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TE WĀNANGA O NGĀ KAUPAPA TURE Ā IWI O AOTEAROA

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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THE CASE FOR PUBLISHING OPCAT VISIT REPORTS IN NEW ZEALAND

Amy Dixon*

This article explores one aspect of the operation of the Optional Protocol to the Convention Against Torture (OPCAT) in New Zealand. The article focuses particularly on the reports on inspection visits to places of detention compiled by National Preventive Mechanisms required by OPCAT. Specifically, this article asks whether these reports could and should be published. It suggests that theoretically publication of visit reports would be beneficial in the New Zealand context, and that OPCAT does not prevent publication. It suggests, however, that publication of visit reports is not currently possible in New Zealand because of the duty of confidentiality in the Crimes of Torture Act 1989. It suggests that information could be more frequently reported via Parliament, but to publish individual reports, the Act must be amended.

I INTRODUCTION

Deprivation of liberty through state detention continues to be an important policy tool in New Zealand, used in criminal justice, health, social welfare, immigration and defence. Unfortunately, state detention is the locus of some of the most significant human rights abuses, resulting from the combination of the hidden nature of detention and the high level of state control.

New Zealand has recently begun to place more emphasis on improving the conditions of detention through visits to places of detention carried out by independent bodies designated as "National Preventive Mechanisms". These bodies are given powers to inspect and make recommendations for the improvement of conditions in places of detention under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or

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Punishment (OPCAT).[1] During the five years that the system has been operating, the National Preventive Mechanisms have reported real improvements in the conditions of detention.[2]

There remains, however, a lot of room to expand prevention efforts within this system. This article explores one relatively simple but significant option for doing so. In carrying out inspections, a huge amount of valuable information is collected about places of detention in New Zealand, in the form of visit reports. To date, these reports have been kept private. This article explores the issue of whether this information should and can be made public.

The article begins by setting out the basic framework of the OPCAT treaty in Part II. It explains how OPCAT aims to effect behavioural change in detention agencies through deterrence and constructive dialogue – mechanisms which can be positively or negatively affected by publication of visit reports. In Part III, the structure of the New Zealand OPCAT system is explained. Reasons are suggested for why visit reports have not been published to date: National Preventive Mechanisms are subject to a strict confidentiality duty in the Crimes of Torture Act 1989 – the Act which implements OPCAT in New Zealand; the system is still new; and proactive dissemination of official information is still relatively uncommon in New Zealand.

In Part IV, the article turns to explain why visit reports should be published. It first orients the issue of publishing visit reports within the debate about freedom of information, in which it has long been argued that transparency can increase effectiveness and accountability of government. It is argued, with reference to examples from the United Kingdom, that publishing visit reports can increase the effectiveness of the National Preventive Mechanisms. This is because dialogue is extended by increasing the number of actors who monitor the detention agencies in society, and this can enhance the deterrence created by OPCAT by creating a societal culture against ill-treatment. Further, publishing visit reports increases the accountability of the National Preventive Mechanisms themselves by enabling the public to scrutinise their activities.

In Part V, this article explains how the publication of visit reports is consistent with the underlying purpose of OPCAT, despite the fact that OPCAT gives states parties the option of keeping reports confidential. It explains that this option is designed to ensure that states will sign up to OPCAT even where they are not comfortable with publication. Where states are willing to publish, publication furthers the purpose of OPCAT because it contributes to the prevention of torture and other forms of ill-treatment.

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1 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 2375 UNTS 237 (opened for signature 18 December 2002, entered into force 22 June 2006) [OPCAT]. New Zealand ratified OPCAT on 16 March 2007.

2 See for example Human Rights Commission *Monitoring Places of Detention: Annual report of activities under the Optional Protocol to the Convention Against Torture (OPCAT) 1 July 2010 to 30 June 2011* (February 2012) [*OPCAT Annual Report 2011*] at 2.

The underlying purpose of OPCAT can only be upheld, however, if National Preventive Mechanisms respect two constraints set out in the Protocol. First, publication should not reveal confidential or private information. Secondly, National Preventive Mechanisms should ensure that publication will not undermine constructive dialogue between the National Preventive Mechanisms and state detention agencies. In some contexts, in order to maintain dialogue, it may be necessary to give the detention agencies some control over publication. But this article suggests that in a robust culture of transparency and human rights, the National Preventive Mechanisms will both be able to publish comprehensive visit reports and maintain constructive dialogue.

Finally in Part VI, this article returns to the main obstacle currently preventing publication of visit reports: the duty of confidentiality in the Crimes of Torture Act. It argues that, notwithstanding this duty of confidentiality, more information could be included within the current annual reports that are tabled in Parliament, and that these reports may be tabled more frequently (such as monthly). However, the article concludes by suggesting that in order to clear the way for visit reports to be published in full, it is essential that the Act be amended.

II KEY ASPECTS AND THEORETICAL BASIS OF OPCAT

OPCAT establishes a framework for an innovative two-tiered system of preventive monitoring. The monitoring is carried out by an international body, the Subcommittee on Prevention of Torture (the SPT), and by national bodies – the National Preventive Mechanisms (the NPMs) of "any place … where persons are or may be deprived of their liberty".[3] Rather than establishing new substantive human rights standards, this framework provides a practical mechanism which helps states parties to fulfil their obligation to prevent torture, and cruel, inhuman or degrading treatment or punishment under the United Nations Convention against Torture.[4] The bodies set up by OPCAT aim to increase human rights compliance in state detention through deterrence and dialogue with states parties.

A OPCAT: The Basic Framework

On one level, OPCAT establishes the SPT, an international body which visits and advises states parties. This committee consists of 25 members who reflect the diverse nature of the states parties and have relevant professional expertise.[5] The SPT visits places of detention and makes

3 OPCAT, art 4(1). See also Association for the Prevention of Torture *Optional Protocol to the Convention Against Torture: Implementation Manual* (Geneva, 2010) [*Implementation Manual*] at 12–13.

4 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987) [UNCAT]; and OPCAT, art 1. See also Rachel Murray and others *The Optional Protocol to the Convention Against Torture* (Oxford University Press, Oxford, 2011) at 1.

5 OPCAT, art 5.

recommendations to states parties on the protection of persons deprived of their liberty.[6] The SPT also advises and assists both states parties and the NPMs themselves to establish and strengthen NPMs.[7] Under OPCAT, states parties are required: to give the SPT access to places of detention and relevant information; to examine the SPT's recommendations; and to "enter into dialogue with it on possible implementation measures".[8] While this paper focuses closely on the domestic OPCAT system through the work of the NPMs, the background and work of the SPT informs the general context of OPCAT.

The real strength of the OPCAT system is found on the national level.[9] Whereas the SPT, at current resource levels, is only able to make a full visit to each state party every 20 years,[10] the NPMs work closely with state agencies that hold detainees, making regular visits and recommendations on the conditions of detainees. OPCAT imposes on states parties an obligation to establish at least one functionally independent, adequately resourced NPM.[11] As with the SPT, states are also required to guarantee the NPMs access to places of detention and relevant information,[12] and to enter into dialogue on the recommendations made by the NPMs.[13]

B Mechanisms of Behavioural Change Underlying Prevention in OPCAT

The object of OPCAT is for the SPT and the NPMs to carry out regular visits to places of detention to prevent torture and other forms of ill-treatment.[14] The main assumption underlying OPCAT is that the visits will lead to prevention via the two main pathways of deterrence and constructive dialogue.[15] As with all human rights treaties, theories of behaviour change connect these practical mechanisms with the desired outcome of compliance, in this case, prevention of

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6 Article 11(1)(a).

7 Article 11(1).

8 Article 12.

9 Murray and others, above n 4, at 115; and Manfred Nowak *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment* A/61/259 (2006) at [71].

10 Subcommittee on the Prevention of Torture *Fifth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* CAT/C/48/3 (2012) at [44].

11 Articles 17 and 18.

12 Article 20.

13 Article 22.

14 See OPCAT, art 1.

15 Nowak *Report of the Special Rapporteur*, above n 9, at [72].

torture and ill-treatment.[16] These theories explain how publication might enhance or undermine deterrence and dialogue.

Ryan Goodman and Derek Jinks identify three distinct mechanisms of behaviour change which induce human rights compliance: coercion, persuasion and acculturation.[17] Coercion influences actors by increasing the benefits of compliance or the costs of non-compliance.[18] Persuasion effects change by actively convincing actors to internalise new norms.[19] Acculturation is a form of influence whereby actors adopt norms to assimilate into the surrounding culture.[20] As Goodman and Jinks argue, an effective human rights regime may combine all three of these mechanisms, which each work optimally under different conditions.[21]

Deterrence encompasses elements of both coercion and acculturation. Deterrence works on the assumption that torture and other forms of ill-treatment are most likely to occur behind closed doors where perpetrators are immune from scrutiny.[22] By opening up places of detention to scrutiny, the potential perpetrators are less likely to feel able to continue such ill-treatment.[23] Actors are deterred either through fear of sanctions (coercion) or because of a desire to avoid the shame of social disapproval (acculturation).

OPCAT recognises that deterrence alone is not enough to bring about compliance. The driving force of OPCAT is the dialogue between the monitoring bodies and the state. The philosophy behind OPCAT is that change is possible by cooperation through constructive dialogue.[24] The purpose of OPCAT is "not to condemn states, but, through advice, to seek improvements" in the conditions of detention.[25]

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16 Ryan Goodman and Derek Jinks "How to Influence States: Socialization and International Human Rights Law" (2004) 54 Duke LJ 621.

17 See generally Goodman and Jinks, above n 16.

18 At 633.

19 At 635.

20 At 638.

21 At 700.

22 Nigel Rodley *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment* A/56/156 (2001) at [35].

23 Nowak *Report of the Special Rapporteur*, above n 9, at [67].

24 Subcommittee on the Prevention of Torture *Fourth annual report of the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* CAT/C/46/2 (2011).

25 Commission on Human Rights *Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations Office at Geneva addressed to the Under-Secretary-General for Human Rights* E/CN4/1991/66 (1991) at [5].

The theory of behaviour change behind dialogue is persuasion. The "managerial model" of compliance, proposed by Abram Chayes and Antonia Chayes, explains how persuasion through dialogue can bring about compliance. Assuming that most states wish to comply with treaties,[26] the model contends that non-compliance arises not out of wilful violation, but rather from insufficient information, understanding or capability.[27] Where performance is less than adequate, it is "a problem to be solved by mutual consultation and analysis, rather than an offense to be punished".[28] In fact, the actors within the detention agencies themselves are often not the problem: many problems can arise because of a lack of resources and attention from the state. The NPMs may thus help to strengthen the agencies' argument for more resources from central government.[29]

These underlying mechanisms of deterrence and dialogue set the scene for the design of an appropriate publication strategy for the NPMs. Publication can buttress both deterrence and dialogue by increasing the effectiveness of persuasion and acculturation. On the other hand, as discussed in Part V, publication must not undermine these mechanisms and, in particular, must not undermine the constructive dialogue with the detention agencies.

III IMPLEMENTATION OF OPCAT IN NEW ZEALAND

As noted above, OPCAT sets up the framework for an important domestic mechanism which works through deterrence and dialogue. But OPCAT gives states parties significant freedom both around institutional design and around decisions on more peripheral issues such as publication. New Zealand has established multiple NPMs endowed with wide powers going beyond what the treaty requires. In terms of the publication of information, however, the New Zealand system has, so far, been less bold.

A Structure of the New Zealand OPCAT System

New Zealand ratified OPCAT on 16 March 2007 after implementing its obligations through an amendment to the Crimes of Torture Act 1989.[30] With respect to the SPT, this Act closely follows the requirements of OPCAT, setting out wide powers necessary for visits by the international monitoring body. As required by OPCAT, the Act also sets out the NPMs' powers. Additionally,

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26 Abram Chayes and Antonia Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge (Mass), 1995) at 3–9.

27 At 9–17. For recognition of this assumption in the OPCAT context, see also Nowak *Report of the Special Rapporteur*, above n 9, at [72].

28 At 26.

29 Rodley, above n 22, at [36].

30 Crimes of Torture Amendment Act 2006.

each NPM is also endowed with the powers, protections, privileges and immunities that it has under any other Act.[31]

Unlike many other jurisdictions, New Zealand opted for multiple NPMs, each monitoring different types of detention facilities.[32] The Human Rights Commission – the central NPM[33] – has no inspection powers. Instead, it coordinates the four other NPMs, communicates with the SPT and may, in consultation with the other NPMs, make recommendations on anything related to the prevention of torture and other cruel, inhuman and degrading treatment or punishment.[34]

Additionally, there are four NPMs mandated to monitor places of detention.[35] The Independent Police Conduct Authority monitors police cells or other places of police custody. The Office of the Children's Commissioner monitors Child, Youth and Family residences. The Inspector of Service Penal Establishments of the Office of the Judge Advocate General covers military detention. Finally, the Ombudsman's jurisdiction covers prisons, health and disability places of detention, immigration detention and, together with the Office of the Children's Commissioner, Child, Youth and Family residences.

Under the Crimes of Torture Act, these NPMs must regularly visit the places of detention that fall under their mandate.[36] The NPMs have wide powers of access to sites and information.[37] NPMs make recommendations to the detention agencies for improvements to conditions of detention and the treatment of detainees, and for the prevention of torture or other forms of ill-treatment.[38]

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31 Crimes of Torture Act 1989, ss 34 and 35. The main Acts which govern the National Preventive Mechanisms [NPMs] include the Ombudsmen Act 1975, the Independent Police Conduct Authority Act 1988, the Children's Commissioner Act 2003 and the Court Martial Act 2007. For example, the Ombudsman has powers under the Ombudsmen Act to compel persons to provide evidence: see Ombudsmen Act, s 19.

32 NPMs are designated by notice in the *New Zealand Gazette* as per the Crimes of Torture Act, ss 26 and 31.

33 "Designation of Central National Preventive Mechanism" (21 June 2007) 69 *New Zealand Gazette* 1816.

34 Crimes of Torture Act, s 32.

35 "Designation of National Preventive Mechanisms" (30 April 2009) 57 *New Zealand Gazette* 1344 and "Amendment – Designation of National Preventive Mechanisms" (28 May 2009) 76 *New Zealand Gazette* 1786.

36 Section 27(a).

37 Crimes of Torture Act, ss 28–30.

38 Crimes of Torture Act, s 27(b).

In practice, the NPM inspects the institution, checking whether the facility complies with some minimum standards drawn from international human rights instruments.[39] The NPM then shares its main findings orally with the agency at the end of its visit.[40] Common practice is that the NPM will then present a visit report to the agency within three months.[41] These reports contain the NPM's main findings and recommendations, which may then lead to on-going dialogue on identified issues.[42]

B Why Are Visit Reports Not Currently Published?

New Zealand's NPMs currently publish little more than what OPCAT expressly requires. The only explicit obligation in OPCAT to publish information is the requirement for the state to publish and disseminate an annual report on the activities of the NPMs.[43] The Crimes of Torture Act meets this obligation through a provision requiring NPMs to publish "at least 1" report on the exercise of their functions annually.[44] The NPMs duly publish a brief combined annual report on their activities,[45] as well as occasional thematic research-based reports.[46] Although this practice meets international obligations, New Zealand generally falls behind the international trend towards increasing OPCAT's effectiveness by publishing visit reports. A number of NPMs in other

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39 For a comprehensive list of the international instruments from which the NPMs' standards are drawn see Human Rights Commission *OPCAT Annual Report 2011*, above n 2, at 22. Beyond the main human rights treaties, relevant instruments include for example the *Standard Minimum Rules for the Treatment of Prisoners* ESC Res XXIV (1957) and ESC Res LXII (1977); and *United Nations Standard Minimum Rules for the administration of Juvenile Justice* A/RES/40/33 (1985) [*The Beijing Rules*].

40 Human Rights Commission *OPCAT Annual Report 2011*, above n 2, at 21.

41 See Ministry of Justice *The achievement of the National Preventive Mechanisms designated to monitor places of detention in New Zealand* (23 November 2011) at [12].

42 Human Rights Commission *OPCAT Annual Report 2011*, above n 2, at 21.

43 OPCAT, art 23.

44 Sections 27(c) and 36.

45 The most recent report, released in 2013, is around 20 pages long and contains a brief summary of the key operations and findings of each NPM: Human Rights Commission *Monitoring Places of Detentions: Annual report of activities under the Optional Protocol to the Convention Against Torture (OPCAT)* (December 2013). Each NPM also includes the same information in its individual annual report: see for example Office of the Ombudsman *Report of the Ombudsmen* (30 June 2011).

46 See for example Independent Police Conduct Authority *Thematic Report: Deaths in Custody – A Ten Year Review* (June 2012).

jurisdictions publish NPM visit reports, either in full or truncated form.[47] Several factors have likely contributed to New Zealand falling behind this international trend.[48]

The most significant legal factor, which this paper will address further in Part VI, is that NPMs are unsure of the scope of their strict duty of confidentiality under the Crimes of Torture Act. That Act holds that all information given to the NPMs must be kept confidential unless one of three exceptions applies.[49] The scope of the prohibition on publication, which is discussed in detail in Part VI, is far from clear. NPMs may have interpreted this provision to preclude publication of their visit reports. Further, the uncertain scope of this provision would in any event have increased the reluctance of NPMs to engage with the issue of publication, particularly because they must already prioritise their focus due to resource constraints.

Besides this legal constraint there are a number of more practical contextual factors which likely explain the lack of focus on publication. First, the New Zealand OPCAT system, established in 2007, is still relatively new and under-resourced.[50] During the first five years, the NPMs have likely focused primarily on increasing the effectiveness of the visits themselves. This task would have required much attention and, in the face of limited resources, would have overshadowed any peripheral issues such as increasing the amount of information published. Like any new policy, the exact design of publication would also require some thought and consultation. In New Zealand, this is complicated further because there are multiple NPMs to be involved in designing a publication strategy. This may require time and resources that a growing system simply does not have.

The fledgling system would likely also be concerned about establishing strong relationships between the NPMs and the monitored agencies. As discussed, a key concept of OPCAT is "constructive dialogue" between parties. How publication affects this dialogue process is an issue relevant to designing any publication strategy and will be discussed further in Part V. However, during the early stages of the system, more than any other time, publication may undermine the process of building trust between actors – something of which NPMs are no doubt aware. This is even more so if there is no prior history of independent monitoring of the detention agencies, as is the case in New Zealand.[51]

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47 Such jurisdictions include the United Kingdom, France, the Czech Republic, Estonia, Switzerland and the Maldives: see Association for the Prevention of Torture *OPCAT Status Ratification and Implementation* (Geneva, 2010).

48 See generally Human Rights Commission *The Optional Protocol to the Convention against Torture (OPCAT) in New Zealand 2007–2012* (April 2013) [*OPCAT 2007–2012*] at 45–46.

49 Section 33.

50 Ministry of Justice *The achievement of the National Preventive Mechanisms*, above n 41.

51 OPCAT has introduced independent monitoring in New Zealand for the first time to many places of detention including prisons and Child, Youth and Family residences: see Richard Harding and Neil Morgan "OPCAT in the Asia-Pacific and Australasia: Themes for Planned Action" (2010) 6 EHRR 99.

More generally, New Zealand is yet to establish a strong culture of proactive release of government information. If one views the NPMs as bodies with some connection to the state, NPMs are not anomalous in their lack of proactive publication. In the past 20 to 30 years, the government has slowly become more transparent, particularly due to the advent of the Official Information Act 1982.[52] Nevertheless, much of this transparency has been reactive – information is often only released where requested. The rate of proactive disclosure by government and other official agencies is still relatively low.[53] The current Government has also recently rejected the Law Commission's recommendation that it move towards more proactive disclosure.[54]

Against this background, alongside their reluctance to disclose due to the law or lack of resources, the NPMs' limited publication of information from inspections may simply be a symptom of a wider reluctance of state agencies in New Zealand to move towards proactive release of government information.

IV JUSTIFICATIONS FOR PUBLISHING VISIT REPORTS: INCREASING NPM EFFECTIVENESS AND ACCOUNTABILITY

Although they are independent institutions set up under OPCAT, NPMs perform a public function similar to other state institutions and hold information useful to society. The publication of visit reports is beneficial for society in the same way that proponents of freedom of access to information argue that transparency of public institutions is important: publication increases both the effectiveness and accountability of the NPMs.

The importance of freedom of information is increasingly being recognised around the world. International law states that the right to freedom of speech includes the right to receive information, although the extent of state obligations arising out of this right is as yet unclear.[55] The United Nations Human Rights Committee has stated that freedom of expression includes a positive obligation to guarantee access to information held by public bodies.[56] Among regional human rights

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52 See Law Commission *The Public's Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012).

53 Law Commission *The Public's Right to Know*, above n 52, at 256.

54 Ministry of Justice *Government Response to Law Commission Report on The Public's Right to Know: Review of the Official Information Legislation* (4 February 2013).

55 *Universal Declaration of Human Rights* GA Res 217, III (1948), art 19; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 19.

56 United Nations Human Rights Committee *Gautier v Canada* CCPR/C/65/D/633/1995 (1999) at [13.4]; and United Nations Human Rights Committee *General Comment 24* CCPR/C/GC/34 (2011).

bodies, the Inter-American Court on Human Rights has recognised such a right,[57] and recent case law from the European Court of Human Rights suggests that this right is included within freedom of expression.[58] Simultaneously, states around the world are ensuring access to official information through legislation.[59] New Zealand has done so in the form of the Official Information Act 1982.

This movement towards access to public information is for good reason – it is generally recognised as a vital element of a well-functioning democracy.[60] The purpose of the Official Information Act encapsulates the key rationales for open government – namely effectiveness and accountability. Official information should be made available:[61]

(i) to enable … more effective participation in the making and administration of laws and policies; and

(ii) to promote the accountability of Ministers of the Crown and officials.

Official but independent institutions that monitor the state – such as the NPMs and ombudsmen – are often not subject to freedom of information legislation, primarily because of the need to manage transparency in a way that is consistent with fostering relationships (with both informants and the state) that are essential to their monitoring functions.[62] These good reasons for withholding certain information do not, however, render the benefits of transparency any less potent. In fact, there is a compelling argument that the benefits are much greater in this context.

Monitoring institutions of this kind exist for the very same reasons that underpin open government: to increase effectiveness and accountability of government. Thus, as far as possible, these institutions should promote, rather than be exempt from, freedom of information. Occupying the space between the state and civil society, these institutions should "act as role models and … cooperate with and promote information and dialogue between the two parties".[63]

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57 *Reyes v Chile* Series C No 151, ICHR 19 September 2006.

58 *Társaság a Szabadságjogokért v Hungary* (37374/05) Section II, ECHR 14 April 2009; and *Kenedi v Hungary* (31475/05) Section II, ECHR 26 May 2009.

59 See Law Commission *The Public's Right to Know: A Review of the Official Information Act 1982 and Parts 1–6 of the Local Government Official Information and Meetings Act 1987* (NZLC IP18, 2010) at 25.

60 Abid Hussein *Report of the Special Rapporteur on Freedom of Opinion and Expression* E/CN4/1995/32 (1995) at [35]; Committee on Official Information *Towards Open Government: General Report* (1981) at [20]; and Christopher Hood "A Historical Perspective on Transparency" in Christopher Hood and David Heald (eds) *Transparency: The Key to Better Governance?* (Oxford University Press, Oxford, 2006).

61 Official Information Act 1982, s 4(a).

62 See Law Commission *Report: The Public's Right to Know*, above n 52, at [14.31]–[14.32].

63 Danish Institute for Human Rights "An Introduction to Openness and Access to Information" (2005) at 76.

On one level, these monitoring institutions play a particular role in promoting public awareness and participation because of their privileged situation in respect of information about the government's activities.[64] In the case of such institutions, the publication of information does not simply increase the effectiveness of participation in any standard government task, which would often be the goal of the release of official information. Much more significantly, publication promotes public participation in holding the government to account – one of the very goals of freedom of information.

On another level, these institutions should themselves be held accountable in order to send a proper message to other state institutions. The Law Commission, in its recent review of the Official Information Act, states: "It does not send a satisfactory message if the Ombudsmen, the authority charged with holding other agencies to account under the [Official Information Act], are themselves completely exempt from it."[65]

Aside from these general reasons for why NPMs, as official institutions, should increase transparency, current resource limitations make transparency a much more pressing issue for NPMs. In the face of current resource constraints, publishing visit reports is a cost-effective way to increase NPM effectiveness by enhancing the deterrence and dialogue effects underlying OPCAT. Further, publishing visit reports introduces another layer of NPM accountability.

The next section explains in depth, based primarily on theory, how publication would increase both NPM effectiveness and accountability. Because of the indirect nature of the relationship, it can be difficult to point to empirical evidence of the benefits of publication. However, it is possible to highlight examples of attention given to visit reports by civil society in jurisdictions which do publish the reports, such as the United Kingdom.

A Increasing Effectiveness

Under current resource constraints, increasing effectiveness through cost-effective measures such as publication is very important. Due to limited resources, the NPMs do not inspect detention facilities every year; indeed, for some of the NPMs, the percentage of facilities visited each year is very low.[66] For example, in 2011, the Independent Police Conduct Authority visited around 15 per cent, and the Ombudsman visited around 20 per cent, of their designated sites.[67] Resources also limit the monitoring of the full array of facilities which fall within the definition of places of

64 At 63.

65 See Law Commission *The Public's Right to Know*, above n 52, at [14.26].

66 Ministry of Justice *The achievement of the National Preventive Mechanisms*, above n 41, at 6.

67 Ministry of Justice *The achievement of the National Preventive Mechanisms*, above n 41, at 3.

detention under OPCAT.[68] The Human Rights Commission notes that "NPMs have undertaken careful prioritisation and planning of monitoring activities, focussing on 'formal' places of detention and adopting a 'risk management' approach where necessary".[69] Limited resources also constrain the ability of NPMs to do other preventive activities outside of visits, such as civil society consultations.[70]

It seems unlikely that the OPCAT monitoring system will receive more resources in the near future.[71] Despite calls for more funding, the Government has confirmed that there is no additional funding available.[72] The NPMs face an uphill battle for extra resources not only because of limited government funds, but because it is difficult to provide the necessary evidence that torture prevention is working.[73] Gains for human rights are themselves particularly difficult to measure, in large part because it is difficult both to define and measure the standards for comparison, and to determine a causal relationship between the measures taken and the improvement in human rights.[74]

Publishing visit reports thus seems to be an extremely important tool for increasing effectiveness within current resources. To recapitulate, the two key pathways through which the NPMs achieve prevention of human rights breaches are the direct pathway of dialogue and the indirect pathway of deterrence. By engaging civil society through increased information, publication adds layers to the existing dialogue between the NPMs and the monitored agencies. Publication also plays a key role in enhancing acculturation – the theory of behaviour change underlying deterrence.

1 Dialogue

Publication of visit reports can increase the direct effect envisioned by OPCAT by involving a wider number of actors in the dialogue with detention agencies. The SPT has stated that publication is a means of enhancing the dialogue with states by improving the knowledge of those who can share in the task of prevention.[75] While publication can generally engage individuals in society, it is

68 OPCAT, art 4(1). For example, although aged care facilities would fall within the Ombudsman's mandate of "health and disability places of detention", the Ombudsman is unable to cover these at current resource levels: see Ministry of Justice *The achievement of the National Preventive Mechanisms*, above n 41, at 3.

69 Human Rights Commission, above n 2, at 18.

70 This was the case for the Independent Police Conduct Authority in the 2011 year, in which fewer than the target of 30 visits were completed because the Authority broadened its focus to other activities including "research, evaluation and engagement with outside groups": Human Rights Commission, above n 2, at 7.

71 Ministry of Justice *The achievement of the National Preventive Mechanisms*, above n 41, at [3]–[7].

72 Ministry of Justice *The achievement of the National Preventive Mechanisms*, above n 41, at [3]–[7].

73 Ministry of Justice *The achievement of the National Preventive Mechanisms*, above n 41, at [14].

74 Richard Carver *Does Torture Prevention Work? Outline of a 3 Year Research Report Commissioned by the APT* (Association of the Prevention of Torture, 2012) at 5.

75 Subcommittee on the Prevention of Torture *Fourth annual report*, above n 24, at [47] and [58].

the engagement of civil society or non-governmental organisations (NGOs) which is most likely to increase the effectiveness of NPMs.

NGOs play an important role in the effectiveness of human rights protection in a society.[76] International human rights treaty bodies generally recognise the essential role that civil society plays in all stages of the process of state reporting, including ongoing monitoring of implementation of treaty bodies' recommendations.[77] The SPT recognises the importance of civil society, and encourages NPMs to maintain dialogue with such groups.[78] As the SPT appropriately states: "There should be no exclusivity in the prevention of torture."[79]

To date, New Zealand's NPMs have consulted civil society on relevant issues in the pre-inspection process, and in reviewing policy and proposed legislation.[80] Publication is thus an opportunity to extend the role that civil society plays within the OPCAT system, which is currently limited by resource constraints. Indeed, by engaging civil society on a larger scale through increased information, the NPMs may "become the centre of a national torture prevention network".[81]

Civil society might add general weight to the dialogue existing between NPMs and the monitored agencies: visit reports can provide resources for civil society action, which increases the pressure on agencies or elected officials to change practices and policies.[82] The specific detail

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76 See for example Council of Europe *In Our Hands: The effectiveness of human rights protection 50 years after the Universal Declaration* (1998) <www.coe.int> at 5.

77 Michael O'Flaherty *Human Rights and the UN: Practice before the Treaty Bodies* (2nd ed, Kluwer Law International, The Hague, 2001) at 4–14; Michael O'Flaherty and Pei-Lun Tsai "Periodic Reporting: The Backbone of the UN Treaty Body Review Procedures" in M Cherif Bassiouni and William A Schabas (eds) *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia, Antwerp, 2011) 37 at 40–41.

78 Subcommittee on Prevention of Torture *Analytical self-assessment tools for National Preventative Mechanisms* CAT/OP/1 (2012) at [23].

79 Subcommittee on Prevention of Torture *The approach of the Subcommittee on Prevention of Torture to the concept of Prevention of Torture and other cruel, inhuman or degrading treatment or punishment under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* CAT/OP/12/6 (2010).

80 See Human Rights Commission *OPCAT 2007–2012*, above n 48.

81 Murray and others, above n 4, at 126.

82 Association for the Prevention of Torture *Civil Society and National Preventive Mechanisms* (Geneva, 2008) at 19–21; Michele Deitch "Distinguishing the Various Functions of Effective Prison Oversight" (2010) 30 Pace L Rev 1438 at 1443; Scott Calnan *The Effectiveness of Domestic Human Rights NGOs: A Comparative Study* (Martinus Nijhoff Publishers, Leiden, 2008) at 174.

which NPMs can provide is likely to result in more effective, focused civil society action. As Michael O'Flaherty notes in respect of international human rights monitoring:[83]

> … all those who wish to see change in society or governmental practice must have as a starting point for their campaigns and activities an understanding of the government position on the matters in question.

NGOs might also play a greater role in directing the media to the most newsworthy issues that come out of reports.[84] For example, in the United Kingdom, organisations such as the Howard League and "Freedom from Torture" issue responses to the HM Inspectorate of Prisons' visit reports.[85] The Howard League has also released more general reports based on OPCAT visit information.[86] Further, the Home Office, the detention agency responsible for prisons, in writing its own reports, has cited Howard League reports.[87] Opposition parties in the United Kingdom Parliament have also drawn attention to negative aspects of visit reports.[88]

Civil society can actively engage in the monitoring process by following the implementation of the NPMs' recommendations. The underlying basis for compliance in OPCAT is persuasion: the state has an obligation to enter into a dialogue with the NPMs around possible implementation measures but, if this fails, there are no coercive powers to ensure that recommendations are implemented. In fact under the Crimes of Torture Act, there is no provision ensuring that any dialogue does occur.[89] Generally it seems that the NPMs do monitor the implementation of recommendations on an ongoing basis, carrying out follow-up visits. Nevertheless, the eyes of civil society would add an extra safeguard and a higher level of pressure to ensure that recommendations are not disregarded over time. For example, in the United Kingdom, the organisation "Action for Prisoners' Families" has highlighted on its website a recommendation from the NPM visit report that

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83 O'Flaherty *Human Rights and the UN*, above n 77, at 2.

84 O'Flaherty *Human Rights and the UN*, above n 77, at 4.

85 See for example The Howard League for Penal Reform "Ashfield: Serco-run children's prison was a 'hotbed of violence and abuse'" (press release, 4 June 2013) <www.howardleague.org>; and Freedom from Torture "HMIP Report Uncovers Flaws in UKBA Detention Practices" (16 August 2012) <www.freedomfromtorture.org>.

86 See for example The Howard League for Penal Reform *Analysis of the Inspectorate of Prisons Reports on Young Offender Institutions holding children in custody* (2009).

87 See for example Jean Corston *The Corston Report* (Home Office, March 2007).

88 See for example United Kingdom Labour Party "Labour: HM Inspector of Prisons report on HMP Oakwood – Response from Sadiq Khan" (press release, 8 October 2013) <www.politicshome.com>.

89 See Beverley Wakem "New Zealand's specialist Ombudsman function – the OPCAT" (paper presented to the Australasian and Pacific Ombudsman Regional Conference, 18–19 March 2010) at 9.

family days are made available to all at a particular prison,[90] thereby increasing pressure to ensure that this recommendation is implemented.

Increasing dialogue through publication has further significance because it is a cost-effective way to improve a system that currently operates under huge resource constraints. The simple action of publishing visit reports can have many flow-on effects: extended monitoring beyond the limited number of visits; increased focus on implementation of recommendations; and more education in society on the prevention of torture.

2 Deterrence

As briefly noted above, NPM visits under OPCAT create a deterrent effect by shining light on potential perpetrators of torture and other forms of ill-treatment. Under watch, these individuals will likely change their behaviour either because they fear sanctions (a form of coercion) or because they wish to avoid social disapproval (acculturation). Publication does not change the coercive aspects of deterrence, but can increase the social pressure to comply with the prevailing anti-ill-treatment norms in society.

Publication of visit reports can induce greater social pressure in two ways. First, greater pressure arises because the agencies must reveal their actions through visit reports not only to the NPMs but also to the wider public. There is thus a higher level of potential shame if unjustified actions are exposed via publication. Secondly, publication increases awareness of anti-ill-treatment norms in society that form the basis for the social pressure.

Social disapproval is contingent on the public being aware of the standards of appropriate behaviour in the area of detention. Such standards must, in other words, form part of society's "legal consciousness". A "legal consciousness" encompasses "people's routine experiences and perceptions of law in everyday life".[91] Publishing visit reports can increase the prevalence of anti-torture and anti-ill-treatment rights-based norms within society's legal consciousness, which can create the necessary psychological pressure on detention agencies.[92]

Education and communication play a vital role in developing such norms. Just as the media plays a significant role in "setting acceptable standards of human rights within which a society operates", through publication both the legal standards and areas which fall short of those standards

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90 Action for Prisoners' Families "Prison inspectors recommend making family days available to all at HMP Maidstone" <www.prisonersfamilies.org.uk>.

91 Dave Cowan "Legal Consciousness: Some observations" (2004) 67 MLR 928 at 929.

92 Denis Galligan and Deborah Sandler "Implementing Human Rights" in Simon Halliday and Patrick Schmidt (eds) *Human Rights Brought Home: Socio-legal Perspectives on Human Rights* (Hart Publishing, Oxford, 2004) 23 at 37.

are exposed to the public.[93] Visit reports are an extremely important and efficient tool for creating this culture: Her Majesty's Inspectorate of Prisons of the United Kingdom considers the publication of its visit reports to be the main tool through which the NPM can raise awareness around prevention generally.[94]

The public thus gains an understanding of the necessary human rights standards, adding them to their legal consciousness.[95] These norms may form the basis for the public's criticism of institutions, in the discourse of human rights, a powerful force that gives ordinary citizens added authority to hold institutions to account.[96] Such criticism can lead to expectations and norms.[97] Ideally, the pressure from these norms will ultimately lead to the internalisation of these norms within the agencies themselves.

Further, often the individual detention agencies may wish to comply with the requirements but are unable to do so because of a lack of resources. The public pressure created by publication of visit reports may change the game slightly. In this respect – and to the extent that the public perceives the problem as a matter of lack of adequate resourcing rather than some other failing of the detention agency – it is not the agencies that fear the public's social disapproval but the state itself.

Thus, publication can provide a cost-effective way of increasing effectiveness by engaging civil society in the dialogue with detention agencies, and by amplifying the deterrent effect through increased social pressure on agencies to comply. These effects not only ameliorate some problems of under-resourcing, but could also add tangible evidence of effectiveness which adds weight to the argument for extra resources. Rachel Murray suggests a number of factors which can be used to measure the effectiveness of human rights institutions.[98] These include the public profile of the organisation,[99] and the connections made with other societal actors involved in human rights

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93 Council of Europe "In Our Hands", above n 76, at 124. Edward Herman and Noam Chomsky *Manufacturing Consent: The Political Economy of the Mass Media* (Pantheon Books, New York, 1988).

94 Council of Europe "The European NPM Newsletter Issue No 17–18" (2011) <www.coe.int>.

95 O'Flaherty *Human Rights and the UN*, above n 77, at 3.

96 Neve Gordon and Nitza Berkovitch "Human Rights Discourse in Domestic Settings: How Does it Emerge?" (2007) 55 Political Studies 243 at 243.

97 Galligan and Sandler, above n 92, at 38; Thomas Risse and Kathryn Sikkink "The socialization of international human rights norms into domestic practices: introduction" in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds) *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, Cambridge, 1999) 1 at 21.

98 Rachel Murray "National Human Rights Institutions: Criteria and Factors for Assessing Their Effectiveness" (2007) 25 NQHR 189.

99 At 217.

activism, such as civil society.[100] Both of these would be much bolstered by publication of visit reports. A higher prevalence of anti-ill-treatment norms and expectations in society is another factor which provides tangible evidence of progress towards prevention. The greater the measurable effect of NPMs, the more likely the state will invest resources in their continuing operation.

B Increasing Accountability

The second benefit of publishing visit reports is that publication can increase accountability of the NPMs themselves. The classic argument in favour of open government is that, in order for individuals to hold institutions to account, they must be informed.[101] Thus citizens should have full information to hold the NPMs to account.

Public dialogue created by publication of visit reports provides another important layer to NPM accountability. As an independent institution, the NPMs lack the otherwise direct line of accountability that government institutions hold. Currently, the main method of NPM accountability is through an annual report tabled in Parliament. As Rachel Murray has argued, however, where the NPMs perform less than adequately, the powers of the state or the SPT to step in to improve the situation can be weak.[102] Where the NPMs are operating less than effectively, the SPT can make recommendations to the state, at which point the state has an opportunity to respond.[103] In the case of an ineffective NPM, the SPT could increase its engagement with the state party.[104] The state does also retain an element of control through its ability to legislate, and its power to appoint and remove members of the NPMs.[105] But publication of visit reports would add a more nuanced layer of accountability by providing the public with information to increase dialogue with the NPMs.

In general discussions of transparency, an argument which commonly accompanies increased accountability is that transparency also increases trust.[106] Agencies and detainees need to trust the NPMs if they are going to cooperate. As an independent institution, if the NPM does not promote its own transparency, it "risks to discredit and alienate itself from the citizens".[107] Nevertheless,

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100 At 214-215.

101 Committee on Official Information, above n 60, at [23]; Law Commission *Issues Paper: The Public's Right to Know*, above n 59, at [1.23]; and Jonathan Fox "The Uncertain Relationship between Transparency and Accountability" 17 Development in Practice 663 at 663.

102 Rachel Murray "National Preventive Mechanisms under the Optional Protocol to the Torture Convention: One Size Does Not Fit All" (2008) 26 NQHR 485 at 512.

103 Murray, above n 102, at 512.

104 Murray, above n 102, at 513.

105 See for example the Independent Police Conduct Authority Act 1988, ss 5–6.

106 See Committee on Official Information, above n 60.

107 Danish Institute for Human Rights, above n 63, at 77.

although secrecy promotes suspicion, it does not necessarily follow that more transparency increases trust.

While transparency might reveal that everything is working effectively and lead to greater trust, there is also reason to suggest that transparency can undermine trust. First, if transparency reveals a corrupt organisation, this will undermine trust. This would be appropriate distrust, and the organisation would be incentivised or coerced to eliminate the corruption. Secondly, too much information can move the focus away from the important objectives to unnecessary detail.[108] An overabundance of unsorted information can make it difficult to discern what is and is not relevant and reliable.[109] This risk is, however, minimised in the case of visit reports, which are carefully constructed by the NPMs and organised with clear headings and summaries.[110]

In sum, publishing visit reports creates a more transparent OPCAT system, which is likely to increase its effectiveness and accountability. Importantly, engaging civil society and the public through visit reports extends the impact of the under-resourced NPMs. Additionally, publishing visit reports can increase the accountability of the NPMs which, because of their independent nature, is currently quite weak.

V OPCAT OBLIGATIONS AND PUBLICATION

The above arguments, if accepted, provide a number of good reasons why NPMs should publish their visit reports. The NPMs can only do so, however, where this is consistent with the OPCAT framework. As already discussed, a key element of OPCAT is the ability for NPMs to engage in dialogue with states – something which requires cooperation. Cooperation is therefore a primary concern of OPCAT, and transparency through publication may be deemed a secondary aspirational concern. But where cooperation can be maintained, publication promotes the purpose of OPCAT because it contributes to overall prevention of torture and ill-treatment.

A Confidentiality: A Means to the End of State Co-operation

Publication can interfere with OPCAT's primary pathway for achieving prevention, that is, dialogue through cooperation. Therefore, in order to first achieve cooperation, OPCAT gives states parties the option of confidentiality in both interactions with the international OPCAT body, the SPT, and interactions with the domestic NPMs. Ultimately, however, confidentiality is only a means

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108 Patrick Birkinshaw "Freedom of Information and Openness: Fundamental Human Rights?" (2006) 58 Admin L Rev 177 at 194. The Independent Police Conduct Authority does not publish all the details of its investigations because of the concern that these details can be blown out of proportion: see Independent Police Conduct Authority "Police Reports" <www.ipca.govt.nz>.

109 Onora O'Neill "Trust and Transparency" (Podcast, 27 Apr 2002) BBC The Reith Lectures <www.bbc.co.uk/radio4>.

110 See for example Office of the Ombudsman *Report on an unannounced inspection of Hutt Valley District Health Board's Te Whare Ahuru Mental Health Unit Under the Crimes of Torture Act 1989* (10 May 2012).

to an end, and this article argues that publication of visit reports will achieve further gains for the overall goal to prevent torture and other forms of ill-treatment – and without compromising dialogue.

Generally, interactions with the SPT are governed by confidentiality. OPCAT provides that the SPT is bound by the principle of confidentiality,[111] and communicates its recommendations to states parties in confidence.[112] The SPT may publish its visit reports only where the state requests the SPT to do so.[113] The SPT sees confidentiality in its activity as a means of fostering the "spirit of constructive engagement".[114] There is, however, an exception to this rule which makes clear that confidentiality is merely a means to the end of cooperation. Publication may sometimes itself be used to regain cooperation. Where the state refuses to improve the situation in light of recommendations made, the SPT may request the UN Committee Against Torture to issue a public statement, which may include the SPT's findings and recommendations.[115]

In terms of publication by NPMs, the state similarly has the option of confidentiality to a large extent. To recapitulate, OPCAT requires the state to publish and disseminate an annual report on the activities of the NPMs.[116] There is, however, no corresponding provision requiring the publication of visit reports. Where a state does choose to publish information, OPCAT lays down some constraints. First, OPCAT explicitly requires that confidential information is treated as privileged and that personal data is not published without the individual's consent.[117] Secondly, and most importantly, by implication, publication must continue to be consistent with the underlying principle of constructive dialogue. These requirements will be discussed further below.

This necessary compromise of confidentiality in respect of both the SPT and the NPMs is reflected in the drafting history of OPCAT. Early on, some parties were concerned that the SPT, which has wide-ranging powers to inspect places of detention within a state's territory, could freely publish damning information about the state.[118] Thus, in respect of sovereignty and in aid of

111 OPCAT, art 2(3).

112 Article 16(1).

113 Article 16(2).

114 Subcommittee on Prevention of Torture *Fourth annual report*, above n 24, at [46].

115 OPCAT, art 16(4).

116 Article 23.

117 Article 21(2).

118 See Murray and others, above n 4, at 31.

cooperation, it was agreed that the principle of confidentiality would guide the SPT, and the visit reports of the SPT would only be published at the request of the state party concerned.[119]

The explicit obligation on NPMs to publish annual reports appears to have arisen out of a compromise between a push towards publication and the desire to leave publication up to the state to ensure cooperation. In the ninth session of the Working Group on OPCAT – the last session to discuss publication by NPMs – most delegates felt that NPMs should be bound by a principle of transparency, publishing at least their annual reports.[120] Because the establishment of the NPMs would be a matter for the state party, other delegates considered that national laws could determine the extent of publication.[121] While there is no explicit statement explaining the final publication policy, it seems evident that this resulted from a compromise between underlying support for publication and the need to ensure state cooperation.

Once cooperation is established, publication becomes important for upholding OPCAT's overall purpose of preventing torture and other forms of ill-treatment. The SPT recognises this in its advice to states. The SPT has stated that "publication of reports significantly enhances their preventive impact".[122] The SPT strongly encourages states to give consent to publish SPT reports,[123] and to allow NPMs to publish their visit reports.[124]

B Two Reasons to Constrain Publication by NPMs

Where states parties do choose to publish visit reports, there are two important constraints in OPCAT that limit the manner and extent of publication. The first is explicitly enshrined in art 21:

> Confidential information collected by the national preventive mechanisms shall be privileged. No personal data shall be published without the express consent of the person concerned.

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119 Commission on Human Rights, above n 25. See also Murray and others, above n 4, at 31; and Manfred Nowak and Elizabeth McArthur *United Nations Convention Against Torture: a Commentary* (Oxford University Press, Oxford, 2008) at 1095.

120 Commission on Human Rights *Report of the working group on a draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its ninth session* E/CN4/2001/67 (2001) at [46].

121 Nowak and McArthur, above n 119, at 1100.

122 Subcommittee on Prevention of Torture *Fourth annual report*, above n 24, at [47].

123 See Office of the United Nations High Commissioner of Human Rights "Subcommittee on Prevention of Torture" <www2.ohchr.org>; and Subcommittee on Prevention of Torture *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mexico* CAT/OP/MEX/1 (2010).

124 Subcommittee on Prevention of Torture *Analytical self-assessment tools for National Preventative Mechanisms*, above n 78, at [21]–[22].

The second implicit constraint is that publication must be consistent with "constructive dialogue" – the direct means through which the NPMs bring about compliance.[125]

1 *Protection of sensitive information*

Private and confidential information must be protected when NPMs issue any publication. OPCAT relies on candid interactions with detainees and other persons.[126] Should sources be revealed in any way, there may be a "chilling effect" which could render the system wholly ineffective.[127] This requirement is part of the general human rights monitoring principle of "do no harm".[128] This principle has its roots in the principle of beneficence in medical ethics,[129] and is now a fundamental principle of humanitarian practice and human rights monitoring.[130]

The implementation of the obligation of confidentiality through the Crimes of Torture Act is discussed in Part VI below. As discussed in that part, the Act currently provides a wider confidentiality obligation than that under OPCAT. For now it suffices to note two points. First, in accordance with OPCAT, the Act requires that if an NPM wishes to publish any identifying information about an individual, the NPM must first obtain consent from the individual.[131] Secondly, any raw discussion during inspection would be privileged – the NPMs may only publish more general information gathered from its inspections.[132]

2 *Maintaining constructive dialogue*

Just as importantly, publication must not undermine cooperation between the NPMs and the detention agencies. The primary means of cooperation is through "constructive dialogue".

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125 Subcommittee on Prevention of Torture *Analytical self-assessment tools for National Preventative Mechanisms*, above n 78, at [21]–[22].

126 Article 20 of OPCAT provides for the opportunity to have private interviews with detainees or any other persons.

127 See for example United Kingdom Justice Committee *Post-legislative scrutiny of the Freedom of Information Act 2000* (2012) at [180]–[189].

128 Mary B Anderson *Do No Harm: How Aid Can Support Peace – or War* (Lynne Rienner, Boulder, 1999).

129 Michael G Wessells "Do no harm: Towards contextually appropriate psychosocial support in international emergencies" (2009) 64 American Psychologist 842.

130 See for example Global Protection Cluster *Handbook for the Protection of Internally Displaced Persons* (June, 2010) at 15; and Office of the High Commissioner for Human Rights *Training Manual on Human Rights Monitoring* (Geneva, 2001).

131 This is provided for in the Crimes of Torture Act, s 33(4).

132 This is provided for in Crimes of Torture Act, s 33; Children's Commissioner Act, s 27(6); Independent Police Conduct Authority Act, s 33; Ombudsmen Act, s 26; and Evidence Act 2006, s 60.

(a) What is constructive dialogue?

As discussed in Part II, constructive dialogue is the means by which OPCAT effects change through persuasion. Dialogue is more than a discussion: dialogue is about exploring entrenched positions, breaking down assumptions and building common ground.[133] Constructive dialogue provides states with a means of support towards human rights compliance.[134] The process can help the state in "identifying weaknesses in its implementation activities and offer possible ways forward".[135]

Constructive dialogue was not invented by OPCAT – it permeates the human rights monitoring world and, in particular, the field of torture prevention. "Constructive dialogue" was first used to name the process whereby treaty bodies review periodic reports voluntarily submitted by states to provide evidence of their compliance with international human rights obligations.[136] Constructive dialogue is also central to the monitoring bodies for torture prevention which inspired OPCAT, namely the International Committee of the Red Cross[137] and the Committee on the Prevention of Torture under the European Convention on the Prevention of Torture.[138]

The "constructive dialogue" model is recognised in the text of OPCAT in arts 12 and 22, which require states parties to examine recommendations and "enter into a dialogue … on possible implementation measures" with the NPMs and SPT respectively. The support for this model is further seen in the context surrounding OPCAT. Following OPCAT, the SPT has continually

133 Richard Daft *Leadership Theory and Practice* (Harcourt Brace & Co, Orlando, 1999) cited in Carole Chapman, Leonie Ramondt and Glenn Smiley "Strong community, deep learning: exploring the link" (2005) 42 Innovations in Education and Teaching International 217 at 221.

134 Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl, Germany, 2005) at 731.

135 O'Flaherty *Human Rights and the UN*, above n 77, at 2.

136 See Nowak *UN Covenant on Civil and Political Rights*, above n 134, at 730–733.

137 Subcommittee on Prevention of Torture *First annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* CAT/C/40/2 (2008) at [40].

138 See for example Renate Kicker "The European Convention on the Prevention of Torture compared with the United Nations Convention Against Torture and its Optional Protocol" in Geir Ufstein *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press, Cambridge, 2007) 91 at 105; and European Convention on the Prevention of Torture CETS 126 (opened for signature 26 November 1987, entered into force 1 February 1989). See generally Malcolm Evans and Rod Morgan *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford University Press, Oxford, 1998).

emphasised the importance of constructive dialogue with states,[139] and advises that any publication strategy which the NPMs adopt should continue to foster dialogue.[140]

(b) Balancing publication and constructive dialogue

Publishing visit reports should not be done in a way that undermines the foundations of constructive dialogue – mutual trust and cooperation.[141] Two key factors build and maintain these foundations. Actors in the dialogue should have the ability to speak openly,[142] and be frank with one another without fear that everything they say will be published.[143] Secondly, the process should be fair and impartial.[144]

In certain circumstances, publication might undermine both of these key factors. Visit reports, in New Zealand and elsewhere, typically only include the final findings and recommendations of the NPMs, rather than the raw opinions of the actors given in confidence in the dialogue.[145] Where informants do not wish raw discussion to be disclosed, it would be considered confidential and therefore comes under privilege, as already discussed. Nevertheless, actors may be afraid to share information that might be revealed, even by general description, particularly where the agency involved is made up of a small number of actors. Publishing visit reports may also undermine the trust between parties if the process is seen as unfair. Agencies may not want certain information to be made public, or the agency may feel that the information published is incomplete, inaccurate or unfair.

To overcome these concerns, as already discussed, OPCAT encourages compromise on publication in order to ensure cooperation through constructive dialogue. The appropriate compromise will vary according to the context – ranging from no publication at all, to merely giving

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139 See for example Subcommittee on the Prevention of Torture *Guidelines on national preventive mechanisms* CAT/OP/12/5 (2010) at [38]; and Subcommittee on Prevention of Torture *Fourth annual report*, above n 24, at [46]–[48].

140 Subcommittee on Prevention of Torture *Analytical self-assessment tools*, above n 78, at [21]–[22].

141 Silvia Casale "The Importance of Dialogue and Cooperation in Prison Oversight" (2010) 30 Pace L Rev 1490 at 1494; Association for the Prevention of Torture *Visiting Places of Detention: Lessons Learned and Practices of Selected Domestic Institutions* (Report on an Expert Seminar, Geneva, July 2003) at 15.

142 William Isaacs *The fifth discipline fieldbook: strategies and tools for building a learning organization* (Nicholas Brealey Publishing, London, 1994) at 357–364.

143 Casale, above n 141, at 1496.

144 Andrew Byrnes "Uses and abuses of the treaty reporting procedure: Hong Kong between two systems" in Philip Alston and James Crawford (eds) *Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, Cambridge, 2000) at 309–310.

145 See for example Office of the Ombudsman *Report on an unannounced inspection of Hutt Valley District Health Board's Te Whare Ahuru Mental Health Unit Under the Crimes of Torture Act 1989* (10 May 2012).

the state an opportunity to check the report for factual accuracy. Examples from other jurisdictions offer a range of options to maintain trust in spite of publication, all of which involve varying levels of the monitored agency's input into and control of the NPM publication.

Some NPMs have found that publication of visit reports is possible, but only once the report is shared with the state before publication. For example, the Maldives NPM, the Human Rights Commission, originally published all of its visit reports.[146] However, since 2010, the Commission has adapted its engagement strategy, now sharing its reports prior to publication to instigate dialogue on the implementation of its recommendations. This has apparently resulted in stronger relations between the NPM and the state, and an increase in implementation of recommendations.[147]

Some states also publish a government response to the NPM's recommendations. For example, the Swiss NPM publishes visit reports on its website together with a concise letter of response from the Government.[148] A government response can help maintain trust between parties and can also provide helpful information on how the government aims to address the issues identified. If this option is adopted, caution must be taken. First, including a government response may affect the quality of the information. If, for example, the Government downplays the issues in the report, this could reduce the level of response from civil society because the issue seems less urgent. Secondly, it takes time to obtain a response from the government, which can reduce the timeliness of the report – one of the key principles identified for effective disclosure. For example, initially Her Majesty's Inspectorate of Prisons in the United Kingdom allowed for state comment; however, this led to long delays in publication.[149] The NPM now only sends the reports to the concerned agency with a strict deadline to check for any factual inaccuracies.[150]

It might be necessary to compromise also on the form that reports take. In some jurisdictions, such as in the United Kingdom, it is possible to publish the visit reports as soon as they are completed. Another example is publishing an extensive annual report rather than individual visit

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146 National Human Rights Act 2004 (Maldives), s 21(i); Human Rights Commission of the Maldives "Report presented at 16th Annual Meeting and Biennial Conference of the Asia Pacific Forum, Bangkok, 16–18 September 2011" <www.asiapacificforum.net> at 5.

147 Human Rights Commission of the Maldives, above n 146, at 5.

148 See <www.nkvf.admin.ch>.

149 Richard Harding "Regulating Prison Conditions: Some International Comparisons" in Joan Petersilia and Kevin Reitz (eds) *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press, Oxford, 2012) 432 at 442.

150 Human Rights Implementation Centre, University of Bristol "HRIC NPM UK Database" <www.bristol.ac.uk>.

reports.[151] Other options might include publishing general reports based either on type of detention or region of detention.

A high level of state input on the form of publication may not, however, be necessary; constructive dialogue can be maintained even where the visit reports are published in their raw form, as originally drafted. At minimum, in order to be fair and impartial, the reports should be accurate and balanced. The agency should also be given an opportunity to check the report at least for factual accuracy – as, for example, is the practice of the HM Inspectorate of Prisons in the United Kingdom.[152] Where there are multiple NPMs, a coherent message across reports is also important for constructive dialogue; the detention agencies should not feel as though they are being treated differently across NPMs. Good relations may also be maintained by praising positive aspects of state action as well as identifying flaws, as is the practice in the concluding observations of international treaty bodies.[153]

Ultimately, the New Zealand NPMs would need to consult with the detention agencies to gauge what would be necessary to maintain constructive dialogue throughout publication. In this sense, the strategy for publication must itself be the subject of a constructive dialogue. It is important that the publication strategy does not undermine the current relationship between NPMs and detention agencies. Over the five years that OPCAT has operated in New Zealand, a strong constructive dialogue appears to have been established. All NPMs have reported good relations between their office and the agencies,[154] and feedback suggests that agencies consider the visits worthwhile.[155]

While the ultimate strategy is a matter to be left to constructive dialogue, New Zealand's relatively strong culture of transparency and human rights would suggest that NPMs have leeway to encourage a more open strategy with little state interference. The Official Information Act has fostered a general expectation of openness of government.[156] Moreover, in New Zealand, the agencies themselves recognise the importance of human rights compliance,[157] unlike in some other jurisdictions, where the NPMs are resistant to the OPCAT system.[158]

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151 See Association for the Prevention of Torture *Implementation Manual*, above n 3, at 245.

152 See <www.justice.gov.uk> and Human Rights Implementation Centre, above n 150.

153 Byrnes, above n 144, at 310.

154 Human Rights Commission *OPCAT Annual Report 2011*, above n 2.

155 Office of the Ombudsman *Report of the Ombudsmen* (30 June 2009) at 32.

156 Law Commission *Report: The Public's Right to Know*, above n 52, at [3].

157 See for example Office of the Ombudsman *Report of the Ombudsmen 2009*, above n 155, at 32.

158 As for example in the Maldives initially: see Human Rights Commission of the Maldives, above n 146.

In short, then, OPCAT therefore leaves it open to New Zealand to publish NPM visit reports; an option which has the potential to greatly improve the OPCAT system. However, in making a decision to publish the reports it would be necessary to take into account both the necessary elements of confidentiality, and the maintenance of constructive dialogue.

VI CURRENT LEGISLATIVE LIMITATIONS ON PUBLICATION

Nevertheless, the legal way for publication in New Zealand is not yet so clear. Currently the Crimes of Torture Act imposes heavy limitations, which will need to be reformed if publication of visit reports is to become a real option.

A Options Under the Current Legislative Framework

As already highlighted in Part III, the legislative framework is confusing to navigate. The Crimes of Torture Act imposes a duty of confidentiality which is subject to limited exceptions. The Act holds in s 33(1) that: "Every person must keep confidential any information that is given to him or her in the exercise of that person's functions or duties under this Act." This duty is subject to three exceptions. They are where disclosure is necessary:

- to enable New Zealand to fulfil its obligations under OPCAT (s 33(2)(a));
- to give effect to the Act (s 33(2)(b)); or
- to make a public statement in the public interest about a report presented in Parliament under the Act (s 33(3)).

In addition to this section, the Act provides that one of the functions of NPMs under the Act is: "to prepare at least 1 written report each year on the exercise of its functions under the Act during the year to which the report relates".[159]

The duty of confidentiality in the Crimes of Torture Act appears to go further than OPCAT itself, in terms of the level of confidentiality that is required. As highlighted previously, OPCAT states only that "confidential information … shall be privileged". That is, any information collected in confidential circumstances, such as a transcript of an interview with a detainee, will be privileged. In contrast, under the Act, "any information" given to a person exercising duties or functions under the Act must be kept confidential. In other words, this duty goes beyond information that is inherently confidential, and includes all information given to NPM actors. Narrow exceptions are then laid down to provide for limited publication.

The legislative history elucidates this difference between the Act and OPCAT. The history suggests that the general purpose of including the duty of confidentiality in s 33 was to ensure compliance with OPCAT, albeit more cautiously than was necessary. The Ministry of Justice, the agency involved in drafting the Bill, stated that because OPCAT "is a very new international treaty,

159 Section 27(c).

the Ministry prefers to include a broad responsibility for NPMs and the Subcommittee to comply with the relevant information articles in [OPCAT]".[160] The duty, the Ministry stated, would ensure "that all institutions must have accord to the provisions of the Optional Protocol when developing guidelines and disclosing information or making public statements".[161] It is clear, then, that the Act does not replicate the words of OPCAT itself, and appears to require confidentiality in a broad range of circumstances.

Nevertheless, there are a number of possible legal arguments around s 33 and its exceptions which support the publication of visit reports in some circumstances. This section first addresses the exception to the confidentiality duty which enables New Zealand to fulfil its obligations under OPCAT but concludes that this does not allow for publication because there is no obligation which would be supported by publication. Secondly, it is suggested that an NPM could publish visit reports with detention agency consent but that this would give too much control to the agency. Thirdly, because the confidentiality duty is limited to information "given" to NPM actors, there may be some visit report information which falls outside the duty. Due to its limited nature, however, this is an impractical option. The fourth and fifth arguments consider the provision allowing for reporting via Parliament, and the provision which allows for public statements about such reports. These options combine to offer an option short of publication of visit reports: more information could be included within the annual report; a more frequent, perhaps monthly report could be made; and the NPMs could release public statements on an issue of public interest contained within these reports, drawing on more specific information from visit reports.

1 Enabling New Zealand to fulfil an OPCAT obligation?

First, publication of visit reports is not possible under the exception to confidentiality under s 33(2)(a), which allows publication if necessary to enable New Zealand to fulfill its obligations under OPCAT. As already discussed, there is no specific obligation under OPCAT to publish visit reports.[162] Further, there are no general obligations which publication would fulfil. For example, New Zealand has no general obligation under OPCAT itself to take effective measures to prevent torture and other forms of ill-treatment. As explained early on in this paper, OPCAT does not set up additional substantive obligations but rather provides a means for states to fulfil their obligation to prevent torture and other forms of ill-treatment under the United Nations Convention against Torture.[163] As discussed in Part IV, OPCAT leaves publication of visit reports by NPMs as an issue for state parties to decide.

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160 Ministry of Justice *Crimes of Torture Amendment Bill: Departmental Report of the Ministry of Justice – Presented to the Foreign Affairs, Defence and Trade Committee* (2006) at 38.

161 Ministry of Justice, above n 160, at 38.

162 See Part V.

163 Association for the Prevention of Torture *Implementation Manual*, above n 3, at 40.

2 Publication by the detention agency itself

Secondly, it may be possible for the detention agencies themselves to publish the visit reports, once received from the NPMs. The detention agencies themselves are not subject to the Act, nor to the duty of confidentiality. This option is, however, unsuitable. The power to publish or withhold visit reports gives the agency too much control and would not be a guaranteed option. There would also be no guarantee that these reports were the original reports received from the NPMs. This option may also undermine the perceived independence of the NPMs which is an essential element of their operation.

3 Publication of information not given in exercise of person's functions?

Another argument might be that some aspects of visit reports fall outside the information covered by the confidentiality provision. Under s 33, the relevant actor must only keep confidential information that has been "given" to him or her in exercising functions under the Act.

Visit reports contain different types of information including findings and recommendations based on those findings. Information created by NPMs, including recommendations, would be excluded from the duty in s 33. In fact, as mentioned in Part III, NPMs have published thematic reports, which would not be covered by the s 33 duty because they contain only information created by the NPMs, not "given" information. Recommendations are based on information "given" to the NPMs, however, NPMs may formulate recommendations in a way that does not divulge any such information. For example, in the Ombudsman's OPCAT report on the Te Whare Ahuru Mental Health Unit, the key recommendation made was that: "Clients should be participating in developing their own recovery plans, and invited to attend any [multi-disciplinary team] meetings."[164] Such recommendations would not fall within the duty and therefore may be published.

This argument provides a possible option for increasing publication, however, in order to achieve the benefits of publishing reports identified in Part III, it would be preferable to publish all of the information in the reports, not only the recommendations. To increase engagement with the OPCAT system, it is important that society also knows the context behind the recommendations. More importantly, in order to hold NPMs accountable it is essential that the public has the information to assess whether the recommendations are well-founded.

4 Publication as a report to Parliament under the Act

Fourthly, could visit reports be routinely published under the provision which requires NPMs to report to Parliament? Under the Crimes of Torture Act, each NPM is required "to prepare at least 1 written report each year on the exercise of its functions under the Act during the year to which the

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164 Office of the Ombudsman *Report on an unannounced inspection*, above n 145.

report relates" and to table that report in Parliament.[165] Once the report has been tabled in Parliament, the NPM must disseminate copies of the report to the public.[166] The s 33(2)(b) exception to confidentiality would apply to such reports, because disclosure is necessary to give effect to the Act. Currently, NPMs file annual reports under this section.[167] On careful analysis, however, this provision does not seem to support the possibility of publishing visit reports on a routine basis.

Although the reference to "at least 1" report leaves the option open for multiple reports per year, in the context of the rest of this provision, the purpose of this section does not seem to be routine publication.[168] For publication to fall within this exception, the reports must cover "the exercise of [the NPM's] functions under the Act".[169] This phrase is open to some interpretation – technically everything produced by an NPM would relate to an exercise of its functions. However, the ordinary interpretation of these words would be that the main focus of such a report relates to how the NPM has been working, rather than the actual substance of its findings and recommendations, as found in visit reports.

Legislation which governs similar organisations would support this narrower interpretation. Whereas the "exercise of … functions" is usually related to a power to present an annual report, legislation often contains an additional power if there is the ability to report anything else. The Ombudsman must report to Parliament "on the exercise of their functions" under a section entitled "Annual Report",[170] and then has a separate power to present investigation reports to Parliament.[171] The Independent Police Conduct Authority Act 1988 includes two provisions for reporting – one on the "general exercise of its functions under the Act" and the second on "any particular case or cases in relation to which it has exercised its functions under the Act".[172] The Auditor-General, in addition to filing an annual report,[173] must report to Parliament at least once every calendar year on

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165 Section 27(c)(ii). If the NPM is not an Officer of Parliament it must provide the report to the Minister, who must then table the report in Parliament under s 36(1). If the NPM is an Officer of Parliament, the NPM must table the report in Parliament directly under s 27(c)(i).

166 Section 36. The NPM must direct the public to these copies and make copies available for inspection free of charge, or for purchase at a reasonable cost.

167 See for example Human Rights Commission *OPCAT Annual Report 2011*, above n 2.

168 In response to a concern raised before the select committee considering the Bill that NPMs could only communicate to the Minister annually, the Ministry of Justice noted that s 27(c) does not limit the ability of the NPM to communicate serious concerns outside of the annual reporting cycle: see Ministry of Justice *Crimes of Torture Amendment Bill*, above n 160, at 30.

169 Crimes of Torture Act, s 27(c).

170 Ombudsmen Act, s 29.

171 Section 22.

172 Independent Police Conduct Authority Act, s 34.

173 Public Finance Act 1989, s 43.

"*matters arising out of* the performance and exercise of [his or her] functions, duties and powers".[174] These three examples tend to suggest that the purpose of the Crimes of Torture Act provision is limited to the style of an annual report (or perhaps more frequent biannual or quarterly reports).

Although this exception would not seem to allow for routine publication of visit reports, the lack of specificity in "exercise of … functions" still leaves room to insert more information from visit reports into the current annual report. Currently, the annual report includes a very brief general summary of issues arising out of visits. As long as the intention remains to explain how the NPM's functions had been exercised during the report period, an NPM could extend the report to include more information. Further, more than one report can be made annually – perhaps quarterly reporting would increase the amount of information available.

5 Publication as a public statement under s 33(3)

Finally, could the visit reports be published, in whole or in part, as a "public statement" under the exception in s 33(2)(c)? Under this section, an NPM can make a "public statement" if it relates to a matter that the NPM considers to be in the "public interest" and was contained in a report on the "exercise of [the NPM's] … functions" tabled in Parliament.

The "public interest" is a very broad concept; arguably, the NPM could always justify a matter in a visit report as being in the public interest, because it is informing the public about the OPCAT system which, as already discussed, increases the effectiveness and accountability of the system. "Public interest" might relate to instances of bad practice, but would also cover examples of good practice.

This exception might permit publication of visit reports *in part* but not in total. According to the Oxford Dictionary a "statement" is a "definite or clear expression of something in speech or writing".[175] This definition tends to suggest that the information must be in fairly concise form, given that the expression must be definite or clear. Visit reports can be quite detailed; they include information on things such as the material conditions of the buildings inspected.[176] The full visit reports in their existing form would likely be too detailed to qualify as a "statement" under this exception. It may, however, be possible to produce summaries of reports which include the important information from the visit. The European Committee on Prevention of Torture has, for example, made public statements in the past where states have failed to cooperate. These statements

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174 Public Audit Act 2001, s 20 [emphasis added].

175 Angus Stevenson (ed) *Oxford Dictionary of English* (online ed, 3rd ed, Oxford University Press, Oxford, 2011).

176 See Office of the Ombudsman *Report on an unannounced inspection*, above n 145.

consist of a short summary of the situation of around 500–1500 words and may include an appendix with extracts from the report made by the Committee on the situation.[177]

Although this option does not, therefore, provide the ability to publish the full visit reports as a statement, it provides the opportunity to publish summaries of visit reports which relate to the reports tabled in Parliament.

B Reform of the Crimes of Torture Act is Necessary

In summary, the existing legislative regime does not enable NPMs to publish full visit reports. As a partial solution, more information could be included in a periodic report to Parliament, which could also be tabled more frequently than annually. Further, the NPMs could issue public statements in the form of summaries of visit reports to highlight key issues arising out of the reports tabled in Parliament. This is, however, not a full solution. This article has argued that it is important that more detailed information is disseminated to the public. A further, very important consideration, is that it is likely to be a lot more administratively efficient to publish visit reports as they are, rather than to have to re-organise information into another report.

It is essential that the Crimes of Torture Act therefore be amended if the benefits of publication highlighted in Part III are to be achieved. Any precaution taken during the original drafting of the Crimes of Torture Act is no longer necessary in the now well-established OPCAT system. A new clearer provision should be drafted to reflect the narrower confidentiality requirements in the OPCAT treaty – namely to provide for the need to keep the confidence of actors providing information, and not to publish personal identity information. Before any such reform is taken it may first be advisable for the NPMs to consult with detention agencies to ensure that constructive dialogue will be maintained throughout publication. Further, it may be appropriate to require explicitly in the legislation that any publication of visit reports should be carried out in a manner which acknowledges the importance of dialogue – although this of course would already be an implied requirement from OPCAT itself.

VI CONCLUSION

In conclusion, this article argues that in order to increase the focus on torture prevention in society, it would be desirable for New Zealand NPMs to publish their visit reports. Publication would increase both the effectiveness and accountability of NPMs. The OPCAT system could be made much more effective: as argued above, publication will likely increase the dialogue between detention agencies and societal actors, and increase the deterrent effect by airing the facts of an otherwise rather secret space. Publishing reports would give civil society groups and the general

177 See for example Committee on the Prevention of Torture "Public Statement concerning the Chechen Republic of the Russian Federation" <www.cpt.coe.int>.

public tools to engage in torture prevention and would facilitate the creation of a culture which is critical of ill-treatment.

This article also argued, crucially, that publication of visit reports can be done in a way that is consistent with OPCAT. Publication will be consistent so long as NPMs protect both confidential and private information, and continue to maintain constructive dialogue with the detention agencies. To maintain constructive dialogue, the NPMs must consult the agencies on the proposed publication strategy. Constructive dialogue is likely to be maintained in New Zealand so long as the agencies are given an opportunity to check the report first for factual accuracy.

This article has highlighted finally that, although a desirable pathway, it is not possible under the current legislation to publish the visit reports in their full form. It is essential that the Crimes of Torture Act be reformed if the benefits of publication are to be achieved.