Aboriginal Peak Organisations Northern Territory

An alliance of the CLC, NLC, CAALAS, NAAJA and AMSANT

Submission to the Northern Territory Government

Response to the Six Month Review of the *Alcohol Mandatory Treatment Act* (NT)

8 August 2014

1 Executive Summary

This submission is provided by:

- The North Australian Aboriginal Justice Agency (NAAJA);
- Aboriginal Peak Organisations Northern Territory (APO NT);
- Central Australian Aboriginal Legal Aid Service;
- Darwin Community Legal Service (DCLS);
- Central Australian Women's Legal Service (CAWLS)

APO NT, together with the above legal services, has serious concerns about the operation of the *Alcohol Mandatory Treatment Act* ('AMT Act') and the related scheme of mandatory treatment.

We welcome this review. Comments in this submission reflect some of the concerns that were raised in the NAAJA, CAALAS, NTLAC, CAWLS and DCLS joint submission, and in a separate submission by APO NT, in February 2014.

We provide a number of specific recommendations to protect the rights of clients interacting with the scheme and to address the grossly disproportionate number of Aboriginal people entering treatment.

2 Comments to Recommendations raised in the Review of the AMT Act

RECOMMENDATION/REVIEWED PROVISION	COMMENT
Criteria for a mandatory treatment order **SECTION 10(b) – misusing alcohol** No recommendation was made to expand or insert a definition to clarify the term misuse or misusing.	• We find real fault in the ambiguity of the terms "misuse" or "misusing". No insertion of a definition leaves interpretation up to the individual or the Tribunal or the Police Officer who takes an individual into custody. Reliance on individual personal interpretation of whether a person is "misusing" alcohol may lead to unfair decisions. • Clarification of the terms "misuse" and "misusing" would ensure that mandatory treatment is targeted at people suffering from severe alcohol dependence, as well as ensure transparency in the decision making process of the Tribunal. • This clarity could easily be achieved by inserting a definition to the terms in section 5 of the AMT Act.
SECTION 10(d) – risk Recommendation 20 is to amend section 10(d) to indicate more critical	• Whilst this recommendation is welcomed it is our suggestion that the language used should more expressly describe the seriousness of the risk to the individual required to satisfy this criteria. It is our

sense of risk caused by a person's alcohol misuse.	proposal that the appropriate wording should include that the risk to the individual be severe impairment or death. • Further, this language would bring the NT into line with other Australian jurisdictions[1] which only allow for involuntary treatment in limited circumstances.
Cultural appropriateness Recommendation 3 from the review was to formulate and insert principles related specifically to the admission, management and care of Aboriginal and Torres Strait Islander people.	We welcome this recommendation in light of the facts that above 90% of the individuals subject to AMT Orders are Aboriginal or Torres Strait Islander people. • We suggest that when formulating principles in the amending legislation, that consideration be had to the crucial nature of an Interpreter being available and present at the assessment of the individual. This is important because the assessment dictates the plan/program put in place for the individual and will be critical to the success of the treatment. • We further highlight that in the absence of legal advice or representation a failure to use an interpreter at a hearing of the Tribunal may also contribute to a denial of natural justice, as was held to be the case in the recent matter of *RP v Alcohol Mandatory Treatment Tribunal*.[2] • Provisions should be included so that assessment clinicians are appropriately culturally trained so that they may understand and communicate with Aboriginal and Torres Strait Islander people, to effectively elicit information, and to formulate culturally appropriate treatment programs.
Notification of decision: sections 37, 43 and 48 – Recommendation made to amend those sections so that all persons eligible to be notified receive a copy of the Order and an Information Notice as defined in Section 5.	• This is a welcome recommendation. However, we believe the recommendation falls short of the necessary change needed to ensure individuals are afforded their rights. • We highlight that under the *Administrative Appeals Tribunal Act* (Cth), a person subject to an administrative decision should be provided with decisions and that notice of a decision should include "…a statement in writing setting out the findings on the material questions of fact, referring to the evidence or other

[1] See, section 9 of the *Drug and Alcohol Treatment Act* 2007 (NSW).
[2] [2013] NTMC 32.

	material on which those findings were based and giving the reasons for the decision …"[3] • It would be beneficial for individuals and the transparency of the program, if a similarly worded provision were inserted into the AMT Act to ensure the reasons are so properly provided. Currently, the provision allowing for the Tribunal's reasons for a mandatory treatment order appears to be limited to simply repeating the criteria in section 10 of the AMT Act. • Reasons for any income management order (and the length of the order) should also be detailed in the assessment report. • Further, we have identified that this is another area of the AMT process which would benefit from a regular ongoing review of the AMT program/process. A review would help to ensure Tribunals are providing eligible persons with those Orders and Information Notices in accordance with section 5 of the AMT Act. It is important to ensure that the reasons are detailed and not simply a check list of the criteria provided at section 10.
Appeal and review provisions: section 51 No recommendation was made to amend the appeals process or framework for the Tribunal.	We consider no action as to the appeal process a serious fault. Our comment reflects our original view in the joint submission of February 2014, that is; • The scheme would be improved by allowing for merits review of a decision of the Tribunal by an external decision-maker, such as the Local Court or an Administrative Decisions Tribunal (should such an administrative body be established). • When conducting a merits review, the relevant decision making body should have an explicit power to obtain and consider all the information and material that was before the Tribunal when the initial decision was made, and to obtain and consider any further information or evidence that may be relevant, including information or evidence that was not before the Tribunal at the time the decision was made. • In addition, if a treatment order is challenged on any basis, the decision making body should have the discretionary power to stay the order pending the review.

[3] See, section 28(1)(a)

Charging a fee: section 70 Recommendation was made to amend section 70 to read: "A treatment provider may charge, a fee as prescribed, a person who participates in treatment provided by the treatment provider under this Act for items used by or for the person. The fee charged by the provider is a debt due and payable to the provider and may be recovered as a debt in a court of competent jurisdiction." The recommendation calls for a fee amount to be set by the Regulations and for the set fee to vary for an individual under certain conditions.	Our comment reiterates our recommendation from the legal joint submission of February 2014; • Section 70 should be repealed. Charging a person a fee for their food and/or medication, amongst other things, whilst the individual is in a detention environment is contrary to human rights principles as well as the therapeutic objects of the Act. • Should the provision remain then a set fee should not be set by regulation, rather the Tribunal, having access to the circumstances of each individual, should have the discretion to set the amount of income management at less than 70%.
Offence provisions: section 72 Recommendation 2 is to remove the offence provision applying to affected persons under mandatory residential treatment orders detained in secure care facilities	• We strongly support this recommendation, and commend the Review. • The Review notes that, should the offence provision be repealed, there will be no consequences attached to absconding from a treatment centre. • As we discussed in our submission, rather than exploring alternative penalties for absconding, we once again submit that positive incentives, to comply with treatment, should be developed. • Should a person abscond even when positive incentives are in place, we agree that this might indicate that the person would no longer benefit from the mandatory treatment order.
Income management provisions: Sections 44, 48, 119(b)	We find the lack of action on the Income Management provisions disappointing. Referring to the legal joint submission on February 2014; • Further consideration should be had to the repeal of section 119(b) of the AMT Act. We do not consider that the Department of Human Services – Centrelink would be able to provide the Tribunal with information regarding the payment status of the partner of the affected individual, given Principle 11 of section 14 of the *Privacy Act* (Cth) restricts a record keeper from disclosing the information unless the individual consents to the closure or there is a serious or imminent threat to the life or health of the individual concerned. We do not consider that the circumstances of the Alcohol Mandatory Treatment system would warrant an imminent threat to the life or health of the individual to satisfy the disclosure of such information. • Further, we do not believe it is appropriate for the

	purposes of the Tribunal, to tie income management orders to the individual's partner's eligibility for a welfare payment. The partner is not the subject of the proceedings before the Tribunal and so their status as an eligible payment recipient is not relevant. • We find the imposition of 12 months income management orders for individuals by the Tribunal for costs to be grossly excessive considering the significant hardship, including on their freedom of movement, such a lengthy order may create. To reiterate our joint submission, for example, a person who wishes to move to a different location in order to secure a job will find it difficult to save the money for moving expenses with access to only 30% of their Centrelink payment as cash. Further, we note that there are still a number of outlets, which include fuel and community stores, which are not BasicsCard merchants. Such a lengthy order may impact on an individual's ability to pay child support. • Whilst we admit that there are provisions to have an income management order reviewed or adjusted to an individual's specific circumstance, an individual is unlikely to seek a review or express the need for special circumstances without representation. • A provision should be inserted to the AMT Act to require the Tribunal to include in their written reasons, why an income management order has been made and the reasons for the length of time of that order.
Apprehension powers: section 79 Recommendation 16 is to extend apprehension powers to persons who take unauthorized leave from a community treatment order program	• We do not support extending apprehension powers given our concerns in relation to the use of 'authorised officers' to affect apprehensions.
Violent and disruptive persons Recommendations 31 and 32 propose amendments to s. 79 to enable a senior assessment or treatment clinician to direct that a violent or disruptive person be taken to an assessment centre	• We oppose the proposed amendments to s. 79. A person should not be held in a secure care facility because their behaviour in a treatment centre is challenging or dangerous. If their behaviour is dangerous, they should be dealt with appropriately through internal procedures and, where necessary, police assistance. Should a person be disruptive and challenging, we would question whether the mandatory treatment order is benefiting the person.
Membership of the Tribunal: section 104	• Recommendation 23 is problematic. We appreciate that finding appropriate members, who are not Department of Health employees, has been difficult. However, we consider it important for the prevention of both actual and perceived bias, that agency

	employees are not appointed as Tribunal members.
Legal Representation: section 113 No Recommendation was made to amend s. 113 to mandate for compulsory legal representation at cost, for an affected person.	It is our understanding from speaking to individuals in the AMT program that no individual has had legal representation before the Tribunal in Alice Springs. An independent advocate has been appointed in Alice Springs however, that is considerably different to legal representation. Some individuals have been represented in Darwin and Katherine by NAAJA lawyers.[4] To date, a NAAJA lawyer has never been appointed by the Tribunal and NAAJA simply does not have the resources to continue to represent people in this situation on an ad hoc basis. Legal representation involved at the Tribunal stage would provide efficacy to the process as well as ensuring that an individual is aware of their rights. Legal representation should be considered of the utmost importance in this process where the stakes are high and relates to the liberty of a person. • The NT Government should provide funding to enable legal services to advise and represent individuals undergoing assessment and appearing before the AMT Tribunal. • The Act should require assessment facilities to expressly, and at the earliest appropriate and reasonable opportunity, notify clients of their right to legal representation. • An ongoing regular review of the AMT Act processes would ensure that the Tribunal is exercising its discretion to appoint legal representation in the appropriate circumstances. • There are a number of circumstances/considerations in Administrative proceedings where Australian courts have concluded that legal representation should be permitted; these include; o A person is unlikely to be capable of representing him/herself or for some other reason is prevented from representing him/herself;[5] o It will be necessary to address questions of law or complex issues of fact;[6] o The decision has serious consequences for the

[4] Since the commencement of the Act, NAAJA civil lawyers have represented people in hearings before the Tribunal in relation to mandatory treatment orders in Darwin and Katherine. Civil lawyers have also responded to requests from clients, subject to the mandatory residential treatment orders, to provide advice on appealing orders and/or applying to the Tribunal for orders to be varied or revoked. Note that this has been done by NAAJA without any funding to conduct this service.

[5] See, *Majar v Northern Land Council* (1991) 37 FCR 117 at 138-139.

[6] Ibid.

	person seeking the representation;[7] ○ The importance of the decision to the liberty and welfare of the person affected.[8] These are all key considerations which is clear, apply to a broad number of the people being subjected to mandatory treatment orders.
Advocate: section 113	• We strongly support recommendation 43, which proposes amendments to s. 113(2) to protect the independence of the advocate. As discussed above, however, clarification in relation to the role of the advocate will not overcome the need to ensure that a person obtains access to legal representation.
Community Treatment Orders: section 134	• It is our belief that a wider range of health providers should be Gazetted as approved community treatment providers for the purposes of section 134(1) of the AMT Act. At present the number of providers does not facilitate all persons form a varying and wide range of communities throughout the Northern Territory. • It is our experience that rehabilitation is best achieved when an individual is familiar and safe in their environment. By allowing for a wider range of community treatment providers, some individuals who ordinarily would not be considered for a community treatment order, because of lack of a community treatment provider in their community, would have a greater opportunity/access to treatment in their home community.
Review of the Program No recommendation made with respect to a regulatory review of the program and processes.	It is our position that a provision should be inserted into the legislation that would require a review of the AMT legislation and its processes be conducted on an ongoing basis and at a regular interval, for example every 6 months. This would ensure a number of vital processes are being adhered to and ensure the transparency of the AMT system.

[7] Ibid.
[8] See, *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 271 at 295.