the Commonwealth to deal with certain issues in Aboriginal communities in the Northern Territory; and in particular the creation of five year leases in favour of the Commonwealth, and the removal of the permit system, over certain Aboriginal land. One limb of the Commonwealth's defence was that if these provisions were properly characterised as laws with respect to the acquisition of property, on the authority of *Teori Tau* there was no requirement for just terms.

Without embarking upon any exhaustive analysis, the primary structural underpinning for the disapproval of *Teori Tau* is that it was inconsistent with the established principle that when the Commonwealth legislates, it does so under all constitutional heads of power capable of supporting the legislation. In the case of s51(xxxi), the High Court had previously held that the requirement of just terms could not be avoided by using some other placitum of s51, thereby confirming the overarching nature of the guarantee: see *Re Dohnert Muller Schmidt & Co; AG (Cth) v Schmidt* (1961) 105 CLR 361 at 371-2 and other cases, cited in *Nintendo Co Ltd v Centronic Systems Pty Ltd* (1994) 181 CLR 134 at 160. It followed that the guarantee of just terms qualifies all Commonwealth legislation effecting an acquisition of property, whether enacted under s51 or under any other head of legislative power. The only means of avoiding that conclusion in relation to territories would be by recourse to the doctrine that the territories power is "a disparate and non-federal matter", which was in turn a product of the colonial perception of territories as subordinate areas populated by an inferior class of citizens. That doctrine had been largely disavowed since *Spratt v Hermes*.

In overruling *Teori Tau*, the High Court has removed a significant distinction between the residents of States, who were entitled to the constitutional guarantee, and the residents of the Northern Territory, who were not so entitled unless the law which effected the acquisition could be characterised as one enacted pursuant to a s51 power as well as the territories power. The *Wurridjal* decision embodies a "full integrationist" approach to s122 (without addressing certain matters within Chapter III that relate solely to the scheme of federal jurisdiction contained therein).

However, a distinction between the Territory and States still remains. Section 51(xxxi) only requires that an acquisition of property "from any State or person" be on just terms. The only way that acquisitions of property from the Territory as a body politic (as opposed to a "person" resident in the Territory) would attract the requirement of just terms within s51(xxxi) is if the Territory may be properly characterised as a "person" as that term is used in s51(xxxi). That issue remains undetermined.

The decision in *Wurridjal* does not strengthen the Territory's case for Statehood in any legal sense. That remains fundamentally a question for political determination. At best, the public policy considerations that necessarily underlie the decision in *Wurridjal* might strengthen the force of representations to the Commonwealth that Statehood is the logical and natural next step in the progression of the Territory's constitutional development.

Mandatory Prison for First Offenders

By Stephen Barlow, a criminal lawyer at NAAJA and lecturer at Charles Darwin University.

Mandatory imprisonment for first offenders is back. Any adult, even a first offender, who is sentenced in the Northern Territory for an assault causing 'harm' now faces a term of mandatory imprisonment.

The amended section 78BA of the *Sentencing Act* came into force on 10 December 2008. The section provides that any person found guilty of assault, resulting in 'harm', must receive a sentence of imprisonment, and that sentence cannot be wholly suspended. The previous law mandated imprisonment for any person found guilty of a second assault.

The new law applies to all adult offenders. The definition of 'harm' in section 78BA is different to its definition in the *Criminal Code*. Under section 78BA, 'harm' involves an interference

with health. Pain on its own does not amount to harm.

Unjust and Draconian

The inherent injustice of mandatory sentencing is well accepted by the courts.[1] Section 78BA involves a prison sentence being predetermined by the legislature before the facts of the offence or the circumstances of the offender are known. It follows that the punishment may not fit the crime. Absurd and unjust results will be inevitable. Lest we forget Kevin Cook. A homeless and mentally diminished man, he was sentenced for a 'third strike' property offence in 1999. He served 12 months in Berrimah prison for stealing a towel.

I am not aware of any other common law jurisdiction in the world that has mandatory prison sentences for assaults causing harm by first offenders. The Northern Territory stands alone.

Historically, Australian courts have declined to establish any general sentencing tariff or guideline for assaults, on the basis that such offences vary so greatly in circumstances.[2] The new section 78BA abandons the evolved wisdom of the common law.

The dramatic erosion of fundamental principle is illustrated by cases involving provocation. Until 2007, provocation was a complete defence to assault. Cases involving provocation now result in mandatory prison. The potential injustices are easy to imagine. An overreaction to racial or sexual abuse, or bullying, will result in prison. So too, prison is the only option for the person who uses a little too much force in self defence.

The circumstances of the offender are also irrelevant. Female offenders will be treated particularly harshly. Many women who commit assault have suffered violence for much of their lives, only to respond to their tormentors in the heat of the moment. These victims of violence will now face the full wrath of mandatory sentencing. A battered wife who kills her husband can avoid prison for manslaughter. But the battered wife who gives her husband a shiner must be locked up.

The brunt of the new law will be felt by the usual list of vulnerable and disadvantaged, in particular those with mental illness.

The Absence of Evidence Based Policy

An official study of the notorious NT mandatory sentencing regime from 1997 -2001 showed that property crime *increased* during mandatory sentencing, and *decreased* after its repeal.[3] The rate of assault crime also increased after the introduction in 2001 of mandatory imprisonment for 'second' assaults. Western Australian studies have produced similar results.[4] The available evidence shows that mandatory sentencing does not reduce crime.

Just as concerning is the lack of information for the general public. I would be surprised if many people outside the legal community were actually aware of the new law and its ramifications. Whilst ignorance of the law is no defence, there is some unfairness when a Government imposing a regime of mandatory imprisonment fails to properly warn the general public of that law. Huge signs have been erected at the entrance of Aboriginal communities to warn of liquor and other intervention restrictions, but they say nothing about section 78BA.

Sentencing Outcomes Elsewhere

Sentencing statistics from NSW illustrate the extent to which mandatory prison is excessive for first offenders for assault causing harm. Between October 2006 and September 2008, the New South Wales Local Court sentenced 8093 offenders for assault occasioning actual bodily harm. Only 15% of all offenders received a sentence of actual imprisonment.

When the statistics are confined to offenders with no prior criminal history, *only 2% of first offenders received a sentence of actual imprisonment*. 1% received weekend detention, 4% received a suspended sentence, 5% received community service, 47% received a bond, 15% received a fine and 25% received no conviction.

For those with some criminal history, but no history of violence, only 8% received a sentence of actual imprisonment.[5]

In the Northern Territory, 100% of offenders will be sentenced to prison.

It remains to be seen whether courts will readily embrace the option of a 'rising of the court' disposition to avoid injustices. This option has been tacitly recognised and approved by the legislature. Section 78BA (3) "does not prevent the court from exercising powers that may be exercised consistently with this section". However, even a 'rising of the court' disposition carries with it the stigma of prison, and the drastic effect on employment

and travel prospects.

A False Rationale

At a philosophical level, it is argued by some that mandatory prison deters offenders. Such an approach does not recognise that the vast majority of assaults causing harm do not involve any planning, calculation or premeditation by the offender. Even assuming that the hypothetical offender is aware of mandatory sentencing, that hypothetical offender rarely weighs up the possible penalty. They act too emotionally, too quickly, too instinctively; or are simply too drunk.

Nicholas Cowdery QC, the NSW DPP, recognises the limitations of deterrence:

"Deterrence rests on two forlorn hopes: first, that offenders act rationally, weighing up the price of offending if they are unlucky enough to be discovered and prosecuted; and secondly, that if an (irrational) offender is caught and punished, that in itself will deter him or her from offending again. The first is called "general deterrence" and the second "specific deterrence".[6]

The amended section 78BA rarely enters the headspace of the hypothetical offender. Moreover, it cannot be claimed that first offenders have been through the court system and warned of the consequences of their conduct. Deterrence in such cases is a fiction.

Mandatory imprisonment cannot be said to protect the community. Mandatory prison carries an 'opportunity loss', as a first offender cannot be sent to anger management counselling or a dry out centre without first going to prison. If anything, a short term of imprisonment will only increase the chance of an otherwise good citizen becoming dysfunctional, unemployed, embittered, bashed or raped. Mandatory imprisonment will not help to rehabilitate offenders.

In terms of case management, more matters will now be defended. This costs money and ties up resources.

The prisons are already full. Inmates are being housed in shipping containers. Sending people to prison is expensive. The new section 78BA will add to these problems.

Put simply, mandatory imprisonment for first offenders does not achieve any positive outcome for the community.

Politics

The politics of mandatory sentencing is ever present. In July 2008, the CLP released a television commercial saying if elected they would ensure offenders convicted for a second time for violent assault would be automatically imprisoned. Embarrassingly, that was the state of the law at the time.

A senior Government adviser, in response to my concerns about this legislation, told me not to worry because the police would use common sense and downgrade the charges to avoid an injustice. All I could take from that comment was that corruption would be relied upon to fix the problem. These examples demonstrate the lack of principle underlying the politics behind these laws.

Interestingly, in NSW the Coalition's shadow Justice spokesperson, Greg Smith, has conceded that the 'law and order auction' has gone too far, and that tough sentencing has failed. A tough and conservative former Deputy Director of the DPP, Smith has pledged to end the 'law and order auction'. As a pragmatist, he claims that rehabilitation needs to be given more consideration, so that the NSW recidivism rate of 43% can be reduced.[7] The Governor of California, Arnold Schwarzenegger, has reached a similar position, after realising that his state spent more money on prisons than any other single component of state financing.[8]

It will only be a matter of time before someone important faces mandatory imprisonment under the new section 78BA. In 2006, the former world motorcycle champion Mick Doohan received a 'without conviction' fine for head butting a Darwin bouncer, causing a fat lip. The Magistrate described Doohan as "an Australian hero, a legend, a shining example of courage and achievement."[9] Nobody would suggest that the sentence was inadequate. Today, all that heroism would count for nothing and Doohan would be imprisoned. In 2007, Fremantle AFL star Chris Tarrant was alleged to have punched Damien Hale, the current Member for Solomon, outside a Darwin nightclub, causing a black eye. Hale did not press charges. Once again, if charges were laid for such an offence today, Tarrant would have to be imprisoned.

A high profile case is inevitable. Maybe then the community at large will wake up to the inherent injustice of this legislation. In the meantime it is the everyday women and men of the Territory who will hear the clanging of the

prison gates.

The lack of opposition to the new law has been disappointing. Unfettered judicial discretion for first offenders has effectively been surrendered. Injustice has been allowed to flourish. The long term integrity and reputation of the Northern Territory criminal justice system will be diminished.

Footnotes

1. Trenerry v Bradley (1997) 6 NTLR 175, Palling v Corfield (1970) 123 CLR 52 at 58, Cobiac v Liddy (1969) 119 CLR 257 at 269
2. *Yardley v Betts* [1979] 22 SASR 108.

3. '*Mandatory Sentencing for Adult Property Offenders – The Northern Territory Experience*', Office of Crime Prevention, Northern Territory of Australia 2003, p10

4. See Broadhurst and Loh, 'Selective Incapacitation and the Phantom of Deterrence', in R Harding (ed) *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia* (2nd ed, 1995) 55; Neil Morgan, *Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories* (1999) 22 UNSWLJ.

5. JIRS, Judicial Commission of New South Wales 2009

6. Nichoals Cowdery QC, '*Who's Sentences, the Judges', the Public's or Alan Jones'?',* 7 November 2001, http://www.odpp.nsw.gov.au/speeches/AAFS%20-%20meeting%207.11.01.htm

7. Andrew West, 'Truce on Hardline Sentencing', *Sydney Morning Herald* (Sydney), January 8 2009.

8. Mark Findlay, 'Being Tough on Crime Does Not Pay, *Sydney Morning Herald* (Sydney), January 9 2009.

9. Lindsay Murdoch, 'Not Doohan Time, but $2500 Fine for 'Hero' Mick', *The Age,* August 9 2006.

What's happening around the Courts

By Chris Cox, Director of Courts

There has been a bit happening around the Courts of late so it is timely that we tell the legal profession what has happened, what is about to happen and what we hope and expect will happen.

Supreme Court Website

Practitioners would be aware that this new website went live late in 2008. The old website was fine for its day (way back in 1998) but was too clumsy and dated for modern browsing.
Our intention was to make the new website as user friendly as possible and put the most heavily accessed areas on the front page – these of course being the judgments, sentencing remarks and daily court lists. We also knew that the site's most frequent visitors were legal practitioners so we specifically set up a page that practitioners could access with most of the relevant links and documents. We also pulled a lot of information out of the Law Almanac to make it easier for users to access.

The information on the history of the court was retained but pushed into the background as our research indicated that those pages on the old site were not frequently accessed. We also managed to persuade the Judges to get out of their robes and suit up for new pics (well there were some suits anyway).

The website is a work in progress and we are continually looking at ways of improving the site for users. Please contact me if you have any thoughts on what you would like to see on the site.

The website's developers were Captovate.

Upgrade of audio and video in courtrooms

Court Support Services is investing more than $100,000 upgrading the audio and video in most courts across the Territory

Northern Territory Supreme Court