



Special Edition: Limits and Prospects of Criminal Law Reform— Past, Present, Future Guest Editors' Introduction

Thalia Anthony and Penny Crofts

University of Technology Sydney, Australia

This special issue traces multifaceted readings of criminal law reform in the context of developments in Australia, North America and Europe. It addresses a range of criminal law legislative regimes, frameworks and issues confronting criminal law reform including as they relate to family violence, organisational liability for child sexual abuse, drug-driving and Indigenous under-representation on juries. In doing so, the articles variously assess the impacts of past criminal law reforms, current processes of reform, areas in need of future reform and the limitations of reform. It poses a number of challenges: Who does law reform serve? What principles should guide the work of criminal justice reform? What is the role and responsibility of universities in law reform? Who are the natural allies of academics in agitating for reform? Is reform of criminal law enough for progressive social change? Do public inquiries and law reform assist with progressive change or do they have the potential to undermine the struggle for more humane and equitable social responses?

The term criminal 'law reform' is a broad one that encompasses any government legislation, policy or measure, and the articles in this issue reflect such breadth. However, the analysis in this Introduction to the special issue—responding to some of the forbearing questions—is concerned with the potential for law reform as an antidote to the myopic politics of social control. The use of the term 'law reform bodies' denotes a government agency dedicated to the considered and balanced appraisal of policy and operates relatively insulated from populist politics. Law reformers more broadly—including academics, community legal centres and other non-government organisations—have the potential to counterbalance the impetus for politicians to pursue knee-jerk policy. These bodies provide a voice of dissent, including in the public arena and through the processes of petitioning, ministerial lobbying and activism. The missed opportunity of a uniform principled approach under the Commonwealth Criminal Code, as analysed in **Archie Loughnan's** opening article, was one such opportunity to provide a reasoned approach, but Loughnan also points to the difficulties of achieving sufficient consensus to provide impetus for reforms. McNamara (2017: 4), who shares this concern for developing unifying principles to inform criminal law reform, points out that the legal academy and legal profession have 'a long history of attempting to counsel governments against overzealous criminal law-making, via submissions, scholarship and others forms of advocacy and lobbying'. This is notwithstanding waves of despondency about the futility of such endeavours in the face of frequent (although not universal) government disregard to informed debate in its pursuit of draconian criminal laws (McNamara 2017: 4).

Even successful attempts to shape the law reform process may bring disappointments, including where reforms are piecemeal or have unintended and unforeseen impacts. This may arise where the reforms are aimed at only part of the problem and fail to address the structural issues underlying the problem. **Bronwyn Naylor and Danielle Tyson's** article in this collection gestures towards the problem of reforms, espoused by feminist legal scholars and advocates, addressing significant deficiencies in criminal law on the one hand but, on the other hand, failing to respond to broader gender issues. Academics are all too aware of the failures and inadequacies of the criminal legal system in achieving justice. Yet, rather than sinking into despair, the continued involvement of academics in the law reform process reflects an on-going belief and responsibility to aspire to justice in the legal system, as demonstrated in many of the articles in this special issue.

Law reform in Australia today: The demise of agencies

This special issue is published in the context of the decline of official law reform bodies in Australia alongside prevailing tough-on-crime government policies. Such bodies have, in the past, provided a check on government criminal law decision-making by providing information and evaluations of policies as well as new and alternative approaches. In doing so, they have been integral to the law reform process and civil society. For example, the New South Wales government's Criminal Law Review Division was abolished in June 2015. In its time, the Division had moderated some of the more extreme and ill-considered government legislation. More recently, it clashed with the public stance taken by the New South Wales police force by resisting mandatory sentences for alcohol-fuelled violence. The article by **Julia Quilter and Luke McNamara** considers the unintended effects of punitive reforms relating to drug-driving that were pushed through parliament without proper scrutiny.

In addition, in the federal arena, the Australian Institute of Criminology (AIC) merged with the Australian Crime Commission (ACC) in 2016. At the time, the federal government asserted that the AIC would continue to function as a crime and justice research branch and maintain peer-reviewed research. However, there is concern that this merger with a law enforcement body may undermine the AIC's aura of independence (see, for example, Campbell 2015). The Institute began in the 1970s after years of lobbying and negotiation by enthused public servants and attorneys-general across Australia to fund research and produce standardised data on national crime issues, crime prevention, and the effectiveness or otherwise of law enforcement and corrections. While the AIC has never been outspoken in the media on the need for change in the criminal justice system, it has, nonetheless, pursued independent research that has not been driven by the tough-on-crime and counterterrorism agendas of governments. The amalgamation of the AIC with the ACC has precipitated fears that its emerging research may more closely reflect the law enforcement efforts of the ACC and align with the federal government's coercive strategies, especially in relation to national security.

The demise of law reform agencies necessitates a greater role for academics and civil society to respond to penal reforms, especially where directed towards the criminalisation of minority groups. Cole (2016) asserts that, in the post-9/11 world, civil society has been integral to keeping alive the ideals of the rule of law and human rights. The work of civil agitators and academics, according to Roach (forthcoming), will become even more important given the nasty populist turn in politics and the danger of scapegoating unpopular minorities.

Law reform processes as an inhibitor to systemic social change?

Official law reform agencies and their close bedfellows—Royal Commissions and parliamentary inquiries—are not necessarily conducive of meaningful social change. Instead, they have been criticised for upholding the 'state's image of administrative rationality' (Burton and Carlen 1979: 51). Burton and Carlen have argued that they repair the state's crisis of legitimacy while upholding the 'coercive and administrative practices of the state' through marginal institutional

reform (1979: 8, 13, 70). When called upon, inquiries can create the appearance of parliamentary procedural fairness and democratic governance (through the solicitation of submissions and witnesses). Inquiries may be called to give the impression that the government is 'doing something'; meanwhile, cynics hope that, by the time an inquiry has been completed, the energy for change will have dissipated. For some, there is an assumption that these inquiries are an end in themselves, an opportunity to identify problems and provide a form of catharsis in the airing of grievances. But the inquiries and their findings are mere ink on paper without the implementation of recommended changes.

The inquiries and terms of reference are mandated by governments rather than at the discretion of the commissioners and investigators appointed by those same governments. The terms of reference can be so narrowly conceived that they overlook the fundamental problem that the inquiry purports to address. For instance, the *Royal Commission into the Detention and Protection of Children in the Northern Territory* (2016-17) was confined to addressing the *failings within* the child protection and youth detention systems rather than the *increasing use* of these segregation systems to manage children (particularly Aboriginal children) as part of the same continuum. The Federal Government was able, therefore, to indemnify itself of responsibility in contributing to the escalation of children into detention through the increase of Federal police and police powers under federal legislation such as the *Northern Territory National Emergency Response Act 2007* (Cth) Part 2. In contrast, the current *Australian Royal Commission into Institutional Responses to Child Sexual Abuse* has very wide terms of reference, yet **Penny Crofts'** article in this collection raises questions about whether or not the necessary structural and systemic recommendations and reforms will follow.

The role of the academy in law reform

A critical role for academic research is to provide a counterpoint to ill-conceived crime policy. Such policy can arise as an impulsive reaction to media outcry about a break down in law-and-order, particularly in the aftermath of an exceptional crime or public protest, such as the recent homeless camps in the city of Sydney. Exceptional circumstances and state panic can, nonetheless, trigger broad-sweeping penal changes, without consultation or deliberation, including the introduction of new crimes, mandatory sentencing provisions or reducing rights to bail. The production and passage of criminal law amendments on-the-run is undemocratic, bypasses professional scrutiny and lacks evidence. Academics are in a position to promptly respond to the populist politics of such reforms with considered, evidence-based arguments. By contrast, law reform agencies—which are dependent on the direction of government—lack this capacity. Along with non-government organisations, academics can provide a voice of independent and informed dissent. Given the penchant of governments to introduce speedy reforms, non-government organisations and academics are all too frequently reacting to the negative impacts of unwise, hasty reforms rather than necessarily shaping the law reform agenda.

In a neo-liberal environment where money is tight, this dissent can come at a cost. Community Law Centres, for instance, have had their funding cut in relation to their policy work. Academics are increasingly operating in a neo-liberal education system that prioritises the measurable output of refereed research publications within a specific disciplinary field above social and public commentary or contributions to strategic litigation in the public interest. It also mitigates against engagement with civil society and those with lived experience in the criminal justice system, as the academy is regarded as a repository of objective expertise that is formed '20,000 feet' above reality.¹ Moreover, pressure is placed on academics to generate impact through building ties with government departments and industry through consultations, contracts and tied research funding grants. This can jeopardise their independent voice when assessing policy, or place them in fear of producing research that would compromise relationships with their external partners.

Academic researchers in Criminal Law need to critically reflect on their assumed affiliations with decision-makers, and work in ways that are both informed by principled theory as well as the needs of those directly affected by criminal laws and law-reform. Such work requires a sensitivity to the holistic needs of those affected by the criminal justice system, which may challenge disciplinary boundaries and partnerships with justice or corrections departments and the legal profession and, instead, involve working with other disciplines, knowledge systems or organisations. This can serve to generate more creative and innovative thinking about change that may not strictly fall within the criminalisation process and, instead, provide alternatives that are premised on decriminalisation and strengthening social and cultural supports.

Reformism versus de-institutionalisation

Critics of law reform assert that reform cycles reinforce core values, practices, norms and power structures. In the words of Spade (2009), 'law reform strategies frequently end up strengthening systems that they seek to change'. They restore the authority and legitimacy of the criminal justice system, while never veering far from the 'present legal order' (Fleming and Lewis 2002). The politics of reform convey *improvement* and *recalibration* rather than *challenge* and *rejection* of the current system. They seek to bridge the supposedly 'small gap that separates justice and the current order', to borrow the language of Eslava and Pahuja (2011: 113). Golder (2004) explains that the poetics of 'liberal law reform' reinscribe narratives of legality and institutionalism, which detract from an 'interconnected' understanding of the subject of the reform. This is highlighted in **Bronwyn Naylor and Danielle Tyson's** article that points to the futility of amendments to homicide defences in the context of family violence on the grounds that they do not engage with key injustices and prevailing gendered assumptions confronting victims.

With respect to the criminal justice system, reforms never countenance abolition of prisons, youth detention centres or punitive policing. Reiner (1992: 212) observes that 'law reform' in police culture reproduces police operational practices. Neocleous (2000: 98) states that the law is continuously rewritten to mystify, legitimise and rationalise criminal justice processes. Academics and law reformers can become complicit in this process. They can become part of a *reform industry* that legitimises the reform process. This is most apparent when academics accept funding from government agencies to do the reform work of these agencies.

By making the legal system appear responsive and procedurally fair, the reform processes, including public inquiries and implementation of piecemeal recommendations, can sideline and distract the need to redress systemic problems and the spectre of social control in the criminal justice system. **Sinéad Ring's** article identifies, for example, the culture of silence around child abuse in Ireland, and the silence by the Irish government and the Church in handling complaints. She argues that reforms do not redress this silence but, instead, replicate it. Equally in **Penny Crofts'** article, we are informed of a Royal Commission process and related criminal prosecutions that are focused on identifying offending individuals without constructing a framework for making liable organisations and churches which are complicit in the sexual abuse of children. Rather, the social status of these establishments is maintained and indeed vindicated through the expressions of remorse. It reinforces the narrative that 'we didn't know better at the time' to impugn them from continued denunciation.

Nonetheless, there are possibilities for dialectical approaches. The pursuit of short-term humanist gains need not sacrifice a longer-term vision. This reflects civil society and activism that often are informed by both short-term demands for immediate injustices and long-term aspirations for a better society. For instance, Sisters Inside Inc, the women's prisoner advocacy group in Brisbane, Queensland,² has a long history of advocating for improvements in rights to bail, better services for women and trauma-informed sentencing approaches. Alongside these demands (and the organisation's related research) has been an agenda directed to the abolition of prisons for everyone.

This special edition

This special edition was initiated from the third annual Criminal Law Workshop hosted at the Faculty of Law, University of Technology Sydney in January 2016. UTS: Law is swimming against the neo-liberal tide of compliance, efficiency and impact-for-the-sake-of-it by creating streams of resistance and progressive social change through research. Hosting the workshop based on the theme of *law reform: past, present, future* was in furtherance of this objective. This special edition is not simply an argument for more law reform but, rather, for better law reform *and* social change. It is cognisant of the limitations of reform, for example with respect to the inclusion of Indigenous jurors, where there are dominant ideas about the neutrality of the legal system, as discussed in **Thalia Anthony and Craig Longman's** article. Critical examination provides an opportunity to respond to gaping holes and discriminatory applications of the law as well as evaluate reforms and their unforeseen impact, issues which are addressed in **Julia Quilter's** article on the impact of one-punch laws on sentencing. In this piece, as well an earlier article published in the *International Journal on Criminal Justice and Social Democracy* (Quilter 2014), Quilter undertakes the necessary task that Roach (forthcoming) claims should be the work of academics and civil society: to demonstrate the false promises of populist politicians that are made to victims and potential victims. Roach (forthcoming) further asserts that it is incumbent on us to illustrate that punitive approaches—more offences, more mandatory sentences, more prisons and more citizenship revocations—'will not make us safer' (also see Roach 1999).

Notwithstanding the opening decry of the disbandment and diminution of law reform bodies, this issue is an opportunity to reflect on the locus of agitation for law reform and indeed the role of law reform in society and in the academy (see Forcese 2015). It is not enough to create paralysis through analysis (Ruddock 2015). Academics cannot respond with a deafening silence once having identified the problems in present-day criminal laws. They need to do the 'hard work' through unpaid labour and career sacrifices of working to fix problems and support civil society organisations in the process (Roach forthcoming). Advocacy should not be pursued for financial reward or academic credit—because this runs the risk of self-interest compromising integrity—but because it is our responsibility, given our skills and position, to advocate for a just society.

This special edition adopts a broad notion of law reform, analysing not just law reforms in discrete areas but those that have gone to the substance of concepts of criminal law. This includes analysis of the historical quest for codification, evaluations of statutory and judicial law reforms, and proposal for reform and systematic changes. The commencing contributions focus on the history (and historical failures) of reforms, in pieces by Arlie Loughnan, and Thalia Anthony and Craig Longman. It then analyses the impacts of current reforms in the articles by Julia Quilter and Luke McNamara, and Bronwyn Naylor and Danielle Tyson. It finally addresses criminal law reform gone awry in the research by Penny Crofts, Sinéad Ring and Julia Quilter. This special edition recognises that law is not the only answer to social injustices but it can be a very powerful instrument. It implores academics to not only commit to law reform in the interests of justice—especially for those historically denied of rights—but to also critically reflect on their own role in and contribution to reform.

Correspondence:

Thalia Anthony, Associate Professor, Faculty of Law, University of Technology Sydney, 15 Broadway, Ultimo NSW 2007, Australia. Email: Thalia.Anthony@uts.edu.au

Penny Crofts, Associate Professor, Faculty of Law, University of Technology Sydney, 15 Broadway, Ultimo NSW 2007, Australia. Email: Penny.Crofts@uts.edu.au

¹ Roach (2018) discusses how academics must work with civil society organisations, including non-government organisations, activist groups and other grass-roots bodies committed to progressive social change.

² Visit Sisters Inside Inc website at <http://www.sistersinside.com.au/> for more information.

Please cite this as:

Anthony T and Crofts P (2017) Special edition: Limits and prospects of criminal law reform—guest editors' introduction. *International Journal for Crime, Justice and Social Democracy* 6(3): 1-7. DOI: 10.5204/ijcjsd.v6i1.423.



This work is licensed under a [Creative Commons Attribution 4.0 Licence](https://creativecommons.org/licenses/by/4.0/). As an open access journal, articles are free to use, with proper attribution, in educational and other non-commercial settings. ISSN: 2202-8005

References

- Burton F and Carlen P (1979) *Official Discourse: On Discourse Analysis, Government Publications, Ideology and the State*. London: Routledge & Kegan Paul.
- Campbell C (2015) Australian Institute of Criminology merger may be a crime against common sense. *The Canberra Times*, 1 December. Available at <http://www.canberratimes.com.au/national/public-service/australian-institute-of-criminology-merger-may-be-a-crime-against-common-sense-20151126-gl8s55.html> (accessed 28 August 2017).
- Cole D (2016) *Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law*. New York: New Press.
- Eslava L and Pahuja S (2011) Between resistance and reform: TWAIL and the universality of international law. *Trade Law and Development* 3(1): 103-130.
- Fleming J and Lewis C (2002) The politics of police reform. In Prenzler T and Ransley J (eds) *Police Reform: Building Integrity*: 83-99. Sydney, New South Wales: Hawkins Press.
- Forcese C (2015) The law professor as public citizen: Measuring public engagement in Canadian common law schools. *Windsor Review of Legal and Social Issues* 36: 66-100.
- Golder B (2004) The homosexual advance defence and the law/body nexus: Towards a poetics of law reform. *Murdoch University Electronic Journal of Law* 11(1): 8-22. Available at <http://www.austlii.edu.au/au/journals/MurUEJL/2004/8.html> (accessed 9 August 2017).
- McNamara L (2017) Editorial: In search of principles and processes for sound criminal law-making. *Criminal Law Journal* 41(3): 3-6.
- Neocleous R (2000) *The Fabrication of Social Order: A Critical Theory of Police Power*. London: Pluto Press.
- Quilter J (2014) One punch laws, mandatory minimums and 'alcohol-fuelled' as an aggravating factor: Implications for NSW criminal law. *International Journal for Crime, Justice and Social Democracy* 3(1): 81-106. DOI: 10.5204/ijcjsd.v3i1.145.
- Reiner R (1992) *The Politics of the Police*, 2nd edn. London: Harvester Wheatsheaf.
- Roach K (forthcoming) Reflections on reforming criminal justice and national security. *Criminal Law Quarterly* 55.
- Roach K (1999) *Due Process and Victims' Rights*. Toronto, Ontario: University of Toronto Press.
- Royal Commission (2016-17) Letters Patent and Terms of Reference. *Royal Commission into the Detention and Protection of Children in the Northern Territory*. Available at <https://childdetentionnt.royalcommission.gov.au/about-us/Pages/letters-patent.aspx>

(accessed 31 July 2017).

Ruddock L (2015) When nothing is cool. *The Point*, 5 December. Available at https://www.researchgate.net/publication/301200802_When_Nothing_Is_Cool (accessed 26 July 2017).

Spade D (2009) Keynote address: Trans law reform strategies, co-optation, and the potential for transformative change. *Women's Rights Law Reporter* 30(2): 288-314.