



Criminal Lawyers Association of the Northern Territory (CLANT)

Patron: The Hon Justice Virginia Bell • President: Russell Goldflam • Secretary: Madeleine Rowley • ABN: 64 391 168 310 • Address: PO 969, Alice Springs NT 0871 • Telephone: 0401119020

Introduction

The Criminal Lawyers Association of the Northern Territory Inc. (CLANT) has been an effective and powerful voice for over 25 years for the improvement of the criminal justice system in the Northern Territory, representing both defence lawyers and prosecutors, practitioners from the public sector, the private profession and the independent bar.

Among CLANT's Objects and Purposes are:

- to promote and advance the administration of the criminal justice system and development and improvement of criminal law throughout the Northern Territory
- to actively contribute in public debates in issues relating to the criminal justice system
- to promote and encourage the protection of human rights and compliance with international human rights principles in the Northern Territory

In this brief submission, CLANT focuses only on some specific key issues. Nevertheless, as discussed below, CLANT remains concerned about many aspects of the *Alcohol Mandatory Treatment Act* (the AMT Act), and, on the basis of the information currently available to CLANT, does not support the scheme.¹

The review: a lack of transparency and independence

CLANT welcomes the opportunity to contribute to the Review of AMT Act. Nevertheless, CLANT has serious reservations about its scope and context.

The stated objective of the Review is "to assess to what degree the AMT Act meets its function". However, publicly available information regarding the outcomes of the AMT scheme is so scant that the capacity of organisations such as CLANT to contribute to comment on the extent to which the scheme is fulfilling its function is severely limited.

This problem is aggravated by the fact that control of the information that has been released to the public is exercised by the Northern Territory agency responsible for the operation of the scheme, the Department of Health, which is also conducting the Review. The Review, accordingly, lacks both transparency and independence. These are fundamental defects which CLANT submits undermine and compromise the Review process.

CLANT submits that an independent evaluation of the AMT scheme be undertaken, to be conducted by an appropriately qualified expert body, such as the National Drug Research Institute at Curtin University, and that the evaluation team be given full and unfettered access to all records held by the Northern Territory Government in relation to the administration of the AMT Act.

In the absence of any meaningful data about the outcomes of the scheme, none of the serious concerns expressed and shared by CLANT prior to the passage of the AMT Act have been allayed, apart from those specific changes to the AMT Bill which were made prior to enactment (such as the abbreviation of the period of assessment detention, which CLANT

¹ See text at footnote 2, below.

welcomes). In May 2013, CLANT published those concerns on its website.² Regrettably, the concerns therein expressed, subject to the limited exceptions referred to above, remain.

As an example of this lack of transparency and independence, CLANT refers to the government's response to the decision in *RP v Alcohol Mandatory Treatment Tribunal of the Northern Territory* [2013] NTMC 32. A central issue in that case was the lack of an advocate for the appellant who had appeared before the Tribunal. The court found:

Without an advocate she was effectively not being heard on factors crucial to the Tribunal's determination and as such I find that failure to appoint an advocate was a denial of natural justice.³

As reported by the ABC on 10 January 2014, Minister Lambley responded by saying that this decision "has no implications for the tribunal's decisions, and it is not a precedent", and that "an advocate is not always required".⁴ What was not disclosed in this or any of the numerous public statements by the Minister, or in the Alcohol Mandatory Treatment Quarterly Reports published to date, or in any of the material published by the government for the purpose of this Review,⁵ was that in fact, no advocate had been provided for any of the scores of people who had appeared before the Tribunal in Alice Springs. This was only disclosed to CLANT by government at the Focus Group consultation with legal services conducted on 4 February 2014, in response to a direct question.

The Minister's statement was seriously misleading. That is deplorable.

Subsequently, on 13th February 2014, the eve of the deadline for the lodgement of submissions to this Review, Minister Lambley, under the cloak of parliamentary privilege, launched an extraordinary attack on the legal service which had represented the successful appellant in the matter referred to above, accusing its staff of "rank duplicity" and "utter hypocrisy" and, in effect, of acting in bad faith. Once again, Minister Lambley omitted to mention in her lengthy statement that in fact, no lay advocate had been provided for any of the people who had appeared before the Tribunal in Alice Springs, and that requests by the legal services for funding to enable them to provide legal representation to persons appearing before the Tribunal had been ignored or refused.

If this is characteristic of the government's response to problems which emerge in relation to the administration of the AMT scheme, then CLANT has little confidence in the process and outcomes of this Review.

Assessable persons

The trigger for being made subject to the AMT scheme is, three times in two months, to be apprehended and taken into custody by police, pursuant to s128 of the *Police Administration Act*. The preconditions for the exercise of that power are broad. For example, it can be exercised by a police officer who forms a reasonable belief that a person is intoxicated in a public place and *may* cause substantial annoyance to someone.⁶ Similarly, the exercise of

² <http://www.clant.org.au/index.php/news/59-alcohol-mandatory-treatment-bill-legal-services-respond>

³ *RP v Alcohol Mandatory Treatment Tribunal of the Northern Territory* [2013] NTMC 32 at [31]

⁴ <http://www.abc.net.au/news/2014-01-10/second-mandatory-grog-rehab-tribunal-ruling-challenge-alice-spr/5193970>

⁵ http://health.nt.gov.au/Alcohol_Mandatory_Treatment/index.aspx

⁶ Section 128(1)(c)(iii) *Police Administration Act*

the discretion as to whether, having apprehended a person using this power, to take the person into custody at a police station, is not effectively structured, regulated or fettered. Although the Police Custody Manual provides, in effect, that police should only take persons apprehended under s128 to a watchhouse as a last resort, there does not appear to be any clear or rigorous system to ensure that this approach is actually applied in practice. The requirement that police only take persons apprehended under s128 to a watchhouse where there is no practicable alternative should be incorporated into the statutory provisions, and not be relegated to subordinate legislation which is not generally open to public scrutiny.

Importantly, an apprehended person can be taken to a private residence, to a sobering-up shelter, or to the police watchhouse, at the discretion of the apprehending police officer. However, it is only the last of these options which results in a 'strike' being recorded for the purpose of the AMT scheme.

The potential for police abuse of power and unlawful discrimination, particularly on the basis of race and age, are patent. The consequences can be enormous: detention for in excess of three months.

If the three strikes trigger (which CLANT has not endorsed and does not endorse) is to be retained, it is essential that this issue be addressed by appropriate amendments to the *Police Administration Act*.

The assessment process

The assessment process drives the entire rehabilitation scheme by channeling persons through the AMT Act's various provisions, to determine whether or not a person who is brought into the AMT Act scheme continues onto mandatory rehabilitation, or whether he or she is unsuitable for the scheme.

Whilst a person is provided with a copy of rights statement upon their entry into an assessment center there is no right of review to the Local Court at this early juncture.⁷ Any relief that may be sought by a prerogative writ, *habeas corpus*, would be defeated (on a pragmatic basis) by the time limits on the assessment process.⁸

The drafting of the assessment process provisions and the 'assessment' to be made by the senior assessment clinician is vague and uncertain.⁹ The AMT Act requires that an assessable person must be assessed by a senior assessment clinician as to their suitability to participate in the rehabilitation scheme.¹⁰ The legislation is unclear as to whether or not the opinion required to be formed by the senior assessment clinician must be formed before the conclusion of the 96 hour time limit or only started.

This dilemma was dealt with by the Court of Summary Jurisdiction in *Police v Karl Portaminni* [2013] NTMC (unreported). In Portaminni's case, having found that the defendant had been

⁷ Section 15 AMT Act; cf. Sections 9 and 10 of the *Alcohol Protection Orders Act* which allows for, at least, a merits review by a senior officer (usually a police officer the rank of inspector or above) of a police decision to issue an Alcohol Protection Order at the initial stages of contact with that Act.

⁸ The time required to take instructions from a client, to obtain all the relevant documents, file affidavits, serve notices on the parties and get a merits hearing date in the Supreme Court before the duty judge would test the limits of the 96 hour time limit and if an application for the writ were made outside of the 96 hours it is possible the court may decline to act as the purpose of acting would have passed.

⁹Section 19 AMT Act.

¹⁰ Section 19(2) AMT Act

held as an assessable person outside the 96 hour time limit, the Court ruled that the opinion of the senior assessment clinician must be finalised and formed within the 96 hour time limit. This construction of an assessment is not clearly spelt out in the AMT Act.

Also of note in Portaminni's case, is that it was not revealed that the defendant had been held outside the 96 hour time limit until his solicitors summonsed the Department of Health to obtain the necessary records regarding his assessment and treatment under the AMT Act. This took considerably longer than 96 hours.

It is the view of CLANT that this initial assessment period can create a vehicle for injustice leading to the unlawful restraint of liberty on the following basis:

- An alcoholic, suffering from an addiction, can be detained against their will for 4 days on the basis of a health problem; and
- The very limited capacity to seek any judicial review by a person deemed to be an assessable person and forced into the assessment process.

As there is currently no judicial oversight of the assessment process under the AMT Act, the capacity for injustice and the unlawful restraint of an individual's liberty loom large.

Representation

Section 113 of the AMT Act gives the appearance of entitling a person to representation. This has proven to be illusory. It is imperative that the Act be amended to guarantee representation. For the reasons expressed in submissions made by numerous stakeholders prior to the passage of the Act, representation by a lay advocate is inadequate. Any person facing a lengthy period of detention should be entitled to legal representation (as for example are persons brought before the Mental Health Review Tribunal). This need is all the greater having regard to the fact that appeals are restricted to a question of law only.¹¹

The first six months of the administration of the AMT Act have resulted in the civil detention of scores of people who appeared before the Tribunal without any representation. Only one such matter has to date come before the courts. The order of the Tribunal in that case was found to have been unlawful. It may follow that the successful appellant in that case was unlawfully detained for a substantial period. It is readily foreseeable that many other people may have been similarly subject to periods of unlawful detention. Although individual persons engaged in the administration of the AMT Act are protected from liability for acts done in good faith, that protection does not extend to the Territory,¹² which may now be exposed to very substantial liability.

It is essential that this issue be addressed urgently and effectively, both to protect the rights of those who are being detained under the Act, and to limit the further exposure of the Territory to liability for engaging in a practice of unlawful detention on a systemic basis.

Criminal sanctions for absconding

Part 4 Division 5 of the AMT Act should be repealed. The stated objects of the Act are all therapeutic. It is counter-therapeutic to criminalise the conduct of people subject to Orders made pursuant to the Act. These provisions are inconsistent with the stated objects of the Act. There is no evidence of which CLANT is aware that the offence provisions have achieved anything of value to anyone.

¹¹ Section 51(2) AMT Act

¹² Section 139(3) AMT Act

Conclusion

Whilst welcoming the opportunity to participate in the AMT Act review, CLANT does not endorse this scheme. CLANT's primary concerns are:

1. The AMT Act review process, being conducted by the Department of Health, is not independent and lacks transparency.
2. Persons being brought into the rehabilitation scheme are subject to powers which can be exercised arbitrarily and effectively in an unfettered and regulated fashion.
3. The assessment process is a vehicle for injustice and can result in a person being deprived of their liberty with no effective judicial oversight.
4. Persons are appearing before the Tribunal without representation and are being denied natural justice and therefore unable to participate fully in the decision making process which can deprive them of their liberty.
5. Criminal sanctions attaching to the program operate counter-therapeutically and serve to undermine the purposes of the AMT Act.