Back to the future

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The Criminal Lawyers Association of the Northern Territory congratulates the incoming Northern Territory Government on its election, and welcomes the appointment of John Elferink, a member of the legal profession, as the Territory's Attorney-General. The incoming Attorney faces formidable challenges in a jurisdiction with by far the highest incarceration rates, recidivism rates, policing levels and alcohol abuse in the nation.

The Country Liberals pledged to substantially reduce the budget deficit, and to reduce crime by 10% a year[1]. These are both things we would all love to see, so let's see if four of the specific law and order policies on which they campaigned would (a) save money; or (b) bring down crime.

More police

Firstly, the government has promised to increase police numbers[2]. Obviously, that will involve a substantial outlay, but at least we know it will bring down crime. Or will it?

Police numbers were boosted by the 'Intervention', which led to the establishment of 18 new police stations on remote communities. Contrary to the expectations of some, police did not find pedophile rings operating in the bush, but they certainly detected a lot of offences. The result: traffic convictions went up by 250% in the ensuing three years[3]. Being picked up for drink driving leads inevitably to disqualification. Disqualification frequently leads to prison. That's why a quarter of our prisoners are traffic offenders.

In the Territory, almost half of those imprisoned re-offend and are re-imprisoned within two years. Imprisonment of a person for the first time sets them up to re-offend and be re-imprisoned. A further increase in police numbers will in all likelihood result in more incarceration, more criminalisation, and more cost.

The government, however, has an opportunity to limit these losses by building on its predecessors' New Era in Corrections initiatives, with their focus on diversionary pathways for minor offenders to avoid gaol.

Getting drunks off the streets

Secondly, the Country Liberals committed to laws which would force problem drinkers to attend 'a mandatory rehabilitation facility' if they do not agree to go into rehabilitation. There is no power in the Australian legal system to order a citizen who is not suffering from an acute episode of mental illness into 'a facility' (i.e. to lock them up), unless they have committed a criminal offence. The pre-existing Alcohol and Other Drugs Tribunal had no such power. In effect, this was a promise to recriminalise drunkenness, which was decriminalised decades ago in the Northern Territory and elsewhere, in accordance with a key recommendation of the Royal Commission into Aboriginal Deaths in Custody. To make being drunk an offence again would widen the net of criminality. Moreover, it would inevitably lead to a cascade of other offences: some problem drinkers ordered into rehab will unlawfully hinder, defy, resist or escape attempts to apprehend, transport and detain them for that purpose.

To make matters worse, the very first thing the incoming government did was set about making alcohol more readily available, by scrapping the Banned Drinkers Register. During the campaign, the Country Liberals also suggested relaxing trading hours and granting

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more liquor licenses to operate on remote Aboriginal communities. As Justice Riley (as he then was) said in sentencing one of the countless Northern Territory offenders who are convicted of alcohol-related violent crimes, in addition to improving rehabilitation and education,

> "A system must be devised to limit the amount of alcohol made available to the people whose lives are being devastated"[4].

The very last thing we should do is the precise opposite and extend the amount of alcohol made available to the people whose lives are being devastated.

The result of all this, it would seem obvious, will be both more cost, and more crime.

One punch homicide

Thirdly, the then Opposition introduced the *Criminal Code (One Punch Homicide) Amendment Bill* in November 2011 following community concern arising from the tragic and violent death of Sgt Brett Meredith in Katherine. The trial of Michael Martyn, the man who caused Sgt Meredith's death, resulted in a conviction for manslaughter. As a result, Mr Martyn is now serving a lengthy prison sentence. If that case illustrates anything, it is that the current law works. If Mr Martyn had been sentenced under the law now proposed, he would have been convicted of a substantially less serious offence, and in all likelihood, would have received a lesser sentence.

The Bill is seriously flawed, as it has been lifted straight from the WA Code, and is drafted in the terms of statutory principles of liability for homicide which were superseded in the Northern Territory some seven years ago, when criminal responsibility provisions based on the Model Uniform Criminal Code were introduced.

One of the key elements of these reforms was the abolition of s154 ("dangerous act causing death") of the *Criminal Code* (NT), which had been widely criticised for allowing many defendants to escape manslaughter and get an unfairly lenient sentence. One clear danger of the proposed new one punch homicide law would be to revive this problem.

There may have been a gap in the law of Western Australia justifying the creation of this new offence. But it is by no means clear or certain that the current Territory provisions for negligent manslaughter are inadequate. As the law stands, a person who engages in unlawful conduct which causes death can be convicted of manslaughter notwithstanding that the perpetrator did not foresee death as a possible consequence of his conduct, provided a jury is satisfied that the conduct was so careless and risky as to merit criminal punishment[5]. I for one can't see a gap that needs filling, but I'd be open to be persuaded otherwise.

It would be irresponsible and premature to rush to enact the Bill. The previous government was right to refer the matter to the Northern Territory Law Reform Committee. Before we fix this purported problem, we need to be sure the system is broke. Given the fact that what we now have is the product of such a careful and considered process of law reform, I am not convinced it is in fact broke, but if there is a gap in the law that needs to be fixed, the fix needs to be very carefully designed.

Would this measure reduce crime? It is very difficult to see how: aggressive drunks are hardly susceptible to the nuanced subtleties of Part IIAA of the *Criminal Code* when they're prowling Mitchell Street or Todd Mall looking for trouble. However, if the one punch homicide laws come into force, there is a reasonable prospect that more trials will settle into pleas for offences which attract shorter prison sentences, which would be good for the Territory economy.

Mandatory sentencing

Finally, there is the old chestnut of mandatory sentencing. The previous CLP government was voted out of office in 2001 after its mandatory sentencing regime for property offenders was strongly criticised and widely discredited, so it is somewhat surprising that during the 2012 election campaign, the Country Liberals once again pinned their colours to the mandatory sentencing mast. This time they targeted aggravated assaults against victims who serve the public. All such offenders, we were told, would cop "a mandatory

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minimum sentence of three months."[6]

This took me back to one of my very first clients, Joanne Coughlan, a trainee pre-school teacher "hitherto of 'impeccable' character"[7]. She got into an argument with a shop attendant over a defective hot dog and in a fit of pique, threw or poured water from a bottle, some of which spilt on the shop attendant, and some of which spilt on a cash register. Ms Coughlan was sentenced to 14 days for property damage under the then new mandatory sentencing laws. So much adverse publicity ensued that following her release, amendments were passed to provide for exceptional circumstances to allow people like her to avoid imprisonment.

Fourteen days in the slammer was an extraordinarily unjust and harsh penalty to impose on this ordinary young woman of good character for engaging in a momentary and trivial bit of misconduct. Of course, if the recently proposed mandatory sentencing laws had been in force instead, Joanne Coughlan wouldn't have got 14 days. She would have got three months, for an aggravated assault on a person who was serving the public.

During the operation of the mandatory sentencing regime for property offences, property offending went up. Each time we send someone to gaol for three months, we taxpayers have to fork out another $20,000 or so, in direct costs alone.[8]

Go figure.

Endnotes

1. Terry Mills MLA, "A Pledge to Territorians" Media Release 22 August 2012
2. Terry Mills MLA, "120 Extra Police to Beat Crime" Media Release 3 August 2012
3. Thalia Anthony, Northern Territory Intervention and Indigenous Criminalisation: Implications for Pre-trial and Post-Sentencing (Conference Paper, Uluru Criminal Law Conference, 31 August 2012)
4. R v Green SCNT 20823606 (Sentence) Riley J, 20 February 2009
5. Section 43AL Criminal Code NT
6. Terry Mills MLA, "Tough Sentences to Protect Those Who Serve the Public" Media Release 10 July 2012
7. Joanne Coughlan v Peter Mark John Thomas (unreported decision of Kearney A/CJ, 9 July 1998, No. JA21 of 1998 (9715192))
8. The total net operating expenditure and capital costs per prisoner per day in the Northern Territory for 2010-11 was $229.65 (Australian Government Productivity Commission, Report on Government Services 2012, Table 8A.7, accessed at http://www.pc.gov.au/__data/assets/excel_doc/0020/114941/25-government-services-2012-chapter8-attachment.xls on 3 September 2012)

Aboriginal Customary Law in the Northern Territory of Australia

FREE Seminar

Wednesday 12 December 2012 from 9.00 am – 5.00 pm.
Law School Moot Court (Building Yellow 1.3.48)
Hosted by Charles Darwin University
Open to anyone – Places limited to 50 – prior registration essential by Thursday 6 December by email to **danial.kelly@cdu.edu.au**.
Participants are welcome to attend full or part day.

Although Aboriginal Customary Law is widely practiced in the Northern Territory, there is very little understanding of this law within the legal profession and academia. In response to this knowledge gap, the University is collaborating with leaders in customary law and the Northern Territory legal profession to increase research and scholarship opportunities as well as teaching in this area. It is hoped that the Seminar will further these endeavours.

Confirmed speakers include Aboriginal customary law leaders (dalkaramirri) from Arnhem Land, Mr George Pascoe Gaymarani and Mr James Gaykamangu.
Reading material is available from http://customarylawproject.yolasite.com