



## Guest Editors' Introduction

### Special Edition: Hidden Criminalisation— Punitiveness at the Edges

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This special issue had its origins in a workshop on criminal law and criminalisation which we co-convened, and our law schools co-hosted, in 2017. That workshop was the fourth in what has become an annual event in Australia (starting with a Sydney Law School-hosted event in 2014 (see Crofts and Loughnan 2015)). These workshops came into being because of a recognised gap in the Australian scholarly environment: a place for criminalisation scholars to share, discuss and receive feedback on their work (see also Anthony and Crofts 2017; Henderson 2016).

A central theme that united contributions to the workshop was a desire to examine aspects of the phenomenon of criminalisation that have traditionally been viewed as undeserving of scholarly attention. Almost 40 years ago, Doreen McBarnet introduced the 'ideology of triviality' to draw attention to the operation of lower courts which handle the bulk of criminal court matters (McBarnet 1981). Workshop participants recognised that the questions provoked by McBarnet's analysis could and should be applied to address criminalisation and punishment that occurs beyond the criminal courts.

Another feature common to workshop participants was a commitment to take seriously the emergence of a body of theoretical scholarship concerned with theorising the normative limits of criminalisation as a public policy mechanism (for example, Duff 2018; Duff et al. 2014). Following Brown (2013), however, this commitment involves avoiding abstract and idealised accounts of the criminal law, and recognising and building upon the strong Australian tradition of politically engaged, criminologically influenced and empirically rigorous criminalisation scholarship.

Out of this workshop evolved the theme for this special issue: 'Hidden Criminalisation—Punitiveness at the Edges'. This theme captures four inter-related concerns that feature—and link the articles—in this issue.

The first concern refers to the deployment of criminalisation and punishment outside the classic structures of the court system, what might be loosely referred to as a third 'tier' of justice or what O'Malley (2010) has described as 'simulated justice'. As **Quilter and Hogg** show, penalty notices surpass all other forms of court-based punishment, including fines imposed by courts, and have punitive effects that warrant closer examination.

Second, many criminal offences are hidden in a different sense. Though they may reach the courts, they are often not recognised as 'real' criminal offences. However, the evidence shows that crimes like breaching a domestic violence order (**Douglas and Fitzgerald**), using offensive language in a public place (**Methven**), and driving while disqualified (**Quilter and Hogg**) are charged in large numbers and represent sites of significant criminalisation. Other criminalising and punitive effects are invisible because they are the product of agencies 'outside' the classically defined criminal justice system, such as state debt recovery agencies.

Third, we draw attention to how particular criminal offences can be enforced in a way that produces punitive effects that are unanticipated or that seem at odds with the original policy rationale for the offence in question. **Douglas and Fitzgerald** show that the enforcement and punishment of the offence of breaching a domestic violence order has impacted disproportionately on Aboriginal and Torres Strait Islander people and Aboriginal and Torres Strait Islander women in particular. **Methven** argues that offensive language laws are employed in a manner that is less about ensuring the amenity of public spaces and more about commanding respect for police officers.

Finally, articles in this special issue draw attention to the diversity of practices that constitute criminalisation. While concerns about 'over-criminalisation' are commonly expressed in relation to new offences or higher penalties, **Sentas and Grewcock** show that the expansion of police powers is an important dimension of the complex phenomenon of contemporary criminalisation. **McNamara et al.** introduce the novel concept of 'modalities' as an explanatory tool for illuminating the variety of ways in which the parameters of criminalisation can be altered.

In an effort to encourage constructive dialogue between criminalisation scholars in Australia and abroad, this special issue includes commentaries from two leading criminalisation scholars from the United Kingdom. **Lindsay Farmer** and **Nicola Lacey**, in their respective contributions, offer valuable reflections on the concept of hidden criminalisation and the potential of a modalities approach to contribute to empirical criminalisation research projects in different parts of the world.

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