BALANCE

LAW SOCIETY NORTHERN TERRITORY

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The Honourable
Chief Justice Trevor Riley

Rights,
Liberties and Grog

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The Northern Territory Government's recently announced alcohol initiatives form the basis of this month's column. While I will describe some of the announced initiatives and the Law Society's response to them I also want to consider some of the theoretical considerations the alcohol issue raises, particularly in relation to the proposed Alcohol and Other Drugs Tribunal.

While I will discuss these theoretical considerations in the context of alcohol policy, I hope the underlying matters will have relevance to policy development in relation to a broad range of social challenges currently facing the Territory.

The Law Society Council has recently released an alcohol policy. I could not honestly say the policy is earth-shattering. It recites the (now) quite well known statistics on the harm caused by alcohol abuse to the Territory community and it in general terms endorses the elements of the Northern Territory Government's alcohol initiative. Although the harm statistics have been prominent in recent Government advertising they are worth repeating in brief at the foot of this page.

The response by the NT Government has been well publicised and I will not go through it all here. Suffice to note that it has the overall objective of reducing Territory alcohol consumption levels to the national average by 2020 and there is an absolute commitment that these will not involve the further criminalisation of alcohol abuse.

There are some aspects that I do want to concentrate on though and these are the "supply based" initiatives. I would include amongst these the "banned drinker" proposals, measures within the Liquor Accords under Part XA of the *Liquor Act* and also the prohibition on particular products (e.g. four litre casks).

The Law Society's policy encourages further supply based measures including amending s31(2) of the *Liquor Act* to empower the Licensing Commission to determine liquor licence conditions with respect to the charging of a particular price for liquor and for a one day a week take away alcohol prohibition.

It is these supply based proposals that have given me the greatest cause for reflection both at a theoretical level. My reflection arose from encountering those, many in the health sector, who see the consumption of alcohol as "a privilege not a right". This "privilege" can be restricted or removed without any impact on rights or liberties.

I do not agree with this theoretical proposition. Rather, I prefer the adage that "what is not unlawful is lawful".

Undertaking lawful activities is the right of every citizen in our democracy. From this standpoint every measure which regulates previously lawful activities is an erosion of our liberties and should be scrutinised as such. However, this is not to suggest that after such scrutiny the proposed regulation will not be found warranted.

Examples of warranted regulation and restriction of rights and liberties are too numerous to bother listing. The question then is not whether there is a "right to drink" but whether there is sufficient justification for

Alcohol Harm Statistics

- **The total annual social cost of alcohol is over $4,000 per adult Territorian, more than four times the national per capita cost;**
- **Alcohol kills 120 Territorians each year.[1]**
- **Alcohol-related crime, the annual cost of which is over $90 million, accounts for over 40% of the costs of policing.[2]**
- **Territorians are imprisoned at over four times the national average, and our imprisonment rates are growing faster than in any other jurisdiction.[3]**

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regulating a lawful activity.

The statistics relating to harm caused by alcohol abuse (for example those tabled on page 4) suggests there is certainly a mischief that needs addressing. More than this though the comparative statistical data from the Territory shows that liquor supply restrictions (for example "Thirsty Thursday") do have a significant effect in reducing alcohol related harm. Similarly, product restrictions (4 litre casks) are shown to reduce alcohol related harm (although not to the same extent as volumetric taxes because of the tendency to product substitution; e.g. from 4 litre cask to flagon of port). From a theoretical perspective then I am convinced that supply based regulation is justified.

However, once it is realised that this regulation ***is*** an encroachment of civil liberties (albeit a justified one) the need for ongoing supervision of this regulatory power is highlighted. In this context, particularly in relation to the various banned drinker orders, the role of the Alcohol and Other Drugs Tribunal proposed under the Exposure Draft of the *Prevention of Alcohol-related Crime and Substance Misuse Bill 2010* is crucial.

The basis for the Police initiated banning orders, as proposed by Government, would appear to be that Police can impose a banning order (a Banning Alcohol and Treatment – BAT - notice) for three months on specified bases: that a person has been in the sobering up shelter three times in three months; that they have been charged with an alcohol related offence or involved in an alcohol related domestic violence incident (cl 51). The criteria are clear. Violation of the first notice can lead to a second BAT notice of a six month duration and violation of the second notice can lead to a third 12 month notice (cl 53). If the person undergoes an "alcohol intervention" the period can be reduced. A person can apply to the Tribunal for review of a notice made against them (cl 60).

The Tribunal though can make a Banning Alcohol and Other Drugs and Treatment (BADT) order. The BADT order is for a period of up to 12 months prohibiting the person from "purchasing, possessing or consuming alcohol" and also requiring them to "undergo treatment, counselling or other intervention" (cl 45, 47).[4] The BADT order can be applied for by the person themselves, the police subsequent to violation of a third BAT order or by a "prescribed applicant" who has made application for an assessment of the person to a clinician (a Chief Health Officer appointed medical practitioner (cl 35, 44).

A "prescribed applicant" is (*inter alia*) a police officer, a health practitioner (doctor, nurse, Aboriginal health worker or psychologist) or the spouse or "any other relative of the person" (cl 5,6). The application for assessment of the person by a clinician can be made if a prescribed applicant "reasonably believes" a person is "misusing a substance": that is has a "dependency" or is affecting the safety health or welfare of the person or their family or is a risk to public safety or a regular public nuisance (cl 36). A substance is "alcohol or another drug" – "drug" is not defined (cl 4).

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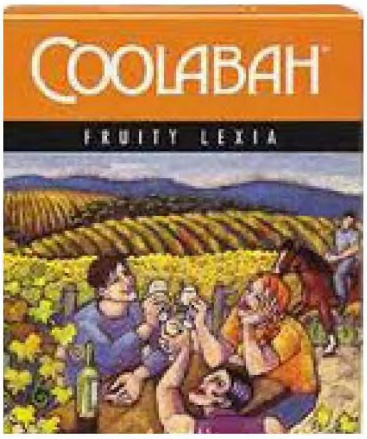

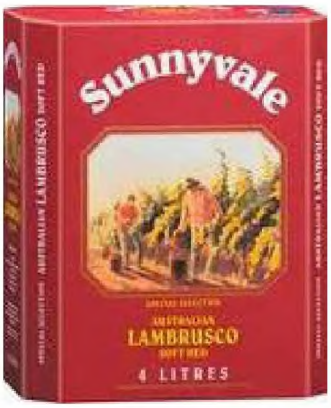

The clinician has discretion as to whether to make an assessment, but if they do, the clinician must give their report to the prescribed applicant (cl 36, 37). The prescribed applicant can then make application for a BADT order. If the person does not attend the examination by the clinician the Tribunal can make a General Alcohol Prohibition (GAP) order prohibiting the person from "purchasing, possessing or consuming alcohol" for a period of three months or until they attend the examination. Further GAP orders can be made if the person continues to fail to attend the examination by the clinician.

The objectives of a BADT order are set out (cl 45): for example a reduction in the person's access to and consumption of alcohol or other drug, reduction in harm to others, or enhanced public safety or wellbeing. However, the criteria upon which the Tribunal would make the order are not set out in the Bill. The only indication is in the required content of the Assessment report which includes whether the person is misusing a substance, the level and nature of misuse, including whether they have a dependency and details of the treatment or intervention recommended (cl 37).

Contravention of the BADT order enlivens in the Tribunal the power to vary or extend the order (cl 48).

The scheme in relation to the Tribunal proposed by the Bill causes me some serious concerns. The core of these goes to the "loose" definition of misusing a substance. Clause 4 provides misuse of a substance includes dependency on the substance (dependency is not defined). Some greater clarity is provided in cl 36(2). Clause 36(2)(a) reiterates that dependency is misuse. Clause 36(2)(b)(i) goes on to provide that misuse can also arise in circumstances where consumption of the substance is "affecting the safety, health or welfare of the person or the persons family".[5]

Apparently then, a dependency on a substance that causes no harm constitutes misuse. Similarly, consumption of a substance, (without dependency) that affects "the safety, health and welfare" of the person is also misuse. From my reading it would appear that every Territorian that has been convicted of even a low range drink driving offence has potentially "misused a substance". Certainly regular smokers "misuse a substance" and arguably those with a penchant for fatty foods or who consume more than the NHMRC recommended two or three standard drinks a day also do.

With this definition in mind recall that a spouse or "any other relative" of a person with a "reasonable belief" that the person is misusing a substance can make application for a clinicians assessment. The person has no opportunity to respond to the relatives allegations except by attending the assessment. Failure to attend results in the making of GAP order. The clinician (although not a legal practitioner) in undertaking the assessment is bound by the statutory definition of misuse and may make recommendations for treatment. The report then must be provided to the relative making the assessment application.

The Tribunal is then charged with determining whether to make a BADT order without any criteria to guide (or constrain it). The Tribunal is not bound by the rules of evidence but can compel attendance and evidence on oath. A person the subject of a BADT order application

is entitled to legal representation but I think it is safe to assume (particularly given the current state of legal aid funding) this will be at their own expense.

While I support the notion of the AODT in principle for the reasons outlined above, I find the provisions of the Exposure Draft Bill very disturbing.

The first area of concern is the (lack of) definition of misuse. By contrast consider the detailed definition of "mental illness" in s 6 of the *Mental Health and Related Services Act*. Consider also the constraints imposed on involuntary admission and treatment under ss 14-16 of that Act. These are extensive and I will not reproduce them here. Suffice to note that a common requirement is that: "the person may cause serious harm to himself or herself or to someone else; or suffer serious mental or physical deterioration; and the person is not capable of giving informed consent to the treatment or care or has unreasonably refused to consent to the treatment or care".[6]

The Bill has no such safeguards.

To me the fact that the affect of contravention of the order is only a continued prohibition on alcohol (or other substance) purchase does not allay these concerns. The precedent of liberties being eroded on the basis of (potentially) arbitrary administrative discretion is established by the Tribunal as currently proposed.

Similarly I find the notion that some distant relative (the Bill gives examples of "any other relative" which includes an "aunt in law") can make an *ex parte* application for an assessment; the failure to attend of which causes a GAP order to issue and *then* that the relative be provided with the details of that assessment, frankly outrageous.

These concerns expressed, I must also re-iterate the view that a Tribunal such as the AOD Tribunal, that can develop therapeutic assistance measures outside of the criminal justice system for those individuals who, because of drug abuse, pose a serious threat to the well-being of themselves or others is a worthwhile objective. However, achievement of this objective must constantly bear in mind that the measures proposed are an erosion of civil liberties. Any such erosion must be warranted, effective and proportionate. The Tribunal as envisaged under the Exposure Draft of the Bill is certainly not the latter.

Footnotes

1. South Australian Centre for Economic Studies, "Harms from and Costs of Alcohol Consumption in the Northern Territory" (2010).
2. South Australian Centre for Economic Studies, "Harms from and Costs of Alcohol Consumption in the Northern Territory" (2010).
3. Australian Bureau of Statistics, 'December Quarter 2008, Corrective Services Australia' (Report 4512.0).
4. I understand from various Departmental briefings that residential treatment could be encompassed within the scope of the order.
5. As noted above cl 36(2)(b)(ii) and (iii) provides that consumption that is or may be a risk to public safety or regularly causing a public nuisance is also misuse
6. See for example *Mental Health and Related Services Act* s 16(b).

Legal Tease

Flex Your Cerebrum!

Q 1. A barrister witnessed her husband plunge head first down a deep ravine. When she eventually returned home, she found him in the kitchen opening a bottle of champagne. How could this be possible?

Q 2. A Detective Sergeant arrived at the station slightly later than he had intended. He didn't start working, he just looked at his watch, sighed and went back home. His Chief wasn't a stickler for punctuality so why the change of heart?

Q 3. A nervous witness told the court that their grandmother was younger than their mother. Further examination revealed that this was infact true. How was this so?

Answers on page 35