



North Australian Aboriginal Justice Agency

NAAJA Submission

Liquor Bill 2019

June 2019

About NAAJA

NAAJA provides high quality, culturally appropriate legal aid services to Aboriginal and Torres Strait Islander people throughout the Northern Territory. NAAJA was formed in February 2006, bringing together the Aboriginal Legal Services in Darwin (North Australian Aboriginal Legal Aid Service), Katherine (Katherine Regional Aboriginal Legal Aid Service) and Nhulunbuy (Miwatj Aboriginal Legal Service). From 1 January 2018 NAAJA has been providing legal services for the southern region of the Northern Territory formerly provided by CAALAS (Central Australian Aboriginal Legal Aid Service). NAAJA and its earlier bodies have been advocating for the rights of Aboriginal people in the Northern Territory since 1974.

NAAJA serves a positive role contributing to policy and law reform in areas affecting Aboriginal peoples' legal rights and access to justice. NAAJA travels to remote communities across the Northern Territory to provide legal advice, deliver community legal education and consult with relevant groups to inform submissions.

This submission draws on the cultural authority of an Aboriginal board which governs NAAJA as an Aboriginal Community Controlled Organisation. NAAJA staff are inspired by the strength and resilience of the Aboriginal people who are board members and come from across the Northern Territory including a strong focus and representation from regional and remote areas. We particularly acknowledge the Elders of our board and the contribution of Aboriginal and Torres Strait Islander people who developed and strengthened NAAJA and its earlier bodies over the years.

Background

NAAJA supports the leadership of the NT Government in committing to implement 219 of the 220 recommendations arising from the Alcohol Policies and Legislation Review conducted by the Hon Trevor Riley (Riley review), particularly within a challenging policy and political context. We recognise and support the Riley review commentary about the culture of alcohol use in the Northern Territory and that these are complex, legacy issues that we have to collectively deal with.

NAAJA has contributed significantly to alcohol related policy including a detailed submission to the Riley review and to the Liquor Act Amendment Bill 2018. Consistent across our submissions is the overarching concerns of the apparent emphasis of the criminalisation of alcohol issues as distinct from a more robust health based response. Whilst we understand the development of a therapeutic response will require significant investment and a shift from the current practice, we see this as important if we are to comprehensively deal with alcohol related harm. We also see the current investment in the justice system as significant. If we coordinate resources more effectively and efficiently, we see opportunities in utilising the National Disability Insurance Scheme (which has a significant underspend), and more effective pathways than custody and prison for people with cognitive impairments who come into contact with the justice system.

Stemming from our previous submissions, and from a health perspective, are three key and consistent themes:

- The potential for over-criminalisation of alcohol related issues;
- Perceptions in the community of discrimination and racial profiling;
- Properly resourcing health based responses to cognitive disabilities, including Foetal Alcohol Syndrome Disorder (FASD – and particularly in the context of the criminal justice system).

The February 2019 submission outlined specific elements of legislative reform, and provided detail in relation to the perceptions in the community of discrimination and racial profiling. Whilst reforms in the current Bill clearly improve and streamline important processes as part of the broader alcohol legislative reform, it appears these over-arching concerns are relevant for the continuing, overall policy direction as established by the Bill.

Criminal justice system response to a health issue

NAAJA is concerned at the apparent continued approach of criminalising alcohol issues and an expensive, current system leading to high rates of contact of Aboriginal people with the justice system. The courts and broader legal system are significantly under-resourced, and face increased numbers of legal matters, including where alcohol related harm is directly connected. There are limited services to assist, especially where a person has a cognitive impairment and it is not diagnosed or where it is diagnosed and there are a lack of services and supports. This is placing significant strain on the legal system, and is well documented.

A recent ABC News report noted ‘hundreds in the Northern Territory’s overcrowded prison system are missing out on programs to address drug and alcohol addiction and domestic violence, because the growth in inmate numbers has outstripped resources.’ⁱ Another ABC Newsⁱⁱ report referred to the under-resourcing of court and legal processes and the apparent increase of matters relating to the criminalisation of alcohol.

Example 1 of the criminal justice response to a health issue – banning notices and exclusion orders and a fines based system

The Bill includes provisions which allow for broad and significant powers of Police.

For example, a person subjected to a banning notice (division 3) or exclusion order (division 4) may have a range of health-related issues including an acquired brain-injury, which may impact their ability to comply with an order. Because this person is unable to comply with their order as a result of their condition, then the policy and legislative framework should reflect a staged process where this person receives a relevant health assessment and clear direction and requirements based on their health-commissioned plan. This could potentially link into the National Disability Insurance Scheme where we know there are significant underspends in the NT and where there are lack of services. We are concerned that the current system trends towards more custody, more prison and more fines (which can exacerbate risk factors leading to contact with the justice system).

The maximum 50 penalty units prescribed for failing to comply with a direction to leave an excluded area (s 225) and the maximum 20 penalty units for an offence to contravene a banning notice (s 215), is far beyond the penalties imposed on liquor outlets for breaching a licence or regulation. This is in the circumstances where overall the liquor industry makes profits from what is the amongst the highest per capita consumption in Australia. The banning notice and exclusion order process, whilst staged and requiring an order of the court (for exclusion orders) can be quite broad in terms of the Police's initial powers to give a banning notice.

For example, whilst the focus in the high-risk area there is no emphasis on other areas should the individual move to another location.

The power to give a banning notice is within s. 209:

Section 209 Police power to give banning notice

- (1) A police officer may issue a banning notice to a person if the officer believes on reasonable grounds that:
 - (a) the person is committing or has committed a banning offence wholly or partly in a high risk area; and
 - (b) the person is likely to continue to commit a banning offence in a high risk area; and
 - (c) the banning offence has caused, or may cause, alcohol-related violence in a high risk area; and
 - (d) the notice would be a reasonable way of preventing the person from continuing to commit the banning offence or committing another banning offence in a high risk area.
- (2) In determining whether the belief is reasonable, the police officer must consider each of the following:
 - (a) the apparent state of health of the person to whom the notice would apply;
 - (b) whether the person should be arrested or held in custody pending the hearing of any charges against the person in relation to the banning offence;
 - (c) whether the person is capable of comprehending the nature and effect of the notice;
 - (d) any other matter the officer considers relevant.

The wording above shows that the powers of Police are very broad.

Example 2 – forfeitures of vehicles

NAAJA welcomes the opportunity to comment on the changes to the seizure and forfeiture provisions within the proposed Liquor Bill 2019. The current seizure and forfeiture framework causes severe hardship for our clients and their communities. Our previous submissions relating to alcohol reform have detailed the circumstances where forfeitures have led to unnecessary and unreasonable hardships on the community and particularly community members who rely on vehicles for positive engagements such as attending (or accompanying others to) health or education activities. The laws relating to forfeiture have also led to severe penalties for people who can have their vehicle seized and forfeited without any recourse and where they continue to have a significant debt over the vehicle, and where small amounts of alcohol is identified or where searches of other person's within a vehicle without the owner's knowledge has led to possession of alcohol. In addition, the cultural obligations and pressures that many Aboriginal people face and that can lead to

vehicle forfeitures can be difficult to understand and accommodate within a legislative framework.

Seizure by police

We view the inclusion of section 242 that requires the Police Officer to consider the impact upon the person and their community before seizing a vehicle as general recognition of the previous concerns raised by NAAJA. However, we believe these types of provisions can be broadened to the overall legislative framework rather than at the point of whether to seize a vehicle (or not). The new provisions are unclear on the process for consideration by the police officer. Although the Bill provides for seizure at any time after the stop and search, seizure can and does often occur at the time of apprehension. We are concerned that a police officer, when apprehending an alleged alcohol offence, will not be able to consider the 'anticipated future use'¹ of the vehicle, and 'whether its seizure and possible forfeiture will cause hardship to a person or community'² in more than a superficial way.

We are also concerned that the amendment to the Liquor Act 1978 section 95A by the Stronger Futures in the Northern Territory Act 2012 has been maintained in the new Bill. The amendment provides for police officers to consider whether the 'main use of the vehicle is for the benefit of the community as a whole', before seizing the vehicle. The requirement for community benefit to be the main use of the vehicle is clearly inconsistent with the considerations within the new provisions, and imposes a much higher standard (i.e. 'main use' as distinct from another type of use where that use can be just as important to the responsible community member using the vehicle for a positive purpose). Section 99A does not take into account the reality that a vehicle owned by an individual may still have significant benefits for the community or a particular section or family member of a community.

Notification by Police Commissioner

It is a positive amendment that the Bill removes the possibility of automatic forfeiture within 60 days, even if the owner was not informed that their vehicle had been seized. The new provisions shift the onus onto the Police Commissioner to take reasonable efforts to find and notify the owner of the vehicle that their vehicle has been seized, and the process for opposing the forfeiture. However, it is likely that in order for this provision to be effective, the Police Commissioner may need to determine the people who have an interest in the vehicle over and above the registered owner, as family members may also use the vehicle for the positive purposes noted earlier (e.g. health and education).

While the removal of the 60-day limit is positive, we note the possibility that the Police Commissioner can hold the vehicle for 28 days without laying charges or applying for forfeiture. Furthermore, an application for forfeiture made in the Local Court may take some weeks or months to determine, and it could be that the Local Court sitting is some distance away from where the registered owner may be expected to attend. The

¹ Liquor Bill 2019 s 242(2)(a).

² Liquor Bill 2019 s 242(2)(b).

effect of this is that the person and community may be deprived of the use of their vehicle for several months without any finding of guilt. A more streamlined process that provides clear legislative direction for the return of a vehicle that is seized is the preferred option. This should be done in a way that is culturally appropriate taking into account language barriers and geographic isolation of communities.

Forfeiture by the Local Court

NAAJA recognises the positive implications of moving the decision to forfeit a vehicle from the absolute power of the Police Commissioner to the Local Court.

However, we note that a more stringent court based process may make it more difficult for community members to seek to have a seized vehicle returned to them and in circumstances where it should be returned. Engaging in the court process concerns matters of access to justice and legal assistance. In these circumstances and without a lawyer, the ability to participate in the process for recovering a vehicle is severely limited.

The Law Council of Australia recommended in their Final Report of the 2017 Justice Project national review that legislatures should consider a *Justice Impact Test* when creating or amending legislation. The test would require assessment of how the change in law or policy would create downstream flow-on effects to the demand for legal assistance services. Moving the forfeiture process to the Courts necessarily requires persons aggrieved to obtain legal assistance and representation. This is particularly true for our clients in remote communities, or who face significant language and other barriers to accessing the Court process. Without representation, persons who have an interest in seized vehicles may have less chance of regaining their vehicles. For NAAJA, the need to advise and represent clients on the Court process creates an increase in pressure on our already strained services. We therefore submit that the legislative change should be accompanied by an increase in funding for legal services, particularly Aboriginal legal services. Without increased access to services, the amendments are likely to push people further out of the process.

Transition arrangements

NAAJA supports the submissions of the Aboriginal Medical Services Alliance NT (AMSANT) and the Foundation for alcohol Research and Education (FARE) recommendations for any unresolved liquor licence applications to lapse and for the new Act to apply for new applications.

Risk Based Licensing Framework

NAAJA supports the introduction of a Risk Based Licencing Framework and supports the leadership of the NT Government in implementing this aspect of the Riley review.

We note the base fee for many licences range between \$100 and \$2,000. In our view, this range may not reflect the variations between Licensees in terms of the sale of alcohol, and is too low of a base fee to serve the purposes of the Bill. We are also of the view that an increase in the base fee will not impact the commercial viability of licenses. And whilst the framework includes loadings to cater for variations across

licenses, a higher base fee will create a stronger incentive for compliance so as to avoid the breach loading provisions (or, in the alternative, the breach loading provisions could be increased).

Further, we recognise the breach loading provisions and the proposed loadings for offences (by the licensee) under the Liquor Act, a finding of breach of a licence condition by the Liquor Commission and also infringement notices under the Liquor Act issued against the Licensee, as follows:

Breach number	% loading
Frist breach	10%
Second breach	25%
Third breach	50%
Fourth breach	100%
Fifth breach	200%

In our view, these loadings could be increased so as to ensure Licensee compliance.

Licensees operate on a commercial and market basis and therefore raise profits through the sale of alcohol. Significant amounts of alcohol in the Northern Territory are sold each year.

In recognition of alcohol misuse and the associated harm on the community, the Northern Territory includes some of the strongest policing and legislative frameworks across Australia which impacts Aboriginal people significantly, contributing to high rates of imprisonment and other non-compliance measures such as fines. This is the standard we hold Aboriginal people to account. In these circumstances, it is not unreasonable to expect a high standard in relation to compliance on Licensees and ensuring Licensees uphold the strong and stringent sets of expectations necessary for effective alcohol policies and laws.

Whilst the Risk Based Licencing Framework information sheet notes 'significant increases in an annual fee if a venue is found to have breached its liquor licences', the relatively low base fee may lead to these provisions not serving as the kind of disincentive that the community expects, and that it holds in a similar respect to the compliance expected of Aboriginal people as reflected in existing laws and policies.

Donations to political parties

The legislative reforms provide an opportune time to address the influence of the liquor industry on Northern Territory political and election campaign processes.

In NAAJA's submission to the Riley review, we said:

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

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

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

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

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

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

Updated 30 Jan 2017 Alcohol campaigners have renewed calls for a ban on political donations after the Northern Territory's Australian Hotels Association (AHA) boss admitted to personally gifting tens of thousands of dollars to both sides of politics. Darwin pub-owner Mick Burns confirmed he had donated \$100,000 in the last 12 months, split evenly between Labor and the Country Liberals. He gifted a total of \$20,000 to the two parties in the 2015/16 financial year, and gave a lump sum payment of \$40,000 to each party before the NT's August election. Mr Burns said the money was given by him personally, and not on behalf of the AHA. "Look, as a Territorian, we needed strong, stable government to have the Territory in the best place that it can be and that it should be," he said. "For governments to be elected, they obviously run campaigns and campaigns cost money." Dr John Boffa from the People's Alcohol Action Coalition said that justification was not credible. "These donations are made for a purpose, they're made to buy influence over a policy," Dr Boffa said. "[The donations] mean [Mr Burns] is expecting equal influence and expecting both parties to ensure they have favourable policy environments to the industry he's representing, which is the Australian Hotels Association. "We should be banning these forms of political donations. It's not good for our democracy ... and it's certainly not good for public health."

Government denies pandering to hotel's lobby

The \$40,000 donations were not due to be revealed by the NT Electoral Commission until March next year, but Territory Labor released the information after requests from the NT News. The Country Liberals party president Shane Stone declined to confirm Mr Burns' comments and said donations would be disclosed according to the timetable set by the NT Electoral Commission. Both parties each received \$150,000 from the hotels lobby in the lead up to the 2012 election.

Newspaper stories of donations from individuals and entities associated with the alcohol industry were also reportedⁱⁱⁱ for previous election cycles.

In the lead up to the 27th August 2016 election the People's Alcohol Action Coalition (PAAC) and the Foundation for Alcohol Research and Education (FARE) wrote to the major political parties and nominees to request information in relation to their alcohol policies. The following indicates the response with the final row noting 'ban political donations from the alcohol industry':

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

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

★ STRONG SUPPORT
☆ SOME SUPPORT
? UNCERTAIN
✗ NO SUPPORT

Whilst the two major political parties which have held government at various times since self-government in the NT are not committed to 'ban political donations from the alcohol industry', minor parties and nominees did indicate their support. This commitment and across the political spectrum (except for the two major parties) reflects a strong level of public sentiment and support for the proposal. From a policy perspective, a ban on donations from the alcohol industry and associated entities will rule out, and put certainty to, the notion that financial contributions to political parties can influence decisions relating to alcohol legislation and policy. It will place greater trust in processes such as the Northern Territory Alcohol Policies and Legislation Review and other similar processes to provide expert opinion and direction. A ban of this nature will also allow for greater freedom and opportunities for governments to extend to other measures such as banning advertisements of alcohol with sports and measures that have led to a decline in cigarette smoking rates without fear of repercussions from the alcohol industry and associated entities. We recommend government legislate for the ban of donations to political parties and the influence of elections by the alcohol industry and associated entities, modelling legislation on the NSW legislation; and that the proposed Independent Commission against Corruption include specific provisions and/or

a specific focus relating to the above to ensure greater public confidence and trust in the process.

The Final Report of the Riley Review of October 2017 at page 12 said:

The subject of political donations from the alcohol industry was raised in submissions to the review and during public consultations. However, as there is a formal inquiry into this issue underway we have chosen not to comment on it in this Report.

The Inquiry Into Options for the Reform of Political Funding and Donations in the Northern Territory, by Commissioner John Mansfield of June 2018, said at page 26:

My investigations into some of that alleged conduct has not confirmed that in fact any of the members of those groups has achieved a perverse political outcome by the making of donations. In those circumstances, I am not disposed to recommend that any of those groups should be prohibited from making donations to political parties.

The Inquiry then went into some further reasons why a recommendation not to ban the liquor industry from making political donations were raised.

For the reasons stated in our submission to the Riley Review, we continue to be of the view that the Northern Territory should lead the way in reforms to disconnect the potential for any influence via funding by the liquor industry on political and election campaign processes.

ⁱ NT Corrections Commissioner pitches plan to plug gap in prison rehabilitation programs' by Jacqueline Breen, ABC News, 29th May 2019

ⁱⁱ Three months' jail for \$25 of stolen wine before Darwin man's robbery charge dropped, ABC News report, By Jacqueline Breen

ⁱⁱⁱ For example, see Liquor firms donated \$300,000 to Labor campaign, Rory Callinan, The Australian, 22nd March 2011