January 2018

Theorising criminalisation: the value of a modalities approach

Luke J. McNamara
University of New South Wales, lukem@uow.edu.au

Julia Quilter
University of Wollongong, jquilter@uow.edu.au

Russell G. Hogg
Queensland University of Technology, russell.hogg@qut.edu.au

Heather Douglas
University of Queensland, h.douglas@law.uq.edu.au

Arlie Loughnan
University of Sydney, arlie.loughnan@sydney.edu.au

See next page for additional authors

Theorising criminalisation: the value of a modalities approach

Abstract

'Criminalisation' has attracted considerable scholarly attention in recent years, much of it concerned with identifying the normative limits of criminal law-making. Starting from the position that effective theorisation of the legitimate uses of criminalisation as a public policy tool requires a robust empirical foundation, this article introduces a novel conceptual and methodological approach, focused on recognising a variety of modalities of criminalisation. The first part of this article introduces and explains the modalities approach we have developed. The second part seeks to demonstrate the utility of a modalities approach by presenting and discussing the findings of a pilot study of more than 100 criminal law statutes enacted in three Australian jurisdictions (New South Wales, Queensland and Victoria) between 2012 and 2016. We conclude that a modalities approach can support nuanced examination of the multiple ways in which adjustments to the parameters of criminalisation are effected. We draw attention to the complexity of the phenomenon of criminalisation, and highlight the need for further quantitative and qualitative work that includes longer-term historical analysis.

Publication Details

L. McNamara, J. Quilter, R. Hogg, H. Douglas, A. Loughnan & D. Brown, 'Theorising criminalisation: the value of a modalities approach' (2018) 17 (3) International Journal For Crime, Justice and Social Democracy 91-121.

Authors

Luke J. McNamara, Julia Quilter, Russell G. Hogg, Heather Douglas, Arlie Loughnan, and David B. Brown

Theorising Criminalisation: The Value of a Modalities Approach

Luke McNamara[1]
University of New South Wales, Australia
Julia Quilter
University of Wollongong, Australia
Russell Hogg
Queensland University of Technology, Australia
Heather Douglas
University of Queensland, Australia
Arlie Loughnan
The University of Sydney, Australia
David Brown
University of New South Wales, Australia

Abstract

'Criminalisation' has attracted considerable scholarly attention in recent years, much of it concerned with identifying the normative limits of criminal law-making. Starting from the position that effective theorisation of the legitimate uses of criminalisation as a public policy tool requires a robust empirical foundation, this article introduces a novel conceptual and methodological approach, focused on recognising a variety of modalities of criminalisation. The first part of this article introduces and explains the modalities approach we have developed. The second part seeks to demonstrate the utility of a modalities approach by presenting and discussing the findings of a pilot study of more than 100 criminal law statutes enacted in three Australian jurisdictions (New South Wales, Queensland and Victoria) between 2012 and 2016. We conclude that a modalities approach can support nuanced examination of the multiple ways in which adjustments to the parameters of criminalisation are effected. We draw attention to the complexity of the phenomenon of criminalisation, and highlight the need for further quantitative and qualitative work that includes longer-term historical analysis.

Keywords

Criminalisation; modalities; law reform; statutes; criminal law theory.

Please cite this article as:
McNamara L, Quilter J, Hogg R, Douglas H, Loughnan A and Brown D (2018) Theorising criminalisation: The value of a modalities approach. *International Journal for Crime, Justice and Social Democracy* 7(3): 91-121. DOI: 10.5204/ijcjsd.v7i3.511.

Introduction

Criminalisation is a frequently employed public policy tool to address a range of types of conduct that involves characterisations of that conduct as harmful or carrying a risk of harm. It includes the creation and enforcement of criminal offences and the punishment of detected transgressions as well as investing police and other state agencies with coercive powers in the name of crime prevention (McNamara 2015: 39). Criminalisation is often controversial for a variety of reasons. It is variously perceived as being too harsh/too soft, too broad/too narrow, too expensive or ineffective. It is criticised for failing to catch the 'Mr Bigs' while disproportionately impacting on marginal groups. It is sometimes too technical and hard to understand, or regarded as unfair and disconnected from 'common sense' understandings of 'right' and 'wrong'. Discomfort about the wisdom of deploying criminalisation as a 'solution' to social problems has been exacerbated in Australia by the proliferation of new and amended criminal laws (Brown 2015) and concern about the sub-optimal conditions under which new laws are often enacted: as a high visibility knee-jerk reaction or 'quick fix' rather than after a careful and unhurried examination of the full range of public policy options.

Although Australian scholars of criminal law, criminal justice and criminology 'have had a deep engagement with issues of criminalization over time' (Loughnan 2014: 690), the tendency in research and activism has been to interrogate discrete instances or 'sites' of criminalisation and to be (rightly) cautious about the possibility and utility of grand normative theories of the legitimate limits of the criminal law (Brown et al. 2015: 13-32). Recently, however, there has been renewed interest among Australian scholars in approaching criminalisation as a phenomenon and subjecting it to systematic analysis (Brown 2013a; Crofts and Loughnan 2015; McNamara 2015; McSherry, Norrie and Bronitt 2009).

Importantly, a defining feature of the emerging scholarship is a conviction that theorising the conditions under which the creation of a criminal offence is a sound public policy choice should avoid the abstraction of criminal law theory in the legal-philosophical tradition (for example, Duff et al. 2010, 2011, 2013, 2014), and respect and build on this country's rich history of contextualised and frequently interdisciplinary criminalisation studies (Brown 2013a). If the future articulation of a compelling normative framework for determining when criminalisation should be used as a policy response is ever to be achieved, it is first necessary to have a better understanding of why, when and how criminalisation has been and is the chosen policy response to an identified harm or risk, and with what effects. This demands that criminalisation be subjected to historicised and empirical analysis as a foundation for normative theory building. In particular, 'we need to understand the phenomenon of criminalisation in all its multi-dimensional complexity' (McNamara 2015: 34) before it is possible to offer a compelling normative account of the legitimate limits of the criminal law, or a persuasive judgment about the merits of particular instances of criminal law making or enforcement.

The aim of this article is to make a contribution to remedying one of the deficits that has impeded large-scale historicised and empirical criminalisation scholarship of the sort we advocate: the absence of shared conceptual tools and language for approaching the topic of criminalisation (Bronitt 2008; Brown 2013a; Lacey 2009, 2013; McNamara 2015; Naffine 2011). Specifically, we introduce a novel organising concept that recognises a variety of modalities of criminalisation. By 'modality' we mean a particular 'method or procedure' (Stevenson 2015) by which the coercive and punitive parameters of the criminal law are set and changed. Although it is the primary focus of many critiques of over-criminalisation, the creation of new offences is not synonymous with criminalisation. Rather, it is simply one of the ways in which the reach of the criminal justice system is extended. The tendencies to approach the phenomenon of criminalisation in a monolithic way and to make generalised claims about over-criminalisation do little, in our view, to 'call out' problematic reliance on criminal law solutions to social and economic problems (including contexts where the problem may be one of under-criminalisation). We believe that a

nuanced approach that illuminates the variety of criminalisation modalities has the potential to support empirical foundations that can sustain normative critiques in relation to specific instances of new criminalisation, as well as longer term patterns of law creation, enforcement and impact.[2]

The first part of this article introduces and explains the modalities approach we have developed. The second part demonstrates the utility of a modalities approach by presenting and discussing the findings of a pilot study of 107 criminal law statutes enacted in three Australian jurisdictions (New South Wales (NSW), Queensland and Victoria) during the five-year period from 2012 to 2016.[3] In addition to offering a quantitative snapshot of the relative frequency with which different modalities were employed during the period under review, we present a qualitative case study of criminalisation in relation to bail, parole and the management of serious sex offenders. Consistent with the theme of the special issue in which this article appears, we have chosen these sites for this case study to highlight the value of our modalities approach in illuminating methods of criminalisation that can be relatively invisible, despite their considerable practical impact in terms of coercion and liberty deprivation.

In addition to contributing to the methodology for the larger study of Australian criminalisation in which we are involved, it is our hope that the concept of criminalisation modalities will be evaluated and potentially deployed by other criminalisation scholars, both in Australia and internationally, who are committed to grounding normative criminal law theories in the practices of local, political and institutional environments.

Modalities of criminalisation: Accounting for complexity

A threshold question we have had to confront is what counts as criminalisation? In a context where much of the existing normative theory literature has been motivated by concerns about over-criminalisation, the tendency has been to focus heavily, if not exclusively, on the creation of criminal offences and penalty increases. It is obvious that, even if concerned only with the enactment of new legislation, this is too narrow a frame of reference. Legislation influences the reach of criminal justice institutions and the intensity of surveillance, policing and penal practices in multiple ways beyond offence creation and provision for harsher punishment.

For the purpose of the current study, we have adopted McNamara's (2015: 39-42) 'thick' conception of criminalisation. This includes not only the creation and enforcement of offences (and defences) and the setting and imposition of penalties, but also statutes that underpin the operation of allied criminal procedures and the deployment of police powers which can also have coercive and punitive effects (such as a denial of bail resulting in detention on remand). We extend the concept further to legislation concerned with technical arrangements regarding the conduct of criminal trials—such as allowing a sexual assault complainant to give evidence via video link—on the basis that such arrangements are designed to both reduce the risk of further trauma for crime victims and optimise the system's capacity to attribute criminal liability to offenders.

If the challenges of accurate categorisation and precise quantification are significant in relation to the creation of new crimes and the expanding scope and reach of the substantive criminal law (Chalmers 2014; Chalmers and Leverick 2013; Husak 2008: 9), the difficulties and complexities multiply when the definition of criminalisation is extended to criminal justice laws that do not govern criminal responsibility or formal punishment but, nonetheless, have tangible impacts on people's lives, such as laws governing police powers and bail. And yet, to fail to account for such laws and practices would be to ignore critical elements of the ways in which the criminal law functions as a regulatory mechanism (or set of mechanisms). Therefore, we have approached the task of conceptualising criminalisation with the conviction that our approach must have the

sophistication required to incorporate procedural laws that impact on liberty (for example, in the form of bail denial or post-sentence detention or conditions) and support coercive police powers.

In addition, whereas the criminalisation debate generally assumes that the essential normative challenge is to rein in criminal law excess, we were concerned to recognise that criminalisation is not universally an always-expanding phenomenon: under-criminalisation is just as significant and equally deserving of attention. We wish to account for contractions in the reach of the criminal law (such as instances of explicit decriminalisation) and grapple with concerns that, whilst excess might (arguably) be obvious in some areas, the problem in other areas (for example, domestic violence, sexual violence, corporate and white collar crime) is too little, rather than too much, criminalisation of seriously harmful conduct.

In an effort to reflect, capture and elucidate these complexities, and move beyond a simple over/under dichotomy, we identify a range of modalities of criminalisation, to better capture the variety of methods and procedures by which the state's coercive and punitive authority is calibrated in the name of crime prevention. The process of identifying modalities of criminalisation began with extensive discussion amongst research team members, drawing on their considerable collective experience in criminalisation research. This exercise produced a provisional typology, which was 'tested' by applying it to a selection of criminal law statutes enacted by the NSW Parliament in the period 2012-2014. This resulted in substantial modification and refinement, and the production of the typology of modalities that we present and demonstrate in this article. The typology utilises four high-level characterisations to account for legislation that:

1) *expands* or extends the parameters of criminalisation;
2) *contracts* or narrows the parameters of criminalisation;
3) represents a relatively 'neutral' attempt to *rationalise* the statute books; or
4) is concerned to better support the interests of *victims* of criminal harm.

We recognise that these categories are not mutually exclusive.

The first two categories—expanding criminalisation and narrowing criminalisation—embrace a dichotomy familiar to criminalisation scholars and using them here enables us to connect with wider normative debates about the legitimate parameters of the criminal law. *Expanding criminalisation* refers to laws that more deeply enmesh a person within a penal or surveillance frame by broadening the scope or net of the criminal justice system. It includes (but, as we explain below, is not limited to) the more 'obvious' forms of criminalisation: new offences and harsher penalties. The *contracting criminalisation* modality denotes laws and practices that restrict the scope of the criminal law, including formal decriminalisation of conduct—often underpinned by changing moral values (for example, regarding homosexuality)—but also instances in which the scope of criminal laws is narrowed by expanding criminal defences or enhancing procedural safeguards.

But, these categories lack the specificity required for detailed and nuanced analysis. Therefore, we have developed nine sub-modalities of expansion and six sub-modalities of contraction. Each of the sub-categories is designed to capture with greater sophistication the many ways in which criminalisation may be extended or curtailed.

1. Expanding criminalisation

Expanding criminalisation includes increased punitiveness such as when new offences are created, maximum penalties for existing offences are increased, or sentencing regimes are mandated. Expanding the reach of the criminal justice system, however, may take many other

forms such as expanding police powers, limiting due process procedural safeguards that protect against criminalisation, and restricting access to bail or parole.

The nine sub-modalities of expanding criminalisation we have adopted are:

- 1a: offence creation;
- 1b: offence expansion;
- 1c: penal intensification (including increasing penalties, mandatory penalties, sentencing aggravating factors and other related procedural changes);
- 1d: restricting defences (including reverse onus provisions);
- 1e: expanding enforcement powers (including police powers as well as the powers of other state agencies including prosecution and corrections);
- 1f: expanding pre/post-correctional powers (including pre-conviction remand and bail conditions, post-sentence detention and post-release conditions);
- 1g: reducing procedural safeguards;
- 1h: civil-criminal hybridity (that is, 'two-step' criminalisation, where conditions are imposed under a civil order and breach is a criminal offence); and
- 1i: compliance regimes (that is, where criminal sanctions form part of a regulatory compliance regime).

The last two sub-modalities require a note of explanation. An increasingly common modality of criminalisation involves hybrid civil/criminal measures, like apprehended violence orders (AVOs), police move-on powers or public place banning notices (or, in the United Kingdom, controversial anti-social behaviour orders (ASBOs) or public space protection orders (PSPOs)). The civil order or police power operates to draw individuals into the orbit of criminal justice intervention, but a criminal offence is only charged by way of a two-step procedure if and when the order is violated. A question may be raised as to whether legislation that supports such arrangements is properly regarded as expanding criminalisation. It might be considered to have a contracting effect, given that a criminal offence (and punishment) is used as a back-up rather than the front-line response and it is possible, indeed quite likely, that on many occasions a measure like an AVO is employed in response to what might otherwise have been charged as an assault. Alternatively, such measures might be considered as expanding criminalisation in that the two-step approach is designed to allow criminal justice intervention in relation to conduct which is not itself a criminal offence (for example, annoying behaviour in public) or where the conduct would, in practice, typically escape criminal sanction despite its criminal nature (for example, assault of a domestic partner). Indeed, AVOs and equivalent protective orders were designed in part to facilitate criminal justice intervention in recognition of the de facto under-criminalisation of domestic violence. We conclude that it is accurate to see these civil/criminal hybrid regimes as expanding criminalisation, although we recognise that such modalities serve to further underline the complexity of the phenomenon of criminalisation and the importance of considering the law 'in practice' and not simply 'on the books'.

The use of criminal sanctions as part of compliance regimes (in relation to the regulation of health and safety, motoring, environmental protection, and so on) raises similar issues. This is a highly fertile area of criminalising activity with such offences/sanctions being inserted into all manner of legislative schemes, governing a diverse field of activities. It is also a mode of criminalisation that is difficult to track and categorise. The heavy (though not exclusive) reliance on strict liability offences in these regimes has also attracted widespread criticism as involving not only over-use of criminal law but also its misuse insofar as core doctrines of subjective fault are abrogated (Ashworth 2000). It might be said that offences that form part of a compliance regime are, nonetheless, simply criminal offences that could be included in sub-modality 1a: offence creation.

Our view is that a discrete sub-modality is warranted because, in most cases (but not all: cf. routine motoring offences), compliance regimes have at least two distinctive features: first, the law is administered by an agency (government bureaucracy, statutory inspectorate) whose primary function is not criminal law enforcement; and, second, the actual imposition of criminal sanctions is treated as a measure of last resort that sits in the background supporting other informal and formal administrative measures aimed at securing compliance (Ayres and Braithwaite 1992; Carson 1970).

These regimes, like the hybrid civil/criminal modality, are not easily categorised according to an expanding/narrowing dichotomy. The most common criticism of strict liability offences is that they criminalise conduct that is not morally blameworthy and thus not 'truly criminal'. On this analysis, such laws represent an illegitimate expansion of criminalisation. By contrast, it might be argued that regulatory/compliance regimes frequently serve to mask or diminish the moral blameworthiness of conduct (for example, moral indifference to exposing others to grave risks of harm) that is incidental to a commercial activity, conduct which ought to be stigmatised as seriously criminal (Hogg 2013). What seems clear, however, is that, like the hybrid modality, statutory compliance regimes are designed to bring conduct that would otherwise generally elude criminalisation, within the scope of the (regulatory) criminal law, however deserving it might be of punishment. Therefore, we locate this specific modality within the expanding criminalisation category.

2. Contracting criminalisation

The contracting criminalisation category is also in common usage among criminalisation scholars, although as mentioned above, it has received insufficient attention from normative scholars. But, it is essential to take such a modality seriously in order to paint a more nuanced picture of criminalisation practices.

The six sub-modalities of contracting criminalisation we have adopted are:

- 2a: enhancing procedural safeguards;
- 2b: expanding defences;
- 2c: depenalisation;
- 2d: diversionary programs;
- 2e: narrowing offences; and
- 2f: decriminalisation.

The sub-modality of depenalisation requires specific comment. This encompasses a range of measures including the downward classification of offences from indictable to indictable triable summarily. Effected to facilitate the more efficient administration of justice by allowing more serious matters to be disposed of in summary courts, there is a concomitant limitation of the sentences that can be imposed by those courts so that, for example, the maximum penalty for larceny in NSW is reduced from five years (as per the *Crimes Act 1900* (NSW), s 117) to two years (the maximum penalty that can be imposed by a Magistrate in the NSW Local Court). There is also a growing trend towards making more offences at the less serious end of the spectrum enforceable via infringement or penalty notices that generate on-the-spot fines (for example, the general larceny offence in NSW may be dealt with by way of a criminal infringement notice under the *Criminal Procedure Regulation 2017* Sch. 4, if the value of the property or amount does not exceed $300). Again, typically, severity of punishment is reduced (to the extent that the penalty notice imposes a penalty that is less than the maximum penalty that can be imposed by a court for that offence) but the reach of the criminal law is expanded (that is, more people are punished less severely: see for example, NSW Ombudsman 2009: 42-3; Quilter and McNamara 2013: 543). Note, however, that the 'fixed price' nature of penalty notices can also produce disproportionately

punitive effects on the socio-economically disadvantaged. Unlike a court-imposed financial penalty, no account is taken of a person's capacity to pay (Quilter and Hogg 2018).

Our focus here is on legislative changes which reduce the severity of punishment, but that such changes can and often do simultaneously expand the reach of the criminal law should be recognised, as should the fact that some offenders could ultimately be subject to penalties involving significant hardship if they default. To the extent that it is accurate to describe these changes as a 'narrowing of criminalisation', it is in a context of efficiency imperatives (including costs, time, complexity) aimed at achieving the overarching goals of the criminal justice system under public sector funding constraints.

We have identified diversionary programs (for example, drug courts, youth conferencing) as a discrete modality of contraction to recognise that schemes that involve diversion from conventional criminal justice conviction and sentencing processes do have a practical effect on the parameters of criminalisation. In particular, diversionary programs are often designed to shift the emphasis from punitive to rehabilitative responses to criminal offending (recognising that such approaches may bring high levels of intervention—such as regular drug testing—into the lives of offenders).

The other two high level modalities—rationalisation and victims—reflect the reality that there are significant legislative criminalisation measures that clearly sit outside the expanding/contracting dichotomy, and are needed for comprehensive cataloguing and analysing of all criminal law reforms.

3. Rationalisation

We use the label *rationalisation* to cover a range of criminal law changes which are relatively neutral in their effect on the parameters of criminalisation. We approach the characterisation of a criminal law statute as 'neutral' with caution. In some cases, the application of the label will be straightforward, as in the case of legislation that produces minor changes arising from legislative 'spring cleaning' or omnibus Acts that aim to remove ambiguity, simplify language, reduce complexity or make consequential amendments. Some amendments that are introduced to achieve efficiencies in the criminal justice system may also be appropriately located in the rationalisation modality, although changes motivated by cost reduction may not be neutral if they involve procedural changes that weaken due process protections or otherwise increase the likelihood of conviction. Legislation that involves the codification and/or updating of an area of law (for example, *Bail Act 2013* (NSW)) can also be categorised as rationalisation, as can legislation that is introduced to clarify matters in the wake of a court decision that draws attention to a problem, ambiguity or unintended effect.

4. Victims

The *victims* modality identifies legislative changes that have, as their object, improvement in the victim's experience of the criminal justice system. This may involve a more active role for the victim in the process (like victim impact statements), protective measures to ensure minimisation of criminal trial trauma (such as permitting victims to give evidence via special arrangement such as video link) or formally articulating the rights of victims. We recognise that many modalities of criminalisation (for example, higher penalties) are motivated by (or are said to be motivated by) a desire to better respond to crime victimisation or, more amorphously, enhance the 'safety' of members of the public. Such measures are more likely to fit within our 'expanding criminalisation' modality. However, we believe there is value in attempting to identify a separate and discrete 'victims' modality encompassing laws that attempt to respond to the needs of victims by enhancing their experience of the criminal justice system.

We acknowledge that, as applied to a particular statutory provision or set of legislative measures, the 17 modalities and sub-modalities in our typology may not be mutually exclusive, and dual characterisation may be possible, even desirable. For example, empowering police to issue interim ('on-the-spot') apprehended violence orders in domestic violence situations represents both the victims modality and the expanding criminalisation (civil/criminal hybridity) modality.

In the next section, we seek to demonstrate the potential of a modalities approach by deploying our typology to examine a data set of recently enacted criminal law statutory provisions.

Pilot Study: Modalities in criminalisation legislation in three Australian jurisdictions

Method

Our data set consists of all criminal law statutes related to 10 chosen criminalisation sites[4] that were enacted by the legislatures of NSW, Queensland and Victoria during the five-year period from 2012-2016. For the purpose of this study, 'criminal law statute' was defined broadly as a statute that:

- creates or deletes/removes a new offence or contracts/expands an existing offence;
- increases/decreases a penalty, establishes a mandatory penalty or changes sentencing laws;
- increases/decreases the powers of police or other state agencies; and/or
- changes the procedures by which criminal offences and allied powers are administered.[5]

Statutes ranged from small issue-specific statutes to large statutes that effected multiple changes to the parameters of criminalisation (for example, *Serious and Organised Crime Amendment Act 2015* (Qld)). We did not set out to offer a precise quantitative analysis of the nature of criminalisation legislation. Nor were we attempting to produce a comprehensive calculation of the volume of criminal law making in the selected jurisdictions. As noted above, we limited the scope of our study to laws affecting 10 important sites of criminalisation. Our primary aim with this initial deployment of our novel conceptual modalities framework was to shed light on the range of different modalities in contemporary Australian criminalisation law-making. We also sought to identify any noteworthy jurisdictional similarities and differences, in a context where there is evidence that the turn to criminalisation can be triggered by 'local' events and drivers, and be a product of cross-jurisdictional 'borrowing' (McNamara 2017; McNamara and Quilter 2016; Quilter 2015).

Our search identified 107 criminalisation statutes that were enacted in the five-year review period: 45 in NSW; 42 in Victoria, and 20 in Queensland (see Table 1). A full list of statutes is contained in Appendix 1.

Each statute was reviewed and coded by a member of the research team using the modalities typology. The coding process involved reading relevant sections of statutes, as well as explanatory memoranda and second reading speeches, in order to identify the criminalisation modalities and sub-modalities deployed. Coders recorded the modalities and sub-modalities reflected in each statute (for example, assigning the legislation a '1a' (offence creation), or a '3' (rationalisation), or a '1a/1c/1e' (offence creation, penal intensification, expanding enforcement powers)). Note that, consistent with our project objectives, we identified whether a statute reflected a particular modality, not how many times that modality was reflected. For example, a statute may have created three new offences. This resulted in a '1a' code for that statute (not 3 x 1a codes). In order to verify our coding, crosschecking was conducted by another member of the research team. Where there was ambiguity or uncertainty in relation to the coding of a particular Act or provision or the precise scope of the modality or sub-modality, this was resolved in discussions involving the wider research team to maximise accuracy and ensure overall consistency.

Table 1: Criminalisation statutes passed for New South Wales, Victoria and Queensland (2012-2016)

Jurisdiction	*Number*
New South Wales:	
2012	10
2013	13
2014	12
2015	3
2016	7
Total	**45**
Victoria:	
2012	7
2013	8
2014	12
2015	4
2016	11
Total	**42**
Queensland:	
2012	3
2013	8
2014	3
2015	2
2016	4
Total	**20**
Overall Total	**107**

Table 2: Frequency of modalities of criminalisation for NSW, Victoria and Queensland (2012-2016)

Jurisdiction	*1 Expanding Criminalisation*	*2 Narrowing Criminalisation*	*3 Rationalisation*	*4 Victims*
New South Wales:				
2012	19	1	4	0
2013	14	0	6	3
2014	18	2	4	2
2015	4	0	0	0
2016	7	0	2	2
Total	**62**	**3**	**16**	**7**
Victoria:				
2012	18	2	5	2
2013	17	3	3	1
2014	15	2	3	5
2015	9	1	1	0
2016	24	2	1	3
Total	**83**	**10**	**13**	**11**
Queensland:				
2012	11	0	0	1
2013	26	0	0	1
2014	14	2	0	0
2015	2	0	0	1
2016	11	5	0	0
Total	**64**	**7**	**0**	**3**
Overall Total	**209**	**20**	**29**	**21**

Table 3: Expanding criminalisation modalities

	1a Offence creation	*1b Offence expansion*	*1c Penal intensificat-ion*	*1d Restricting defences*	*1e Expanding enforcement powers*	*1f Expanding pre/post-correctional powers*	*1g Reducing procedural safeguards*	*1h Civil-criminal hybridity*	*1i Compliance regimes*
New South Wales:									
2012	4	1	4	0	4	0	3	1	2
2013	1	2	4	0	4	2	0	0	1
2014	3	2	3	1	3	3	3	0	0
2015	1	0	1	0	1	1	0	0	0
2016	0	1	1	0	2	1	0	2	0
Total	**9**	**6**	**13**	**1**	**14**	**7**	**6**	**3**	**3**
Victoria:									
2012	3	3	4	0	4	1	1	2	0
2013	4	0	1	0	5	4	1	0	2
2014	3	0	5	0	3	4	0	0	0
2015	2	2	0	0	2	2	0	1	0
2016	4	3	5	1	3	5	3	0	0
Total	**16**	**8**	**15**	**1**	**17**	**16**	**5**	**3**	**2**
Queensland:									
2012	1	2	3	0	1	1	2	1	0
2013	3	2	4	0	4	7	4	1	1
2014	3	2	3	1	2	0	2	1	0
2015	0	0	1	0	1	0	0	0	0
2016	2	1	2	0	2	1	0	2	1
Total	**9**	**7**	**13**	**1**	**10**	**9**	**8**	**5**	**2**
Overall Total	**34**	**21**	**41**	**3**	**41**	**32**	**19**	**11**	**7**

Table 4: Contracting criminalisation modalities

	2a Enhance procedural safeguards	*2b Expand defence*	*2c Depenalisation*	*2d Diversionary programs*	*2e Narrowing offence*	*2f Decriminalisation*
New South Wales:						
2012	1	0	0	0	0	0
2013	0	0	0	0	0	0
2014	2	0	0	0	0	0
2015	0	0	0	0	0	0
2016	0	0	0	0	0	0
Total	**3**	**0**	**0**	**0**	**0**	**0**
Victoria:						
2012	1	1	0	0	0	0
2013	1	0	0	2	0	0
2014	0	1	0	0	0	1
2015	0	0	0	0	0	1
2016	1	1	0	0	0	0
Total	**3**	**3**	**0**	**2**	**0**	**2**
Queensland:						
2012	0	0	0	0	0	0
2013	0	0	0	0	0	0
2014	1	0	0	1	0	0
2015	0	0	0	0	0	0
2016	2	0	1	1	1	0
Total	**3**	**0**	**1**	**2**	**1**	**0**
Overall Total	**9**	**3**	**1**	**4**	**1**	**2**

Results

Our quantitative findings regarding the representation of the four macro-level criminalisation modalities are summarised in Table 2. More detailed statistics on Expanding Criminalisation and Contracting Criminalisation sub-modalities are summarised, respectively, in Tables 3 and 4.

A large majority (85%) of the criminal law statutes passed in NSW, Victoria and Queensland between 2012 and 2016 effected an expansion of criminalisation.[6] Predictably, expanded criminalisation often took the form of new offence creation (34 (16%) of expanding occasions), or penal intensification (41 (20%) of expanding occasions).

In some instances, the creation of new offences coupled with penal intensification was part of a familiar strategy of addressing a 'particular' mode of carrying out an existing criminal activity and adopting an additionally punitive response. For example, the *Drugs, Poisons and Controlled Substances Amendment Act 2016* (Vic), *inter alia*, added seven new offences to the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). The s 71AC(2) offence is illustrative: 'A person who … trafficks or attempts to traffick in a drug of dependence at a school or in a public place within 500 metres of a school is guilty of an indictable offence and liable to level 3 imprisonment (20 years maximum)'. Another illustration is provided by the *Crimes Legislation Amendment (Child Sex Offences) Act 2015* (NSW) which introduced a new version of an existing offence—sexual intercourse with a child under 10 years of age—and introduced a 'term of natural life' as the maximum penalty. In other instances, a new offence was created as part of a multi-faceted regime of criminal justice system measures for more tightly managing particular crime risks. For example, the *Domestic and Family Violence Protection Act 2012* (Qld) expanded the parameters of criminalisation in multiple ways, including by creating a new offence of contravening a 'police protection notice', being a new type of temporary domestic violence order. This example also draws attention to the sophistication of many contemporary deployments of criminalisation, and the interrelationship between different modalities, matters which we address below in more detail, in our case study.

Vindicating our decision not to limit our analysis to the traditional offence + penalty approach to conceiving the contours and parameters of criminalisation, we found that the two most common modalities of expansion in NSW, Queensland and Victoria during the review period were penal intensification (1c) and expanding enforcement powers (1e): a total of 41 (20% of total expanding occasions) for each of these sub-modalities (see Table 3). For example, the *Domestic and Family Violence Protection Act 2012* (Qld) referred to above expanded several powers for police and magistrates, including increased powers for police to direct alleged perpetrators of family violence to stay in or away from a particular place and increased powers to take alleged perpetrators into custody. In NSW, the *Crime Legislation Amendment (Organised Crime and Public Safety) Act 2016* (NSW) amended the *Law Enforcement (Police Powers and Responsibilities) Act 2002* (NSW) to empower a senior police officer to impose a 'public safety order' banning an individual from attending a specified event or being present in a specified location for up to 72 hours, where that person's presence is considered a 'serious risk to public safety or security'. These examples and the prevalence and diversity of the expanded enforcement powers sub-modality underscores the importance of tracking the form, origins and effects of each of the ways the parameters of criminalisation may be expanded.

One of the interests our larger study will explore is when, why and how particular 'innovations' in criminalisation become notable features of the landscape. Pre-emptive criminalisation in the form of civil/criminal hybridity directed at 'outlaw' motorcycle and other organised crime groups were a prominent feature of criminal law-making in the period under review. All three states introduced 'anti-bikie' consorting and/or control order regimes, via multiple statutes: *Crimes (Criminal Organisations Control) Act 2012* (NSW); *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW); *Criminal Organisations Control Act 2012* (Vic); *Criminal Organisations*

Control and Other Acts Amendment Act 2014 (Vic); *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* (Vic); *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld); *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld); *Vicious Lawless Association Disestablishment Act 2013* (Qld); *Serious and Organised Crimes Legislation Amendment Act 2016* (Qld).

Although detailed examination of the drivers behind particular instances of law-making is beyond the scope of this article (though most certainly part of our larger study), it is worth noting that cross-jurisdictional 'borrowing' is a significant feature on this topic. It influences why a jurisdiction might be alerted to the option of a new mode of criminalisation, as well as what legislative architecture is most likely to survive constitutional scrutiny (Appleby 2015; McNamara 2017).

Only 14 per cent of the statutes passed in the review period narrowed the parameters of criminalisation, in any respect (see Table 4). Only two statutes effected formal decriminalisation of conduct that had previously been a crime.[7] Both instances were in Victoria. The *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) repealed the manslaughter-like offence of defensive homicide (committed via excessive self-defence),[8] and the *Bail Amendment Act 2016* (Vic) exempted children from the offence of failing to comply with a bail condition.

The characterisation of a statute as having narrowed the parameters of criminalisation needs to be approached with caution. In some cases, the same statute that narrowed criminalisation in some respect also expanded criminalisation in others. For example, the *Bail Amendment Act 2016* (Vic) had the narrowing effect just mentioned but also increased the penalty for the offence of failing to answer bail from 12 months to two years. In other instances, a statute's narrowing characterisation needs to be contextualised. For example, the *Serious and Organised Crimes Legislation Amendment Act 2016* (Qld), introduced by the Annastacia Palaszczuk Labor Government, 'qualifies' as a statute that effects a narrowing of decriminalisation in various respects, but only in relative terms: it rolled backed some of the more excessive and punitive forms of criminalisation introduced by the Campbell Newman Liberal National Party (LNP) Government a few years earlier (for example, via the *Vicious Lawless Association Disestablishment Act 2013* (Qld)). We return to this point in the case study presented below.

Turning to the rationalisation modality, the first thing to note is that its deployment was uneven across the three jurisdictions. We recorded a similar number of instances in NSW (16) and Victoria (13) but, surprisingly, none in Queensland. The 29 instances of the 'rationalisation' modality covered an eclectic range of statutory provisions and, while there were some similarities between NSW and Victoria, there were also differences. In NSW (but not in Victoria) a number of the statutes that attracted a rationalisation categorisation were 'omnibus' bills that made relatively minor amendments to a number of criminal law and justice administration statutes. For example, the *Justice Portfolio Legislation (Miscellaneous Amendments) Act 2016* (NSW) made amendments to a large and diverse number of statutes, including the *Bail Act 2013* (NSW), the *Children (Criminal Proceedings) Act 1987* (NSW), the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), *Crimes Act 1900* NSW), the *Criminal Procedure Act 1986* (NSW), the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the *Drug Misuse & Trafficking Act 1985* (NSW). At second reading, the bill was described as:

> … part of the Government's regular legislative review and monitoring program. The bill makes miscellaneous amendments to legislation to clarify criminal procedure and improve the efficiency and operation of legislation affecting the courts and other justice cluster agencies. All of the proposals in this bill have been widely consulted on. Many proposals originated with stakeholders who have 'on the ground' experience of our justice system and are well placed to advise

> government on the minor clarifications, corrections and improvements required to make sure the system works in the best way possible. (Clarke 2016)

Such statutes are an efficient way of addressing minor deficiencies and making minor 'improvements' and updates. It is worth noting, however, that, although their contents are often relatively uncontroversial, they may produce subtle changes in the parameters of criminalisation without attracting the attention associated with a more specific (and named) amending statutes addressing, for example, domestic violence or sentencing for drug offences.

Omnibus-style law-making was less evident in Victoria. The *Correction Legislation Amendment Act 2015* (Vic) made changes to a number of statutes, but the focus was the discrete site of parole. One such change—amendment of the *Parole Orders (Transfer) Act 1983* (Vic)—illustrated another type of rationalisation legislation that occurs in Australia's federal system. The aim was to ensure that Victoria had the necessary laws in place to participate in a national system for transferring responsibility for supervising parole orders. A similar motivation underpins rationalising amendments to domestic violence legislation (for example, *National Domestic Violence Order Scheme Act 2016* (Vic)).

Another version of a rationalisation criminalisation statute is where the focus of the legislative 'tidy up' is a discrete aspect of criminal law or procedure, including in response to a review into a particular statute or statutory provision. For example, the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014* (NSW), *inter alia*, reformulated the wording of police powers of arrest in s 99 of the *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW), based on a review conducted by former parliamentarians, Andrew Tink and Paul Whelan (Tink and Whelan 2013). The *Crimes Amendment (Sexual Offences) Act 2016* (Vic)—which responded to findings and recommendations from a number of inquiries, including by the Victorian Law Reform Commission, the Victorian Parliament's Family and Community Development Committee and the Royal Commission into Institutional Responses to Child Sexual Abuse—made multiple changes to child sexual offences with the aims of reducing complexity, modernising statutory language and ensuring coverage of new technologies that can be involved in the commission of sexual offences against children.[9]

A significant number of the NSW and Victorian statutes drafted during the review period that involved the rationalisation modality were concerned with road safety rules (for example, *Road Safety Amendment (Operator Onus) Act 2012* (Vic); *Road Safety Legislation Amendment Act 2013* (Vic); *Road Transport Legislation Amendment (Offender Nomination) Act 2012* (NSW); *Road Transport (Licence) Act 2013* (NSW)). It is unsurprising that, in relation to driving and road safety (perhaps the 'busiest' site of criminalisation in Australia in terms of the number of offences detected and penalised), there is an almost continuous need to 'fine tune' legislation in pursuit of the optimal balance between effectiveness and efficiency.

As anticipated, most of the 21 instances of law-making during the review period that reflected the victims modality were focused on victims of domestic violence and/or sexual assault, and many could be located within a broader strategy of easing the burden imposed on victims giving evidence in criminal trials. For example, the *Crimes Legislation Amendment Act 2016* (Vic) amended the *Criminal Procedure Act 2009* (Vic) to allow a recording of a complainant's evidence in a sexual offence matter heard in the Children's Court to be admitted in subsequent criminal proceedings. Others were of more general application, such as the *Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act 2014* (NSW), which amended the *Crimes (Sentencing Procedure) Act 1999* (NSW) to allow judges to take into account, when determining the sentence to be handed down, a victim impact statement provided by a family member in relation to an offence as a direct result of which a primary victim has died. However, although applying generally to such cases, this statute had a very specific origin. It was part of the NSW government's response to the tragic death of Thomas Kelly as a result of a random drunken

'one punch' attack in 2012 (Quilter 2015, 2017). This example offers a further suggestion about the likely importance of future criminalisation studies that examine not only the 'moment' of law-making, but also the catalysts for change (as well as the operational effects of such change).

These summary data are useful in drawing attention to the complexity of criminalisation legislation and in confirming that, while most law-making is concerned with the expansion of the state's coercive and punitive powers in pursuit of crime prevention, it is important to look beyond this modality to be able to offer a nuanced assessment of criminalisation. However, the modalities concept we are introducing in this article is not primarily a quantitative tool but, rather, a conceptual and methodological tool for facilitating rich qualitative analysis for understanding the phenomenon of criminalisation. Consistent with this approach, the final section of this article presents a case study of laws passed by NSW, Victoria and Queensland during the period 2012-2016 that engage multiple modalities of criminalisation to manage risks of offending and re-offending.

Case study of criminalisation and risk: Bail, parole and sex offender control regimes

The central focus in criminalisation scholarship on the expanding reach of criminalisation by way of the enactment of new crimes has led to neglect of the range of ways in which criminalisation occurs. Thus, for example, laws relating to bail, parole and the novel area of serious sex offender (SSO) regimes have received little attention. The modalities approach highlights the significance that these areas have, particularly in terms of the volume of legislative changes and the multiple ways they expand the reach of the criminal justice system. Our study found that statutes related to bail, parole and SSOs, accounted for a remarkable 31 per cent of the criminal law statutes enacted in NSW, Victoria and Queensland during the five-year review period.[10]

Legislative changes relating to these sites shed particular light on the workings of our sub-modality (1f), which involves expanding the reach of the criminal justice system by way of extending powers of supervision over persons already within the purview of the system, whether prior to conviction, pre- or post-conviction or, in the case of SSO regimes, post-sentence. This sub-modality was the fourth most commonly employed in our study period: 32 instances (15% of total expanding occasions; see Table 3). We make some general observations below as to why this may be so but, in order to better highlight the features of this sub-modality, we analysed in detail the statutes in the study period relating to bail, SSO and parole laws.

From this detailed analysis, we found that this form of criminalisation is articulated in a variety of ways, adding further layers of complexity in our understanding of how criminalisation works. For example, in the bail context, a number of statutes in the study period make it harder for persons to obtain bail by adding 'presumptions against' bail (for example, *Serious Sex Offender (Detention and Supervision) and Other Acts Amendment Act 2015* (Vic)), or by introducing categories of offences for which the person must show 'exceptional circumstances' (for example, *Bail Amendment Act 2015* (NSW)) or 'show cause'[11] before obtaining bail. In the SSO area, statutes similarly expand the categories of offenders to whom such regimes apply (for example, *Crimes (Serious Sex Offenders) Amendment Act 2013* (NSW); *Crimes (High Risk Offenders) Amendment Act 2016* (NSW)); or expand the restrictive supervision or detention conditions applying generally to a SSO (for example, *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* (Vic)). In relation to parole, statutes exclude parole for particular individuals (*Corrections Amendment (Parole) Act 2014* (Vic)),[12] categories of offenders (for example, convicted of murdering a police officer: *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* (Vic)) or unless certain conditions are met.[13] Legislation also provides for greater surveillance and supervision of parolees (for example, the *Corrections Legislation Amendment Act 2016* (Vic), which empowers community corrections officers to search parolees and their homes), and automatic cancellation of parole for committing certain offences (for example, *Corrections Legislation Amendment Act 2015* (Vic)).

The upshot of this legislative activity is that a larger number of offenders will remain in jail (due to bail or parole refusal) or be returned to jail if stricter supervision conditions are breached. While these examples are all quite different in legislative expression and in relation to the 'subjects' they potentially impact, they nevertheless all operate through a particular logic: the apparent need for increased supervision of a person either pre- or post-conviction, with the effect that the parameters of criminalisation are significantly extended. Underpinning this logic is a determination that the 'traditional' parameters of criminalisation—including the principle that the justification for punishment/liberty deprivation starts after conviction and finishes on expiration of sentence—are regarded as inadequate to manage crime risks.

This mode of expanding criminalisation (1f 'expanding pre/post correctional powers') needs to be distinguished from the civil-criminal hybridity covered by sub-modality 1h. On the face of it, the 1f modality may at times look like hybridity; for example, the *Sex Offenders Registration Amendment Act 2016* (Vic) amended s 66ZP of the *Sex Offenders Registration Act 2004* (Vic) to provide that where a prohibition order has been made against a registrable offender and proper notice has been given to the registrable offender, it is an offence to contravene that prohibition without reasonable excuse (maximum penalty of five years). However, this is not 'two-step' criminalisation where the making of the civil order provides the pathway to criminalisation. With the 1f modality, the person is already under the supervision of the criminal justice system, whether as a person charged with an offence or one serving a sentence or even, as with the example here, as a category of offenders (serious sex offenders) whose sentence has been completed.

As the above comparison suggests, sub-modality 1f is also often closely related to 1a (offence creation). This is because a statute that intensifies pre- or post-correction supervisory powers is typically backed-up by the creation of a new criminal offence for breach. The new offence is, however, secondary to the pre- or post-supervisory power that expands criminalisation according to the 1f sub-modality. This points to a further strength of the modality approach: it highlights the complexity of the criminalisation process and the inter-relationships between different forms of criminalisation. It also underlines the inflationary tendencies that are often involved: criminalisation in one form begets yet further criminalisation in another as legislation expanding supervisory powers inevitably also proliferates offence creation. Moreover, it is offence creation of a kind that might not be detected if we were to overlook the central role of the expansion in pre and post-corrections supervision in criminalisation.

As indicated above, the 1f sub-modality was the fourth most commonly occurring in the study period and the statutes that most commonly featured this sub-modality (those relating to bail, parole and SSO) accounted for 31 per cent of all legislation passed during the study period. We make three further general observations about this sub-modality and the sites to which it is often related, which may explain its heightened significance.

First, this sub-modality underlines the growing role of risk and actuarial justice as a driver of expanded criminalisation (Feeley and Simon 1992, 1994). New legal provisions relating to bail, parole or the post-sentence detention or supervision of certain serious sex (or violent) offenders often enlarge and/or deepen criminalisation by incorporating new categories of risk. Categorical risk weakens the hold that traditional limiting principles (like the presumption of innocence, proportionality, individualisation and sentence finality) exert over criminal law making and administration. The sites commonly affected (bail, parole and sex crimes/homicide) are the perennial focus of media and community concern that is often heightened in the wake of tragic fatalities (what may be called 'signal crimes': Innes 2014). The political answer is often a 'review' followed by a 'quick fix' legislative change that expands the parameters of criminalisation through this modality and signals political 'success' in managing the risk.[14] For example, the 2014 Sydney Lindt Café Siege by Man Haron Monis, which led to the deaths of two hostages, occurred at a time when Monis was on bail. This prompted a review[15] of, and changes to, NSW bail laws (*Bail*

Amendment Act 2015 (NSW) and *Justice Portfolio Legislative Miscellaneous Amendment Act 2016* (NSW)).[16] The 2012 murder of Jill Meagher by Adrian Bayley while on parole in Victoria led to a review (Callinan 2013) and directly to a suite of legislative changes to parole laws in Victoria (*Corrections Amendment (Parole Reform) Act 2013* (Vic); *Corrections Amendment (Further Parole Reform) Act 2014* (Vic)).[17] Following such tragedies, the need for ever greater and more refined supervisory powers and controls to prevent their repetition seems 'self-explanatory', fuelling reliance on sub-modality 1f to 'address' such risks. Wisdom after the event and the promise of future vigilance, however, ignores the fallibility of all efforts to predict future criminal behaviour. It indulges a fantasy of total control and seamless security against criminal risks, a perpetual summons to push out the frontier of criminalisation.

Secondly, as such tragic cases demonstrate, each of these areas (bail, SSO and parole) lends itself to *ad hominem* legislative creation: that is, a notorious crime or offender[18] or a tragedy involving an 'ideal victim' (Christie 1986), becomes the generator of a new law calculated to address that offender and placate public opinion. But, laws enacted under such circumstances invariably apply to a general category of future cases and/or often provide a precedent for further changes to the law. In this way, the expansionary logic of criminalisation develops the power of precedent and is consolidated as unexceptional. For example, in our study, the *Corrections Amendment (Parole) Act 2014* (Vic) restricted parole options specifically for Julian Knight (the perpetrator of the 1987 Hoddle Street mass killings in Clifton Hill, a suburb of Melbourne, which resulted in the death of seven people and serious injuries to 19 others). These changes were then used as a 'model' to remove the opportunity for parole for persons convicted of murdering a police officer (*Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* (Vic)). Similarly, in NSW, the Sydney Lindt Café Siege led to the *Bail Amendment Act 2015* (NSW), a link that is explicitly recognised in the title of Sch. 2, 'Amendment of Bail Act 2013 No 26 in response to Martin Place Siege review'.

Thirdly, at its heart, the 1f sub-modality frequently operates to detract from fundamental principles of criminal justice such as the 'presumption of innocence'—for example, in relation to bail (Myers 2017; Shrestha 2015)—and the principle of 'sentence finality'—most obviously in relation to SSO regimes but also in relation to parole.[19] Such novel departures are said to be justified by the exceptional case—a heinous crime or a notorious offender—and usually implemented with solemn undertakings that they will be so limited. Yet, down the track, it is often the case that the new provision is invoked as a precedent for further change until the exception becomes the new norm and the circumstance and circumspection surrounding its initial creation are forgotten. This is a further factor helping to explain the proliferation of legislation involving sub-modality 1f.

We see here a number of logics coalescing to propel criminalisation in the sites of bail, parole and SSO that rely heavily on sub-modality 1f. A spiral of 'hyper' legislative activity (McNamara and Quilter 2016) can be set in train over time as change is implemented on the back of individual cases that are treated as exemplars of some new category of risk or 'gap' in the existing law, and the normalisation of exceptional measures reduces the threshold for extending the reach of criminalisation. Examples in the study period of bail laws that introduce presumptions against bail, 'exceptional circumstances' or 'show cause' provisions (see above) illustrate the logic. Another example is the extension of the serious sex offender regime from its origins—when it was justified as an exceptional measure limited to the special case of certain sex offenders—to other so-called high-risk offenders, with the possibility for a growing list of further offenders to be added (see the above examples of such legislation in NSW). Similarly, as described above, extreme legislation, which denied parole to Julian Knight (the *Corrections Amendment (Parole) Act 2014* (Vic)), became the model for legislation to remove the possibility of parole for offenders convicted of murdering a police officer (the *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* (Vic)).

While the expansion of criminalisation through enlarging supervision (that is, sub-modality 1f) is a dominant feature of legislative changes to bail, SSO and parole laws, these sites are also affected by other sub-modalities. We have already noted the important inter-relationship of 1f expanded criminalisation with further expansion effected by way of the creation of a new offence (1a). However, other modalities of criminalisation are also evident in this group of statutes. The most notable is the expansion of state agency enforcement powers (1e). This was the case study's second most common sub-modality (10 times), expanding criminalisation in the sites of bail (2), SSO (4) and parole (4). Examples include:

1. the *Child Protection Legislation Amendment (Offender Registration and Prohibition Orders) Act* 2013 (NSW) which, in addition to expanding the conduct which can be the subject of a child protection prohibition order (1f) and increasing penalties for an offence of failing to comply with such an order (1c), also increased police powers (1e) to enter and inspect (without prior notice) any residential premises of a registrable person for the purpose of verifying personal information required to be reported by the person;
2. the *Serious Sex Offenders (Detention and Supervision) and Other Acts Amendment Act 2015* (Vic) which, *inter alia*, gave police a general power to enter premises where an offender resides so as to monitor compliance with a supervision order; and
3. the *Corrections Legislation Amendment Act 2016* (Vic) which significantly expands the powers of community corrections officers supervising prisoners on parole by allowing officers to: direct prisoners on parole to do or not do specified things based on safety grounds (and use reasonable force to compel the prisoner to obey the direction); search the prisoner or residence (using reasonable force) to monitor compliance with parole orders and seize things said to compromise the welfare or safety of a member of the public or compliance by the prisoner with parole orders; and require the prisoner to submit to breath or urine testing.

One of the insights gained from our case study is that, although our modalities framework is a useful tool for analysing laws that alter the parameters of criminalisation, the tasks of characterising and classifying legislative changes cannot be conducted in a mechanical or essentialist way. It is often the case that legislation contains multiple and inter-related criminalisation currents, particularly in relation to modalities of expansion. So long as the modalities analysis is used to illuminate this complexity (rather than gloss it over or 'neaten' it out of existence), we are confident about the value of a modalities approach.

The overwhelming trajectory of the bail, parole and SSO laws examined in this case study is to expand criminalisation. However, there were some instances where legislation narrowed criminalisation: four on bail; two on parole; but, notably, none for SSO regimes. Drilling down on these instances, our study shows that such narrowing is limited in its application. In some instances, the 'benefit' of narrowing accrued only to certain 'vulnerable' groups, such as children. For example, the *Bail Amendment Act 2013* (Vic) provides for pre-sentence diversion for young people (sub-modality 2d); and the *Bail Amendment Act 2015* (Vic) tailors bail provisions to enable a parent/guardian to be present during an inquiry if the child is in custody (2a) and exempts children from the offence of failing to comply with conditions of bail (2f). In other instances, the narrowing legislation was applicable to only a small group of offenders or was limited in terms of the 'quality' of the narrowing. For example, the *Crimes (Administration of Sentences) Amendment Act 2013* (NSW) removed an anomaly that the Parole Authority could not consider parole for up to 12 months for offenders who had had their parole revoked following release. The 'fix' only applies to an offender's case if parole was revoked in certain limited circumstances constituting 'manifest injustice'.[20] The 'quality' of the narrowing effected by the *Bail Amendment (Enforcement Conditions) Act 2012* (NSW) was also limited. This legislation overcame the legal problem that bail conditions imposed by police had been found to be invalid in the decision of *Lawson v Dunlevy*

[2012] NSWSC 48. The Act provided a legislative basis for bail enforcement conditions to be imposed by a court, and empowered police officers to give certain directions for monitoring and enforcing compliance with bail conditions. Therefore, while the legislation attracts a 2a characterisation because, arguably, it enhances procedural safeguards (by requiring that such conditions are 'imposed only if the court considers it reasonable and necessary in the circumstances' having regard to certain criteria), the net effect of the legislative change is the expansion of criminalisation by expanding state agency powers (1e).

Finally, returning to a point made in the general discussion of results above, the two other instances of narrowing criminalisation we identified in this case study need to be viewed within the 'unique' political context of the Queensland Labor Government's attempt to roll back some of the more egregious aspects of the previous LNP Government's hastily passed and excessive legislation directed at criminal bikie gangs, including the infamous 'VLAD Act' (the *Vicious Lawless Association Disestablishment Act 2013* (Qld)) and the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld). Thus, the *Serious and Organised Crime Amendment Act 2015* (Qld) repealed the 2013 amendment to the *Bail Act 1980* (Qld) which imposed 'show cause' requirements on participants in a criminal organisation when applying for bail in all cases. In the other instance, the Labor Government's *Tackling Alcohol-Fuelled Violence Legislation Amendment Act 2015* (Qld) included a diversionary program (that is, a 2d sub-modality) by amending the *Bail Act 1980* (Qld), which had previously been amended by the LNP Government's *Safe Night Out Legislation Act 2014* (Qld)) to redefine the role of a drug and alcohol assessment referral (DAAR) as a bail condition. Such a condition was changed from being mandatory for persons charged with certain offences where they were intoxicated at the time of alleged commission (Quilter et al. 2016), to being discretionary for any offence to which the *Bail Act 1980* (Qld) applies. It also removed the offence of failing to complete a DAAR condition; and removed the offence of breaching a condition that a defendant participate in a therapeutic program.

We also found some evidence of the rationalisation modality in the case study sites. This is not at all surprising in light of the dynamics of criminalisation law-making described above. Laws hastily enacted following a terrible crime and which are often designed to solve a short-term political problem as much as an enduring legal one are prone to leave in their wake technical and drafting 'loose ends' that require subsequent tidying up. This is one form of rationalisation common in the sites considered in this case study.[21] Another is where the cumulative effect of *ad hominem* knee-jerk legislative responses over time renders a particular legislative regime incoherent: a proverbial 'dog's breakfast'. This has been a notable long-term feature of 'reforms' to bail laws.[22] The unwieldy complexity of bail laws in NSW, including the multiple and complex presumptions against bail, led to bi-partisan support for a complete 'rationalisation' of bail laws and the passing of the *Bail Act 2013* (NSW). Unfortunately, this positive form of 'rationalisation' was short-lived: the Act has been amended four times since its commencement in May 2014,[23] with two such amendments leading us back to the complexity of the old bail laws.[24]

As discussed above, much of the legislation relevant to the sites of bail, parole and SSO and sub-modality 1f was occasioned by a particularly egregious crime that generated outpourings of public sympathy for the victims and their families. Urgent legislative change in such circumstances is frequently represented as being undertaken on behalf of a named victim, almost as a commemoration of the tragedy. Nevertheless, the 'victims' modality in the way we have conceived it (that is, to describe legislation which is designed to improve victims' experiences of the criminal justice system) was rarely—indeed only twice—at play in our case study. Both instances related to the law of parole and aimed to: ensure victims receive notice of parole applications (*Corrections Amendment (Parole Reform) Act 2013* (Vic)); and require the Parole Board to have regard to any submissions from victims when determining whether to grant parole and provide victims with notice of parole orders (*Corrections Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* (Vic)). We would argue, as suggested above, that, in relation to bail, parole and SSO, 'victims' are often evoked more as a symbol or trope to justify

expanded criminalisation, in terms of the intensification of supervision or a harsher approach towards offenders, rather than such laws providing genuine safeguards for victims. The 'downside'—particularly for victims and the community generally—is that these forms of expansion, for example, in the area of parole or SSO, may lead to offenders being subjected to treatment that is likely to increase the risks they present to the community when, as is usually the case, they are ultimately released into the community.[25] Measures that genuinely address the concrete needs and the legitimate access to justice expectations of victims and enhance the 'safety' of members of the public on the one hand, should not be confused with changes that, on the other hand, invoke the victim as a rhetorical cloak for expanding criminalisation and extracting political advantage from the harsher treatment of offenders. Our decision to limit the victims modality to the former, and characterise the latter as expanding criminalisation, is designed to draw attention to this important difference.

Finally, although we did not set out to compare criminalisation patterns across the three jurisdictions, a brief comment on similarities and differences is warranted. The volume of law-making on bail was similar (seven statutes in NSW, five in Queensland, four in Victoria). There were four statutes amending SSO regimes in NSW and Victoria, but only one in Queensland. The most striking cross-jurisdictional discrepancy was for parole: eight statutes in Victoria during the review period, compared to one in NSW and two in Queensland. Our modalities approach draws attention to these differences, together with more precisely identifying the complexity involved, and the ways in which the criminalisation landscape is changing. However, there is more that we need to know that is not revealed by a modalities approach. For example, how do we account for the 'reasons' for jurisdictional differences? As flagged in the beginning of this article, the modalities approach we have introduced has been developed for use in a larger study of criminalisation in Australia. An important objective of the rich socio-legal case studies of criminalisation that we plan to develop for each of our chosen 10 sites[26] will be to chart and explain jurisdictional differences in patterns of criminalisation across Australia's jurisdictions, paying close attention to the local events that may form an important part of the back-story of criminalisation practices.

Conclusion

This article represents an initial attempt to conceive and 'road-test' a new conceptual and methodological paradigm for conducting criminalisation research, centred on the identification and analysis of modalities of criminalisation. We believe we have achieved our modest goals of explaining the modalities concept and illustrating how it can support nuanced examination of the multiple ways in which adjustments to the parameters of criminalisation can be effected. We have drawn attention to just how complex the phenomenon of criminalisation is; the need for further quantitative and qualitative work; and the importance of longer-term historical analysis. It is not our contention that a modalities evaluation of legislative law-making represents the only way forward. Future research should examine multiple points in the 'life cycle' of criminalisation, including scrutiny of pre-enactment variables such as the drivers of, and *processes* leading to, criminalisation legislation, as well as post-enactment operations and impacts.

Our larger study of Australian criminalisation aims to contribute to addressing these needs through further investigations. What factors have led to the criminalisation of behaviours in response to an identified problem, harm or risk? How have these factors changed over time, particularly in periods/instances of expanding/contracting criminalisation? What normative principles have exerted influence over criminalisation decisions and by whom have these principles been invoked? The project will analyse major events, developments, trends and shifts in the deployment of criminalisation, and produce a rich account of the 'stories' of criminalisation in Australia. Accounting for cross-jurisdictional similarities and differences, in terms of drivers and outcomes and changes over time, will be a key objective of this larger study. We are committed to the view that scholars of criminal law, criminalisation and criminology should make

a contribution to articulating principles and practices for sound evidence-based criminal law-making. We are equally committed to the view that such pronouncements need a strong empirical foundation, including a deep understanding of what Australia's history reveals about the circumstances under which sound decisions are made regarding the deployment of criminalisation as a public policy tool.

Correspondence: Luke McNamara, Professor and Co-Director, Centre for Crime, Law and Justice, Faculty of Law, UNSW, Sydney NSW 2052, Australia. Email: luke.mcnamara@unsw.edu.au

---

[1] We thank Jai Clark for excellent research assistance.

[2] In *Folk Devils and Moral Panics*, Cohen (2002: xxxiv) points out that, in drawing attention to the social construction of social problems and instances of 'social injustice', sociologists should be 'not only exposing u*nder-reaction* (apathy, denial and indifference) but making the comparisons that could expose *over-reaction* (exaggeration, hysteria, prejudice and panic) [emphases in original]'. As criminal law and criminology researchers, we take a similar approach to criminalisation.

[3] We acknowledge that this approach addresses only the 'law creation' moment of criminalisation, in a context where we are committed to the view that attention must also be paid to the operation and effects of criminal law-making (intended and unintended). Our more limited focus in this article is consistent with our primary goal of introducing the organising concept of 'modalities' of criminalisation, and demonstrating part of its nature and value, by applying it to a limited sample of criminalisation legislation.

[4] Our larger project aims to map the origins and operation of the criminal law as a public policy tool in Australia since the 1970s, across 10 sites of criminalisation: 1) Homicide; 2) Sexual assault; 3) Domestic violence; 4) Alcohol-related violence and public order; 5) Drugs; 6) Consorting and association; 7) Fraud and financial crime; 8) Driving offences; 9) Food safety regulatory offences; and 10) Bail and parole.

[5] We excluded generic procedural Acts that did not directly address any of our selected sites, even if the legislation in question might have an indirect impact on the operation of the criminal justice system in relation to our sites.

[6] Note that some statutes expanded criminalisation in one or more respects, and narrowed criminalisation in another respect (or reflected other modalities). 100 per cent of the statutes passed in Queensland during the five-year review period expanded criminalisation, but a small number of these statures also narrowed criminalisation or reflected the 'victims' modality.

[7] Although they did not technically fall within one of our 10 chosen criminalisation sites (which included sexual assault but not the wider category of sexual offences) we note that a unique and important form of contracting criminalisation occurred in two of our subject jurisdictions during the review period for our study. The legislatures of Victoria and NSW enacted statutes that provided for the expungement of criminal records related to convictions that occurred before the decriminalisation of homosexual sex in the 1980s: *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act* 2014 (Vic); *Criminal Records Amendment (Historical Homosexual Offences) Act 2014* (NSW). Queensland passed equivalent legislation in 2017: *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017* (Qld).

[8] We acknowledge that characterising the abolition of defensive homicide as an instance of decriminalisation is debateable. Certainly, the legislation in question removed a (lesser) homicide offence from the Victorian statute books. Therefore, at least formally, the decriminalisation label is warranted. However, the substantive effect of the change was not to reduce the parameters of criminal responsibility. Rather, since this amendment, a person who kills is now more likely to be charged with murder, a more serious homicide offence. Arguably, the abolition of defensive homicide could be said to be akin to a restriction on the partial defence of excessive self-defence (sub-modality 1d) which was embedded within the definition of defensive homicide.

[9] See also *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic).

[10] Some of the statutes in our study amend dual sites—for example, the *Serious Sex Offender (Detention and Supervision) and Other Acts Amendment Act 2015* (Vic) made amendments to both the law of bail in Victoria and to its SSO regime (hence sexual assault) and so we have not double counted these—while others touch only one of our sites (for example, bail, as in the *Bail Act 2013* (NSW)). Some Acts, notably in

Queensland (for example, *Criminal Law Amendment Act 2012* (Qld), *Criminal Law Amendment Act 2014* (Qld); *Serious and Organised Crime Amendment Act 2015* (Qld)), amended a number of our criminalisation sites (including bail, parole and SSO) and have been counted only once.

[11] For example, the *Crimes Amendment (Carjacking and Home Invasion) Act 2016* (Vic) extended the Victorian 'show cause' regime to persons charged with the offences of aggravated carjacking, home invasion and aggravated harm invasion.

[12] This legislation was directed at one individual: Julian Knight. In 2017 the High Court upheld the constitutionality of this legislation: *Knight v Victoria* [2017] HCA 29 (17 August 2017).

[13] For example, in relation to cases where the victim's body has not been found, the *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* (Vic) imposes a condition that the offender cannot be granted parole unless s/he discloses where the victim's body is located.

[14] In relation to bail see Brown and Quilter 2014, Brown 2013b, Steel 2009, Booth and Townsley 2009; also NSW Law Reform Commission 2012: 29-43. In relation to parole, see Bartels 2013, Fitzgerald et al. 2016. In relation to SSO, a violent incident in 2015 in Victoria led to a review of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) by his Honour Judge David Harper ('The Harper Review') which led to amendments, including by the *Serious Sex Offenders (Detention and Supervision) and Other Acts Amendment Act 2015* (Vic) and the *Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016* (Vic).

[15] See *Martin Place Siege: Joint Commonwealth – New South Wales Review* (Department of Prime Minister and Cabinet and Department of Premier and Cabinet 2015); and a lengthy inquest: Magistrate Michael Barnes, State Coroner of NSW, *Inquest into the Deaths Arising from the Lindt Café Siege: Findings and Recommendations* (2017).

[16] While outside the study period, we note two further cases. David Bradford was granted bail on domestic violence charges stemming from an alleged violent assault on Teresa Bradford at her home in November 2016. After serving 44 days in custody he was bailed (having had no prior domestic violence allegations and a relative lack of criminal history otherwise) and then murdered his estranged wife and killed himself at her home (where children were also present). In light of this, the Queensland government passed the *Bail (Domestic Violence) and Another Amendment Act 2017* (Qld) amending bails laws so that anyone charged with a serious domestic violence offence will have to prove why they should be granted bail. There were also provisions for alleged offenders to be fitted with GPS tracking devices as a bail condition, and urgent appeal rights for victims. In January 2017, James 'Dimitrious' Gargasoulas, while on bail, drove his car through the busy Bourke Street pedestrian mall in Melbourne, Victoria, killing six people. This led to the Hon Paul Coghlan QC's review including *Bail Review: Second Advice to the Victorian Government (2017)* (Vic) and the subsequent passing of the *Bail Amendment (Stage One) Act 2017* (Vic).

[17] While outside the review period for our study, we note that the pattern we are describing here was evident in the response to the 2017 hostage taking and killing in Melbourne, Victoria, by Yacqub Khayre who was on parole at the time. This event led to the announcement of State/Territory/Commonwealth agreement to change parole laws to introduce a strong presumption against parole in cases where links to terrorism can be proved. See also the Queensland Government's response to the case of Anthony O'Keefe, who, in 2016, murdered 81-year-old Elizabeth Kippin on the day he was paroled.

[18] For example, Gregory Wayne Kable was the target of one of the first modern preventive detention statutes, the Community Protection Act 1994 (NSW). That statute was struck down as unconstitutional by the High Court of Australia in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51. Ironically, rather than deterring legislatures from enacting post-sentence preventive detention regimes, the Kable decision 'educated' law-makers about how to make such regimes safe from constitutional challenge (see Appleby 2015; Keyzer 2013; McSherry 2014).

[19] For example, the *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012* (Qld) changed the parole eligibility date for a prisoner serving a life term for a repeat serious child sex offence from 15 years to 20 years.

[20] See *Crimes (Administration of Sentences) Act 1999* (NSW) s 137B, and *Crimes (Administration of Sentences) Regulation 2014* (NSW) s 223, which provides the circumstances constituting manifest injustice: '(a) if it becomes apparent that the decision to refuse or revoke parole was made on the basis of false, misleading or irrelevant information; (b) if it becomes apparent that a matter that was relevant to the decision to refuse or revoke parole is no longer relevant; (c) if it becomes apparent that a matter that was relevant to the decision to refuse or revoke parole has been addressed in a way that warrants reconsideration of the decision or can be so addressed by imposing additional conditions on parole; (d) if a Community Corrections officer requests that the Parole Authority reconsider the decision to refuse or revoke parole and less than 12 months of the offender's sentence remains to be served; (e) if a Community Corrections officer requests that the Parole Authority reconsider the decision to revoke parole and parole has been

revoked because the offender, while on release on parole, committed an offence for which any of the following sentences was imposed: (i) a non-custodial sentence; (ii) a custodial sentence with a non-parole period of a term of less than 12 months; (iii) a sentence with a fixed term of less than 12 months.'

[21] This was common with NSW bail laws during the review period, with three statutes effecting 'spring cleans' (filling gaps and tinkering as part of the government's regular review process): *Crimes Legislation Amendment Act 2013* (NSW); *Bail (Consequential Amendment) Act 2013* (NSW); and *Justice Portfolio Legislation (Miscellaneous Amendment) Act 2016* (NSW)).

[22] See endnote 14.

[23] By the the *Bail (Consequential Amendment) Act 2014* (NSW); the *Bail Amendment Act 2014* (NSW); the *Bail Amendment Act 2015* (NSW); and the *Justice Portfolio Legislation (Miscellaneous Amendment) Act 2016* (NSW). Two of these statutes (the Bail Amendment Acts in 2014 and 2015) were passed in haste following trigger cases (see Brown and Quilter 2014). The other two statutes, however, represent a form of 'rationalisation' law-making resulting from the regular review of legislation following the identification of loop-holes.

[24] *Inter alia*, the *Bail Amendment Act 2014* (NSW) and the *Bail Amendment Act 2015* (NSW) introduced 'show cause' offences and produced a new category of 'exceptional circumstances'.

[25] The case of Robert Fardon, the first prisoner to be detained under Queensland's SSO laws, is a salutary example. Although Fardon has not committed further offences since his release, his treatment by successive governments, including legislative efforts to keep him in prison, appear to have been more calculated to exacerbate his risk factors to justify his continued detention than support his transition to a law-abiding life in the community (Hogg 2014). In similar vein, harsher parole laws will often see prisoners released into the community with no supervision at all when imprisonment is prolonged by amendments designed to restrict their access to parole.

[26] See endnote 4.

References

Appleby G (2015) The High Court and Kable: A study in federalism and human rights protection. *Monash University Law Review* 40: 673-697.

Ashworth A (2000) Is the criminal law a lost cause? *Law Quarterly Review* 116: 225-256.

Ayres I and Braithwaite J (1992) *Responsive Regulation: Transcending the Deregulation Debate*. Oxford, England: Oxford University Press.

Barnes M (2017) *Inquest into the Deaths Arising from the Lindt Café Siege: Findings and Recommendations*. Sydney, New South Wales: State Coroner of New South Wales.

Bartels L (2013) Parole and parole authorities in Australia: A system in crisis? *Criminal Law Journal* 37: 357-376.

Booth T and Townsley L (2009) The process is the punishment: The case of bail in New South Wales. *Current Issues in Criminal Justice* 23(1): 41-58.

Brown D (2013a) Criminalisation and normative theory. *Current Issues in Criminal Justice* 25(2): 605-625.

Brown D (2013b) Looking behind the increase in custodial remand populations. *International Journal for Crime, Justice and Social Democracy* 2(2): 80-99. DOI: 10.5204/ijcjsd.v2i2.84.

Brown D (2015) Constituting physical and fault elements: A NSW case study. In Crofts T and Loughnan A (eds) *Criminalisation and Criminal Responsibility in Australia*: 13-32. Melbourne, Victoria: Oxford University Press.

Brown D, Farrier D, McNamara L, Steel A, Grewcock M, Quilter J and Schwartz M (2015) *Criminal Laws: Materials and Commentary on Criminal Law and Process of NSW*, 6th edn. Sydney, New South Wales: Federation Press.

Brown D and Quilter J (2014) Speaking too soon: The sabotage of bail reform in New South Wales. *International Journal for Crime, Justice and Social Democracy* 3(3): 73-97. DOI: 10.5204/ijcjsd.v3i2.181.

Bronitt S (2008) Towards a universal theory of criminal law: Rethinking the comparative and international project. *Criminal Justice Ethics* 27(1): 53-66. DOI: 10.1080/0731129X.2008.9992228.

Callinan I (2013) *Review of the Parole System in Victoria*. Melbourne, Victoria: Melbourne Department of Justice, Corrections Victoria.

Carson WG (1970) Some sociological aspects of strict liability and the enforcement of factory legislation. *Modern Law Review* 33(4): 396-412. DOI: 10.1111/j.1468-2230.1970.tb01283.x.

Chalmers J (2014) 'Frenzied law making': Overcriminalization by numbers. *Current Legal Problems* 67(1): 483-502. DOI: 10.1093/clp/cuu001.

Chalmers J and Leverick F (2013) Tracking the creation of criminal offences. *Criminal Law Review*: 543-560.

Christie N (1986) The ideal victim. In Fattah E (ed.) *From Crime Policy to Victim Policy: Reorienting the Justice System*: 17-30. London: Palgrave Macmillan.

Clarke D (2016) Second reading speech, *Justice Portfolio* Legislation (Miscellaneous Amendments) Bill. NSW Parliament, Legislative Council, Hansard, 12 October: 11-16.

Coghlan P (2017) *Bail Review: Second Advice to the Victorian Government*. Victoria.

Cohen S (2002) *Folk Devils and Moral Panics*, 3rd edn. Abingdon, England: Routledge.

Crofts T and Loughnan A (eds) (2015) *Criminalisation and Criminal Responsibility in Australia*. Melbourne, Victoria: Oxford University Press

Department of Prime Minister and Cabinet and Department of Premier and Cabinet (2015) *Martin Place Siege: Joint Commonwealth – New South Wales Review*. Canberra, Australian Capital Territory; Sydney, New South Wales.

Duff RA, Farmer L, Marshall SE, Renzo M and Tadros V (eds) (2010) *The Boundaries of the Criminal Law*. Oxford, England: Oxford University Press.

Duff RA, Farmer L, Marshall SE, Renzo M and Tadros V (eds) (2011) *The Structures of the Criminal Law*. Oxford, England: Oxford University Press.

Duff RA, Farmer L, Marshall SE, Renzo M and Tadros V (eds) (2013) *The Constitution of Criminal Law*. Oxford, England: Oxford University Press.

Duff RA, Farmer L, Marshall SE, Renzo M and Tadros V (eds) (2014) *Criminalization: The Political Morality of the Criminal Law*. Oxford, England: Oxford University Press.

Feeley M and Simon J (1992) The new penology: Notes on the emerging strategy of corrections and its implications. *Criminology* 30(4): 449-474. DOI: 10.1111/j.1745-9125.1992.tb01112.x.

Feeley M and Simon J (1994) Actuarial justice: The emerging new criminal law. In Nelken D (ed.) *The Futures of Criminology*: 173-201. London: Sage Publications.

Fitzgerald R, Bartels L, Freiberg A, Cherney A and Buglar S (2016) How does the Australian public view parole? Results from a national survey on public attitudes towards parole and re-entry. *Criminal Law Journal* 40(6): 307-324.

Hogg R (2013) Populism, law and order and the crimes of the 1%. *International Journal for Crime, Justice and Social Democracy* 2(1): 113-130. DOI: 10.5204/ijcjsd.v2i1.96.

Hogg R (2014) 'Only a pawn in their game': Crime, risk and politics in the preventive detention of Robert Fardon. *International Journal for Crime, Justice and Social Democracy* 3(3): 55-72. DOI: 10.5204/ijcjsd.v3i3.152.

Husak D (2008) *Overcriminalization*: *The Limits of the Criminal Law*. New York: Oxford University Press.

Innes M (2014) *Signal Crimes: Social Reactions to Crime, Disorder and Control*. Oxford, England: Oxford University Press.

Keyzer P (ed) (2013) *Preventive Detention: Asking the Fundamental Questions*. Cambridge, England: Intersentia.

Lacey N (2009) Historicising criminalisation: Conceptual and empirical issues. *Modern Law Review* 72(6): 936-960. DOI: 10.1111/j.1468-2230.2009.00775.x.

Lacey N (2013) The rule of law and the political economy of criminalisation: An agenda for research. *Punishment & Society* 15(4): 349-366. DOI: 10.1177/1462474513500619.

Loughnan A (2014) Book review: 'The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorizing' by Carl Constantin Lauterwein. *Criminal Law and Philosophy* 8(3): 687-691. DOI: 10.1007/s11572-013-9227-8.

McNamara L (2015) Criminalisation research in Australia: Building a foundation for normative theorising and principled law reform. In Crofts T and Loughnan A (eds) *Criminalisation and Criminal Responsibility in Australia*: 33-51. Melbourne, Victoria: Oxford University Press.

McNamara L (2017) Editorial: In search of principles and processes for sound criminal law-making. *Criminal Law Journal* 41(1): 3-6.

McNamara L and Quilter J (2016) The 'bikie effect' and other forms of demonisation: The origins and effects of hyper-criminalisation. *Law in Context* 34(2): 5-35.

McSherry B (2014) *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment*. New York: Routledge.

McSherry B, Norrie A and Bronitt S (eds) (2009) *Regulating Deviance: Redirection of Criminalisation and the Futures of Criminal Law*. Oxford, England: Hart.

Myers N (2017) Eroding the presumption of innocence: Pre-trial detention and the use of conditional release on bail. *British Journal of Criminology* 57(3): 664-683. DOI: 10.1093/bjc/azw002.

Naffine N (2011) Human agents in criminal law and its scholarship. *Criminal Law Journal* 35(1): 51-56.

NSW Law Reform Commission (2012) *Bail*, Report No. 133. Sydney, New South Wales: NSW Law Reform Commission.

NSW Ombudsman (2009) *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (August). Sydney, New South Wales.

Quilter J (2015) Criminalisation of alcohol fuelled violence: One-punch laws. In Crofts T & Loughnan A (eds) *Criminalisation and Criminal Responsibility in* Australia: 82-121. Melbourne: Oxford University Press.

Quilter J (2017) Judicial Responses to alcohol-fuelled public violence: The Loveridge effect. *International Journal for Crime, Justice and Social Democracy* 6(3): 123-146. DOI: 10.5204/ijcjsd.v6i3.415.

Quilter J and Hogg R (2018) The hidden punitiveness of fines. *International Journal for Crime, Justice and Social Democracy* 7(3). DOI: 10.5204/ijcjsd.v7i2.512.

Quilter J and McNamara L (2013) Time to define 'the cornerstone of public order legislation': The elements of offensive conduct and language under the *Summary Offences Act 1988* (NSW). *UNSW Law Journal* 36(2): 534-562.

Quilter J, McNamara L, Seear K and Room R (2016) The definition and significance of 'intoxication' in Australian criminal law: A case study of Queensland's 'safe night out' legislation. *QUT Law Review* 16(2): 42-58.

Shrestha P (1015) Two steps back: The presumption of innocence and changes to the *Bail Act 2013* (NSW). *Sydney Law Review* 37: 147-154.

Steel A (2009) Bail in Australia: Legislative introduction and amendment since 1970. In Segrave M (ed.) *Australia & New Zealand Critical Criminology Conference: Conference Proceedings*: 228-243. Melbourne, Victoria: Monash University.

Stevenson A (2015) *Oxford Dictionary of English*, 3rd edn. Oxford, England: Oxford University Press (online).

Tink A and Whelan P (2013) *Review of the Law Enforcement Powers and Responsibilities Act 2002 (LEPRA)*. Sydney, New South Wales: NSW Department of Attorney General and Justice and Ministry for Police and Emergency Services.

Cases

High Court of Australia in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51.

Knight v Victoria [2017] HCA 29 (17 August 2017).

Lawson v Dunlevy [2012] NSWSC 48.

Legislation

Bail Act 2013 (NSW).

Bail Amendment Act 2014 (NSW).

Bail Amendment Act 2015 (NSW).

Bail Amendment (Enforcement Conditions) Act 2012 (NSW).

Bail (Consequential Amendment) Act 2013 (NSW).

Bail (Consequential Amendment) Act 2014 (NSW).

Child Protection Legislation Amendment (Offender Registration and Prohibition Orders) Act 2013 (NSW).

Children (Criminal Proceedings) Act 1987 (NSW).

Community Protection Act 1994 (NSW).

Crimes Act 1900 (NSW).

Crimes (Administration of Sentences) Act 1999 (NSW).

Crimes (Administration of Sentences) Amendment Act 2013 (NSW).

Crimes (Administration of Sentences) Regulation 2014 (NSW).

Crimes Amendment (Consorting and Organised Crime) Act 2012 (NSW).

Crimes (Criminal Organisations Control) Act 2012 (NSW).

Crimes (Domestic and Personal Violence) Act 2007 (NSW).

Crimes (High Risk Offenders) Amendment Act 2016 (NSW).

Crimes Legislation Amendment Act 2013 (NSW).

Crimes Legislation Amendment (Child Sex Offences) Act 2015 (NSW).

Crime Legislation Amendment (Organised Crime and Public Safety) Act 2016 (NSW).

Crimes (Sentencing Procedure) Act 1999 (NSW).

Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act 2014 (NSW).

Crimes (Serious Sex Offenders) Amendment Act 2013 (NSW).

Criminal Procedure Act 1986 (NSW).

Criminal Procedure Regulation 2017 (NSW).

Criminal Records Amendment (Historical Homosexual Offences) Act 2014 (NSW).

Drug Misuse & Trafficking Act 1985 (NSW).

Justice Portfolio Legislation (Miscellaneous Amendments) Act 2016 (NSW).

Law Enforcement (Police Powers and Responsibilities) Act 2002 (NSW).

Law Enforcement (Powers and Responsibilities) Amendment Act 2014 (NSW).

Road Transport Legislation Amendment (Offender Nomination) Act 2012 (NSW).

Road Transport (Licence) Act 2013 (NSW).

Bail Act 1980 (Qld)
Bail (Domestic Violence) and Another Amendment Act 2017 (Qld).
Criminal Law Amendment Act 2012 (Qld).
Criminal Law Amendment Act 2014 (Qld).
Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld).
Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013 (Qld).
Criminal Law (Historical Homosexual Convictions Expungement) Act 2017 (Qld).
Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012 (Qld).
Domestic and Family Violence Protection Act 2012 (Qld).
Safe Night Out Legislation Act 2014 (Qld).
Serious and Organised Crime Amendment Act 2015 (Qld).
Serious and Organised Crimes Legislation Amendment Act 2016 (Qld).
Tackling Alcohol-Fuelled Violence Legislation Amendment Act 2015 (Qld).
Vicious Lawless Association Disestablishment Act 2013 (Qld).

Bail Amendment Act 2013 (Vic).
Bail Amendment Act 2015 (Vic).
Bail Amendment Act 2016 (Vic).
Bail Amendment (Stage One) Act 2017 (Vic).
Corrections Amendment (Further Parole Reform) Act 2014 (Vic).
Corrections Amendment (Parole) Act 2014 (Vic).
Corrections Amendment (Parole Reform) Act 2013 (Vic).
Corrections Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016 (Vic).
Correction Legislation Amendment Act 2015 (Vic).
Corrections Legislation Amendment Act 2016 (Vic).
Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic).
Crimes Amendment (Carjacking and Home Invasion) Act 2016 (Vic).
Crimes Amendment (Sexual Offences) Act 2016 (Vic).
Crimes Amendment (Sexual Offences and Other Matters) Act 2014 (Vic).
Criminal Organisations Control Act 2012 (Vic).
Criminal Organisations Control Amendment (Unlawful Associations) Act 2015 (Vic).
Criminal Organisations Control and Other Acts Amendment Act 2014 (Vic).
Criminal Procedure Act 2009 (Vic).
Drugs, Poisons and Controlled Substances Act 1981 (Vic).
Drugs, Poisons and Controlled Substances Amendment Act 2016 (Vic).
Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016 (Vic).
National Domestic Violence Order Scheme Act 2016 (Vic).
Parole Orders (Transfer) Act 1983 (Vic).
Road Safety Amendment (Operator Onus) Act 2012 (Vic).
Road Safety Legislation Amendment Act 2013 (Vic).
Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014 (Vic).
Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic).
Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016 (Vic).

Serious Sex Offender (Detention and Supervision) and Other Acts Amendment Act 2015 (Vic).
Sex Offenders Registration Act 2004 (Vic).
Sex Offenders Registration Amendment Act 2016 (Vic).

Appendix 1: Criminalisation statutes enacted 2012-16 in NSW, Victoria and Queensland

Year	*Statute name*	*Date passed*
New South Wales		
2012	Bail Amendment (Enforcement Conditions) Act 2012	14 Nov 2012
	Courts and Crimes Legislation Amendment Act 2011	14 Mar 2012
	Crimes (Criminal Organisations Control) Act 2012	14 Mar 2012
	Crimes Amendment (Cheating at Gambling) Act 2012	12 Sep 2012
	Crimes Amendment (Consorting and Organised Crime) Act 2012	7 Mar 2012
	Criminal Procedure Amendment (Summary Proceedings Case Management) Act 2011	13 Mar 2012
	Graffiti Legislation Amendment Act 2011	22 Aug 2012
	Law Enforcement (Powers and Responsibilities) Amendment (Kings Cross and Railways Drug Detection) Act 2012	24 Oct 2012
	Road Transport (General) Amendment (Vehicle Sanctions) Act 2012	1 May 2012
	Road Transport Legislation Amendment (Offender Nomination) Act 2012	4 Apr 2012
2013	Bail Act 2013	22 May 2013
	Child Protection Legislation Amendment (Offenders Registration and Prohibition Orders) Act 2013	22 Oct 2013
	Crimes (Domestic and Personal Violence) Amendment Act 2013	30 Oct 2013
	Crimes (Sentencing Procedure) Amendment (Provisional Sentencing for Children) Act 2013	20 Mar 2013
	Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013	22 Oct 2013
	Crimes (Serious Sex Offenders) Amendment Act 2013	13 Mar 2013
	Crimes and Courts Legislation Amendment Act 2013	23 Oct 2013
	Crimes Legislation Amendment Act 2013	13 Nov 2013
	Drugs and Poisons Legislation Amendment (New Psychoactive and Other Substances) Act 2013	18 Sep 2013
	Intoxicated Persons (Sobering Up Centres Trial) Act 2013	27 Mar 2013
	Law Enforcement (Powers and Responsibilities) Amendment (Arrest Without Warrant) Act 2013	19 Nov 2013
	Road Transport Amendment (Licence Disqualification on Conviction) Act 2013	20 Aug 2013
	Road Transport Amendment (Obstruction and Hazard Safety) Act 2013	14 Aug 2013
2014	Bail (Consequential Amendments) Act 2013	5 Mar 2014
	Bail Amendment Act 2014	17 Sep 2014
	Crimes (Administration of Sentences) Amendment Act 2013	5 Mar 2014
	Crimes Amendment (Provocation) Act 2014	14 May 2014
	Crimes Amendment (Strangulation) Act 2014	28 May 2014
	Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014	30 Jan 2014
	Crimes (High Risk Offenders) Amendment Act 2014	15 Oct 2014
	Crimes Legislation Amendment Act 2014	15 Oct 2014
	Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act 2014	14 May 2014
	Criminal Procedure Amendment (Domestic Violence Complainants) Act 2014	18 Nov 2014
	Graffiti Control Amendment Act 2013	8 May 2014
	Law Enforcement (Powers and Responsibilities) Amendment Act 2014	18 Jun 2014
2015	Bail Amendment Act 2015	27 Oct 2015
	Crimes Amendment (Off-Road Fatal Accidents) Act 2015	18 Nov 2015
	Crimes Legislation Amendment (Child Sex Offences) Act 2015	24 Jun 2015
2016	Crimes (Domestic and Personal Violence) Amendment (National Domestic Violence Orders Recognition) Act 2016	22 Mar 2016
	Crimes (Domestic and Personal Violence Amendment (Review) Act 2016	21 Jun 2016
	Crimes (High Risk Offenders) Amendment Act 2016	1 Jun 2016
	Crimes (Serious Crime Prevention Orders) Act 2016	4 May 2016
	Crime Legislation Amendment (Organised Crime and Public Safety) Act 2016	4 May 2016
	Drug Misuse and Trafficking Amendment (Drug Exhibits) Act 2016	16 Mar 2016
	Justice Portfolio Legislation (Miscellaneous Amendments) Act 2016	19 Oct 2016

Year	*Statute name*	*Date passed*
Victoria		
2012	Criminal Organisations Control Act 2012	13 Dec 2012
	Drugs, Poisons and Controlled Substances Amendment Act 2012	9 Oct 2012
	Justice Legislation Amendment (Family Violence and Other Matters) Act 2012	11 Dec 2012
	Road Safety Amendment (Operator Onus) Act 2012	29 Nov 2012
	Road Safety Amendment Act 2012	28 Aug 2012
	Road Safety and Sentencing Acts Amendment Act 2012	16 Aug 2012
	Serious Sex Offenders (Detention and Supervision) Amendment Act 2012	25 Oct 2012
2013	Bail Amendment Act 2013	22 Aug 2013
	Corrections Amendment (Breach of Parole) Act 2013	5 Sep 2013
	Corrections Amendment (Parole Reform) Act 2013	29 Oct 2013
	Crime Amendment (Investigation Powers Act) 2013	28 Nov 2013
	Justice Legislation Amendment (Cancellation of Parole and Other Matters) Act 2013	21 Mar 2013
	Road Legislation Amendment Act 2013	26 Nov 2013
	Road Safety and Sentencing Acts Amendment Act 2013	17 Sep 2013
	Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013	28 May 2013
2014	Corrections Amendment (Further Parole Reform) Act 2014	8 May 2014
	Corrections Amendment (Parole) Act 2014	27 Mar 2014
	Corrections Amendment (Abolition of Defensive Homicide) Act 2014	3 Sep 2014
	Crimes Amendment (Grooming) Act 2013	20 Feb 2014
	Crimes Amendment (Protection of Children) Act 2014	8 May 2014
	Crimes Amendment (Sexual Offences and Other Matters) Act 2014	15 Oct 2014
	Criminal Organisations Control and Other Acts Amendment Act 2014	19 Aug 2014
	Family Violence Protection Amendment Act 2014	15 Oct 2014
	Road Safety Amendment Act 2014	26 Jun 2014
	Sentencing Amendment (Baseline Sentences) Act 2014	5 Aug 2014
	Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014	18 Sep 2014
	Sentencing Amendment (Emergency Workers) Act 2014	16 Sep 2014
2015	Corrections Legislation Amendment Act 2015	3 Sep 2015
	Criminal Organisations Control Amendment (Unlawful Associations) Act 2015	8 Oct 2015
	Road Safety Amendment Act 2015	3 Sep 2015
	Serious Sex Offenders (Detention and Supervision) and Other Acts Amendment Act 2015	10 Oct 2015
2016	Bail Amendment Act 2015	11 Feb 2015
	Corrections Legislation Amendment Act 2016	25 Oct 2016
	Crimes Amendment (Carjacking and Home Invasion) Act 2016	13 Oct 2016
	Crimes Amendment (Sexual Offences) Act 2016	1 Sep 2016
	Crimes Legislation Amendment Act 2016	24 May 2016
	Drugs, Poisons and Controlled Substances Amendment Act 2016	9 Feb 2016
	Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016	8 Dec 2016
	National Domestic Violence Order Scheme Act 2016	11 Oct 2016
	Sentencing (Community Correction Order) and Other Acts Amendment Act 2016	10 Nov 2016
	Serious Sex Offenders (Detention and Supervision) Amendment (Community Safety) Act 2016	24 May 2016
	Sex Offenders Registration Amendment Act 2016	14 Apr 2016

Year	*Statute name*	*Date passed*
Queensland		
2012	Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012	10 July 2012
	Criminal Law Amendment Act 2012	21 Aug 2012
	Domestic and Family Violence Protection Act 2011	16 Feb 2012
2013	Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2012	16 Apr 2013
	Criminal Law (Criminal Organisations Disruption) Amendment Act 2013	15 Oct 2013
	Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013	21 Nov 2013
	Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013	17 Oct 2013
	Criminal Law Amendment Act (No 2) 2012	6 Aug 2013
	Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2012	1 May 2013
	Police Powers and Responsibilities (Motor Vehicle Impoundment) and Other Legislation Amendment Act 2012	16 Apr 2013
	Vicious Lawless Association Disestablishment Act 2013	15 Oct 2013
2014	Criminal Law Amendment Act 2014	5 Aug 2014
	Police Powers and Responsibilities and Other Legislation Amendment Act 2013	11 Feb 2014
	Safe Night Out Legislation Amendment Act 2014	26 Aug 2014
2015	Criminal Law (Domestic Violence) Amendment Act 2015	15 Oct 2015
	Domestic and Family Violence Protections and Another Act Amendment Act 2015	3 Dec 2015
2016	Criminal Law (Domestic Violence) Amendment Act 2016	20 Apr 2016
	Domestic and Family Violence Protection and Other Legislation Amendment Act 2016	11 Oct 2016
	Serious and Organised Crimes Legislation Amendment Act 2016	29 Nov 2016
	Tacking Alcohol-Fueled Violence Legislation Amendment Act 2016	17 Feb 2016