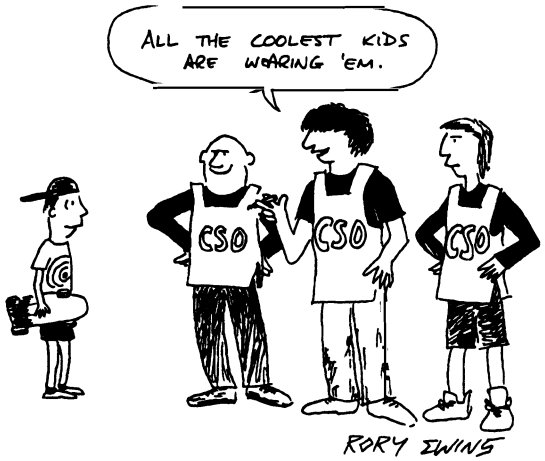
ONE STRIKE AND YOU'RE OUT!

Martin Flynn

Mandatory imprisonment and chain gangs — coming to a jurisdiction near you.



The politicisation of sentencing law reform reached new heights in the Northern Territory (NT), in November 1996, when the NT Parliament passed legislation providing for mandatory imprisonment for first-time property offenders and creating a novel sentencing option called a 'punitive work order'. The legislation is the *Sentencing Amendment Act (No. 2) 1996* (NT) and *Juvenile Justice Amendment Act (No. 2) 1996* (NT) (together referred to as the Amendments). This article details the content of the Amendments, outlines the policy arguments concerning mandatory sentencing and punitive work orders and considers legal arguments over the validity of legislation imposing mandatory imprisonment.

Punishment is popular

On 20 August 1996 the Attorney-General of the NT, Denis Bourke delivered a Ministerial Statement to the NT Legislative Assembly on 'The Criminal Justice System and Victims of Crime' while introducing the Amendments. The statement is a good example of the political rhetoric emerging in many jurisdictions. It commences with a proud listing of the Government's recent achievements including the highest numbers of police per capita in Australia, the passage of tough 'truth in sentencing' laws, the reversal of the presumption in favour of bail in relation to some offences and the creation of new street offences. It continues:

> [T]he first principle of law and order is Territorians have the right to be protected from those who would do them harm. And the second principle is: if you choose to abuse the first principle you will pay the price... It seems to me that the emphasis in justice matters has for too long concentrated on the rights of the offender, the criminal, the person who has said: *to hell with your laws, to hell with your rights, to hell with you, i want and i am going to have whether you like it or not* [sic]. This government says that if that is their attitude then we say to hell with them... It is a fundamental belief of the Judaic-Christian ethic that provides the moral foundations of western society that those who offend society should be punished. It is a fundamental belief in Aboriginal culture that those who offend should be punished... But in the laudable moves to include rehabilitation as part of any state treatment of offenders, we seem to have moved too far and lost the notion of punishment altogether... I believe it is the rightful role of the parliament to reflect the concerns of the community. And who doubts that Territorians want harsher penalties for those who continue to abuse the rights of others?

The novel element of the statement is the fact that it does not emphasise the need for proportionality as a justification for the proposed sentencing laws. Rather, the Government relies on a 'community mandate' for retribution to enthusiastically deliver a punitive blow to offenders. The Amendments were passed by the NT Parliament within three months of the making of the Ministerial Statement. The Amendments have been assented to by the Administrator and will commence on a date to be determined by the Government. The Attorney-General

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has publicly stated that he hopes that the law will commence by mid-1997.

Mandatory imprisonment

Mandatory imprisonment is not unknown in Australia. Some jurisdictions provide for mandatory imprisonment for murder or for very serious drug offences. The significance of the Amendments is that they apply to a large number of very common offences. The Amendments provide for mandatory imprisonment terms for adults (17 years and over) found guilty of a nominated property offence as follows: first offence — 14 days; second offence — 90 days; third and subsequent offence — 12 months. There is also a mandatory 28-day detention period for 15 and 16 year olds found guilty of a second and subsequent nominated property offence. The 'nominated' property offences are commonplace offences and include criminal damage, stealing, unlawful entry of a building and unlawful use of a motor vehicle. Shop-lifting is excluded from the nominated list.

Punitive work order

The Amendments also create a 'punitive work order' as an additional sentencing option for all offenders aged 15 and over convicted of nominated property offences. In the Ministerial Statement (noted above) the punitive work order was described as follows:

> This will be over and above the Community Service Order that already exists. The punitive work order will be hard work; it will be for the benefit of the community and most importantly it will be public. Those serving a punitive work order will be obvious to the rest of the community. They will identifiable as PWOs either by wearing a special uniform or some other label. This is not some Territory form of chain gang but it is meant to be a punishment that shames the guilty person.

Curiously, the offences nominated for punitive work orders are the same as those to which the mandatory sentencing regime applies. As a result, apart from first offending 15 and 16 year olds (who are not subject to mandatory imprisonment), a punitive work order will not be made unless the court considers an offender should receive both the mandatory prison term and a punitive work order. The result is that, apart from first offending 15 and 16 year olds, a punitive work order is unlikely ever to be made.

What is wrong with public humiliation of offenders?

On 17 January 1997, the Minister for Correctional Services stated in a Media Release that 'Offenders ordered to perform Community Service Orders will be required to wear distinctive orange vests from January 31... the Government is committed to increasing the visibility of Community Service Order programs being performed in the community'. The orange vests resemble a large netball bib and have the words 'Community Service Order' emblazoned on the front and back. The Community Service Order (CSO) proposal appeared to render community service orders indistinguishable from the proposed punitive work order. The apparent confusion cannot be solved by an exercise in statutory interpretation. The expression 'punitive work order' is not defined in the Amendments other than to state that it is a project nominated by the executive. The CSO proposal was implemented by way of an administrative direction which was not made public.

The policy flaw in the punitive work order (and the CSO proposal) was explained by Associate Professor Bill Tyler of the Centre for Social Research at Northern Territory University, in a letter to editor published in the *NT News* in November 1996:

> The Minister hopes that this kind of punishment will act as a 'warning and deterrent', because it is so harsh and publicly degrading. He is quite wrong. This measure is far more likely to increase crime rather than reduce it. The New Zealand experience with young Maori people has shown that successful shaming depends on face-to-face confrontation between the offender and victim, preferably in a family or group conference situation. This method has been shown to be more likely to lead to the re-integration of the offender back into the community. The punitive work order (PWO) regime, however, will do just the opposite, by isolating, degrading and stigmatising the offender. Public punishment destroys the self-esteem needed for successful re-integration into conforming society... Those who will undergo the stigmatising experience of the proposed PWO system will be far more likely to form a criminal youth subculture for status and social support rather than turn to the traditional elders. Any potential for successful and positive shaming through community, family and peer group will have been cancelled. This scheme will almost certainly create an expanding core of 'hard cases' whose public degradation will guarantee immediate entry to the marginalised offender 'in-group'.

There is also a legal difficulty with the CSO proposal. The Minister proposes to direct probation officers to report to court that an offender is considered unsuitable for CSO unless the offender consents to wearing the orange vest. The relevant provision of the *Sentencing Act 1995* (NT) states: 'A court shall not make a community service order unless it ... is satisfied, after considering a report from a probation officer about the offender ... that the offender is a suitable person to participate in the...[CSO]' (s.35). A close reading of the provision quoted reveals that the Minister's direction does not guarantee the result desired by the Minister. The Court must form its own opinion as to the suitability of the person and is free to disregard the views of the probation officer.

What is wrong with mandatory imprisonment?

Punishment and proportionality are already part of the common law

It is a fundamental principle of the common law that a sentence be proportionate to the circumstances of the particular offence: *Veen v The Queen* (1979) 143 CLR 458. The impact of the offences on the victim of the offence is a relevant circumstance in considering proportionality: *R v Webb* [1971] VR 147 at 151. The common law demands that retribution be accorded priority in formulating the sentence where the circumstances of the offence require retribution: *R v Williscroft* [1975] VR 292 at 300. The significant advantage of an unfettered judicial discretion is that a sentence is able to be formulated having regard to these and other relevant and sometimes competing objectives.

Three criticisms of mandatory imprisonment

There are three fundamental criticisms of any mandatory imprisonment regime including the one created by the Amendments.

First, many of the claims made to justify the need to 'get tough' cannot be substantiated. Crime is not out of control. An examination of police statistics reveals that between 1995 and 1996 there was actually a *decrease* in the absolute number of reported property offences that occurred in Dar-

win. Judges are accountable — at least to the extent that reasons for each sentence must be given and an appeal court may increase a sentence that is manifestly inadequate.

Second, many of the claimed advantages of mandatory imprisonment are illusory. In particular there is no evidence that mandatory imprisonment legislation acts as either a general deterrence to offending or a specific deterrence to offenders subject to mandatory imprisonment: see for example, Richard Harding (ed.) *Repeat Juvenile Offenders: the Failure of Selective Incapacitation in Western Australia,* Crime Research Centre, Perth, 2nd edn, 1993.

Third, in providing for mandatory detention of 15 and 16 year olds the Amendments give rise to a violation of those Articles of the Convention on the Rights of the Child that cast an obligation on Australia to ensure that, in criminal proceedings, detention is used only as a measure of last resort and for the shortest appropriate period of time (Article 37), that a court be free to take account of age and the desirability of promoting rehabilitation (Article 40(1)) and that a court have open to it a variety of sentencing dispositions to ensure that children are dealt with in a manner appropriate to their wellbeing and proportionate both to their circumstances and the offence (Article 40(4)).

It may be conceded that at a literal level mandatory sentencing delivers proportionality between offences and the sentence served. There can be no complaint of disparity by offenders, victims or the public. Further, for those in the community to whom retribution is important, there is the satisfaction of knowing that this element will never be overlooked. However, the disadvantages of mandatory sentencing set out below outweigh these advantages.

Prisons will overflow

The NT imprisonment rate, expressed as the number of prisoners per 100,000 of the population, was 360.5 at 30 June 1993. The imprisonment rate for other jurisdictions was NSW: 160; Vic: 67; Qld: 89; WA: 163; SA: 103.7; Tas: 75.7; ACT: 6.8. The NT rate of detention for children aged 10-17, expressed as the number of detainees per 100,000 of the relevant population, was 35.8 at 31 March 1994. The rate for detention of children in other jurisdictions was NSW: 38.4; Vic: 11.9; Qld: 12.2; WA: 28.1; SA: 24.1; Tas: 16.4; ACT: 24.6. The NT imprisonment rate for adults and children, Australia's highest by far with the single exception of children detained in NSW, will increase dramatically as a result of the Amendments.

The government will be required to allocate the funds necessary to house prisoners and juvenile detainees

The most recently available figures of the NT Department of Correctional Services suggests that it will cost $12,432 to accommodate each juvenile sentenced to the mandatory 28-day period of detention.

The government will have to build new prisons

The current population of the Darwin prison exceeds its design capacity to the extent that prison management has recently commenced a system of involuntary transferring of prisoners, including Aboriginal prisoners, to Alice Springs prison. The involuntary transfer of an Aboriginal prisoner with family or cultural links to the 'top end' contradicts the recommendations of the Royal Commission into Aboriginal Deaths in Custody (Nos 168-171) concerning the placement of Aboriginal prisoners and the need to have regard to kinship obligations of prisoners. Moreover, it may amount to a violation of Article 27 of the International Covenant on Civil and Political Rights which casts an obligation on the state not to deny the right of indigenous peoples to enjoy their own culture. This violation raises the spectre of an application for judicial review of the decision to transfer based on the principles in *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353.

Even more Aboriginal people will be imprisoned

The NT ratio of Aboriginal over-representation in prison is 10.8 (at 30 June 1993) and the ratio of Aboriginal over-representation in juvenile detention centres is 2.7 (at 31 March 1994). The offences to which the Amendments apply dominate the court lists of remote Aboriginal communities. A typical pattern of offending for a young Aboriginal man in a remote community is to commit a large number of property offences over a period of one to five years and then to cease offending. The effect of the Amendments will be that this offender will spend this entire period in prison. Over a short period a generation of young Aboriginal men will be transported from court sittings in their communities to prison. The Amendments flatly contradict the spirit and letter of the conclusion of the Royal Commission into Aboriginal Deaths in Custody that imprisonment should be a sanction of last resort (see Recommendations Nos 92-121). Further, assuming the availability of relevant statistical data, it may be possible to argue that the Amendments are contrary to the provisions of the *Racial Discrimination Act 1975* (Cth) concerning indirect discrimination.

Administration of criminal justice system will be distorted

A shift in power from the judge to the prosecutor

A police officer who discovers a young person writing on a bus seat must decide whether to warn the person or to charge him/her with the offence of criminal damage. The officer will know that, if convicted of criminal damage, the young person will be imprisoned. There will be an appreciable shift in power from the judiciary to the executive. There are disadvantages of such a transfer of power. In contrast to the exercise of judicial power, the prosecutor's discretion is exercised in private and, generally, is not capable of judicial review: *Maxwell v The Queen* (1996) 184 CLR 501.

Fewer pleas of 'guilty'

An offender caught by the Amendments will have nothing to gain by pleading guilty and everything to gain by putting the prosecution to 'proof'. Victims and police will be required to spend time waiting at court to give purely formal evidence. There will be political embarrassment when, inevitably, some defendants escape conviction when formal proof is not available or police prosecutors inadvertently fail to prove all of the elements of an offence. Without the appointment of extra judicial officers, the increased number of hearings of property offences will mean delays in court lists.

Hard cases

From time to time the justice system will be brought into serious disrepute when individual instances of mandatory imprisonment are revealed to be particularly harsh and oppressive given the unique circumstances of the offender.

Legal arguments to defeat mandatory imprisonment

Separation of powers

The judicial power of the Commonwealth is vested in the High Court, Federal Courts and State Courts vested with

federal jurisdiction: s.71 Commonwealth Constitution. The effect of the separation of powers doctrine is that attempts by the legislature or executive to exercise the judicial power of the Commonwealth will be invalid: *Attorney-General (Cth) v R* (1957) 95 CLR 529 *(The Boilermakers* case); *Kable v DPP (NSW)* (1996) 138 ALR 577; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220. This principle was invoked by a defendant to criminal proceedings in *Palling v Corfield* (1970) 123 CLR 52 to argue that a mandatory sentencing provision of the *National Service Act 1968* (Cth) was invalid. The Act provided that a person was liable to a fine of between $40 and $200 for failing to respond to a notice of attendance for national service and further provided that, if the prosecutor so requested, the court must impose a mandatory imprisonment term of seven days where the person remained unwilling to respond to the notice. The defendant argued that, in allowing the prosecutor to determine whether to request a mandatory imprisonment term, the Act conferred a judicial function on the prosecutor.

The argument failed. A full bench of the High Court was unanimous in deciding that the potential interpolation of the prosecutor in the proceedings did not amount to an invalid assumption of judicial power by the executive. Barwick CJ, Owen J and Walsh J (with whom Gibbs and Windeyer JJ agreed) also expressly affirmed the proposition that the legislature does not interfere with judicial power by simply nominating a specific penalty that must be imposed on conviction. On this view, the Amendments would be a valid law. A different view on the latter point was expressed by Murphy J in *Sillery v The Queen* (1981) 180 CLR 353. In determining whether a particular provision should be construed as providing for mandatory or a maximum term of life imprisonment he stated (at 361):

> The Crown argued that although the penalty of life imprisonment would be excessive for some of the offences covered, Parliament intended to leave those to be dealt with by the application of executive discretion to reduce the penalty by remission of whole or part of the sentence. This suggestion is very dangerous to civil liberty. It would mean the judicial sentence would be a sham, and the real sentence would be by the Executive. This goes much further than the traditional exercise of executive clemency. It raises a question of whether legislation so construed would violate the constitutional separation of powers. If applied generally it would call for an executive parallel to the judicial processes of hearing and determination involved in sentencing.

The separation of powers doctrine enunciated in the *Boilermakers* case only applies to the exercise of the judicial power of the *Commonwealth.* Until recently it had been thought that the exercise of judicial power by State courts pursuant to State laws was not subject to the doctrine. However, in *Kable v DPP (NSW)* (1996) 138 ALR 577 a majority of the High Court held that as a result of the recognition of State Supreme Courts in Chapter III of the Commonwealth Constitution it was beyond the power of a State Parliament to 'impose on the Supreme Court an authority the exercise of which undermines and is antipathetic to the exercise by the Supreme Court of the judicial power of the Commonwealth' (per Gummow J at 638). It remains to be seen whether the High Court would consider that a law providing for mandatory imprisonment of property offenders answered this criterion.

The application of the separation of powers principles to the Amendments is complicated by the fact that it has been held that courts in Commonwealth Territories are not subject to the requirements of Chapter III of the Commonwealth Constitution: *R v Bernasconi* (1915) 19 CLR 629. The broad scope of this proposition has been doubted: *Spratt v Hermes* (1965) 114 CLR 226. However, two cases currently before the High Court have raised the argument squarely. Those cases are the *Stolen Generation* case *(Kruger & Ors v The Commonwealth of Australia* (M021/95*); Bray & Ors v The Commonwealth of Australia* (D005/95)) and the *Euthanasia* case (an appeal from *Wake v NT* (1996) 109 NTR 1 in which special leave to appeal has been adjourned). If the High Court determines that the *Boilermakers* separation of powers doctrine applies to courts in the NT then the Amendments will need to be considered in light of the reasoning in *Palling* and *Sillery* noted above.

If the High Court concludes that the *Boilermakers* separation of powers doctrine does not apply in the NT then it will become necessary to consider whether the principle in *Kable* applies in the NT. Courts of the NT have had conferred on them jurisdiction in relation to Commonwealth criminal matters: see s.68 *Judiciary Act 1903* (Cth). It may be argued that the Amendments are an invalid attempt by the NT legislature to alter the operation of the *Judiciary Act* by altering an essential characteristic of a court conferred with criminal jurisdiction by the *Judiciary Act:* see Gummow J in *Kable* at 644; *Re Kearney; Ex parte Japanangka* (1984) 58 ALJR 231 (at 239 per Brennan J: 'It is beyond the capacity of a law of the Northern Territory...to affect the operation of a law of the Commonwealth or to destroy or to detract from a right thereby conferred...') and *University of Wollongong v Metwally* (1984) 158 CLR 447.

'Cruell and unusual punishments'

The Act of the United Kingdom Parliament of 1688 (1 *William and Mary* sess. 2 c. 2) is commonly known as the *Bill of Rights.* It was enacted for the purpose of 'declaring the rights and liberties of the subject'. The *Bill of Rights* provides that 'excessive baile ought not to be required nor excessive fines imposed nor cruell and unusual punishments inflicted'. There is debate about whether this provision was inserted to curb the habit of Lord Chief Justice Jeffreys in inventing punishments that were not known or authorised by law (such as scourging to death), or was a response to public outrage at the lawful sentences of drawing and quartering, burning of female felons, beheading and disembowelling that were handed down by the Lord Chief Justice to hundreds of defendants convicted of treason in a single special commission (the Bloody Assizes): *Harmelin v Michigan* 501 US 957 (1991). The latter explanation suggests that proportional punishment is a requirement of this provision of the *Bill of Rights.* The *Magna Carta* also contains a relevant provision: 'free man shall not be fined for a small offence, except in proportion to the measure of the offence; and for a great offence he shall be fined in proportion to the magnitude of the offence...'

The 'correct' interpretation of the intention of the *Bill of Rights* provision has assumed significance in the US as a result of the entrenching of the provision in the US Constitution (as the Eighth Amendment). The 'proportionality interpretation' was favoured by the majority of the US Supreme Court in *Solem v Helm* 463 US 277 (1983) and led to a striking down of a state law providing for mandatory life imprisonment for a recidivist property offender. In determining whether the sentencing law was disproportionate to the point of being 'cruel and unusual' the court looked at the

gravity of the offence, the harshness of the penalty, the sentences imposed for other offences and the sentences imposed for similar offences in other (US) jurisdictions. This view has not prevailed in the US. *Solem* was overruled in *Harmelin v Michigan* 501 US 957 (1991) (by majority), largely on the basis that the original purpose of the English *Bill of Rights* was to prevent unlawful punishments only. Much depends on the view taken of English legal history.

The Supreme Court of Canada has taken a similar view to *Solem* in relation to the constitutional prohibition of 'cruel and unusual treatment or punishment' contained in s.12 of the Canadian Charter of Rights and Freedoms. In *R v Smith (Edward Dewey)* [1987] 1 SCR 1045 the court, by majority, struck down a mandatory seven-year prison term for certain drug offences. The (SCR) headnote of the case summarises the reasoning as follows:

> Section 12 of the Charter, although primarily concerned with the nature or type of treatment or punishment, is not confined to punishments which are in their nature cruel and extends to those that are 'grossly disproportionate'. The mandatory imposition of the minimum seven-year sentence...on a youthful offender with no previous record would contravene s.12 of the Charter in that it would be a cruel and unusual punishment 'so excessive as to outrage standards of decency'... The arbitrary nature of the mandatory minimum sentence is fundamental to its designation as cruel and unusual under s.12 of the Charter. The seven-year minimum sentence is not per se cruel and unusual but it becomes so because it must be imposed regardless of the circumstances of the offence or the offender. Its arbitrary imposition will inevitably result in some cases in a legislatively ordained grossly disproportionate sentence.

The *Bill of Rights* and *Magna Carta* apply in every Australian jurisdiction either as received English law or the application of statutes such as the *Imperial Acts Application Act 1969* (NSW) and have featured in cases concerning the exercise of judicial discretion (*R v Boyd* (1995) 81 ACrimR 260, *Smith v R* (1991) 25 NSWLR 1 per Kirby J in dissent) and the development of the common law *(Aboud v A-G* (1987) 10 NSWLR 671). In *Sillery v The Queen* (1981) 180 CLR 353 Murphy J suggested that if the Commonwealth Parliament had imposed a mandatory life sentence for an offence, the provision would have violated the *Bill of Rights* prohibition of cruel and unusual punishment. Murphy J further suggested that the *Bill of Rights* was constitutionally entrenched in Australian law. The latter proposition is contrary to the orthodox view that any received English law, including one applying in Australia by paramount force, may be amended by the local legislature as a result of the *Statute of Westminster Act 1931* and *Australia Act 1986* (Cth).

The *Bill of Rights* and *Magna Carta* apply in the Northern Territory as a result of the reception of the South Australian law into the Territory in 1911: see s.7(1) *Northern Territory Acceptance Act 1910* (Cth). Assuming, for the purpose of argument, that the Amendments effectively amend the *Bill of Rights* and the *Magna Carta*, the relevant question is not whether the NT Parliament has power to enact such a law. Rather, the issue relates to the procedure adopted by the NT Administrator for assenting to the Amendments which assumes that the self-government structure created by the *Northern Territory (Self-Government) Act 1978* (Cth) conferred power on the NT Government in relation to matters covered by the Amendments. This assumption is correct if the Amendments relate to one of the list of matters prescribing executive authority appearing in the Regulations under the *Self-Government Act,* for example, 'maintenance of law and order' or 'civil liberties'. However, 'constitutional development' does not appear in the list. If the Amendments were characterised as a law relating to 'constitutional development' or another similar matter then the Amendments may be invalid on the basis that the incorrect procedure for assent has been adopted: see the argument in *Wake v NT* (1996) 109 NTR 1.

Conclusion

While it may be hoped that the NT Government is alone in its desire for a punitive sentencing regime characterised by mandatory imprisonment terms, there is evidence to the contrary. The Premier of Victoria has announced his preference for 25-year mandatory imprisonment terms for any person convicted of arson — including children. The *Crimes Amendment (Mandatory Life Sentences) Act 1996* (NSW) provides for a mandatory 'never to be released' life imprisonment sentence for murder and certain drug offences where certain criteria are met. The Western Australian Government went into the last State election with the following promise: 'People in the community want serious and repeat offenders locked away from society where they can be punished for their crimes. This will act as a deterrent to repeat offenders or potential criminals.'

It has become commonplace to criticise proposed sentencing legislation as 'draconian'. However, having regard to the following observation of Murphy J in *Sillery v The Queen* (1981) 180 CLR 353 the description is uniquely apt in the NT:

> The policy of maximum and not mandatory penalties is so pervasive that it should be presumed that any penalty is intended as a maximum... Otherwise, the law would be Draconian. The Athenian lawmaker Draco is reputed to have imposed for all offences, even the most trifling, the penalty appropriate for the most severe so that there was only one punishment.

POSTSCRIPT

On 7 March 1997 the NT Correctional Services Minister, Steve Hatton, announced that the Amendments would commence immediately and, that as a consequence, the NT Government would spend $3 million to create an additional 140 places at Darwin prison.

MORE MENTIONS

CONFERENCES

International Humanitarian Law Conference

Viewpoints on various issues crucial to International Humanitarian Law, and recommendations for its future direction, will be presented. An issue targeted for discussion is the effect of war on women and children.

Date: 8 & 9 July 1997.
Venue: University of Melbourne, Melbourne.
Contact: tel 03 9650 6655 fax: 03 9650 3535
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Australian Reconciliation Convention

Date: 26-28 May 1997
Venue: World Congress Centre Melbourne
Contact: Council for Aboriginal Reconciliation
tel 06 271 5120 fax 06 271 5168