

ARTICLES

THE CURSE OF ‘WHITE MAN’S WATER’:¹ ABORIGINAL PEOPLE AND THE CONTROL OF ALCOHOL

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I. INTRODUCTION

The question of how to respond to the devastating impact of alcohol on Indigenous communities continues to be controversial. Recently the Northern Territory and Commonwealth governments have attempted to address the problem, introducing extensive changes to the way in which alcohol is regulated.² The underlying concern of these recent initiatives is the protection of Aboriginal people from the devastating effects of alcohol. Alcohol has consistently been linked to high levels of crime and violence, significant health problems and loss of cultural identity in Aboriginal communities. For example recent statistics from the Northern Territory show that in the four years from 2001 there was an average of 2000 assaults and 110 sexual assaults per year that were related to alcohol.³ Between 1992–2001 the Northern Territory recorded the highest proportion of deaths and hospitalisations related to

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¹ From a letter written by a Yolngu leader, quoted in Pat Anderson and Rex Wilde, “Little Children are Sacred”: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government, 2007, 163.

² See Anderson and Wilde, *ibid* and Northern Territory National Emergency Response Act 2007 (Cth).

³ Anderson and Wilde, *above n1*.

alcohol in Australia.⁴ Many recent studies have also associated loss of cultural identity with alcohol abuse.⁵ The interaction between Aboriginal people and alcohol has been a source of tension in the relationship between white people and Aboriginal people since colonisation.⁶ From early in Australia's history alcohol was used to barter for the sexual services of Aboriginal women and as payment for Aboriginal labour.⁷ Langton notes that alcohol was used by the colonisers to seduce Aboriginal people into interacting with white society politically, economically and socially.⁸ The question of how to regulate the consumption and distribution of alcohol to Aboriginal people has continued to occupy courts and legislatures in Australia ever since. This article follows the development of the legal control of Aboriginal people's consumption of alcohol and the distribution of alcohol to Aboriginal people from the 1950s on, focusing on Australia's Northern Territory.⁹ It is concerned with

⁴ Tanya Chikritzhs, *Australian Alcohol Indicators: Patterns of Alcohol Use and Related Harms for Australian States and Territories 1990-2001*, National Drug Research Institute, Curtin University of Technology, 2003 at xiii; 6.4 deaths per 10,000 per year compared with next highest number in South Australia where 2.4 deaths per 10,000 per year were recorded; at xiv there were 94.3 hospitalisations per 10,000 in the Northern Territory compared with the next highest 63.3 per 10,000 in Queensland.

⁵ For example, Northern Territory Law Reform Committee, *Background paper 1: Aboriginal Communities and Aboriginal Law in the Northern Territory*, Northern Territory Law Reform Committee, 2003, 16-17; Anderson and Wilde, above n 1, 17.

⁶ Maggie Brady, 'Drug and Alcohol Use among Aboriginal People' in Janice Reid and Peggy Trompf (eds), *The Health of Aboriginal Australia*, (1991) 174. See Louis Nowra, *Bad Dreaming* (2007) where he tracks media concerns about Indigenous communities' welfare especially over the past few years.

⁷ Sherry Sagers and Dennis Gray, *Dealing with Alcohol: Indigenous Usage in Australia, New Zealand and Canada*, (1998) 43.

⁸ Marcia Langton, 'Rum, Seduction and Death: "Aboriginality" and Alcohol', in Gillian Cowlishaw and Barry Morris (eds), *Race Matters* (1997) 87.

⁹ In the Northern Territory approximately 30% of the population are Indigenous people and there has been particular interest in the Northern Territory in recent times. However similar developments can be seen across Australia where Indigenous people make up about 2 to 5% of the overall population. For example see legislation in Western Australia: s 7(1) (g) *Aboriginal Communities Act* (1979) WA; South Australia: s 16A *Aboriginal*

understanding the transitions from government managed top-down prohibition during the 1950s, to various regulatory regimes that relied upon Aboriginal people's collaboration in their design and implementation over the intervening period, to the recent return to top-down regulation of alcohol. The article explores the tensions involved in the approaches to regulation of Aboriginal people's drinking and shows how the ideas underlying the assimilation policy are reflected within new approaches to alcohol regulation.

II. CONCEPTUAL TENSIONS IN THE LEGAL REGULATION OF ALCOHOL

Three distinct phases of alcohol regulation can be observed over the last sixty years in the Northern Territory. The first can be described as the assimilation phase running generally between 1950 and the middle of the 1960s. The second can be understood as the 'collaboration'¹⁰ approach, beginning in approximately 1963 when prohibition ended for Northern Territory Aboriginal people and they gained the right to vote (in 1964).¹¹ This period lasted until around 1999 when the then Prime Minister passed a formal motion of something he described as 'practical reconciliation'.¹² It is argued in this article that a new phase of

Lands Trust Act (1966) SA and Queensland: part 6, *Aboriginal Communities (Justice and Land Matters) Act* (1984) Qld.

¹⁰ In this article 'collaboration period' is used as a short-hand term for the years between the mid 1960s and the late 1990s, subsuming other policies introduced during the period — including the integration policy introduced by the Labour Government in 1965, the formal government policy of 'self-determination' introduced in 1972 and reconciliation discussed by the then Prime Minister Paul Keating in his 'Redfern Speech' of 1992.

¹¹ Basil Sansom, *The Camp at Wallaby Cross: Aboriginal Fringe Dwellers in Darwin* (1980), 49.

¹² Robert Manne, 'Introduction' in Robert Manne ed. *Whitewash: On Keith Windschuttle's Fabrication of Aboriginal History* (2003), 4–5. This policy moved the emphasis from symbolic reconciliation focussed on Indigenous rights to practical reconciliation focussed on socio-economic outcomes, see J.C. Altman and B.H. Hunter, 'Monitoring 'Practical' Reconciliation: Evidence From the Reconciliation Decade, 1991–2001', Discussion Paper 254, Centre for Aboriginal Economic Policy Research, Canberra, 2003, 11

alcohol regulation has been gaining ground since around this time. This most recent phase is referred to in this article as 'neo-assimilation'. These three phases are discussed in turn later in this article. However before doing this, some conceptual tensions which have consistently plagued regulatory approaches to Aboriginal drinking are discussed.

One of the central tensions that has played out in alcohol regulation has been the issue of racial discrimination and its relevance to the creation of special laws for Aboriginal people. This issue became especially important after 1966 when the United Nations adopted the *International Convention on the Elimination of All forms of Racial Discrimination*. However it became even more significant after the *Racial Discrimination Act* (Cth) was introduced in 1975. Thus the avoidance of discrimination, or how to justify discrimination were particularly pressing concerns during the collaboration period. The fact that few Aboriginal people are problem drinkers has meant that drinking regulations have impacted unnecessarily on many Aboriginal people and has also been argued to be discriminatory.¹³ The tensions between individual rights and individual autonomy on the one hand and collective rights and collective autonomy on the other hand have also been key concerns in struggles to regulate Aboriginal drinking. While it has been argued that individuals should have the absolute right or freedom to drink, this right has been balanced against community rights to be free of the destructive effects of alcohol.¹⁴ Top-down approaches such as those seen during the assimilation era rejected the possibility of Aboriginal autonomy. However, while more collaborative approaches, like those seen after the 1960s, fostered autonomy and self-determination, arguably this resulted in significant social costs being borne by communities.

¹³ Dennis Gray et al Substance Misuse and Primary Healthcare Among Indigenous Australians, Aboriginal and Torres Strait Islander Primary Healthcare Review: Consultant Report No 7, Officer of Aboriginal and Torres Strait Islander Affairs, Canberra, 2004, 8; Boni Robertson (Chair) The Aboriginal and Torres Strait Islander Women's Taskforce on Violence Report (2000) [2.7]; Anderson and Wilde, above n 1, 161.

¹⁴ Race Discrimination Commissioner, *Alcohol Report* (1995) at 21. Also extracted in (1996) 1 AILR 312.

These tensions and challenges underlie regulatory responses in the three periods examined below

A. Assimilation

1. Assimilation policy

A frequently quoted version of the assimilation policy suggests that the objectives were to ensure that Aboriginal people would live as members of a single Australian community, who would enjoy the same rights and privileges, accept the same responsibilities, observe the same customs and be influenced by the same beliefs as other Australians. Any special measures, for example any unequal applications of relevant laws, would be regarded as temporary measures for special care and assistance and to protect Aboriginal people from any ill-effects of sudden change.¹⁵

Throughout the 1950s most Aboriginal people in the Northern Territory were prohibited from drinking alcohol. Specific provisions in the *Licensing Ordinance* and the *Welfare Ordinance* were developed in the Northern Territory to control Aboriginal drinking. This prohibitionist legislation of the assimilation era was a special measure; it was intended to protect Aboriginal people on their way towards assimilation.¹⁶ The laws governing consumption in the prohibition period focused directly and coercively on the individuals involved. This response resulted in illegal suppliers and consumers of alcohol being prosecuted and incarcerated for criminal offences. Penalties for

¹⁵ John Chesterman, 'Defending Australia's Reputation: How Indigenous Australians Won Civil Rights Part One', (2001) 116 *Australian Historical Studies* 20, 22. For a discussion of the development of the assimilation policy see Heather Douglas and John Chesterman, "'Their Ultimate Absorption': Assimilation in 1930s Australia" (2004) 85 *Journal of Australian Studies* 23–42.

¹⁶ This is discussed by Rowse, see Tim Rowse, 'The Modesty of the State: Hasluck and the Anthropological critics of Assimilation' in eds Tom Stannage and Kay Saunders *Paul Hasluck in Australian History: Civic personality and Public Life* (University of Queensland Press, St Lucia, 1998) at 124, 128.

consumption and supply of alcohol fluctuated during the assimilation period but were always high.¹⁷

2. *Justice Kriewaldt assimilation and alcohol*

As the sole-judge of the Northern Territory Supreme Court during the 1950s, Kriewaldt J was an important interpreter of alcohol laws during the assimilation period. He strongly supported the general alcohol prohibition in place for most Aboriginal people during that period. Kriewaldt J maintained that there was a clear nexus between unassimilated Aboriginal people drinking and social devastation and crime.¹⁸ He accepted that prohibition was a way of protecting Aboriginal people as they moved towards assimilation. Kriewaldt J was unsympathetic to those charged with supplying alcohol to Aboriginal people and often issued maximum penalties.¹⁹ Like other assimilationists of the era, he was of the view that the move towards assimilation would be a gradual one.

For Kriewaldt J, there was no appropriate space or context for unassimilated Aboriginal people to drink.²⁰ In considering prosecutions for drinking Kriewaldt J's main concern was to ensure that prohibition was maintained. He found that it was too early in the assimilation process to withdraw the prohibition and accepted that the majority of the violent crimes involving Aboriginal people involved alcohol and that alcohol use amongst Aboriginal people lead to greater criminal activity.²¹ He believed that a retreat from prohibition would retard the assimilation of Aboriginal people.²² In considering the *Licensing, Aboriginal and Welfare Ordinances* in the alcohol supply case of *Namatjira* (1958) he noted that, '[t]hose of us who have lived for more than

¹⁷ This legislation is overviewed in Heather Douglas, 'Justice Kriewaldt, Aboriginal Identity and the Criminal law', (2002) 26 *Criminal Law Journal* 204, 217.

¹⁸ Martin Kriewaldt, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia', (1960) 5 *University of Western Australia Law Review* 1, 2.

¹⁹ Kriewaldt, *ibid.*, 38.

²⁰ Kriewaldt, *ibid.*, 8.

²¹ *Ibid.*

²² *Ibid.*, 2.

a year or two in the Territory realise that legislation for the protection and advancement of Aborigines is essential if they are to escape extinction'.²³ For Kriewaldt, the choice was stark: advancement and assimilation or extinction. He was shocked that some did not seem to see the absolute necessity of the position and the 'evil effects of supply'.²⁴ These views were consistent with the assimilation policy articulated by government.²⁵ Fundamentally, Kriewaldt viewed prohibition as a mechanism that, through the direct controls it placed on the behaviour of suppliers and Aboriginal consumers assisted in creating conditions whereby assimilation would be fostered.

The legislative attack on consumption of alcohol by Aboriginal people was two-pronged. First legislation created offences for supplying alcohol to Aboriginal people, and offences for Aboriginal people who consumed liquor.²⁶ The legislative penalties for the offence of supplying liquor to unassimilated Aboriginal people were, at their height, a mandatory penalty of six months imprisonment.²⁷ It was not until 1957 that legislation allowed courts to recognise extenuating circumstances or the youth of the supplier in mitigation of the penalty on a first offence.²⁸ For the majority of his ten years on the bench Kriewaldt regarded those who supplied alcohol to Aboriginal people as a disgrace to the community.²⁹ He was extremely unsympathetic to offenders and 'ungenerous' in accepting pleas in relation to mitigation of sentence. In 1957 new welfare legislation was enacted in support of the assimilation policy. Kriewaldt's judgment in the *Namatjira* case, discussed below, was focused on articulating the legitimacy of welfare legislation and in effect the legitimacy of the assimilation policy. However, ultimately, the case helped to problematise the whole question of

²³ *Namatjira v Raabe* (1958) NTJ 608, p 618.

²⁴ *Lewis v Metcalfe* [1959] NTSC (Unreported, Kriewaldt J, 5 May 1959), 3.

²⁵ Chesterman, above n 15, 22.

²⁶ ss140, 141 *Licensing Ordinance 1939–1957* (NT).

²⁷ *Mathews v Stokes*, (1951) NTJ 59, 60.

²⁸ ss141 (5) (a) and (b) *Licensing Ordinance 1939–1957* (NT).

²⁹ Douglas, above n 17, 219.

Aboriginal drinking and the response of prohibition that, in turn, led to significant changes in the approach to regulating drinking.

3. *Namatjira and the problem of prohibition*

By the late 1950s, Namatjira was well known throughout Australia for his watercolour painting. When the regulation of Aboriginal people was remodelled as the *Welfare Ordinance* in 1957, Namatjira, along with about eight other Aboriginal people, was considered to be assimilated enough, and able to take appropriate care of himself, that he was not a government ward. He was thus a citizen with the full rights of any other (white) Australian.³⁰ In making the decision whether to declare a person a ward, the administrator was required to consider whether a person was in need of care by reason of his or her manner of living; inability, without assistance, to manage his or her own affairs; their standard of social habit and behaviour and personal associations.³¹ There was no explanation or definition of these terms in the Ordinance or any associated legislation. The result of the legislation was that in 1957 most Aboriginal people in the Northern Territory were declared to be wards in need of care. A ward's life was largely controlled by government officials who could make decisions about, for example, who wards could marry and where they could live. Pursuant to the *Welfare Ordinance* it was illegal to supply alcohol to wards and similarly illegal for wards to consume alcohol. However, Namatjira as a non-ward, had free access to alcohol. This access to alcohol was double-edged. Inevitably most of Namatjira's associates were Aboriginal wards.³²

By 1958 Namatjira was allegedly drinking heavily. He had moved in from the bush and was living in a camp on the fringe of Alice Springs. There were reports of violent incidents at his camp. Late in 1958, a woman was killed at his camp in the context of heavy drinking.³³ The incident led to a coronial inquest and Namatjira became central to the inquest because he

³⁰ Julie Wells and Michael Christie, 'Namatjira and the Burden of Citizenship', (2000) 114 *Australian Historical Studies*, 110, 112.

³¹ s14(1) *Welfare Ordinance* 1953–1960 (NT).

³² Wells and Christie, above n 30, 119.

³³ Colin Macleod, *Patrol in the Dreamtime*, (1997) 220.

was considered to be the main supplier of alcohol to the camp.³⁴ The situation reinforced the links between Aboriginal people, alcohol and violence.³⁵

As a result of the dramas at his camp the question of Namatjira's non-ward status was debated in the press. The local paper firmly supported Namatjira's non-ward status and argued that the failing of Namatjira was not symptomatic of the failing of the welfare legislation.³⁶ For the newspaper editors, it was a question of whether Namatjira could live by 'ordinary white standards' and this was something they argued he had already proven that he could do. Apparently the proof lay, in part, in his capacity to earn money³⁷ and in the cleanliness of his camp.³⁸

Later, Namatjira was charged with supplying rum to an Aboriginal ward, his cousin Raberaba. Namatjira was originally sentenced by a magistrate to six months imprisonment. The newspaper observed that the painter had been 'seeking oblivion in strong drink from the realities of the civilisation he attempted to enter... the black skin of Albert Namatjira hides the sick heart of a white man. A white man if ever there was'.³⁹ But for the colour of his skin Namatjira was identified as a white man. In contrast, the newspaper also noted that a jail sentence would mean that he would not see the stars that had guided his ancestors.⁴⁰ Namatjira embodied the tension between Aboriginal and non-Aboriginal and between ward and non-ward, between assimilated and unassimilated. In a sense, he embodied the discomfort that was developing in the community in relation to

³⁴ Ibid.

³⁵ 'Action Over Native Artist', *Northern Territory News*, 14 August 1958, p 1.

³⁶ 'The Case for Full Rights' (editorial), *Northern Territory News*, 14 August 1958, 1.

³⁷ Ibid.

³⁸ 'No Gaol Walls for Painter-Hasluck', *Northern Territory News*, 17 October 1958, 7.

³⁹ 'The Truth About Namatjira', *Northern Territory News*, 10 October 1958, 3.

⁴⁰ Ibid.

the operation of the welfare legislation.⁴¹ The categories were causing problems.

Namatjira appealed both conviction and sentence. The appeal was packaged as a constitutional issue.⁴² Drawing attention to the question of what it means to become assimilated, Namatjira's lawyer was reported to describe the *Welfare Act* as a 'grotesque thing contrary to the basis of our civilisation,' suggesting that it made Aboriginal people into prisoners and that Namatjira was a man torn between two worlds.⁴³ Namatjira's counsel argued that the *Welfare Ordinance* and the declaration of Namatjira's cousin as a ward were both invalid, making the supply conviction invalid. His counsel argued that the law was beyond the legislative council's powers and not a law for the peace, order and good government of the Territory.

Kriewaldt J heard the appeal and disagreed on all points raised by Namatjira's counsel.⁴⁴ The judge found it unnecessary to interfere with the conviction on the supply charge. He accepted and supported the 'firm legislative decision' that Aboriginal people should not drink alcohol and that people who supply would be subjected to severe penalties. He quoted statistics about the high number of prosecutions of wards drinking alcohol and noted the 'serious social consequences from Aboriginals consuming alcohol'. He noted a link between alcohol and violent crime among Aboriginal people and found that the prohibition of alcohol to wards assisted with their continuation and advancement. This was the general background against which Kriewaldt J considered Namatjira's particular situation. However, unlike most other Aboriginal people that Kriewaldt J had sentenced, Namatjira was defined by the state to be an assimilated person. Kriewaldt commented:

[b]y the deliberate decision of the highest official of the Territory [Namatjira] has been thought not to stand in need of 'special care and assistance' ... he has reached such a state

⁴¹ Macleod, above n 33, 221.

⁴² Wells and Christie, above n 30, 112.

⁴³ 'All NT Laws in Melting Pot?: Artists Counsel Attacks Welfare', *Northern Territory News*, 16 December 1958, 1.

⁴⁴ *Namatjira v Raabe* (1958) NTJ 608.

of assimilation where he may be treated as an ordinary member of the community.⁴⁵

Kriewaldt found that the seriousness of the charge required a jail sentence and he fixed the sentence at three months imprisonment.⁴⁶

Namatjira lodged a further appeal to the High Court but his application for special leave to appeal was refused. The Chief Justice of the High Court, Sir Owen Dixon, delivered the decision of the Court and noted that Kriewaldt understood the local environment and thus refused to re-consider his decision.⁴⁷ To deal with the growing tension over the decision, a Government minister directed that the sentence should be served not in prison but in the bush. This was alleged by a Member of Parliament to be political interference. The Member of Parliament argued that:

Namatjira, a certified white man, will go scot-free while many ... whites are now serving long gaol terms for the identical offence ... Namatjira is a lawful white man, a citizen entitled to ... drink [and] ... go to gaol like any other citizen if he breaks the law ... we can never have assimilation if distinctions of this kind are allowed to aggravate the issue...⁴⁸

This commentator found that the law had inappropriately distinguished Namatjira from other white people, the group to which Namatjira was now supposed to belong. Again, this was an indication that the logic of assimilation was failing. The identity categories prescribed by white law were collapsing. Similarly, the contradictions inherent in ideas of formal legal equality, arguably the bedrock of the assimilation policy, were being exposed.⁴⁹

⁴⁵ Ibid., 629.

⁴⁶ Ibid., 632.

⁴⁷ Ibid, 667.

⁴⁸ 'Namatjira Move by Hasluck Lambasted', *Northern Territory News*, 17 March 1959, 1.

⁴⁹ I suggest that the stresses of the case were felt by both, Namatjira and Kriewaldt J died within six-months of each other in 1959 and 1960 respectively.

B. From Assimilation to Collaboration

Around the time of Namatjira's case, the *Northern Territory News* began to discuss the alcohol issue in a new way. The idea of removing prohibition and normalising drinking practice among Aboriginal people started to be discussed. Newspaper commentators suggested that Aboriginal people should be allowed to drink, but that they should be educated about how to drink⁵⁰ and that drinking should be limited to particular times and spaces. Community canteens were debated in the press.⁵¹ These debates occurred along with discussions about citizenship.⁵² By the end of the 1950s there was a shift in public opinion towards a relaxation of the prohibitions on Aboriginal people drinking. The changes in attitude were, in part, spearheaded by widespread public awareness of the case involving Albert Namatjira and the cracks in the policy of assimilation that the case exposed.⁵³ That case raised intense public interest and sympathy and Kriewaldt J's judgment was fiercely debated in the local press at the time. Increasing pressures to conform to international human rights standards and concerns about racial discrimination during the late 1950s also encouraged a retreat from prohibition of alcohol focused on Aboriginal people.⁵⁴ By the 1960s the idea of prohibition of Aboriginal drinking as a protective mechanism had become conceptually problematic.⁵⁵ By 1963 Aboriginal people in the Northern Territory had the legal right to drink.⁵⁶ Other

⁵⁰ 'Let Natives Drink-Evans', *Northern Territory News*, 17 February 1959, 1.

⁵¹ Ibid.

⁵² 'Alcohol and the Natives', *Northern Territory News*, 20 February 1959, 1. See Mariana Valverde, *Diseases of the Will: Alcohol and the Dilemmas of Freedom*, (1998), 147 who has noted the links between the recognition of citizenship and repeals of prohibition laws in a number of jurisdictions including Canada and the United States (162).

⁵³ Wells and Christie, above n 30, 111.

⁵⁴ See generally Jennifer Clarke, "'Something to Hide": Aborigines and the Department of External Affairs, January 1961-January 1962' (1997) 83 *Journal of the Royal Australian Historical Society* 71.

⁵⁵ Sherry Sagggers and Dennis Gray, 'Supplying and Promoting "Grog": The Political Economy of Alcohol in Aboriginal Australia', (1997) 32 *Australian Journal of Social Issues* 215, 225.

⁵⁶ John Chesterman, *Civil Rights: How Indigenous Australians Won Formal Equality* (2005), 109.

matters, such as the campaign for equal wages for Aboriginal people, the gradually increasing pressure to recognise customary land holdings during the 1960s and 1970s, and the 1967 referendum⁵⁷ also supported the groundswell for the shift in approach. However, the shift did not result in all Aboriginal people being able to drink wherever or whenever they wished. The question changed from whether Aboriginal people should drink to how and under what conditions Aboriginal people's alcohol consumption could be managed? There was, throughout this middle period, a gradual development of detailed regulations around how, where and when Aboriginal people could drink.

Kriewaldt's descriptions of alcohol suppliers as 'evil'⁵⁸ were steadily replaced from the mid-1960s on with words like 'addiction' and 'abuse'. A view began developing that Aboriginal people needed to manage and make decisions about their own lives and that they would need education and assistance in order to do this. There was a shift towards government sponsored self-help strategies that involved education programs and counselling. These were designed, in collaboration with Aboriginal people, to assist in the development of appropriate drinking habits.⁵⁹ Such strategies were designed to encourage self-governance and to promote self-determination.⁶⁰ These changes were supported by a range of professional interventions from, for example, social workers and health-professionals, but most importantly by Aboriginal people themselves. Regulations about drinking were regularly evaluated

⁵⁷ Alan Powell, *Far Country: A Short History of the Northern Territory* (1996), 205. In July 1963 a Bark Petition against mining on the Gove Peninsula is drawn up by the senior men of the affected clans and presented to the Governor General. Charles Perkins *Freedom Ride* also set out in 1966.

⁵⁸ *Lewis v Metcalfe* [1959] NTSC (Unreported, Kriewaldt J, 5 May 1959), 3.

⁵⁹ Peter d'Abbs and Samantha Togni, 'Liquor Licensing and Community Action in Regional and Remote Australia: A Review of Recent Initiatives', (2001) 25 *Aboriginal and Islander Health Worker Journal*, 18, 24.

⁶⁰ Dennis Gray et al, 'Beating the Grog: An Evaluation of the Tennant Creek Liquor Licensing Restrictions', (2000) 24 *Australia and New Zealand Journal of Public Health* 38, 40.

and re-evaluated by a range of 'experts' including Aboriginal groups throughout the period.⁶¹

Judges continued to be concerned with how to deal with controlling Aboriginal drinking, however their approaches rarely reflected the 'top-down' approach of the assimilation period. The judiciary began to seek the input of Aboriginal elders and Aboriginal communities in deciding the appropriate response to drinking related issues and they tended to support the demands for controls on drinking initiated by Aboriginal people.⁶² There was a proliferation of regulation that occurred with the strong involvement and support of Aboriginal people. The regulation of alcohol became much more diffuse and the rules about its consumption and supply became highly detailed. Such increased detail corresponded with Aboriginal people's involvement in the regulation of drinking practice. This was consistent with approaches that sought to respond to the needs and demands of specific community interests. The law in this regard reflected a community-focused and 'bottom-up' approach. Regulations were justified on the grounds of public health and community amenity, rather than as special protective measures on the way to assimilation.⁶³

Despite the change in approach, the earlier connections between drinking, crime and social devastation also continued. It was no longer a crime for Aboriginal people to drink; the act of drinking was only 'criminal' when it was carried out in a certain place. In many of the places where Aboriginal people lived, it remained an offence to consume or possess alcohol. As this intervening period progressed the space for Aboriginal drinking became increasingly contracted. For example, the 'two kilometre' law, introduced in the Northern Territory in 1982, prohibited drinking

⁶¹ D'abbs and Togni, above n 59, 18.

⁶² See for example *Atkinson v Walkley* (1984) 27 NTR 34 at 35; *Joshua v Thomson* NTSC 27 May 1994 Kearney J.

⁶³ Peter d'Abbs, 'Restricted Areas and Aboriginal Drinking' in Julie Vernon (ed), *Alcohol and Crime*, Proceedings of Australian Institute of Criminology conference held 4-6 April 1989, p 1, <http://www.aic.gov.au/publications/proceedings/01/Dabbs.pdf> at 20 April 2006.

in a public space within two kilometres of licensed premises.⁶⁴ This legislation was designed to ensure that public drinking took place inside more formal lounge bars and restaurants.⁶⁵ However, at least partly because of their regular exclusion from such premises, many Aboriginal people tended to drink in outdoor public spaces and thus their drinking was regularly targeted by the legal system. This continued to lead to the criminalisation of Aboriginal people through their alcohol consumption because they drank in the 'wrong place'.⁶⁶ This particular provision was regularly found to be discriminatory but was not repealed.⁶⁷

The reach of the state's power into Aboriginal people's lives by white authorities including police, health professionals, social scientists, anthropologists and the judiciary continued to be pervasive during this time. Thus although Aboriginal people gained some autonomy over their everyday lives with respect to drinking it was autonomy that was complexly held in balance with the authority of various decision-makers including policy makers, publicans and police.

The two examples of regulatory regimes developed during the collaboration period that are discussed below show how the 'problem' of Aboriginal people and alcohol was dealt with differently during this period. No longer was control of Aboriginal drinking focused on exercising direct physical control on individual Aboriginal drinkers through prohibition. Rather, the period saw the development of a diffuse, detailed disciplinary regime focussed on the collaborative regulation of the 'space' of Aboriginal people's drinking. This was justified on the basis of promoting healthy drinking practices⁶⁸ and in responding the requirements of Aboriginal people. Aboriginal people became active participants in the design and implementation of the regulatory regimes of the period.

⁶⁴ See Part VIA *Summary Offences Act 1982* (No. 22 of 1982)(NT).

⁶⁵ Peter Khoury, 'Aborigines and the Politics of Alcohol' in Richard Kennedy (ed), *Australian Welfare: Historical Sociology*, (1989) 232.

⁶⁶ Chris Cuneen and D. McDonald, *Keeping Aboriginal and Torres Strait Islander People out of Custody*, (1996) 109.

⁶⁷ Race Discrimination Commissioner, above n 14, 58–61.

⁶⁸ Valverde, above n 52, 147.

The examples discussed below are the Tennant Creek restrictions introduced in the 1990s which led the way for a number of copy-regimes throughout Australia and the legislation allowing 'dry' or 'restricted' areas. Both of these responses were developed with the direct assistance and involvement of Aboriginal people. Both examples demonstrate the shift to a more collaborative approach to regulatory regimes. Both examples also show the high level of detail embedded in the regimes developed during this period.

1. *Collaboration — the Tennant Creek example*

The alcohol restrictions that were introduced in Tennant Creek in the 1990s provide a good example of the change in approach to drinking regulations that developed after the assimilation period's prohibition-focussed approach to Aboriginal drinking.⁶⁹

Tennant Creek is a small town near the centre of Australia. In the 1990s an experiment was conducted in the town with respect to alcohol regulation, the changes imposed during this 'experiment' continue in a similar form. During the 1980s Aboriginal people in Tennant Creek began agitating for a 'grog-free' day so that alcohol-related harm and social dysfunction could be reduced.⁷⁰ Both white and Aboriginal people appear to have accepted that alcohol consumption by Aboriginal people living around the town was contributing to high levels of violence, police arrest, social poverty and hospitalisation. Wright suggests that, for Tennant Creek Aboriginal people, the issues of violence and health problems were paramount, while for the white people of the town the central concern was the visibility of the violence.⁷¹ The agitation led to the introduction of various restrictions on the sale and purchase of alcohol, health programs, changes in policing practice and a system of groups of Aboriginal people patrolling communities at night called 'night patrols'.⁷² The following discussion explores the detail of the regulatory regime.

⁶⁹ Similar approaches were subsequently taken in a number of towns in the Northern Territory, Western Australia and South Australia.

⁷⁰ Alexis Wright, *Grog War*, (1997), 51.

⁷¹ *Ibid*, 109.

⁷² Marcia Langton, 'Aborigines and Policing: Aboriginal Solutions from Northern Territory Communities', Wentworth Lecture no. 2, 1992, 5.

In 1993 the Northern Territory Liquor Commission (the Commission) undertook a detailed consultation process to find out what should be done. The Commission commenced discussions with a symposium.⁷³ This led to the Commission directing the closure of all liquor outlets in Tennant Creek on a social welfare pay day in March 1994. Subsequently, a steering committee was established, which included liquor licensees and members of Julalikari Council, the representative body for many local Aboriginal communities. Proposals were generated and community debate took place. The Commission heard submissions from the Julalikari Council who submitted that their members would be prepared to abide by various detailed alcohol restrictions during a specific period.⁷⁴ The Commission then issued a notice proposing a number of variations to local alcohol licenses for a trial period of three months. The focus was on take-away purchases of liquor and front-bar drinking. The restrictions included that members of the Julalikari Council were prohibited from take-away purchases of wine in casks of four litres or more; spirits, and limited to the purchase of six cans of beer per person per day. Further, licensees would not be allowed to make third party sales to taxi drivers, trading hours were curtailed, take-away sales were prohibited on Thursdays, and certain bars were limited to selling certain types of alcohol. Specifically, public bars were prohibited from selling wine to any person. These measures were a prescription designed to arrest the chaotic and destructive effects of the drinking behaviours of Aboriginal people in and around the town. The spaces which were being regulated and the type of alcohol targeted were those associated directly with Aboriginal drinking. Under these new regulations, Aboriginal people were not able to purchase certain alcohol and take it away to the bush or their communities to drink. If they wanted to drink, drinking would be largely restricted to the more formal environments of lounge bars and restaurants where dress

⁷³ Peter d'Abbs, 'Out of Sight, Out of Mind? Licensed clubs in Remote Communities', (1998) 22 *Australia and New Zealand Journal of Public Health*, 679, 680.

⁷⁴ *Tennant Creek Trading & Ors v The Liquor Commission of the Northern Territory* Supreme [1994] NTSC (Unreported, Master Coulehan, 15 September 1994) 4.

codes were enforced and where food was required to be purchased along with alcohol.

Licensees were unsatisfied with the proposals and many requested and were granted a further hearing. Subsequently, a directions hearing was arranged. The Julalikari Council, concerned to ensure that the new regulations applied to all Aboriginal people — not just members of the council — sought to be represented at the hearing as a party to the proceedings. The Commission allowed this. Thus, not only were Aboriginal people supportive of the restrictions, they became a key party essentially collaborating with the Liquor Commission supporting a proposal to limit their own access to alcohol.⁷⁵ A space was provided for Aboriginal people within the legal system. However, as Rush points out, this has a price. In order to be heard by the legal system — to enter this legal space — Aboriginal people must ‘pledge themselves as subjects of law, to experience themselves as legal subjects’.⁷⁶ The recognition and incorporation of Julalikari Council as parties within the legal process provided a means of making Aboriginal people subjects of white law. Through this process of legal recognition, Aboriginal people bound themselves to the judicial decision. After hearing from the licensees at the further hearing, Justice Thomas accepted that there were problems stemming from alcohol abuse in Tennant Creek and that the community were not united in the approach that should be taken to address the problem. She noted that the Commission would have to ‘tread through a mire of conflicting opinions and interests’.⁷⁷ She returned the decision to the Commission and, after a final hearing which eventually took place in June 1995, the trial of restrictions went ahead.⁷⁸ The chairman of the Commission noted that licensing measures ‘will only be one in a web of measures needed to address and control

⁷⁵ Ibid.

⁷⁶ Peter Rush, ‘An Altered Jurisdiction: Corporal Traces of Law’, (1997) 6 *Griffith Law Review*, 144, 154.

⁷⁷ *Tennant Creek Trading Pty Ltd & Ors v The Liquor Commission of the Northern Territory of Australia and Julalikari Council Aboriginal Corporation* [1995] NTSC (Unreported, Thomas J, 7 April 1995), at [79].

⁷⁸ Wright, above n 70, 168.

the problem'.⁷⁹ He also referred to other organisations such as policing, night-patrol, education and alcohol rehabilitation measures and the importance of employment.

The restrictions included a total ban on the sale of four and five litre casks of white wine, wine in glass bottles, alcohol to third party taxi drivers and wine in front bars without a substantial meal. Sales hours were generally restricted and front bar and take-away sales were prohibited on Thursdays.

A sociologist who undertook subsequent reviews of the restrictions recommended the extension of the trial. In due course, at the end of the trial period the report — which surveyed individual responses and examined hospital admissions, police arrests and violent offences as well as the economic impact on licensees — was positive, although the gains associated with the increased regulation appeared to be marginal.⁸⁰ Further, it was noted positively that due to the new regulations there was a change in drinking practice manifested in an increase in lounge-bar patronage, 'where dress and behaviour standards are higher and food is served'.⁸¹ The comment is reminiscent of the assimilation policy that sought to change behaviours of Aboriginal people so that they reflected a more civilised or white standard. As a consequence of the apparent success of the restrictions, the Commission introduced longer-term restrictions that were more specific and strengthened. The Commission later reviewed those restrictions.⁸² Members of the local Aboriginal community arranged for a detailed and independent evaluation of the effect of the restrictions. The final report of the evaluation noted that if the restrictions were coupled with good policing, they would remain effective in reducing criminal behaviour.⁸³ The Commission decided to maintain restrictions without

⁷⁹ Ibid, 195.

⁸⁰ Sherry Siggers and Dennis Gray et al, *Evaluation of the Tennant Creek Liquor Licensing Restrictions*, National Centre for Research into the Prevention of Drug Abuse, (1998); and d'Abbs and Togni, above n 59, 21.

⁸¹ Siggers and Gray, above n 7, 165.

⁸² Northern Territory Liquor Commission, *Review of Tennant Creek Liquor Restrictions*, Northern Territory Government, Darwin, 1998.

⁸³ Siggers and Gray, above n 7, 7.

extension⁸⁴ and these restrictions largely continued in place until very recently. The small positive improvements noted in successive reports were found to outweigh any cost to Aboriginal people in terms of rights and freedoms.⁸⁵ Members of Night Patrol were regularly the authority that drunk or offending Aboriginal people initially confronted, and Night Patrol members commonly reported offending to police.⁸⁶ It was Aboriginal people who spurred on the demand for the restrictions in Tennant Creek and became involved in regulating their own drinking behaviours. The example shows the collaboration of government and Aboriginal people in developing a regulatory regime suited to the needs and circumstances of a particular community.⁸⁷ Other versions of collaborative regulation of alcohol that developed during this period in the Northern Territory included the 'restricted areas' legislation which is examined below.

2. *Collaboration and Dry Communities*

Spaces that were originally administratively set aside to protect Aboriginal people when they were considered to be a dying race were reconceived in the 1950s as transient places for Aboriginal people on their way to assimilation.⁸⁸ During this middle period these same spaces became designated as Aboriginal communities. This approach aimed to recognise the cultural distinctiveness of Aboriginal people and the areas were primarily regulated by Aboriginal people.⁸⁹ The 'restricted areas' legislation within the *Liquor Act* was introduced in 1978. Part VIII of the *Liquor Act* (NT) allowed Aboriginal people to apply for their community to be listed as a 'restricted' community. After considering an application, the Liquor Commission was

⁸⁴ Northern Territory Liquor Commission, above n 82, 7.

⁸⁵ Race Discrimination Commissioner, above n 14, 68.

⁸⁶ Marcia Langton, 'Too Much Sorry Business', (1992) March *Aboriginal and Islander Health Worker*, 10, 15.

⁸⁷ I note again, the important considerations related to individual as opposed to collective rights Race Discrimination Commissioner, above n 14, 25.

⁸⁸ Jeremy Beckett, 'Aboriginality Citizenship and Nation State', (1988) 24 *Social Analysis*, 3, 12.

⁸⁹ Sherry Sagers, 'Dry Damp and Wet Revisited: Alcohol Control Policies in Indigenous Australia and Canada', (2001) 19 *Australia-Canadian Studies*, 83, 86.

able to declare that a specified area of land was a restricted area. Once an area was declared restricted, it became an offence to consume, control, possess or bring alcohol into the restricted area. Vehicles like cars and boats and the alcohol involved in these offences would also be forfeited to the Northern Territory Government where such offences occurred. D'Abbs has referred to this kind of liquor regulation, which combines both community and statutory control, as a 'complementary control model'.⁹⁰ It is a legislative regime which, like the Tennant Creek restrictions, makes the link between government management and Aboriginal self-management. Various offers of Aboriginal leaders in the some communities (where 'restricted areas' were in place) to cooperate with governments to identify traffickers of alcohol illustrate the link between government and self-management.⁹¹ However the balance between government and Aboriginal control was unstable. For example d'Abbs has noted problems with the relationship between statutory authorities, especially the police, and Aboriginal community councils.⁹² In dry communities policing of offences was largely carried out by the state police force, rather than members of the Aboriginal community.

Appeal Court judges appeared supportive of the legislation and reluctant to reduce sentences for restricted area offences. Some judges suggested that the restriction assisted in stopping the cycle of alcohol and violence.⁹³ An important reason for judicial support of the strong sentencing regime was that Aboriginal people were, through the *Liquor Act*, requesting protection from the state. One judge, in refusing to reduce a sentence of imprisonment for an offence of bringing liquor into a restricted area, noted that:

⁹⁰ Peter d'Abbs, *Alcohol-Related Problems in Katherine: A Report Prepared for Morgan Buckley*, 1999, p 6, <http://espace.lis.curtin.edu.au/archive/00000355/01/Katherine.pdf> at 20 April 2007, 8.

⁹¹ Penelope DeBelle, 'Black Leaders to target Traffickers', *The Age*, 21 April 2004, p 3, Mick Dodson, 'Violence Dysfunction Aboriginality' presentation to the National Press Club, Canberra, 2003, 2, <http://law.anu.edu.au/anuia/dodson.pdf> at 25 January 2005, 3.

⁹² D'Abbs, 1989, above n 63, 11.

⁹³ *Marrungun v Peach* [1997] NTSC (Unreported, Bailey J, 11 April 1997) 2.

It is likely that the application to have the area so declared [as a restricted area] was made by, or at the instigation of that community ... One object of the criminal justice system is to protect the community, and that assumes even greater importance when it is the community itself which has sought the specific form of protection provided for under the *Liquor Act*.⁹⁴

The examples of Tenant Creek and dry communities discussed here show that the way in which many Aboriginal people became key collaborators in the development of the web of mechanisms that regulated their own drinking. Many Aboriginal people were supportive of such regulations. The prevailing view during this period was that in order to deal with the social devastation wrought by alcohol Aboriginal people needed to have the right to control their lives.⁹⁵ The examples discussed also demonstrate that although Aboriginal people gained the right to drink during this middle period, the right continued to be subjected to significant regulation and surveillance. Intricately detailed regulations flourished with support of a developing body of knowledge around Aboriginal drinking. Numerous reports tracking the effects of these new regulatory regimes were generated by health professionals, sociologists, police and Aboriginal people themselves during this middle period.⁹⁶ The rhetoric associated with drinking regulation was no longer that it was a technique to assist Aboriginal people to become assimilated. Rather these approaches recognised alcohol abuse as creating social devastation and disease and therefore a need to assist Aboriginal people to manage their everyday lives in order to restore health to Aboriginal communities. Despite the demise of prohibition and the development of self-management strategies, the link between Aboriginal people, alcohol abuse and social devastation continued.⁹⁷ Increasing recognition of the

⁹⁴ *Nelson v Jeffrey* [1996] NTSC (Unreported, Martin CJ, 22 April 1997) 3.

⁹⁵ Race Discrimination Commissioner, above n 18, 26.

⁹⁶ Saggars and Gray, above n. 7, 39–44; D'abbs, above n 90; NT Liquor Commission, above n 82; Noel Pearson, 'Alcohol bans Save Aborigines' Seminar at Griffith University, 2004, 5. <http://news.ninemsn.com.au> at 6 September 2004.

⁹⁷ Nanette Rogers, 'Crown Prosecutor Speaks out about Abuse in Central Australia', ABC *Lateline*, 15 May 2006, transcript available at:

failure of these strategies to respond to the extraordinary social devastation experienced by Aboriginal communities ultimately lead to the implementation of radical changes in 2007.

C. From Collaboration to Neo-assimilation:

The radical changes of 2007 were precipitated by constant exposure, by a range of studies and individuals, of shocking statistics and events related to Aboriginal communities. Despite the shift away from prohibition, the connection identified during the prohibition period, between Aboriginality, alcohol and criminal offending has endured.⁹⁸ Early research emphasised that the removal of prohibition brought with it a high increase in drinking and in alcohol-related convictions.⁹⁹ More recent research in Australia shows that this increase in drinking has not abated in any significant way and the relationship between Aboriginality, alcohol and crime continues to impact on many Aboriginal people, both directly and indirectly.¹⁰⁰ Indeed far from becoming better managed, since collaborative management regimes have been introduced, in many communities alcohol has become further entrenched in daily life. McKnight has found that for a number of Aboriginal communities alcohol is a substantial part of life, underscoring how community life is experienced.¹⁰¹ Related to this, Dodson suggests that '... alcohol-related violence and dysfunction dominate the rhythms of life for everyone' in Aboriginal communities.¹⁰² The Indigenous activist lawyer Noel Pearson emphasises the entrenched nature of alcohol in Aboriginal communities. He suggests that the use of alcohol has itself become symbolic of what it means to be an Aboriginal person in some communities. He notes

<http://www.abc.net.au/lateline/content/2006/s1639127.htm> at 12 April 2007. See also Nowra, above n6.

⁹⁸ Maggie Brady, 'Indigenous and Government Attempts to Control Alcohol Use Among Australian Aborigines', (1990) 17 *Contemporary Drug Problems*, 195, 202.

⁹⁹ Lee Sackett, 'Resisting Arrests: Drinking, Development and Discipline in a Desert Context', (1988) 24 *Social Analysis*, 66, 68.

¹⁰⁰ David McKnight, *From Hunting to Drinking: The Devastating Effects of Alcohol on an Australian Aboriginal Community*, (2002) 212.

¹⁰¹ McKnight *ibid.*, 93–114.

¹⁰² Dodson, above n 91.

... your fellow drinkers will challenge your Aboriginal identity in order to establish your obligation to contribute money to buy grog: "Come on, don't be flash! We not white fellas! You-me black people".¹⁰³

Pearson further explains:

... social and cultural relationships between the drinkers are expressed, reinforced and reiterated whilst people are engaged in drinking ... These social and cultural obligations are invoked at every turn by members of the drinking circle.¹⁰⁴

In recent years, Pearson has been waging a campaign on behalf of his Cape York community against the ravages of alcohol and what he sees as the problem of welfare dependency. He has been a pivotal figure in shifting the debate. For example in 2004, Pearson noted that:

... substance abuse is the main cause of Aboriginal society's problems today ... It is the last nail in the cultural coffin ... unless we get on top of addiction and get organised, we won't be able to save ourselves.¹⁰⁵

Pearson argues that drinking for Aboriginal people is an epidemic and an addiction; it is a significant contributing cause of the current malaise.¹⁰⁶ He makes the connection between Aboriginal people's drinking and [cultural] death, reflecting Kriewaldt J's earlier concerns. His commentary has consistently emphasised the urgency of the plight of Aboriginal people.

Pearson has been involved in moving the focus towards ever-greater regulation of Aboriginal people's drinking on Aboriginal communities. He has called for a model of regulation focused on abstinence and/or strict regulation and control. Pearson suggests that Aboriginal alcoholics must 'rehabilitate and abstain'.¹⁰⁷

¹⁰³ Noel Pearson, *Our Right to Take Responsibility*, (2000) 17.

¹⁰⁴ Pearson, *ibid.*, 16–17.

¹⁰⁵ Pearson above n 96.

¹⁰⁶ Noel Pearson, 'The Light on the Hill', Ben Chifley Memorial Lecture, Panthers Leagues Club, Bathurst, 2000, <http://www.balkanu.com.au/people/noelpearson/lightonhill-12-8-00.htm> at 25 January 2005, 14; Noel Pearson, 'An Abyss Beyond the Bottle' *The Australian*, 14 July 2007, 8 .

¹⁰⁷ Queensland Government, *Cape York Justice Study Report*, (2003) 67.

Comprehensive legal restrictions on liquor consumption and possession were introduced in 2004 in a number of Aboriginal communities in the state of Queensland.¹⁰⁸ The restrictions largely mirror those in place in the Northern Territory during the collaboration period; there are similar high levels of specificity and detail relating to allowable quantities of alcohol and allowable spaces of drinking put in place by the bans. For instance, at one Queensland community possession of alcohol is limited to 24 cans (one carton/nine litres) of light or mid-strength beer and two litres of wine (no fortified wine is allowed).¹⁰⁹ Both dry places (no alcohol to be consumed) and restricted areas are identified. Other Queensland communities have different, although equally specific, restrictions in place. Under this model, the legal limits are usually negotiated by Community Justice Groups who represent the communities involved and are established under the legislation so collaboration between legislators and Aboriginal people remains important in most communities. However Queensland Police and Liquor Licensing investigators enforce the legislation. Similar to the Northern Territory experience, the anecdotal evidence suggests that some positive effects have resulted from stringent application of these regulations. Alcohol-related admissions to hospital and alcohol-related offences are said to have reduced and children's attendance at school has increased.¹¹⁰ Simultaneously, the numbers of Aboriginal people coming before the courts in breach of alcohol restrictions are reported to be rising.¹¹¹ The response to this has been a call for greater regulation and enforcement.¹¹² There is some anxiety that not all community leaders agree to the changes and that many Aboriginal people who did not previously

¹⁰⁸ Ibid, 3.

¹⁰⁹ See ss114–140 Community Services (Aborigines) Act 1984 (Qld).

¹¹⁰ *ABC online*, 'Alcohol Restrictions Transform Aboriginal Community' 5 April 2004 <http://www.abc.net.au/news/newsitems/200404/s1080963.htm> at 30 March 2007.

¹¹¹ Petria Wallace, 'Cape York Alcohol Ban Failing', *The World Today*, 26 August 2004, p 3. <http://www.abc.nat.au/worldtoday/content/2004/s1185696.htm> at 3 September 2004.

¹¹² Amanda Banks, 'Remote Town Police to Control Grog Flow', *The Australian*, 3 May 2005, p 3.

have a criminal record are now receiving one as a result of liquor restriction offences.¹¹³ A particular concern is that the end result for repeat offenders with respect to these alcohol offences would be a period of imprisonment.¹¹⁴ Despite these concerns, the positive results on other measures are argued to justify increasingly stringent controls.¹¹⁵

Nanette Rogers and Louis Nowra have also been outspoken about the desperate situation of Aboriginal people in recent times. Louis Nowra, a playwright, felt compelled to voice his concerns about the state of Aboriginal communities. In discussing the extraordinary violence of Aboriginal communities he noted that '[o]f the many problems in these communities, a main one is undoubtedly alcohol'.¹¹⁶ In a highly publicised interview on ABC's *Lateline* in 2006 Northern Territory Public Prosecutor, Nanette Rogers discussed alarming examples of child sexual abuse in Aboriginal communities. When asked why she thought this was happening, she referred to the impact of 'grog' and noted that the:

... malaise is mostly because of the entrenchment of violence in the whole of the community. But there is also a second aspect and that is that Aboriginal people here are overwhelmed time and time again by a fresh new tragedy.¹¹⁷

Three months after this interview the Northern Territory Government commissioned an inquiry into the extent, nature and factors contributing to sexual abuse of Aboriginal children.¹¹⁸ The resulting report, *Little Children are Sacred*, was presented to the Northern Territory government in April 2007 after extensive enquiries.¹¹⁹ It was not publicly released until 15 June 2007.¹²⁰

¹¹³ Wallace above n 111.

¹¹⁴ Ian Townsend, 'Aboriginal Community Takes Qld Govt to Court Over Alcohol Laws' *Message Stick*, ABC World Today, 19 March 2004.

¹¹⁵ Mal Brough, Second Reading Speech, *Northern Territory National Emergency Response Bill 2007*, Hansard, 7 August, 2007, 9.

¹¹⁶ Nowra above n 6, 85.

¹¹⁷ Rogers above n 97.

¹¹⁸ Anderson and Wilde above n 1 at 4.

¹¹⁹ *Ibid* at 1.

The report found that the conquering of alcoholism was a priority.¹²¹ Chapter 18 was dedicated to a discussion of alcohol regulation in Aboriginal communities. Like Pearson and Dodson, the report of the inquiry recognised that 'extreme alcohol abuse has become normal' and that this abuse contributes significantly to the social devastation of Aboriginal communities.¹²² The report of the inquiry made a number of recommendations including reducing the flow of alcohol, developing best practice community drinking clubs, increased powers of review of liquor licenses, community education and counselling and stronger enforcement of existing laws.¹²³ The report found that it was critical that there was genuine Aboriginal involvement in the development of responses.¹²⁴ Although the report emphasised the crisis in Aboriginal communities the recommendations reflected the aspirations of the 'collaboration' period. The constant challenges raised by Pearson, recent dramatic reports by people like Nowra and Rogers and the watershed *Children are Sacred Report* created a tipping point and brought home the crisis of Aboriginal health, particularly focussed on child sexual abuse, and the role of alcohol in the devastation of Aboriginal communities. The Federal Government reacted swiftly in June 2007 with an 'emergency response'.

1. *Neo-Assimilation and The National Emergency Response*

The *Northern Territory National Emergency Response Act 2007* (Cth) (NT Act), introduced by the Federal Government in 2007, seeks to break with the approaches to alcohol regulation attempted in the recent past. In his first reading speech Minister Mal Brough explained:

¹²⁰ See the Northern Territory Government Website, <http://www.nt.gov.au/dcm/inquirysaac/> (4 October 2007)

¹²¹ Anderson and Wilde above n 1 at 18.

¹²² Ibid at 161 and generally chapter 18, Pearson above n 103, 16–17; and Dodson above n 91.

¹²³ Anderson and Wilde, *ibid.*, at 167, 170, 171, 172.

¹²⁴ *Ibid.*, at 21, 28, 29, during the enquiry words such as 'dialogue', 'culture', 'ownership' and 'empowerment' emerged during consultations, *ibid.*, 15.

When confronted with a failed society where basic standards of law and order and behaviour have broken down and where women and children are unsafe, how should we respond? Do we respond with more of what we have done in the past? Or do we radically change direction with an intervention strategy matched to the magnitude of the problem?¹²⁵

Thus the NT Act seeks to introduce radical changes that dismantle many of the initiatives of the collaboration period. The drinking of alcohol will be banned in most communities and outstations and in many town camps in larger towns. For some communities this will mean a significant winding back of the availability of alcohol. The offences that existed under the previous *Liquor Act* (NT) for possessing, controlling and consuming alcohol in prescribed areas are expanded and result in higher penalties.¹²⁶ Other changes to drinking laws include a reduction in the amount of liquor allowed to be purchased at any single time and there are increased penalties applicable to those who sell alcohol in excess of these limits. Purchasers must present identification and there are greater requirements on sellers to keep records. In discussing the question of the right to drink, Brough commented in Parliament that, '[w]hen it comes to a choice between a person's right to drink and a child's right to be safe, there is no question in my mind which path we must take.'¹²⁷ This new legislation purports to be focussed on the safety of children.

Other significant changes in approach that will impact on the regulation of alcohol have been discussed in recent press.¹²⁸ Changes include a response to concerns raised by Pearson in relation to welfare dependency and to the concern that too much

¹²⁵ Brough, above n 115., 10.

¹²⁶ Northern Territory National Emergency Response Act 2007 (Cth) ss 11,12,20,21.

¹²⁷ Brough, above n 115, 13; this point was also reflected in *The Children are Sacred Report*, Anderson and Wilde, above n 1, 161 .

¹²⁸ See for example the thorough overview provided by David Marr, 'Entering Dangerous Territory' *Sydney Morning Herald*, 11–12 August 2007, 33; Jon Altman and John Taylor, 'A Drift Towards Disaster: Indigenous Policy-making on the run could have Major Unintended Consequences, *The Australian*, 11 July 2007, 8.

welfare money is spent on alcohol instead of the care of children.¹²⁹ Pursuant to the new regime, half of welfare money will be managed by the government for a trial twelve month period. The managed part of welfare funding will not be able to be spent on alcohol.¹³⁰ More police have been placed in communities so that laws can be effectively enforced, soldiers also have a role in 'logistical support' in a number of communities under the regime and in bail and sentencing matters customary law must not be taken into consideration.¹³¹ The Government is acquiring leases over Aboriginal townships for a five year period, will resume some leases of town camps and is also changing the permit system to increase access to Aboriginal land.¹³² The purpose of these changes is to allow the government greater access to communities to 'improve conditions' and allow 'normal scrutiny' of what is going on in communities.¹³³

Drawing on the language of equality, Brough explained that there was a 'need to act urgently to ensure that Aboriginal people, the children in particular, receive the *same* protection from the law that other Australians get.'¹³⁴ At the same time, and similar to earlier periods of regulation discussed above, the direct racial discrimination involved in this regime is justified as a special measure.¹³⁵ This regime is conceived as a direct and practical response,¹³⁶ to the devastation of Aboriginal

¹²⁹ Brough above n 115, 2.

¹³⁰ Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007(cmth)

¹³¹ Brough above n 115, 10; Australian Government, *Northern Territory Emergency Response Facts Sheets*, 8 & 9, 24 August 2007. In relation to the 'abolition' of customary law considerations see s 91 *Northern Territory National Emergency Response Act 2007* (Cth).

¹³² Northern Territory National Emergency Response Act 2007 (Cth) part 4.

¹³³ Australian Government, *Northern Territory Emergency Response Facts Sheets*, 17 & 18, 24 August 2007. Traditional owners will still own the land, Brough n115, 14.

¹³⁴ Mal Brough, *Message from the Minister for Aboriginal Affairs*, 18 August 2007, <http://www.nt.gov.au/dcm/inquiryasaac/> (3 October 2007) (emphasis added).

¹³⁵ Northern Territory National Emergency Response Act 2007 (Cth) s132.

¹³⁶ Brough, above n 115, 10: 'They are practical and targeted responses to real issues within our community.' The suggestion is that the changes are

communities which has been regularly exposed over many years.

III. CONCLUSION

We are yet to see whether the extreme measures introduced recently in the Northern Territory will have any significant impact on the desperate circumstances currently experienced by many Aboriginal people living in the Northern Territory. The neo-assimilation model discussed above does appear to return to an assimilationist approach. The failure to consult with Aboriginal people and the heavy use of police and soldiers to implement and enforce the new regime demonstrate the top-down nature of the approach. Considerations of self-determination, collaboration or customary law do not feature in the new regime. Apparently the need for an alliance between self-management and government management has disappeared from policy aspirations. Like the assimilation policy, which was concerned with the provision of privileges on the one hand and responsibilities on the other, the current regime is similarly concerned with mutual obligation.¹³⁷ Both versions of assimilation have only limited engagement with the concept of rights. Like the assimilation policy the new response is concerned to 'advance' Aboriginal people¹³⁸ and the stringent rules are justified as a special measure.¹³⁹ Both approaches recognise the links between crime, alcohol and Aboriginal people, and respond to a more pessimistic and desperate view about the future of Aboriginal people than was present in the collaboration era.¹⁴⁰ Both the assimilation and neo-assimilation regimes reflect a concern that alcohol will extinguish Aboriginal people if it is not dealt with urgently. In light of these

practical rather than ideological recalls Howard's embracing of 'practical reconciliation' in 1999, see Manne above n 12.

¹³⁷ Brough, n 115, 9; (strategically?) borrowing from the work of Pearson, above n 103.

¹³⁸ *Ibid.*, 22.

¹³⁹ *Ibid.*,

¹⁴⁰ Robert Manne makes this point, in his article 'Pearson's Gamble: Stanner's Dream' (2007) August *The Monthly* 1, 8.

similarities, it is clear that the approach to alcohol regulation has come full-circle and that this new regime is in effect much the same, in intention, as assimilationist prohibition.

Direct and top-down regulation was ultimately a failure during the assimilation period.¹⁴¹ However the regulatory models put in place during the collaborative period were largely unsuccessful. Now the social devastation of Aboriginal people and communities is extreme and many Aboriginal people are also asking for strong interventions that will break the cycle of alcohol, crime and violence.¹⁴² As the *Little Children are Sacred Report* pointed out, in many communities drinkers hold positions of power, and in the past they would often be the ones consulted in any collaborative development.¹⁴³ The fact that many Aboriginal people have expressed concerns about their own leadership has complicated the problem. As a short term response the emergency action may indeed be necessary¹⁴⁴ but in the longer term it is difficult to see how or why this new assimilationist response will fare any better than the original version. Pearson has noted the risks of seeing idealism as being diametrically opposed to pragmatism.¹⁴⁵ In spite of the need for strong practical action and support by government surely there can still be some space for idealistic aspirations towards self-determination to continue.

¹⁴¹ Sagers, above n 89, 86.

¹⁴² Anderson and Wilde above n 1, 163–165, Pearson above n 103.

¹⁴³ *Ibid.*, 166.

¹⁴⁴ Noel Pearson has supported the focus on 'grog and policing' resulting from the 2007 reforms, Noel Pearson, 'Politics Aside: An End to the Tears is our Priority' *The Australian* 23 June 2007, 12.

¹⁴⁵ Noel Pearson, 'White Guilt, Victimhood and the Quest for a Radical centre' (2007) 16 *Griffith Review* 13, 49.