



## UK NPM Scotland Subgroup

### Response to the [Scottish Government's Human Rights Bill consultation](#)

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The UK's National Preventive Mechanism (NPM) was established in March 2009 after the UK ratified the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in December 2003. It is made up of 21 statutory bodies that independently monitor places of detention. In coordination across the four nations of the UK, the NPM focuses attention on practices in detention that could amount to ill-treatment.

The UK NPM Scotland Subgroup was established in 2014. It represents the interests of Scottish members of the UK NPM, and is open to NPM members who have a lead role in monitoring and inspecting places of detention across Scotland:

- HM Inspectorate of Prisons for Scotland (HMIPS)
- The Mental Welfare Commission for Scotland (MWCS)
- Scottish Human Rights Commission (SHRC)
- The Care Inspectorate
- Independent Custody Visiting Scotland (ICVS)
- HM Inspectorate of Constabulary for Scotland (HMICS)

**The UK NPM Scotland Subgroup broadly welcomes the Human Rights Bill and incorporation proposal. However, members hope to see full incorporation of all four treaties to the same extent, the inclusion of UNCAT and OPCAT, and a more ambitious programme of delivery.**

The NPMs parent treaty is United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and it also interacts with the ECHR, which covers civil and political rights protected through the Human Rights Act 1998 and the European Convention on Human Rights. Under Part 6: Incorporating Further Rights and Embedding Equality, it is proposed not to pursue incorporation of UNCAT in the framework legislation, due to the existing provisions under UK law and the constitutional settlement. **The NPM Scotland Subgroup strongly believes that the UNCAT and OPCAT should be incorporated in the Human Rights Bill (Scotland).**

The UK, though it has ratified OPCAT and designated an NPM, has not provided a legislative basis for the NPM, despite UN SPT recommendations to do so. While protections for the prohibition on torture are provided by the Human Rights Act 1998, the UN Committee Against Torture (CAT) has previously expressed its concern that the UK has not incorporated the UNCAT, despite ratifying it in 1988, recommending future exploration of incorporation as an option. The CAT made particular reference to the right to rehabilitation, which is not currently protected by UK domestic law. Incorporation of the UNCAT in the Human Rights Bill (Scotland) would therefore not only bolster the rights of those deprived of their liberty in Scotland, but improve mental and physical health outcomes following detention, including for any refugees finding a home in Scotland who are victims of torture in their countries of origin.

Incorporation of the UNCAT and OPCAT would be a welcome and overdue step to enshrining a clearer mandate for the NPM with a clear legislative footing, making a clear statement on the prohibition of torture in Scotland and taking proactive steps to prevent it through the duties and obligations set out in OPCAT.

The Human Rights Act is reserved to the UK Parliament, and this year was under threat of repeal; incorporation of UNCAT in Scottish legislation would provide an extra level of assurance and protection against torture in the context of potential attempts to repeal the Human Rights Act 1998. Incorporation of UNCAT would ensure that protections for people detained in Scotland or under Scottish authority are maintained in the event of any changes to the status of the ECHR in the UK. It would provide further security for the international prohibition on torture by strengthening protections for people deprived of their liberty in Scotland.

The Subgroup's response will deal primarily with the proposals relating to Scrutiny, followed by some ancillary points on other relevant questions. Particular consideration is given to how new duties for independent scrutiny bodies to identify and escalate issues will interact with members' individual statutory powers and their collective role under OPCAT. Necessarily, this raises questions of budget and resources for operationalisation of the Bill.

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### **Consultation question 30: What are your views on our proposals in relation to scrutiny bodies?**

Strengthening existing infrastructure of devolved scrutiny bodies is a positive step in the prevention of ill-treatment of people deprived of their liberty. As a membership body, the NPM recognises the advantages of a multi-institutional approach in upholding human rights and is also experienced in some of the challenges that multi-institutional approaches can pose. **The Subgroup supports these proposals overall, however, it has the following concerns.**

Under *Part 8: Ensuring Access to Justice for Rights-Holders*, three proposals are made regarding scrutiny bodies:

1. Require scrutiny bodies, when undertaking their functions, to assess the bodies they oversee in light of the human rights obligations in the Bill, and to consider how these bodies can further mainstream human rights in the Bill.
2. Enable scrutiny bodies to work more closely with each other – for example, making it easier to share information relating to human rights matters, being able to work together when looking at human rights issues and letting other scrutiny bodies know if there may be overlap in the issues they are looking at.
3. Require scrutiny bodies (including the SPSO) to inform the SHRC of any systemic human rights issues they come across, as well as informing other relevant organisations (such as the SPSO, the Children and Young People's Commissioner Scotland, the Mental Welfare Commission and Environmental Standards Scotland) of any systemic human rights issues that may be relevant to their organisations.

#### **Under proposal 1:**

The NPM Scotland Subgroup welcomes Human Rights Taskforce **Recommendation 19** for the Scottish Government to consider adequate resources and guidance necessary to support scrutiny bodies to fulfil these requirements.

Under OPCAT, members of the NPM Subgroup approach scrutiny from a human rights perspective and the NPM and its members have a Human Rights based approach in all that we do. Embedding human rights practices in the work of scrutiny bodies is to be welcomed, but to fulfil it as a requirement, scrutiny bodies must see increases in funding to allow for

relevant expertise to match expectations. **The Bill will simply not achieve its already modest ambitions if the Scottish Government does not fund its execution.**

For example, this year HMIPS had budget denied for the replacement of a fixed-term human rights lead. The Chief Inspector is unable to take on further obligations without expert legal capacity, therefore, **to take on these extra obligations, members will need significantly enhanced resource.** Consideration should also be given to any additions to current expectations in inspection, and the training needs of staff to cover these. The NPM expects close consultation and engagement to make meeting any further obligations a realistic goal.

NPMs are mandated under OPCAT Article 19(b) to “make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty”. The competent authorities of the State Party are obliged to “examine the recommendations...and enter into a dialogue with [the NPM] on possible implementation measures” (Article 22). **However, there are limits to scrutiny bodies’ impacts if the organisations under scrutiny do not accept and implement their recommendations.**

For example, MCWS 2022 report *Mental health support in Scotland’s prison 2021: under-served and under-resourced* echoes several of the recommendations made ten years earlier in *Mental Health of Prisoners: Themed visit report into prison mental health services in Scotland*.<sup>1</sup> The 2022 document remarks, “Little has changed: Today’s report disappointingly shows that while structures and processes are different, little has changed in relation to the outcome for prisoners’ mental health”. **Therefore, to make meaningful improvements to outcomes for people detained, there must be a focus on delivery on recommendations made by our members.**

In addition, the Subgroup has some concerns over the wording “require” in the proposed Bill. **Requiring independent scrutiny bodies to do anything must be done in line with their statutory bases; the Bill must reflect this.**

#### **Under proposal 2:**

Collaboration between scrutiny bodies is already prevalent and is to be encouraged. The NPM Subgroup has developed an effective forum for close joint work and consultation, not only among members but also with Health Improvement Scotland and other scrutiny bodies. The NPM allows for joint working on scrutiny of settings of deprivation of liberty. HMIPS routinely work with Care Inspectorate, HIS, Education Scotland, and SHRC. HMICS now deliver joint custody inspection programmes with Health Improvement Scotland. There is ongoing joint work and intelligence sharing with MWCS.

It may be useful to note that there is already a legislative basis for scrutiny bodies to work together under the Public Services Reform (Scotland) Act 2010:

S. 114: Duty of co-operation:

Scheduled scrutiny authorities must co-operate and co-ordinate activity with each other with a view to achieving the purpose of improve the exercise of the scrutiny functions of the scheduled scrutiny authorities in relation to

- (a) Local authorities
- (b) Social services

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<sup>1</sup> [PrisonReport-April2022.pdf \(mwscot.org.uk\)](#); [Mental health of Prisoners 2011.pdf \(mwscot.org.uk\)](#)

(c) Health services

(d) Policing

having regard to efficiency, effectiveness and economy.

The scheduled scrutiny authorities are:

- Accounts Commission for Scotland
- Food Standards Scotland
- Healthcare Improvement Scotland
- His Majesty's Inspectors of Constabulary
- His Majesty's Chief Inspector of Prisons for Scotland
- His Majesty's Chief Inspector of Prosecution in Scotland
- His Majesty's Inspectors of schools (Education Scotland)
- Mental Welfare Commission for Scotland
- Scottish Housing Regulator
- Social Care and Social Work Improvement Scotland (Care Inspectorate)

We feel that proposal 2 needs to be clearer on what aspects may not already be covered by existing legislation and how any proposed new or amended legislation would be framed.

The Subgroup therefore is concerned that any legislative *requirement* may lead to a lack of clarity over potentially overlapping obligations.

Any legislative requirement to work together must respect the independence of each inspectorate and its mandate.

Leadership and findings must have clear delineation to avoid diluting responsibilities through multiple actors. **We question whether the goal of close collaborative working is best achieved through legislation or is better actioned by joint working and memoranda of understanding at a local and sectoral level. This Bill should focus on tangible actions that will improve the lives of people in Scotland, and not the minutiae of relations between scrutiny bodies.**

**Under proposal 3:**

**Including question 31: What are your views on additional powers for the Scottish Human Rights Commission?**

SHRC is a member of the NPM and the Scotland Subgroup and provides welcome advice. However, the core duty of scrutiny bodies is the prevention of ill-treatment, rather than its investigation, and it is important not to blur these responsibilities. The subgroup welcomes the capacity to refer issues to SHRC – and work collaboratively to utilise their expertise - but is mindful that SHRC cannot take on the functions of these bodies, especially in light of an increased remit to cover under the Bill. SHRC will provide their own response, which we defer to on this matter.

### **Further consultation questions:**

- 1. What are your views on our proposal to allow for dignity to be considered by courts in interpreting the rights in the Bill?**
- 2. What are your views on our proposal to allow for dignity to be a key threshold for defining the content of MCOs?**

The Subgroup supports these proposals. The UNCAT recognises that the equal and inalienable rights of all people derive from the inherent dignity of the person, which underlies all the protections in the treaty for those deprived of their liberty. The ICCPR outlines that “all people deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person” (Article 10). Not treating people with dignity amounts to ill-treatment, prohibited under UNCAT, OPCAT, ECHR and HRA 1998.

HMIPS’ [standards for Inspecting and Monitoring Prisons in Scotland](#) outlines a human rights based approach founded on inherent dignity of all human beings, acknowledging that dignity is a central consideration in translating human rights law into realised outcomes for people. This recognises prisoners not as mere passive receivers of treatment but as active parties with an influence in how their rights are realised and how the state can fulfil its obligations. [MWCS](#) considers dignity as central to individualised treatment and upholding rights in care under deprivation of liberty.

**The NPM Scotland Subgroup hopes that allowing for dignity to be considered by courts in interpreting the rights of the Bill will widen courts’ interpretive toolkit in order to better uphold prohibitions on ill-treatment in closed settings. In line with our previous comments, the Bill misses the opportunity to create a legal obligation, rather than offering an option of interpretation.**

#### **Q. What are your views on the types of international law, materials, and mechanisms to be included within the proposed interpretative provision?**

The NPM Scotland Subgroup strongly believes that the UNCAT and OPCAT should be incorporated in the Human Rights Bill (Scotland). See page 1.

#### **Q. What are your views on the proposed model of interpretation?**

The UK NPM Scotland Subgroup broadly welcomes the Human Rights Bill and incorporation proposal. There is an issue with alignment of UNCRPD and ECHR with regards disability and deprivation of liberty. The CRPD Article 14(1)(b) requires that in no case shall a disability justify a deprivation of liberty however ECHR Article 5(2)(e) provides for mental disorder (a disability) as the basis for detention and this (with other criteria) is a provision of existing mental health legislation in Scotland. This should be considered further.

Members expected to see full incorporation in the creation of legal duties, rather than just a requirement on duty bearers to actively consider the rights in the ICERD, CEDAW and CRPD when delivering services. Members would like to see the same expectations and creation of legal duties with the additional incorporation of UNCAT

#### **Q. Do you agree or disagree with our proposed approach to the protection of healthy and sustainable food as part of the incorporation of the right to adequate food in ICESCR, rather than inclusion as a substantive aspect of the right to a healthy environment? Please give reasons for your answer.**

The right to food merits particular attention in closed settings, particularly in light of rising costs of living and the consequent fiscal challenges faced by those services. While the right

to adequate food is outlined in the ICESCR, the right to a healthy environment, including healthy and sustainable food, access to clean and potable water, and access to clean air, should also be prioritised for closed settings such as prisons, YOIs, custody, and care homes where people are deprived of their liberty. While we understand the framing in the consultation is necessarily around procedural aspects of awareness-raising, education and capacity building, and substantive aspects including non-toxic environments to live, work and play, it is important that policy makers are conscious of this right in closed settings where individual agency is limited or non-existent.

The human right to adequate food is recognised in several instruments, most comprehensively under the ICESCR, which may therefore be a more appropriate platform on which to base the protection of the right.<sup>2</sup> ICESCR Article 11.1 outlines the right to an adequate and continuously improving standard of living, including food, while 11.2 recognises the right of freedom from hunger or malnutrition. Moreover, the Committee on Economic, Social and Cultural Rights has affirmed the right to adequate food as indivisibly linked to the inherent dignity of the human person, a central concept to prevent ill-treatment, as outlined above.

Therefore, the NPM subgroup agrees it is appropriate to approach this right through the incorporation of the ICESCR. However, it is necessary to review approaches to this right in closed settings, asking what the Bill will accept as an “adequate” standard of food. The Committee on Economic, Social and Cultural Rights stipulates that the right to adequate food is not to be interpreted in a restrictive way that would equate it to “a minimum package of calories, proteins and other specific nutrients”, but that it is linked to prevailing social, economic, cultural, climatic, ecological and other conditions.<sup>3</sup> The core content of the right involves:

*The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture.  
The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.*

Article 2 ICESCR deals with the States’ obligation to achieve the full realisation of rights progressively, incorporating both the obligation to facilitate and to provide. Whenever an individual is unable, for reasons beyond their control, to enjoy the right to food by the means at their disposal, states have the obligation to fulfil/provide that right directly.

The concept of physical accessibility, central to the right to adequate food, is essential in closed settings, particularly “elderly people...and persons with persistent medical problems, including the mentally ill”.<sup>4</sup> Older persons have unique nutrition needs and inability to access enough wholesome food can expose them to a number of harmful health effects.<sup>5</sup> Therefore particular attention should be paid to food quality and environment in settings of deprivation of liberty orders.

For children in secure settings adequate nutrition and food environments should be protected by the UNCRC Article 27. While Scotland has incorporated this into domestic legislation, it is important that the right of children to good nourishment and nutrition, healthy

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<sup>2</sup> [G:e99f49942012 \(un.org\)](https://www.un.org/en/ga/doc/res/1994/res44_12.html)

<sup>3</sup> [G:e99f49942012 \(un.org\)](https://www.un.org/en/ga/doc/res/1994/res44_12.html) Paragraph 7

<sup>4</sup> [G:e99f49942012 \(un.org\)](https://www.un.org/en/ga/doc/res/1994/res44_12.html) Paragraph 13

<sup>5</sup> [Older Persons' Right to Adequate Food by Alan S. Gutterman, PhD, JD, DBA, MBA, CPG :: SSRN](https://www.ssrn.com/abstract=3444444)



education and associations with food be protected under the ICESCR (or the right to a healthy environment) as an essential component of their growth and development.

Adequate standards of food in closed settings is already an obligation under international law, and the subject of repeated calls for necessary improvements.

In prisons and custody, quality and volume of food is a common concern, most recently expressed following HMIPS inspections at HMP Barlinnie and HMP Addiewell. Food stock in police custody has also been an issue raised by ICVS since 2015. Inadequate quantity and quality is often linked to budgeting and resources. The Committee for Economic, Social and Cultural Rights emphasises that should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, it must demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, these minimum obligations.<sup>6</sup>

The Minimum Core Obligations should refer to these, but the NPM hopes for a more ambitious scope for this right in Scotland. European Prison Rule 22 covers the provision of a nutritious diet, prepared and served hygienically, and its prescription in national law. It does not enter into culturally acceptable or appetising food, or food environments. Though shorter, the UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) go further in providing for food of nutritional value and “wholesome quality”, well prepared and served.

All of this to say that **incorporating this right must translate to tangible improvements in the experiences of detainees, and it is not clear how this will manifest in the context of repeated recommendations from scrutiny bodies over two decades. If this Bill does change this state of affairs, it is to be welcomed. However, the NPM subgroup is concerned that incorporation of the right in a further piece of legislation will not change the longstanding reality.**

**Q. Given that the Human Rights Act 1998 is protected from modification under the Scotland Act 1998, how do you think we can best signal that the Human Rights Act (and civil and political rights) form a core pillar of human rights law in Scotland?**

It is not for the independent NPM to tell the Government how to signal that the Human Rights Act and civil and political rights form a core pillar of human rights law in Scotland. However, **the best way to show respect for international human rights is to comply with the obligations contained in international conventions and domestic interpretations of those obligations. Findings by NPM members, the CPT and SPT have all raised concerns about the Scottish Government’s upholding of these rights in places of deprivation of liberty. This must improve, whether or not it is further signposted in law.**

For example, in 2022 MWCS found instances of mentally unwell prisoners being kept in cells without access to the open air, contrary to the European and Nelson Mandela prison rules.<sup>7</sup> There are longstanding concerns regarding people with acute mental ill-health being held in prisons due to extended transfer times to hospitals and unavailability of beds. This fundamentally undermines the right to health in receiving timely, hospital-based care. In secure children’s homes (SCH), issues with staff recruitment and retention, continued cross-

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<sup>6</sup> [G:e99f49942012 \(un.org\)](https://www.un.org/en/development/desa/population/publications/pdf/workingpaper/WP2012_1.pdf)

<sup>7</sup> [PrisonReport-April2022.pdf \(mwscot.org.uk\)](https://www.mwscot.org.uk/PrisonReport-April2022.pdf)

border placements and late-night transportation continue to undermine full compliance with Article 5 ECHR and Article 37 UNCRC.

In police custody, custody visitors frequently raise the use of anti-ligature clothing as a concern, particularly in light of dignity. HMICS identified earlier this year that medical staff working in custody centres (Lanarkshire) found did not receive any specific human rights-based training. Human rights-based training can help to proactively respect and protect fundamental rights.

**Do you think certain public authorities should be required to report on what actions they are planning to take, and what actions they have taken, to meet the duties set out in the Bill?**

On the additional reporting duty that this would impose, members are mindful that this would need to align with existing reporting duties. In the areas covered by the NPM, this includes reporting obligations under UN Universal Periodic Review, responses to the SPT and CPT. The Scottish Government contributes to the UK's "formal engagement" with the UPR, Treaty Bodies (such as the UN Committee Against Torture – UNCAT – and Special Procedures.

What would be useful to bolster the upholding and progressive realisation of rights, would be to require, under this duty, responses to recommendations made by all scrutiny bodies. This would support the proposed duty to comply by encouraging proactive action plans to improve practice and conditions.

**How could the proposed duty to report best align with existing reporting obligations on public authorities?**

See response to Question 22.

**How can the Scottish Government and partners effectively build capacity across the public sector to ensure the rights in the Bill are delivered?**

Pervasive problems identified by scrutiny bodies in prisons, secure hospitals, secure children's homes, and police custody, repeatedly include the lack of resource to recruit, retain and train key staff. Until this is addressed, it is unlikely that the public sector will have full capacity to ensure that rights in the Bill are delivered. Likewise, the adequate resourcing of the scrutiny bodies themselves are crucial to ensuring the monitoring of closed conditions and prevention of ill-treatment.

**What are your views on monitoring and reporting?**

As mentioned above, requirements on the state and state institutions to report on their response to scrutiny reports and recommendations will support the improvement of rights in closed settings, especially given the nature of these places outside the public eye. While the Scottish Government carries out its core functions under UN guidance, this national level reporting will increase accountability for addressing rights violations or risks.

**Ends.**