Introduction

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This Special Issue of *Law in Context* is comprised of articles developed at the 2015 Criminal Law Workshop, co-hosted by the La Trobe University and Melbourne University Law Schools. This annual workshop brings together criminal law academics from across Australia and New Zealand, and results in a day of intense, diverse, and fascinating discussion about contemporary criminal law issues. This collection of articles is accordingly wide-ranging. From the creation of new offences dealing with contemporaneous political panics (such as one-punch homicides and the spectre of out-of-control teenagers using social media to gatecrash suburban parties) and new processes such as paperless arrest warrants, to the re-purposing of old crimes (consorting, conspiracy) and processes (such as bail) in the service of new targets of social/political concern (bikies, domestic violence perpetrators), the articles in this Special Issue interrogate the boundaries of the criminal law and the extent to which it can or should legitimately be used as a tool to police the margins of society.

In the first article, Luke McNamara and Julia Quilter outline four new offences and procedures developed in response to specific public-political concerns about chaos: cohort laws targeted at bikie violence; one-punch laws aimed at late-night alcohol-fuelled violence; out of control parties leading to violence in the suburbs; and paperless arrest warrants in the Northern Territory, designed to allow the police to remove intoxicated belligerent (usually Indigenous, and often homeless) people from public places with as few procedural hurdles as possible. While each of these developments appears to be a common-sense response to a new social problem, the article demonstrates that the problems are hardly new, and that once introduced, these new legislative interventions will not remain confined within their specific contexts, but rather have been almost immediately appropriated to the task of further criminalising those at the margins of society, in the service of far more trivial offending than that which was used to justify their introduction.

For instance, it is argued that the consorting offences, introduced to deal with public concerns about serious 'bikie' violence, are now being used primarily to police the homeless (and the Indigenous). As these groups have higher rates of previous convictions, and spend more time in public spaces, McNamara and Quilter argue convincingly that they make easy prey for consorting offences – regardless of the fact that they were not the intended target of this legislation. The introduction across Australia of one punch or 'coward's punch' laws arguably provide another example of politicians using criminal legislation to demonstrate their 'tough on crime' credentials rather than actually filling a legal void. Here it is argued that the technical details of the new homicide provisions are such that they are

unlikely to succeed (or even apply) to actual one-punch killings, and that existing homicide laws will continue to apply undisturbed.

In a similar vein, Emily Ng and Heather Douglas argue that changes to bail legislation passed as a response to several highly publicised cases of violence and homicide committed by (family violence) offenders while on bail, also represent unnecessary over-reach. In the same way that social and political panics are argued by McNamara and Quilter to have led to hyper-criminalisation, here Ng and Douglas argue that these legislative changes, which effectively reverse the presumption of bail for those accused of family violence, are unnecessary. Arguing that existing rules around risk assessment and judicial powers to tailor bail conditions in light of such risks were sufficient tools to deal with bail applications from those alleged to have committed family violence, Ng and Douglas assert there is no evidence that the new bail legislation has resulted in increased public safety, and that in the process, important long held civil liberties have been lost.

Julia Tolmie and Kris Gledhill's article, on the judicial re-interpretation of common purpose and conspiracy doctrines in New Zealand, also focuses on claims of over-reach and over-criminalisation. The central argument is that the true function of complicity doctrines – holding accountable those individuals who have purposively committed to a course of criminal offending on the basis of a common understanding – has been lost as the requirements for proof of that commitment have been repeatedly diluted. In New Zealand, the co-conspirators rule means that in order to convict a particular defendant, the prosecution need only adduce 'reasonable' evidence of a criminal enterprise and, having done so, the use of hearsay evidence becomes permissible. Further, the New Zealand High Court has indicated that there is substance to an argument that conspiracy charges could properly be used where there is insufficient evidence to convict an accused of a substantive criminal offense. Preferring Kirby J's dissent in the High Court of Australia decision of *R v Keenan*,¹ the authors argue that the gap between the moral culpability of a defendant and serious criminal liability is now so great that there is a real possibility that guilt will be established by association, rather than on the basis of individual positive fault. The conclusion to be drawn from this argument is that the New Zealand High Court has moved too far away from proper standards of individual criminality.

Shedding a different light on criminal enterprise, Penny Crofts' article analyses the Royal Commission into Institutional Responses to Child Sexual Abuse in light of Scott Veitch's theory that legal institutions operate as much to deflect responsibility as to acknowledge harm. Focusing specifically on the Toowoomba Catholic Education Office case study, this article demonstrates the manner in which criminal law enables (or actively organises) legal irresponsibility. While the case studies examined by the Royal Commission provide clear and consistent evidence that sexual abuse is an institutional, rather than an individual, problem, Crofts argues that

1 *R v Keenan* [2009] HCA 1, [66].

the centrality of individuation and subjective culpability within criminal law ensures that effectively responding to systemic failures is extremely difficult, if not impossible. Organisations are the most likely vehicles of systemic harm, and yet the more complex the organisation, the less likely it is that anyone or anything will be held accountable. Thus, Crofts concludes that the focus of criminal responsibility within complex organisations must change, with new norms attributing institutional failures to official position holders and their organisations.

Jeremy Finn engages in an analysis of the defence of necessity, arguing that there is a need to reconsider its constitutive components. Based on research into the legal effects of the Canterbury earthquakes of 2010-2011, Finn claims that long-standing assumptions that disaster victims and disaster responders would not be liable for offences committed during or in the aftermath of disasters, as long as their conduct was directed at protecting themselves or others, do not match the technical requirements of the criminal law. The cause of this disjuncture results, the article posits, from confusion as to the underlying historical rationales for the defence. The first is justificatory (that the conduct does not involve the commission of an offence because it was morally correct in the circumstance) and the second is excusatory (the conduct is recognised as wrong but human nature is such that criminal punishment is inappropriate in the circumstances, because anyone in the same situation would have responded in the same way). Once faced with the peril or threat confronting the actor, he or she could have been expected to act differently. The article is centred around the fact that a failure to properly take these different rationales into account has led to formulations of the defence which are likely to restrict its application to disaster response conduct, and may discourage volunteer responses to such disasters.

The collection is rounded out with Elyse Methven's essay, which brings us back to the introduction of paperless arrest warrants in the Northern Territory (also discussed by McNamara and Quilter). The paperless arrest warrant process provides the background here for a discussion of the ways in which offensive language is used to (over)police vulnerable minorities. This new process has led to the extraordinary situation where parliament, having explicitly excluded the possibility of imprisonment in relation to certain minor forms of offending, has simultaneously granted police the right to detain those suspected of such conduct for up to four hours (or longer, until a person is no longer considered to be intoxicated), in addition to requiring the person to be subjected to biometric identification and search and seizure procedures. The *raison d'être* of the process is to ensure that none of the ordinarily available procedural safeguards, such as the right to apply for bail or the right to speak to a lawyer, apply. Further, this process appears to exist with no official oversight or review. The conduct which brings the paperless arrest warrant into operation (public offensiveness, drinking in public and so on) may be minor, but the effect of the over-policing of vulnerable minorities is not. As Methven points out, the fact that the meaning of offensiveness – which has long been a topic of

judicial notice, impervious to analysis and definition – is opaque, only adds to the legal vulnerability of those most likely to be subject to its dictates: the homeless, the indigent, and the Indigenous. The fact that a citizen may now be subject to detention, ‘free’ from procedural safeguards and oversight, for the use of language that may or may not actually constitute a crime, should be of concern to all.

The boundaries of the criminal law are constantly redrawn in the face of contemporary social and political concerns. As the articles within this Special Issue demonstrate, it can be difficult at the outset to determine where there is a legitimate need to reconfigure our legal traditions. Research and reflection of the calibre demonstrated at the 2015 Criminal Law Workshop and recorded in this volume, is a necessary element of the continued development and progress of the discipline. I would like to thank the organisers of the Workshop, Jeremy Gans and Patrick Keyzer, for bringing together such a diverse and rigorous group of academics and then giving me the opportunity to work with the contributors in bringing this issue together. I would also like to thank the contributors themselves for trusting us with their work and for meeting the deadlines and requests for revisions with such good grace. Finally, I would like to thank the Managing Editors of *Law in Context* for all their hard work in bringing the Special Issue to fruition.