

REGULATING ALCOHOL:

ONE STEP FORWARD, TWO STEPS BACK?

by Nicole Watson

On 1 July 2008, the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Act 2008* (Qld) ('the Act') commenced operation. The Act further strengthens alcohol restrictions that were introduced in discrete Indigenous communities from 2002 to 2006. The restrictions were introduced pursuant to the *Meeting Challenges, Making Choices* ('MCMC') strategy; the Queensland Government's response to the *Cape York Justice Study* that, among other things, found unacceptably high rates of alcohol-related harm in Indigenous communities in north Queensland.¹

A Government review in 2007 revealed that the existing restrictions had not led to a 'sufficient or sustained' reduction in alcohol related harm.² In response, the Bligh Government developed a package that further tightened restrictions on supply and possession of alcohol, as well as providing for improved enforcement of the stricter measures. Encouragingly, the package promises new funding for alcohol rehabilitation services; the State Government has committed \$66 million for 'service and program enhancement'.³

The Bligh Government's apparent commitment to addressing alcohol abuse in Indigenous communities is to be applauded. This paper will argue, however, that the means adopted in the Act actually reduces the scope for effective partnerships between the Queensland Government and Indigenous communities and are likely to yield counterproductive results.

This paper will be divided into three parts. Part one will discuss the substantive sections of the Act and, in particular, those provisions that stripped Indigenous Community Councils of liquor licences and increased police search powers. This part will also briefly consider the Act's closure of the Aborigines Welfare Fund ('AWF'), a measure that appears to be a gratuitous incursion on Indigenous rights. Part two will consider the risk that the focus on enforcement will increase Indigenous people's contact with the criminal justice system. Finally, part three will argue that genuine change is impossible while

'solutions' to alcohol abuse in Indigenous communities are imposed by governments on a unilateral basis.

UNDERSTANDING THE ACT

In order to understand the Act, it is useful to review the historical background behind this legislative regime. Regulation of alcohol consumption by Indigenous people has been one of the most enduring themes of Queensland's Indigenous legislation. The *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld), for example, made it an offence to supply liquor to an 'Aboriginal or half-caste'.⁴ Alcohol remained prohibited in Indigenous communities until the 1970s, when the Director of the Department of Aboriginal and Torres Strait Islander Affairs was empowered, in conjunction with Aboriginal Community Councils, to establish canteens. In the supervening years, Community Councils acquired two contradictory roles: on the one hand they operated a liquor outlet; on the other hand they administered by-laws to regulate the extent of alcohol consumption.

The Act attempts to address this paradox by preventing local governments from holding liquor licences.⁵ The primary aim of the legislation is to 'ensure that the full policy intent of the alcohol restrictions in discrete Indigenous communities' is realised.⁶ The alcohol restriction regime for each community is contained in schedule 1A – 1R to the *Liquor Regulation 2002* (Qld), which prescribes both 'restricted areas', and the quantity of liquor permitted within each restricted area. Section 168B *Liquor Act 1992* (Qld) ('the *Liquor Act*') deems it an offence to possess alcohol in excess of the amount allowed in any particular restricted area. In determining alcohol restrictions, the Government considered the level of alcohol related harm in each community and the different recommendations of the local community justice group.⁷

The Act is also a response to some significant gaps identified in the 2007 review of the application of the alcohol restrictions. In particular, under the earlier regime, restrictions applied only to public places; so if people were 'able to get illicit alcohol through the community and into a house, the ability of the police to act [was] limited'.⁸

The Act addresses those gaps in a number of ways. Firstly, the application of alcohol restrictions was extended from public places to roads, with an exemption provided for *bona fide* travellers.⁹ Secondly, the restrictions were further expanded to apply to private residences, although breaches are set to apply only to the *type* rather than the quantity of alcohol.¹⁰

In order to bolster effective enforcement of alcohol restrictions, the Act amended the *Police Powers and Responsibilities Act 2000* (Qld) ('the *Police Powers and Responsibilities Act*'). As a result, police can now search persons and premises within the MCMC communities for alcohol without a warrant.¹¹ The Explanatory Notes argued that such powers are not new and were already used for the seizure of illicit drugs.¹² However, the reality is that Indigenous people in MCMC communities will now be deprived of procedural safeguards enjoyed by most other Australians. Further, there is an added danger that overzealous use of such powers will exacerbate existing tensions between police and Indigenous people.

For example, in 2008, 16 children from Mornington Island had their bags searched by police, as they were returning home from a basketball tournament in Cairns. It is highly unlikely that such a targeted search would occur in a mainstream Queensland suburb. This was not lost on the Mornington Island community, whose members expressed their outrage in an open letter to Premier Bligh:

We as a community now realise where we stand in the general scheme of things – we are all criminals, including our children who positively represent {us}.¹³

Controversially, Parliament also included in the Act provisions that had the effect of closing the AWF.¹⁴ Established in 1943, the AWF was a medley of Indigenous monies, including levies on the wages of Indigenous workers and income from enterprises run on former Reserve communities. As of 31 January 2008, the balance of the Fund was over \$10,000,000.¹⁵ As a result of the Act, those monies will now be used for the Indigenous Queenslanders Foundation, a fund intended to provide traineeships and scholarships to Indigenous youth.¹⁶

Closure of the AWF and the subsequent establishment of the Indigenous Queenslanders Foundation were always going to be contentious. Many Indigenous people who were deprived of their wages are yet to be adequately compensated by the State; in all likelihood, they never will be. Certainly, it is difficult to imagine that a fund holding the private monies of non-Indigenous people would be

seized in order to fund a service already falling squarely within State responsibility, namely, education. These points beg the question: if the Queensland Parliament genuinely wished to work in partnership with communities in addressing alcohol abuse, why did it include provisions in the Act that were not only unrelated to alcohol abuse, but were almost certain to inflame Indigenous angst?

In summary, the package of which the Act is a part is both a blessing and a curse. It is a blessing because, at the very least, the State has pledged to provide desperately needed alcohol treatment services to some Indigenous communities. But it is a curse because the measures adopted by the legislation signify a return to paternalism. Without doubt, the closure of the AWF is cause for concern; this arbitrary and unexplained measure certainly casts doubt on the *bona fides* of the Bligh Government. But even absent this problematic measure, the legislation follows a troubling path: it simultaneously provides for further scrutiny of already over-policed Indigenous people, while disempowering their elected representatives. Clearly, this leaves very little room for meaningful partnerships between Indigenous communities and the State.

INCREASED CONTACT WITH THE CRIMINAL JUSTICE SYSTEM

The increased policing of Indigenous people appears to be at odds with the *Queensland Aboriginal and Torres Strait Islander Justice Agreement* ('the Agreement'). The Agreement was developed in partnership between the Queensland Government and the former Aboriginal and Torres Strait Islander Advisory Board. It represented the Queensland Government's response to the National Ministerial Summit on Aboriginal Deaths in Custody, where it was resolved that governments ought to develop multilateral agreements to address over-representation of Indigenous people in the criminal justice system. Significantly, the Agreement aims to halve the rate of Indigenous people in prison by 2011; in the long term, it aims to reduce Indigenous people's contact with the criminal justice system to reflect contact rates for other Queenslanders.¹⁷

In a comprehensive evaluation of the Agreement in 2005, Chris Cunneen analysed the impacts of the alcohol restrictions on Indigenous people's contact with the criminal justice system.¹⁸ The review revealed that, after the introduction of the alcohol restrictions, there was a significant drop in hospital admissions arising from assaults. However, new and unintended problems also arose. By way of example, liquor-related offences increased by over 400 percent.¹⁹

In some cases, liquor offences attracted significant penalties of imprisonment; the *Callope* decision is instructive in this regard. Mr Callope, a resident of Napranum, had been an alcoholic for several years. While convicted in respect of violent offences in 1988, Mr Callope had not been convicted of any offences over the next 15 years. Indeed, it was only after the introduction of alcohol restrictions that he came back into contact with the criminal justice system.

In 2004 Mr Callope was sentenced for two offences under the *Liquor Act*. The first arose from his possession of a single can of beer in a restricted area; for this offence he was sentenced to one month's imprisonment and forty weeks' probation. The second offence took place the following day, when Mr Callope was found in possession of a cask of wine. For the second offence, he was sentenced to six weeks' imprisonment, followed by 42 weeks' probation.²⁰ Although the sentences were overturned on appeal, the case highlights the potential for alcohol restrictions to expose already vulnerable people to further risks of incarceration.²¹

THE NEED FOR GENUINE COMMUNITY CONSULTATION

There is a growing body of research suggesting that the most successful programmes are those that are developed in partnership with Indigenous communities.²² This argument found resonance in the report, *Little Children are Sacred*:

There is now sufficient evidence to show that well-resourced programs that are owned and run by the community are more successful than generic, short term, and sometimes inflexible programs imposed on communities.²³

Arguably, the above comments are applicable to alcohol restrictions. In the 2007 *Social Justice Report*, the Aboriginal and Torres Strait Islander Social Justice Commissioner (the 'Commissioner') provided a case study of the successful *Umbakumba Alcohol Management Plan* ('Umbakumba'). Umbakumba was the only community identified in *Little Children are Sacred* as achieving success in the reduction of alcohol abuse. Community ownership, flexibility, the empowerment of women, and partnerships between the community and government agencies were key features that contributed to the Plan's effectiveness.²⁴

But community ownership, crucial to the success of alcohol restrictions, is also relevant to the *Racial Discrimination Act 1975* (Cth) ('RDA'). Alcohol restrictions in other jurisdictions have previously been categorised as 'special measures' under s 8 RDA. That is, although

such legislation is implemented on the basis of race, it is legitimated as a measure intended to ensure 'equal enjoyment or exercise of human rights and fundamental freedoms' for Indigenous people. In this way the racially-determined measures avoid being characterised as 'racially discriminatory'.²⁵ However, for such laws to be justifiable, even as a 'special measure', the Commissioner stresses that they must be enacted and implemented with the consent and participation of those affected.²⁶

The extent of Indigenous involvement in the development of the Act is unclear. The Explanatory Notes make reference to the Indigenous Ministerial Roundtable in February 2008 and to an information sheet that was also made available to the MCMC communities.²⁷ No information has been provided about the responses by those within the MCMC communities to the legislation. However, the fact that the reforms have already sparked litigation suggests that community consultation was less than exemplary.

In *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury*,²⁸ the applicant Council sought judicial review of a decision in relation to certain licenses and, in the alternative, a declaration that certain provisions of the *Liquor Act* were invalid. The applicant held the only alcohol license in Aurukun; the license severely restricted the type of alcohol that the Council was permitted to sell, as well as the hours in which it could legally trade. As a result of the Act, the applicant's liquor licence lapsed on 1 July 2008. The respondent extended the Council's licence to 1 November 2008, to coincide with the introduction of improved alcohol treatment facilities. However, not all of the treatment services were in place by November. With the support of the Queensland Police Service, the applicant sought – unsuccessfully – an extension of the licence until 30 December 2008, giving rise to the litigation.

The Council argued that the provisions prohibiting a local government from applying for, or holding, a licence were inconsistent with the RDA. Justice Jones rejected this argument, finding that the prohibition was not targeted at any particular race: the evidence suggested that non-Indigenous persons, particularly miners, had also purchased alcohol from the applicant's premises.²⁹

Further, his Honour believed that there was no nexus between the prohibition and the rights protected by Article 5 of the *Convention on the Elimination of All Forms of Racial Discrimination*,³⁰ incorporated in the RDA. However, Jones J was not in this case required to consider the amendments

to the *Police Powers and Responsibilities Act*. Arguably, it would be easier to establish such a connection between enlarged police search powers – specifically targeted at Indigenous people – and the rights to equality before the law, as guaranteed by s 10 RDA.

CONCLUSION

It is almost impossible to argue against the need to address the corrosive impacts of alcoholism in Indigenous communities. While the Bligh Government's commitment to providing more resources for alcohol treatment in some Indigenous communities is to be applauded, the Act is a step backwards. Measures that disempower Indigenous Councils, increase the policing of Indigenous people, and stealthily close the AWF, preclude any kind of collaborative relationship between the State and Indigenous communities. It is time for the Bligh Government to approach Indigenous people in a spirit of goodwill, to demonstrate respect for our knowledge and for the expertise of our community organisations. Only then will the Queensland Government finally break with the paternalism of its past.

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- 1 Tony Fitzgerald, *Cape York Justice Study* (2001).
- 2 Explanatory Notes, Aboriginal and Torres Strait Islander Communities (Land, Justice and Other Matters) and Other Acts Amendment Bill 2008 (Qld) (ATSICJLA) 3.
- 3 Ibid.
- 4 *The Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) s 19.

- 5 ATSICJLA s 20.
- 6 Explanatory Notes, ATSICJLA 1.
- 7 Ibid 2.
- 8 Ibid 3.
- 9 ATSICJLA s 22.
- 10 Ibid.
- 11 Ibid Part 7.
- 12 Explanatory Notes, ATSICJLA 8.
- 13 Margaret Wenham, 'Search Tactic Riles Islanders', *Courier-Mail* (Brisbane), 31 January 2008.
- 14 ATSICJLA s 4.
- 15 Explanatory Notes, ATSICJLA 5.
- 16 Ibid.
- 17 Queensland Government, *Queensland Aboriginal and Torres Strait Islander Justice Agreement Summary* (2001) 11.
- 18 Chris Cunneen, *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement* (2005).
- 19 Ibid 157.
- 20 Ibid 153-155.
- 21 *Callope v Senior Constable B Elseley* (Unreported, District Court of Queensland, Cairns, White DCJ, 8 March 2005).
- 22 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (2007) 189, New South Wales Aboriginal Child Sexual Assault Taskforce, *Breaking the Silence: Creating the Future* (2006) 291-292; Elliott Johnston, *Royal Commission into Aboriginal Deaths in Custody, National Report* (1991) [1.8]. The *Cape York Justice Study* also called for greater support of community-based crime prevention initiatives. See Tony Fitzgerald, *Cape York Justice Study* (2001) Volume 1, 68.
- 23 Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred* (2007), 53.
- 24 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 22, 81-91.
- 25 Art 1(4), *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with Article 19.
- 26 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 22, 80.
- 27 Explanatory Notes, ATSICJLA 10.
- 28 [2008] QSC 305.
- 29 Ibid [25].
- 30 Ibid [26].

Burial Platform

Heather Anjolu Umbagai

Acrylic on canvas
710mm x 630mm

