

25 November 2020

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Principal Council Officer | Upper House Committees
Parliament of New South Wales

Dear Committee Chair,

Change the Record response to Questions on Notice

As Change the Record set out in our submission, there are a number of key features which we believe are essential to any state or territory national preventative mechanism (NPM) operating effectively. It is our view that any mechanism must:

1. Be established with full and transparent consultations with civil society and others as recommended by the Subcommittee on Prevention of Torture (SPT)
2. Include Aboriginal and Torres Strait Islander representation in all oversight bodies and expert advisory panels to ensure NPMs are established in a culturally safe way, and with the trust of community
3. Have a statutory basis and be independent of government and the institutions they oversee
4. Be adequately and jointly resourced by Federal, State and Territory Governments
5. Make findings and recommendations publicly available and require a response from governments and detaining authorities which should also make public their responses
6. Be empowered to undertake regular and preventative visits
7. Have free and unfettered access (to all places of detention, whether announced or unannounced; to all relevant documents and information; and to all persons including public employees and privately engaged contractors, including the right to conduct private interviews);
8. Have the power to submit proposals and observations to Parliament or the public concerning existing or proposed legislation; and
9. Be afforded appropriate privileges and immunities (no sanctions or reprisals for communicating with the NPM; confidential information should be privileged).

We also draw the Committee's attention to the SPT's Guidelines on National Preventive Mechanisms which establish the standards required for states and territories establishing NPMs.

The scheme in Western Australia, the Office of the Inspector of Custodial Services (OICS), is the only mechanism that has been established by a state jurisdiction in Australia. While it complies with some elements of OPCAT, there are a number of key limitations that we would encourage the NSW Parliament to consider when establishing its own oversight and preventative mechanisms.

At the outset, both the Western Australian, and the National Preventative Mechanism, were established without adequate civil society consultation. For any NPM to be effective, particularly as a mechanism designed to *prevent* torture and human rights abuses, it must have the trust of the community and affected persons. Change the Record is particularly concerned that Aboriginal and Torres Strait Islander peoples, and people in prison and their families, are consulted with and inform the development and designation of the NPM. Without the trust and confidence of the community that they can approach, inform and interact with the NPM, it will not be able to fulfill its preventative function.

A crucial success of the WA OICS is that it is structurally independent. It is established by stand-alone statute, has its own budget and staff, publishes its own reports and standards and its Inspector is an officer of the Parliament. It publishes reports directly to the Parliament not to a particular Minister. It has strong powers to access correctional facilities, documents, conduct unannounced inspections and carry out a preventative, continuous schedule of inspections across all sites and publish reports and give recommendations accordingly. These are all strong, positive features of the mechanism that we encourage other states and territories to look to when designing their own.

Some limitations include:

- The Minister is able to direct the Inspector to carry out inspections of particular sites or to carry out particular functions (s17(2) and (3)). This is inconsistent with OPCAT principles of independence.
- The Minister may appoint independent official visitors to prisons under s41. It is our view that the OICS (or designated NPM) should be responsible for all hiring decisions and voluntary appointments, and set the terms and conditions of those arrangements (e.g. the duration of such appointments)
- The legislation facilitates the Inspector appointing public servants as staff on a full or part time basis under s16. It is our view that this compromises the real or perceived independence of the NPM.
- The Act imposes a minimum 30 day embargo period after a report is received by Parliament (which is a lengthier embargo than other comparable bodies) and requires reports to be tabled on a Parliamentary sitting day unless the Inspector decides it would be unreasonable to delay tabling (s35). It is our view that these requirements are unreasonable and present an excessive delay (one month) of the release of reports after they have been finalised.

- There is no requirement for the Minister or responsible authority to respond to findings and recommendations. It is our view that this is essential both to ensure that recommendations are considered and acted upon, and to promote trust in the efficacy of the NPM.

Thank you for the opportunity to participate in the Select Committee's inquiry and please do not hesitate to contact us should you have further questions on

Yours Sincerely,

Sophie Trevitt
Executive Officer - Change the Record