur at each stage of the system.
- Whatever their current flaws, in many countries, NPMs provide the best – possibly the only – pathway towards progress.