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Let Alone to Listen: The Impact of Northern Territory Liquor Laws on Aboriginal Justice Outcomes

Joseph Negrine*

Abstract

This article tracks the development of liquor laws in the Northern Territory, considering their impacts on Aboriginal justice outcomes and possible areas for reform. Noting the putative trade-off between health and justice outcomes, it examines the *Northern Territory National Emergency Response Act 2007* (Cth), the *Stronger Futures in the Northern Territory Act 2012* (Cth) and the 2022–23 *Liquor Act 2019* (NT) amendments. Under the most recent *Liquor Act* amendments, the sale, possession and consumption of alcohol remain restricted in prescribed areas, which must determine the future of their liquor laws by 28 February 2027. This article proposes that greater investment is required to support Aboriginal leadership throughout this decision-making process. Indeed, a central proposition of this article is that the failure to adequately consult Aboriginal communities has been a shared feature of all three laws, and a fundamental barrier to improving Aboriginal justice. Reflecting on the interaction between Aboriginal and non-Aboriginal legal systems, this article identifies issues in the current policies that risk replicating the shortcomings of previous laws, thereby failing to empower Aboriginal leadership or improve Aboriginal justice services.

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I Introduction

Few policy debates in the Northern Territory animate the power struggle between paternalistic governments and Indigenous self-determination like liquor laws. Despite decades of evidence

* LLB (Hons) candidate, Australian National University and former Law and Justice Intern at the North Australian Aboriginal Justice Agency. The views expressed in this article are those of the author and do not necessarily reflect the views or positions of NAAJA. With thanks to NAAJA's John Rawnsley and Harita Sridhar, as well as the Wiltshire family and Winona Kang for their support and encouragement on previous drafts. I respectfully acknowledge the Larrakia people, the traditional owners and custodians of the country on which I lived and wrote this article. I pay my respect to their Elders past and present, for they hold the traditions and memories that form their rich cultural tapestry. I acknowledge that sovereignty was never ceded.

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demonstrating the correlation between Indigenous self-determination and positive community outcomes, previous laws like the *Stronger Futures in the Northern Territory Act*[1] indicate that government paternalism has historically overshadowed Indigenous-led solutions.[2] The *Stronger Futures Act* and its legislative package,[3] which commenced in July 2012,[4] reinforced controls on, among other things, land ownership[5]; income management[6]; and alcohol control and consumption[7] — intervention measures established in the preceding 2007 Emergency Response.[8] While purportedly designed to improve social conditions in Aboriginal communities,[9] the laws were widely condemned as paternalistic, counterproductive and contrary to international law standards surrounding the rights of Indigenous peoples.[10] On 16 July 2022, the alcohol-related provisions in the *Stronger Futures Act* ceased to be in force.[11] In its place, the NT Government adopted an opt-in policy, providing alcohol-protected areas[12] with the choice to extend their alcohol restrictions.[13] The change in alcohol restrictions — in theory — offered the possibility of moving away from reductive historical stereotypes that portrayed Aboriginal people as 'largely incapable of governing their own lives'.[14] However, much like the *Stronger Futures Act* itself, the new regulations did not receive universal support. Priscilla Atkins (Eastern Arrernte), the then-CEO of the North Australian Aboriginal Justice Agency (NAAJA), viewed the change as 'utterly irresponsible' and 'a recipe for disaster'.[15] Paul McCue, the then-President of the NT Police Association, stated that the laws would

1. *Stronger Futures in the Northern Territory Act 2012* (Cth) ('*Stronger Futures Act*').
2. *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991) vol 1, [1.7.11]; Janet Hunt and Diane Smith, 'Indigenous Community Governance Project: Year Two Research Findings' (Working Paper No 36/2007, Centre for Aboriginal Economic Policy Research, April 2007) xvii, 3, 12.
3. The Gillard government passed three Acts, which have been collectively described as the 'Stronger Futures' legislation: *Stronger Futures Act* (n 1); *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth); *Social Security Legislation Amendment Act 2012* (Cth).
4. *Stronger Futures Act* (n 1) s 2(1).
5. Ibid ss 43, 45.
6. *Social Security Legislation Amendment Act 2012* (n 3).
7. *Stronger Futures Act* (n 1) pt 2.
8. See *Northern Territory National Emergency Response Act 2007* (Cth) ('*NTNER*').
9. Consistent with the Pathways to the Northern Territory Aboriginal Justice Agreement Report, this article uses the term Aboriginal to refer to all people of Aboriginal and Torres Strait Islander descent living in the Northern Territory (NT). 'The use of this term reflects the wishes of Aboriginal people in the Northern Territory': Northern Territory Government, *Pathways to the Northern Territory Aboriginal Justice Agreement* (Report, 2021) 6 <https://justice.nt.gov.au/__data/assets/pdf_file/0009/728163/Pathways-to-the-northern-territory-aboriginal-justice-agreement.pdf>.
10. See, eg, Shelley Bielefeld, 'History Wars and Stronger Futures Laws: A Stronger Future or Perpetuating Past Paternalism?' (2014) 39(1) *Alternative Law Journal* 15, 17.
11. *Stronger Futures Act* (n 1) s 118.
12. 'Alcohol-protected areas' refer to geographic areas in the NT where the possession, sale and consumption of alcohol are highly regulated. The term was introduced in the *Stronger Futures Act*, see ibid s 27.
13. *Liquor Act 2019* (NT) s 170A, as at 17 July 2022 ('*Liquor Act*'). See also Elizabeth Crawford Spencer and Andrew Lockyer, 'The Northern Territory is about to ease alcohol restrictions, but more consultation from First Nations community members is needed first', *The Conversation* (online, 28 June 2022) <https://theconversation.com/the-northern-territory-is-about-to-ease-alcohol-restrictions-but-more-consultation-from-first-nations-community-members-is-needed-first-184844>.
14. Bielefeld, 'History Wars and Stronger Futures Laws' (n 10) 15-6; Michael Park, '"Shameful chapter": Intervention ends in the NT after 15 years', *SBS* (online, 18 July 2022) <https://www.sbs.com.au/nitv/article/2022/07/18/shameful-chapter-intervention-ends-nt-after-15-years>.
15. Aboriginal Medical Services Alliance of the Northern Territory, North Australian Aboriginal Justice Agency (NAAJA) and Aboriginal Housing NT, 'NT Government must withdraw Stronger Futures Alcohol Bill' (Media Release, 22 April 2022) <https://www.amsant.org.au/wp-content/uploads/2022/04/220422_Media-Release_NAAJA_AMSANT_AHNT_Alcohol-legislation.pdf>.

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go 'completely against' the government's stated goal of reducing alcohol-related harm.[16] Perceiving an alcohol-driven 'crime wave' rolling through the NT, the opt-in policy was ultimately reversed in February 2023 in favour of a temporary return to the previous restrictions.[17] Now, alcohol-protected areas must opt-out of these restrictions by obtaining the Director of Liquor Licensing's approval of their community alcohol plans.[18]

This article does not intend to trivialise the issues of alcohol-related harm in the Northern Territory. The NT has the highest rates of alcohol-fuelled violence and crime in Australia,[19] and many statistics underscore this reality.[20] Although Indigenous Australians are more likely to abstain from alcohol than non-Indigenous Australians,[21] the Australia-wide rate of the former's alcohol-related injury hospitalisations is 9.5 times higher than the latter's.[22] Jacinta Nampijinpa Price (Warlpiri) and Malarndirri McCarthy (Yanyuwa Garrawa), speaking from different sides of the Senate, have both shared stories of the scars left by alcohol abuse on their families and communities.[23] Various federal government policies, legislated from different sides of Parliament, have sought to reduce these harms through regulatory attempts to restrict the demand and supply of alcohol. However, liquor laws in the NT have traditionally been viewed as 'reactionary',[24] 'punitive'[25] and inimical to the internationally recognised right of Indigenous peoples to self-determination.[26] Thus, a central tension in liquor laws is the apparent trade-off between improving health and justice outcomes.[27]

16. Danila Dilba Health Service et al, 'Liquor Laws - Joint Media Release' (Media Release, 18 May 2022) <https://ddhs.org.au/news/liquor-laws-joint-media-release>.
17. Angus Thompson, 'Alcohol bans to be reinstated in Alice Springs communities', *Sydney Morning Herald* (online, 6 February 2023) <https://www.smh.com.au/politics/federal/alcohol-bans-return-to-alice-springs-20230206-p5ci3y.html>.
18. *Liquor Act* (n 13) s 170AB.
19. James A Smith et al, 'Emerging alcohol policy innovation in the Northern Territory, Australia' (2019) 30 *Health Promotion Journal of Australia* 3, 3; see generally Northern Territory Government, *Alcohol policies and legislation review* (Final Report, October 2017); Steven J Skov et al, 'How much is too much? Alcohol consumption and related harms in the NT' (2010) 193(5) *Medical Journal of Australia* 269; Timothy Buckley, 'A criminal shift: alcohol regulation in the Northern Territory' (2014) 8(2) *Indigenous Law Bulletin* 20.
20. See, eg, Anna Krien, 'Booze Territory', *The Monthly* (online, 1 September 2011) <https://www.themonthly.com.au/issue/2011/september/1318218855/anna-krien/booze-territory#mtr>. See also James Smith, Steve Whetton and Peter d'Abbs, *The social and economic costs and harms of alcohol consumption in the Northern Territory* (Report, February 2019) 41; Paul Secombe et al, 'Alcohol misuse and critical care admissions in the Northern Territory' (2021) 51(9) *Internal Medicine Journal* 1433, 1438.
21. Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Health Performance Framework* (Summary Report, July 2023) 62.
22. Australian Institute of Health and Welfare, *Alcohol-related injury: hospitalisations and deaths, 2019-20* (Web Report, 21 March 2023) <https://www.aihw.gov.au/reports/injury/alcohol-related-injuries-2019-20/contents/hospitalisations/priority-populations>.
23. Matt Garrick and Lee Robinson, 'Senators Jacinta Nampijinpa Price and Malarndirri McCarthy share truths of alcohol abuse amid Alice Springs crisis', *ABC News* (online, 11 February 2023) <https://www.abc.net.au/news/2023-02-11/nt-alice-springs-alcohol-bans-senators-reveal-hard-truths/101956934>.
24. Annalee E Stearne et al, 'First Nations Australians' experiences of current alcohol policy in Central Australia: evidence of self-determination?' (2022) 21(1) *International Journal for Equity in Health* 127, 129.
25. Matt Garrick, 'Tangentyere Council in Alice Springs blasts previous Northern Territory liquor bans as "punitive"', *ABC News* (online, 25 January 2023) <https://www.abc.net.au/news/2023-01-25/nt-liquor-restrictions-alice-springs-punitive-aboriginal-council/101889336>.
26. AMSANT Aboriginal Corporation, Submission to Department of the Chief Minister and Cabinet, *Draft Northern Territory Alcohol Action Plan* (14 April 2023) 3 <https://www.amsant.org.au/wp-content/uploads/2023/04/AMSANT-Submission-NT-Alcohol-Action-Plan.pdf>.
27. This tension is apparent in debates concerning whether alcohol restrictions that aim to improve health outcomes (ie, reduce alcohol-related harm) are 'special measures', justifying the (often top-down) discriminatory treatment of Indigenous Australians: Explanatory Memorandum, Stronger Futures in the Northern Territory Bill 2011 (Cth) 1-2.

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Acknowledging this trade-off, this article argues that the sunsetting of the *Stronger Futures Act* provides an invaluable opportunity for settler and Aboriginal legal systems to begin meaningful cooperation aimed at improving justice outcomes. Such cooperation must confront the ongoing effects of colonialism and unsuccessful policymaking, which has generated considerable distrust towards the settler legal system.[28] The author acknowledges that, as a non-Indigenous scholar, they are not positioned to represent the views of any Indigenous legal system. Therefore, this article is guided by the Northern Territory Aboriginal Justice Agreement's (*'NT AJA'*) three Aboriginal justice outcomes[29]:

1. Reducing offending and imprisonment of Aboriginal Territorians[30];
2. Engaging and supporting Aboriginal leadership[31]; and
3. Improving justice responses and services for Aboriginal Territorians.[32]

These outcomes were distilled from a three-year consultation process across the NT, which acknowledged the historic failure of government policies to 'build on the strength and expertise of Aboriginal communities'.[33] During this process, the Aboriginal Justice Unit conducted over 160 consultations in 120 NT communities, receiving over 1,000 comments from Aboriginal Territorians.[34] Then-Attorney-General of the Northern Territory, Selena Uibo (Nunggubuyu), described it as 'one of the most extensive processes undertaken by an NT Government Agency'.[35] The *NT AJA*'s guiding principles explicitly recognise the need for 'respectful and collaborative relationships built on the foundations of mutual understanding and trust'.[36] This cooperation between government agencies and Aboriginal leaders is viewed as 'essential' in improving justice outcomes such as reduced imprisonment rates.[37] Owing to the *NT AJA's* comprehensiveness in consulting Aboriginal voices, along with the author's non-Indigenous positioning,[38] this definition of Aboriginal justice is adopted for this article's analytical framework.

28. Bhiamie Williamson (Euahlayi) et al, 'Indigenous peoples and the Australian census: Value, trust, and participation' (2021) 5(2) *Australian Population Studies* 1, 6; see also the Aboriginal staff's yarning excerpts in Ariana C Kong et al, '"Got to build that trust": the perspectives and experiences of Aboriginal health staff on maternal oral health' (2020) 19(1) *International Journal for Equity in Health* 187, 191, 196.
29. Northern Territory Government, *Northern Territory Aboriginal Justice Agreement 2021–2027* (Report, 2021) ('*NT AJA*') <https://justice.nt.gov.au/__data/assets/pdf_file/0005/1034546/nt-aboriginal-justice-agreement-2021-2027.pdf>. The *NT AJA* is a step towards greater cooperation between the Northern Territory Government and Aboriginal Territorians, aligned Aboriginal organisations and non-governmental organisations in respect of Aboriginal justice outcomes. See below Section III, which explores how such cooperation is a necessary condition for reconciling the tensions between Aboriginal and settler legal systems.
30. Ibid 13–5.
31. Ibid 17–8.
32. Ibid 21–3.
33. *NT AJA* (n 29) 19.
34. Paul Ramsay Foundation, 'Joint Media Statement from the Paul Ramsay Foundation, the NT Aboriginal Justice Agreement Reference Group and the Northern Territory Government' (Media Release, 31 August 2021) < https://www.paulramsayfoundation.org.au/news-resources/new-partnership-to-break-the-cycle-of-incarceration-in-the-northern-territory>.
35. Ibid.
36. *NT AJA* (n 29) 9.
37. Ibid 13.
38. The author acknowledges that, as a result of their non-Indigenous heritage and education, their understanding of Indigenous epistemologies is necessarily limited. As a legal scholar who is actively engaged in the decolonising process, the author acknowledges the centrality of Indigenous voices in interrogating and reshaping the law and legal institutions.

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This article proceeds in three sections. First, it explores how the federal government's two laws preceding the current situation, the *NTNER* and the *Stronger Futures Act*, failed to improve Aboriginal justice outcomes. Identifying these flaws is necessary to acknowledging how the settler legal system has hitherto marginalised Indigenous legal systems. Next, it considers how an understanding of interlegality, the pluralist phenomenon of intersecting legal systems,[39] serves as a useful lens for examining the history of interventionist alcohol policies. In Section IV, this article examines the current liquor laws, arguing that they may serve to perpetuate the failings of the *NTNER* and the *Stronger Futures Act*. Thus, it identifies gaps in the current policies that hamper the support of Aboriginal leadership and justice outcomes in the long term. Ultimately, addressing these gaps will support a stronger legal pluralism that promotes Aboriginal self-determination. Improving Indigenous self-determination at sub-national levels is especially important in the wake of the unsuccessful Voice referendum, which greatly set back the possibility of the right's constitutional recognition.[40]

II Previous Liquor Laws: 2007–22

This section highlights the key failings of previous liquor laws in the NT. It argues that these laws echoed the historical discourse of 'benevolent colonialists acting primarily for the benefit of Aboriginal peoples', without regard to their capacity for self-determination or situational needs.[41] Indeed, a consistent flaw across the *NTNER* and its continuation via the *Stronger Futures Act* has been the failure to work meaningfully with Aboriginal communities. This paternalism has prevented relationships of trust between the Australian government and Aboriginal communities, limiting the popular support that the laws received.[42] More importantly, a failure to work meaningfully with Aboriginal communities can be understood as a failure to engage and support Aboriginal leadership: an Aboriginal justice outcome that the *NT AJA* perceives as having flow-on effects for improved justice responses and reduced offending and imprisonment rates.[43] Any law reform in this field must address the importance of not only hearing, but listening to, Aboriginal leadership.

A *2007: The NTNER*

The *Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred'*[44] report is generally viewed as the *NTNER*'s catalyst.[45] Published in June 2007, the report examined the extent, nature and

39. See Boaventura de Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14(3) *Journal of Law and Society* 279, 288; Neil Walker, 'Legalising inter-legality' (2022) 1(1) *European Law Open* 216, 218–21.
40. See generally 'Open letter: A statement for our First Nations People and our Country', Uluru Statement (Open Letter, 24 October 2023) <https://ulurustatement.org/statement-for-our-people-and-country/>. Improving the Indigenous right to self-determination at sub-national levels should not be viewed as mutually exclusive with federal level efforts. The *NT AJA* consultations underscored the need for Aboriginal voices to 'influence and inform policy, service delivery and law reform on a local, territory and national level': *NT AJA* (n 29) 17.
41. Bielefeld, 'History Wars and Stronger Futures Laws' (n 10) 15.
42. Ibid; Commonwealth of Australia, *Report of the NTER Review Board* (Report, October 2008) 7, 48.
43. *NT AJA* (n 29) 17.
44. Northern Territory Government, *Ampe Akelyernemane Meke Mekarle: 'Little Children Are Sacred': Report of the Northern Territory Board of Inquiry Into the Protection of Children From Sexual Abuse* (Report, 30 April 2007) ('*Little Children Are Sacred Report*').
45. See, eg, Nicole Watson, 'The Northern Territory Emergency Response: The More Things Change, The More They Stay The Same' (2011) 48(4) *Alberta Law Review* 905, 911; Bielefeld, 'History Wars and Stronger Futures Laws' (n 10) 15.

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factors leading to child sexual abuse in Aboriginal communities, depicting the communities as 'in the throes of addiction and dysfunction'.[46] The excessive consumption of alcohol and abuse of other substances were identified as factors fuelling a breakdown of Aboriginal culture and sexual violence.[47] A failure to overcome substance abuse and its related harms, the report argued, would likely lead to the disappearance of Aboriginal people and their cultures 'within a generation or so'.[48] To address substance abuse, the report explicitly recommended a multi-faceted and collaborative approach to identify culturally effective strategies.[49] This approach recognised the underlying issues driving the excessive consumption of alcohol, including poverty, unemployment, and overcrowded and inadequate housing.[50] Within 2 months of the report's publication, the federal government passed the *NTNER*'s legislative package, consisting of three substantive Acts and two appropriation Acts,[51] pursuant to section 122 of the *Commonwealth Constitution*. The *NTNER* provided that certain areas of land in the NT were 'prescribed areas'[52] and made it an offence to bring liquor into, possess liquor within or consume liquor within those areas.[53] In practice, Aboriginal Territorians 'predominantly or solely' lived in those prescribed areas.[54] Geography had been used as a proxy for race to target the Aboriginal possession and consumption of alcohol.[55] This part describes two failings of the *NTNER* in respect of Aboriginal justice outcomes: the suspension of the *Racial Discrimination Act*[56] and its normative force; and the failure to consult Aboriginal communities.

1 *Suspension of the* RDA *in Relation to the* NTNER. The *NTNER*'s provisions, and acts taken pursuant to those provisions, were unilaterally deemed 'special measures' by the Australian government.[57] Section 8(1) of the *RDA* provides that actions amounting to 'special measures' do not constitute racial discrimination and are therefore lawful.[58] These measures are generally understood

46. Nicole Watson, 'The Northern Territory Emergency Response' (n 45) 911.
47. *Little Children Are Sacred Report* (n 44) 12.
48. Ibid 16.
49. Ibid 28–30.
50. Ibid 12.
51. See generally *NTNER* (n 8); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); *Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007-2008* (Cth); *Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007-2008* (Cth).
52. *NTNER* (n 8) pt 2 div 2.
53. Ibid ss 12(2)(a)(i)–(iii).
54. Parliamentary Joint Committee on Human Rights ('PJCHR'), *2016 Review of Stronger Futures measures* (Final Report, 16 March 2016) 19 <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_Inquiries/strongerfutures2/Final_report> ('*2016 Review of Stronger Futures measures*'); Deirdre Howard-Wagner and Ben Kelly, 'Containing Aboriginal Mobility in the Northern Territory: From "Protectionism" to "Interventionism"' [2011] (15) *Law Text Culture* 102, 117.
55. Cf *Maloney v The Queen* (2013) 252 CLR 168, 302 (Gageler J).
56. *Racial Discrimination Act 1975* (Cth) ('*RDA*').
57. *NTNER* (n 8) s 132(2).
58. See *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1(4) ('*ICERD*').

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as those aimed at securing 'effective equality',[59] such as affirmative action[60]: a form of positive discrimination that ameliorates structural inequalities of opportunity and outcome.[61] To further limit opportunities to challenge the *NTNER*'s lawfulness, the Commonwealth excluded the Act from the operation of Part II of the *RDA*.[62] Therefore, the *NTNER* was insulated from legal challenges, regardless of whether its provisions amounted to special measures. The Commonwealth's decision was significant and involved the weighing up of several conflicting rights, as noted by the Parliamentary Joint Committee on Human Rights.[63] On one hand was a health imperative: reducing alcohol-related harms championed the right to health; the rights of the child, including protection from all forms of physical or mental violence[64]; and the right to security from bodily harm.[65] On the other hand was a justice imperative: the *NTNER* justified these ends by restricting the right to a private life[66] and the right to self-determination in Aboriginal communities.[67] For such a complex decision, the parliamentary consideration was grossly inadequate: just 13 minutes were allotted to debate the proposed suspension in the House of Representatives.[68] The suspension of the *RDA*, accordingly, was perceived as an acknowledgement of the *NTNER*'s discriminatory nature.[69] Indeed, the United Nations Human Rights Council, representing various Aboriginal peoples living in the *NTNER*'s prescribed areas, viewed the measures as neither proportionate to the legitimate objective of reducing child sexual abuse, nor having received the consent of the affected parties.[70] It

59. UN Committee on the Elimination of Racial Discrimination, *General recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination*, CERD/C/GC/32 (24 September 2009) [11]-[12], [19].
60. Emma Partridge, Sarah Maddison and Alastair Nicholson, 'Human rights imperatives and the failings of the Stronger Futures consultation process' (2012) 18(2) *Australian Journal of Human Rights* 21, 30; Jonathon Hunyor, 'Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention' (2009) 14(2) *Australian Journal of Human Rights* 39, 39.
61. See, eg, Yin C Paradies, 'Affirmative action and equity in Aboriginal and Torres Strait Islander health' (2005) 183(5) *Medical Journal of Australia* 269, 269. See generally *Bruch v Commonwealth of Australia* [2002] FMCA 29; *Jacomb v Australian Municipal Clerical and Services Union* (2004) 140 FCR 149.
62. *NTNER* (n 8) s 132(2). See also Australian Human Rights Commission, *The Suspension and Reinstatement of the RDA and Special Measures in the NTNER* (Report, 2 November 2011) 20, citing *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) s 4(3); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) s 6(3).
63. See *2016 Review of Stronger Futures measures* (n 54) 21–2 [3.10]-[3.11].
64. *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 19, 24, 27.
65. *2016 Review of Stronger Futures measures* (n 54) 21 [3.10], citing *International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976) art 9 ('*ICCPR*'); *ICERD* (n 58) art 5(b).
66. *ICCPR* (n 65) art 17; Castan Centre for Human Rights Laws, *Northern Territory Intervention: An Evaluation* (Report, February 2020) 43.
67. *2016 Review of Stronger Futures measures* (n 54) 22 [3.11], citing *ICCPR* (n 65) art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1.
68. Peter Billings, 'Mind the Gap: Public Power, Accountability and the NT Emergency Response' (2010) 17(3) *Australian Journal of Administrative Law* 132, 137, citing George Williams, 'Wisdom of politicians is frail shield for our rights', *Sydney Morning Herald* (online, 2 June 2009) <https://www.smh.com.au/politics/federal/wisdom-of-politicians-is-frail-shield-for-our-rights-20090601-bsv7.html>.
69. Partridge, Maddison and Nicholson (n 60) 30.
70. James Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Addendum*, UN A/HRC/15/37/Add.4 (1 June 2010) 31 [20], 41 [63]. See also Tom Calma, 'The Northern Territory Intervention – It's Not Our Dream' (2009) 27(2) *Law in Context* 14, 24-5.

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is therefore likely that, had the *RDA* not been suspended in relation to the *NTNER*, the *NTNER*'s legality would have been challenged on the grounds that its provisions were not 'special measures'. The inadequately informed measures, misled by a failure to consult Aboriginal voices and engage in rigorous debate, further fractured the relationships of trust between Aboriginal communities and the federal government.[71]

In addition, the *NTNER* and its exclusion from the *RDA*'s operation entrenched negative stereotypes concerning Aboriginal peoples. When announcing the *NTNER*, then-Indigenous Affairs Minister, Mal Brough, spoke of the goal of 'stabilising' and 'normalising' Aboriginal communities.[72] This seemingly innocuous rhetoric communicated two points. First, that Aboriginal communities were unable to protect vulnerable women and children (a legitimate social objective) from the 'crisis' described in the *Little Children Are Sacred Report*.[73] Second, that the *NTNER* was justified in criminalising addiction and taking hold of decision-making power to protect Aboriginal peoples from themselves. Without looking to Aboriginal leadership for solutions, it was evident that health outcomes had largely displaced justice outcomes. In this way, Minister Brough alluded to the 'deficit discourse' underpinning the *NTNER*, where a 'narrative of deficiency' characterised Aboriginal Territorians.[74] This discourse has persisted over centuries, evidenced by paternalistic policies depicting Indigenous Australians as incapable of governing their own lives.[75] A host of Indigenous Elders and scholars have argued that this narrative has marginalised Indigenous people, communities and legal systems at large.[76] Indeed, the moral 'crusade'[77] against the depicted spectre of Aboriginal culture was highlighted by the government's insufficient consultation with communities prior to and during the *NTNER*'s operation, a failing explored below.

2 *Failure to Consult.* Both domestic and international law provide that 'special measures' should be designed with the prior consultation and active participation of affected communities.[78] Justice Brennan, as he was then, held that advancing the affected group's wishes is 'perhaps essential' in demonstrating that an impugned law amounts to a 'special measure'.[79] In that vein, the first

71. *Report of the NTER Review Board* (n 42) 7. For Aboriginal reflections, see, eg, Claire Smith and Gary Jackson, *A Community-Based Review of the Northern Territory Emergency Response* (Report, August 2008) 126.
72. Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 7 (Malcom Brough, Minister for Families, Community Services and Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs).
73. Ibid; Shelley Bielefeld, 'The Intervention, Stronger Futures and Racial Discrimination: Placing the Australian Government Under Scrutiny' in Elisabeth Baehr and Barbara Schmidt-Haberkamp (eds), *'And there'll be NO dancing'. Perspectives on Policies Impacting Indigenous Australia Since 2007* (Cambridge Scholars Publishing, 2017) 145, 146.
74. Cressida Fforde et al, 'Discourse, Deficit and Identity: Aboriginality, the Race Paradigm and the Language of Representation in Contemporary Australia' (2013) 149(1) *Media Journal Australia* 162, 162.
75. Bielefeld, 'History Wars and Stronger Futures Laws' (n 10) 16. See also *Aboriginals Ordinance 1918* (Cth) ss 17-18.
76. See, eg, Irene Watson, 'In the Northern Territory Intervention: what is saved or rescued and at what cost?' (2009) 15(2) *Cultural Studies Review* 45, 55; Aileen Moreton-Robinson, 'Imagining the Good Indigenous Citizen: Race War and the Pathology of Patriarchal White Sovereignty' (2009) 15(2) *Cultural Studies Review* 61, 74-5. Concerning this narrative's continuation via the *Stronger Futures Act*, see Dijniyini Gondarra et al, 'Northern Territory Elders and Community Representatives – Press Conference Statement, Melbourne, 4 November 2011' in Rosie Scott and Anita Heiss (eds), *The Intervention: An Anthology* (NewSouth Publishing, 2nd ed, 2016) 128, 129-30.
77. Jillian Kramer, 'Legitimating Fictions: The Rule of Law, the Northern Territory Intervention and the War on Terror' [2015] (19) *Law Text Culture* 127, 145, citing Malcolm Farr, 'PM Leads the Way Against Evil', *The Daily Telegraph* (Sydney, 22 June 2007).
78. *General recommendation no. 32* (n 59) [18]; Alison Vivian and Ben Schokman, 'The Northern Territory Intervention and the Fabrication of "Special Measures"' (2009) 13(1) *Australian Indigenous Law Review* 78, 87–8. See below Section II(B)(1).
79. *Gerhardy v Brown* (1985) 159 CLR 70, 135 (Brennan J).

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recommendation of the *Little Children Are Sacred Report* urged the Commonwealth and NT governments to 'commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities'.[80] This recommendation was unmistakably clear as to what genuine consultation should have looked like. The report suggested as a 'matter of urgency' that the government consult *all* affected Aboriginal communities to identify culturally effective strategies to be incorporated in *individual* community management plans aimed at reducing alcohol-related harm.[81] Although the *NTNER* was formed in response to the report,[82] there was 'not a skerrick of consultation'[83] with the Aboriginal communities that were to be profoundly impacted by it.[84] In terms of Aboriginal justice outcomes, therefore, there was no attempt to engage or support Aboriginal leadership. This leadership, as the *NT AJA* notes, is crucial for developing justice services that are adapted to the NT's geographic, cultural and social realities.[85]

The consequent criticism led to a round of redesign consultations in 2009.[86] These meetings could never correct the failure to provide *prior* consultation. However, they represented an opportunity to give Aboriginal communities a role in reforming the laws that would affect them. An examination of the consultations' substance rather than form indicates that the Labor Government did not empower the 73 communities affected by the *NTNER*. The *ex post facto* consultations failed because, among other things, they lacked Aboriginal input in their design and implementation; notice was not given; interpreters were not provided[87]; and the *NTNER* measures were inadequately explained.[88] Opposition to these measures was underreported,[89] and Aboriginal communities were not given the opportunity to provide feedback on the proposals informed by the redesign consultations.[90] Without local input on the design of the consultation process, it was prefiguratively distorted into a mere 'forum for comment' on the government's eight proposed changes to *NTNER* measures.[91] Aboriginal decision-making and legal systems were again marginalised, furthering the 'deep hurt' and sense of betrayal that Aboriginal communities felt towards the Australian government.[92]

In light of the above, the Australian government's claims that the *NTNER* has operated for the good of Aboriginal people have been widely disputed.[93] While the *NTNER* contributed to a year-on-year fall in the annual supply of alcohol, the Australian Indigenous Doctors' Association perceived a

80. *Little Children Are Sacred Report* (n 44) 22.
81. Ibid 28.
82. Irene Watson, 'In the Northern Territory Intervention' (n 76) 53.
83. Nicole Watson, 'The Northern Territory Emergency Response' (n 45) 912.
84. Bielefeld, 'The Intervention, Stronger Futures and Racial Discrimination' (n 73) 146.
85. *NT AJA* (n 29) s 21.
86. Partridge, Maddison and Nicholson (n 60) 31.
87. Nicole Watson, 'The Northern Territory Emergency Response' (n 45) 917.
88. See Alistair Nicholson et al, *Will They Be Heard?: A Response to the NTER Consultations June to August 2009* (Report, November 2009) 9 <https://rqi.org.au/wp-content/uploads/2012/01/wil_they_be_heard_report_nov_09.pdf>.
89. Alastair Nicholson et al, *Listening but not Hearing: A response to the NTER Stronger Futures Consultations June to August 2011* (Report, March 2012) 57 https://www.uts.edu.au/sites/default/files/ListeningButNotHearing8March2012_1.pdf ('*Listening but not Hearing*').
90. Ibid 117-18 [300].
91. Ibid 72 [150].
92. *Report of the NTER Review Board* (n 42) 8.
93. Patrick Dodson and Darryl Cronin, 'An Australian Dialogue: Decolonising the Country' in Sarah Maddison and Morgan Brigg (eds), *Unsettling the Settler State: Creativity and Resistance in Indigenous Settler-State Governance* (Federation Press, 2011) 189, 194; Alex Brown and Ngiare J Brown, 'The Northern Territory intervention: voices from the centre of the fringe' (2007) 187(11) *Medical Journal of Australia* 621, 622; Tom Calma, 'The Northern Territory Intervention – It's Not Our Dream' (2009) 27(2) *Law in Context* 14, 36.

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sense of 'helplessness, hopelessness and worthlessness' perpetuating throughout entire communities.[94] Central to this sense of despair was the lack of engagement with Aboriginal communities to explore local solutions tailored to their specific needs. This failure to recognise the strength of Aboriginal leadership, as argued in the following part, was largely ignored rather than responded to by the *Stronger Futures Act*.

B *2012: The Stronger Futures Act*

The *Stronger Futures Act* was introduced in July 2012, one month ahead of the *NTNER*'s sunsetting.[95] In many ways, the *Stronger Futures Act* represented a more severe continuation of, rather than a departure from, the *NTNER*.[96] The 'prescribed areas' became 'alcohol-protected areas' ('APAs').[97] Under the *Stronger Futures Act*, however, breaches of alcohol-related offences became punishable to a considerably greater extent.[98] Bringing liquor into, possessing liquor within or consuming liquor within the *NTNER*'s prescribed areas carried a maximum penalty of 10 penalty units for a first offence[99] and 20 penalty units for subsequent offences.[100] Committing a substantively identical offence under section 8 of the *Stronger Futures Act* had a maximum penalty of 100 penalty units or six months' imprisonment.[101] Penalty units were given the same meaning in the *Stronger Futures Act* as in section 4AA of the *Crimes Act*.[102] Therefore, at the time of the *Stronger Future Act*'s sunsetting, the maximum penalty for breaching section 8 was $21,000.[103] Although the imposition of the maximum penalty is rare, the change reflected the top-down 'tough on crime' stance taken towards Aboriginal Territorians in relation to alcohol-related offences.[104] With fine defaults threatening to exacerbate the Aboriginal overrepresentation in the criminal justice systems, the change posed a stark challenge to the justice goal of reducing Aboriginal offending and imprisonment rates.[105] This part argues that the *Stronger Futures Act* demonstrated a continued failure to improve Aboriginal justice outcomes. Again, the Australian government demonstrated an unwillingness to engage Aboriginal leadership, evidenced by the inadequate consultation process and failure to decentralise liquor laws.

1 *A Repeated Failure to Consult.* At first glance, the *Stronger Futures* consultations indicated a new approach to lawmaking in the NT: one that engaged Aboriginal communities. Manderson notes that over a six-week period in mid-2011:

94. Nicole Watson, 'The Northern Territory Emergency Response' (n 45) 916 (citations omitted); *The Northern Territory Intervention: An Evaluation* (n 66) 30.
95. *NTNER* (n 8) s 6.
96. Errin Walker, 'Stronger Futures Alcohol Regulation in the NT' (2012) 8(3) *Indigenous Law Bulletin* 20, 21.
97. See generally *Stronger Futures Act* (n 1) pt 2.
98. See Bielefeld, 'History Wars and Stronger Futures Laws' (n 10) 18.
99. *NTNER* (n 8) s 12(2)(c).
100. Ibid s 12(2)(d).
101. *Stronger Futures Act* (n 1) s 8.
102. *Crimes Act 1914* (Cth); ibid s 5.
103. *Crimes Act 1914* (n 102) s 4AA(1).
104. See generally Sarah Clifford et al, 'A historical overview of legislated alcohol policy in the Northern Territory of Australia: 1979–2021' (2021) 21(1) *BMC Public Health* 1.
105. Errin Walker (n 96) 21; Australian Human Rights Commission, Submission No 351 to Senate Community Affairs Legislation Committee, *Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related Bills* (6 February 2012) 49 [299]-[300].

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> [T]he federal government released its *Stronger Futures Discussion Paper* and rapidly organised a large number of consultations across the NT: 378 'open-door' meetings between individuals and officials, 101 'whole of community' meetings, five public meetings in towns and cities, and several additional meetings between government members, stakeholders, and experts.[106]

While this appears to be a significant improvement from the *NTNER*'s lack of consultations, it is unlikely that the *Stronger Futures* consultations met the standards identified in the *United Nations Declaration on the Rights of Indigenous Peoples*.[107] Australia was one of the four states that voted against UNDRIP in 2007, objecting to the proposed right to self-determination.[108] Although Australia formally announced its support of UNDRIP in 2009, the Commonwealth Parliament has not enacted enabling legislation to date. Nevertheless, UNDRIP is recognised as reflecting evolving human rights standards regarding Indigenous peoples,[109] despite not creating additional legal obligations itself.[110] Specifically, UNDRIP provides that states should obtain the 'free, prior and informed consent' of Indigenous peoples before implementing laws that may affect them.[111] Partridge maintains that 'prior' consent requires states to allow sufficient time for Indigenous peoples to engage in their own decision-making processes.[112] Moreover, 'informed' consent requires Indigenous peoples to be provided with information that is objective, accurate and reflective of all positions on the relevant issue.[113] This process, in many cases, cannot be rushed. It is often necessary for materials to be translated into Indigenous languages[114] and for communities to deliberate over the full range of potential risks and benefits before legislative action can be taken.

Given the *Stronger Futures Act* would establish far-reaching measures affecting Aboriginal communities for 10 years,[115] the six-week consultation process was unsatisfactory.[116] Rather, it was evident that the federal government had not listened to the criticisms of the 2009 *NTNER*

106. Desmond Manderson, 'Crocodile Tears' (2012) 7(30) *Indigenous Law Bulletin* 8, 8.
107. GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('UNDRIP').
108. Megan Davis, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 11(3) *Australian Indigenous Law Review* 55, 55, 58.
109. Ibid 55; Robert T Coulter, 'U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law' (2009) 45(3) *Idaho Law Review* 539, 551-2.
110. Law Council of Australia, Submission No 60 to Senate Standing Committees on Legal and Constitutional Affairs, *Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 June 2022) 6; Ben Schokman, '"Stronger Futures" is Disempowering, Damaging and Doomed to Fail' (2012) 7(30) *Indigenous Law Bulletin* 17, 18; Stephen Allen, 'The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project in the Indigenous Context' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 225, 229.
111. UNDRIP (n 107) art 19.
112. Partridge, Maddison and Nicholson (n 60) 26, citing Andrea Carmen, 'The right to free, prior and informed consent: a framework for harmonious relations and new processes for redress' in Jackie Hartley, Paul Joffe and Jennifer Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Purich, 2010) 120, 124-5.
113. Ibid. See also Aboriginal Affairs NSW, *On our terms: obtaining Aboriginal community consent for social research: a literature review and case study* (Report, 2018) 45.
114. Cyndy Baskin, 'Storytelling Circles: Reflections of Aboriginal Protocols in Research' (2005) 22(2) *Canadian Social Work Review* 171, 181.
115. *Stronger Futures Act* (n 1) s 118(1).
116. The Aboriginal Peak Organisations Northern Territory ('APO NT'), whose members include the Central and Northern Land Councils, as well as NAAJA, called for specific funding to peak Aboriginal organisations to better facilitate community consultations: APO NT, Submission No 22 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Review of Stronger Futures in the Northern Territory Act 2012 and Related Legislation* (29 November 2014) 5.

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consultations. Many of the same flaws arose: insufficient information was provided for 'informed' consultations[117]; the *Stronger Futures Discussion Paper* was not translated into Aboriginal languages[118]; and consultations began just a few days after the discussion paper's release.[119] In addition, there were concerns that the consultations were conducted with no intention of changing the government's desired approach.[120] Aboriginal communities believed that, in an act of bad faith, the government had presented them with predetermined policy documents that later became the *Stronger Futures* legislative package.[121] To that end, the consultation process was perceived as merely a 'paper trail'[122] enabling (the illusion of) local input to justify increasingly severe top-down policies.[123] Again, the formulation of laws affecting Aboriginal communities appeared to ignore both local expertise and international law standards.[124]

2 *Moving Away from Blanket Restrictions?.* Despite inadequate consultation, the *Stronger Futures Act* contained several potentially redeeming features. In particular, the Act included provisions[125] for 'alcohol management plans' ('AMPs') that would purportedly allow communities to determine measures for reducing alcohol-related harms that accounted for their specific needs.[126] The stated aim suggested a movement away from unilaterally imposed 'solutions' towards collaborative approaches with Aboriginal communities.[127] But a closer examination at the law's formulation and implementation told another story. AMPs had to meet five minimum standards,[128] covering matters like the responsibilities of the police; measurable outcomes and benchmarks; and dispute-resolution mechanisms.[129] Professor d'Abbs writes:

> All of these components … are supposed to be meaningful not only to bureaucrats and ministerial officers, but also to residents of the community itself. Whatever the original intentions behind the adoption of AMPs as a policy instrument, they have become vehicles for a degree of administrative oversight and management that *threatens to stifle, rather than nurture, genuine community engagement*. Too often, the result is disillusionment and yet more disempowerment.[130]

To further the sense of disempowerment, the *Stronger Futures Act* stipulated the federal Minister for Indigenous Affairs' approval for AMPs.[131] Once approved, an AMP could be revoked at the

117. Bielefeld, 'History Wars and Stronger Futures Laws' (n 10) 17.
118. Australian Human Rights Commission, *Social Justice Report 2011* (Report, 24 October 2011) 28.
119. Ibid 27.
120. Australian Human Rights Commission, *Social Justice Report 2012* (Report, 26 October 2012) 46.
121. Bielefeld, 'The Intervention, Stronger Futures and Racial Discrimination' (n 73) 151; Nicole Watson, 'Listening but not hearing' [2012] (118) *Arena Magazine* 27, 27; Rachel Siewert, 'Ten years of intervention' [2017] (148) *Arena Magazine* 5, 6. See also Shelley Bielefeld, 'Compulsory Income Management and Indigenous Peoples – Exploring Counter Narratives amidst Colonial Constructions of Vulnerability' (2014) 36(4) *Sydney Law Review* 695, 720.
122. Manderson (n 106) 10.
123. *Social Justice Report 2012* (n 120) 47.
124. See Schokman (n 110) 17-18.
125. See *Stronger Futures Act* (n 1) pt 2 div 6.
126. Revised Explanatory Memorandum, Stronger Futures in the Northern Territory Bill 2012 (Cth) 2.
127. Millicent Churcher, 'Reimagining the Northern Territory Intervention: Institutional and cultural interventions into the Anglo-Australian imaginary' (2018) 53(1) *Australian Journal of Social Issues* 53, 58.
128. See *Stronger Futures in the Northern Territory (Alcohol Management Plans) Rule 2013* (Cth) r 4.
129. Peter d'Abbs, 'Widening the gap: The gulf between policy rhetoric and implementation reality in addressing alcohol problems among Indigenous Australians' (2015) 34(5) *Drug and Alcohol Review* 461, 462.
130. Ibid (emphasis added).
131. *Stronger Futures Act* (n 1) ss 16-17.

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Minister's behest[132] and could not be varied without Ministerial approval.[133] In deciding whether to approve an AMP's variation, the Minister had broad powers to consider any matter they considered relevant.[134] For these reasons, AMPs were rarely successful. Five years after the *Stronger Futures Act* came into force, seven AMP proposals had been rejected, and only one — the Titjikala community — had been approved.[135] Again, concerns were raised about whether the government truly intended to support Aboriginal leadership. Inadequate resources and support structures were cited as reasons why Aboriginal communities could not properly formulate their AMPs.[136] Due to the repeated failure to adequately consult with Aboriginal communities, communities began to lose confidence in the promise of regained control and attendance at meetings, convened to deliberate over AMPs, ebbed.[137]

Thus, Aboriginal justice outcomes were further neglected: Aboriginal leadership, which could guide the development of more specialised policies, had scarcely been engaged, let alone listened to. Reflecting on the paternalistic perpetuation of legal and bureaucratic control over Aboriginal communities,[138] the *Stronger Futures Act* failed to improve Aboriginal justice outcomes and 'build stronger futures'[139] for Aboriginal Territorians. The identified shortcomings of the consultative processes indicate that the federal government policies were in reality top-down: they did not truly engage and support Aboriginal leadership. Offending and imprisonment rates, which the *NT AJA* identifies as key Aboriginal justice metrics, had not improved either. By 2017, Aboriginal incarceration in the NT had increased, hospitalisation rates had risen and unemployment was at an all-time high.[140] In addition, the laws had a range of unintended consequences. Drinking occurred in unsafe areas outside of communities like highways, where drinkers were away from family members and risked being hit by vehicles.[141] Community members relocated to urban areas to access alcohol.[142] Further, there were fears that drinkers would substitute alcohol for illicit drugs.[143] It is doubtful when looking back on the *Stronger Futures Act* that the means — which were problematic themselves — achieved either the stated ends or improvements in Aboriginal justice outcomes. The legislative package was evidence of a 'punitive justice model lacking cultural flexibility'[144] and failing to address the root causes of drinking problems.[145] Moreover, the government's failure to empower Aboriginal communities — both in consultations and through

132. Ibid s 24.
133. Ibid s 23.
134. Ibid s 23(2)(c); see generally *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1.
135. *2016 Review of Stronger Futures measures* (n 54) 20–1 [3.8].
136. Errin Walker (n 96) 22.
137. Burlayn and Jamjin, members of the Galbarn community, reported this dwindling of motivation: Peter d'Abbs, Burlayn and Jamjin, 'Aboriginal alcohol policy in Australia: A case study of unintended consequences' [2019] (66) *International Journal of Drug Policy* 9, 12.
138. Bielefeld, 'History Wars and Stronger Futures Laws' (n 10) 18.
139. See *Stronger Futures Act* (n 1).
140. Bielefeld, 'The Intervention, Stronger Futures and Racial Discrimination' (n 73) 160, citing Productivity Commission, *National Indigenous Reform Agreement, Performance Assessment 2013-14* (Report, November 2015) 2, 9.
141. *2016 Review of Stronger Futures measures* (n 54) 27 [3.29].
142. Ibid 27 [3.31].
143. Ibid 27 [3.29]; Errin Walker (n 96) 21.
144. Harry Blagg, Tamara Tulich and Suzie May, 'Aboriginal youth with foetal alcohol spectrum disorder and enmeshment in the Australian justice system: can an intercultural form of restorative justice make a difference?' (2019) 22(2) *Contemporary Justice Review* 105, 105.
145. Peter d'Abbs, 'Problematizing alcohol through the eyes of the other: Alcohol policy and Aboriginal drinking in the Northern Territory, Australia' (2012) 39(3) *Contemporary Drug Problems* 371, 373.

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AMPs — furthered what Manderson describes as a 'crisis of faith'.[146] The disillusionment felt by Aboriginal communities furthered the pessimistic prospects of Indigenous laws and self-determination gaining greater recognition, an issue explored in the following section.

III Realising Interlegality

The previous section argued that the *NTNER* and *Stronger Futures Act* failed to improve Aboriginal justice outcomes due to a persistent failure to understand and respect the wishes of Aboriginal Territorians.[147] This section draws on the jurisprudential theory of interlegality to provide a framework for examining the consequences of this disempowerment.

A *Understanding Interlegality*

De Sousa Santos theorises that, at any given time, social objects are subject to various levels — or scales — of law.[148] Our social actions are regulated by local, national and world legalities, which create different 'legal objects' from the same subject.[149] A Ngarrindjeri Elder, for example, may have different legal rights and obligations in relation to *ruwe*, a Ngarrindjeri understanding of land, compared to the Western appropriation of Native Title.[150] Importantly, these legal systems exist in overlapping and often conflicting relationships, even if they do not acknowledge the existence of each other.[151] This 'interaction and intersection' is known as interlegality.[152] For the purposes of this article, the value of interlegality as a concept is that it legitimises the existence of legal systems that have historically been ignored. The literature on interlegality in the Australian context is nascent; however, academics elsewhere have studied the dialectic between Indigenous legal systems and state law.[153] In the Norwegian context, Svensson notes:

> [E]stablished legal systems of the nation-state are continuously changed by means of the transfer and adoption of legal perceptions of an indigenous people, at the same time as customary activities of the latter are reshaped according to instituted regulations concerning, for instance, their traditional land use patterns, and other customs.[154]

146. Manderson (n 106) 8.
147. See, eg, Nicholson et al, *Listening but not Hearing* (n 89) 5-6.
148. De Sousa Santos (n 39) 287.
149. Ibid.
150. Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 1st ed, 2016) 31. See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 76 (Brennan J).
151. See, eg, Bawaka Country, 'Caring as Country: Singing Up Sovereignties' in Nicole Graham, Margaret Davies and Lee Godden (eds), *The Routledge Handbook of Property, Law and Society* (Taylor and Francis, 2022) 16, 17.
152. De Sousa Santos (n 39) 288.
153. See, eg, André Hoekema, 'The conundrum of cross-cultural understanding in the practice of law' (2017) 49(1) *Journal of Legal Pluralism and Unofficial Law* 67; Nedim Hogic and Imad Antoine Ibrahim, 'Arctic Indigenous Communities and Antarctic Icebergs as Subjects of Inter-Legality' (2021) 57(1) *Stanford Journal of International Law* 105, 109; Dedy Sumardi, Ratno Lukito and Moch Nur Ichwan, 'Legal Pluralism Within The Space of Sharia: Interlegality of Criminal Law Traditions in Aceh, Indonesia' (2021) 5(1) *Samarah* 426, 441.
154. Tom G Svensson, 'Interlegality, a Process for Strengthening Indigenous Peoples' Autonomy: The Case of the Sámi in Norway' (2005) 37(51) *Journal of Legal Pluralism and Unofficial Law* 51, 52.

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A meaningful understanding of interlegality entails the acknowledgement that a singular legal system does not work for a diverse population.[155] Therefore, promoting the Indigenous right to self-determination — and the flourishing of Indigenous legal systems — is congruent with this pluralistic recognition of interlegality. What does this look like in practice? Often, different legal systems are integrated into a single hierarchy of law, which is referred to as 'weak' legal pluralism.[156] To some extent, this integration is necessary to protect the law's capacity to enforce rights and obligations. Otherwise, conflicting rights in different legal systems would be irreconcilable. It would be a mistake, however, to assume that all instances of weak pluralism are equally weak. Granting subordinate legal systems more autonomy — or, better yet, engaging and supporting these systems — heightens their legitimacy. This could be thought of as a 'stronger' weak pluralism. As the next part explores, stronger forms of weak pluralism can support the improvement of Aboriginal justice outcomes.

B *Embracing Interlegality*

Federal government policies that have centralised decision-making for Aboriginal communities have been recognised as eroding the family and social bonds between Aboriginal peoples.[157] Where decision-making power has been conferred on Aboriginal peoples, it has generally occurred within non-Aboriginal models situated within the settler legal system. This was the case with the Aboriginal and Torres Strait Islander Commission ('ATSIC'), which was established in 1990 to enable Aboriginal and Torres Strait Islander peoples to have greater control over matters affecting them. ATSIC's legislative functions, broadly speaking, were threefold: advising governments; advocating on behalf of Indigenous people; and funding and monitoring programmes.[158] However, ATSIC encountered many challenges, including a limited control of its budget; being subject to constant amendment; and suffering attacks on its legitimacy, rendering it an 'inherently unstable organisation'.[159] While ATSIC was ultimately abolished in 2005, Tanganekald Professor Irene Watson argues that it was 'doomed and set up to fail' because it did not properly support Indigenous voices.[160] This phenomenon can be thought of as a weak 'weak pluralism',[161] where the forced assimilation of Indigenous leadership into the settler legal system deters the struggle for greater

155. Craig Proulx, 'Blending Justice: Interlegality and the Incorporation of Aboriginal Justice into the Formal Canadian Justice System' (2005) 37(51) *Journal of Legal Pluralism and Unofficial Law* 79, 83.
156. Kirsty Gover, 'Legal Pluralism and Indigenous Legal Traditions' in Paul Schiff Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (Oxford University Press, 2020) 847, 848.
157. See, eg, Marlene Hodder, Submission No 223 to Senate Standing Committees on Community Affairs, *Inquiry into Stronger Futures in the Northern Territory and Other Related Legislation* (14 March 2012) 1–2; Robert Parker, 'Australia's Aboriginal Population and Mental Health' (2010) 198(1) *Journal of Nervous and Mental Disease* 3, 4, citing Human Rights and Equal Opportunity Commission, *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Report, April 1997). See also Laetitia Lemke, 'Leanne Liddle is on a mission to bring the NT's remote communities back from the brink in 5 years', *ABC News* (online, 16 December 2020) <https://www.abc.net.au/news/2020-12-15/mapping-justice-in-the-northern-territory/12918946?nw=0&r=Gallery>.
158. *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) s 7.
159. Joan Cunningham and Juan I Baeza, 'An "experiment" in Indigenous social policy: the rise and fall of Australia's Aboriginal and Torres Strait Islander Commission (ATISC)' (2005) 33(3) *Policy and Politics* 461, 436, 466-7.
160. Irene Watson, 'Settled and Unsettled Spaces: Are We Free to Roam?' [2005] 1 *Australian Critical Race and Whiteness Studies Association Journal* 40, 45.
161. Cf Parker (n 157) 4. See also Peter Yu, 'The Kimberley: from welfare colonialism to self-determination' (1994) 35(4) *Race and Class* 21, 31.

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recognition of Indigenous legal systems.[162] Weaker forms of pluralism are unsuited for supporting Aboriginal leadership. As observed by Simon Thomas in the Ecuadorian context, formally recognising pluralism animates an ongoing process of contestation and negotiation between local Indigenous authorities and national judiciaries.[163] In some cases, this contestation can choke rather than champion the legal empowerment of Indigenous authorities. This outcome is largely influenced by the settler system's delimitation of an Indigenous legal system's jurisdiction. Members of the 'Progressive No' campaign such as Senator Lidia Thorpe (Gunnai, Gunditjmara and Djab Wurrung) and Leah House (Ngambri) adopted this reasoning in opposing the Voice referendum in favour of stronger measures promoting self-determination.[164]

In response to the announcement of what would become the *Stronger Futures Act*, Yolŋu Elder Djiniyini Gondarra called for a 'diplomatic and respectful dialogue, negotiation and relationship' to characterise future negotiations between settler governments and Aboriginal communities.[165] Crucially, Gondarra noted that this required an acknowledgement of, and proper consultation with, the traditional lawmakers in the affected communities. Supporting these traditional lawmakers, who are 'seen as the true leaders by their communities … charged with maintaining ceremony, language, law and order',[166] recognises the continued existence of Aboriginal legal systems despite their historical neglect.[167] Indeed, there are cogent reasons to do so. Studies suggest that Aboriginal leaders are more likely to comprehend local needs, deliver initiatives in a culturally competent manner and improve community participation in those initiatives.[168] This evinces a connection between interlegality and Aboriginal justice outcomes — enabling Aboriginal legal systems to function more autonomously requires Aboriginal leadership to be engaged and supported, which in turn may improve justice responses and services for Aboriginal Territorians. It is unlikely that this has occurred to date. And while the aftershocks of the unsuccessful Voice referendum may not have been fully felt yet, the result highlighted a 'shameful' opposition to promoting Indigenous self-determination.[169] As Maddison maintains, Aboriginal self-determination of alcohol restrictions has not 'failed' to generate positive outcomes.[170] Rather, '*real* autonomy, *real* self-determination, has

162. Sarah Maddison, 'Indigenous autonomy matters: what's wrong with the Australian government's "intervention" in Aboriginal communities' (2008) 14(1) *Australian Journal of Human Rights* 41, 41.
163. Marc Simon Thomas, 'The Effects of Formal Legal Pluralism on Indigenous Authorities in the Ecuadorian Highlands' (2017) 22(1) *Journal of Latin American and Caribbean Anthropology* 46, 47, 57, 59.
164. Lidia Thorpe, 'It's Time For Us To Mature As A Nation' (Speech, National Press Club of Australia, 16 August 2023) 11-12; Ian Anderson et al, 'Racism and the 2023 Australian constitutional referendum' (2023) 402(10411) *Lancet* 1400, 1401; Jade Toomey, 'Canberra Voice campaigners from both sides rally two weeks out from referendum', *ABC News* (online, 30 September 2023) <https://www.abc.net.au/news/2023-09-30/canberra-voice-no-campaigners-rally-ahead-of-election/102920672>.
165. Djiniyini Gondarra, 'Response to the Prime Minister – Julia Gillard's Announcement of a Second Intervention in the Northern Territory, 26 June 2011' in Scott and Heiss (n 76) 72, 72.
166. Ibid.
167. André Hoekema, 'European Legal Encounters between Minority and Majority Cultures: Cases of Interlegality' (2005) 37(51) *Journal of Legal Pluralism and Unofficial Law* 1, 11. This point is also made by the late Rosalie Kunoth-Monks, who challenged the Australian Government 'to *realise* and admit—and not go into denial—that the lands belong to us [Indigenous persons]': Rosalie Kunoth-Monks, 'Reflections on the Intervention: Quotes Made between 2011 and 2014' in Scott and Heiss (n 76) 14, 24 (emphasis added).
168. *NT AJA* (n 29) 17, citing *Royal Commission and Board Inquiry into the Detention and Protection of Children in the Northern Territory 2017* (Final Report, November 2017) vol 1, 248.
169. 'Open letter: A statement for our First Nations People and our Country' (n 40); Stephen Charles and Lucy Hamilton, 'The Voice and Australia's democracy crisis' (2024) 83(1) *Meanjin* 200, 202.
170. Maddison (n 162) 55.

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never been tried in Australia'.[171] Even where Indigenous communities had formulated AMPs pursuant to the *Stronger Futures Act*, the approval and implementation process went astray in a bureaucratic labyrinth. The Intervention Rollback Action Group, pointing to coordination errors between the NT and federal governments, viewed the AMP process as a waste of time, effort and money.[172] In some cases, the approval process took as long as 2 years, weakening the community mobilisation that had supported the AMPs.[173] The Tangentyere Council identified politics and the electoral cycle as two barriers to developing sustainable approaches that meaningfully engaged with Aboriginal perspectives and addressed alcohol-related harm.[174] The administrative responsibility for developing AMPs shifted between various government departments with inconsistent understandings of what these responsibilities entailed. Throughout this process, there were changes in leadership at the federal and territory levels. Amidst this flux, the Tangentyere Council reported that 'the only constant has been the lack of AMPs in the Northern Territory'.[175] Thus, Aboriginal self-determination was stifled within the settler system's procedures and its various revisions. Limited autonomy, prescribed by the settler legal system to assert its primacy, hampered the development of justice responses and services for Aboriginal Territorians. The following section considers what real autonomy and self-determination could look like in the context of the NT's liquor laws.

IV 2022–3: Where to from Here?

Since the sunsetting of the *Stronger Futures Act* on 16 July 2022, alcohol policies have been subject to multiple changes. The NT Parliament passed the *Associations and Liquor Amendment Act* in May 2022,[176] which contained a range of interim measures to replace the *Stronger Futures Act* on 16 July 2022.[177] These measures affected the communities previously known as APAs under the *Stronger Futures Act*,[178] while existing alcohol restrictions remained in communities classified by the NT government as 'general restricted areas' ('GRAs').[179] Chansey Paech (Eastern Arrernte, Gurindji), the NT Attorney-General, stated that the changes would 'clean up the mess' of previous federal government policies.[180] They did not. A report by the Office of the Central Australia Regional Controller recommended urgent amendments to the *Liquor Act* to reduce alcohol-related harm and

171. Ibid (emphasis in original).
172. House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities* (Final Report, June 2015) 49, citing Intervention Rollback Action Group, Submission No 57 to House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities* (17 April 2014) 4.
173. Ibid (citations omitted).
174. Tangentyere Council Inc, Submission No 95 to House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities* (1 May 2014) 16. See also Shelley Bielefeld, 'Government mythology on income management, alcohol, addiction and Indigenous communities' (2018) 38(4) *Critical Social Policy* 749, 760.
175. Submission No 95 to House of Representatives Standing Committee on Indigenous Affairs (n 174) 16.
176. *Associations and Liquor Amendment Act 2022* (NT) ('*Associations and Liquor Amendment Act*').
177. Ibid s 2, pt 3.
178. *Liquor Act* (n 13) s 170.
179. Ibid pt 8 div 3. As of 8 August 2023, there are 344 interim APAs and 412 GRAs: see the lists contained on 'Changes to alcohol restrictions in NT communities', *Northern Territory Government* (Web Page, 8 August 2023) <https://nt.gov.au/law/alcohol/bans-and-dry-areas/changes-to-alcohol-restrictions-in-nt-communities>.
180. Jesse Thompson, 'NT government passes liquor laws to replace Commonwealth Intervention-era alcohol bans in remote communities', *ABC News* (online, 18 May 2022) <https://www.abc.net.au/news/2022-05-18/nt-remote-intervention-alcohol-laws-passed-territory-parliament/101077440>.

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bolster community-led alcohol policies.[181] Consequently, another amendment to the *Liquor Act* followed in February 2023, establishing the current policies that are set to expire in 2027.[182] This section examines these amendments chronologically, referring to them as the *2022 Amendment* and *2023 Amendment*, respectively. It argues that the similarities between the *Stronger Futures Act* and the *2022 Amendment* foreseeably posed challenges to embracing interlegality and thereby improving Aboriginal justice outcomes. Then, it concludes by considering whether and to what extent the *2023 Amendment* is an improvement on this position.

A *The 2022 Amendment*

Under the *2022 Amendment*, communities that were not GRAs were given the option between 16 July 2022 and 31 January 2023 to opt-in to remaining dry, becoming 'interim APAs' for up to 2 years.[183] The NT government intended to consult communities during this interim period about their long-term alcohol aspirations.[184] Much like the federal government's implementation of the *Stronger Futures Act*, the NT government was criticised for its failure to undertake adequate consultations *prior* to the *2022 Amendment*.[185] In addition to the (twice-ignored) issues explored in Section II, this decision had the potential to limit improvements in Aboriginal justice outcomes in two ways.

First, there was an expected increase in Aboriginal offending (Outcome 1), coupled with an absence of culturally sensitive justice responses (Outcome 3). In communities that neither opted-in to becoming interim APAs nor were GRAs, it was no longer an offence to possess or consume alcohol.[186] Meanwhile, bringing liquor into, possessing liquor within, consuming liquor within or selling liquor within interim APAs remained an offence.[187] The maximum penalty was double that of the *Stronger Futures Act*: 200 penalty units or 12 months' imprisonment.[188] In anticipation of a foreseeable rise in alcohol-related issues, the NT government vaguely promised 'extra support' to communities that did not opt-in.[189] Without clear indication of what this support would actually look like, there were legitimate concerns that the main 'justice' response would be additional policing services. Deploying more officers could lead to more arrests for low-level offences, along with more police violence and protests,[190] all of which risked increasing rates of Aboriginal

181. Office of Central Australian Regional Controller, *Proposed Actions for Alcohol Related Harm in Central Australian Communities* (Report, 7 February 2023) 14 ('*OCARC Report*').
182. *Liquor Act* (n 13) s 170D.
183. Ibid s 170A(2), (14), as at 17 July 2022.
184. Explanatory Statement, Associations and Liquor Amendment Bill 2022 (NT) 1.
185. See, eg, Samantha Jonscher and Stewart Brash, 'NT Police, health bodies concerned about "hasty" return of alcohol to remote communities', *ABC News* (online, 22 April 2022) <https://www.abc.net.au/news/2022-04-22/nt-intervention-alcohol-bans-territory-police-amsant/101007954>.
186. *Liquor Act* (n 13) s 170A, as at 17 July 2022.
187. Ibid s 170B(1), as at 17 July 2022.
188. Ibid; cf *Stronger Futures Act* (n 1) s 8.
189. Spencer and Lockyer (n 13).
190. An increased police presence may also fuel negative sentiments against the police. This can increase the likelihood of 'trifecta arrests', where (1) an initial apprehension for offensive language (*Summary Offences Act 1923* (NT) s 47) generates further conflict, resulting in (2) resisting arrest (*Criminal Code Act 1983* (NT) s 121); and (3) assaulting police (*Criminal Code Act 1983* (NT) s 103A). See, eg, Christine Feerick, 'Policing Indigenous Australians: Arrest as a method of oppression' (2004) 29(4) *Alternate Law Journal* 188, 188.

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offending and imprisonment.[191] While the *OCARC Report* did not find a 'substantial sustained increase in alcohol-related harm' in the five months following the sunsetting of the *Stronger Futures Act*, it reported an increase in such harm from November 2022 onward.[192] This included a rise in alcohol-related assaults, record-high levels of property offences in Alice Springs, as well as concerns that the severity of harm being inflicted on Aboriginal women in domestic violence incidents and alcohol consumption rates were both increasing.[193]

The second failing of the *2022 Amendment* in respect of Aboriginal justice outcomes was that the little Aboriginal leadership that had been engaged did not appear to be supported. The NT government's consultations with communities appear to have been limited to a period between December 2021 and January 2022: a period — as the NT government noted — where COVID-19 restrictions hamstrung consultations in remote areas.[194] Without adequate prior consultation, the *2022 Amendment* foisted the aftermath of the *Stronger Futures Act* on Aboriginal communities. Aboriginal opinions were divided over whether this was appropriate.[195] Jaru woman and health worker, Marianne Skeen, welcomed the possibility of her community choosing whether to remain dry.[196] Contrastingly, East Arnhem Regional Council CEO, Dale Keehne, said more consultation was required.[197] Keehne's view is supported by the troubled legacy of NT alcohol regulations that have failed to properly consider local input. The Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs viewed the NT and Commonwealth government policies following the *Stronger Futures Act* as insufficiently informed or prepared.[198] The opt-in feature of the *2022 Amendment* reflected this. The nudge towards allowing alcohol back into communities,[199]

191. Spencer and Lockyer (n 13), citing Saskia Mabin, Justin Fenwick and Stewart Brash, 'NT Police Association concerned about impending end to alcohol restrictions in remote communities', *ABC News* (online, 11 April 2022) <https://www.abc.net.au/news/2022-04-11/alcohol-bans-remote-communities-lifting-nt-police-concerned/100981856>.
192. *OCARC Report* (n 181) 9-10.
193. Ibid 10–2. The crime statistics are controversial because they rely on the individual discretion of the reporting police officers. This has potentially led to the inclusion of incidents where the victim was intoxicated, but the perpetrator was not: Chay Brown et al, 'Here's some context missing from the Mparntwe Alice Springs "crime wave" reporting', *The Conversation* (online, 10 February 2023) <https://theconversation.com/heres-some-context-missing-from-the-mparntwe-alice-springs-crime-wave-reporting-199481>.
194. Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into community safety support services and job opportunities in the Northern Territory* (Final Report, February 2023) 15.
195. See, eg, Lee Robinson and Matt Garrick, 'Return of NT alcohol bans welcomed by some remote residents, with others bitterly disappointed', *ABC News* (online, 7 February 2023) <https://www.abc.net.au/news/2023-02-07/nt-alice-alcohol-ban-welcomed-by-some-others-disappointed/101941798>.
196. Lucy Murray, '"You can't keep treating us like kids": The end of alcohol bans in remote NT communities welcomed', *SBS News* (online, 17 July 2022) <https://www.sbs.com.au/news/article/you-cant-keep-treating-us-like-kids-the-end-of-alcohol-bans-in-remote-nt-communities-welcomed/drqv50wcu>.
197. Matt Garrick, 'Northern Territory Intervention-era alcohol bans are set to expire after 15 years', *ABC News* (online, 7 April 2022) <https://www.abc.net.au/news/2022-04-07/nt-aboriginal-communities-alcohol-restrictions-could-be-lifted/100967520>.
198. *Inquiry into community safety support services and job opportunities in the Northern Territory* (n 194) 16.
199. Cass R Sunstein, 'The Ethics of Nudging' (2015) 32(2) *Yale Journal on Regulation* 413, 450; T M Wilkinson, 'Nudging and Manipulation' (2013) 61(2) *Political Studies* 341, 341, citing Richard Thaler and Cass Sunstein, *Nudge* (Yale University Press, 2008) 3.

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rather than requiring an opting-out of remaining dry, suggested that insufficient consultation was undertaken with stakeholders like women's groups[200] and youth groups.[201] The Central Australian Aboriginal Congress, who report to have not been consulted, later stated that an opt-out system would have 'provided a stronger transitionary arrangement' that would enable consultation and community-led solutions.[202]

By 31 January 2023, over 700 consultations with affected communities had taken place, with 13 former APAs opting to become interim APAs.[203] But it was clear that the *2022 Amendment* had neither improved Aboriginal health nor justice outcomes.[204] Like the *NTNER* and *Stronger Futures Act*, there was inadequate Aboriginal input in the design and implementation of these laws. This demonstrated, in the Northern Land Council's view, that '[r]emoving restrictions without appropriate consultation is as bad as imposing restrictions without any consultation'.[205] New solutions were proposed: the NT government re-amended the *Liquor Act* — reversing some of the changes under the *2022 Amendment* — and the Commonwealth government pledged $250 million towards a plan for 'A Better, Safer Future for Central Australia'. The following part considers these changes and whether they are likely to improve Aboriginal justice outcomes.

B *The 2023 Amendment*

Following the *OCARC Report*, amendments were made to the *Liquor Act* that came into force on 16 February 2023.[206] Most importantly, the changes made under the *2022 Amendment* were replaced by an opt-out model. All communities that were formerly APAs under the *Stronger Futures Act* became 'interim APAs', where the possession, sale and consumption of alcohol were again prohibited.[207] From 16 February 2023 until 28 February 2027,[208] communities can stop being interim APAs by applying to have their interim APA status revoked by the Director of Liquor Licensing or by applying to become a GRA by the Liquor Commission. In the case of the former, this requires a community alcohol plan that must meet the *Liquor Act*'s requirements, including the Director of Liquor Licensing's approval and the support of at least 60 per cent of adult members in the community.[209] Meanwhile, becoming a GRA requires the successful approval of an application under section 174 of the *Liquor Act*. GRA status — which means either a total alcohol ban or, upon attaining a liquor permit, allowing alcohol under certain conditions — is intended to remain in place after the *2023 Amendment* expires in 2027.[210]

Primarily, the above changes limit the supply of alcohol in interim APAs. The *OCARC Report* anticipated that this would 'undoubtedly reduce alcohol related offending and harm, at least in the

200. *Inquiry into community safety support services and job opportunities in the Northern Territory* (n 194) 16. See, eg, Stephanie Zillman, 'Calls to extend alcohol sale ban to Aboriginal people at remote roadhouses in central Australia', *ABC News* (online, 26 May 2017) <https://www.abc.net.au/news/2017-05-26/calls-to-extend-alcohol-ban-in-central-australia/8561694>.
201. Tom Zaunmayr, 'A relic of NT Intervention is being lifted, but peak Aboriginal groups are furious', *National Indigenous Times* (online, 19 May 2022) <https://www.nit.com.au/a-relic-of-nt-intervention-is-being-lifted-but-peak-aboriginal-groups-are-furious/>.
202. *Inquiry into community safety support services and job opportunities in the Northern Territory* (n 194) 15.
203. *OCARC Report* (n 181) 6.
204. Ibid 12.
205. *Inquiry into community safety support services and job opportunities in the Northern Territory* (n 194) 23.
206. *Liquor Amendment Act 2023* (NT).
207. *Liquor Act* (n 13) s 170. Cf *Liquor Act* s 170, as at 17 July 2022.
208. Ibid s 170D(1).
209. Ibid s 170AB(2)–(6).
210. 'Changes to alcohol restrictions in NT communities' (n 179).

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immediate term'.[211] Supply-side restrictions were the dominant feature of liquor laws under the *NTNER* and *Stronger Futures Act*, with the federal government providing 'little investment in harm reduction or demand'.[212] As this article has argued, it is doubtful that either of these laws improved Aboriginal health outcomes, let alone justice outcomes. But the *2023 Amendment* is also supplemented by a $250 million commitment by the federal government to improve, among other things: community safety and cohesion; health services; and on country learning. This spending package does not include the $48.8 million that the federal government pledged in January 2023, which will increase investment in domestic violence services and other justice initiatives.[213] The following part evaluates the likely affect that these policies will have on Aboriginal justice and health outcomes.

1 *Improving the* 2023 Amendment. If several key issues are addressed, these changes have the potential to improve *both* health and justice outcomes. The potential to improve these outcomes relies on the provision of two key resources: money and time. Whether this potential is realised depends on how effectively these resources are used. Unlike the previously discussed liquor laws, the new funding looks beyond supply-side restrictions to a significant extent, committing up to $100 million for housing services and $19 million for Aboriginal health infrastructure projects.[214] The $250 million investment package also includes $10 million for justice reinvestment initiatives, designed to enable Aboriginal communities to identify best practices to 'reduce contact with the criminal justice system' (Outcome 1) and empower communities to determine policies that affect their lives (Outcomes 2-3).[215] Such funding is crucial. The *OCARC Report* identified supply-side measures as a necessary but insufficient condition for addressing the underlying causes of poor health and justice outcomes.[216] Donna Ah Chee, a Bundjalung woman and CEO of the Central Australian Aboriginal Congress, similarly emphasises the importance of a multi-dimensional approach to liquor laws. Acknowledging the need for alcohol restrictions, Ah Chee stresses that they must be coupled with funding to address the structural causes of alcohol abuse, and Aboriginal community-controlled input in negotiations concerning the allocation of this funding.[217]

It is clear that the *2023 Amendment*'s measures and additional funding are intended to improve both health and justice outcomes. But whether they actually will is another question. Comprehensive consultations *must* be undertaken across the NT during the interim APA period, engaging Aboriginal communities in a manner that previous consultations have failed to do. Natasha Fyles, the former Chief Minister of the NT, has branded the *2023 Amendment* as a change that 'provides a

211. *OCARC Report* (n 181) 14.
212. *Inquiry into community safety support services and job opportunities in the Northern Territory* (n 194) 18, 30.
213. Prime Minister and Chief Minister of the Northern Territory, 'A Better, Safer Future for Central Australia' (Media Release, 6 February 2023) <https://www.pm.gov.au/media/better-safer-future-central-australia>.
214. Linda Burney, 'Community-led response to improve community safety in Alice Springs' (Media Release, Department of the Prime Minister and Cabinet, 24 January 2023) <https://ministers.pmc.gov.au/burney/2023/community-led-response-improve-community-safety-alice-springs>.
215. Malarndirri McCarthy, 'New investment to support a better, safer future for Central Australia' (Media Release, Department of the Prime Minister and Cabinet, 9 May 2023) <https://ministers.pmc.gov.au/mccarthy/2023/new-investment-support-better-safer-future-central-australia>.
216. *OCARC Report* (n 181) 4.
217. Lorena Allam, '"We have to come together": alcohol bans alone won't fix Alice Springs' problems', *The Guardian* (online, 3 February 2023) <https://www.theguardian.com/australia-news/2023/feb/04/we-have-to-come-together-alcohol-bans-alone-wont-fix-alice-springs-problems>.

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pathway … [for] community voice[s] to be heard'.[218] In a similar vein, Linda Burney (Wiradjuri), the Minister for Indigenous Australians, hailed the federal government funding as delivering 'circuit-breaker measures [that] will improve community safety on the ground in Alice Springs'.[219] For these claims to hold true, the NT government must smoothly facilitate the implementation of the new measures. Indeed, one issue that the transition away from the *Stronger Futures Act* faced was a coordination failure between — and within — the NT and federal governments.[220] The Association of Alcohol and other Drug Agencies NT note that this failure had negative flow-on consequences, including a lack of structured engagement with key stakeholders; untimely and inaccessible information regarding the proposed changes; and a failure to prepare communities to enact localised solutions.[221] It is imperative that the NT government co-designs a strategy with local communities to engage and support Aboriginal leadership throughout and beyond the interim APA period. Unlike the previously discussed laws, subsequent liquor laws must obtain the free, prior and informed consent of these affected communities.

Another potential issue is whether the current amount or distribution of funding is appropriate. As mentioned above, there are over 300 interim APAs across the NT. The opt-out model under the *2023 Amendment* relies on each interim APA to decide to remain dry or submit a community alcohol plan to permit the consumption, possession and sale of alcohol. This coheres with both Aboriginal justice outcomes and the PJCHR's endorsement of transitioning away from 'blanket restrictions to locally developed AMPs'.[222] In addition to supporting the development and implementation of community alcohol plans, improving Aboriginal justice outcomes requires adequate resourcing for each community to explore and facilitate community-led diversionary activities; cultural rehabilitation programming; and alternate custody and sentencing options.[223] In the ongoing negotiation of intersecting legal systems in the NT, these measures represent a widening of the jurisdiction of Aboriginal authorities. However, the cost of designing and implementing these services across the hundreds of interim APAs may exceed the current allocation for justice reinvestment. Fortunately, a solution has been built into the $250 million package for Central Australia. With nearly $95 million in uncommitted funds, the federal government intends to direct this money to areas in need based on the input of remote communities and Alice Springs.[224]

The activities and options designed by Aboriginal communities, like the community alcohol plans, would currently source their authority from instruments within the settler legal system.[225] On one hand, this could increase the recognition of interlegality within Australia, improving Aboriginal justice (Outcome 3) through the locally designed justice responses. However, the legislation of local laws poses an intrinsic threat to Aboriginal leadership (Outcome 2) by forcing communities to

218. Jacqueline Breen, 'Laws reinstating alcohol bans in town camps, Aboriginal remote communities pass Northern Territory parliament', *ABC News* (online, 14 February 2023) <https://www.abc.net.au/news/2023-02-14/nt-alcohol-ban-laws-pass-parliament-amid-alice-springs-uproar/101973816>.

219. Burney (n 214).

220. Association of Alcohol & other Drug Agencies NT, Submission No 5 to Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into community safety support services and job opportunities in the Northern Territory* (1 December 2022) 2.

221. Ibid.

222. *2016 Review of Stronger Futures measures* (n 54) 35.

223. West Arnhem Land and Maningrida Community Stakeholders, Submission No 26 to Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into community safety support services and job opportunities in the Northern Territory* (2023) 7-8.

224. Lara Stimpson, Charmayne Allison and Stewart Brash, 'How the $250m promised for Central Australia will be spent', *ABC News* (online, 11 May 2023) <https://www.abc.net.au/news/2023-05-11/federal-funding-package-for-central-australia-explained/102326322>.

225. *Wik Peoples v Queensland* (1996) 187 CLR 1, 237-8 (Kirby J), citing *Mabo v Queensland (No 2)* (n 150) 59, 61 (Brennan J).

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follow written, bureaucratic procedures of administering laws.[226] Where these Aboriginal justice outcomes collide, it may be necessary to review the existent measures that may stifle Aboriginal leadership. One such measure is the discretionary power of the Director of Liquor Licensing to approve or reject community alcohol plans, which is reminiscent of the Ministerial override power under the *Stronger Futures Act*. As the delays in AMP approvals under the *Stronger Futures Act* demonstrated, a time limit on the review process can lubricate the bureaucratic process and prevent a dampening of community momentum and goodwill.[227] Therefore, the *2023 Amendment* must be supported by a genuine consultation process and significant investment into locally identified health and justice initiatives to avoid the failings of the previously discussed liquor laws in respect of Aboriginal justice outcomes.

V Conclusion

'It's complex' is an ineffable refrain often heard in discussions about the NT's alcohol policies.[228] Indeed, it is complex. This article has identified the failings of the *NTNER* and the *Stronger Futures Act* in respect of the *NT AJA*'s three Aboriginal justice outcomes: (i) reducing the offending and imprisonment of Aboriginal Territorians; (ii) engaging and supporting Aboriginal leadership; and (iii) improving justice responses and services for Aboriginal Territorians. It then argued that the NT government's new liquor laws will not improve these outcomes unless Aboriginal leadership is engaged and supported through the 2023–7 interim APA process. This must be emphasised because, at the time of writing, there is no clear plan to engage and support Aboriginal leadership in interim APAs. A renewed commitment to obtaining the free, prior and informed consent of Aboriginal Territorians is a necessary first step in rebuilding bonds of trust that have been frayed by insufficient previous consultations. And this leadership is *necessary* for formulating intercultural, interlegal justice services that are driven by Aboriginal communities and tailored to local needs. Section III described this as a stronger 'weak pluralism'. The acknowledgement that consultations must be comprehensive and obtain the free, prior and informed consent of affected Aboriginal communities is regrettably far from novel. To internalise this acknowledgement, policymakers must understand the shortcomings of the consultative processes in the *NTNER* and *Stronger Futures Act*. This article's contribution, accordingly, is to underscore the repeated issues of recent liquor laws in the NT, analysed through one contemporary understanding of Aboriginal justice outcomes. Starting this examination at the *NTNER*, this article has demonstrated that the need for comprehensive consultations has been recognised yet unrealised since the *Little Children Are Sacred Report*. These consultations are not an end in themselves. Rather, policymakers must *listen* to Aboriginal voices, enabling local expertise to influence and inform liquor laws. In acknowledging the federal government's 'insufficient and inadequate'[229] earlier attempts to empower Aboriginal leadership, new policies can finally harness the strength of Aboriginal communities to improve both health and justice outcomes.

ORCID iD

Joseph Negrine https://orcid.org/0000-0001-7771-3621

226. Hoekema, 'European Legal Encounters between Minority and Majority Cultures' (n 167) 8. See above Section III(B).
227. *Inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities* (n 172) 55-6.
228. Buckley (n 19) 20; Peter d'Abbs, Submission to Northern Territory Government, *Alcohol Policies and Legislation Review* (June 2017) 1-2, 22; Elizabeth Adamson et al, 'Industry views about the Banned Drinker Register in the Northern Territory: Early lessons from a qualitative evaluation' (2021) 40(2) *Drug and Alcohol Review* 210, 215.
229. As said by Senator Lidia Thorpe in reference to the consultations preceding the transition away from the *Stronger Futures Act*: *Inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities* (n 172) 67.

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