
A CRIMINAL SHIFT: ALCOHOL REGULATION IN THE NORTHERN TERRITORY

by Timothy Buckley

INTRODUCTION

One of the first acts of the Country Liberal Party ('CLP'), following their election to government in the August 2012 Northern Territory ('NT') elections, was reforming the Territory's alcohol regulation. Soon after being elected, the CLP abolished the Banned Drinkers Register ('BDR') and the Substance Misuse Assessment and Referral for Treatment Court ('SMART Court') on the basis that they 'did not work'.¹ In 2013, the new government began the implementation of an alternative alcohol policy with the introduction of two controversial laws in July and in December: *The Alcohol Mandatory Treatment Act 2013* (NT) (*Mandatory Treatment Act*) and *The Alcohol Protection Orders Act 2013* (*Protection Orders Act*). Alcohol related harm is a complex policy problem in the NT without clear solutions. The current policies represent the most novel, contentious, and radical of government responses to the NT's alcohol problem. This article compares the *Mandatory Treatment Act* and the *Protection Orders Act* with the previous laws they replaced, and discusses the prospects of these new laws to effectively dam the NT's 'rivers of grog'.²

ALCOHOL-RELATED HARM IN THE NORTHERN TERRITORY

Alcohol dependence is not a uniquely Aboriginal problem in the NT. With the highest rate of alcohol consumption per capita of any state or territory in Australia, alcohol abuse is having a significant negative impact on family and community development, as well as Territorians' health, safety, education, and employment opportunities. Alcohol-related harm is also escalating. From 2008 to 2013, alcohol-related domestic assaults increased by 77 per cent, while all alcohol-related assaults have increased by 52 per cent over the same time period.³ This has seen the NT's prison population nearly double in the past decade, 85 per cent of whom are Aboriginal.⁴ Higher levels of alcohol consumption are associated with both short and long-term health conditions, premature death, Foetal Alcohol Syndrome and Foetal Alcohol Spectrum Disorders.⁵ Alcohol misuse is also associated with higher rates of homicide, manslaughter, domestic violence and

sexual and other assaults; the neglect and abuse of children, and the disruption and dysfunction of communities.⁶ With severe impacts felt in health, education, employment, housing, the courts, and workplace productivity, the total cost to the community is estimated to be \$642 million a year.⁷

PAST GOVERNMENT RESPONSES — A BRIEF OVERVIEW

In recent years, the politics and policy of alcohol in the NT has been in a state of flux—subject to extensive regulation at both a Territory and Commonwealth level. The Commonwealth Government's central reforms in this area are the *Stronger Futures in the Northern Territory Act 2012* (Cth), which replaced the Northern Territory Emergency Response in July, 2012.⁸ At a NT Government level, one of the more recent developments was introduced under the former Labor Government in 2011. Called the 'Enough is Enough Alcohol Reform Package',⁹ it included the creation of the BDR and SMART Courts. The government stated that their goal was the adoption of a preventive, protective, harm reduction based approach to alcohol regulation.¹⁰

THE BANNED DRINKERS REGISTER

When first implemented, the BDR was described by the NT Alcohol Policy Minister, Delia Lawrie as 'the toughest grog laws in the nation'.¹¹ Under the scheme, persons who had been given a 'Banning Alcohol and Treatment' ('BAT') notice were entered into an identification system and prevented from purchasing alcohol.¹² It was an offence for licensees to sell alcohol to a person on the BDR. A BAT notice could be given for a number of reasons, including to a person who had, within the previous three months, been held in alcohol-related protective custody at least three times, or had been summonsed or charged in relation to an alcohol-related offence.¹³ To ensure compliance with the BDR, the Act provided for the breath testing of people subject to a notice or order when in public and where it was reasonably believed they had consumed alcohol.¹⁴ In keeping with its remedial and rehabilitative focus, however, it was not a criminal offence for a person to breach a notice under the BDR.¹⁵

SMART COURTS

The SMART Court had enhanced powers to make alternative sentencing orders for people with a history of serious substance misuse who have been found guilty of committing certain offences.¹⁶ The purpose of the SMART Court was threefold: reduce the criminal activity associated with alcohol's misuse, provide increased opportunity for rehabilitation, and reduce the risks and harms associated with that misuse.¹⁷ The procedural safeguards and immunities within the Act encourage the conclusion that the SMART Court's emphasis in sentencing was not punitive, but rather on encouraging peoples' prospects of success in rehabilitation.

A PROMISING START

The three pillars of the National Drug Strategy are demand reduction, supply reduction, and harm reduction.¹⁸ It is arguable that the BDR and the SMART Court struck an appropriate balance between these goals, by preventing consumption and alcohol-related harm whilst ensuring the onus was cast on the licensee to ensure enforcement and compliance. The NT Police Association, in its submission to the House of Representatives Standing Committee on Indigenous Affairs Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Communities, stated:

The BDR was a unique tool to assist in the fight ... against excessive consumption of alcohol, the alcohol-caused damage to the Territory's rich Aboriginal history and culture, and in particular, efforts to alleviate aboriginal disadvantage.¹⁹

There is evidence that the BDR contributed to a drop in alcohol consumption,²⁰ alcohol-related harm,²¹ and anti-social behaviour,²² particularly in the public areas of the major city and towns.²³ When it was abolished in August 2012, there were more than 2500 people on the BDR. Alcohol-related emergency admissions in NT hospitals increased by 80 per cent in the 14 months following its abolition.²⁴ For the first time in six years, there was an increase in alcohol consumption in the NT,²⁵ mirrored by alcohol-related harm in the NT. The NT Government has released evidence which it argues illustrates that alcohol-related emergency admissions have been steadily rising since 2005.²⁶ Many people have argued that the BDR was a step in the right direction, which could have become one of the central tools in combatting alcohol-caused disadvantage.²⁷

THE MANDATORY TREATMENT ACT

The *Mandatory Treatment Act* came into force on 1 July 2013. Costing the NT Government \$100 million to implement, its purpose was to mandate assessment, treatment, and management of 'people with chronic drinking problems in public areas' in the NT.²⁸ The stated purpose of the Act is harm reduction, with the ultimate aim of reducing a person's alcohol intake and thereby improving overall quality of life and functioning.²⁹

The Act targets people taken into police protective custody three or more times in a two-month period for being intoxicated in public.³⁰ A person can be detained in an assessment facility by police, after which the Alcohol Mandatory Treatment Tribunal ('AMT Tribunal')³¹ decides on treatment options. A person may be held in custody for nine days while this process occurs. Treatment options include placing the person in a secure residential treatment facility,³² treating the person in a community residential treatment facility, or other forms of community management, including income management.³³ Orders may be up to three months in length. In detention, a person will have to pay for the cost of their treatment and food. Contrary to the legislation's stated harm-reduction rationale, a penalty of up to three months imprisonment can be imposed where a detained person absconds three times or more.³⁴

ANALYSIS OF THE MANDATORY TREATMENT ACT

The question remains whether the *Mandatory Treatment Act* offers anything that makes it likely to achieve its stated goals. This Act attracted a significant community response both prior to and after its enactment. Most submissions to the government were critical, expressing concern about the lack of evidence supporting the effectiveness of mandatory treatment for alcohol misuse, the paucity of human rights protections,³⁵ lack of legislative safeguards, the lack of judicial oversight beyond questions of law, the criminalisation of illness and addiction,³⁶ and the lack of broader policy measures to address the multi-causal nature of alcohol related harm such as public health and social welfare.

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International human rights law requires that limitations on human rights are only permissible when the state can produce 'cogent and persuasive' evidence to justify the limitation, and make clear the consequences of imposing or not imposing the limit.³⁷ A concern raised by this Act is that the NT Government has not produced strong enough empirical evidence to justify the potentially severe limitations on people's human rights. The list of rights that might be affected include: freedom from arbitrary detention, the right to a fair trial, the right to health, freedom from forced medical treatment, freedom from cruel, inhuman or degrading treatment, and the right of equality and non-discrimination.³⁸

Three hundred and ten people have passed through *Mandatory Treatment* during its first year of operation. The North Aboriginal Justice Agency ('NAAJA') argues that only five per cent of participants are expected to reduce their consumption of alcohol.³⁹ While the NT Government has stated that as of March 2014, 74 clients have absconded from treatment centres, Minister for Alcohol Rehabilitation, Robyn Lambley, has pointed out that 70 per cent of clients who have absconded have returned to complete their treatment order.⁴⁰ However, as nine out of 10 people taken into protective custody by the police in the NT are Aboriginal,⁴¹ this de facto criminalisation of public drunkenness appears to heavily impact upon Aboriginal people in a manner that is contrary to the recommendations of the Royal Commission into Aboriginal Deaths in Custody.⁴²

Ongoing concerns have also been expressed about the lack of legal protections afforded to participants. In the first appeal against the imposition of an order by the AMT Tribunal, Magistrate David Bamber held the plaintiff had been denied natural justice, as she had not been represented during the tribunal hearing: 'Without an advocate, she was effectively not being heard on factors crucial to the Tribunal's determination.'⁴³ The Central Australian Aboriginal Legal Aid Service ('CAALAS') argued that the decision cast doubt on all the AMT Tribunal's decisions, as they state that nobody who has appeared before the Tribunal in Alice Springs has been represented.⁴⁴

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THE PROTECTION ORDERS ACT

In certain respects the *Protection Orders Act* takes over where the BDR left off.⁴⁵ Coming into force on 18 December 2013, the purpose of the Act was to provide a further law enforcement tool for the NT Police Force and to deter alcohol-related crime.⁴⁶ An Alcohol Protection Order ('APO') may be issued to an adult prohibiting them from consuming or possessing alcohol or entering licenced premises.⁴⁷ A police officer may issue an APO for up to 12 months if a person is arrested, summonsed, or served with a notice to appear in court for an offence punishable by imprisonment for six months or more, and where the officer believes the person was

'affected by alcohol' when committing the offence.⁴⁸ The *Protection Orders Act* empowers police to breath test people they reasonably believe to have consumed alcohol while subject to an APO,⁴⁹ and, without warrant, to search, seize and destroy alcohol containers in the possession of such a person.⁵⁰ A significant point of difference between this Act and the BDR is that if a person breaches an APO they may be imprisoned for up to three months.⁵¹ Whereas the BDR adopted a strategy based upon the prevention of a social harm, the *Protection Orders Act* adopts a criminal justice approach. This is illustrated through the NT government's strategy of coupling APO enforcement with intensive policing outside bottle shops.⁵² Concerns that have been raised about the new Act include: the shift in responsibility from the licensee to the individual, the criminalisation of alcoholism, the broad ambit of qualifying offences—which has the potential to lead to higher incarceration rates, the unusually far-reaching powers afforded the police, and inadequate review mechanisms.⁵³ The concern has been expressed that this legislation will lead to more encounters with the criminal justice system, higher rates of incarceration of Indigenous people, and the further entrenchment of Indigenous disadvantage.

CONCLUSION

The *Mandatory Treatment Act 2013* and the *Protection Orders Act* represent a new turn in the direction of policies designed to dam the NT's 'rivers of grog'. They reflect a shift away from demand, supply, and harm reduction towards criminalisation and mandatory interventions. Existing research indicates that this re-direction was premature: the BDR and SMART Courts demonstrated promise in arresting alcohol's harm through adopting a remedial and rehabilitative focus. It is striking that the body representing the people who are called upon to enforce these laws—the NT Police Association—recently lamented the abolition of the BDR and described the existing approach to alcohol regulation as an 'institutional and legislative blind eye' response to Indigenous disadvantage.⁵⁴ The primary concern with this turn to the criminal justice system is that the NT government has not produced persuasive evidence to justify its current policies on alcohol regulation. There is a concern that these policies establish a dangerous precedent—where government does not address the causes and effects of social issues but rather diverts those most in need into a system ill-equipped to offer holistic solutions: the criminal justice system. The concerns raised by this legislation such as its paucity of evidence, human rights protections, legislative safeguards, judicial oversight, and indirect discrimination on Aboriginal people have the potential to result in a widening of the legal divide between Aboriginal and non-Aboriginal Australians.

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