**Submission to the Productivity Commission's review of the National Agreement on Closing the Gap**

October 2023

## About Change the Record

Change the Record is Australia's only national First Nations-led justice coalition. We are a coalition of legal, health, human rights and First Nations organisations.

Change the Record has two key objectives - to end the mass incarceration of First Nations peoples and the disproportionate rates of family violence experienced by Aboriginal and Torres Strait Islander women and children.

## Our submission

Baiame's Ngunnhu on unceded Ngemba land, also known as the Brewarrina fish traps, were created and maintained over thousands of years through the cooperation of First Nations peoples, an extraordinary feat of engineering and agriculture managed collectively by sovereign peoples through agreements that functioned for millennia.

Agreement-making, or treaties, over the care and use of land and resources and the sharing of culture and social life is fundamental to First Nations peoples. Indigenous knowledge and community on this continent is ancient and continuous, negotiated over long periods of time and great distances with intention. In contrast, the colonies and the Australian federation they negotiated are very young.

British pastoralists began colonising Ngemba Country in the 1840s. Shortly after, settlers began dismantling the fish traps, using the stones for their own infrastructure and gradually altering the course of the Barwon River. In 1859 Brewarrina's settlers, led by prominent pastoralists, murdered hundreds of local Aboriginal people in the Hospital Creek Massacre. One of the first acts of the NSW Aboriginal Protection Board was the establishment of a mission at Brewarrina in the 1880s, the first formal institution for the segregation of Aboriginal peoples in NSW. In just a few decades, colonisation destroyed a sustainable, egalitarian Indigenous economy many thousands of years older than any parliamentary system. This catastrophe was replicated across the continent.

The process of agreement-making that led to federation and the establishment of Australia's Washminster system was heavily influenced by the racism of the colonies and the economic concerns of settler landholders and industry, particularly mining and agriculture. A choice was made by the drafters of the Australian constitution to guarantee only a limited schedule of civil rights, in contrast to most other liberal democracies. The effect of this decision is that federation did not impede the continuation of slavery on the continent or challenge the economic power of the squattocracy, and decisions about whether social, economic and cultural rights exist and should be upheld are at the ultimate discretion of Australian parliaments.

In our work we are often asked, what can be done about the 'problem' of Australia's federated structure? What powers exist under our current governance arrangements to compel a jurisdiction to uphold human rights? If a state, territory or federal government is unwilling to stop criminalising and impoverishing their citizens, how can they be held accountable? What recourse do First Nations peoples and civil society have to discipline governments that say one thing and do the opposite, a contradiction that is painfully acute in Australia's carceral systems?

These are challenging questions about power and politics. Their answers have implications for shared understandings of sovereignty and self-determination, and the meaning of agreement-making under the Closing the Gap process and through other processes.

While Australia has signed on to many international human rights conventions, including the United Nations Declaration on the Rights of Indigenous Peoples, these conventions have not been incorporated into domestic law. First Nations peoples in Australia face a situation where

governments have endorsed the idea of our rights, but provided no mechanism for their enforcement.

As the decision-makers in our parliaments, it is politicians, particularly those in executive government, who are ultimately responsible for the impact of government policy and their failures to uphold human rights. Cabinets and ministers are responsible for the institutions and agencies they control, as legislators are responsible for the laws they pass. The conventional formation of Australian governments according to whichever political party can form a lower house majority raises the question of the responsibilities of elite and grassroots members of those parties to discipline themselves.

The National Agreement on Closing the Gap commits all Australian governments to ‘an unprecedented shift in the way governments work, by encompassing shared decision-making on the design, implementation, monitoring and evaluation of policies and programs to improve life outcomes for Aboriginal and Torres Strait Islander people.’

Our experience of government policy-making since the Agreement was signed is that there has not been a marked shift in how governments do business, as demonstrated by the lack of progress on the priority reforms and jurisdictions’ grim performance against the socio-economic outcome targets.

We find contradictions and disconnections between the stated goals of governments and their policy choices. The persistence and deepening of mass incarceration of Aboriginal and Torres Strait Islander peoples in Australia is the product of our nation’s colonial history and governments’ refusals to implement the institutional changes needed to end and heal the harm of colonisation. While the Agreement’s preamble notes very early on that our people face ongoing institutional racism, we have not observed serious efforts by our governments to change those institutions.

In signing the Closing the Gap Agreement, Australia's governments formally accepted the pressing need for widespread institutional change to be pursued through four priority reforms to the way governments do business. Their collective failure to progress the priority reforms raises questions about how much political will there is in our governments to confront and redress the genocide and dispossession that has occurred on this continent.

**On consultation**

Often contributing to consultation processes is experienced as an exercise in rewriting the same advice we and our colleagues have already provided to governments over the course of years, sometimes decades. For more than 30 years, for example, our colleagues and communities have called for governments to implement the recommendations of the report of the Royal Commission into Aboriginal Deaths in Custody.

We observe that governments will regularly refer to the expertise of ACCOs and communities and sometimes reach out to ACCOs for advice, but with no guarantee that that advice will be followed or understood. Rarely will ACCOs and communities be compensated for their time spent responding to government requests. ACCOs and First Nations communities lack the secretariat capacity of government and are often involved in frontline service delivery. Diverting internal resources from frontline services to policy and advocacy work involves real tradeoffs.

When consultation is undertaken in culturally unsafe and institutionally racist ways, this creates additional burdens for First Nations experts. We are placed in the position of having to choose between patiently educating the bureaucrats who are consulting us, or not. Challenging cultural incompetence and institutional racism is explicitly within the responsibilities of governments under priority reform 3 of the Closing the Gap Agreement. Progress on priority reform 3 is limited, and in our experience this limited progress is reflected in consultation processes.

The Productivity Commission has asked for Change the Record's reflections on our experience of consultation in two ongoing processes: one, the Australian Capital Territory's implementation of its commitment to raise the minimum age of criminal responsibility and, two, the Australian government's development of an Aboriginal and Torres Strait Islander Action Plan under the National Plan to End Violence against Women and Children 2022-2032.

**Experience of consultation on the ACT's bill to raise the minimum age of criminal responsibility**

As a leading voice for raising the minimum age of criminal responsibility, Change the Record participated in consultation with the ACT government about the reform over several years.

Change the Record have been clear and consistent in our expectation that the minimum age of criminal responsibility should be raised to at least 14 without exception and that the decriminalisation of children requires not just an end to the detention of children, but also a paradigm shift from policing and punishment to care and accountability of systems and people.

In late November 2022 Change the Record staff attended a MACR Reference Group meeting with senior officials from the ACT Community Services Directorate as part of consultations on the bill. In this meeting, our staff became concerned by questions from Directorate officials about children who might be 'resistant' to engaging with treatment orders. Staff raised concerns about the language used, noted that coercion is not consistent with a therapeutic approach to children in crisis, and stated that we would have major concerns about any punitive or coercive action taken against families and carers of noncompliant children. Directorate officials assured the meeting the government's approach and philosophy was non-punitive. As far as we are aware, the MACR Reference Group did not meet again.

When the bill was released months later, we were surprised and dismayed to find that it provided for new offences that could criminalise families and carers of noncompliant children.[1] We and other colleagues in civil society raised the provisions in our submissions[2] to the ACT parliament's inquiry into the bill. CTR staff approached the ACT Attorney-General's office with questions, but these were referred to the Directorate.

When Change the Record appeared in June 2023 at the ACT parliament's Standing Committee on Justice and Community Safety's inquiry into the Bill, we were not asked about our concerns about the new offences or some of the other concerns we'd raised. Nor were government ministers and senior Directorate staff asked about them during their appearance at the hearing

[1] Change the Record, Submission on the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023, June 2023, page 6-7.
[2] See, for example, submissions from the Aboriginal Legal Service NSW/ACT, Human Rights Law Centre, ANTAR.

later that afternoon.[3] Concerns about the new offences were not acknowledged in the committee's report.[4]

Change the Record isn't aware whether Directorate staff knew in November that there was a chance of new criminal offences being provided for in the bill. We're not aware of the level of communication between executive government and departmental staff in the drafting of the bill, and at which point the decision to include new criminal offences was made. We are unsure why all the concerns we and our colleagues raised were not explored in the committee process. Ultimately, responsibility for the legislation and its provisions lies with the government and minister bringing the bill.

**Experience of consultation on the Aboriginal and Torres Strait Islander Action Plan**

Change the Record participated in the community campaign to secure a dedicated, self-determined First Nations National Safety Plan developed for and by Aboriginal and Torres Strait Islander women.

In November 2021 we published the report *Pathways to Safety* with the National FVPLS Forum, the peak body for Aboriginal and Torres Strait Islander Family Violence Prevention and Legal Services (FVPLS). In the report we expanded on the case for a dedicated, self-determined First Nations plan and the policy reforms such a plan should include. The report was informed by the experiences of frontline FVPLS and other ACCOs, decades of scholarly research, and the lived experience and aspirations of First Nations women and girls in all their diversity recorded in the Australian Human Rights Commission's Wiyi Yani U Thangani (Women's Voices) project.

In February 2022 Change the Record made a submission to DSS's consultation on the National Safety Plan, raising concerns about self-determination and limited information in the draft plan.

When a draft plan for the government's Aboriginal and Torres Strait Islander Action Plan was subsequently released, we were concerned to find that its two key features were the creation of a new First Nations family violence peak body and Commissioner, as these had not featured in

[3] ACT Legislative Assembly Hansard, Inquiry into Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023.
[4] ACT Legislative Assembly Standing Committee on Community Safety and Justice, Report of the Inquiry into Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023.

the demands of the community campaign we had been a part of. This was a matter of concern discussed at the Wiyi Yani U Thangani First Nations Women's Safety Policy Forum in September 2022, in which we participated. Our concerns were raised with DSS and NIAA.

In our view the National FVPLS Forum, the established peak body for First Nations Community Controlled FVPLS, is the most appropriate body to undertake the work of the peak under this plan. There must be a transparent process for the appointment and selection of ACCOs and advisors to undertake the work of the Plan. We note that Change the Record members with many years of experience and deep expertise in this area have submitted EOIs to be part of the Advisory Committee for the Plan, but at the time of writing successful applicants have not been identified by the government.

We note too that the commitment made to FVPLS in the Action Plan is inadequate. The Plan states as an action point: 'Maintain existing funding base to the Family Violence Prevention Legal Services, which provides services for Aboriginal and Torres Strait Islander families, predominately women and children, experiencing family, domestic and sexual violence.'[5] Existing base funding to FVPLS does not meet existing demand for their services - demand which continues to increase year on year. Services require a substantial increase to their base funding, a point which has been raised with DSS, NIAA and Treasury every budget cycle for many years. In successive pre-budget submissions and reports, we have called for additional investment in FVPLS to at least meet existing service demand, and a separate line item in the federal budget clarifying funding for FVPLS. These services remain significantly underfunded.

In the last two federal budgets we hoped to see significant investment in First Nations community-controlled services, particularly FVPLS and Aboriginal and Torres Strait Islander Legal Services (ATSILS), and adequate resourcing of their peak bodies. The current government's election platform included an acknowledgement of the importance of these services and a commitment to ensuring FVPLS and ATSILS are 'properly resourced'.[6]

The 2023/24 Commonwealth budget did not contain the investment in FVPLS or ATSILS that was called for. A small amount of FVPLS funding which had been cancelled in previous budgets was replaced, but additional investment to meet increasing need was not made. Rather than

[5] Aboriginal and Torres Strait Islander Action Plan, page 60.
[6] Australian Labor Party 2021 Platform, page 72.

guaranteeing the requested funding for FVPLS and clarifying its place in the budget papers, the government put forward a 'Women's Safety - First Nations' package which allocated $128.6 million over 4 years to the Contingency Reserve 'to support activities which address immediate safety concerns for First Nations women and children who are experiencing, or at risk of experiencing, family, and domestic and sexual violence.'[7] On budget night we and our Forum colleagues were unable to establish what plans, if any, there were for the monies allocated to the Contingency Reserve.

**On street-level bureaucrats, discretion and institutional racism**

Street-level bureaucrats are the grassroots implementers of government policy: public school teachers, social workers, police, doctors and nurses, and workers in privatised government services. Street-level bureaucrats have a level of discretion over how the power of the state is used. This might be the power to evict someone, or arrest someone, or remove a child from their family, or cancel a person's social security payment, or withhold medical care. The vast majority of workers employed as street-level bureaucrats are non-Indigenous. It's likely that many have no First Nations family or friends.

These staff exercise discretion in their work according to the options available within policy frameworks decided further up in the government hierarchy. Their use of discretion is influenced by their education, workforce structure and composition, the culture of the institution they work for, and broader socio-economic conditions and systemic inequalities.

Discretion over policy implementation in this way involves the delegation of decision-making power to lower levels of a hierarchy. According to the liberal interpretation of Westminster politics, discretion over law enforcement and the power of the state generally begins in executive government from the Cabinet level down. In a representative democracy, Cabinet is presumed to be primarily accountable to their constituents, who have the power to vote them out. Policy is decided at the Cabinet level then negotiated through parliament, with delegated responsibility for its implementation flowing through to the grassroots workforce.

When the policy decisions of governments are racist or have the effect of widening racialised and gendered inequalities and enabling discrimination, they reduce the ability of street-level

[7] Commonwealth, Budget 2023-24, Budget Paper 2, page 90.

bureaucrats to make antiracist decisions and increase the likelihood that the grassroots implementation of policy will be institutionally racist.

An example of how these decision-making processes manifest is in the intersection between housing and the criminal legal system. We regularly see government budgets which invest more money in capital works in the prison system than in public housing or crisis accommodation. In several Australian jurisdictions, bail acts contain accommodation requirements. In a system where housing need deliberately goes unaddressed by governments, remand can be used as a de facto tenure of last resort for people experiencing homelessness. While governments claim there is a fiscal constraint that prevents them from investing in public housing, no such fiscal constraint seems to exist concerning the expansion of prisons. The effect of such funding and policy decisions is to criminalise homelessness.

The institutional racism of Australia's police forces and prison systems is of particular concern to Change the Record. Policing and police violence in Australia cannot be divorced from their genesis in colonial violence. Police forces have repeatedly shown that they are either not equipped or not prepared to effectively discipline racism by their officers and leadership, despite external and internal investigations having made findings of widespread, systemic discrimination. We advocate for systemic change to the workforce of first responders to crisis situations to reduce police violence and end mass incarceration, in part by investing significantly in community-based alternatives to police and Aboriginal and Torres Strait Islander community-controlled systems of accountability and justice.