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Indigenous Law and Justice Hub
University of Melbourne

Submission to the Inquiry into the current regression on Closing the Gap targets

Select Committee on Measuring Outcomes for First Nations Communities

28 February 2025



Who We Are

The Indigenous Law and Justice Hub, Melbourne Law School

The Indigenous Law and Justice Hub (ILJH) brings together legal experts and community leaders to produce rigorous legal research that can be directly applied in Indigenous advocacy and self-governance. We are educators who play a central role in developing our law students' understandings of Indigenous cultures, legal systems, and Indigenous experiences of settler law.

The ILJH's research focus is two areas of law and policy that are of pressing importance for Indigenous peoples: Criminal In/justice and Treaty. Our aim is to support and amplify Indigenous voices in these fields with high quality legal research and improved community access to research and advice.

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For more information about the ILJH [visit our website.](#)

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Acknowledgement of Country

The Indigenous Law and Justice Hub acknowledges the Wurundjeri people of the Kulin Nation, the Traditional Owners of the unceded land on which our University building sits. We acknowledge the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation.

Director's Foreword

Thank you for the opportunity to make a submission to the **Select Committee on Measuring Outcomes for First Nations Communities**.

I write as a proud Larrakia, Wadjigan and Central Arrente man with a three-decade professional history of advocacy to uphold Aboriginal and Torres Strait Islander rights in the justice system. My relevant experience includes working as a Legal Aid lawyer, the Anti-Discrimination Commissioner of the Northern Territory, the Chair of the North Australian Aboriginal Justice Agency, Executive Officer of the National Aboriginal and Torres Strait Islander Legal Service, Director of Community Engagement on the NT Royal Commission into the Detention and Protection of Children, and completing a PhD through which I studied justice policy and self-determination in the context of Australia's Aboriginal and Torres Strait Islander community-controlled legal services movement. Having seen our in/justice system from many angles, I am acutely aware of the regression on Closing the Gap (CtG) targets and particularly those relating to justice, through both my lived and academic experience.

This submission is particularly concerned with CtG target **10 (adult incarceration)** and will focus on the terms of reference relating to progress under the National Priority Reforms (c), opportunities for building on the current CtG framework (g) and other related matters (h).

This submission is motivated by my recent experiences as an independent member of the National Justice Policy Partnership (JPP) since 2022. Through this period I have been ashamed at the duplicity of the States and Territory members who increasingly utilise harmful 'tough on crime' tactics, while continuing to attend the JPP forum and stating commitment to the Closing the Gap measures addressing the over-incarceration of First Nations people. We cannot keep turning up to tables where our 'partners' approach in bad faith. The Commonwealth has significant responsibility and underutilised powers in this space.

We urge the Commonwealth to take strong and transformative action to bring the States and Territories into compliance with their commitments under the *National Agreement on Closing the Gap*. To achieve the target 10 (along with target 11 on youth justice) we must re-think the Commonwealth's role in the justice space from one of convening, **to utilising the available constitutional levers to ensure accountability of State and Territory governments to their commitments to end the racial discrimination in our justice system.**

Regards,

Professor Eddie Cubillo

Director of the Indigenous Law and Justice Hub, Melbourne Law School

Time for Government Parties to the Closing the Gap Agreement's Justice Policy Partnership to Measure Up!

A number of State and Territory governments are taking regressive measures which will drive even more Aboriginal and Torres Strait Islander adults and young people into their prisons. At the same time, these governments are attending national forums as 'partners' under the *National Agreement on Closing the Gap*,¹ paying lip service to their commitment to end these very practices, and to take the necessary measures to end the shocking overrepresentation of First Nations adults and young people in the criminal justice system.²

In this submission we ask how the States and Territories are able to continue to get away with such sustained duplicity? And when will the Commonwealth take the necessary action to ensure the targets are met?

The Closing the Gap Agreement Justice Measures

The National Agreement on Closing the Gap came into effect in 2020, as an agreement between Commonwealth, State and Territory, and Local Government and Aboriginal and Torres Strait Islander Peak Bodies. This agreement included new targets to end overrepresentation of Aboriginal and Torres Strait Islander adults (Target 10) and young people (Target 11) in prisons.

Up until then, the Closing the Gap policy framework ('National Indigenous Reform Agreement') had sought to end disparities in Aboriginal and Torres Strait Islander wellbeing without addressing the chronic impacts of hyper-incarceration on First Peoples.³ The inclusion of justice targets was long overdue.

The 2020 'refresh' came with another important change; government parties committed to work in formal partnership with First Nations peoples, with the Coalition of Peak Aboriginal and Torres Strait Islander Organisations being a party to the Agreement, and 'priority reforms' designed to transform government ways of working. These priority reforms reflect the evidence on what is required to make change in Aboriginal and Torres Strait Islander wellbeing – formal partnership and shared decision making, building the community-controlled sector, transforming government organisations and access to data and information at the regional level. In the justice space there was the establishment of a National Justice Policy Partnership forum where Australian government worked alongside Aboriginal and Torres Strait Islander Peak Bodies and independent representatives.

Unfortunately, it has become evident that these commitments do not seem to count for much. **Since the agreement commenced Productivity Commission data shows rates of adult incarceration are**

¹ *National Agreement on Closing the Gap* (July 2020).

² Productivity Commission, 'Socio-economic outcome area 10', *Closing the Gap Information Repository* (Web Page) <https://www.pc.gov.au/closing-the-gap-data/dashboard/se/outcome-area10>; Productivity Commission, 'Socio-economic outcome area 11', *Closing the Gap Information Repository* (Web Page) <https://www.pc.gov.au/closing-the-gap-data/dashboard/se/outcome-area11>.

³ Council of Australian Governments, *National Indigenous Reform Agreement (Closing the Gap)* (Canberra, 2009).

worsening,⁴ and there has been no progress in keeping young people out of prison⁵. State and Territory governments say one thing in the rooms of the Justice Policy Partnership forum and do another when they return to their cabinets. Their actions are in direct opposition to the targets the Agreement lays out, and meeting records don't assure us that the parties have been transparent about their intentions.

State and Territory Blindsiding and Backsliding

When Productivity Commissioner and Yawuru man Romlie Mokak wrote in his review of the National Agreement on Closing the Gap in 2024 that 'it remains too easy to find examples of governments making decisions that contradict their commitments in the Agreement' he captured perfectly what the next six months of regression in criminal justice demonstrated.⁶

From 19-20 November 2024 all Australian Governments were at the table with Aboriginal and Torres Strait Islander representatives on Ngunnawal Country, Canberra to progress the 14th meeting of the Justice Policy Partnership. The parties recorded that they worked on "progressing tangible and action-oriented outcomes that will have the immediate and long-term positive impact in ensuring justice systems work for Aboriginal and Torres Strait Islander people."⁷

Furthermore, States and Territories were working on a Strategic Framework under the Agreement, committing amongst other goals to "transforming justice systems so that they work for and not against, Aboriginal and Torres Strait Islander people, by eliminating racism, embedding self-determination, ensuring policies and programs are culturally appropriate and designed in partnership with communities in a strengths-based way."⁸

Just prior to this at the Closing the Gap Joint Council meeting on 15 November 2024 parties had agreed to elevate target 11 on youth justice outcomes as an urgent priority.⁹

Yet the following month regressive "tough on crime" tactics continued by State and Territory members.

In December the Northern Territory Deputy Chief Minister and Minister for Corrections boasted that prisoner numbers increased by 84 people, 3.3% in just six days, stating "Our government will not apologise for continuing to lock up those who cause harm in our community."¹⁰ When the Country

⁴ Productivity Commission, 'Socio-economic outcome area 10', *Closing the Gap Information Repository* (Web Page) <https://www.pc.gov.au/closing-the-gap-data/dashboard/se/outcome-area10>

⁵ Productivity Commission, 'Socio-economic outcome area 11', *Closing the Gap Information Repository* (Web Page) <https://www.pc.gov.au/closing-the-gap-data/dashboard/se/outcome-area11>

⁶ Productivity Commission, *Review of the National Agreement on Closing the Gap* (Study Report, 2024) 79 ('Study report').

⁷ Attorney General's Department, *Justice Policy Partnership Meeting 14* (Meeting Summary, 2024)

<https://www.ag.gov.au/sites/default/files/2024-12/justice-policy-partnership-meeting-14-summary.pdf>

⁸ Commonwealth Attorney General's Department, *Justice Policy Partnership Strategic Framework* (2024)

⁹ *Communique on the thirteenth meeting of the Joint Council on Closing the Gap* (Communique, 15 November 2024).

¹⁰ Deputy Chief Minister Gerard Maley, 'Prisoner numbers surge by 84 in six days amid crime crackdown' (Media Release, NT Government, 30 December 2024) <<https://createsend.com/t/t-25F2B4CAD1634C912540EF23F30FEDED>>.

Liberal Party entered government in October, they lowered the age of criminal responsibility to 10 years old within their first sitting week.¹¹

In Queensland the State Government was passing their *Making Queensland Safer Act 2024* which removes the principle of detention of last resort for children and increases a range of minimum and mandatory sentences for young people. When the legislation was fast tracked through Parliament, the Queensland Government confirmed in the accompanying Human Rights Statement that the legislation was incompatible with human rights and international standards regarding the best interest of the children in the justice system.¹² The statement also highlighted that “the amendments are expected to have a greater impact on Aboriginal and Torres Strait Islander Children”.¹³

The National Aboriginal and Torres Strait Islander Legal Services has condemned the moves, highlighting that all evidence and experience tells us ‘the tragic shift back to failed, punitive policies will lead to a lot more children in jail and more dangerous communities.’¹⁴

Notably the Justice Policy Partnership meeting records do not indicate that there Notably there is no indication in the meeting records from the JPP that States and Territory parties brought these serious and regressive measures to the table for the visibility of Aboriginal and Torres Strait Islander partners and to discuss how they would affect the progress of the CtG targets.¹⁵

State and Territory action of this nature means the legitimacy of the JPP has taken a series blow. Noongar Lawyer and Human Rights Expert Hannah McGlade has argued “As the evidence points to the failure of the JPP, surely, it's time we do better than superficial cooperation with racist governments whose promises 'are like writing in the sand’”.¹⁶

'An Accountability Gap' says Productivity Commission

Productivity Commission Review of the National Agreement on Closing the Gap led by Yawuru man Commissioner Romlie Mokak, highlighted the need for accountability on the Agreement commitments, stating that the current arrangements ‘lack bite’ with no independent oversight and ‘no consequences for failure’.¹⁷

The Review of the National Agreement on Closing the Gap report recommended an independent Aboriginal and Torres Strait Islander led monitoring mechanism on government’s commitments under the agreement, both in policy outcomes and in transformation of their ways of working. It highlighted:

¹¹ *Making Queensland Safer Act 2024* (Qld).

¹² Human Rights Statement of Compatibility, *Making Queensland Safer Act 2024* (Qld) <<https://www.legislation.qld.gov.au/view/html/bill.first.hrc/bill-2024-043>>.

¹³ Ibid.

¹⁴ National Aboriginal and Torres Strait Islander Legal Service, ‘*Aboriginal Legal Service warns against national jail crisis*’ (10 September 2024, media release) <<https://www.natsils.org.au/wp-content/uploads/2024/09/NATSILS-2409-MR-10.pdf>>

¹⁵ See Attorney General’s Department, *Justice Policy Partnership Meeting 14* (Meeting Summary, 2024) <<https://www.ag.gov.au/sites/default/files/2024-12/justice-policy-partnership-meeting-14-summary.pdf>>

¹⁶ Dr Hannah McGlade, ‘Justice “gap” remains wider than ever’, *National Indigenous Times* (online, November 26 2024) <<https://nit.com.au/26-11-2024/15033/dr-mcglade-opinion-piece>>.

¹⁷ *Study Report* (n 6) 7 [2].

“The wide gap between governments’ rhetoric and action appears to stem, in part, from a failure by governments to fully grasp the nature and scale of the change required to fulfil the Agreement.”¹⁸

Though there seems some consensus the Agreement life is 10 years, there is no official timeframe for the targets. Without a timeframe for them to achieve outcomes and consequences for not delivering on their commitments, the States and Territories are in no rush to reach their targets. They are able to continue in inaction, and worse yet, increase their “tough on crime” policies that deliberately increase incarceration in blatant opposition to their commitments under the Agreement.

The continued rhetoric from State and Territories committing to transformation is far from the reality of their actions.

Measuring the Rights Things

Data collection and reporting relating to Justice under CtG should place greater emphasis on being useful to local communities in informing their justice work and holding governments to account on their commitments. This involves measuring the government parties performance on implementing their commitments to the priority reforms. It also includes providing local-level data which can be useful to local communities in understanding progress against the targets within their context.

The 2024 Productivity Commission’s Review of the National Agreement on CtG found that a critical gap in the data is that ‘no data is being reported on the agreed targets or supporting indicators for the Priority Reforms.’¹⁹ In the absence of independent evaluation,²⁰ government is failing to assess its own performance against the changes to its ways of working it has committed to. These are essential part of the CtG frameworks which have so far gone without monitoring and evaluation.

Ironically, one of these unmeasured targets relates to community access and control over Indigenous data.²⁰

The Productivity Commission review also examined the State and Territories implementation plans that were meant to outline clear ways they were going to transform to achieve positive impacts. It found the governments listed extreme numbers of initiatives that provided “little, if any, detail on the ‘how’ or the ‘why’” these initiatives are going to create any real tangible change.

“There is, for the most part, no strategic approach or ‘theory of change’ that explains how the initiatives that governments have identified are linked to the Closing the Gap objectives, reforms or outcomes. And where a link is identified, in many cases it is tenuous.

*Further, governments’ annual reports are difficult to reconcile against their implementation plans. This **makes it near impossible for the community to use these***

¹⁸ Ibid 79 [2].

¹⁹ Study report (n7) 6.

²⁰ See Priority Reform 4.

plans and reports to assess progress and to hold governments to account for their actions to enact the Priority Reforms.”²¹

The collection, distribution and transparency of data relevant to Indigenous peoples in the various government executives, with current siloed data structures, does not allow for, or support, the collecting of new data relevant to Closing the Gap and supporting community-led solutions.

The Victorian Government Aboriginal Affairs Report 2023 noted that...

“The latest year of available data varies across the Report due to the inconsistent frequency of collection of survey data and lags in processing administrative data. Data in this Report is the most up to date available for publishing.”²²

For “Goal 17: Aboriginal Victorians feel safe and connected”, Victorian First Peoples-State Relations reported that for Measure 17.1.2 and 17.1.3 no new data was available on their progress at the time of reporting. The Victorian government additionally plans to implement the Agreement’s Justice targets through goals 15-17, of which 16 and 17 are not theoretically linked to any national Agreement Justice measure.²³

The fidelity and richness of data reported on is vital in the National Agreement, especially within Indigenous community. The Closing the Gap Annual Data Compilation Report July 2024, in pointing out the lack of formal ‘targets’ at the State and Territory level to evaluate, highlights that...

“Data, especially at macro-levels, can reinforce deficit narratives and binary comparison and fails to recognise the contributions and resilience of Aboriginal and Torres Strait Islander people (Prehn 2024).”²⁴

Current measures, lacking the necessary micro-level data, obfuscate both good and bad practice for disrupting cyclical offending patterns in Indigenous justice. The Indigenous Law and Justice Hub endorses the position of Just Reinvest NSW on centring a data-drive approach as a central principle,

“When Aboriginal communities are involved in how and what data will be used to define goals and measure progress, they will have a sense of ownership of their work with [Just Reinvest]. Community-owned monitoring, evaluation, and learning (MEL) frameworks provide a structured approach to guide this work, and locally-defined indicators can engage government in the same community-guided goals, outcomes,

²¹ Ibid 35–36.

²² First Peoples – State Relations, Department of Premier and Cabinet, *Aboriginal Affairs Report 2023* (Report, June 2024) 7 https://www.firstpeoplesrelations.vic.gov.au/sites/default/files/2024-07/VIC-GOV_Aboriginal-Affairs-Report_2023.pdf.

²³ Ibid 145, 148.

²⁴ Productivity Commission, *Closing the Gap Annual Data Compilation Report July 2024* (Report, July 2024) 3 <<https://www.pc.gov.au/closing-the-gap-data/annual-data-report/closing-the-gap-annual-data-Compilation-july2024.pdf>> quoting J Prehn, ‘An Indigenous Strengths-based Theoretical Framework’ [2024] *Australian Social Work* 1–14.

and measurement processes. In the absence of this, important cultural and community perspectives are denied in government ways of working.”²⁵

These concerns held by the Indigenous community reflect the necessity of integrated Indigenous Data Sovereignty in the national Agreement. Former Productivity Commissioner Romlie Mokak noted during the inaugural Mokak Oration,

“The Indigenous Data Sovereignty movement is the antidote to these continuing representations of First Peoples. The rise of Indigenous Data Sovereignty, here and abroad, directly challenges the preconceived and continuing reproductions of us as peoples, as communities, as families, as individuals.”²⁶

The ambiguous Indigenous Data structures reflect a failure in governments’ progress in respecting the Indigenous community’s right to government data. It is equally a failure of governments to integrate Indigenous community-controlled organisations as data generators with the capability to lead the generation of direction in addressing the theory gap for Agreement measures.

As Pat Turner, Gudanji- Arrente woman and Lead Convener of the Coalition of Peaks, said at the *Commonwealth Senate Committee on Australia’s Youth Justice and Incarceration System Inquiry* Public Hearing on 3 February 2025, **now** is the time where governments need to really ‘start investing and working in true partnership with our people, do the data collection, and reform the cultures of your bureaucracies to be safe places for our people to engage’.²⁷

Where States and Territories Shirk Their Responsibilities, the Commonwealth Must Step Up

The Commonwealth has a range of constitutional levers at its disposal to incentivise the concerted State and Territory action required to bring them into compliance with their Agreement commitments on justice.

Concurrent responsibility for Indigenous affairs between the States and the Commonwealth continues to see governments shift blame and avoid responsibility. The Hon Wayne Martin AC, former Chief Justice of Western Australia, addressed the diffusion of responsibility for Aboriginal Affairs between the Commonwealth and the States in his 2017 lecture ‘passing the Buck – has the diffusion of responsibility for Aboriginal people in our federation impeded closing the gap?’. He shared:

“The programs and policies required to address the multifaceted disadvantage experienced by too many Aboriginal Australians must address areas commonly

²⁵ ‘Policy and Impact’, *Just Reinvest NSW* (Web Page) <<https://www.justreinvest.org.au/about/policy-impact/>>.

²⁶ Romlie Mokak, ‘Beyond discomfort and dismay: Aboriginal and Torres Strait Islander people, power and prosperity’ (Mokak Oration, Productivity Commission, 20 November 2024) 9 <<https://www.pc.gov.au/media-speeches/mokak-oration/discomfort-dismay/discomfort-dismay.pdf>>.

²⁷ Legal and Constitutional Affairs Committee Hansard (3 February 2024) 40.

administered by separate agencies of each of State or Territory and Commonwealth governments in fields such as housing, health, education and justice. Dissatisfaction with the “silo-based” approach to policy and program delivery to Aboriginal people in these areas has been at a level of crescendo for many years. Both State and Commonwealth levels of government acknowledge the need for a whole-of-government approach but, in my respectful view, have generally failed to deliver.”²⁸

When the then United Nations Special Rapporteur on the Rights of Indigenous Peoples, Ms. Victoria Tauli-Corpuz visited Australia in 2017 their report outlined the need for concerted *Commonwealth* action on criminal justice under the Closing the Gap Agreement, powerfully stating:

‘The current claim by the Government that matters relating to incarceration remain the sole prerogative of states is untenable in the severe and worsens the impact of the national detention crisis on the Aboriginal and Torres Strait Islander peoples.’²⁹

The Special Rapporteur emphasised that **it is the responsibility of the federal Government to ensure compliance with international human rights obligations**. The Federal government has the constitutional power to legislate to implement Australia’s international obligations.³⁰

Despite the Minister for Indigenous Australians, the Hon Malandirri McCarthy, expressing concern round the “tough on crime” laws introduced across the country,³¹ the federal government has failed to act within its constitutional power to prevent human rights breaches within the concern of the justice targets.

We echo the calls of Pat Turner, Gudanji- Arrente woman and Lead Convenor of the Coalition of Peaks, who recently highlighted at the Commonwealth Legal and Constitutional Affairs Committee that the Commonwealth has the fiscal and policy levers available to it to drive State and Territory accountability on the Closing the Gap targets. They stated **‘we urge the Commonwealth to use these powers, including the funding provided through Commonwealth-state funding agreements to drive change in line with the national agreement.’³²**

The Australian Government though it does not have primary jurisdictional responsibility for key areas of justice must understand that it has the power and responsibility to make sure the targets are achieved, utilising political, fiscal and legislative powers to intervene and influence across jurisdictions. The Commonwealth should be utilising its power to accelerate progress towards target 10, to drive change in line with the agreement.

²⁸ Hon Wayne Martin AC, ‘Passing the Buck – has the diffusion of responsibility for Aboriginal people in our federation impeded closing the gap?’ (Speech, Samuel Griffith Society, 26 August 2017) 256 <<https://classic.austlii.edu.au/au/journals/SGSocUphAUCon/2017/13.pdf>>.

²⁹ Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017) 15 [2]. <<https://digitallibrary.un.org/record/1303201?ln=en&v=pdf>>.

³⁰ Constitution of the Commonwealth of Australia (1902) s51(xxix).

³¹ Department of Prime Minister and Cabinet, ‘Media-Conference- Parliament House, Canberra’ (10 February 2025).

³² Legal and Constitutional Affairs Committee Hansard (3 February 2024) 40.

State and Territories must not be allowed to continue making such a blatant mockery of the Partnership Forums without consequences, which is well within Commonwealth powers to achieve.

Conclusion

It is time for the Commonwealth to use the more robust constitutional mechanisms available to it to honor Australia's Human Rights obligations to Aboriginal and Torres Strait Islander people in criminal justice settings. For the Closing the Gap Agreement to really mature it needs to grow some teeth and now become just a monitoring mechanism for continuing bad faith of its parties.



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