

## **Appendix A: Extract for Social Justice and Native Title Report 2013**

### **Human rights in practice – alcohol policy**

#### **1.1 Introduction**

Alcohol consumption, misuse and related harm are some of the most challenging issues confronting communities across the length and breadth of Australia. These challenges are not limited to Aboriginal and Torres Strait Islander communities, but confront every demographic in Australian cities and towns. From Kings Cross to Halls Creek, St Kilda to Santa Teresa – communities grapple with alcohol related harm arising from over-consumption and the extent to which punitive or restrictive measures should or should not be applied.

Alcohol misuse is not unique to Aboriginal and Torres Strait Islander people. Compared to the broader population, a greater percentage of Aboriginal and Torres Strait Islander people do not drink alcohol at all. The 2010 National Drug Strategy Household Survey report noted that 24.5% of Aboriginal and Torres Strait Islander people surveyed abstained from drinking alcohol, compared to 19% of the general population.<sup>1</sup>

However, Aboriginal and Torres Strait Islander people who do drink are more likely to do so at levels which are risky.<sup>2</sup>

Alcohol, therefore, is an issue of particular concern in many Aboriginal and Torres Strait Islander communities. It has repercussions across many areas, including health, education, community safety and children's rights. It is a major contributor to many different social and health problems, ranging from social disorder, family breakdown and violence, through to child neglect, loss and diversion of income and high levels of imprisonment.<sup>3</sup>

Worryingly, the emerging evidence tells us that the damage to children of Foetal Alcohol Syndrome Disorders (FASD) potentially represents one of the worst intergenerational impacts of alcohol misuse. Finally, alcohol misuse can be a major contributor to the dysfunction of whole communities.

There is no denying the harm alcohol can have in our communities, nor is there any denying the negative consequences of poorly conceived alcohol management policies. As I noted back in my first address at the Press Club in 2010 in relation to

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<sup>1</sup> Australian Institute of Health and Welfare, *2010 National Drug Strategy Household Survey report* (2011), p 60. At <http://www.aihw.gov.au/publication-detail/?id=32212254712> (viewed 2 October 2013). Note that some reservations were held over the accuracy of this data given the small sample size.

<sup>2</sup> Australian Institute of Health and Welfare, *2010 National Drug Strategy Household Survey report* (2011), p 60. At <http://www.aihw.gov.au/publication-detail/?id=32212254712> (viewed 2 October 2013).

<sup>3</sup> M Wilson, A Stearne, D Gray and S Saggars, *The harmful use of alcohol amongst Indigenous Australians* (2010). At [http://www.healthinfor.net.ecu.edu.au/alcoholuse\\_review](http://www.healthinfor.net.ecu.edu.au/alcoholuse_review) (viewed 25 September 2013).

the Northern Territory Emergency Response (NTER), poorly conceived policy stigmatises our people:

Each of the Intervention communities had big blue signs erected outside them which, amongst other things, loudly proclaimed restrictions on alcohol and pornography – as if everyone living behind those signs are alcoholic, perverts and perpetrators!

I invite the residents of Yarralumla, Redhill, Woollara, Mosman and Toorak, to name just a few well-known, middle-class suburbs, to contemplate how they would feel with similar signs erected at the entrance to their communities.

These signs continue to diminish the people living behind them and they diminish us as a nation.<sup>4</sup>

While I am happy to say that these signs have been taken down, the tensions about alcohol management are still very real in the Northern Territory. Dissatisfaction and feelings of unfairness also continue in other parts of the country where policies and laws which are in place have not been consistent with human rights standards. For example, as I say above, while alcohol misuse is an Australia-wide issue, it is only in Aboriginal and Torres Strait Islander communities where adults are criminalised for the consumption of alcohol across an entire community

Dealing with alcohol is one of the most contested and intractable issues in our legal and policy sphere, however, I believe the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) is one of the most valuable tools we have available to us in solving complex social policy issues confronting Aboriginal and Torres Strait Islander peoples such as this.

In this chapter, I will discuss how human rights treaties under which Australia has obligations, and the Declaration can be used to guide the development of alcohol policy.

I will then look at case studies on alcohol management and related policies in Queensland and the Northern Territory. These case studies demonstrate how strategies that are consistent with human rights and the Declaration can provide opportunities to improve practice and outcomes.

## **1.2 What works in addressing alcohol misuse in discrete communities**

As alcohol misuse is a multi-causal phenomenon any response must take a holistic approach. These responses should consider the particular circumstances of the community or location and include measures focussed on harm reduction, supply reduction and demand reduction.<sup>5</sup>

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<sup>4</sup> M Gooda, *Towards a reconciled Australia: National Press Club speech* (Speech delivered at the National Press Club, Canberra, 3 November 2010). At <http://www.humanrights.gov.au/news/speeches/towards-reconciled-australia-national-press-club-speech-2010> (viewed 28 September 2013).

<sup>5</sup> D Gray and E Wilkes, *Reducing alcohol and other drug related harm*, Closing the gap clearinghouse Resource sheet no. 3 (2010). At

Policies must address the underlying social determinants of alcohol misuse, including the effects of social deprivation, poverty, lack of education and intergenerational and contemporary trauma.<sup>6</sup> Remedial action should also include cultural healing.<sup>7</sup>

The effectiveness of any response is also highly influenced by the level of buy-in from the community. Interventions imposed without community control or culturally appropriate adaption can be counter-productive.<sup>8</sup> The Closing the Gap Clearinghouse has found that 'to be effective, such interventions need to be applied in a non-discriminatory manner, adapted so that they are appropriate to local cultures, and be subject to Indigenous community control'.<sup>9</sup>

Underpinning all effective interventions should be an understanding that first and foremost alcohol misuse is a health issue of which a primary consideration is the social and emotional wellbeing of the particular community and individuals.<sup>10</sup>

Text Box 4.1 provides a summary of features of effective interventions.

**Text Box 4.1: Effective interventions<sup>11</sup>**

Evidence indicates that effective interventions to address alcohol abuse are:

- supported and controlled by affected communities
- designed and tailored to the specific needs of particular communities and subgroups within them

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[http://www.aihw.gov.au/closingthegap/documents/resource\\_sheets/ctgc-rs03.rtf](http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs03.rtf) (viewed 22 September 2013).

<sup>6</sup> W Loxley, J Toumbourou and T Stockwell, 'Summary', in A Kirsner (ed), *The Prevention of Substance Use, Risk and Harm in Australia: a review of the evidence* (2004), The National Drug Research Institute and the Centre for Adolescent Health, p 15.

<sup>7</sup> Department of Health and Aging, *Alcohol treatment guidelines for Indigenous Australians* (2007) p 10. At <http://www.healthinfonet.ecu.edu.au/key-resources/promotion-resources?lid=967> (viewed 25 September 2013).

<sup>8</sup> D Gray and E Wilkes, *Reducing alcohol and other drug related harm*, Closing the gap clearinghouse Resource sheet no. 3 (2010), p 2. At

[http://www.aihw.gov.au/closingthegap/documents/resource\\_sheets/ctgc-rs03.rtf](http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs03.rtf) (viewed 22 September 2013).

<sup>9</sup> D Gray and E Wilkes, *Reducing alcohol and other drug related harm*, Closing the gap clearinghouse Resource sheet no. 3 (2010), p 8. At

[http://www.aihw.gov.au/closingthegap/documents/resource\\_sheets/ctgc-rs03.rtf](http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs03.rtf) (viewed 22 September 2013).

<sup>10</sup> D Gray and E Wilkes, *Reducing alcohol and other drug related harm*, Closing the gap clearinghouse Resource sheet no. 3 (2010). At

[http://www.aihw.gov.au/closingthegap/documents/resource\\_sheets/ctgc-rs03.rtf](http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs03.rtf) (viewed 22 September 2013).

<sup>11</sup> In the Commission's submission to the Parliamentary Committee inquiry into the Stronger Futures legislation we presented evidence, from a variety of sources including the Closing the Gap Clearing House, as to what makes an effective intervention. see Australian Human Rights Commission, *Submission to the Senate Community Affairs Legislation Committee Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related Bills* (6 February 2012). At [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=clac\\_ctte/strong\\_future\\_nt\\_11/submissions.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=clac_ctte/strong_future_nt_11/submissions.htm) (viewed 11 October 2013).

- culturally sensitive and appropriate
- adequately resourced and supported, including to cater for clients with complex needs
- provide a mix of broad-based and substance specific services
- planned and integrated as a suite of interventions.

(a) *Alcohol restrictions*

A common response to alcohol misuse is the imposition of restrictions, often in the form of complete bans, over specific geographic areas. This approach has been implemented predominately in discrete and remote communities with varying results.

There are several examples of communities deciding to be dry and implementing successful policies. For example the Groote Eylandt community of Umbakumba, which was featured in the *Social Justice Report 2007*, developed a plan to manage alcohol through an extended and in-depth process. The alcohol bans in Umbakumba and restrictions on the sale of takeaway in other parts of the island saw reduced consumption of alcohol along with a reduction in instances of violence and crime.<sup>12</sup>

There are also places where the community has chosen to restrict the availability of alcohol, as opposed to a complete ban. This approach has had success in areas such as Fitzroy Crossing, where restrictions have provided a circuit breaker to address dysfunction.<sup>13</sup>

On the other hand, bans imposed on communities without consultation or consent have been less effective and resulted in feelings of disempowerment and marginalisation in communities.<sup>14</sup>

The Northern Territory Intervention is an example of this. The Commission has consistently highlighted evidence which indicates that blanket alcohol bans, such as those imposed in the Northern Territory Intervention, are less effective than those driven by communities.<sup>15</sup>

Negative consequences of blanket alcohol bans include increased drinking in unsafe environments and displacement of people from communities into larger towns where alcohol is more readily available.<sup>16</sup>

Blanket bans also have the effect of criminalising behaviour that is not subject to criminalisation anywhere else. This is highly problematic given the disproportionate

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<sup>12</sup> T Calma, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008). At [http://humanrights.gov.au/social\\_justice/sj\\_report/sjreport07/index.html](http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html) (viewed 11 September 2013).

<sup>13</sup> M Gooda, *Social Justice Report 2010*, Australian Human Rights Commission (2011), p 28. At [http://www.humanrights.gov.au/social\\_justice/sj\\_report/sjreport10/index.html](http://www.humanrights.gov.au/social_justice/sj_report/sjreport10/index.html) (viewed 18 October 2013).

<sup>14</sup> Central Land Council, *The Central Land Council Community Development Framework* (2009), p 8.

<sup>15</sup> See T Calma, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 285-289. At [http://www.humanrights.gov.au/social\\_justice/sj\\_report/sjreport07/index.html](http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html) (viewed 9 January 2013).

<sup>16</sup> Aboriginal and Torres Strait Islander Legal Services and Aboriginal Peak Organisations Northern Territory, *The Future of the Northern Territory 'Intervention': Issues Paper* (2010), p 7.

rate at which Aboriginal and Torres Strait Islander people are imprisoned in comparison to the non-Indigenous population.<sup>17</sup>

### **1.3 A human rights-based approach**

A human rights-based approach to alcohol misuse advocates neither for the free flow of alcohol into every community nor the blanket application of alcohol bans.

This approach requires that communities are empowered to make decisions about the policies adopted to manage alcohol within their community. It also ensures that measures are reasonable, proportionate and necessary. The combination of these factors will, the evidence tells us,<sup>18</sup> ensure policies have the greatest likelihood of success and will respect and protect the human rights of our communities.

The *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) is a crucial tool in guiding this process. As outlined in chapter 3, when developing any policy there must be consideration of the four Declaration principles of:

- self-determination
- free, prior and informed consent
- respect for and protection of culture
- non-discrimination and equality.

Any response delivered in line with these principles will result in the empowerment of communities to develop and implement responses, which, consistent with the evidence presented above, is most likely to have a positive impact.

I will consider the application of some aspects of the Declaration in more detail below.

#### **(a) Protection from alcohol related harm**

The protection of people from alcohol related harm is a legitimate goal which is consistent with the human rights contained in the Declaration. As well as the principles underpinning the Declaration, specific articles contain rights which are pertinent to alcohol policy. In particular, Article 7(1) includes the rights to life, physical

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<sup>17</sup> The rate of imprisonment for Indigenous persons is 2 268 per 100,000 compared the general population rate of 169 per 100 000 (based on average daily imprisonment rate): Australian Bureau of Statistics (ABS), 'Corrective Services Australia June Quarter 2012', 4512.0 (September 2012). At <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0?OpenDocument> (viewed 11 September 2013).

<sup>18</sup> D Gray and E Wilkes, *Reducing alcohol and other drug related harm*, Closing the Gap Clearinghouse Resource Sheet no. 3 (2010). At [http://www.aihw.gov.au/closingthegap/documents/resource\\_sheets/ctgc-rs03.rtf](http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs03.rtf) (viewed 22 September 2013).

and mental integrity, liberty and security of person.<sup>19</sup> Article 22 of the Declaration is also important in any approach to this issue. It states:

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

While we know the devastating harm that alcohol abuse can cause in some communities, a human rights-based approach mandates action to address and protect those most vulnerable to this harm.

*(b) Non-discrimination and equality*

A major human rights consideration in relation to the development of alcohol policies is the principle of non-discrimination and equality. Australia has obligations under both domestic and international law relating to discrimination on the basis of race.<sup>20</sup>

Non-discrimination and equality is acutely relevant because many alcohol policies, particularly geographic bans, involve treating Aboriginal and Torres Strait Islander people differently to other Australians.

There are provisions in Australian and international law that allow States to justify differential treatment as 'special measures'. Special measures involve treating people differently on the basis of their race, where there is a requirement for the protection of a racial or ethnic group or individuals in order to ensure their equal enjoyment or exercise of human rights and fundamental freedoms. In fact, States are obliged to take special measures to ensure the full enjoyment of a particular group's human rights and fundamental freedoms.<sup>21</sup>

*(c) Special measures in domestic Australian law*

The *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act) s 8(1) provides an exception to the general prohibition against racial discrimination in s10 if a measure can be considered a special measure. The section makes reference to the *International Convention on the Elimination of All Forms of Racial Discrimination* Article 1(4) for an understanding as to what constitutes a special measure.<sup>22</sup>

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<sup>19</sup> These Declaration rights are strongly supported by *International Convention on the Elimination of All Forms of Racial Discrimination*, 1969, art 5(b); *International Covenant on Civil and Political Rights*, 1966, art 9; *Convention on the Rights of the Child*, 1990.

<sup>20</sup> *Racial Discrimination Act 1975* (Cth) and *International Convention on the Elimination of All Forms of Racial Discrimination*, 1969.

<sup>21</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 1969, art 2 (2)

<sup>22</sup> *Racial Discrimination Act 1975* (Cth), s 8(1) reads 'This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).'

In the High Court case of *Gerhardy v Brown*<sup>23</sup> Justice Brennan identified the characteristics that must be satisfied in order for a measure to be considered a special measure within s 8(1).

- the measure must confer a benefit on some or all members of a class of people whose membership is based on race, colour, descent, or national or ethnic origin
- the sole purpose of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms
- the protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others<sup>24</sup> and
- the measure must not have yet achieved its objectives (the measure must stop once its purpose has been achieved and not set up separate rights permanently for different racial groups).<sup>25</sup>

The above elements of the test set out by Justice Brennan were confirmed in the recent case decided by the High Court, *Maloney v The Queen*.<sup>26</sup>

Text Box 4.2 summarises the case and its findings.

**Text Box 4.2 : *Maloney v The Queen*<sup>27</sup>**

Mrs Maloney is an Aboriginal woman and resident of Palm Island in Queensland. She was convicted in the Magistrates Court in Townsville for breaching the island's alcohol restrictions.<sup>28</sup>

Mrs Maloney's appeal against her conviction to the District Court of Queensland was dismissed. Her application for leave to appeal to the Court of Appeal was also dismissed.<sup>30</sup>

By special leave, she appealed to the High Court. The Commission was granted leave to appear as *amicus curiae* – a friend of the court.

The Palm Island community is composed almost entirely of Aboriginal and Torres Strait Islander peoples. Mrs Maloney claimed that the alcohol laws on Palm Island were in breach of the Racial Discrimination Act because those provisions affected her enjoyment of three rights: the right to equal treatment before courts and tribunals; the right to own property; and the right to access places and services intended for use by the general public. She also argued that they were not a 'special measure'.<sup>31</sup>

<sup>23</sup> *Gerhardy v Brown* (1985) 159 CLR 70.

<sup>24</sup> *Gerhardy v Brown* (1985) 159 CLR 70,133 (Brennan J).

<sup>25</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 139-140 (Brennan J).

<sup>26</sup> [2013] HCA 28 (19 June 2013).

<sup>27</sup> [2013] HCA 28 (19 June 2013)

<sup>28</sup> Mrs Maloney was charged with the offence of being in possession of more than a prescribed quantity of liquor in a restricted area on Palm Island contrary to s 168B of the *Liquor Act* 1992 (Qld). Schedule 1R of the Liquor Regulation, made under the Act, has the effect of restricting the nature and quantity of liquor which people may have in their possession in public areas on Palm Island.

<sup>29</sup> *Maloney v Queensland Police Service* [2011] QDC 139.

<sup>30</sup> *R v Maloney* [2013] 1 Qd R 32.

<sup>31</sup> *Liquor Act* 1992 (Qld), s 168B in conjunction with Schedule 1R.



The Court found that the laws did involve differential treatment on the basis of race, however it confirmed the lower court's decision that the laws were a special measure. They found that the introduction of criminal penalties as part of the policy to ban alcohol did not preclude the laws from being a special measure.<sup>32</sup> Therefore, Mrs Maloney's conviction was upheld.

The judgment adds to the understanding of what constitutes a special measure and how this is determined in a number of ways – but of particular note is its consideration of consultation and consent.

The Court found it is not necessary to show that there had been consultation or consent with those to whose benefit the measure is directed for the law to be a special measure. The majority did, however, find that the question as to whether there was genuine consultation may be relevant to the assessment of whether it is a special measure.<sup>33</sup>

The Court also found that materials which were produced after the passing of the Racial Discrimination Act, such as general recommendations from treaty bodies and the Declaration, could not be considered to alter the understanding of the legislative provision. This was found despite the *Vienna Convention on the Law of Treaties* (1969) Article 31(3) which relates to the use of subsequent material in interpretation of treaty obligations.

In its submissions to the High Court, the Commission argued, on the basis of the international law, that in order to determine whether the measures are special measures<sup>34</sup> a court should assess whether there is 'free, prior and informed consent' to the measures. We argued that if consent was not the standard accepted by the court then alternatively it should be considered whether the intended beneficiaries of the measures were consulted.

The test for what is required as a special measure under the Racial Discrimination Act does not accord with the requirements set out in the various international instruments, set out below. We would argue however, that if governments are to act in good faith, and in compliance with their obligations under the Declaration, CERD and other international instruments,<sup>35</sup> they must satisfy more than the narrower requirements of the Racial Discrimination Act. In my view, they must seek the free, prior and informed consent of the communities concerned, or as a bare minimum, undertake effective consultation.

(d) *Special measures at international law*

Special measures are a complex area of law where international law sets a higher benchmark than domestic Australian law. Text Box 4.3 sets out the international obligations which inform Australia's responsibilities in relation to special measures.

**Text Box 4.3: International Obligations**

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<sup>32</sup> *Maloney v The Queen* [2013] HCA 28 (19 June 2013) 39-41 (French CJ).

<sup>33</sup> *Maloney v The Queen* [2013] HCA 28 (19 June 2013) 46 (French CJ).

<sup>34</sup> The particular questions it would address are whether the measures would confer a 'real benefit' on the members of a particular racial group and whether it is for the sole purpose of securing their advancement.

<sup>35</sup> Such as the *International Convention on Civil and Political Rights*, 1966 and the *International Covenant on Economic, Social and Cultural Rights*, 1966.



## **The Declaration**

Article 21(2) of the Declaration places an obligation upon States regarding special measures:

States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

## **Convention on Elimination of all forms of Racial Discrimination**

Article 1 (4) of CERD allows for differential treatment on the basis of race in certain circumstances.<sup>36</sup> For differential treatment to be deemed acceptable, and not racial discrimination, it must be a special measure.

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.<sup>37</sup>

The Declaration's principle of non-discrimination and equality, informed by CERD and the guidance from the CERD Committee, provides authority as to what can be considered a special measure at international law.

The CERD Committee states that:

Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary....States should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.<sup>38</sup>

A way to apply this guidance, and ensure that special measures are legitimately characterised, is to ensure they:

- have a legitimate objective
- be a reasonable and proportionate measure to achieve that objective<sup>39</sup>
- have a rational connection between the objective and the measures.<sup>40</sup>

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<sup>36</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 1969.

<sup>37</sup> *International Convention on the Elimination of All Forms of Racial Discrimination* 1969, art 1(4).

<sup>38</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009), paras 16, 18.

<sup>39</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009).

The legitimacy and proportionality of an objective will be harder to establish if the measures involve impeding the rights of or criminalises the purported beneficiaries. More restrictive measures are more likely to be considered reasonable if accompanied by a suite of measures which treat the problem in a holistic manner.

(e) *Free, prior and informed consent*

The best way to prove that the measures are reasonable and proportionate with a legitimate objective is to develop and implement them in close consultation with the community to gain their free, prior and informed consent.

I have said time and time again that a key element of free prior and informed consent is ensuring those most vulnerable in our communities have their say. If their voices are excluded then a community cannot be considered to have legitimately given their free, prior and informed consent. This is particularly important when considering alcohol policy, as those most vulnerable to alcohol related harm, such as women, children and the victims of abuse, are not necessarily those with the loudest voices.

(f) *Government to establish effectiveness*

The Special Rapporteur on the rights of indigenous peoples, Professor James Anaya, says that:

discriminatory measures...cannot be found necessary to the legitimate objectives they are intended to serve, if the discriminatory treatment is not shown to actually be achieving the intended results.<sup>41</sup>

Too often we see governments' policies characterised as special measures without a clear demonstration for the basis of such a claim. If the Government implements measures which impact on our rights and are claimed to be special measures, governments should make clear to Aboriginal and Torres Strait Islander peoples how their actions are consistent with the Racial Discrimination Act.

## **1.4 Alcohol policy in the Northern Territory and Queensland**

In this reporting period substantial developments in alcohol policy have occurred in two jurisdictions – Queensland and the Northern Territory.

Both jurisdictions have implemented pathways for communities to develop their own Alcohol Management Plans (AMPs). I welcome these developments and their potential to return power to communities and effectively address alcohol misuse with community developed solutions. However, the way the Plans are implemented will

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<sup>40</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009).

<sup>41</sup> J Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum: Situation of indigenous peoples in Australia*, Report to the Human Rights Council, fifteenth session, UN Doc A/HRC/15/37/Add.4 (2010), para 63. At [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/15/37/Add.4](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/15/37/Add.4) (viewed 19 September 2013).

ultimately determine their compatibility with human rights and their overall effectiveness.

If we are viewing alcohol policy holistically it is important to look at the suite of measures being proposed. Recent developments to address alcohol misuse in the Northern Territory raise serious human rights concerns that may undermine the overall efficacy of the return to community control in alcohol management plans in the Northern Territory.

(a) *Queensland*

In Queensland, 19 discrete Aboriginal and Torres Strait Islander communities have alcohol restrictions in place.<sup>42</sup> These restrictions operate through AMPs. As was promised in the lead up to the State election in early 2012, the Minister for Aboriginal and Multicultural Affairs is currently coordinating a review of AMPs.

Each community has been given the opportunity to lead the review of their community's AMP.

The terms of reference, common to all reviews, requires the consideration of five issues:

1. Previous views and evidence base regarding alcohol misuse.
2. The strength of community leadership and the capacity to manage alcohol misuse and reduce alcohol related harm.
3. The effectiveness and impacts of the current AMP supply and demand strategies to reduce alcohol related harm.
4. The impact of AMPs on community members and regional centres.
5. Future strategies to manage alcohol misuse and reduce alcohol related harm, in each community, with a view to transitioning from AMPs if a community wishes to.<sup>43</sup>

The review will operate in three phases.<sup>44</sup> Phase one involves communities conducting a review and submitting proposals to the State government. The community does not have to submit a proposal if it is happy with the current arrangements. Department officials are available to the community to assist with consultation and development of proposals if requested.

Phase two involves the development of alternative strategies and transition plans. At this stage, government officials will assist with the finalisation of the transition plan in

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<sup>42</sup> Queensland Government, Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, *Community alcohol limits*. At <http://www.datsima.qld.gov.au/atsis/government/programs-and-initiatives/alcohol-reforms/community-alcohol-limits> (viewed 19 September 2013).

<sup>43</sup> Queensland Government, Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, *Review of Alcohol Management Plans: Background and Terms of Reference*, pp 1-3. At <http://www.datsima.qld.gov.au/atsis/government/programs-and-initiatives/review-of-alcohol-management-plans-2012> (viewed 19 September 2013).

<sup>44</sup> Queensland Government, Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, *Review of Alcohol Management Plans: Review Process*. At <http://www.datsima.qld.gov.au/atsis/government/programs-and-initiatives/review-of-alcohol-management-plans-2012> (viewed 19 September 2013).

order to move from the existing restrictions to a new plan. However, the transition plan is restricted to existing budgets.

At Phase two, the transition plan will be sent to the Queensland Government for approval.

Phase three involves the implementation and monitoring of the new plans, with close interrogation of levels of alcohol related violence and harm.

I have had the opportunity to engage with the Woorabinda community about their AMP. Text Box 4.4 provides a history of Woorabinda, the context of alcohol policy and opportunities for the future.

#### **Text Box 4.4: Woorabinda<sup>45</sup>**

Woorabinda is an Aboriginal community of just under 1000 people approximately two hours south-west of Rockhampton.

Woorabinda was established in 1927 when the Queensland Government moved the residents of the Aboriginal reserve at Taroom. The conditions on Woorabinda were harsh. A lack of water, a fatal outbreak of influenza and inadequate shelter from cold winters made life difficult.

Between 1927 and 1943, government policy under the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) and subsequent protection Acts resulted in large numbers of people being forcibly moved to Woorabinda. In 1938, people from 47 different tribal groups, from as far away as NSW and the Northern Territory were living in Woorabinda.

During the Second World War, 271 Aboriginal people from the Cape Bedford mission (Hopevale) near Cooktown were moved to Woorabinda. It is estimated that at least 70 people from Cape Bedford including many children died within a year of arriving at Woorabinda because of inadequate facilities and disease. A further 630 people were forcibly moved to Woorabinda in the period after the end of the war until 1970.

In 1986, Woorabinda was transferred into the trusteeship of the newly formed Woorabinda Aboriginal Council.

The traumatic histories of many of the residents of Woorabinda, a lack of opportunities and generations of discrimination have created an environment highly susceptible to alcohol misuse.

Alcohol restrictions were put in place in Woorabinda in 2003. These restrictions involved limits on amounts of takeaway alcohol. A full ban on all alcohol and homebrew equipment was implemented in 1 July 2008.<sup>46</sup>

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<sup>45</sup> Information about the history of Woorabinda has been sourced from D Craig, 'The Social Impact of the State on a Reserve in Queensland, Australia' Unpublished PhD Thesis, University of California, 1980. (John Oxley Library) and T Forde, *Confinement and Control: A History of Woorabinda Aboriginal Community 1927-1990*. At <http://espace.library.uq.edu.au/view/UQ:266148> (viewed 19 September 2013).

<sup>46</sup> Queensland Government, Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, *Quarterly Bulletin for the period January to March 2012: Woorabinda*, (2012). At <http://www.datsima.qld.gov.au/atsis/government/programs-and-initiatives/reports/quarterly-bulletin-on->

In April 2013, on the invitation of the local community, I travelled to Woorabinda to help start a discussion about alcohol. I chaired a community meeting where a consensus was reached as to how the people of Woorabinda would engage with the AMP Review process.

The community acknowledged that the issue of alcohol was a contentious one and committed to developing a fair process to achieve a decision. Community members were anxious to ensure the voices of all members of the community were heard, especially those most vulnerable to alcohol related harm.

The community decided to form a Working Group, sitting independent from any existing organisational structure but accepting some logistical support from the Woorabinda Aboriginal Shire Council. The Working Group operate under terms of reference which ensure the review is undertaken in consultation with:

- the Woorabinda community including:
  - men, women and young people.
- service providers
  - government
  - non-government
- the Woorabinda Aboriginal Shire Council
- experts
- other communities
- other stakeholders in the community.

The Working Group will make minutes publically available and any community member is welcome to attend.

Although it is early days, the community of Woorabinda's approach to alcohol promises to be a process of empowerment for the community in exercising self-determination. There are many hurdles yet to overcome both within the community and navigating the review process. However, if the community is able to conduct the review and develop a plan with the same considered and inclusive approach which has characterised the early stages then the potential is great. This must be accompanied by the Queensland Government acting to facilitate and enable the community to develop, enact and implement their plan,

The Queensland Government also have a responsibility to ensure any plan respects the human rights of the people of Woorabinda. However, considering the above framework, any plan developed and supported by the community has a strong likelihood to be considered consistent with the human rights of the community.

I have welcomed this process because it places communities in control of the development of their responses to their own issues. Once developed by the community, any new measures should, by their nature, have the free, prior and informed consent of communities if all voices are heard, particularly the voices of the most vulnerable.

The development of AMPs stemming from the review and community involvement in the process can be seen as an exercise of self-determination, an essential principle and right of the Declaration. The community developed nature of AMPs and the guidance by the requirements of the terms of reference increases the likelihood that the measures can be considered special measures.

(b) *Northern Territory*

A lack of policy continuity has frustrated efforts to address the devastating impacts of alcohol misuse in some parts of the Northern Territory. Promising approaches, both at the community and government levels, have not been given an opportunity to prove themselves due to constant changes in policy. For instance, some of the community developed AMPs prior to the NTER achieved some positive results until they were abolished and replaced with blanket bans.<sup>47</sup> Also, as I will argue below, some good government programs have also been prematurely cut.

At different points alcohol policy has flared as a point of tension between state and federal governments and the people of the Northern Territory have suffered as a result of these tensions. For example, earlier this year both Commonwealth and Territory ministers strongly criticised each other's policies after the Northern Territory refused to conduct a premises assessment on two Alice Springs hotels after a request from the former Commonwealth Minister for Indigenous Affairs Jenny Macklin.<sup>48</sup>

The partisan nature of alcohol policy in the Northern Territory has resulted in great fluctuations in government responses to alcohol. A lack of coordination, conflicting philosophies and a lack of evidence based policy has resulted in ineffective responses, often at odds with human rights.

(i) *Australian Government – Stronger Futures measures*

The recent history of alcohol restrictions in the Northern Territory are outlined in Text Box 4.5.

**Text Box 4.5: Background – alcohol restrictions in the Northern Territory**

Before the Northern Territory Emergency Response (NTER) in 2007, some Aboriginal communities in the Northern Territory had successfully developed their own plans to respond to alcohol misuse. These responses varied from complete alcohol bans, to restrictions on carriage limits, bans on takeaway and restricted operating hours for licensed venues.

These community developed plans were replaced with blanket bans when the NTER was imposed.

The original 2007 NTER implemented a ban on drinking, possessing, supplying or

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<sup>47</sup> For example see Unpublished, K Conigrave, E Proude and P d'Abbs, *Evaluation of the Groote Eylandt and Bickerton Island Alcohol Management System, A report produced for the Department of Justice*, Northern Territory Government (31 July 2007).

<sup>48</sup> AAP, 'NT and Canberra clash over booze curbs', *The Adelaide Advertiser*, 7 February 2013.

transporting liquor in 73 Aboriginal communities (nominated as 'prescribed areas') in the Northern Territory.<sup>49</sup> The measures also established mechanisms to monitor takeaway sales across the whole of the Northern Territory.<sup>50</sup> Police were provided with powers to enter private residences in prescribed areas as if they were public places.<sup>51</sup> At the time, the Australian Human Rights Commission (the Commission) expressed concerns about the discriminatory nature of the measures, most particularly the suspension of the Racial Discrimination Act and that these measures would be ineffective because they undermined community control in addressing alcohol-related harm.<sup>52</sup>

The 2010 NTER redesign measures made a number of amendments to the operation of the alcohol measures.<sup>53</sup> The Commission welcomed aspects of the redesigned measures including:

- the provision of greater discretion in placing appropriate signage and publishing notices
- reinstatement of the Racial Discrimination Act
- provisions that enable communities to introduce voluntary alcohol management arrangements and apply to be exempted from blanket alcohol bans.<sup>54</sup>

However, the Commission also expressed concerns regarding some features of the alcohol measures included in the 2010 NTER redesign, particularly that they were not developed with adequate community consultation.<sup>55</sup> At this point in time, no alternative plans were approved after these changes were made.

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<sup>49</sup> *Northern Territory National Emergency Response Act 2007 (Cth)*, Parts I, II.

NOTE – communities included in the intervention were nominated as prescribed areas. The new measures allowed for the continued operation of licensed premises and individual permits issued under the *Liquor Act* (NT) and for some recreational, tourism and commercial fishing activities.

<sup>50</sup> Department of Families, Housing, Community Services and Indigenous Affairs, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (2009), p 6. At [http://www.facsia.gov.au/sa/indigenous/pubs/nter\\_reports/policy\\_statement\\_nter/Documents/landmark\\_reform\\_welfare\\_system.pdf](http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf) (viewed 25 October 2013).

<sup>51</sup> These powers were repealed in 2012 by *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012*, s 1.

<sup>52</sup> T Calma, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 285-289. At [http://www.humanrights.gov.au/social\\_justice/sj\\_report/sjreport07/index.html](http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html) (viewed 25 October 2013).

<sup>53</sup> *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010 (Cth)*, sch 3.

<sup>54</sup> Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (2010), 10 February 2010, paras 123-124. At [http://www.humanrights.gov.au/legal/submissions/sj\\_submissions/2010\\_welfare\\_reform.html](http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html) (viewed 25 October 2013).

<sup>55</sup> Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (2010), 10 February 2010, paras 126-136. At [http://www.humanrights.gov.au/legal/submissions/sj\\_submissions/2010\\_welfare\\_reform.html](http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html) (viewed 25 October 2013).



Federal government alcohol policy in the Northern Territory currently operates under the Stronger Futures suite of legislation and policies.<sup>56</sup>

Stronger Futures continues the area-based restrictions created by the NTER but establishes a process through which the Commonwealth Minister for Indigenous Affairs can approve the AMPs proposed by communities. These plans are the first step in the process of communities seeking to adjust restrictions.

The legislation contains a requirement for community consultation<sup>57</sup> to precede the Minister making, revoking<sup>58</sup> or varying a rule restricting alcohol over a certain area. It also contains the requirement for the Minister to have regard to submissions received during consultations prior to making such a determination.

The legislation allows for the development of minimum standards for AMPs by legislative instrument. These minimum standards were made and registered in late 2012 and these standards must be met when the Minister makes a determination on whether to accept an AMP. Text Box 4.6 contains categories that make up the minimum standards.

#### **Text Box 4.6: AMP minimum standards overview**

The minimum standards involve considerations in the following areas:

- Standard 1: Consultation and engagement
- Standard 2: Managing the Alcohol Management Plan
- Standard 3: Alcohol Management Plan strategies – supply, demand and harm reduction
- Standard 4: Monitoring, reporting and evaluation
- Standard 5: Clear geographical boundaries.<sup>59</sup>

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<sup>56</sup> Stronger Futures is made up of three pieces of legislation:

- the *Stronger Futures in the Northern Territory Act 2011* (Cth)
- the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2011* (Cth)
- the *Social Security Legislation Amendment Act 2011* (Cth)

<sup>57</sup> Before making, revoking or varying a rule the Minister must ensure that information about the proposal to make the rule, together with a short explanation of the consequences if such a rule is made, have been made available in the area in question. The Minister must also ensure people in the affected area have been given a 'reasonable opportunity' to make submissions to the Minister about the proposal to make the rule, the consequences if the rule is made and their circumstances, concerns and views: *Stronger Futures in the Northern Territory Act 2011* (Cth), s 27(6).

<sup>58</sup> The community consultation requirement does not apply if the rule is in relation to the approval of an alcohol management plan: *Stronger Futures in the Northern Territory Act 2011* (Cth), s 27(7). The Explanatory Memorandum states that there should be sufficient community consultation prior to an alcohol management plan being approved: Explanatory Memorandum, *Stronger Futures in the Northern Territory Act 2011* (Cth), p 18.

<sup>59</sup> Stronger Futures in the Northern Territory (Alcohol Management Plans) Rule 2013, pursuant to s 119, *Stronger Futures in the Northern Territory Act 2012* (Cth).

During the consultation on the AMP minimum standards, I raised concerns about the operation of the planning process. Expectations were raised during the development of Stronger Futures that the new process would allow each community to modify existing alcohol restrictions. However, this modification is not automatic as the revocation of existing restrictions requires further consideration by the Minister once an AMP has been approved.<sup>60</sup>

The government considers the continued restrictions under Stronger Futures to be special measures. The Joint Committee on Human Rights (JCHR) criticised this characterisation and found that 'the government has not provided a detailed explanation of why the Stronger Futures Measures can be legitimately viewed as special measures under international law.'<sup>61</sup> The JCHR accepted the possibility that the measure may be justified, however, it said that sufficient evidence had not been presented to accept the assertions that the continuing bans were special measures.

Given the chorus of concerns raised by myself and others, such as the JCHR, it is of particular importance that information is provided by Government to justify the characterisation as a special measure. On the other hand, these concerns could be alleviated if communities develop their own plans. But communities must be supported and assisted (including the provision of adequate resources) to transition to their own community developed plans. These AMPs should also be able to involve the lifting of blanket bans if that is what the community wants following a rigorous consultation process.

#### (ii) Northern Territory Government

The election of the Country Liberal Government in the Northern Territory in 2012 saw a dramatic change in approach to alcohol policy. I am concerned about many aspects of the new Northern Territory alcohol policy measures. I am particularly alarmed at the movement towards criminalisation of something that is a health problem that requires a preventative public health response.<sup>62</sup>

The Banned Drinkers Register (BDR) and Substance Misuse and Referral Treatment (SMART) Court were abolished soon after the change of government and around the same time, the Mandatory Alcohol Treatment Act 2013 (NT) was introduced in the NT Parliament.

The below section provides details and context of the key developments in alcohol policy.

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<sup>60</sup> *Stronger Futures in the Northern Territory Act 2012* (Cth), s 27(3).

<sup>61</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (2013), p 28. At [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Completed\\_inquiries/2013/112013/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/112013/index) (viewed 1 October 2013).

<sup>62</sup> See for example United Nations Association of Australia, *Australia and the UN: Report Card* (2013), pp 21-23. At <http://www.unaa.org.au/release-of-australia-and-the-un-report-card-2013.html> (viewed 25 September 2013).

## Banned Drinkers Register

The BDR enforced identification checks for all takeaway alcohol purchases and allowed residents of the Northern Territory to be banned from purchasing alcohol. People were banned:

- if they were found guilty of an 'alcohol related offence'
- were taken into protective custody three times in three months
- charged with high range drink driving offences.

## The Substance Misuse and Referral Treatment (SMART) Court

The abolition of the SMART Court was announced in December 2012, after only eight months of operation, and it was repealed in Northern Territory legislation on 30 June 2013. Offenders with a 'history of serious substance misuse' who have criminal matters being heard before the Magistrates or Youth Justice Court may refer themselves, or be referred by a prosecutor or police officer, to the SMART court for the matter to be heard.<sup>63</sup>

The SMART Court had the ability to make orders to address the substance misuse behaviours which had led to offending. Orders can include a ban on the consumption of alcohol or drugs, referral to treatment, and other conditions. Offenders are assessed by a Court Clinician prior to the making of an order and are monitored for at least six months after the order was made.

Non-compliance with the order could lead to consequences such as increased drug/alcohol testing, changes in orders and as a last resort, a short period of incarceration.<sup>64</sup>

Chief Magistrate Hilary Hannam bemoaned the scrapping of the SMART Court, stating:

We have now nothing in the court system, not a single program, not for drugs, not for illicit drugs, not for alcohol, not for mental health, not for Indigenous people.<sup>65</sup>

Whilst the SMART Court was not in operation long enough to have produced strong results of its effectiveness, therapeutic drug and alcohol courts similar to the SMART court are in operation in a number of other Australian jurisdictions and have been shown to be effective.<sup>66</sup>

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<sup>63</sup> *Alcohol Reform (Substance Misuse Assessment and Referral for Treatment Court) Act 2011* (NT) Part 3.

<sup>64</sup> Northern Territory Magistrates Court, *Specialist Courts*. At [http://www.nt.gov.au/justice/ntmc/specialist\\_courts.shtml](http://www.nt.gov.au/justice/ntmc/specialist_courts.shtml) (viewed 28 September 2013).

<sup>65</sup> APONT, 'Maintain Court's discretion – Therapy not "throw away the key"' (Media release 3 July 2013).

<sup>66</sup> D Weatherburn, C Jones, L Snowball and J Huw, *The NSW Drug Court: A re-evaluation of its effectiveness*, NSW Bureau of Crime Statistics and Research (2008). At [http://www.bocsar.nsw.gov.au/bocsar/bocsar\\_pub\\_dtoh.html#drug\\_court](http://www.bocsar.nsw.gov.au/bocsar/bocsar_pub_dtoh.html#drug_court) (viewed 28 September 2012).

## Mandatory Treatment

A key element of the Northern Territory Government's current alcohol policy is mandatory alcohol treatment. In May this year, I expressed my concerns about the human rights implications of the *Alcohol Mandatory Treatment Act 2013* (NT) (Alcohol Mandatory Treatment Act).<sup>67</sup> An outline of the Act is provided in Text Box 4.7.

### Text Box 4.7: *Alcohol Mandatory Treatment Act*

The Alcohol Mandatory Treatment Act requires that people who are taken into protective custody three times in two months must to be taken into custody for assessment and forced to appear before an independent tribunal which will determine if and how the individual will be mandatorily treated.<sup>68</sup> The tribunal will have the option to force treatment:

- in a secure facility
- in a community residential facility
- in the community through measures such as income management.

If individuals abscond from a treatment facility more than twice they will be subject to criminal sanctions.<sup>69</sup> The criteria for making a mandatory treatment order is as follows:

- (a) the person is an adult;
- (b) the person is misusing alcohol;
- (c) as a result of the person's alcohol misuse, the person has lost the capacity to make appropriate decisions about his or her alcohol use or personal welfare;
- (d) the person's alcohol misuse is a risk to the health, safety or welfare of the person or others (including children and other dependants);
- (e) the person would benefit from a mandatory treatment order;
- (f) there are no less restrictive interventions reasonably available for dealing with the risk mentioned in paragraph (d).<sup>70</sup>

I continue to have concerns that the involuntary detention under Mandatory Alcohol Treatment Act could be in breach of Australia's human rights obligations, in particular the right to freedom from arbitrary detention in Article 9 of the *International Covenant on Civil and Political Rights*.<sup>71</sup> The draft General Comment on Article 9 states:

any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the person in question or preventing injury to others, must take into

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<sup>67</sup> M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, Correspondence to Robyn Lambley MLA, Minister for Health, Minister for Alcohol Rehabilitation, 31 May 2013.

<sup>68</sup> *Alcohol Mandatory Treatment Act 2013* (NT), Part 2.

<sup>69</sup> *Alcohol Mandatory Treatment Act 2013* (NT), s 72.

<sup>70</sup> *Alcohol Mandatory Treatment Act 2013* (NT), s 10.

<sup>71</sup> *International Covenant on Civil and Political Rights*, 1966, art 9.

consideration less restrictive alternatives, and must be accompanied by adequate procedural and substantive safeguards established by law.<sup>72</sup>

I outlined my concerns about deprivation of liberty in a letter to the Minister, elements of which are included in Text Box 4.8.

#### **Text Box 4.8: Deprivation of Liberty<sup>73</sup>**

Section 6 of the Alcohol Mandatory Treatment Act appears to recognise the need for such limitations on detention, stating:

The following general principles must be applied by a person when exercising a power or performing a function under this Act:

- a) involuntary detention and involuntary treatment of a person are to be used only as a last resort when less restrictive interventions are not likely to be effective or sufficient to remediate the risks presented by the person
- b) the least restrictive interventions are to be used when a person is being treated or dealt with under this Act
- c) any interference with the rights and dignity of a person are to be kept to the minimum necessary.<sup>74</sup>

However, in practice, if these principles were followed, there would be few if any occasions on which involuntary detention of the kind described in this Act would be permitted.

As noted above, any infringement of the right to liberty must be necessary and proportionate to a legitimate aim. Proportionality typically has three aspects:

- the restrictive measure must be appropriate to achieve its protective function
- it must be the least intrusive instrument amongst those which might achieve the desired result
- it must be proportionate to the interest to be protected.<sup>75</sup>

However, even before reaching this point, there must be some basis to the consideration that the deprivation of liberty is appropriate to achieve the protective aim. Given there is little evidence that involuntary drug and alcohol treatment is effective,<sup>76</sup> there is unlikely to be considered sufficient connection between the health promotion purpose of the Bill and the involuntary detention measures which the Bill provides.

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<sup>72</sup> Human Rights Committee, *Draft General Comment No. 35 – Article 9: Liberty and security of person*, UN Doc CCPR/C/107/R.3 (2013), para 19. At [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=CCPR/C/107/R.3](http://www.un.org/en/ga/search/view_doc.asp?symbol=CCPR/C/107/R.3) (viewed 28 September 2013).

<sup>73</sup> M Gooda, Aboriginal and Torres Strait Islander Social Justice Commission, Australian Human Rights Commission, Correspondence to Robyn Lambley MLA, Minister for Health, Minister for Alcohol Rehabilitation, 31 May 2013.

<sup>74</sup> *Alcohol Mandatory Treatment Act 2013* (NT), s 6.

<sup>75</sup> For example, see M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005), p 275.

<sup>76</sup> W Tan and M Johnson, *A Report into the effectiveness of civil commitment in the treatment of alcoholism, and its suitability for implementation in the Northern Territory*, AMSANT Research Issues Report (2013).

Measures that disproportionately impact the ability for particular racial groups to enjoy their rights can be considered racial discrimination, inconsistent with the Racial Discrimination Act and Australia's international obligations. I hold fears that the laws will disproportionately affect Aboriginal and Torres Strait Islander people. In fact, comments by members of the Northern Territory Government suggest that the laws were developed with the intention of targeting Aboriginal and Torres Strait Islander people.<sup>77</sup> These comments give weight to predictions that the laws may have the practical effect of having an unfair and disproportional impact on Aboriginal and Torres Strait Islander people which could see them in breach of the Racial Discrimination Act.

The objection I raised about the Act's effect of criminalising health problems was reflected by the President of the Australian Medical Association, Dr Peter Beaumont:

The whole thing is meant to be a health pathway, and it's funny that the path leads to criminality if people don't abide by it. This is about illness and addiction; it's not about crimes, other than the fact that some people do commit crimes. But the ordinary courts of law can handle those; we already have laws for those.

The potential for the operation of this Act to add to the already drastic levels at which Aboriginal and Torres Strait Islander people are overrepresented in prisons in the Northern Territory is of particular concern. The Act provides yet another pathway for Aboriginal and Torres Strait Islander people to be incarcerated for behaviours which are not subject to criminal sanctions elsewhere in Australia.

In my communication to the Minister, I raised further human rights issues regarding:

- the ability of the Alcohol Mandatory Treatment Tribunal to make orders for the detention of a person cannot be considered an 'exceptional case' to justify the powers of administrative detention
- the extended periods of detention for assessment
- lack of safeguards for suitable representation before the tribunal
- adequate avenues of timely review
- criminalisation of health problems
- use of force
- charges for food and medication
- measures contrary to recommendations of the Royal Commission into Aboriginal Deaths in Custody.<sup>78</sup>

Overlapping concerns about the Act were raised by a number of organisations and Peak organisations in the Northern Territory including Aboriginal Peak Organisations Northern Territory (APO NT), North Australian Aboriginal Justice Agency, Central

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<sup>77</sup> For example see A Aikman, 'Experts unite on "obscene" grog bill', *The Australian*, 28 May 2013. At <http://www.theaustralian.com.au/national-affairs/indigenous/experts-unite-on-obscene-brob-bill/story-fn9hmlpm-1226651729984> (viewed 30 September 2013).

<sup>78</sup> M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, Correspondence to Robyn Lambley MLA, Minister for Health, Minister for Alcohol Rehabilitation, 31 May 2013.



Australian Aboriginal Legal Aid Service and Northern Territory Legal Aid Commission and Northern Territory Council of Social Services.

Whilst there were some welcome changes made after a consultation process,<sup>79</sup> I still harbour significant concerns about the human rights implications of this Act, including that the treatment facility in Darwin will soon be housed at the Darwin Correctional Centre, a jail.<sup>80</sup> It is hard to see how the treatment can be characterised as anything but a punitive measure when participants are held in a jail. It is also unlikely that this facility will provide an appropriate therapeutic environment, undermining the likelihood that the treatment is successful.

While limited data is available about the impact of the Act so far, responsibility lies with the government to ensure its implementation is appropriately monitored and reported on transparently. This is particularly important because of the punitive nature of the provisions, especially the deprivation of liberty.

### Alcohol Protection Orders

In October 2013 the Government introduced the Alcohol Protection Orders Bill 2013 (NT) to Parliament. Alcohol Protection Orders (APO) can be issued to people who are found guilty of an offence, including traffic offences, where alcohol was a factor which carries a minimum penalty of six months imprisonment or more. People who breach an APO by being in possession of alcohol, or found to have consumed alcohol will be liable to a \$7000 fine or six month jail term. Police will be given power to conduct breath tests on people who are thought to be under APOs.<sup>81</sup>

I have grave concerns over the introduction of these measures. Where the previous Banned Drinkers Register restricted the purchase of alcohol, this measure goes further in effectively criminalizing the consumption of alcohol for those under APOs. My concerns relate to the fact that these APOs will further criminalise alcoholism, which, as I say above, is primarily an issue of health and social and emotional wellbeing. APOs may also lead to over policing of Aboriginal and Torres Strait Islander people, particularly those who are homeless.

People placed on APOs are likely to be a similar cohort to those on the BDR. However, the abolition of the BDR removed barriers to the supply of alcohol. Consequently alcohol is easier to access for people previously restricted by the BDR. This access is of particular concern given the introduction of APOs would impose severe penalties for the consumption of alcohol. There is no evidence to suggest that the threat of punitive sanctions is effective against behaviours driven by addiction,

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<sup>79</sup> R Lambley MLA, Minister of Alcohol Rehabilitation, *Alcohol Mandatory Treatment Bill: Proposed amendments as the result of consultations, 13 May to 12 June 2013*. At <http://newsroom.nt.gov.au/index.cfm?fuseaction=viewRelease&id=10965&d=5> (viewed 28 September 2013).

<sup>80</sup> J Elferink, Minister for Correctional Affairs and R Lambley, Minister for Alcohol Rehabilitation, 'New Location for Darwin's Alcohol Mandatory Treatment Facility' (Media release 21 August 2013). At <http://newsroom.nt.gov.au/index.cfm?fuseaction=viewRelease&id=11309&d=5> (viewed 3 October 2013).

<sup>81</sup> 105.7 ABC Darwin, 'Vicki Kerrigan asks Dave Tollner to explain the new Alcohol Protection Orders', *Drive with Vicki Kerrigan*, 13 May 2013 (D Tollner). At <http://www.abc.net.au/local/stories/2013/05/13/3757618.htm> (viewed 28 September 2013).



such as alcoholism.<sup>82</sup> The associated penalties are likely to result in increased rates of incarceration.

Priscilla Collins, CEO of the North Australia Aboriginal Justice Agency, described the planned introduction of APOs as:

a major step backwards. The Government has learnt nothing from the Royal Commission into Aboriginal Deaths in Custody. That warned against criminalizing drunkenness and emphasised diversion from police custody. The Government is doing exactly the opposite.<sup>83</sup>

## 1.5 Conclusion

This chapter has reviewed the complex human rights framework around alcohol policy in Australia. While I find the standards around consultation required under domestic legislation disappointing, I believe the Declaration nonetheless, provides the necessary guidance to develop sound alcohol management policies.

When people ask me what alcohol policy should look like in a particular community, quite simply I say that it is not up to me to tell them. A human rights approach doesn't dictate what alcohol policy should entail but it does set up a clear process to approach policy development based on the four principles that underpin the Declaration. If communities and governments can use these principles, they will have developed an alcohol management plan that demonstrates the Declaration in practice. Text Box 4.9 contains a summary of how these principles should guide practice.

### Text Box 4.9: Principles of the Declaration and alcohol management planning

#### Self-determination

If communities organise and respond to alcohol misuse, which may require varying levels of facilitation and enablement by government, then responses to alcohol misuse can be seen as an exercise in self-determination. June Oscar spoke about exercise of self-determination in the Fitzroy Valley response:

...I want to tell a different story. It is about how Aboriginal people can be the authors of our stories and not passive and powerless subjects in stories told and written by others.  
... I want to talk about how the leaders of the Fitzroy Valley in the Kimberley are working together to create a pathway of hope and community vitality and resilience...<sup>84</sup>

Self-determination can be exercised in these contexts by government's providing space for

<sup>82</sup> W Tan and M Johnson, *A Report into the effectiveness of civil commitment in the treatment of alcoholism, and its suitability for implementation in the Northern Territory*, AMSANT Research Issues Report, (2013).

<sup>83</sup> North Australian Aboriginal Justice Agency, 'New laws won't fix the Territory's drinking problem' (Media release 13 May 2013). At <http://www.naaaja.org.au/index.php/82-news/134-new-laws-won't-fix-the-territory's-drinking-problem.html> (viewed 3 October 2013).

<sup>84</sup> J Oscar, community member and CEO of Marninwarntikura, *Speech to the Western Australian Equal Opportunity Commission Forum* (Speech delivered at the Western Australian Equal Opportunity Commission Forum, Perth, 10 August 2009), pp 1-2.

communities to take responsibility for responses to their own issues.

### **Free, prior and informed consent**

Free, prior and informed consent is also key to developing responses to alcohol misuse in line with human rights. Without the consent of communities any response should not be legitimately considered a special measure, nor is it likely to be effective.

### **Respect for and protection of culture**

Respect for and protection of culture is paramount through all stages of any alcohol management planning process and the implementation of any measures. It is key to ensure interventions have the greatest chance of being effective. Culturally appropriate rehabilitation services, demand reduction strategies and strong communities are all important to address alcohol misuse.

Alcohol abuse and related violence is not part of Aboriginal or Torres Strait Islander cultures. As outlined in the *National Aboriginal and Torres Strait Islander Health Plan 2013-2023*:

Culture, in the Aboriginal and Torres Strait Islander context, needs to be differentiated from the excessive behaviours which can have a detrimental effect on the health and wellbeing of people, their families and communities. These excessive behaviours have no basis in Aboriginal and Torres Strait Islander cultures. Indeed it is the restoration and continuation of cultures which provide both the reason for change, and the pathway for securing it.<sup>85</sup>

### **Non-discrimination and equality**

The principle of non-discrimination and equality, incorporating considerations of special measures, is key to developing responses to alcohol in line with human rights. Any policy response to alcohol misuse must not be discriminatory, therefore when targeting discrete Aboriginal and/or Torres Strait Islander communities it must be implemented as a special measure.

In terms of the case studies in Queensland and the Northern Territory, control has been returned to some extent to communities to formulate their own AMPs. Both approaches are motivated by an aim to protect people from alcohol related harm. Both have the potential to lead to effective and empowering responses to alcohol misuse if the process proceeds in line with the rights and principles of the Declaration.

However, both also have the potential to frustrate community efforts and result in further disempowerment. Government departments involved in the planning process must respect and be guided by the four principles of the Declaration in facilitating communities involvement in the process. There also needs to be adequate support to enable communities to undertake this task.

Community developed AMPs may also have their effectiveness hindered if operating in parallel with punitive and problematic measures, such as those implemented and planned in the Northern Territory. I am highly concerned about the implications of Mandatory Alcohol Treatment and proposed Alcohol Protection Orders. I also have

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<sup>85</sup> *National Aboriginal and Torres Strait Islander Health Plan 2013-2023*, Department of Health and Ageing (2013) p 9. At <http://www.health.gov.au/natsihp> (viewed 25 September 2013).

serious concerns about their compliance with human rights and will continue to monitor these developments.