

## SPECIAL ISSUE: CRIMINAL LAW INTRODUCTION

This special issue of the *UWA Law Review* is a collection of articles by criminal law scholars from across Australia and Aotearoa New Zealand. Its subject matter covers assault occasioning bodily harm, infringement notices, consorting laws, sexual assault laws, elder law and more. The collection is the result of the fifth Criminal Law Workshop, an annual meeting of criminal law teacher-researchers held in February 2018 at the University of Western Australia. The workshop series, which began in 2014 at the University of Sydney Law School, is designed to provide scholars with an opportunity for peer exchange. In-progress research is discussed and critiqued in a supportive, collegiate setting. In 2018 we decided to develop the research into a collection of papers, which represent scholarship from law schools in Auckland, Christchurch, Melbourne, Sydney and Perth.

One of the benefits of the workshop series has been the opportunity for exchange between code and common law lawyers. Along with Aotearoa New Zealand, the criminal law in Western Australia, Queensland and Tasmania, and more recently the Northern Territory, the Australian Capital Territory and the Australian Commonwealth, is codified. New South Wales, South Australia and Victoria remain 'common law jurisdictions'. There remains a distinction among criminal lawyers, between 'code thinkers' and 'common law thinkers'. It can be difficult from a common law perspective, for example, to make sense of a system without *mens rea*, and the concept of 'intention', fundamental to criminal responsibility, means a quite different thing in each tradition. However, the differences between these kinds of jurisdiction is far from straightforward. On the one hand, codes differ from each other, including on significant matters such as whether fundamental principles of criminal responsibility are included in the code or remain sourced in the common law.<sup>1</sup> And codes are amended, gradually lessening the systematised efficiency associated with them, and increasing divergence between jurisdictions that enacted a model code. On the other hand 'common law' jurisdictions are

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<sup>1</sup> For example, the Griffith Code (Queensland and Western Australia) codified principles of criminal responsibility (*Criminal Code* (WA); *Criminal Code* (Qld) ch 5), though not other common law principles such as the onus and standard of proof. *Criminal Code* (Cth) (Ch 2) codified principles of criminal responsibility and the onus and standard of proof. *Tasmanian Criminal Code Act* (Tas) (s8) and *Crimes Act 1961* (NZ) (ss20-25) preserve common law justifications and excuses.

governed by numerous statutes, including major consolidated crimes acts. It may be that the differences between these two kinds of jurisdiction are as much about culture and tradition as legal principle.<sup>2</sup>

Historically, the Australian state codes have been treated as islands in Australian criminal law – and associated with a certain obtuseness and conservatism.<sup>3</sup> But they are, in fact, part of the major codification movement of the 19<sup>th</sup> century - associated with a progressive democratisation. Although the United Kingdom was not influenced by the European codification movement sufficiently to enact a code, a number of its former colonies were. Criminal codes were enacted in India (1860), Canada (1892), Aotearoa New Zealand (1893), Queensland (1899), Western Australia (1902/1913) and Tasmania (1924), all influenced, if indirectly, by the European movement.<sup>4</sup> Moreover, England, with its Draft Criminal Code presented to Parliament in 1880,<sup>5</sup> and also Victoria and South Australia,<sup>6</sup> came closer to being code jurisdictions than is generally known. Had these draft codes been enacted the character of Australian criminal law would have been very different.

As we see in Kris Gledhill's article in this collection, 'The Meaning of Knowledge as a Criminal Fault Element: Is to Know to Believe?', Aotearoa New Zealand's *Criminal Code Act*, enacted in 1893, was revised and re-enacted in 1908 and again in 1961. The 1961 statute is named the *Crimes Act 1961* but is a code in the sense that criminal punishment can only be imposed pursuant to a statutory offence.<sup>7</sup> Unlike the Western Australian and Queensland codes, however, some principles of criminal responsibility (justifications and excuses) remain sourced in the common law.<sup>8</sup>

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<sup>2</sup> Stella Tarrant, 'Building Bridges in Australian Criminal Law' (2013) 39 *Monash Law Review* 838.

<sup>3</sup> See, eg, Matthew Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal* 152, 157-163. See also, the now famous passage of Dixon CJ in *Vallance v R* (1961) 108 CLR 56, 58.

<sup>4</sup> Barry Wright, 'Self-governing Codifications of English Criminal Law: The Queensland and Canadian Examples' (2007) 26 *University of Queensland Law Journal* 39; Barry Wright, 'Criminal Law Codification and Imperial Projects: The Self-governing Jurisdiction Codes of the 1890s' (2008) 12 *Legal History* 19; Alberto Cadoppi, 'The Zanardelli Code and Codification in the Countries of the Common Law' (2000) 7 *James Cook University Law Review* 116.

<sup>5</sup> *Criminal Code Bill 1880* (UK), drafted by Sir James Fitzjames Stephen.

<sup>6</sup> Greg Taylor, 'The Victorian Criminal Code' (2004) 23 *University of Queensland Law Journal* 170.

<sup>7</sup> *Crimes Act 1961* (NZ), s9.

<sup>8</sup> *Crimes Act 1961* (NZ), ss20, 21-25. Major proposed reforms in the early 1990s were not passed. Geoffrey Palmer, 'The Reform of the Crimes Act 1961' (1990) *Victoria University Wellington Law Review* 9.

Both code and common law criminal law traditions were therefore represented in the February 2018 workshop. Both these traditions are, of course, overlays upon far longer legal traditions in Australia and Aotearoa New Zealand. Aboriginal and Māori systems of laws have for centuries governed those who live on and as part of the lands we occupy and do our scholarship on. Those much older systems of law were not represented in the workshop, although two of the articles in the collection address some of the colonising effects of Australian criminal law. Thalia Anthony and Kieran Tranter's article, 'Race, Australian Colonialism and Technologies of Mobility in Kalgoorlie', is concerned with the colonial project as it is advanced in contemporary Western Australia through concepts of mobility. And Tanya Mitchell's article, 'A Dilemma at the Heart of the Criminal Law: The Summary Jurisdiction, Family Violence, and the Over-incarceration of Aboriginal and Torres Strait Islander Peoples', addresses some of the effects on Aboriginal people of non-Indigenous efforts to curb domestic and family violence.

The 2018 workshop did not begin with a theme. This was, consistent with the design of the workshop overall, to provide space for scholars to pursue research of their own initiation according to their own creative assessment of what needs to be written about. The collection is therefore an eclectic one, though as often happens, themes did emerge. The papers deal with the themes of: criminal responsibility; criminalisation and inequities of class; effects of settler laws on Aboriginal people; criminal law practice and ethics; and violence and gender. Most of the articles deal with more than one of these themes. As was to be expected, also, research methods varied. These papers include doctrinal analyses, socio-legal investigations, historical-legal analysis, reflexive narrative and critical discourse analysis. By way of introduction, a precis of each article follows.

**Arlie Loughnan's** article, '**Consorting, Then and Now: Changing Relations of Responsibility for Crime**', examines two 'generations' of consorting laws, that is, laws outlawing association with criminals. We are used to thinking of the state's role in the criminal process as acting against an individual on behalf of a wronged community (and individual), but consorting involves the state in a different configuration of relations of responsibility: the offence of consorting involves the criminalisation of relations between individuals, with the criminal law implicating others in the evaluation of the particular individual charged with the offence. Loughnan identifies the 'first

generation' of consorting laws as those enacted in the early 20<sup>th</sup> century and a 'second generation' as those comprising the modern framework of consorting laws which continues today. In each generation of laws, Loughnan argues, different relations of criminal responsibility are encoded; relations between self, others and the state. The article tells a story of the changing nature of relations of responsibility revealed through these laws.

**Theodore Bennett's** article, '**Locating the Body in "Bodily Harm"**', concerns what may be said to be the quintessential problem of the criminal law: the causing of (non-consensual) bodily harm by one person to another. The article asks, how should we conceptualise a 'body' in today's criminal law? Bennett argues, in the context of assault occasioning bodily harm, that the conceptualisation of the body as flesh, blood and bone is no longer fit for purpose. Rapidly advancing technologies, such as electronic implants and prostheses, make it necessary to reformulate conceptions of what is 'subject' and what is 'object' in this area of criminal law. A more sophisticated formulation of the 'means by which [we] experience the world' (that is, our bodies), should underpin criminal responsibility for causing 'bodily harm' to another.

**Elyse Methven's** article, '**Cheap and Efficient Justice? Neoliberal Discourse and Criminal Infringement Notices**', looks at the economisation of the criminal justice system through infringement notice schemes: legislative schemes which provide for fixed quasi-criminal penalties where an enforcement officer believes a prescribed offence has been committed. Focussing on the Western Australian scheme, the author argues that this 'criministrative' law<sup>9</sup> erodes traditional, primary concerns of the justice system. The values of 'economic efficiency' are imported from the market into the criminal justice system through language. Language such as 'saving costs' and 'reducing red tape' obscure both this shift away from primary values of morality and responsibility and the disproportionate imposition and impact of the notices on already-disadvantaged people, including Aboriginal people, and especially Aboriginal women.

**Thalia Anthony and Kieran Tranter's** article, '**Race, Australian Colonialism and Technologies of Mobility in Kalgoorlie**', examines the legal and social mechanisms of a current settler state. 'Mobility and

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<sup>9</sup> Anne Weyembergh and Nicolas Joncheray, 'Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture That Needs to Be Addressed' (2016) 7(2) *New Journal of European Criminal Law* 190, 190.

technologies of movement can be transformative' the authors say 'but are often conservative; maintaining their own systemic functions and facilitating established and orthodox power relations.' 'Mobility', as a contemporary focus of social thought, provides a conceptual framework through which to examine in close detail the racial context and legal texts concerning the death of an Aboriginal child pursued and run down by a non-Aboriginal adult in a large, four-wheel drive vehicle. 'Motifs and themes of mobility' are identified and in this identification 'the colonial politics of mobility in Australia comes into focus'.

Feminisms are many and varied.<sup>10</sup> If a central idea could be extracted, it may be, in the words of Leslie Bender's 'working definition', 'an analysis of women's subordination for the purpose of figuring out how to change it'.<sup>11</sup> Feminisms of all kinds face challenges, not only from critics who would reject the existence, even, of a hierarchy organised around sex and gender, but from those who demand a broad and inclusive understanding of social disadvantage. Two of the articles in this collection contribute to this field of scholarship addressing violence against women in contexts of intersections of disadvantage and vulnerability.

Aboriginal researchers have for a long time recognised the limitations for Aboriginal women and men of many (white) feminist approaches to family violence.<sup>12</sup> An individualist, criminal justice-focus leaves out of account not only Aboriginal women's experiences of wider family but also Aboriginal women and men's experiences of racism and the legacies of colonialism, which are integral to their experiences of violence, including family violence. Even where Aboriginal and non-Aboriginal women share the same aim – stopping violence – Aboriginal women have not seen non-Aboriginal criminal justice approaches as effective.<sup>13</sup> **Tanya Mitchell's article, 'A Dilemma at the Heart of the Criminal Law: The Summary Jurisdiction, Family Violence, and the Over-incarceration of Aboriginal and Torres Strait Islander Peoples'**, is concerned with this intersection. Mitchell

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<sup>10</sup> For an excellent introduction to different feminist approaches, see Rosemarie Putnam Tong, *Feminist Thought* (Westview Press, 5<sup>th</sup> edition, 2017).

<sup>11</sup> Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38 *Journal of Legal Education* 3, 5.

<sup>12</sup> See, eg, Larissa Behrendt, 'Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse' (1993) 1 *The Australian Feminist Law Journal* 27.

<sup>13</sup> Heather Nancarrow, 'In Search of Justice for Domestic and Family Violence: Indigenous and non-Indigenous Australian Women's Perspectives' (2006) 10(1) *Theoretical Criminology* 87.

juxtaposes recent public attention on domestic violence (for example, the 2016 *Victorian Royal Commission into Family Violence*) and over-incarceration of Aboriginal and Torres Strait Islander people (for example, the Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2018)). This article examines the history of criminal justice responses to domestic violence in Australia to demonstrate its disproportionate application to Aboriginal people and its contribution to the devastating number of Aboriginal people imprisoned.

**Elisabeth McDonald's** article, '**Gender Neutrality and the Definition of Rape: Challenging the Law's Response to Sexual Violence and Non-Normative Bodies**', examines another intersection where women experience violence. Major reforms of rape laws in the 1970s and 1980s, led by feminist reformers, aimed to recognise more accurately the sexual violence inflicted on women. With shared aims, vigorous debates occurred about the efficacy of gender-neutral and gender-specific drafting of legislation. Aotearoa New Zealand was among the jurisdictions which retained an offence of 'rape'. Within this historical context, and with focus on the current offence in s 128 of the *Crimes Act 1961* (NZ), McDonald examines the capacity of an offence of 'rape' to include sexual violence against transgender and intersex people. The article asks what form the criminal offence should take so as to be responsive to all communities' experiences of sexual violence.

**Meredith Blake's** article, '**Protecting older persons from life-threatening and fatal abuse: Should Western Australian criminal law do more?**', considers the role of criminal law in the protection of a different vulnerable group, the elderly. 'Children are mandatorily monitored in ways in which adults are not, for example, through required school attendance. Adults in the workforce are also visible in a way in which older people, particularly the more elderly, are not.' This lessening of social oversight can create conditions for abuse. Blake surveys law reform proposals in this field of growing public concern and argues that the 'moral distinctiveness' of abuse suffered by the elderly warrants a specific criminal law duty of care.

**Kris Gledhill's** article, '**The Meaning of Knowledge as a Criminal Fault Element: Is to Know to Believe?**', provides a detailed statutory analysis of the major New Zealand criminal legislation to make a direct challenge to the judicial conclusion that the two states of mind, knowing and

believing, may be the same. Based on an argument that Parliament is discerning in its criminal legislation when it comes to standards for imposing criminal responsibility, and supported by the doctrine of lenity, the author argues that where 'knowledge' is required, a person should not be convicted unless they are proved to have had a *correct* belief.

**Toby Nisbet and Ann-Claire Larsen's** article, '**Normativity and the Ordinary Person Formula: Comparing Provocation and Duress in Australia**', revisits the objective test for setting standards of conduct in criminal law defences. The authors examine the tension inherent in these standards, between the assignation of 'characteristics' of the particular defendant to the 'ordinary person' and assuming (if it is possible to do so) a universal standard. They explore the possibility of reworking the ordinary person test to achieve uniformity across the defences of provocation and duress. They argue that, although the rationales for these defences differ, constructing a minimum objective standard for the ordinary person test would promote law's principle values of fairness, impartiality and predictability.

**Jeremy Gans's** article, '**True Criminal Law Ethics**', is a reflective paper raising questions about ethics in criminal law research. We have chosen this paper to conclude the collection because its subject is us, criminal law scholars and researchers. Legal research, more than ever, crosses disciplinary boundaries and this raises questions for the academic about the nature of her work.<sup>14</sup> Serious questions of research ethics are raised for legal academics as they step beyond the traditional focus on cases and statutes into sociology, criminology, psychology and, as is this article's focus, journalism and more. Legal academics are not often trained in the research methods and ethical practices of these disciplines and yet there is increasing pressure within the academy for cross-disciplinary work. This article is situated in this context but raises further questions - about the ethics of, even, traditional, doctrinal research, something legal researchers have tended to assume they have an ethical right to do. Both in its content and reflexive form, this article is concerned with disciplinary demarcations and the ethical questions they raise for criminal law scholarship.

We hope you enjoy the collection.

Stella Tarrant and Meredith Blake

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<sup>14</sup> See, eg, Terry Hutchinson and Nigel Duncan, 'Defining What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83.