The ‘Bikie Effect’ and Other Forms of Demonisation: The Origins and Effects of Hyper-Criminalisation*

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The last decade has seen a significant expansion in the net cast by Australian criminal laws. In the name of crime prevention and risk management, legislatures around Australia have introduced various forms of ‘extreme’ criminalisation which push the criminal law beyond its traditional boundaries. This article presents four recent case studies of ‘hyper-criminalisation’ to show that law-makers have effectively deployed tropes of demonisation and danger – ‘bikies’ are the archetypal 21st century example – to justify expansion of the parameters of criminal law and the severity of its sanctions. We consider the implications of this type of law-making, given that, frequently, the resulting laws are not limited in their operation to the bikies or other ‘demons’ who were instrumental in their rhetorical justification.

I INTRODUCTION

In 2014 the editors of the *Australian and New Zealand Journal of Criminology* observed that recent years have seen ‘some bold – some say too bold in some cases – approaches to long-standing problems and groups perceived as “problem groups” (boat people/asylum seekers, bikies, potential terrorists, protestors, etc)’.¹ Some of the ‘bold approaches’ in question have involved a significant expansion of the parameters of criminalisation, including the creation of new offences which cast the net of criminal responsibility substantially beyond its traditional limits, and the expansion of police powers that they warrant the label *hyper-criminalisation*.² Our primary aim in this article is to draw attention to a recurring feature of many such instances: the rhetorical justification of extreme forms of criminalisation by evoking the spectre of extraordinary and unprecedented risk and danger,³ and a strategy of simultaneously

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1 Philip Stenning and Anna Stewart, ‘Editorial’ (2014) 47(1) *Australia & New Zealand Journal of Criminology* 3, 4.

2 See Loïc Wacquant, ‘Class, Race & Hyperincarceration in Revanchist America’ (2010) 139(3) *Daedalus* 74; Loïc Wacquant, ‘Deadly Symbiosis: When Ghetto and Prison Meet and Mesh’ in David Garland (ed), *Mass Imprisonment: Social Causes and Consequences* (Sage, 2001); Chris Cunneen et al, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Ashgate Publishing, 2013).

3 Pat O’Malley, *Crime and Risk* (SAGE Publications, 2010); Lucia Zedner, ‘Fixing the Future? The Pre-emptive Turn in Criminal Justice’ in Bernadette McSherry,

embracing (or provoking) popular anxiety and offering a punitive 'law and order' solution to the problem. We illustrate this phenomenon with four case studies: the revival and expansion of the offence of consorting in New South Wales in 2012; the creation of a new form of 'one punch' homicide in New South Wales, Queensland and Victoria in 2014; the creation of a new offence of organising an 'out-of-control' party (and associated police powers) in Western Australia in 2012 and Queensland in 2014; and the introduction of 'paperless' arrests for public order offences in the Northern Territory in 2014. Each of these recent examples illustrates the contemporary prominence of 'dangerisation' as an organising paradigm for both conceiving of social 'problems' and enacting 'solutions'. According to Lianos and Douglas, dangerisation is:

[T]he tendency to perceive and analyse the world through categories of menace. It leads to continuous detection threats and assessment of adverse probabilities; to the prevalence of defensive perceptions over optimistic ones and to the dominance of fear and anxiety over ambition and desire. ... Far from an objective condition, presumed dangerousness is the major postindustrial criterion for distinguishing between those who should be avoided and those who can approach.⁴

A defining feature of dangerisation-inspired criminalisation is the articulation of a demonised target group ('folk devils' in the context of Cohen's classic 'moral panic' analysis,⁵ or 'subversive minorities' in the account of Hall and the CCS Mugging Group⁶) whose exploits are so contemptible (and 'dangerous') that extraordinary measures are required (and justified) in order to quell them and re-establish social order ('deviancy amplification'⁸). These claims are a critical part of the government's pitch

Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009).

4 Michalis Lianos and Mary Douglas, 'Dangerization and the End of Deviance: the Institutional Environment' in David Garland and Richard Sparks (eds), *Criminology and Social Theory* (Oxford University Press, 2000) 103, 110-111.

5 Stanley Cohen, *Folk Devils and Moral Panics* (Routledge, 3rd ed, 2002). Conscious that the term 'moral panic' has been much used and abused (see Scott Poynting and George Morgan, 'Introduction' in Scott Poynting and George Morgan (eds), *Outrageous: Moral Panics in Australia* (Australian Clearinghouse for Youth Studies Publishing, 2007), we emphasise that it is not our contention each of the case studies examined in this article necessarily represented a 'moral panic' in Cohen's terms. Our more modest goal is to draw attention to the longer history of a relationship between *anxiety* and criminal law 'reform'.

6 CCCS Mugging Group, 'Some Notes on the Relationship Between the Societal Control Culture and the News Media: the Construction of a Law and Order Campaign' in Stuart Hall and T Jefferson (eds), *Resistance Through Rituals: Youth Subcultures in Post-war Britain* (Hutchinson, 1976) 77. See also Chas Critcher, *Media and Moral Panics* (Open University Press, 2003); Amanda Porter, 'Riotous or Righteous Behaviour?: Representations of subaltern resistance in the Australian mainstream media' (2015) 26(3) *Current Issues in Criminal Justice* 289.

7 See John Pratt, *Governing the Dangerous: Dangerousness, Law and Social Change* (Federation Press, 1998).

8 Cohen, above n 5, xxiv.

to the electorate as to why legal change is required. Law-makers – often aided (or goaded) by mainstream tabloid media – have effectively deployed rhetorical tropes of demonisation, danger and lawlessness to justify troubling expansions of the criminal law and the severity of its sanctions, as well as police powers. 'Bikies' are the archetypal 21st century example,⁹ but others include 'gate-crashers', 'public drunks', 'hoons', 'troublemakers' and 'coward punchers'. A powerful part of the narrative is that all 'good' people are at risk of being the victims of crimes perpetrated by the dangerous. As Simon has observed, 'The vulnerabilities and needs of victims define the appropriate conditions for government intervention'.¹⁰

It is not our contention that the phenomenon we describe (and problematise) here is a new one – the moral regulatory framework advanced by Corrigan and Sayer,¹¹ and others,¹² reveals the long history of criminalisation associated with targeting and marginalisation, including in terms of class, race and sex. Rather, by examining four recent examples of hyper-criminalisation,¹³ we seek to draw attention to a contemporary practice which continues to trouble sound criminal law formation: a correlation between criminalisation which trades on demonisation for its (short-term) electoral appeal, and problematic law-making with long-term negative effects. For example, although they attract considerable attention – from police, politicians and the media – the available evidence is that outlaw motorcycle gangs are responsible for only a relatively small proportion of the crimes that are committed every year.¹⁴ And yet, the danger posed by 'bikies' have been used as a central justification for significant expansions of the parameters of the criminal law and police powers across the country. These discursive practices have muted resistance and encouraged popular endorsement or acquiescence in relation to extraordinary measures.

Two problematic effects may arise. First, often, the resulting laws are not limited in their operation to the bikies or other 'demons' who were instrumental in their rhetorical justification. They apply to all members of the community and may have effects that extend substantially beyond the evil at which they were ostensibly directed. The result is over-criminalisation. Secondly, in some instances, the drafting of 'draconian'

9 Hence the title of this article: 'The Bikie Effect ...'.

10 Jonathan Simon, *Governing Through Crime* (Oxford University Press, 2007), 76.

11 Philip Corrigan and Derek Sayer, *The Great Arch: English State Formation as Cultural Revolution* (Blackwell, 1985).

12 See, for example, Amanda Glasbeek (ed), *Moral Regulation and Governance in Canada: History, Context and Critical Issues* (Canadian Scholars' Press Inc, 2006); also Peter Squires and John Lea (eds), *Criminalisation and Advanced Marginality* (Policy Press, 2013).

13 Another obvious site for analysis of hyper-criminalisation is terrorism, which has been the subject of extensive research: see, for example, Andrew Lynch, Nicola McGarrrity and George Williams, *Inside Australia's Anti-Terrorism Laws and Trials* (NewSouth Publishing, 2015); Vicky Sentas, *Traces of Terror: Counter-Terrorism Law, Policing, and Race* (Oxford University Press, 2014).

14 Ilya Gridneff, 'Bikie Little Threat to Society – Police Study', *Sydney Morning Herald* (online), 7 May 2012 <www.smh.com.au/national/bikies-little-threat-to-society--police-study-20120506-1y73e.html>; and below n 34.

new criminal laws is so influenced by the desire to maximise the appearance that the problem has been solved (and solved with strength), rather than to meaningfully augment existing laws – that ‘success’ is chimeric, because there is little or no place for the new offence in the day-to-day operations of police and prosecutors. The result, ultimately, is community dissatisfaction and a further erosion of public confidence in the criminal law and the criminal justice system.

The role of the media has long been recognised as an important part of the story of moral panic driven law-making.¹⁵ In several of the case studies examined in this article it is evident that tabloid media was a major driver of the statutory change ultimately made, and hugely influential in the rhetorical framing and intensification of the need for action. For example, a January 2012 *Daily Telegraph* (Sydney) editorial said: ‘When extreme situations present themselves, extreme action is justified. ... A dragnet-style operation across the west is long overdue. Some law needs to be brought to streets that have become lawless’.¹⁶ In Queensland, a concerted campaign by the *Courier-Mail/Sunday Mail*¹⁷ was a major factor in shifting the Newman Government from the position that no new laws were required to address the problem of ‘out of control’ parties to the decision to make radical changes to the *Police Powers and Responsibilities Act 2000* (Qld).¹⁸ Similar pressure was exerted by both the *Daily Telegraph* and the *Sydney Morning Herald* in the lead-up to the introduction of a ‘one punch’ assault causing death offence in New South Wales.¹⁹

The context for this article is a wider program of criminalisation research, through which we aim to both interrogate problems associated with over-criminalisation,²⁰ motivated by a desire to contribute to an improvement in the quality of decision-making about when, why and how governments turn to the criminal law and policing as public policy mechanisms for addressing an identified harm, risk or anxiety.²¹ One of

15 Poynting and Morgan, above n 5, 3.

16 Editorial, ‘Zero Tolerance at Crime Ground Zero’, *Daily Telegraph*, 22 January 2012, 20.

17 See, for example, Felicity Sheppard and Michael Madigan, ‘Hurry Up and Ban Net Parties’, *Courier Mail* (Brisbane), 12 January 2014, 7.

18 *Police Powers and Responsibilities and Other Legislation Amendment Act 2014* (Qld).

19 Julia Quilter, ‘One Punch Laws, Mandatory Minimums and “Alcohol-Fuelled” as an Aggravated Factor: Implications for NSW Criminal Law’ (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 81. See also David Brown, ‘Is Rational Law Reform Still Possible in a Shock-jock Tabloid World?’, *The Conversation* (online), 15 August 2014 <<https://theconversation.com/is-rational-law-reform-still-possible-in-a-shock-jock-tabloid-world-30416>>.

20 Douglas Husak, *Overcriminalisation* (Oxford University Press, 2008); also David Brown, ‘Criminalisation and Normative Theory’ (2013) 25(2) *Current Issues in Criminal Justice* 605; Antony Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014).

21 Luke McNamara, ‘Criminalisation Research in Australia: Building a Foundation for Normative Theorising and Principled Law Reform’ in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015); Luke McNamara and Julia Quilter, ‘Public

the criticisms which has been made of contemporary criminal law-making is that governments are too willing to use the criminal law 'broadly and casually as a regulatory tool',²² and 'in an unprincipled way, as a high visibility quick fix rather than as a carefully considered and designed policy instrument'.²³ As Hogg and Brown have observed, a key tenet of the prevailing wisdom or 'common sense' on crime prevention is that the solution is to be found in 'measures to redress the imbalance that currently favours 'criminals' and strengthen the capacity of the criminal justice system to control and suppress crime'.²⁴

We adopt McNamara's 'thick' conception of criminalisation which recognises the following:

- (a) Criminalisation is *one* of the public policy options available to a government that is moved to address an identified social or economic harm or risk; its deployment is not pre-ordained but the result of a political choice.
- (b) Criminalisation is employed in relation to a diverse range of harms and risks – from the minor to the very serious.
- (c) Criminal offences can take a multiplicity of forms (including in terms of constituent conduct and fault elements and defences), can be enforced by a diverse range of agencies using different methods (criminalisation is not synonymous with policing), and transgression can produce a broad range of sanctions (from no action to penalty notice/fine to court conviction/incarceration).
- (d) Criminalisation is not only a phenomenon of law *creation*; how criminal laws *operate* must also be addressed as part of any assessment of alleged over-criminalisation or under-criminalisation, or any other examination of legitimacy.
- (e) Criminalisation is a set of practices that includes not only the enforcement of *offences*, but the operation of allied criminal *procedures* and the deployment of coercive police *powers* which produce comparable punitive effects (for example, denying bail resulting in detention on remand).²⁵

Intoxication in NSW: The Contours of Criminalisation' (2015) 37(1) *Sydney Law Review* 1; Luke McNamara and Julia Quilter, 'Turning the Spotlight on "Offensiveness" as a Basis for Criminal Liability' (2014) 39(1) *Alternative Law Journal* 36; Julia Quilter and Luke McNamara, 'Time to Define "The Cornerstone of Public Order Legislation": The Elements of Offensive Conduct and Language under the *Summary Offences Act 1988* (NSW)' (2013) 36(2) *University of New South Wales Law Journal* 534.

22 Darryl Brown, 'History's Challenge to Criminal Law Theory' (2009) 3(3) *Criminal Law and Philosophy* 271, 272.

23 McNamara, above n 21, 34.

24 Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998) 20. See also David Brown, 'Continuity, Rupture, or Just More of the "Volatile and Contradictory"?: Glimpses of New South Wales' Penal Practice Behind and Through the Discursive' in J Pratt et al (eds), *The New Punitiveness: Trends, Theories, Perspectives* (Willan Publishing, 2005) 27.

25 McNamara, above n 21, 39-42.

Our presentation of each case study of hyper-criminalisation will be organised around the following questions: What change to the law governing criminal offences or police powers was affected by the statute? In what respect(s) does that change constitute hyper-criminalisation? How was ‘dangerisation’ rhetoric used to justify and/or defend the legislation? What have been the demonstrated/likely/possible consequences of the change?

II CASE STUDY 1: THE REVIVAL OF CONSORTING IN NEW SOUTH WALES

A What Changed?

In 2012 the New South Wales Parliament passed the *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) which, inter alia, added a new offence of consorting to the *Crimes Act 1900* (NSW): Pt 3A Div 7. Consorting offences have existed since the early 19th century,²⁶ but are rarely charged.²⁷ The 2012 legislation represented a revival and expansion of the offence, and a significant increase in the maximum penalty – from six months to three years. Under s 93X:

- (1) A person who:
 - (a) habitually consorts with convicted offenders, and
 - (b) consorts with those convicted offenders after having been given an official warning in relation to each of those convicted offenders,
 is guilty of an offence.

‘Habitually consorts’ is defined in broad terms. It is satisfied if a person consorts with two convicted offenders (whether together or separately) on two occasions, including one occasion after a warning²⁸ has been granted. Consorting includes any form of communication, whether in-person or via technology. A convicted offender is someone who has been convicted of an indictable offence. The content of the communication is irrelevant; that is, it is not an element of the offence that the communication be for the purpose of committing or planning to commit a crime. The mere fact of communication in the circumstances described here satisfies the conduct element. Knowledge that the other persons are convicted persons is deemed on the basis of the official warning. Section 93Y creates a reverse onus defence: a person charged under s 93X can avoid conviction if s/he can establish that the consorting was reasonable in the circumstances (for example, communicating with family members; in the course of employment, business or education; in the delivery of health services or legal advice; in custody or in complying with a court order).

26 David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) 1211; Andrew McLeod, ‘On the Origins of Consorting Laws’ (2013) 37(1) *Melbourne University Law Review* 103.

27 Alex Steel, ‘Consorting in New South Wales: Substantive Offence or Police Power?’ (2003) 26(3) *University of New South Wales Law Journal* 567.

28 *Crimes Act 1900* (NSW) s 93X(3).

B *How Does the Legislation Represent Hyper-Criminalisation?*

Section 93X criminalises communication between individuals purely on the basis of the criminal history of one of them. Note that a person does not need to have a criminal record in order to be charged: it is the records of persons with whom s/he associates that is determinative. The idea that two innocent conversations can expose a person to criminal punishment represents a form of pre-emptive criminalisation (or 'preventive justice'²⁹) that substantially widens the parameters of criminal responsibility, and which violates the fundamental human right of freedom of association enshrined in Art 22 of the International Covenant on Civil and Political Rights (ICCPR). In addition, as Sanders has noted 'there are significant privacy concerns surrounding the issue of warnings to a person's associates. The threat of consorting charges can also be a significant barrier to an ex-offender's rehabilitation'.³⁰

C *Rhetoric/Rationale*

The context for the *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) was anxiety about the involvement of motorcycle gangs in criminal activity; anxiety which had intensified over a number of years,³¹ and which had yielded a range of criminalisation measures, including control order regimes³² modelled on anti-terrorism legislation.³³ Although motorcycle gangs are responsible for a relatively small proportion of the crimes that are committed,³⁴ they have been a major focus of the expansion of the criminal law during the last decade.³⁵ The immediate 'trigger' for the legislation was extensive media coverage of a number of 'drive-by shootings' in western Sydney,³⁶ which were described as 'gang-related' and

29 Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014).

30 Jane Sanders, 'Consorting Law in NSW' (2013) 38(2) *Alternative Law Journal* 130.

31 Lorana Bartels, 'The Status of Laws on Outlaw Motorcycle Gangs in Australia' (Research in Practice No 2, Australian Institute of Criminology, 12 June 2009).

32 See *Crimes (Criminal Organisations Control) Act 2012* (NSW), and equivalents in other Australian jurisdictions.

33 See Nicola McGarrrity, 'From Terrorism to Bokies: Control Orders in Australia' (2012) 37(3) *Alternative Law Journal* 166.

34 Terry Goldsworthy, 'A Phony War: Bokies Aren't the Only Problem on Queensland's Glitter Strip', *The Conversation* (online), 17 October 2013 <<https://theconversation.com/a-phony-war-bokies-arent-the-only-problem-on-queenslands-glitter-strip-19231>>; Terry Goldsworthy, 'The Revealing Facts on Bokie Laws and Crime in Queensland', *The Conversation* (online), 20 January 2015 <<https://theconversation.com/the-revealing-facts-on-bokie-laws-and-crime-in-queensland-35892>>.

35 See Australian Crime Commission, *Outlaw Motorcycle Gangs* (July 2013) <<https://crimecommission.gov.au/publications/intelligence-products/crime-profile-fact-sheets/outlaw-motorcycle-gangs>>.

36 Andrew Clennell, 'O'Farrell Returns Fire in Drive-by Shootings War', *Daily Telegraph* (online), 13 February 2012 <www.news.com.au/national/ofarrell-returns-fire-in-drive-by-shootings-war/story-e6frfkvr-1226269242323>.

which were characterised as evidence of growing lawlessness.³⁷ During parliamentary debate, the ALP Opposition (which supported the bill) claimed that the Government had only moved to introduce new legislation because of media pressure:

For the past nine or 10 months the Government has not been interested in introducing this type of legislation, but it became interested when the *Daily Telegraph* started roughing up the Premier. Members opposite were not interested in bikie legislation, yet that will be introduced today because the *Daily Telegraph* roughed up the Premier and Ray Hadley [a prominent conservative radio commentator] roughed up the Attorney General.³⁸

The Government advanced two primary justifications for introducing a new offence of consorting. The first was it was a 'solution' to the 'problem' that police had reported a lack of victim and witness co-operation when they attempted to investigate drive-by shootings.³⁹ The then Premier, Barry O'Farrell, said that '[t]hese new laws will be additional tools in the police armoury to help them protect innocent lives and bring those involved in criminal gangs behind drive-by shootings before the courts'.⁴⁰ Note the serious disjuncture between problem and solution.⁴¹ Although there is no question that s 93X extends criminalisation significantly, it does nothing to compel co-operation with the police in the context of crime investigations. Nonetheless, the spectre of 'drive-by shootings' – in many respects the ultimate symbol of United States-style urban lawlessness and 'random' violence⁴² – was a potent signifier that change was essential.

The wider justification for the revived consorting offence in New South Wales was that it would assist the police to disrupt the activities of organised crime gangs, and 'outlaw motorcycle gangs' in particular. In Parliament, the Attorney-General Greg Smith said:

[T]he goal of the offence is not to criminalise individual relationships but to deter people from associating with a criminal milieu. ... [Consorting] does not extend to chance or accidental meetings, and it is not the intention of the section to criminalise meetings where the defendant is not mixing in a criminal milieu or establishing, using or building up criminal networks. This bill puts police in a position to do what they do best every day and make a judgement about whether observed behaviour reaches the level

37 Editorial, 'Zero Tolerance at Crime Ground Zero', *Daily Telegraph* (online), 22 January 2012 < www.dailytelegraph.com.au/news/opinion/zero-tolerance-at-crime-ground-zero/story-e6frezz0-1226558523959>, 20.

38 NSW, *Parliamentary Debates*, Legislative Assembly, 15 February 2012, 8318 (Michael Daley).

39 Anna Patty, 'O'Farrell's Consorting Law Slammed as "Easy Politics"', *Sydney Morning Herald* (online), 14 February 2012 <www.smh.com.au/federal-politics/political-news/ofarrells-consorting-law-slammed-as-easy-politics-20120213-1t26v.html>, 7.

40 Andrew Clennell, 'O'Farrell Returns Fire in Drive-by Shootings War', *Daily Telegraph* (online), 13 February 2012 <www.dailytelegraph.com.au/ofarrell-returns-fire-in-drive-by-shootings-war/story-e6freuy9-1226269139073>.

41 A point that was made by the Opposition, which nonetheless supported the bill: NSW, *Parliamentary Debates*, Legislative Assembly, 15 February 2012, 8300.

42 Hogg and Brown, above n 24, 28-29.

sought to be addressed by the bill, that is, behaviour which forms or reinforces criminal ties.⁴³

The Attorney-General explained that the Government was 'modernising' consorting laws – to keep up with the sophistication of 21st century criminal gangs:

The bill also modernises the offence of consorting by extending its application to include consorting by any means including electronic or other forms of communication. This will include electronic forms of communication which have become everyday parts of our lives but which we must ensure cannot be exploited by criminals to avoid prosecution. These amendments will ensure that networks established via Facebook, Twitter and SMS will not be immune from these provisions.⁴⁴

What is noteworthy about the manner in which the New South Wales Government made its case for the revival of consorting was the strong tone of reassurance that it would only be directed at those who were 'deserving' of its reach – organised crime groups and bikies in particular. And yet the broad terms in which the legislation is struck is inconsistent with the rhetoric of targeted criminalisation of individuals who are widely and unambiguously demonised based on their bikie or other gang associations. During the parliamentary debate, one Government MP said: 'As a former police officer, I think consorting laws are a wonderful tool. ... I encourage the police to use the legislation whenever possible. Police know who the criminals are'.⁴⁵

D Consequences/Effects

There is evidence that s 93X has been successfully employed by police to disrupt bikie meeting practices. Most notably, official club houses are less likely to be used.⁴⁶ Whether there has been any reduction in the criminal activity of bikie gangs is not yet established. What *is* clear is that the consorting legislation is having a much wider effect than the demonised target at which the Government claimed it would be directed. The first man charged and convicted with consorting under s 93X had no motorcycle or criminal gang connections, and received an official warning from the police while grocery shopping with a housemate who had a criminal record.⁴⁷

43 NSW, *Parliamentary Debates*, Legislative Assembly, 14 February 2012, 8131-8132 (Greg Smith).

44 Ibid.

45 Ibid, 8302 (Stephen Bromhead).

46 Ben Pike, 'Police Crash Bikies' Party', *Sunday Telegraph*, 1 February 2015, 14; Mark Morri, 'Nowhere to Ride, Nowhere to Hide' *Daily Telegraph*, 23 February 2015, 14; Lia Harris, 'Bikies Getting Run off the Road', *Sunday Telegraph*, 15 March 2015, 22.

47 Stephen Jeffery, 'Appeal as Anti-bikie Consorting Laws Snare Serial Shopper', *Sydney Morning Herald* (online), 14 August 2012 <www.smh.com.au/nsw/appeal-as-antibikie-consorting-laws-snare-serial-shopper-20120813-244zq.html>, 7; Stephen Jeffery, 'State's First Consorting Verdict is Overturned', *Sydney Morning*

In 2013 the New South Wales Ombudsman released a preliminary report on the first 12 months of operation of s 93X.⁴⁸ It found that the new consorting laws were being used by police in different parts of the State in a range of ways, and the majority of warnings issued related to individuals who were not associated with bikie or other organised crime gangs. In the Central Metropolitan Region (Sydney), in 57 per cent of cases, the target of the consorting provisions was an Aboriginal person.⁴⁹ Despite the rhetoric of ‘modernisation’, the Ombudsman found that ‘there was little or no reliance by police on electronic consorting’ and that ‘use of the consorting provisions primarily involved police observing people in public places to determine if they were consorting’.⁵⁰

Because police strategies for identifying consorting rely on observations of behaviour in public places, there is the potential for people who spend a lot of time in areas open to the public, such as young people, Aboriginal people and people experiencing homelessness, to be subject to the consorting provisions to a greater degree than others who may spend less time in public places. In addition to being more visible to police, some vulnerable or disadvantaged groups have proportionally higher numbers of people with previous convictions for indictable offences when compared to the general population. This brings those vulnerable groups and the people they spend time with, more readily within the ambit of the consorting provisions.⁵¹

The Ombudsman also identified 100 instances in which a warning was given contrary to the legislation – where the alleged ‘convicted offender’ had no criminal record or no qualifying conviction.⁵²

Despite these concerns about over-reach, the Government claimed vindication when a challenge to the constitutional validity of the legislation failed in 2014.⁵³ When the High Court’s decision was handed down, the New South Wales Attorney-General said: ‘It is not surprising that criminals don’t like the laws and wanted them overturned, but today’s decision in the High Court ensures they are here to stay’.⁵⁴

Herald (online), 15 August 2012 <www.smh.com.au/nsw/states-first-consorting-verdict-is-overturned-20120814-246pq.html>, 4.

48 New South Wales Ombudsman, ‘Consorting Issues Paper: Review of the Use of Consorting Provisions by the NSW Police Force’ (Working Paper, Ombudsman NSW, November 2013).

49 Ibid, 10.

50 Ibid, 28.

51 Ibid.

52 Ibid, 43. See also Anna Patty, ‘NSW Consorting Laws: About 100 Peoples Given Wrong Warnings by Police’, *Sydney Morning Herald* (online), 8 February 2014 <www.smh.com.au/nsw/nsw-consorting-laws-about-100-people-given-wrong-warnings-by-police-20140207-3273v.html>.

53 *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35. See also Luke McNamara, ‘Careful Who You Chat With: It Could Turn You into a Criminal’, *The Conversation* (online), 14 October 2014 <<https://theconversation.com/careful-who-you-chat-with-it-could-turn-you-into-a-criminal-32727>>.

54 Louise Hall, ‘Controversial NSW Consorting Laws to Target Bikie Gangs Valid, High Court Finds’, *Sydney Morning Herald* (online), 8 October 2014 <www.smh.com.au>.

III CASE STUDY 2: 'ALCOHOL-FUELLED VIOLENCE' AND 'ONE PUNCH' FATALITIES

A What Changed?

In 2014 three Australian States (New South Wales, Queensland and Victoria) enacted a new discrete homicide offence to address deaths that are caused in the context of a 'one punch' assault. These provisions followed earlier moves by Western Australia (2008) and Northern Territory (2012) to introduce forms of 'assault causing death' legislation.⁵⁵ The New South Wales Parliament passed its 'assault causing death' offence, including the aggravated intoxicated version,⁵⁶ on 30 January 2014 (and it came into operation the next day).⁵⁷ Queensland followed on 26 August 2014 enacting the *Safe Night Out Legislation Amendment Act 2014* (Qld) which added a new Ch 28A 'Unlawful striking causing death' to the *Criminal Code* with the offence having the same name and being contained in s 314A.⁵⁸ On 18 September 2014, Victoria passed the *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* (Vic) which, inter alia, deems a 'single punch or strike to be dangerous' for the purpose of unlawful and dangerous act manslaughter in the *Crimes Act 1958* (Vic) s 4A.⁵⁹ Before this time, it was assumed that the categories of assault-based killings for which a person should be held criminally responsible was covered by the various forms of murder and manslaughter that are defined in all Australian States and Territories.⁶⁰

com.au/nsw/controversial-nsw-consorting-laws-to-target-bikie-gangs-valid-high-court-finds-20141008-10rqwv.html>.

- 55 See *Criminal Code Amendment (Homicide) Act 2008* (WA) which inserted the offence of 'Unlawful assault causing death' into *Criminal Code* (WA) s 281 and the *Criminal Code Amendment (Violent Act Causing Death) Act 2012* (NT) which inserted the offence of 'Violent act causing death' into the *Criminal Code* (NT) s 161A. On the history of these provisions see Julia Quilter, 'The Thomas Kelly Case: Why a "One Punch" Law is Not the Answer' (2014) 38(1) *Criminal Law Journal* 16, 18-21.
- 56 See *Crimes Act 1900* (NSW) ss 25A, 25B.
- 57 See Julia Quilter, 'Responses to the Death of Thomas Kelly: Taking Populism Seriously' (2013) 24(3) *Current Issues in Criminal Justice* 439; Quilter, above n 19; Julia Quilter 'Populism and Criminal Justice Policy: An Australian Case Study of Non-punitive Responses to Alcohol Related Violence' (2015) 48(1) *Australian and New Zealand Journal of Criminology* 24.
- 58 Originally the offence was s 302A, Ch 28 'Homicide' after s 302 (murder). Late amendments to the Bill relocated the offence to the newly created Ch 28A 'Unlawful striking causing death'.
- 59 For a discussion of the enactment of these laws see Julia Quilter, 'Criminalisation of Alcohol Fuelled Violence: One-Punch Laws' in Crofts and Loughnan, above n 21, 82-104. On recent Victorian high profile deaths see Appendix A in Paige Darby, 'Research Note on One-Punch Laws and the Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Bill 2014' (Parliamentary Library and Information Service, Department of Parliamentary Services, Parliament of Victoria, No 3, September 2014).
- 60 See Paul Fairall, *Homicide: The Laws of Australia* (Thomson Reuters, 2012).

While there are differences between the various Australian ‘one punch’ laws,⁶¹ the essence of the new offences is that where a person assaults another and causes that person’s death, the person is guilty of what is, in effect, a new homicide offence. Importantly, unlike murder and manslaughter, there is no fault element (subjective or objective) in relation to the consequence of death. The mere fact that death is *caused* by the assault is sufficient, making this component absolute liability.⁶² The penalties for this new form of absolute liability homicide range from 10 years (Western Australia) to life imprisonment (Queensland), with two jurisdictions imposing mandatory minimum sentences (MMS) (10 years in Victoria and eight in New South Wales).⁶³

B How Does the Legislation Represent Hyper-Criminalisation?

There are four reasons why these laws represent instances of hyper-criminalisation. First, they constitute new homicide offences (being the only substantive addition to the offence structure of homicide in decades)⁶⁴ and in a context where the conduct covered by them was arguably already sufficiently addressed by existing murder or manslaughter offences.⁶⁵ Secondly, the new offences depart significantly from classic expectations in relation to criminal responsibility as no fault element (subjective or objective) is required in relation to the consequence of death. It is extraordinary that one of our most serious offences (homicide) has been drafted in such a way as to make this consequence effectively an absolute liability component.⁶⁶ Thirdly, a number of the new provisions either exclude or restrict the availability of defences.⁶⁷ Finally, two jurisdictions (New South

61 On the defining features and differences, see Quilter, above n 59, 86-87.

62 The NT offence provides that this component is strict liability: see *Criminal Code* (NT) s 161A(2).

63 In New South Wales, the mandatory minimum applies to an offender who is intoxicated: *Crimes Act 1900* (NSW), ss 25A(2), 25B. See Julia Quilter, ‘More Law and Order on the Run’ (2014) 39(1) *Alternative Law Journal* 50.

64 For example, in New South Wales, the new assault causing death offence in s 25A of the *Crimes Act 1900* (NSW) was the first substantive change since 1951 when infanticide (s 22A) was inserted by the *Crimes (Amendment) Act 1951* (NSW). It is noted that the Victorian provision does not create a new offence but rather ‘deems’ certain acts to be dangerous (see *Crimes Act 1958* (Vic) s 4A(6)) for the purposes of unlawful and dangerous act manslaughter.

65 Particularly unlawful and dangerous act manslaughter in the common law states. It is noted that arguments were made in the Code jurisdictions that there was a ‘gap’ in homicide laws in relation to ‘one punch’ manslaughters because of the operation of the defence of ‘accident’ which applies to manslaughter cases. These issues are further discussed in Quilter, above n 55. The accident defence does not apply in the common law states and furthermore, convictions for ‘one punch’ manslaughters were being achieved.

66 The Northern Territory offence provides that this component is strict liability: see *Criminal Code* (NT) s 161A(2).

67 For example, in the WA provision the accident defence is removed (*Criminal Code* (WA) s 28(2)) and in NT consent is no defence under the *Criminal Code* (NT) s 161A(3). The Queensland ‘unlawful striking causing death’ offence abrogates

Wales and Victoria) have resorted to the extreme measure of a mandatory minimum sentence (MMS).⁶⁸

C Rhetoric/Rationale

In each State and Territory the primary justification for introducing this new form of homicide was the need to address the problem of 'one-punch' fatalities and in particular the menace of so called 'coward' punchers.⁶⁹ This danger is most overtly expressed in the political rhetoric surrounding the enactment of the Victorian provision and in the resulting law – notably the bill being entitled *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Bill 2014* (Vic). When announcing the provision, Premier Napthine indicated:

[T]he legislation would ensure that cowards who engage in one-punch attacks on unsuspecting victims would be held to account ... A single punch is a dangerous act that can kill, and there is no excuse for such violence.⁷⁰

In the second reading speech the Attorney-General, Robert Clark MP, stated:

Offenders who use ... unprovoked, one-punch attacks on unsuspecting victims, must be held to account. Too frequently, the victims are young people with their whole lives ahead of them. For the families and friends who have to deal with the sudden and senseless loss of a loved one, the consequences are significant and last a lifetime.

The bill will ensure that adult offenders who cause death by inflicting a coward's punch ... will go to jail for at least 10 years, unless the court decides that a genuinely special reason applies. This is a high minimum sentence and the government makes no apologies for this. This bill sends a strong message to would-be offenders that if you go out and end up killing someone in ... these circumstances, you can expect to go to jail for a minimum of 10 years.⁷¹

the major defences usually applicable to similar serious offences by expressly removing the accident defence (*Criminal Code* (Qld) s 23(1)(b)), and the excuse of being provoked and using reasonable force to prevent the repetition of an act or insults (*Criminal Code* (Qld) s 270). In New South Wales, the only remaining defences are self-defence (s 418), intoxication where it is not self-induced (s 25A(5)(a)) and if the accused had a significant cognitive impairment at the time the offence was alleged to have been committed (s 25A(5)(b)).

68 See *Crimes Act 1900* (NSW) s 25B which includes a MMS of eight years for the aggravated offence under s 25A(2) and *Sentencing Act 1991* (Vic) s 9C provides for a 10 year MMS if the court is satisfied beyond reasonable doubt of the aggravating factors contained in s 9C(3) and there are no 'special reasons' under s 10A.

69 The term 'coward's punch' emerged in 2013-2014 to replace another colloquialism that was widely used to describe a random, surprise punch: a 'king hit'. The adoption of the phrase 'coward's punch' was a conscious disavowal of the implication that a 'king hit', with its royal connotations, might attract admiration or 'hero-worshipping'.

70 Denis Napthine, 'Coward Punch Killers to Face 10 years Jail' (*Media release*, 17 August 2014).

71 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2823-2824 (Robert Clark).

The term ‘coward’s punch’ connotes the innocent victim and the ‘demon’ is clearly the man (the offender) who did not play by the rules – failing to forewarn the victim so ‘he’ could ‘square up’ and sort it out ‘like a man’ in a ‘fair fight’. These messages are embedded in the provisions relating to the MMS. Under the *Sentencing Act 1991* (Vic) s 9C(3), prior to imposing the MMS, a sentencing court must be satisfied, inter alia, that:

- (c) the victim was not expecting to be punched or struck by the offender; and
- (d) the offender knew that the victim was not expecting, or was probably not expecting, to be punched or struck by the offender.⁷²

The implication is that the culpability that justifies a 10-year MMS is not the fact of using fatal violence, but the element of taking your opponent by *surprise*. It might be countered that the focus on surprise reflects the fact that it carries greater risk – that such a victim is more likely to fall and suffer fatal injury. Nonetheless, it is hard to ignore the message conveyed by the legislative language: that there is a ‘right’ way to engage in male violence and harsh punishment awaits only those who do not ‘follow the (unwritten) rules’.

In the case of the more recently enacted laws (New South Wales, Queensland and Victoria) there was also another motif of ‘dangerisation’: *alcohol-fuelled* violence. In New South Wales, the one-punch deaths of Thomas Kelly (July 2012) and Daniel Christie (January 2014⁷³) triggered an intense media campaign around alcohol-fuelled violence⁷⁴ which finally led (on 21 January 2014) the then New South Wales Premier Barry O’Farrell to announce a 16-point plan to tackle drug and alcohol violence⁷⁵ which included the ‘assault causing death’ offence. In the second reading speech to the Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014 introducing the offence, the then Premier O’Farrell stated the purpose was:

[T]o make our streets safer by introducing new measures to tackle drug- and alcohol-related violence. Recent months have seen a number of serious violent alcohol- and drug-fuelled assaults in the Sydney central business district [CBD] and elsewhere that shocked the community across the State. The New South Wales Government has heard the community’s call for action. We are committed to continuing to address the drug- and alcohol-fuelled attacks on our streets and the increase in violence that is used in those attacks.⁷⁶

72 See also *Sentencing Act 1991* (Vic) s 9C(4)-(5).

73 Christie was assaulted on 31 December 2013 but remained in a coma until his family turned off life support on 13 January 2014.

74 See Quilter 2015, above n 57.

75 See Barry O’Farrell, ‘Lockouts and Mandatory Minimums to be Introduced to Tackle Drug and Alcohol Violence’ (NSW Government Media Release, 21 January 2014) <www.nsw.gov.au/news/lockouts-and-mandatory-minimums-be-introduced-tackleviolence>.

76 New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 January 2014, 26621 (Barry O’Farrell).

Similar statements about the need to address alcohol-fuelled one-punch violence are echoed in the passing of Queensland's Safe Night Out Legislation Amendment Bill 2014 with Premier Newman stating:

As we all know, Queensland is a great place to enjoy a night out. Our night-life is vibrant and diverse, offering world-class venues that cater for all. Overwhelmingly, Queenslanders and visitors to our great state enjoy our night-life safely and without incident.

Unfortunately, alcohol and drug fuelled violence is not a new phenomenon in Queensland or throughout the country. ...

The bill includes a number of significant criminal law reforms. *Fresh measures are called for to counter the dangerous trend of innocent people falling victim to senseless violence at the hands of people who are drunk or high on illicit drugs.* We have all seen the devastating and too often tragic effects of coward punches – not just in our state but across the nation. The bill creates a new Criminal Code offence of unlawful striking causing death to directly target these unacceptable and cowardly acts of violence within our communities.⁷⁷

In spite of the heavily rhetorical statements about the need for such laws to protect the community from 'alcohol-fuelled' one-punch coward violence, no jurisdiction has confined the assault to a *single* punch, or indeed, a *punch*. The qualifying conduct is variously defined: *any* 'unlawful assault' (Western Australia); any 'violent act' (including application of any form of direct force whether or not by an offensive weapon) (Northern Territory); 'intentionally hitting' 'with any part of the person's body or with an object held by the person' (New South Wales); any 'unlawful striking' 'by punching or kicking, or by otherwise hitting using any part of the body, with or without the use of a dangerous or offensive weapon or instrument' (Queensland); and a 'punch or strike' 'delivered with any part of the body' to the head/neck which causes injury to that area whether by a single strike or one of a series of strikes (Victoria). Furthermore, in only one jurisdiction (New South Wales) is 'intoxication' a specific feature of the offence definition (as an aggravating factor).⁷⁸ In the majority (Western Australia, Northern Territory, Queensland and Victoria) this justificatory 'context' – the need to address alcohol-fuelled violence – has been omitted from the laws altogether. It neither features as part of the offence definition nor as a sentencing factor.

D Consequences/Effects

In addition to these mismatches between the stated justifications and resulting laws, the new 2014-round of 'one-punch' homicide offences is

77 Queensland, *Parliamentary Debates*, 6 June 2014, 2234 (Campbell Newman) (emphasis added). See also the emphasis on alcohol-fuelled violence in the second reading speech to the Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Bill 2014 (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2823-2824 (Robert Clark).

78 *Safe Night Out Legislation Amendment Act 2014* (Qld) introduces an aggravating circumstance in Ch 35A of being 'adversely affected by an intoxicating substance' for certain assault offences, not including unlawful striking causing death.

likely to have problematic effects in operation. Unlike the earlier Western Australian/Northern Territory provisions which were drafted in broad terms,⁷⁹ these offences are characterised by a form of drafting Horder calls *particularism*: the inclusion of definitional detail that merely exemplifies rather than delimits wrongdoing.⁸⁰ The problem with this approach is that it opens up 'the possibility of unmeritorious technical argument' over which conduct falls within the offence and 'creates arbitrary distinctions between (that conduct) included and those left out'.⁸¹ Not only is there the danger that this will produce unintended outcomes in particular cases, but, more generally, the communicative function of the criminal law may be undermined.⁸²

For example, the Queensland s 314A of the *Criminal Code* (Qld) requires three elements: a person unlawfully strikes another person; the strike is to the head/neck; and it causes the death of the other person. 'Strike' is defined as 'directly apply force to the person by punching or kicking, or by otherwise hitting using any part of the body, with or without the use of a dangerous or offensive weapon or instrument'.⁸³ This definition thereby removes a series of ways such an assault may occur (notably throwing an object at the person) but by also requiring the strike to 'land' on the victim's head/neck also excludes certain assaults. For example, a strike to the chest causing a victim to fall backwards and hit his or her head on the road or footpath and die (that is, reminiscent of a 'classic' one-punch attack) will not fall within the definition of unlawful striking causing death. Furthermore, the specificity of the Queensland definition is likely to invite evidentiary challenges to the Crown's capacity to prove that the strike was to the head/neck and/or to establish causation. For example, where an assault includes a punch to the head and a strike to the chest but it is the latter that makes the victim topple over and hit a hard surface and suffer fatal injuries, it is doubtful that it can be said that the strike to the head/neck was the direct or indirect cause of death.⁸⁴ By confining the qualifying conduct to certain *kinds* of assaults these laws arbitrarily exclude other types of assaults (which may be equally fatal) and open up arguments as to whether particular conduct is included or excluded.

In New South Wales proving the aggravating factor of 'intoxication' for the s 25A(2) offence is also likely to be problematic. 'Intoxication' is not defined in the Act creating considerable uncertainty as to where the line is between consumption of alcohol/drugs which triggers s 25A(2) and

79 On the problems with this approach, see Quilter, above n 19.

80 Jeremy Horder, 'Rethinking Non-fatal Offences Against the Person' (1994) 14(3) *Oxford Journal of Legal Studies* 335.

81 Ibid, 340.

82 RA Duff, 'Penal Communities' (1999) 1(1) *Punishment and Society* 27; RA Duff, *Punishment, Communication and Community* (Oxford University Press, 2001).

83 *Criminal Code* (Qld) s 314A(7).

84 For further details of 'particularist' drafting in the Victorian and New South Wales provisions, see Quilter, above n 59, 90-92.

consumption that does not. The conclusive presumption of intoxicated in s 25A(6)⁸⁵ may also be difficult to prove in many instances either because no testing was undertaken and/or was not completed within the relevant time frames.⁸⁶

While these governments have set high expectations for how 'coward' and 'alcohol-fuelled' punchers will be handled in the future, the operational problems that are likely to occur with the legislation means that there is no guarantee the legislation will deliver on these promises.

IV CASE STUDY 3: 'OUT OF CONTROL' PARTIES

A What Changed?

In 2012 the Western Australian Parliament enacted the *Criminal Law Amendment (Out-of-Control Gatherings) Act 2012* (WA). The main effects of the legislation was to add new offences to the *Criminal Code* (WA) and new police powers to the *Criminal Investigation Act 2006* (WA). Under s 75B(2) of the Code it is now an offence to organise an out-of-control party:

A person –

- (a) who organises a gathering that becomes an out-of-control gathering; or
- (b) who –
 - (i) is a responsible adult in relation to a child who organises a gathering that becomes an out-of-control gathering; and
 - (ii) gives the child permission to organise the gathering or permits the gathering to occur,

is guilty of an offence and is liable to imprisonment for 12 months and a fine of \$12 000.

Section 75B(3) creates a reverse onus defence whereby an accused can attempt to prove that s/he 'took such steps (if any) as were reasonable in the circumstances to ensure that the gathering did not become an out-of-control gathering'.⁸⁷ 'Organise' is defined as 'to have a substantial involvement in arranging, managing, advertising or promoting the gathering (whether or not any other organisers of the gathering know of or consent to that involvement)'.⁸⁸ Under s 75A a gathering (which can occur in a 'place or vehicle') is an 'out-of-control gathering' if:

- the gathering involves '12 or more persons'; and
- '2 or more persons associated with the gathering' engage in any one of a long list of public order and other offences, such as trespassing, disorderly, obscene or indecent behaviour, property damage, assault,

⁸⁵ If the accused's breath or blood contains 'a concentration of 0.15 grams or more of alcohol in 210 litres of breath or 100 millilitres of blood': s 25A(6).

⁸⁶ For alcohol testing within two hours after the commission of the alleged offence or four hours for a blood/urine sample for alcohol or drugs: *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 138F(3) and 138G(3).

⁸⁷ Possible steps are illustrated in the *Criminal Code* (WA) s 75B(4).

⁸⁸ *Criminal Code* (WA) s 75B(1).

loud noise, excessive noise or smoke while driving a car, obstructing traffic or pedestrians, littering, public intoxication; and

- ‘the gathering, or the conduct of persons associated with the gathering (taken together), causes or is likely to cause –
 - (i) fear or alarm to any person who is not associated with the gathering; or
 - (ii) a substantial interference with the lawful activities of any person; or
 - (iii) a substantial interference with the peaceful passage through, or enjoyment of, a place by any person who has lawful access to that place ...’.

Under s 75A(5) a person is ‘associated with a gathering’ if the person ‘(a) is attending the gathering; or (b) is in the vicinity of the gathering and has attended or is proposing to attend the gathering’.

In 2014 the Queensland Parliament introduced similar legislation.⁸⁹ The *Police Powers and Responsibilities Act 2000* (Qld) now contains an offence of organising an ‘out-of-control event’. The only significant definitional difference is that in Queensland three (rather than two) people must engage in out-of-control conduct in order for the party to qualify as an out-of-control event. The offence normally carries a maximum penalty of 110 penalty units or one year’s imprisonment, but if the event is held other than at the person’s residence the penalties are higher (165 penalty units or three years’ imprisonment). The Queensland legislation (s 53BI) also creates an offence of *causing* an out-of-control event, directed at ‘gate-crashers’:

- (1) A person commits an offence if the person –
 - (a) has been refused entry to an event; and
 - (b) engages in out-of-control conduct near the event; and
 - (c) as a result of the person’s conduct, the event becomes an out-of-control event.

Maximum penalty – 110 penalty units or 1 year’s imprisonment.

- (2) A person may be liable for an offence against subsection (1) even if another person’s conduct contributed to the event becoming an out-of-control event.

‘Out-of-control conduct’ is defined in terms similar to the Western Australian legislation.⁹⁰

B How Does the Legislation Represent Hyper-Criminalisation?

The aim of the new crime of organising an out-of-control gathering/event in Western Australia and Queensland is to deter public order crimes and related anti-social behaviour, not by targeting the perpetrators of the behaviour in question, but by extending criminal responsibility to the person or persons who are considered to have created the *opportunity* for

⁸⁹ *Police Powers and Responsibilities and Other Legislation Amendment Act 2014* (Qld).

⁹⁰ See *Police Powers and Responsibilities Act 2000* (Qld) s 53BC.

the behaviour to occur by organising/hosting the party. This represents a significant extension of liability beyond the traditional parameters of criminal responsibility. There is no reliance on recognised principles of complicity. There is no requirement for the prosecution to prove that the accused authorised or even knew about the behaviour in question. Although neither statute has yet been the subject of considered judicial interpretation, it would appear that there is not even an objective fault element in relation to the organiser's awareness of the behaviour. In a context where the evil at which the legislation is directed was large scale 'Facebook-fuelled' parties (see below), the number of attendees required for a party to potentially qualify as an out-of-control party is low (12) and the behaviour of only a very small number of people (two or three) can trigger the legislation. The criminal responsibility of the organiser(s) is akin to a form of vicarious liability, noting that the triggering behaviour need not be carried out by an invited guest, but also by uninvited guests, or those who have been denied entry or ejected.

In Queensland a coalition of community legal centres circulated a series of hypotheticals to show just how broad the laws were. Their point was to highlight the extent to which the laws constituted hyper-criminalisation and that 'ordinary Queenslanders' could easily fall foul of them. For example:

Cathy and Bruce agree that their daughter Sharon can have a sixteenth birthday party at their home, although only 20 of her friends can attend. Four of Sharon's classmates, who Bruce considers 'bad eggs', turn up at the party, and Bruce prevents them from entering. They get angry and, as they are leaving, one of the boys (Macca) knocks over the letterboxes of Bruce's next door neighbour. Police are called and two officers attend for an hour.⁹¹

In the Queensland Parliament, Government MPs ridiculed this and other hypotheticals as 'divorced from the legislation',⁹² but there is little doubt that the law does cover such situations given the definitional approach which has been adopted. In essence the Government's position was that police would exercise their discretion so that only the 'deserving' were caught by the criminal law's wide net (the Police Minister was reported as saying that 'those not at fault would not be targeted'⁹³). The evidence on the use of the new consorting law by New South Wales Police (discussed above) invites doubt about this proposition.

As Opposition MPs in both States said during parliamentary debate, there is a serious mismatch between the behaviour at which the legislation is said to be directed and the definitions used:

What is so unreasonable about saying, 'Bring a few of your friends along if you like'? My children organise those sorts of functions in my house; they

91 Queensland Association of Independent Legal Services, 'How New Police Party Powers Could Affect Ordinary Queenslanders' (2013) <www.qails.org.au/_dbase_upl/Party%20powers%20factsheet.pdf>.

92 Queensland, *Parliamentary Debates*, 11 February 2014, 71 (Ian Berry).

93 'Last Drinks for Wild Parties as New Laws Permit Jailing of Organisers', *Courier-Mail* (Brisbane), 10 February 2014, 7.

are good kids and they behave themselves, but it could happen that one day somebody brings someone along and they leave the party and break a bottle on the driveway, so my kids could be subject to criminal sanction. That is not the target of this legislation, or I presume it is not. ... That is the fundamental problem with this legislation. It does not talk about an out-of-control party being rioting in the streets and people committing assaults and the sorts of behaviour we see on the telly; it talks about littering, noisy vehicles and obstructing traffic, and it talks about two people doing so!⁹⁴

This bill does not deliver what it intends. It is an obtuse, overreaction catch-all that will not work any better than the existing laws unless the real goal is to prevent any person having a party on private property in Queensland. ... The opposition is not opposed to taking appropriate, proportionate action against out-of-control parties. An opportunity has been lost with this legislation. Huge parties where members of the public are subjected to wild, illegal behaviour should be stamped out. People who organise parties for profit and then take no responsibility for the behaviour of attendees should be condemned, censured and worse. But we should not be attacking people who hold family parties in their backyard. To apply these laws to parties of 12 people of whom three misbehave is an overreach in the extreme.⁹⁵

C Rhetoric/Rationale

In Perth during 2012, stories of criminal and antisocial behaviour and confrontations with police arising out of ‘wild parties’ – parties that were said to be the product of Facebook invitations – began to attract media attention.⁹⁶ In a familiar political manoeuvre, the Opposition used the stories as ammunition to criticise the Government for being ‘soft’ on crime.⁹⁷ The Government’s initial reaction was to promise tougher police powers rather than new criminal offences,⁹⁸ but ultimately decided to do both, an approach which the Western Australia Police endorsed.⁹⁹

Queensland’s adoption of out-of-control party laws was initially triggered in March 2013 when the Lord Mayor of Brisbane, Graham Quirk, in the wake of a highly publicised incident, called on the State

94 Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 October 2012, 6911b-6955a (Martin Whitely).

95 Queensland, *Parliamentary Debates*, 11 February 2014, 70 (Bill Byrne).

96 Gabrielle Knowles and Natasha Boddy, ‘Rowdy Parties “Beyond a Joke”’, *The West Australian*, 2 April 2012, 11; Gabrielle Knowles, ‘Pictured Here? The Cops Want a Word’, *The West Australian* (Perth), 19 September 2012, 5; Gabrielle Knowles, ‘Yet Another Party Goes Feral’, *The West Australian*, 29 October 2012, 9.

97 Knowles and Boddy, *ibid*.

98 Phil Hickey, ‘Greater Police Powers on Rowdy Parties, Premier Tells Police Union Conference’, *Perth Now* (online), 25 June 2012 <www.perthnow.com.au/news/western-australia/greater-police-powers-on-rowdy-parties-premier-tells-police-union-conference/story-e6frg13u-1226407872481>.

99 ‘Police to Shut Down Out of Control Parties’, *Australian Broadcasting Corporation* (online), 25 June 2012 <www.abc.net.au/news/2012-06-25/legislation-to-cover-out-of-control-parties/4091428>.

Government to introduce laws modelled on Western Australia's legislation.¹⁰⁰ Interestingly, early reports indicated that the Queensland Police Union 'doesn't much like the idea, saying current laws are sufficient',¹⁰¹ and the Queensland Government didn't think new laws were necessary.¹⁰² However, in July the Government announced its intention to follow Western Australia's lead and 'Queensland Police Union president Ian Leavers said any attempt by the Government to rid the suburbs of out-of-control parties was welcomed'.¹⁰³ By January 2014 the Police Union was demanding that the Government 'move quickly on the out-of-control party legislation'.¹⁰⁴

When the Western Australian Government moved to introduce the out-of-control parties legislation, it characterised the problem as a novel one that required a novel solution. On second reading, the Police Minister said that out-of-control gatherings – which 'are characterised by large numbers of attendees and criminal or antisocial conduct' – are 'a relatively modern social phenomenon'. She stated that 'in many cases, attendance at these gatherings is fueled by reports or invitations in social media'.¹⁰⁵ As in Western Australia, the risk posed by social media were a significant part of the case for action in Queensland, the Police Minister stating: 'all too often we've seen parties quickly spiral out-of-control after being advertised on social media sites like Facebook'.¹⁰⁶ The Attorney-General and the Tourism Minister elaborated:

It is time for all of us, parents and children to realise that posting a party invitation on Facebook is like pouring blood in the water and expecting the sharks to stay away.¹⁰⁷

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- 100 Renee Viellaris, 'Party Riot Host May Get Damage Bill as Brisbane Lord Mayor Graham Quirk Calls for "No Tolerance"', *Courier-Mail* (online), 18 March 2013 <www.couriermail.com.au/news/queensland/party-riot-host-may-get-damage-bill-as-brisbane-lord-mayor-graham-quirk-calls-for-no-tolerance/story-e6freoof-1226599370990>.
 - 101 Editorial, 'Need for Laws to be Relevant', *Courier-Mail* (Brisbane), 19 March 2013, 20.
 - 102 Jacinda Tutty and Robyn Ironside, 'Police Outwitted by a New Breed of Party Planners as Suburban Streets Become Alcohol-fuelled Battle Zones', *The Sunday Mail* (online), 14 April 2013 <www.couriermail.com.au/news/police-outwitted-by-a-new-breed-of-party-planners-as-suburban-streets-become-alcohol-fuelled-battle-zones/story-e6freon6-1226619824367>.
 - 103 Thomas Chamberlin and Stephanie Bennett, 'Reforms Crack Down on Parents and Teens to Control Facebook Parties', *The Sunday Mail* (online), 7 July 2013 <www.couriermail.com.au/technology/news/reforms-crack-down-on-parents-and-teens-to-control-facebook-parties/story-fniho3wq-1226675350420>.
 - 104 Felicity Sheppard and Michael Madigan, 'Hurry Up and Ban Net Parties', *Courier Mail* (Brisbane), 12 January 2014, 7.
 - 105 Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 September 2012, 6426b-6427a (Liza Harvey).
 - 106 Queensland Cabinet and Ministerial Directory, 'New Laws to Help Keep Parties "In Control"' (Media Statement, 10 February 2014).
 - 107 Felicity Sheppard, 'Newman Government Urged to Fast-track Planned laws', *The Sunday Mail* (online), 12 January 2014 <www.couriermail.com.au/news/newman-government-urged-to-fast-track-planned-laws/story-e6freoof-1226675350420>.

A modern society and the advancement of technology have contributed extensively to the widespread issue of out-of-control events that are causing grief to communities throughout our great state.¹⁰⁸

The danger and unacceptability of chaos in the suburbs was a recurring feature of the political rhetoric in both States:

The people who organise out-of-control parties have wreaked havoc in our suburbs and they need to be held responsible.¹⁰⁹

[The community] has had a gutful of out-of-control parties disturbing the quiet enjoyment and amenity of our suburbs.¹¹⁰

The risk of escalation was a common theme, as was the association with excessive consumption of alcohol and other drugs:

These events are becoming more frequent. ... We are more likely to see greater risks for people attending such events, including potential damage and injury. ... There is the phenomenon of gatecrashers and of high-energy drinks mixed with alcohol ... Of course, there are drugs and the willingness for a lot more people to carry weapons ... All these elements are coming together to create what is now a phenomenon whereby more and more parties are likely to become potential risks to the people who attend them, to the people who host them and, indeed, to the people who live around them.¹¹¹

Antisocial behaviour seems to be on the increase, and we know anecdotally what occurs when young men and youths get together in groups and imbibe alcohol: they hunt in packs and they see parties on Facebook to which they are not invited, but they attend. ... This legislation is about protecting communities from antisocial behaviour. Our constituents have asked us to act on this situation, and we have acted accordingly. ... It is not fair on the public to have these marauding youths gallivanting around their neighbourhoods and causing distress.¹¹²

com.au/news/queensland/newman-government-urged-to-fasttrack-planned-laws-curtailing-facebook-parties/story-fnihsrf2-1226799809848>.

- 108 Queensland, *Parliamentary Debates*, Legislative Assembly, 11 February 2014, 74 (Jann Stuckey).
- 109 Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 October 2012, 6911b-6955a (Michelle Roberts).
- 110 Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 October 2012, 6911b-6955a (Margaret Quirk).
- 111 Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 October 2012, 6911b-6955a (David Templeman). In Queensland: 'That is the problem; people go along to parties and this conduct erupts into circumstances which nobody really foresees. Somebody pulls out a knife and the next thing somebody is stabbed' (Queensland, *Parliamentary Debates*, Legislative Assembly, 11 February 2014, 72 (Ian Berry)).
- 112 Queensland, *Parliamentary Debates*, Legislative Assembly, 11 February 2014, 71 (Ian Berry). Also: 'Many participants in these out-of-control events become subject to mob mentality to the point that bottles, fence pailings and even bricks have been thrown at our police officers in the community' (Queensland, *Parliamentary Debates*, Legislative Assembly, 12 September 2013, 3053 (Jack Dempsey)).

D *Consequences/Effects*

In October 2014 the first two people charged with organising an out-of-control party (on 22 December 2012),¹¹³ and the first to plead not guilty,¹¹⁴ were acquitted in the Perth Magistrate's Court. Magistrate Huston found that 'prosecutors had failed to prove the antisocial behaviour had been committed by people attending the party'.¹¹⁵ Nonetheless the Western Australian Government has claimed that the legislation has been effective. In June 2015 the Police Minister announced that 98 people had been charged with offences under the out-of-control gathering legislation.¹¹⁶ At the same time the Minister announced the expansion of the Western Australia Police 'K9 Unit' as part of the continuing fight against wild parties: 'Police tell me it's quite remarkable the effect one of these dogs can have on an unruly mob, they may abuse officers but quickly quieten down when a police dog lunges towards them'.¹¹⁷ Queensland's laws came into effect in February 2014. No data is yet available on police use, and the media continues to report on 'wild parties' that get 'out-of-control'.¹¹⁸

V CASE STUDY 4: 'PAPERLESS' ARREST

A *What Changed?*

The *Police Administration Amendment Act 2014* (NT) commenced operation on 17 December 2014¹¹⁹ amending the *Police Administration*

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- 113 Gabrielle Knowles, 'First Charges Laid Under Party Law', *The West Australian* (Perth), 18 January 2013, 3.
 - 114 Tayissa Barone, 'Out-of-Control Party Test Case', *The West Australian* (online), 24 September 2013 <<https://au.news.yahoo.com/thewest/wa/a/19078128/out-of-control-party-test-case/>>.
 - 115 Amanda Banks, 'Police Case Over Wild Party Fails', *The West Australian* (Perth), 25 October 2014, 14.
 - 116 Government of Western Australia, Minister of Police, 'Dogs Add Bite to Out of Control Party Crackdown', Media Statement, 21 June 2015 <www.mediastatements.wa.gov.au/Pages/Barnett/2015/06/Dogs-add-bite-to-out-of-control-party-crackdown.aspx>.
 - 117 Claire Bickers, 'Police Dogs to Tackle Out-of-Control Parties in WA Government Crackdown', *PerthNow* (online), 21 June 2015 <www.news.com.au/national/western-australia/police-dogs-to-tackle-out-of-control-parties-in-wa-government-crackdown/story-fnii5thn-1227408324058?sv=1f12cc38201eda80fd8d6bec38c13fe2>.
 - 118 Emma Williams, 'Carnage at Out-of-Control Party', *Courier Mail* (online), 28 June 2015 <www.couriermail.com.au/news/queensland/carnage-at-out-of-control-party/story-fnn8dlfs-1227418505700>; Brooke Baskin and Josh Dutton, 'Facebook Party Goes Viral, then Feral as Police Assaulted, Teens Charged', *The Sunday Mail* (online), 28 December 2014 <www.couriermail.com.au/news/queensland/facebook-party-goes-viral-then-feral-as-police-assaulted-teens-charged/story-fnn8dlfs-1227168161553>.
 - 119 *Police Administration Amendment Act 2014* (NT). Curiously the Police Administration Amendment Bill contained a second amendment which would require police to compulsorily answer questions in relation to internal disciplinary investigations. Interestingly, in this context the second reading speech and

Act (NT) to insert a new Div 4AA into Pt VII ‘Taking person into custody for infringement notice offence’. This new Division extends police powers to arrest a person without a warrant where the police officer believes ‘on reasonable grounds that the person had committed, was committing or was about to commit, an offence that is an infringement notice offence’ (s 133AB). A person can be held in custody under these new powers for a period of up to four hours (s 133AB(2)(a)) or if the person is intoxicated ‘for a period longer than 4 hours until the member believes on reasonable grounds that the person is no longer intoxicated’ (s 133AB(2)(b)).¹²⁰

The power is potentially exercisable in a wide range of situations, both because of the breadth of minor offences defined as an ‘infringement notice offence’¹²¹ and the high volume nature of the offences. North Australian Aboriginal Justice Agency (NAAJA) and Central Australian Aboriginal Legal Aid Service (CAALAS) have catalogued the various existing offences that might come within this definition.¹²² These include 15 offences under the *Summary Offences Act* (NT) including high frequency offences such as offensive conduct (s 47) and obscenity in a public place or in a licensed premises (s 53(1) and (7)); 18 offences under the *Liquor Act* (NT) and two offences under the *Misuse of Drugs Act* (NT) – totalling 35 potential trigger offences. As NAAJA and CAALAS have pointed out, some of these are fine-only offences¹²³ – meaning a person can be held in custody for four hours for things the Northern Territory Parliament has specifically provided cannot and should not attract a term of imprisonment.

While the officer’s belief as to the commission of an ‘infringement notice offence’ triggers the power, at the conclusion of the custody period no infringement notice or any other charge need be laid – indeed, the person can be released unconditionally (s 133AB(3)(a)).¹²⁴ A person taken into custody under the Division *must* also be subjected to an identity

debates discussed the safeguards that ought to be in place for police who might incriminate themselves, for example, provisions giving direct immunity in any criminal/civil proceedings.

120 See Thalia Anthony, ‘Paperless Arrests are a Sure-fire Trigger for More Deaths in Custody’ *The Conversation* (online), 28 May 2015 <<https://theconversation.com/paperless-arrests-are-a-sure-fire-trigger-for-more-deaths-in-custody-42328>>.

121 See combined effect of *Police Administration Act* (NT) s 133AA and *Police Administration Regulations* (NT) reg 19A.

122 ‘NAAJA and CAALAS’ Concerns with Paperless Arrests’ (2016) <www.naaja.org.au/wp-content/uploads/2014/12/NAAJA-CAALAS-concerns-on-paperless-arrests.pdf>; see also Human Rights Law Centre, *High Court Case Against NT Government: Background Information* (27 March 2015) <http://hrlc.org.au/wp-content/uploads/2015/03/Background_NTHighCourt_case_March2015.pdf>.

123 See, for example, *Summary Offences Act* (NT) ss 53A(2), 53B(3) (failure to comply with undue noise direction) and s 76(2) (street musician who plays musical instrument after being asked to leave neighbourhood).

124 The person may however be released and issued with an infringement notice offence (s 133AB(3)(b)), released on bail (c) or brought before a justice or court for the infringement notice offence or another offence allegedly committed by the person (d).

check by 'taking and recording the person's name and further information relevant to the person's identification, including photographs, fingerprints and other biometric identifiers' (s 133AC(1)). The person may also be searched with money or items likely to cause harm to the person or another, removed (s 133AC(2)). There is no monitoring or oversight mechanism (such as Ombudsman review) provided for by the Division. The Government indicated during debate on the Bill that existing processes are available and sufficient.¹²⁵

These extensions of police powers are 'the culmination of the broadening of the scope and powers of policing, particularly targeted at Indigenous people, since 2006 when the Federal Police were deployed to NT Indigenous communities'.¹²⁶ The laws were the subject of an unsuccessful High Court constitutional challenge by the NAAJA and the Human Rights Law Centre on the basis that the new detention laws lack judicial oversight and place too much power in the hands of police.¹²⁷

B How Does the Legislation Represent Hyper-Criminalisation?

There is a significant body of case law recognising that arrest forms an 'additional punishment' involving 'deprivation of freedom and frequently ignominy and fear'¹²⁸ and therefore should be used as a mechanism of 'last resort' and not for minor offences, particularly summary offences.¹²⁹ These principles were foundational to the recommendations of the Royal Commission into Aboriginal Deaths in Custody and in particular, the recommendation that arrest should be a sanction of last resort (Recommendation 87a) and not normally used for offensive language

125 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2014, 507-517 (Lynne Walker).

126 Anthony, above n 120. Anthony gives examples of the Northern Territory *Emergency Response Act 2007* (Cth) in conjunction with s 95 of *Liquor Act* (NT) and powers to apprehend without warrant intoxicated persons in Div 4 of Pt VII of the *Police Administration Act* (NT) which are specifically to prescribed Aboriginal communities. See also Thalia Anthony, 'Governing Crime in the Intervention' (2009) 27(2) *Law in Context* 90. On the history of various intervention measures in relation to alcohol in Aboriginal communities in Northern Territory see also Heather Douglas, 'The Curse of "White Man's Water": Aboriginal People and the Control of Alcohol' (2007) 4(1) *University New England Law Journal* 3.

127 *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41; see Jonathon Hunyor, 'Imprison Me NT: Paperless Arrests and the Rise of Executive Power in the Northern Territory' (2015) 8(21) *Indigenous Law Bulletin* 3.

128 See *DPP v Carr* [2002] NSWSC 194, [35]: 'This Court in its appellate and trial divisions has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and there is no reason to believe that a summons will not be effective'.

129 *Lake v Dobson* (1981) 5 PS Rev 2221, 2223; *DPP v Carr* [2002] NSWSC 194, [35]. See also Vicki Sentas and Rebecca McMahon, 'Changes to Police Powers of Arrest in New South Wales' (2014) 25(3) *Current Issues in Criminal Justice* 785.

(Recommendation 86a).¹³⁰ The new paperless arrest laws turn these foundational principles on their head: arrest is made a mechanism of ‘first resort’¹³¹ and the trigger for the exercise of the power is simply the police officer’s belief that a minor offence (an infringement notice offence) has, was or may be committed. As a result, Northern Territory police have the most expansive arrest and detention powers in the country.

C *Rhetoric/Rationale*

First, the term *paperless* arrest is itself noteworthy. In an era where ‘paperless’ connotes a normative good (reduced environmental waste and less bureaucratic red-tape), it is ironic that in the present context the term is appropriated to describe a procedure that avoids all procedural safeguards and police accountability. The things that are ‘saved’ by a paperless process are traditionally regarded as essential to the fair administration of justice and the protection of civil liberties – the reverse of what is occurring here.

The Government’s case for introducing ‘paperless’ arrests was based on the asserted need to arm police with a new tool to deal with ‘trouble makers’ and ‘drunken morons’ who are causing a ‘public nuisance’, the behaviour of whom was described by the Attorney-General (a former police officer) in colourful terms:

[I]n the practical, real world of Mitchell Street when people are standing on street corners with their pants around their ankles blaring out expletives or baring their buttocks to passing cars, expectorating, fornicating, urinating, defecating and doing all the other things they do when they have a skin full of juba juice, we can now say to the police, ‘Go out, lift them, pull them out of circulation’. You may be doing them a favour because whilst they are sitting in the cells they are not getting drunker still and committing, later in the evening, indictable offences.¹³²

The targets of police attention are characterised in ‘dehumanised’ terms, reinforced by the description of what police are empowered to do as taking trouble-makers ‘out of circulation’. Such language evokes disturbing images of neutralisation or incapacitation, or worse still, the sort of termination which is carried out by a hitman.

Police try to deal with the matter by moving people on and dishing out a sinny, but they do not take these people out of commission.

This system simply restores a simple idea that when a police officer arrests a person for a street offence, they have taken that person out of commission.

130 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991). See also Rec 86a (arrest or charge should not be normally used for offensive language) and Rec 85 (decriminalisation of public drunkenness).

131 Sentas and McMahon, above n 129.

132 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2014, 507-517 (Johan (John) Wessel Elferink).

This means the police will no longer become arrest averse. It will actually say to the police that if these clowns are playing up, arrest them, take them into custody, get them out of circulation.¹³³

Elsewhere, the Attorney-General used a fishing/hunting metaphor to describe the power that would be made available to the police:

That is basically what this power will be for the police: to quickly and efficiently deal with individuals who present themselves as offending generally against the *Summary Offences Act*. It will give police a vehicle by which to remove them, contain them and then release them. It is a form of catch and release.¹³⁴

Troubling in any context, such language seems especially hyperbolic if the problem in question is understood to be relatively low-level public nuisance behaviour (and, the likely 'objects' of the target, Aboriginal people). The Government, however, underpinned its case for change based on a more serious characterisation of the menace:

Taking a person out of circulation was really important because every single copper out there will know this truth: the moron standing on a street corner being a foul-mouthed git at 9.30 pm at night is nearly always the person you are arresting at 2 am for a serious assault, sexual assault or something worse. If you take them out of circulation nice and early you are already well in advance of cutting off a lot of problems down the track.¹³⁵

An additional feature of the 'demonisation' rhetoric present in this instance was that traditional principles of legality and mechanisms of accountability befitting a state power to deprive a person of his/her liberty like arrest, were treated as part of the nuisance or 'evil' to be overcome. The formalities and protections associated with traditional police arrest are portrayed as a resource intensive inconvenience that diminishes the capacity of the police to fulfil their most important function: to protect the community by keeping the street free of 'trouble-makers'.

Police want to have a level of control, not because they are thugs and bullies, but because they believe in standing up for the integrity of social order in our community. ... This legislation is about restoring the concept of effective control back to the hands of the police force.¹³⁶

The formal legal conception of arrest as a method of 'last resort' that is inappropriate for minor offences (that is, the *ideal*) is actively rejected in favour of a more pragmatic reality. 'Paperless' arrest is directed at removing the current safeguards and documentation required to complete a lawful arrest because they are 'inefficient' and tie police to desks, thus preventing them from being out on the street stopping 'crime'. There is a valorisation of the 'good old days' when police officers 'could knock ... [an arrest] over in about 20 to 25 minutes pretty comfortably' whereas the 'problem nowadays is that the process of arresting a person is laborious;

133 Ibid.

134 Ibid.

135 Ibid.

136 Ibid.

it is hard'. With the flexibility and reduced red tape made available by the option of paperless arrest:

[T]he police will no longer become arrest averse. It will actually say to the police that if these clowns are playing up, arrest them, take them into custody, get them out of circulation. I will bet you London to a brick serious assaults later on in the evening will substantially drop. Moreover, I will bet you London to a brick the police will feel a much greater level of control over the environment they police.¹³⁷

In this way, legality is recalibrated to better match a 'common sense' conception of what arrest is *really* for. Rather than establish a standard with which police are expected to comply, the paperless arrest arrangements validate the multiple ways in which police have long preferred to use the power of arrest, including as 'a demonstration of police control over a situation'.¹³⁸

In an extraordinary assault on principles of legality, liberty and accountability 'paperless' arrest was heralded by the Northern Territory Government as a desirable and necessary *first resort* for addressing the risk posed by 'trouble-makers'. Perversely, summary deprivation of liberty without charge is portrayed as a *positive* – for the police, for the community and for the person taken into custody. The Attorney-General said: 'You may be doing them a favour because whilst they are sitting in the cells they are not getting drunker still and committing, later in the evening, indictable offences'.¹³⁹

D Consequences/Effects

There is no express mention in the second reading speech, debates or elsewhere that the laws were *designed* to target Aboriginal people, although it is hard to imagine that disproportionate impact was not anticipated. Certainly, it is well recognised that expanded arrest powers are likely to have a disproportionate impact on Indigenous people and vulnerable people, such as those with a mental illness.¹⁴⁰ It is therefore unsurprising that information on the operation of the laws in the first three months indicates they have been used over a staggering 700 times and 75 per cent of those times involved Aboriginal people.¹⁴¹ Even more problematic is that in June 2015 a 59 year old Indigenous man detained under the laws for an alcohol-related offence in the Darwin watch house was found dead three hours later. He was reportedly visiting Darwin from central Australia

137 Ibid.

138 David Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Press, 1997) 77; Robert Reiner, *The Politics of the Police* (Oxford University Press, 4th ed, 2010).

139 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2014, 507-517 (Johan (John) Wessel Elferink).

140 Sentas and McMahon, above n 129.

141 Simon Lauder, 'NT Arrest Powers Under Scrutiny After Death in Custody', *ABC News AM*, 25 May 2015 (Ruth Barson) <www.abc.net.au/am/content/2015/s4241656.htm>.

for medical treatment.¹⁴² After an inquest into his death conducted in August 2015, the coroner found that the paperless arrest procedures increased the risk of Aboriginal deaths in custody, and recommend that the laws establishing them be repealed – a recommendation the Northern Territory declined to follow.¹⁴³

That a 'reform' introduced in 2014 would actively increase the number of Aboriginal persons held in police custody, despite all that is known about the massive over-representation of Aboriginal persons in prison and police custody, and the dangers of custody, is especially disturbing.¹⁴⁴ As Anthony has observed, '[t]he introduction of paperless arrests is a direct affront' to the recommendation of the Royal Commission into Aboriginal Deaths in Custody.¹⁴⁵ Perversely, paperless arrests deliberately *undo* the benefits of on-the-spot-fines, which were introduced as an alternative to traditional coercive methods for initiating criminal charges, including arrest and police detention.

VI CONCLUSION

Our aim in this article has been to illustrate and problematise the deployment of criminalisation – whether new offences, higher penalties or wider police powers – on the basis of hyperbolic characterisations of the problem to be addressed, and the criminal law's capacity to offer the solution. It is not our contention that *all* criminal law-making takes this form; it does not. Rather, our conclusion is that 'dangerisation' and 'law and order' narratives, particularly when constructed around the perceived activities of individuals and groups that are heavily demonised in political and media discourse, do not provide a solid foundation for sensible adjustments to the boundaries of the criminal law.

We have documented a number of instances where the entrenched political environment in which no government (or aspiring government) want to be seen as anything other than 'tough on crime', and the pressure exerted by intense media scrutiny and agitation in response to 'trigger' events (as well as police force and union lobbying), combine to compel legislatures to enact dramatic expansions of the parameters of the criminal law

142 Helen Davidson, 'Indigenous Man's Death in Custody Blamed on NT "Paperless Arrest" Powers' *The Guardian* (online), 25 May 2015 <www.theguardian.com/australia-news/2015/may/25/indigenous-mans-death-in-custody-blamed-on-nt-paperless-arrest-powers>.

143 Jane Bardon, 'NT Government dismisses coroner's call to scrap paperless arrests after death of Kumanjayi Langdon', *ABC News* (online) 14 August 2015 <www.abc.net.au/news/2015-08-14/paperless-arrest-system-manifestly-unfair-langdon-inquest-told/6697818>.

144 See Australian Bureau of Statistics, *Prisoners in Australia 2013* (Media Release, 219/2013, 5 December 2013); Brown et al, above n 26; Amy McQuire, 'In the NT, streamlined police paperwork takes priority over black deaths in custody', *The New Matilda*, 12 June 2015 <<https://newmatilda.com/2015/06/12/nt-streamlined-police-paperwork-takes-priority-over-black-deaths-custody/>>.

145 Anthony, above n 120.

and police authority. In such cases, governments appear to actively exploit the leverage and latitude afforded by (genuine) popular anxiety regarding the ‘crisis’ in question (bikie gang, alcohol-fuelled violence, coward punchers, wild parties, gate-crashers and public disorder) to produce changes to the law that they would find difficult to justify absent the ‘extraordinary’ and/or ‘novel’ circumstances. The message to the electorate appears to be: ‘You are right to be scared; there is a danger. But don’t panic. Because we can overcome this crisis – as long as police, prosecutors, judges and juries have these new criminal laws at our disposal’. This appeal reflects both the persistence of confidence in the power of criminal law to produce a deterrent effect, as well as the conviction that effective crime prevention demands early intervention. In the name of risk management, law-makers display a willingness to criminalise and punish ‘pre-cursor’ behaviours, or to expose individuals to criminal penalty (or the ‘de facto’ penalty of police custody) without first satisfying the traditional justifications for punishment, including evidence of subjective or objective criminal fault.

Hyper-criminalisation by State/Territory legislatures does not happen in a jurisdictional vacuum. One of the consequences of Australia’s federal system in which criminal law-making authority resides mainly with the States is that States have (and take) the opportunity to ‘borrow’ tools (offences and powers) from other jurisdictions. It is a powerful narrative to be able to achieve ‘buy-in’ by saying, for example: ‘The good citizens of Queensland deserve a system of criminal laws to protect their communities every bit as powerful as the system that Western Australians enjoy’. Or for those who might be concerned about whether a proposed expansion of the criminal law in their State is excessive: ‘This measure is not a radical experiment; it is a recognised and legitimate feature of the criminal law in New South Wales/South Australia/Victoria etc’.

Our case studies also indicate there is often a poor match between the claimed objectives behind an extension of the criminal law and the operational effects. In some cases, a ‘radical’ change on paper will be shown to have been little more than posturing and symbolism – a case of what one WA politician described as ‘bumper-sticker politics’,¹⁴⁶ or ‘law ‘n’ order huffing and puffing ... [that] is all about public relations and stunts’.¹⁴⁷ However, in other cases, the heavy weight of draconian hyper-criminalisation falls not on those whose behaviour was said to require the change, but on the marginalised populations who have long felt the force of harsh offences and intrusive police powers.

There is a danger that hyper-criminalisation inspired by rhetoric of *demonisation* and *danger* is becoming a permanent feature of governance in Australia.¹⁴⁸ This is a pattern that needs to be resisted. More than

146 Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 October 2012, 6911b-6955a (Martin Whitely).

147 Richard Ackland, ‘O’Farrell Tries Newman’s Bike for Size’, *Sydney Morning Herald*, 8 November 2013, 22.

148 On the idea of a ‘permanent moral panic’, see Jock Young, ‘Slipping Away – Moral Panics Each Side of “The Golden Age”’ in David Downes et al (eds), *Crime, Social*

ever we need a robust set of principles¹⁴⁹ (and processes¹⁵⁰) to guide the deployment of criminal law as a public policy tool in the future.

Control and Human Rights: From Moral Panics to States of Denial. Essays in Honour of Stanley Cohen (Willan Publishing, 2007) 63-64.

149 See Brown, above n 20; McNamara, above n 21.

150 Luke McNamara and Julia Quilter, 'Institutional Influences on the Parameters of Criminalisation: Parliamentary Scrutiny of Criminal Law Bills in New South Wales' (2015) 27(1) *Current Issues in Criminal Justice* 21.