



**North Australian Aboriginal Justice Agency**

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# Northern Territory Alcohol Policies and Legislation Review

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**North Australian Aboriginal Justice Agency  
submission to the Expert Panel, Alcohol  
Policies and Legislation Review**

**July 2017**

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## **Background to the submission**

As a legal service and justice agency the North Australian Aboriginal Justice Agency (NAAJA) has a strong interest in the development of appropriate and effective alcohol policy and legislation.

The voices we represent, of a Board comprising Aboriginal people from across the Top End, have direct insight from their observations and experiences of the negative impact of alcohol abuse on families and communities.

In NAAJA's criminal law practice the misuse of alcohol features prominently across our matters. The statistics of alcohol and its connection to criminal behaviour are well known to the Expert Panel of the Alcohol Policies and Legislation Review.

In NAAJA's civil law practice including matters dealing with Victims of Crime, Child Protection, Motor Vehicle Accident Compensation and other areas the issue of alcohol abuse is also too common.

In our Throughcare and Prison Support service our clients go through a period of not accessing alcohol and engaging in programs aimed at equipping them with the tools to not abuse alcohol, and then return to places where alcohol is accessible and where peer and family networks engage in risky alcohol consumption. Alcohol is then a risk factor when it comes to recidivism.

These issues are not confined to Aboriginal people. The statistics are clear that alcohol abuse, risky consumption levels and associated harms extend to other Territorians with high rates in comparison to national and international levels. As the Issues Paper highlights, the Northern Territory continues to have the highest estimated pure alcohol per capita consumption in Australia and the second highest proportion of non-Indigenous adults at risk of long-term harm from excessive alcohol consumption. An unknown proportion of these incidences occur behind closed doors and in private residences away from the purveyor of a law enforcement response.

Our role in this submission is to draw on our collective experiences and insights to provide a perspective based on our practice as a legal service and justice agency.

We also support our Aboriginal led community organisations in the health sector and the insight and expertise from a specialised, health perspective. In particular, we support Aboriginal health led community organisations and experts in the health field who focus on trauma and its connection to risky alcohol consumption. Our aim is to complement this work and these perspectives by focusing on our role as a legal service and justice agency.

## **About NAAJA**

NAAJA provides high quality, culturally appropriate legal aid services to Aboriginal people in the Top End of the Northern Territory. NAAJA was formed in February 2006, bringing together the Aboriginal Legal Services in Darwin (North Australian Aboriginal Legal Aid Service), Katherine (Katherine Regional Aboriginal Legal Aid

Service) and Nhulunbuy (Miwatj Aboriginal Legal Service). NAAJA and its earlier bodies have been advocating for the rights of Aboriginal people in the Northern Territory since 1974.

NAAJA serves a positive role contributing to policy and law reform in areas impacting on Aboriginal peoples' legal rights and access to justice. NAAJA travels to remote communities across the Top End to provide legal advice and consult with relevant groups to inform submissions.

## **The nature of our problem**

*What does progress look like in addressing alcohol misuse?*

What is well known to people involved in the Alcohol Policies and Legislation Review is the extent of alcohol abuse and associated impacts in the NT. We have some of the highest rates of alcohol consumption in the world and highest rates of associated harms. These harms lead to trauma and this compounds existing trauma, leading to more harm. We have had these very high rates for many, many years.

What does progress look like in addressing alcohol abuse? The answer varies depending on the perspective. It may begin first with an acknowledgement of the nature of our problem.

Alcohol consumption is ingrained in our culture, as Territorians. Well known lyrics to popular songs attest to drinking alcohol as Territory culture<sup>1</sup>. Alcohol use at risky consumption levels is too often part of this culture. Incidences of risky consumption levels takes place across the Territory and in different parts, from Mitchell Street to suburban houses to open places and in cities, regional towns and at the outskirts of restricted areas. Alcohol consumption features heavily in the statistics of serious criminal behaviour. For example, a minimum of 53 per cent of all assaults are associated with alcohol and up to 65 per cent of domestic and family violence incidents reported to police in 2015/16. It is also a significant factor in road accidents with alcohol being involved in 49 per cent of crashes leading to death. This statistic does not include accidents where pedestrians were impaired due to alcohol.

The connection between alcohol and Territory culture comes from many different places and stories. In this culture, risky consumption levels has always been an ingrained practice. This history of the Northern Territory connects alcohol use to other States and Territories across Australia to places where risky consumption levels continue to feature heavily. And whilst many of these other places appear to have handled alcohol more effectively from a public policy perspective, there are still pockets and parts of these places where risky consumption levels and the connection between serious criminal behaviour and alcohol are too common.

For Aboriginal people, the consumption of alcohol has been regulated from earlier periods of the Northern Territory's history and in the control over Aboriginal people under protectionist policies. During periods in our history as alcohol became more accessible, the unmet need of social determinants including housing, education,

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<sup>1</sup> 'We've Got Some Bloody Good Drinker's in the Northern Territory' by Ted Egan AO.

employment, limited agency between two worlds combined with increased supply and a permissive social ideology meant alcohol abuse spread and led to concerning rates of dependency and harm.

For many Territorians regardless of background, alcohol abuse is a part of self-medicating process for unresolved trauma. This trauma takes many forms. Many incidences of trauma are connected to alcohol abuse. Trauma can be inter-generational and passed down from generations. Unresolved trauma and alcohol and other drug abuse has led to concerning levels of mental health and related issues. Trauma connected to alcohol compounds existing trauma.

The nature of our challenge also has a political dimension. Alcohol supply reduction measures can be evidence-based approaches that are strongly resisted by a political voice or group which claims alcohol use including at risky consumption levels is a 'right', or that harm connected to alcohol is a problem for the 'other' group in society (and not 'our' group). This tension forms the fault lines of much of the media coverage and public policy debate. The liquor industry is attuned to this debate. The core centre of our political spectrum, particularly with voters in suburban, city and town areas, is mindful to this claim and so governments of any political persuasion are sensitive to this voice.

A comprehensive response to alcohol abuse will require reform to the systems that comprise or help describe the nature of our problem. It will require being up-front about our Territory culture and how risky consumption levels and associated harm is inconsistent with our core values and lifestyle preferences. It will require leadership and targeted community education and awareness around these core values.

We need to be up-front and recognise the scale of our problem and the need for a substantive response, including reform that limits the influence of the alcohol industry and holds the alcohol industry to account *as much as it does* for Aboriginal people. It will require empowering Aboriginal people across the legislative and policy response in a meaningful way and ensuring culturally competent therapeutic and health based responses where there are interventions related to alcohol abuse, including interventions in the criminal justice system. With pathways tailored to individual circumstances and need we can work towards a response more suited and adapted to the regional and local context.

## Summary of recommendations

The core threads of our submission are:

1. **Be sensitive to discrimination:** an interpretation of discrimination from an Aboriginal perspective cuts across many aspects of legislation and policy design and the criminal justice response.
2. **Take social determinants seriously:** housing, employment, education and other social determinants requires a comprehensive and sustained effort. Empowering Aboriginal people across government policy in a meaningful way can deliver many benefits.

3. **Link interventions to therapeutic and health based responses:** a properly resourced, health based response should be integrated across the interventions relating to alcohol abuse. Criminalising the interventions in the absence of effective therapeutic and health based responses compounds the problems.
4. **Integrate and resource cultural authority to therapeutic responses:** a culturally competent response must be adapted and responsive to local and regional contexts.

The recommendations of this submission are:

- We recommend a formal, independent evaluation is put in place as part of the Banned Drinker's Register (BDR) so that it can be assessed as part of an evidence-based approach.
- We recommend the BDR along with other intervention measures are linked to properly resourced and culturally responsive pathways of therapeutic support.
- We recommend government initiate a consultation process to recommend the removal of individual permits for 'general and restricted areas' under the Liquor Act.
- We recommend Alcohol Protection Orders in its present form are abolished.
- We recommend in relation to Alcohol Mandatory Treatment (AMT):
  1. The AMT Act is abolished.
  2. Should any future civil commitment scheme is introduced that it is in line with international best practice, which means that any mandatory interventions are short term and are only enacted in emergency situations where there is an imminent risk of harm to the person.
- In relation to drinking spots near restricted areas: we recommend:
  1. Drinking spots are relocated to a safe location away from major highways.
  2. Speed limits are reduced in the vicinity of known drinking spots and patrols are undertaken by Police officers in the vicinity of known drinking spots to enforce reduced speed limits.
  3. Prominent signage is erected in known drinking spots to warn road users.
  4. Adequate lighting is installed in known drinking spots to provide greater visibility of people or obstacles.
  5. Regular patrols by police officers and/or community night patrols are undertaken at known drinking spots.
  6. That a working group under the auspices of the Northern Territory Government is established for the purposes of reviewing and improving the safety of drinking spots in the Northern Territory.

- The Liquor Act and the Police Administration Act is amended to provide the NT Police with express statutory authority to conduct identification checks at takeaway alcohol outlets.
- That Temporary Beat Locations (TBLs) are conducted in a non-discriminatory manner that every purchaser of alcohol is asked where they intend to consume alcohol and are engaged in the same process in relation to furnishing identification.
- In relation to traffic offences for 'drink driving' that government initiate a process with communities and relevant stakeholders with a commitment to reform existing laws, develop frameworks adapted and responsive to regional circumstances, and delivery of therapeutic services.
- We recommend the offence provisions under the *Liquor Act* (NT) which allow for the seizure and forfeiture of property should be amended so that property can only be seized if a person has been charged with offences relating to the commercial supply of alcohol, and the police have reason to believe that the person charged is the sole owner the property.
- That government legislate for the ban of donations to political parties and the influence of elections by the alcohol industry and associated entities, modelling legislation on the NSW legislation; and
- That the proposed Independent Commission Against Corruption include specific provisions and/or a specific focus relating to the above to ensure greater public confidence and trust in the process.
- Government develops a dedicated program of supporting community-led and driven initiatives that relate to healing by investing in and resourcing cultural authority and local initiatives.
- That alcohol related therapeutics courts are established and properly resourced.
- That courts have greater access to services and mechanisms so that interventions into alcohol abuse are provided with options as an alternative to imprisonment.
- We recommend the Liquor Act is amended to include provisions for the Director-General to make public a Community Impact Statement drawing on the views of communities and relevant stakeholders including legal and social services affected by an application.
- That there is a periodic review of a Community Impact Statement in relation to alcohol use for communities and regions.
- In relation to Fetal Alcohol Syndrome Disorder (FASD) we recommend
  1. We recommend targeted training on FASD among the judiciary, Justices, , lawyers, prosecutors, police corrections and youth justice officers.

2. We recommend that legal stakeholders be provided with a checklist or another basic screening instrument to improve early identification of defendants who might be FASD-affected and require a referral to an assessment service.
  3. We recommend that the NT Government develops accessible and culturally safe therapeutic programs across the Northern Territory for expectant mothers and support FASD-affected individuals.
  4. We recommend that the NT Government improve diagnostic capacity within the justice system to enable routine screening of FASD-suspected defendants and their families.
  5. We further endorse recommendation 13 from NAAJA and CAALAS's submission which called for a range of non-custodial sentencing options be introduced to address FASD-affected defendants in the justice system. These include:
    - a. intensive, culturally safe and individually tailored support programs for FASD-affected individuals involved with the criminal justice system,
    - b. special court processes for FASD-affected defendants,
    - c. secure care facilities for those who do not have stable accommodation and who would otherwise be sent to prison.
  6. We recommend that the NT Government invest in funding whole-of-community FASD education programs which particularly target young women to prevent FASD.
- We recommend implementing an Alcohol and Drug Court in the Northern Territory founded on therapeutic justice principles. This would be particularly beneficial for young people whose offending behaviour is linked to alcohol or drug misuse.

## **Context to an evidence based approach**

The importance of developing policy consistent with evidence based approaches is often expressed in submissions to reviews and inquiries.

We reiterate this view.

We also appreciate alcohol policy sits within a complex social, political and cultural terrain and there are a number of factors particular to our experience in the Northern Territory that present challenges to integrating evidence based approaches to policy.

For example, whilst data may reflect trends in the purchase of alcohol in a certain location this data is limited in capturing other areas of drug or alcohol misuse (such as cannabis or methamphetamines). Data can also be limited by how it helps to explain particular areas of policy trends when there are a multitude of policies that relate and impact each other (such as welfare reform or supply reduction measures). Because the behaviour of abusing alcohol is influenced by complex factors, and



because we see through our own world-view and not that of others, it can be challenging to accurately diagnose the underlying factors contributing to behaviours of alcohol abuse and to tailor responses.

There may also be matters specific to the particular circumstances of the Northern Territory. Our people, matters of geography, history, languages, incidences relating to inter-generational trauma and particular relationship to the Commonwealth Government (as experienced by, for example, the Northern Territory Emergency Response into Aboriginal Communities 2007)

And whilst evidence-based approaches take into account limitations in a genuine and transparent way, in our direct experiences there is a need to exercise caution when considering purported data to back a particular point. NAAJA has found a need to exercise caution in this way including for points raised by government spokespersons for policy.

In addition, alcohol policies and legislation, particularly public drinking laws, are sometimes recognised as a 'wicked problem', meaning that policies in this area are strongly contested, complex, open-ended and intractable.<sup>2</sup> Such problems require comprehensive and more innovative approaches that are not merely 'quick fixes' and 'simple solutions'.<sup>3</sup> Instead of taking a traditional linear approach to developing policies, tackling wicked problems demands the 'involvement, commitment and coordination of multiple organisations and stakeholders to be delivered effectively'.<sup>4</sup>

Whilst there is much debate about approaches to wicked problems including disadvantage, using third-party partnerships, investing in research to gain better knowledge and encouraging better and ongoing consultations are widely recommended ways to tackle wicked problems.<sup>5</sup> Through this, policy-makers can adopt evidence-informed policies that work with communities in a place-based capacity to address the multi-varied, complex reasons for alcohol abuse.

## **The current legislative and policy framework**

### ***Banned Drinker's Register***

We are supportive of the imminent reintroduction of a Banned Drinker's Register. Particularly, we note there is a level of political resistance to the idea of every person furnishing identification to be scanned for the purpose of implementing the BDR and we acknowledge and respect the view that the crisis of alcohol abuse necessitates such a response. We note there are opportunities to strengthen the model and make it more effective based on a review of previous practices.

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<sup>2</sup> Brian W Head, 'Wicket Problems in Public Policy' (2008) 3(2) *Public Policy* 101; Amy E Pennay 'Wicked problems': The social conundrum presented by public drinking laws' (2012) 19 *Drugs: Education, Prevention and Policy* 185.

<sup>3</sup> See Commonwealth of Australia, 'Tackling Wicked Problems: A Public Policy Perspective' (2007) Australian Public Service Commission, Canberra.

<sup>4</sup> See Commonwealth of Australia, 'Tackling Wicked Problems: A Public Policy Perspective' (2007) Australian Public Service Commission, Canberra.

<sup>5</sup> Brian W Head, 'Wicket Problems in Public Policy' (2008) 3(2) *Public Policy* 101, 114.

We make the following observations:

- *The need for an independent and comprehensive evaluation* – we understand that there was no independent and formal evaluation of the BDR’s efficacy prior to its abolishment in 2012. We acknowledge there were positive indications of its success in reducing alcohol related harm in Central Australia and Alice Springs.<sup>6</sup> We are concerned that with the imminent reintroduction of the BDR there are matters such as obtaining accurate, benchmark data that may be critical to an effective evaluation, and that the opportunity for such an evaluation is passing.

#### Recommendation

We recommend a formal, independent evaluation is put in place as part of the BDR so that it can be assessed as part of an evidence-based approach.

- *Uniform implementation of the BDR* – the Northern Territory is culturally, geographically and linguistically diverse. Policy solutions that are successful in one region may not work in another, or may require an adjustment to other policy areas to ensure they can work effectively and can complement existing practices seen by a broad consensus of a community to be working. It is important that the reintroduction of the BDR does not dismantle successful interventions already in place. As policy interventions are most successful when they are designed in genuine consultation with local communities,<sup>7</sup> reforms need to be implemented keeping in mind the need to work alongside Aboriginal communities.
- *Offence provisions relating to supply of alcohol to persons on the BDR* – we understand the reinstated BDR will make it a criminal offence to knowingly supply alcohol to a person already on the BDR. This shift is related to the government’s efforts to ‘address weaknesses in the old version by better addressing the problem of secondary supply and cutting red tape’.<sup>8</sup> NAAJA is concerned that these offence provisions will disproportionately impact Aboriginal people who may face difficulties in relation to their cultural obligations to family members, and who have less understanding of their legal rights or consequences for breaching the law in this way. The current offence provisions will increase Aboriginal peoples’ interaction with the criminal justice system, and will circumvent the therapeutic purpose of the BDR.

#### Recommendation

We recommend alternative measures to a criminal offence provision are considered for actions where a person knowingly supplies alcohol to a person already on the

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<sup>6</sup> National Drug Research Institute, Alcohol Control Measures: Central Australia and Alice Springs

<sup>7</sup> Mandy Wilson, Anna Stearne, Dennis Gray and Sherry Saggars, The Harmful use of alcohol amongst Indigenous Australians, 2010

<sup>8</sup> Michael Gunner, ‘A Better BDR – Tackling Secondary Supply and Cutting Red Tape’ (media release, 11 April 2017) 1 < <http://newsroom.nt.gov.au/mediaRelease/23052>>.

BDR and in circumstances where the person providing the alcohol is not doing so to make a profit.

- *Ensure therapeutic pathways are available* – when the BDR was introduced in 2011, it aimed to reduce the supply of and demand for alcohol. Demand reduction measures included the establishment of the Alcohol and Other Drugs Tribunal, which referred banned drinkers to alcohol treatment options. The Substance Misuse Assessment and Referral for Treatment (SMART) Court, which diverted offenders from the criminal justice system and into treatment, was also introduced. Banning Alcohol and Drugs Treatment Order aimed to increase peoples’ access to counselling or interventions for misuse of a substance. We are concerned the *Alcohol Harm Reduction Bill 2017* does not provide the same referral pathways for alcohol misusers. A person in receipt of a Banned Drinker Order issued by a police officer does not have to be referred or assessed for any treatment options. NAAJA strongly believes that the BDR should focus not only on reducing the supply of alcohol, but supporting people to access treatment options including expanding and tailoring treatment options to demand and local and regional circumstances.

#### *Recommendation*

We recommend the BDR along with other intervention measures are linked to properly resourced and culturally responsive pathways of therapeutic support.

#### ***Permits to allow drinking in restricted areas***

Part VIII of the *Liquor Act (NT)* (Act) deals with ‘general and public restricted areas’. The Director-General under the Act has the power to declare a ‘specified area of land to be a general restricted area’ (section 74 (1) (a)) or a ‘specified area of land, other than a private premises, to be a public restricted area’ (section 74 (1) (b)). A person commits an offence if the person ‘(a) brings liquor into a general restricted area; or has liquor in his or her possession, or under his or her control, in a general restricted area; or (c) consumes, sells, supplies or otherwise disposes of liquor in a general restricted area’ (section 75).

A person may apply to the Director-General for a permit and the Director-General ‘may grant a permit to a person who resides in, or temporary living in, or intends to temporarily liv in, a general restricted area’ (section 87 (1)).

The holder of the permit may ‘(a) bring liquor into; or (b) have liquor in his possession or under his control within; or (c) consume liquor within) the general restricted area to which the permit relates’ (section 87 (2)).

We understand there are more than 100 areas in the NT declared as a general restricted area, and that many of these have been operating for a number of decades and are established practice. In major communities including Lajamanu, Maningrida, Wadeye, Barunga and Yirrkala these measures apply and in circumstances where there is no licensed premises and in some communities where there are also licensed premises with significant regulations (for example, with no take away).

We have received extensive feedback from communities declared as a general restricted area that the prohibitions of alcohol and the accompanying permit system for individuals appears to operate on a discriminatory basis, and that these perceptions are leading to resentment and associated negative feelings and attitudes that have real consequences for the people affected.

The issue is not so much that alcohol should be more accessible and to a broader cohort of the community beyond permit holders, but that permit holders are commonly non-Aboriginal people who live in private residences and can take, consume and control alcohol within their residences and at the exclusion of other people who are commonly Aboriginal and in the community who do not have permits. Local people ask and have strong feelings about – why do they get to drink and we don't? Why can't this rule apply to everyone? Why doesn't the system trust Aboriginal people? Why when this is our land?

#### *Recommendation*

We recommend government initiate a consultation process to recommend the removal of individual permits for 'general and restricted areas' under the Liquor Act.

#### **Alcohol Protection Orders**

We oppose Alcohol Protection Orders (APOs) in its current form and raise the following concerns:

- *Unintended and unfair consequences* – under the *Alcohol Protection Orders Act (NT)* (APO Act), if a person is charged with an offence punishable by 6 months imprisonment<sup>9</sup> and there is reason to believe that the person was 'affected by alcohol'<sup>10</sup> at the time of the offence, the police can issue an APO. If a person is issued with an APO, it is an offence to possess, or consume alcohol, or enter a licensed premise (unless it is their place of work or their residence). These prohibitions have unintended consequences for people subject to an APO, including not being able to attend social functions, sporting events, and not being able to enter supermarkets, which are also licensed premises.
- *Criminalisation of public drunkenness and the absence of any connection to therapeutic pathways* – if a person breaches the rules of their APO, gives alcohol to a person subject to an APO, or refuses to take a breath test whilst they are subject to an APO they can be fined 25 penalty units and/or sentenced to three months imprisonment. APOs clearly breach the recommendations of the 1991 Royal Commission into Aboriginal Deaths in Custody as they recriminalize public drunkenness and increase incarceration of Aboriginal offenders for minor offences involving alcohol.<sup>11</sup> Further, while

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<sup>9</sup> The offences are not just serious offences, but almost all criminal offending. Qualifying offences include loitering, disorderly behavior in a public place, or high and medium range drink driving.

<sup>10</sup> A police officer only has to believe that the person was 'affected by alcohol' at the time of the alleged offence.

'Affected by alcohol' sets a very low threshold – is a person who has had a few drinks 'affected by alcohol'?

<sup>11</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, National Report, (1991), see recommendation 87 and also recommendations 79–85 in relation to the decriminalisation of public drunkenness.

the purpose of APO's is to reduce alcohol related violence arising from alcohol abuse<sup>12</sup>, their application primarily targets people suffering from alcohol dependence or alcoholism.

- *Police powers are too broad* – the current powers allow a Police Officer who reasonable believes that an adult is subject to an APO to search the person without a warrant. This is an unacceptably broad power.
- *Lend itself to discrimination* – APOs disproportionately impact Aboriginal people. Between the commencement of the APO Act and 19 July 2014 86% of first APOs issued and 94% of second APOs issued were to Aboriginal people. Similarly, the process for reviewing a decision to issue an APO is also inadequate and potentially discriminatory. An application for reconsideration must be made in writing, state the reasons why the APO shouldn't have been made and be lodged at a police station within three days of the issue of the APO.<sup>13</sup> If the officer confirms the APO, an aggrieved person has a further seven days to apply for a merits review of that decision.<sup>14</sup> As a greater number of Aboriginal people in the Northern Territory have significant difficulties with the English language than non-Indigenous people, the strict time limits and written requirements under the APO Act, make it extremely difficult for Aboriginal people to challenge a decision. The disproportionate burden placed on Aboriginal people because of the formal requirements of the APO Act undermines their right to equality of access to Courts and other adjudicative bodies.<sup>15</sup>

### *Case studies*

NAAJA was successful in having an APO issued in Darwin revoked. In this instance, our client had a DVO in place which prevented him from being intoxicated in the presence of his wife. On the occasion in question, our client had no intention to consume alcohol with his wife, but started drinking with her when family members arrived. Our client removed himself from the situation, but his wife followed. Our client contacted Police. The Police arrived, arrested him for breach of his DVO and further issued him with an APO. NAAJA made submissions, which were accepted, that the APO should be revoked because of the facts leading up to the issue of the APO and because the APO did not serve an additional purpose to the conditions stipulated in the DVO.

In another matter, NAAJA successfully challenged an APO in the Katherine Local Court in 2014. Our client had been drinking with his wife and others outside a Police Station. It is alleged that our client assaulted his partner while intoxicated. Our client denied assaulting his partner, and said he was trying to help her up from the road as there

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<sup>12</sup> Second Reading Speech for the Alcohol Protection Orders Bill 2013, Northern Territory Legislative Assembly, Parliamentary Debates, 16 October 2013

<sup>13</sup> APO Act s 9(2)

<sup>14</sup> APO Act, s 11(1) and (2)

<sup>15</sup> Article 5(a) of the ICERD

was a road train approaching. His story was confirmed by multiple witnesses and also his partner. His partner was later examined at the clinic and was found to have no visible injuries. Police arrested our client and further issued him an APO.

NAAJA is presently waiting on a decision of the Court of Appeal of the Northern Territory challenge to the APO laws. Our client is an Aboriginal man who does not speak English as his first language. He requires an Aboriginal language interpreter and has very limited literacy. While homeless, he was issued his first three-month APO after being arrested for allegedly stealing food items to the value of \$4.20 of a bread roll, silverside and an orange juice from a supermarket while apparently intoxicated. Those charges were later withdrawn and discharged. Three days after being placed on the APO, the plaintiff was arrested when he was found intoxicated by police. He was issued with a further six-month APO. A week later he was again arrested for drinking and was issued with a further 12-month APO. At the time of his first hearing, our client had been arrested for breaching the APO on a total of 20 occasions, but had committed no other offences in that time.<sup>16</sup>

#### Recommendation

We recommend Alcohol Protection Orders are repealed.

#### ***Alcohol Mandatory Treatment***

We recommend the abolishment of Alcohol Mandatory Treatment (AMT) and are concerned with the following:

- *Indirectly criminalises public drunkenness* – the referral mechanisms in the *Alcohol Mandatory Treatment Act (NT)* (AMT Act) are triggered by three protective custody episodes in two months, which means that people drinking in public spaces are disproportionately impacted. The AMT Act was amended to introduce a medical referral pathway in 2016, but this option was never utilised by medical professionals.<sup>17</sup> People subject to a residential treatment order are deprived of their liberty for three months and not allowed to leave of their own accord. In Darwin, the facilities are also on the site of the old Berrimah prison and are secured by high fences and barbed wire. For many of our clients, mandatory residential treatment orders are akin to three month prison sentences. Initially, the AMT Act also imposed criminal sanctions on people who escaped assessment or treatment facilities, however these were removed after six months.

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<sup>16</sup> Jonathon Huynor, *Imprison Me NT: Paperless arrests and the rise of executive power in the Northern Territory*, *Indigenous Law Bulletin*, November/December, Volume 8, Issue 21.

<sup>17</sup> PwC Indigenous Consulting with Menzies School of Health Research, 'Evaluation of the Alcohol Mandatory Treatment Program in 2017' (submitted to Northern Territory Department of Health, January 2017).

- *Lack of evidentiary basis for mandatory rehabilitation* – there is no conclusive evidence that the use civil commitment for the treatment of alcohol dependent people is effective.<sup>18</sup> Recently, the Evaluation of the Alcohol Mandatory Treatment Program in 2017 (the Evaluation) found that participation in AMT did not have any measureable long term health benefits or restore peoples' capacity to make decisions about alcohol use.<sup>19</sup> Given the significant restrictions to individual rights, the lack of evidence of the efficacy of AMT is deeply troubling.
- *Implemented too quickly* – the AMT Act was implemented very quickly. This meant that there was insufficient time to properly consult with experts in the field, prepare culturally appropriate treatment programs, recruit staff or implement effective procedures and guidelines. In 2013-4, the Community Visitor Program's Annual Report noted that the Darwin Assessment and Treatment Service was not systematically updating individualized treatment plans, individual counselling was not provided as a matter of course and that there were no 'clear treatment or rehabilitation goals or aims'.<sup>20</sup> While some of these issues were later rectified, the rushed implementation had significant consequences for the people who were subject to orders in the first years of operation.
- *The AMT Act is not in line with international best practice* – International law suggests that civil commitment is only justified when it is short term, emergency treatment for an acutely intoxicated individual who is not able to look after themselves and poses an imminent risk to their own safety.<sup>21</sup> The AMT Act is not in line with international best practice. Mandatory treatment regimes in NSW and Victoria better reflect international standards, such as ensuring qualified medical oversight in the assessment process,<sup>22</sup> and removing extended periods of incarceration.<sup>23</sup>
- *Disproportionately effects Aboriginal people* – we know that 97% of the people ordered to receive AMT between 1 July 2014 and 30 June 2015 identified as Aboriginal or Torres Strait Islander.<sup>24</sup> It is evident that the AMT Act primarily targets Aboriginal drinkers and as such may infringe the provisions of the *Racial Discrimination Act 1975 (Cth)*.<sup>25</sup>

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<sup>18</sup> Lander Fiona, Gray, Dennis, & Wilkes, Edward, 'The Alcohol Mandatory Treatment Act: evidence, ethics and the law'

<sup>19</sup> PwC Indigenous Consulting with Menzies School of Health Research, 'Evaluation of the Alcohol Mandatory Treatment Program in 2017' (submitted to Northern Territory Department of Health, January 2017), 47, 55.

<sup>20</sup> CVP Report 2013-4, p 99

<sup>21</sup> UNODC, From coercion to cohesion: Treating drug dependence through health care, not punishment

<sup>22</sup> Section 131 of the AMT Act does not require a senior assessment clinician to be a medical practitioner

<sup>23</sup> Lander Fiona, Gray, Dennis, & Wilkes, Edward, 'The Alcohol Mandatory Treatment Act: evidence, ethics and the law'

<sup>24</sup> PwC Indigenous Consulting with Menzies School of Health Research, 'Evaluation of the Alcohol Mandatory Treatment Program in 2017' (submitted to Northern Territory Department of Health, January 2017), 44.

<sup>25</sup> Lander Fiona, Gray, Dennis, & Wilkes, Edward, 'The Alcohol Mandatory Treatment Act: evidence, ethics and the law'

- *Significant costs not justified* – AMT costs \$24 million dollars per annum to operate<sup>26</sup> and the average cost per client per completed residential treatment episode was \$53,915.<sup>27</sup> These costs diverted scarce resources away from effective prevention and early intervention measures, and reduced the number of voluntary residential rehabilitation beds available.
- *Doesn't address the social determinants of alcohol abuse* – The Evaluation found that AMT does not do enough to address the social and cultural determinants of alcohol misuse, including housing stress, trauma and cognitive impairment.<sup>28</sup> When AMT was first introduced, there was no follow up care provided to people after they were released from treatment facilities, which meant that people exiting residential rehabilitation simply resumed their previous drinking patterns. The Evaluation found that there was only limited improvements in housing or income stability for participants exiting AMT and that the majority of case study participants returned to their home communities, overcrowded town camps or the long grass after their orders.<sup>29</sup>
- *Concerns about the lack of interpreter use in assessment and treatment centres* – it is estimated that the majority of people entering AMT assessment and treatment centres speak English as a second or third language.<sup>30</sup> In *RP v Alcohol Mandatory Treatment Tribunal of the Northern Territory* [2013] NTMC 34, the applicant was not provided with an interpreter for the medical assessment or Tribunal hearing. Anecdotally, NAAJA is aware of other examples whether interpreters were not used for peoples' medical assessments that effected their ability to understand the assessment process. Further, NAAJA understands that interpreters are not supplied as a matter of course for group treatment sessions.
- *Lack of transparency with record keeping and evaluation* – an independent evaluation of the AMT scheme was not released until 2017. This was not a timely response considering the significant uncertainty relating to AMT's efficacy. Similarly, it is clear that rigorous record keeping and sharing procedures in relation to AMT were not established.<sup>31</sup> Gaps in the information captured by the NT Police, the Department of Health/Top End Health Service, and the AMT assessment and treatment centres, made the evaluation of the AMT Act more difficult.
- *Mandatory Alcohol Treatment did not reach a majority of 'vulnerable drinkers'* – AMT reached a section of the most vulnerable drinkers who do not often access voluntary rehabilitation services. These include people 'who are frequently taken into protective custody, emergency departments, are in poor

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<sup>26</sup> Natasha Fyles, Minister for Health, November 2016

<sup>27</sup> PwC Indigenous Consulting with Menzies School of Health Research, 'Evaluation of the Alcohol Mandatory Treatment Program in 2017' (submitted to Northern Territory Department of Health, January 2017) p77

<sup>28</sup> PwC Indigenous Consulting with Menzies School of Health Research, 'Evaluation of the Alcohol Mandatory Treatment Program in 2017' (submitted to Northern Territory Department of Health, January 2017) p72

<sup>29</sup> PwC Indigenous Consulting with Menzies School of Health Research, 'Evaluation of the Alcohol Mandatory Treatment Program in 2017' (submitted to Northern Territory Department of Health, January 2017) p54

<sup>30</sup> Community Visitor Program 2013-4, p68

<sup>31</sup> Inquest into the death of Virginia (Kumanytjayi) Nabarula Brown [2015] NTMC015 1



health, homeless and with histories of past trauma and disconnection with families and communities'.<sup>32</sup> However, 77% of the people who met the trigger for the AMT Act, did not proceed to treatment. This means that AMT was not effective in ensuring that the most vulnerable section of drinkers who present with a range of social and health problems have access to therapeutic treatment or support.

### *Recommendations*

We recommend in relation to AMT's:

The AMT Act is repealed.

That any civil commitment scheme introduced by the Northern Territory Government in the future is in line with international best practice, which means that any mandatory interventions are short term and are only enacted in emergency situations where there is an imminent risk of harm to the person.

### ***Drinking spots near general restricted areas***

Drinking spots have developed on the boundaries of remote communities which are the borders of general restricted areas. Most drinking spots present significant risks to public health and safety because they are often:

- Situated along main highways with maximum speed limits;
- Are inadequately lit to provide visibility of people or obstacles on the road; and
- Are inadequately signed to warn drivers of the likelihood of people or obstacles on the road.

NAAJA has represented several family members of persons killed by motor vehicles whilst intoxicated at drinking spots near remote communities. It is important that immediate steps are undertaken to ensure that tragic deaths of this nature are prevented, and the serious risks that drinking spots post to the community are minimized. Media coverage of Aboriginal communities initiatives and concerns are highlighted in;

- Aborigines in Mataranka want Designated Drinking Area in Aboriginal Owned Paddock.<sup>33</sup>
- Grieving bush community fights back against alcohol.<sup>34</sup>
- Arnhem Lands Indigenous Community Alcohol Bans.<sup>35</sup>

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<sup>32</sup> PwC Indigenous Consulting with Menzies School of Health Research, 'Evaluation of the Alcohol Mandatory Treatment Program in 2017' (submitted to Northern Territory Department of Health, January 2017) piii

<sup>33</sup> Aborigines in Mataranka want Designated Drinking Area in Aboriginal Owned Paddock', *NT News* (online), 22 March 2016 <<http://www.ntnews.com.au/news/northern-territory/aborigines-in-mataranka-want-designated-drinking-area-in-aboriginalowned-paddock/news-story/a10dcf32344ad49697fb3cd07f4c7713>>.

<sup>34</sup> Sarah Everingham, 'Grieving bush community fights back against alcohol', *ABC Lateline* (online), 15 November 2012 <<http://www.abc.net.au/lateline/content/2012/s3634021.htm>>.

### *Recommendations*

In relation to drinking spots near restricted areas: we recommend:

Drinking spots are relocated to a safe location away from major highways.

Speed limits are reduced in the vicinity of known drinking spots and patrols are undertaken by Police officers in the vicinity of known drinking spots to enforce reduced speed limits.

Prominent signage is erected in known drinking spots to warn road users.

Adequate lighting is installed in known drinking spots to provide greater visibility of people or obstacles.

Regular patrols by police officers and/or community night patrols are undertaken at known drinking spots.

That a working group under the auspices of the NT Government be established for the purposes of reviewing and improving the safety of drinking spots in the Northern Territory.

### ***Point of Sale Interventions***

Point of Sale Interventions (POSI) involve the positioning of Police Officers at establishments where takeaway alcohol can be purchased. The purpose of POSI are to prevent breaches of the *Liquor Act* (NT) (i.e. drinking in a public place) by identifying people who will likely consume alcohol in a restricted area and if a reasonable view is formed to then confiscate alcohol.

Police officers undertake POSI by:

- Requesting a person entering a licensed establishment including take away to produce their identification.
- Questioning the person where they intend to consume their alcohol; and
- If the above enquiries give the police any reason to believe that the person may consume alcohol in a restricted area, then the police tell the person that they cannot purchase alcohol because the police will seize it.

A Temporary Beat Location Scheme (TBL) has been running in Katherine since 2014. Similar POSI are also in place in Tennant Creek and Alice Springs. There is some evidence of a direct correlation between a police presence at bottleshops and a reduction in alcohol related violence.<sup>36</sup> There are concerns that the POSI have

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<sup>35</sup> Clare Martin, 'Arnhem Lands Indigenous Community Alcohol Bans', *The Saturday Paper* (online), 10-16 October 2015 <<https://www.thesaturdaypaper.com.au/news/politics/2015/10/10/arnhem-lands-indigenous-community-alcohol-bans/14443956002482>>.

<sup>36</sup> Kieran Banks, 'Point of Sale Intervention Policy Clarification Wanted After NT Police Commissioner Reece Kershaw Comments', *NT News* (online), 23 June 2017 <<http://www.ntnews.com.au/news/northern-territory/point-of-sale-intervention-policy-clarification-wanted-after-nt-police-commissioner-reece-kershaw-comments/news-story/3e30a62deecbab629f995ce21fd425>>.

merely 'dispersed' drinkers to other locations, such as Darwin and the increase of 'sly grogging' offences.<sup>37</sup>

*Whether the police have a statutory basis for the powers exercised under the POSIs*

POSI purport to utilise existing police powers. However, it is unclear whether the Northern Territory Police currently have express statutory authority to conduct identification checks outside takeaway outlets for the purposes of POSI. The alleged use of 'inspector's powers under Part II, Division 3 of the *Liquor Act* (NT) is questionable because the powers granted to an 'inspector' do not appear to be intended to capture the manner in which they are being purportedly exercised by police through TBLs. Similarly, s 134 of the *Police Administration Act* (NT) is predicated on the police believing 'on reasonable grounds' that the person 'may be able to assist them with their inquiries in connection with an offence that has been, may have been, or may be committed'. In our view entering a liquor store to purchase alcohol is unlikely to give the police 'reasonable grounds' to ask a person for their identification documents.

#### *Recommendation*

That there is a legislative requirement to conduct identification checks at takeaway alcohol outlets.

#### *Concerns about racial profiling and unconscious bias*

NAAJA has received numerous complaints about the manner in which the TBL in Katherine is being implemented, leading to suggestions of racial profiling. In one recent complaint, our client was asked to show her identification documents which showed that she lived at a residential address in Katherine. The Police Officers said to her 'we don't believe you live here' and prevented her from buying alcohol. Our client immediately presented to the NAAJA office in Katherine to make a complaint. After making enquiries, the Superintendent of the Katherine office informed NAAJA that our client had smelt of alcohol, appeared intoxicated and had been moved along for drinking yesterday. Our client strongly refuted these allegations, instructed that she was 'stone sober' and offered to attend the police station for a breath test.

There is a real risk that individual Police Officers make assumptions about people wishing to buy alcohol based on their race or demeanor. The Police might target Aboriginal people under this arrangement on the basis of a reasonable belief that Aboriginal people live on restricted areas and therefore it is appropriate to target them, however this perception and the optics of this are concerning. Because Police Officers target Aboriginal people and even if a person shows identification and is permitted to purchase alcohol the feelings of shame and being targeted lends itself to discrimination and this, in turn, can be associated with trauma. In some instances we are aware that Police Officers might also ask some non-Aboriginal people to show identification and as an alternative to just asking Aboriginal people however perceptions of this are that it is a very limited and selective practice. NAAJA has

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<sup>37</sup> Alexandra Fisher, 'Violence rising in Darwin, as homeless drinkers relocate, NT Police Association says', *ABC News* (online) 8 February 2016 < <http://www.abc.net.au/news/2016-02-07/nt-police-association-claims-problem-drinkers-relocate-to-darwin/7146580> >

also had a number of clients who have physical disabilities including issues with mobility or hearing, which, at first presentation could appear to suggest intoxication.

### *Recommendation*

That TBL's are conducted in a way where every person who intends to purchase alcohol is asked where they intend to consume alcohol and are engaged in the same process in relation to furnishing identification.

### ***Drink driving programs in regional and remote areas***

The legislative and policy framework regulating driving and discouraging drink driving includes a range of mandatory penalties such as disqualification of licences, fines, alcohol ignition locks and the sanction of imprisonment. Collectively, these penalties are aimed at putting in place a range of disincentives proportionate to the circumstances to discourage people from drink-driving and ensuring a safe community and reduction of vehicle related deaths and major trauma.

Those these policy objectives reflect the entire communities wishes Aboriginal and non-Aboriginal that there is the need for greater consideration by policy makers for those persons who are more disadvantaged by reason of geographical distances, isolation, poverty and the lack of services, programs and public transport. Our desire is to see a disincentive structure that suits all persons in being adaptive and responsive to local circumstances. .

### *Case study*

In one community and as part of a criminal court matter NAAJA's legal team became aware of the process concerning Drink Driving Education (DDE) and the steps required to address these matters. In one community, DDE is available at a cost of \$600 which must be paid in order for an individual to access this education in the community. The certificate attained from the course is required to access a Driver's licence. The cost for the same course in Darwin is \$300. To participate in the DDE a person must have paid a minimum in relation to outstanding fines, and measures in relation to fines that are connected to suspended licences may also need to be resolved before obtaining a licence again. Full payment is required before the course is available. Supported loans are often not accessible. There can be a lot of confusion in the community about who is required to participate in the DDE, and information is not easily accessible. There is an alternative to paying fines and individuals can be considered for community work. However, if the person does not perform this work the next step is prison. The system of bush courts and associated, limited resources means it is very difficult to assist people to navigate this process and to ensure people are properly informed of the requirements and engage in a pathway to completing DDE and obtaining a licence.

Many people in this community are on low income and some people have no income at all. In June 2017 NAAJA made a submission to the Senate Finance and Public Administration Committees in relation to the Community

Development Programme (CDP), noting the extensive feedback from communities of more people disengaging from CDP (and any form of receiving a cash payment) and the hurdles and obstacles relating to maintaining CDP. This means many people simply have no income and if they have fines or are required to participate in a DDE course they have no ability to pay these fines or access these courses. It's likely a broad range of people simply give up.

### *Recommendations*

We recommend existing drink driving legislation is reformed in providing courts with greater discretion and options.

That there is introduced extraordinary driving licences for persons disqualified from driving by a Court similar to West Australian legislation.

That there is established a therapeutic framework for an Alcohol Court and conditions for Court orders.

That government meaningfully engages with communities and relevant stakeholders to create policy frameworks that are adaptive and responsive to regional circumstances

### **Property seizures**

General restricted areas refer to those areas of the Northern Territory in which the Northern Territory Government has prohibited the possession or consumption of alcohol, subject to certain conditions. There are currently over 100 general restricted areas in place in the Northern Territory, all of which are on Aboriginal land. Restrictions can include:

- a total absence of liquor;
- a permit system, where liquor can be consumed by permit holders in private homes;
- Liquor available from a local community outlet; or
- Liquor available (either to drink on site or to takeaway) from a licensed club.

The Liquor Act makes it an offence to bring liquor into a general restricted area (other than for the purpose of travelling through); have liquor in a person's possession or control; or consume, sell, supply or dispose of liquor in a general restricted area.<sup>38</sup>

Further, the Liquor Act gives the Northern Territory Police broad discretionary powers to search and seize property related to one of the above offences.<sup>39</sup> NAAJA has the following submissions to make in relation to the current search and seizure provisions under the Liquor Act:

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<sup>38</sup> Liquor Act (NT), s 75

<sup>39</sup> Liquor Act (NT), s 95

### *Difficulties with returning vehicles*

Once a person's vehicle (or other property) is seized, they only have 60 days to apply to get their property returned. An applicant will only be successful if they have not been charged in relation to the offence, own or have an interest in the property and did not know, or could not have reasonably known about the commission of the offence.<sup>40</sup> A further application can be made to the Local Court within 60 days of the finalization of the proceedings in relation to the offence(s), unless the property has already been forfeited.<sup>41</sup>

As providers of legal representation, the current legislative framework raises many issues for NAAJA. Many Aboriginal people living in remote communities speak English as a second or third language, are not literate, and have little understanding of their legal rights. The current application process is complicated and very difficult for people to navigate without the help of a lawyer. The strict time limits in relation to these provisions mean that people do not have sufficient time to obtain legal advice.

As the below case studies highlight, there are often instances in which people have legitimate claims to have vehicles returned. This includes instances in which people have lent vehicles to family members for bush holidays, where people have smuggled alcohol into vehicles without the knowledge of the owner, or instances in which the vehicle is not the sole property of the person charged with the offence. This may be because ownership of the vehicle is shared between family members or because the vehicle has been bought using finance, and the finance company has a relevant stake in the ownership of the vehicle.

Unfortunately, the current provisions mean that applications can be refused if they are out of time, or if the family member does not have sufficient evidence that they own or have an interest in the vehicle. This occurs even when family members, or other owners (finance companies) have valid claims to the seized vehicle. NAAJA believes that the current legislative framework needs to be simplified and the application period extended, to make it easier for people to apply to have seized property returned.

#### *Case study*

Our client lives in a remote community near a town. He bought a car from a registered car dealer but had not transferred registration in his name. The vehicle was borrowed by family members to drive to town to withdraw money and purchase groceries. Unknown to our client, the family members bought alcohol and the vehicle was seized by the Police. At the time of the arrest, the family members informed the arresting police officers that they owned the vehicle, causing a legal dispute as to ownership. NAAJA was able to negotiate the release of the vehicle by the Police Superintendent prior to the finalization of the criminal proceedings but after the 60 days had expired. Our client would not have had the knowledge to enter into these negotiations himself.

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<sup>40</sup> Liquor Act (NT), s 97

<sup>41</sup> Liquor Act (NT), s 98

### *Case study*

Our client applied for the return of a seized vehicle. He had no knowledge, and could not have reasonably known about the commission of the offence. His wife took the vehicle without his knowledge while he was sleeping. Our client did not pay the original deposit, but had a financial and equitable interest in the vehicle. He paid for the upkeep of the vehicle, including petrol and taking it to the workshop. He also paid for the cost of replacing tires on the vehicle. He was the registered owner of the vehicle and the primary driver, and he used the car to travel to his place of employment. He also used the car to take his family hunting and fishing. The Police superintendent declined to return the vehicle as they were of the opinion that our client's wife was the actual owner of the seized vehicle. In this instance, it was difficult to comply with the statutory time limits as our client worked on remote outstations without telephone reception, which made it very hard to obtain updated instructions.

### *Case study*

Our client successfully applied for the return of a vehicle seized pursuant to the Liquor Act. Our client lives in an Aboriginal community. She purchased the vehicle partly with money she received from her child support payments, as the car was intended for use by her family. Our client was driving back from a major town with the vehicle when the car was searched by the NT Police. The Police seized the vehicle after they discovered three concealed beer bottles. The beer bottles belonged to her sister's partner. Our client's application was successful because NAAJA was able to make detailed legal submissions on her behalf about why she didn't know, and could not reasonably have known, about the commission of the offence. We were also able to submit our client's application within the 60 day time frame. Our client required legal assistance as she would not have known to make these submissions herself, and did not know about the strict time limits for making an application.

### *Serious repercussions for property owners and their families*

There is a lack of public transport options for Aboriginal people living in remote communities, homelands and outstations. Consequently, a vehicle may be the only way to access basic services, such as shops, school, child care, employment, and medical assistance. Further, it may be difficult for people to undertake their cultural obligations without access to a vehicle. NAAJA stresses that the confiscation of a vehicle under the Liquor Act can have very serious flow on effects not just for the owner of the vehicle, but for their entire family.

For instance, without access to transportation, it is more difficult for people to meet their CDP requirements, and to ensure that their children attend all necessary medical appointments. Similarly, many Aboriginal people buy cars under finance arrangements. Once a vehicle is forfeited, people remain encumbered with significant debts, despite no longer being in possession of the vehicle. This creates

further financial burden on families already suffering from significant financial hardship.

Offences under the Liquor Act are also punishable by fines or imprisonment. Consequently, for many people, forfeiture of the vehicle is a further punitive sanction upon the person. Given that many offences do not involve commercial smuggling or 'grog running' and relate to small quantities of alcohol being found in restricted areas, the consequences do not seem proportionate to the crimes committed. NAAJA supports policies which discourage sly-grog running, but does not think there is any justifiable policy basis for the forfeiture of vehicles for all offences under the Liquor Act.

#### *Case study*

Our client used her Centrelink money to purchase a vehicle for the purpose of assisting her family look after her children, go shopping and take the children out bush. The day after the car arrived, her husband, his brother and a friend asked to borrow the car. On the way back the car was seized by police with alcohol in it. Our client's husband had previously been charged in relation to bringing alcohol into the community. Our client was not in the car, and warned her husband against getting in trouble with the law. When she found out that the car was seized. Her application to the Court to get her vehicle returned was not accepted as she couldn't prove that she 'could not have reasonably known about the commission of the offence'.<sup>42</sup> This meant that our client and her three children did not receive any benefit from the vehicle.

#### *Recommendation*

We recommend the offence provisions under the *Liquor Act* (NT) which allow for the seizure and forfeiture of property should be amended so that property can only be seized if a person has been charged with offences relating to the commercial supply of alcohol, and the police have reason to believe that the person charged is the sole owner the property.

## **The alcohol industry**

The approach to alcohol policy and legislation in the Northern Territory has had a significant impact on Aboriginal Territorians. Over many years the gradual response has been a law and order response with an increase in the harshness of penalties and greater reach and impact on Aboriginal people. Whilst this reflects the crisis of alcohol abuse and associated harm, there is a widespread perception that the impact has been to Aboriginal people as distinct to other parts of a broader system connected to alcohol abuse.

The following are examples of the extent of this approach:

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<sup>42</sup> *Narjic v Commissioner for Police* [2009] NTMC 051



- Property forfeitures have resulted in cars being confiscated for having a small amount of alcohol inside and to the detriment of families who rely on these cars for transport;
- Responsible drinkers of alcohol are banned from consuming alcohol on private premises, and in many cases effectively don't have anywhere to drink alcohol responsibly;
- Point of sale interventions confiscate alcohol after it is purchased rather than serve as an intervention at the point of sale and before the alcohol is purchased.

These significant impacts in response to a crisis of alcohol abuse and associated harm warrants consideration of the responsibility of the alcohol industry and its role in the crisis.

### ***Alcohol industry influence of the political process***

The Northern Territory has some of the highest per capita rates of alcohol consumption and associated harm in the developed world. This harm is often trauma and compounds existing trauma. The connection between serious criminal behaviour and risky alcohol consumption means we have a crisis which requires substantial and systemic reform. Because it is a crisis the issue also deserves broad consensus at the need for substantial and systemic reform.

Individuals, businesses and organisations with a commercial interest in the sale of alcohol hold unacceptable levels of political influence and power in the decisions relating to alcohol policy. The political influence of individuals, businesses and organisations with a commercial interest in the sale of alcohol can be limited and regulated by new legislation, and using the recent experiences of the NSW government in regulating donations by property developers and the alcohol industry. Donations to political parties by the alcohol industry and associated entities should be banned.

#### *Case study – township and a liquor licence*

In a legal matter NAAJA was involved in and concerning a liquor licence in an remote town the name of the liquor licence holder was 'Cash Cow Pty Ltd' This was for a liquor licence where Aboriginal people form a core part of the consumer group and where the social consequences and human costs to the community as a direct result of alcohol abuse are significant.

Whilst the above case study is an example of one liquor licence holder and is not necessarily reflective of the broader industry, the blatancy and poignancy of the action to name their licence 'cash cow' is significant cause for concern.

The following media reports identify financial payments to political parties by the liquor industry and associated entities:

Political donations under fire after NT hotels boss confirms \$100k gift to Labor, Country Liberals

By Jacqueline Breen

Updated 30 Jan 2017

Alcohol campaigners have renewed calls for a ban on political donations after the Northern Territory's Australian Hotels Association (AHA) boss admitted to personally gifting tens of thousands of dollars to both sides of politics.

Darwin pub-owner Mick Burns confirmed he had donated \$100,000 in the last 12 months, split evenly between Labor and the Country Liberals.

He gifted a total of \$20,000 to the two parties in the 2015/16 financial year, and gave a lump sum payment of \$40,000 to each party before the NT's August election.

Mr Burns said the money was given by him personally, and not on behalf of the AHA.

"Look, as a Territorian, we needed strong, stable government to have the Territory in the best place that it can be and that it should be," he said.

"For governments to be elected, they obviously run campaigns and campaigns cost money."

Dr John Boffa from the People's Alcohol Action Coalition said that justification was not credible.

"These donations are made for a purpose, they're made to buy influence over a policy," Dr Boffa said.

"[The donations] mean [Mr Burns] is expecting equal influence and expecting both parties to ensure they have favourable policy environments to the industry he's representing, which is the Australian Hotels Association.

"We should be banning these forms of political donations. It's not good for our democracy ... and it's certainly not good for public health."

#### *Government denies pandering to hotel's lobby*

The \$40,000 donations were not due to be revealed by the NT Electoral Commission until March next year, but Territory Labor released the information after requests from the NT News.

The Country Liberals party president Shane Stone declined to confirm Mr Burns' comments and said donations would be disclosed according to the timetable set by the NT Electoral Commission.

Both parties each received \$150,000 from the hotels lobby in the lead up to the 2012 election.

Newspaper stories of donations from individuals and entities associated with the alcohol industry were also reported<sup>43</sup> for previous election cycles.

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<sup>43</sup> For example, see Liquor firms donated \$300,000 to Labor campaign, *Rory Callinan*, The Australian, 22<sup>nd</sup> March 2011

In the lead up to the 27<sup>th</sup> August 2016 election the People’s Alcohol Action Coalition (PAAC) and the Foundation for Alcohol Research and Education (FARE) wrote to the major political parties and nominees to request information in relation to their alcohol policies.

The following indicates the response with the final row noting ‘ban political donations from the alcohol industry’:

**SO WHERE DO THE PARTIES AND CANDIDATES STAND ON KEY ALCOHOL POLICIES LEADING UP TO THIS ELECTION?**

	Country Liberals	Labor	Greens	1Territory	Delia Lawrie	Kezia Purick
Reintroduce a Banned Drinkers' Register	✗	★	★	★	★	?
Introduce a minimum price for alcohol, equivalent to the existing price of takeaway full-strength beer	✗	✗	★	★	★	★
Respond to the final report of the Select Committee on Action to Prevent Foetal Alcohol Spectrum Disorders	?	☆	?	★	★	★
Introduce a risk-based liquor licensing scheme	✗	✗	★	☆	★	?
Ban political donations from the alcohol industry	✗	?	★	★	★	☆

★ STRONG SUPPORT  
 ☆ SOME SUPPORT  
 ? UNCERTAIN  
 ✗ NO SUPPORT

Whilst the two major political parties which have held government at various times since self-government in the NT are not committed to ‘ban political donations from the alcohol industry’, minor parties and nominees did indicate their support. This commitment and across the political spectrum (except for the two major parties) reflects a strong level of public sentiment and support for the proposal.

From a policy perspective, a ban on donations from the alcohol industry and associated entities will rule out, and put certainty to, the notion that financial contributions to political parties can influence decisions relating to alcohol legislation and policy. It will place greater trust in processes such as the Northern Territory Alcohol Policies and Legislation Review and other similar processes to provide expert opinion and direction.

A ban of this nature will also allow for greater freedom and opportunities for governments to extend to other measures such as banning advertisements of alcohol with sports and measures that have led to a decline in cigarette smoking rates without fear of repercussions from the alcohol industry and associated entities.

*Recommendation*

We recommend government legislate for the ban of donations to political parties and the influence of elections by the alcohol industry and associated entities, modelling legislation on the NSW legislation; and

That the proposed Independent Commission against Corruption include specific provisions and/or a specific focus relating to the above to ensure greater public confidence and trust in the process.

## **Empowering Aboriginal people**

### ***Cultural competency***

An area of importance and relevance in the design of legislation and policy responses to social issues such as alcohol is the area of cultural competency<sup>44</sup>.

In the public policy debate we use terms such as cultural safety, culturally sensitive, culturally responsiveness, cultural awareness and cultural competency however there is no commonly understood meanings of these terms. This lack of commonly understood meanings distorts and limits our thinking and our collective ability to understand how these terms can contribute to effective laws and policies. There are also many people who contribute to these debates who overlook the potential value of unpacking these terms and its relevance to responses to social issues such as alcohol. Legislation and policy is often technical in nature and serves to provide significant detail to a particular area however this information is often very limited in how it connects to such terms.

Whilst cultural competency and responses to alcohol abuse is a complex area, there are a number of possible reform directions where this area can offer guidance and direction for improved legislation and policy design.

### ***Linking cultural authority to healing and rehabilitation***

A guiding principle of NAAJA's cultural competency work is 'the cultural landscape in the NT is rich and diverse and we value this diversity'. This guiding principle is explained as:

Whilst there are some common bonds between all Aboriginal peoples in the NT there is also significant diversity including languages, culture, history, families, geography, and proximity to service centres, and so on. Whilst many programs, policies and approaches refer to Aboriginal people as a single group, NAAJA recognises this diversity and seeks to put in place programs, policies and approaches to accommodate this diversity.

The following is the status quo in dealing with alcohol abuse in the Territory:

- Alcohol Mandatory Treatment, Paperless Arrests, Point of Sale interventions, Law and Order responses to restricted areas, and other similar measures;
- Protective Custody, Prisons and Correctional facilities;
- Residential rehabilitation<sup>45</sup> led by Aboriginal community controlled organisations;

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<sup>44</sup> NAAJA has developed a 'Cultural Competency Framework 2017 - 2020' as a strategic outline of how we operate as an organisation providing a culturally appropriate service. The Framework sets out a number of key strategies and actions which reflect a meaningful commitment to developing cultural competency.

<sup>45</sup> In our direct experience we understand from time to time there is a shortage of beds and capacity at these centres.

- Limited programs such as placing Alcohol and Other Drug Workers across communities with limited resources and detached from culturally adapted programs and interventions regulating access to alcohol

We respectfully submit that this framework is insufficient in meeting the complex, diverse and varied needs of Aboriginal people in dealing with alcohol abuse. That is, these policies, approaches and responses collectively are too disconnected from the diversity and richness of the Aboriginal cultural landscape in the NT to effect more meaningful change.

This disconnection makes the work of 'government' working alongside 'industry' and the 'community' challenging because the characteristics of the 'community' are not being reflected in what should otherwise be a 'joined-up' approach to policy design.

The following media report provides an example of a community-led health program which resources and equips cultural authority in a way which respects the diversity of the cultural landscape in the NT (please note it is not suggested that this specific program links in with a law and order response to alcohol abuse but rather it serves as an example of how a program adequately values diversity and is driven from the ground-up):

Aboriginal health retreat using bush foods and medicines a 'promising' model for improvement

By Nadia Daly

Wild yams and fish, traditional bush medicines, Aboriginal herbal remedies and even sand massages are all part of a holistic health program designed to turn back an "epidemic" of chronic disease in north-east Arnhem Land in the Northern Territory.

A remote Indigenous-led health program which has shown "impressive" results could be rolled out as a model to reduce high rates of chronic disease among Indigenous people, according to a public health expert.

The Hope for Health project was started by volunteers and Aboriginal Yolngu people on Elcho Island, aiming to tackle chronic health problems by incorporating traditional health practices and knowledge with western medicine.

After crowdfunding \$90,000, the group held its first health retreat camp on the island last year.

"The most common conditions we see [are] chronic kidney disease, type 2 diabetes, and cardiovascular disease," said Kate Jenkins, a naturopath based on the island, who coaches participants and is a case manager on the project.

The men and women who participated in the program reported good results from the outset, and more detailed data received three months later was even better.

"We knew we were getting good results on the ground — you start to see people transforming," Ms Jenkins said.

"You barely recognise some photos of individuals - they're walking around glowing now.

"But once we saw the hard data... it just blew the whole community away."

Hope for Health said 85 per cent of participants showed a reduction in waist circumference, almost two-thirds had improved kidney function, and four in five people had reduced their blood pressure

So far the results looked "promising", said Adrian Bauman, a professor of Public Health at the University of Sydney.

"The results among those 25 participants are impressive: they lost a clinically useful amount of weight, they had improvements in kidney function, blood sugar and blood pressure levels," he said.

'Why did this project work so well?'

Yolngu participant Valerie Bulkunu said the experience helped her make long term changes, such as swapping two-minute noodles and cordial for more wholesome home-cooked food.

"It's changed my family's lifestyle, to cook our own food," she said.

"We get a lot of vegetables from the shop, I've been purchasing a lot of greens from the shops. Meats, frozen meats, chicken, kangaroo."

Her experience and new knowledge also encouraged her sisters to give up smoking, she said.

Professor Bauman said the key to replicating the project would be ascertaining exactly why it worked.

"One of the interesting questions is, 'why did this project work so well when we've had such little success in these kinds of projects in the past?'"

Hope for Health's Kate Jenkins said the answer was the hands on support provided in the local language, and the fact the project was driven by the community and guided by Yolngu leaders.

Looking to the future



*PHOTO: Broccoli and avocado salad with wallaby stew blends vegetables with traditional meats. (Supplied: Hope for Health)*

The group is now focused on making the program sustainable in the long term, securing funding from public donations on their website and hoping to win government grants.

"We get contacted weekly by different communities wanting Hope for Health to go to their community; that's beyond our capacity at this point," said Ms Jenkins.

Professor Bauman, who holds particular interest in chronic disease, cautioned that the evidence must be considered preliminary at this stage, but said it showed great potential for being a model for improving remote Aboriginal health around the country.

"What we need to do is that the government fund a replication study where this is tested in six communities; they're given funding, they go away and do it in their own way," he said.

"Get a scientific independent evaluation. And if you got six different communities who all achieve similar health gains of this one, then it's got to be one that State Government, Federal Government take seriously, scaling up to 30, 50, 100 communities.

"If we could prevent one of these people from going onto dialysis it would more than pay for the whole program."

Valerie Bulkunu also has big plans for the project and her community on Elcho Island.

"It's not [only] about healthy food, it's also about growing our own gardens, we'd like to see that," she said.

"Growing plants and native plants, that's what I want to see in the future."

The current legislative and policy framework does not provide scope or room to develop and consider evidence-based approaches for alternative programs which adequately value this diversity.

#### *Recommendation*

We recommend that:

Government develops a dedicated program of supporting community-led and driven initiatives that relate to healing by investing in and resourcing cultural authority and local initiatives.

That these initiatives are linked by way of referral pathways by courts and other services and mechanisms so that interventions into alcohol abuse are provided with options as an alternative to more prisons and protective custody.

#### ***Community Impact Statement***

In relation to applications for a liquor licence or variation or material alteration or substitution interested persons from the community can make an objection under section 47F of the Liquor Act (NT). Objections are limited to (2) (a) the amenity of the neighbourhood where the premises the subject of the application are or will be located; or (b) health, education, public safety or social conditions in the community. The applicant can respond to an objection under s. 47G.

Given the seriousness of alcohol abuse in the Territory, connection to harm and the scale of the crisis we are of the view that more can be done to ensure the views of communities and related stakeholders in terms of likely impact is collected and integrated in a more comprehensive way into the decision-making process. This is

particularly relevant for Aboriginal people where a range of services are stretched and are at capacity and where there are opportunities such as Coroner reports and related reports to be noted and included more directly in the process.

#### Recommendation

We recommend the Liquor Act is amended to include provisions for the Director-General to make public a Community Impact Statement drawing on the views of communities and relevant stakeholders including legal and social services affected by an application.

## Foetal Alcohol Syndrome Disorder

A significant concern arising out of risky alcohol consumption is Foetal Alcohol Spectrum Disorders (FASD). FASD is an umbrella term that describes a range of mental and physical impacts caused by prenatal exposure to alcohol. The symptoms of FASD, such as impaired impulse control, poor social judgment, anger and aggression can make it more likely for a young person to be in contact with the criminal justice system.<sup>46</sup>

Whilst it can be difficult to identify FASD, health workers, educators and communities have detected high incidences in the NT. The prevalence FASD in ATSI children is high, which is similarly common for Indigenous people in other countries.<sup>47</sup> A study conducted in the NT estimated that between 1.87 and 4.7 per 100,000 live Aboriginal births were identified as having FASD or a similar alcohol-related development condition.<sup>48</sup>

FASD can have a widespread impact on an individuals' life including their completion of school and ability to secure employment.<sup>49</sup> Studies have found that over 90 per cent of people diagnosed with FASD also suffer from a mental health condition such as anxiety or depression.<sup>50</sup> Dr James Fitzpatrick, one of the world leading researchers in FASD, gave evidence recently at an inquest into the deaths of 13 young Aboriginal people in the Kimberley. According to an ABC article, he stated that despite FASD being entirely preventable, it is a strong cause of disadvantage and suicide in remote communities that is not being taken seriously.<sup>51</sup>

In considering FASD in ATSI children, it is important to bear in mind the historical context of colonisation, dispossession of land and culture and the high prevalence of trauma. Dr Fitzpatrick's evidence to the Royal Commission into the Protection and

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<sup>46</sup> Clare Townsend, Janet Hamill and Paul White, 'Fetal Alcohol Disorder, disability and the criminal justice system' (2015), 17 *Indigenous Law Bulletin* 30.

<sup>47</sup> See National Indigenous Alcohol Committee, submission on the harmful use of alcohol in Aboriginal and Torres Strait Islander communities, *Addressing fetal alcohol spectrum disorder in Australia*, 2012, 8.

<sup>48</sup> K.R. Harris and I.K. Bucens, 'Prevalence of Fetal Alcohol Syndrome in the Top End of the Northern Territory' (2003), 39 *Journal of Paediatrics and Child Health* 528, 528.

<sup>49</sup> Heather Douglas, 'Sentencing and Fetal Alcohol Spectrum Disorder' (Program Research Paper, National Judicial College of Australia, 2010), 6.

<sup>50</sup> Heather Douglas, 'Sentencing and Fetal Alcohol Spectrum Disorder' (Program Research Paper, National Judicial College of Australia, 2010), 5.

<sup>51</sup> Charlotte Hamlyn, 'Indigenous suicide inquest: WA Government not taking FASD seriously, researcher claims' *The ABC* (online) 4 July 2017 <<http://www.abc.net.au/news/2017-07-04/inquest-hears-foetal-alcohol-disorder-not-taken-seriously/8678048>>.



Detention of Children in the Northern Territory indicates that whilst FASD happens in communities from all postcodes, it is a particular issue in Aboriginal communities.

### ***FASD and criminal justice system***

More NT specific data is needed to better understand how many people going through the justice systems are FASD-affected. Research overseas indicates that individuals with FASD are 19 times more likely to come into contact with the criminal justice system, often at an early age.<sup>52</sup> Evidence given to the Royal Commission into the Protection and Detention of Children in the Northern Territory suggests that a high number of the Aboriginal young people being held in Don Dale are likely to be FASD-affected.

FASD-affected defendants are more susceptible to agreeing with a proposition put to them and may have a poor understanding of time and sequence. Additionally, they may have increased difficulty following court proceedings and being actively involved.<sup>53</sup> This means that FASD-affected defendants are placed in a position of disadvantage within the criminal justice system. Moreover, without early diagnosis and effective treatment FASD-affected individuals are at an increased risk of developing mental health issue which may result in adverse behaviour and additional contact with the criminal justice system.<sup>54</sup>

Despite the high level of contact FASD-affected individuals have with the justice system, many legal stakeholders lack awareness and adequate training regarding identifying FASD and understanding the impact of its symptoms. An Australian study found that one fifth of legal practitioner respondents had not heard of FASD and roughly half of those who had heard of FASD previously were unclear of its effects.<sup>55</sup> Police awareness of FASD is particularly important as police are the first point of contact in the system and have an opportunity to identify a potential FASD diagnosis earlier in the process.

A joint submission from NAAJA and CAALAS to the NT Parliamentary Inquiry into FASD recommended targeted training on FASD among judges, magistrates, lawyers, prosecutors, police and correction officers. In this submission we reiterate this position. The submission also recommended that legal stakeholders be provided with a checklist or another basic screening instrument to improve early identification of defendants who might be FASD-affected and require a referral to an assessment service.<sup>56</sup>

Page 2 of the submission stated the following:

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<sup>52</sup> Jerrod Brown et al, 'Fetal Alcohol Spectrum Disorders in the Criminal Justice System: A Review' (2014) 3 *Law Enforcement Journal* 1, 3.

<sup>53</sup> Heather Douglas, 'Sentencing and Fetal Alcohol Spectrum Disorder' (Program Research Paper, National Judicial College of Australia, 2010) 13.

<sup>54</sup> Courtney R Green et al, 'FASD and Criminal Justice System' (policy paper, CanFASD) 2.

<sup>55</sup> Heather Douglas et al, 'The importance of foetal alcohol spectrum disorder for criminal law in practice: Views of Queensland lawyers' (2012) 32 *Qld Lawyer* 153, 163.

<sup>56</sup> North Australian Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service, Submission to the NT Parliamentary Inquiry into Foetal Alcohol Syndrome Disorder (FASD), May 2014, 2.

Urgent steps are needed to improve diagnostic capacity within the justice system in the Northern Territory to enable routine screening of FASD-suspected defendants and their family members. This requires multi-disciplinary health professionals to undertake assessments and prepare treatment plans.

Canada is a leading international jurisdiction in this area for both providing supportive programs for FASD-affected defendants and raising awareness about FASD among legal stakeholders. Canada has developed a FASD checklist as well as a Youth Probation Officers' Guide to FASD Screening and Referral.

### ***The need for better resourcing of the criminal justice system***

The criminal justice system needs to be equipped in a way that allows it to maximise therapeutic outcomes for FASD-affected defendants.<sup>57</sup>

NAAJA endorses APONT's previous submission which recommended the following:

APONT maintains that there needs to be better resourcing of the criminal justice system and changes to criminal justice system legislation and practices to enable any person suspected of having developmental or cognitive impairments to be assessed and have access to appropriate case management that informs sentencing dispositions.<sup>58</sup>

Currently in Australia, FASD is not recognised as a disability. It also does not fall within the legal definitions of 'mental impairment' or 'cognitive impairment' in NT legislation.

An academic article describes how this impacts FASD-suspected individuals from better supports and benefits:

This challenges Article 25(b) of the *Convention on the Rights of Persons with Disability* ratified by Australia in 2008. Declaring FASD a disability will enable appropriate disability policy, service development and reform in accordance with the Convention. This also has implications for how people with FASD will be treated in the criminal justice system including assessing responsibility, guilt and moral culpability.<sup>59</sup>

The difficulty of diagnosing FASD among children and adults also means that individuals affected by FASD enter the criminal justice system without the court being able to appropriately consider their impaired functioning.<sup>60</sup> A FASD diagnosis, however, can be critical to making an appropriate and meaningful sentencing submission for both the defence and prosecution. In the absence of a diagnosis,

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<sup>57</sup> Ian Feckelton, 'Sentencing Offenders with Foetal Spectrum Disorder (FASD): The Challenge of Effective Management' (2016) 23 *Psychiatry, Psychology and Law* 815, 824.

<sup>58</sup> Aboriginal Peak Organisation Northern Territory, Submission to the Australian House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into Foetal Alcohol Spectrum Disorder, December 2011, 8.

<sup>59</sup> Clare Townsend, Janet Hammill and Paul White, 'Fetal Alcohol Disorder, disability and the criminal justice system' (2015), 17 *Indigenous Law Bulletin* 30.

<sup>60</sup> Aboriginal Peak Organisation Northern Territory, Submission to the Australian House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into Foetal Alcohol Spectrum Disorder, December 2011, 8.

characteristics of FASD may be misinterpreted as ‘aggravating factors’ to the offending. This could lead to a harsher sentence when considered in isolation. Such characteristics include the individuals’ limited capacity to think about others, low empathy, a lack of insight into their offending, a lack of remorse and behaviour in court that could be interpreted as being disrespectful.<sup>61</sup>

Even where a defendant is suspected of being FASD-affected, obtaining an assessment can be difficult and there is a lack of tailored processes and decisions to suit the particular circumstances of the individual. This was illustrated in a 2014 judgment the Supreme Court of Western Australia which criticised the imposition of a community-based order on a FASD-affected individual, finding the order to be ‘unrealistic’.<sup>62</sup> The court also highlighted how the failure to provide support and assistance following the accused’s first offence at 16 meant that the criminal justice system response not only failed her but also her community.

Evidently, the effect of FASD on a defendant makes it inappropriate for a judicial officer to primarily consider principles of denunciation and punishment in sentencing compared to community safety and rehabilitation. It is important that issues faced by FASD-affected defendants are taken into account as mitigating circumstances and that sentencing orders are tailored in response to such issues. Dr Fitzpatrick told the Royal Commission that a young person with FASD may have a reduced ability to respond appropriately to court orders or school expectations.

### ***Alternatives to incarceration***

The social and financial cost behind the over-representation of Aboriginal offenders’ needs to be recognised and alternative pathways for FASD-affected defendants should be implemented. As of March 2017, the NT has the second highest ATSI imprisonment rates across Australia.<sup>63</sup> According to the Department of Correctional Services annual report, the cost per prisoner per day between 2015-2016 was \$177.36.<sup>64</sup>

As stated in a previous joint submission into FASD:

NAAJA and CAALAS’s experience is that many defendants (including FASD-affected defendants) would not have received a custodial sentence if appropriate non-custodial sentencing alternatives were available to the courts at the time of sentencing.

With respect to FASD-affected defendants, the need for alternatives to imprisonment is even more urgent.<sup>65</sup>

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<sup>61</sup> North Australian Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service, Submission to the NT Parliamentary Inquiry into Foetal Alcohol Syndrome Disorder (FASD), May 2014, 12; See Heather Douglas, ‘Sentencing and Fetal Alcohol Spectrum Disorder’ (Program Research Paper, National Judicial College of Australia, 2010), 4.

<sup>62</sup> AH v Western Australia [2014] WASCA 228, [3] (Martin CJ, Mazza, JA and Hall J).

<sup>63</sup> Australian Bureau of Statistics, 2017, *Correction Services, Australia*, no 4512.0, viewed 5 July 2017 <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0>>.

<sup>64</sup> Northern Territory Department of Correctional Services, *Annual Report 2015-2016* (27 October 2016) 38.

<sup>65</sup> North Australian Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service, Submission to the NT Parliamentary Inquiry into Foetal Alcohol Syndrome Disorder (FASD), May 2014, 17.

### ***Prevention, early intervention and education***

The NT government needs to urgently invest in raising awareness about FASD as well as providing funding to prevent FASD within Aboriginal communities. NAAJA believes that early intervention is critical for FASD.

Any program seeking to address FASD in Aboriginal communities must be evidence-based and community-led. A good example of a culturally appropriate project is *Marulu: the Lililwan project* which was developed to address FASD in the Fitzroy Valley of Western Australia. The project is a partnership between a group of Aboriginal leaders and experts in Aboriginal health, paediatric medicine, human rights advocacy and child protection. One of its aims is to educate the communities about the risks of drinking alcohol during pregnancy and about the challenges faced by children with FASD and their families.

The Anyinginyi Health Aboriginal Corporation FASD project represented a community-led initiative that NAAJA believed was an important program in Tennant Creek. The program aimed to raise awareness, educate, prevent and support people with FASD and had developed a Pregnancy Pamper Pack which health professionals distributed to pregnant women in Tennant Creek. The packs provided information and support to encourage women not to drink alcohol during their pregnancy. NAAJA urges for a similar project which provides culturally safe education and support to Aboriginal women living in remote communities to be implemented.

### ***Recommendation***

- We recommend targeted training on FASD among the Judiciary, lawyers, prosecutors, police and corrections and youth justice officers.
- We recommend that legal stakeholders be provided with a checklist or another basic screening instrument to improve early identification of defendants who might be FASD-affected and require a referral to an assessment service.
- We recommend that the NT Government develops accessible and culturally safe therapeutic programs across the Northern Territory for expectant mothers and support FASD-affected individuals.
- We recommend that the NT Government improve diagnostic capacity within the justice system to enable routine screening of FASD-suspected defendants and their families.
- We further endorse recommendation 13 from NAAJA and CAALAS's submission which called for a range of non-custodial sentencing options be introduced to address FASD-affected defendants in the justice system. These include:
  - a) intensive, culturally safe and individually tailored support programs for FASD-affected individuals involved with the criminal justice system,
  - b) special court processes for FASD-affected defendants,
  - c) secure care facilities for those who do not have stable accommodation and who would otherwise be sent to prison.

- We recommend that the NT Government invest in funding whole-of-community FASD education programs which particularly target young women to prevent FASD.

## Therapeutic and Specialised Courts

Alcohol consumption is a key contributing factor leading to offending behaviour. In 2010, over 60% of Aboriginal and Torres Strait Islander police detainees had consumed alcohol prior to their arrest.<sup>66</sup>

In light of this connection, it is evident that the NT needs to adopt an alternative and more effective way of combating alcohol-fuelled crime.

Many jurisdictions across Australia, and internationally, have established courts that specialise in alcohol-related offending as well as mental health and drug issues. These courts usually enshrine therapeutic jurisprudence approaches, which address underlying causes of offending and significantly differ from the conventional criminal justice system's punishment-based model.

Currently, the Northern Territory does not have a court that specialises in tackling these issues since the Court Referral and Evaluation for Drug Intervention and Treatment (CREDIT) Program and the Substance Misuse Assessment and Referral for Treatment (SMART) Court were defunded.

NAAJA strongly recommends the introduction of therapeutic courts to target alcohol-fuelled offending. International research indicates that drug and alcohol courts have shown positive results in reducing recidivism, costs and dependency whilst improving the general health and wellbeing of the offender.<sup>67</sup>

## Case studies

### *New Zealand Alcohol and Drug Treatment Courts*

The Alcohol and Drug Treatment Court (AODT Court) in New Zealand is a good example of a therapeutic model aimed at reducing offending that is driven by alcohol and other drug dependency. The Court began operating in 2012 and provides treatment programmes and rehabilitation support services to offenders before they are sentenced.

Importantly, the AODT Court includes a Cultural Framework which provides for Māori cultural practices, services and pathways. The AODT Court received feedback from an international expert and judge who found that the court is an example of one of the best and most culturally competent drug courts in the world.<sup>68</sup>

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<sup>66</sup> Aboriginal Peak Organisations Northern Territory, Submission to the Northern Territory Legislative Assembly Select Committee, *On the Prevalence Impacts and Government Responses to Illicit Use of the Drug Known as "ice" in the Northern Territory*, 13 May 2015, 9; see National Indigenous Drug and Alcohol Committee, *Alcohol and other drug treatment for Aboriginal and Torres Strait Islander peoples*, June 2014, 4.

<sup>67</sup> S B Rossman et al 'The Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts' (2011) 4, Volume 4. *National Criminal Justice Reference Service*, US Department of Justice.

<sup>68</sup> Liz Smith, Alison Chetwin and Maria Marama, *Final Process Evaluation for the Alcohol and Other Drug Treatment Court*, process evaluation (2016) 64.

An evaluation of the program showed that the initiative increased the understanding of dependency based offending for both justice and health professionals.<sup>69</sup>

#### *Victoria Assessment and Referral List*

The Assessment and Referral Court List (ARC) located in Melbourne is a specialist court list developed to meet the needs of accused persons who have a mental illness and/or a cognitive impairment.

ARC aims to reduce the risk of harm to the community by addressing underlying factors contributing to offending behaviour while improving the health and wellbeing of accused persons. It follows a problem-solving court model which uses informal approaches to achieve its aims. ARC also works collaboratively with the Court Integrated Services Program (CISP) which provides referrals and linkages to support services. This enables ARC to deliver case management to participants, which may include alcohol treatment.

An early evaluation of CISP showed it achieved a 20% reduction in reoffending rates for participants.<sup>70</sup> The program also saved costs and improved assessments, which ensured better informed sentencing.

#### *Western Australia Pre-Sentence Opportunity Program*

The Pre-Sentence Opportunity Program (POP), which operates in Western Australia, is an early intervention program. It assists people who have drug use problems and are attending court. It is available for early or low-level offenders who plead guilty to an offence and who would have otherwise received a fine or community-based order. When a referral is made to the program, the offender's case will be remanded so that they may access treatment for their alcohol and other drug use. After receiving treatment, the offender returns to court for sentencing. POP provides culturally appropriate brochures to ATSI people. In the first evaluation of the program, participants rated it positively.<sup>71</sup>

Western Australia has a similar program for young people, referred to as the Young Persons Opportunity Program (YPOP). The program provides a voluntary drug treatment for young people aged 10 to 18 years old who have been accused of low level offending. The young person and their family are given an opportunity to talk to a Diversion Officer who is trained as a drug and alcohol counsellor and will provide information and ongoing support for the young person.

#### *United States of America specialised courts*

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<sup>69</sup> Litmus, 'Formative Evaluation for the Alcohol and other Drug Treatment Court Pilot' (prepared for Ministry of Justice, 2014) 105.

<sup>70</sup> Victorian Department of Justice, 'Court Integrated Services Program: Executive Summary Evaluation Report' (2010) 2.

<sup>71</sup> Crime Research Centre, 'WA Diversion Program - Evaluation Framework (POP, STIR, IDP)' (Final Report, 2007) 68.

Drug and Alcohol courts have operated in the United States since 1989 and have some of the longest running specialised alcohol and drug courts in the world.<sup>72</sup> Currently there are 3,142 drug courts operating in the United States which include 1,558 adult courts, 409 juvenile courts and 138 tribal run courts.<sup>73</sup> These courts provide a good example of how drug and alcohol courts can reduce recidivism rates among participants and reduce the costs to the court system by diverting participant from prison into rehabilitation.

A study of the second oldest drug court in the US found that while the court had better years and worse years, overall, the court lower recidivism rates in its jurisdiction with the incidents of re-arrests for drugs or alcohol falling by nearly thirty percent.<sup>74</sup> The study also found that over time the court lower costs on average saved \$6,744 per participant.<sup>75</sup> Over the 10 year period of the study, the total cost savings to the whole court system of \$79 million or about \$7.9 million per year.<sup>76</sup>

### *Recommendation*

We recommend implementing an Alcohol and Drug Court in the Northern Territory founded on therapeutic justice principles. This would be particularly beneficial for young people whose offending behaviour is linked to alcohol or drug misuse.

## **Conclusion**

In conclusion, we respectfully submit 4 key principles to guide the direction of alcohol policy and legislation:

1. **Be sensitive to discrimination:** an interpretation of discrimination from an Aboriginal perspective cuts across many aspects of legislation and policy design and the criminal justice response.
2. **Take social determinants seriously:** housing, employment, education and other social determinants requires a comprehensive and sustained effort. Empowering Aboriginal people across government policy in a meaningful way can deliver many benefits.
3. **Link interventions to therapeutic and health based responses:** a properly resourced, health based response should be integrated across the interventions relating to alcohol abuse. Criminalising the interventions in the absence of effective therapeutic and health based responses compounds the problems.

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<sup>72</sup> National Institute of Justice, Office of the Department of Justice, 'Drug Courts: The Second Decade Special Report' June 2006 < <https://nij.gov/publications/pages/publication-detail.aspx?ncjnumber=211081>>.

<sup>73</sup> Drug Courts, National Institute of Justice, Office of Justice Programs, <<https://nij.gov/topics/courts/drug-courts/pages/welcome.aspx>>.

<sup>74</sup> M.W. Finigan et al, '[Impact of a Mature Drug Court Over 10 Years of Operation: Recidivism and Costs](#)' (July 2007) 10.

<sup>75</sup> M.W. Finigan et al, '[Impact of a Mature Drug Court Over 10 Years of Operation: Recidivism and Costs](#)' (July 2007) 10.

<sup>76</sup> M.W. Finigan et al, '[Impact of a Mature Drug Court Over 10 Years of Operation: Recidivism and Costs](#)' (July 2007), 12.

4. **Integrate and resource cultural authority to therapeutic responses:** a culturally competent response must be adapted and responsive to local and regional contexts.

We are appreciative of the opportunity to provide a submission.