DRINK SPIKING AND ROCK THROWING

The creation and construction of criminal offences in the current era

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> Politicians [and others] often express themselves as if the creation of a new offence is the natural or only appropriate response to a particular event or series of events giving rise to social concern ... [T]here is little sense that the decision to introduce a new offence should only be made after certain conditions have been satisfied, little sense that making conduct criminal is a step of considerable social significance.[1]

The creation of new criminal offences has come to be a prominent feature of parliamentary activity in Australian and other common law jurisdictions. Among other offences introduced in recent years, NSW has seen the creation of an offence of drink and food spiking, criminal association, assault in the context of a large-scale public disorder and rock throwing.[2] Similar offences have also been introduced in other jurisdictions.[3] In several instances, these new offences have been accompanied by high maximum penalties and parallel changes to bail laws, as well as changes to the relevant rules of evidence and procedure and law enforcement powers.

Much of the critical commentary on these criminal laws situates them in a broad criminal justice policy context and takes into account associated developments in governance and punishment. A number of commentators have noted the overarching trend toward increasingly punitive and populist penal policies in a number of jurisdictions, facilitated by 'law and order' political rhetoric and widespread fear of crime.[4] The willingness of parliaments to draft and pass new laws in relation to perceived social problems seems to represent a conviction that more law will produce more order. As Andrew Ashworth's comment, above, suggests, the widespread popularity of legislative offence creation seems to encode an overly-enthusiastic and even cavalier attitude to the criminal law as a means of social control.

This sort of reactive law making is not new, nor is it confined to the criminal justice arena. When viewed independently, these diverse offences might be regarded as simply examples of disconnected political reactions to high-profile offending. But a closer look reveals particular features which, taken together, amount to a distinctive mode of offence creation and construction; one which has risen to a position of prominence in the current era. With the popularity of this mode showing no signs of abating, it is timely to consider the consequences of this approach for the criminal law. The consequences of this mode of offence creation and construction are profound and worrying and include the exacerbation of the *ad hoc* and rather incoherent character of the criminal law corpus and the reduction of the social status and communicative power of criminal law.

This article identifies five features that make up the new mode of offence creation and construction and outlines some of the consequences of this approach for the development of the criminal law.

Speed and timing

A number of new criminal offences have been created in short periods of time. Their drafting and passage through parliament has occurred at a rapid pace and often before broad-based consultation can occur. In addition, some new offences have been created in the immediate aftermath of incidents of offending which attract exceptional media and public interest. For example, in the wake of several high-profile incidents of 'bikie gang'-related violence in early 2009, the NSW Government drafted, introduced, and passed new provisions to expand police powers relating to 'criminal organisations' — all within one week. The development of the so-called 'bikie' legislation — the *Crimes (Criminal Organisations Control) Act* 2009 (NSW) — lends support to David Garland's well-known argument that, in a 'law and order' context, responses on the part of political actors are often 'reactive, triggered by specific events and deliberately partisan'.[5] According to Garland, they tend to be 'urgent and impassioned, built around shocking but atypical cases, and more concerned to accord with political ideology and popular perception than with expert knowledge or the proven capacities of institutions'.[6] As Don Weatherburn has argued in relation to what he calls 'irrational crime control policies', the problem with such policies and equivalent laws is that they are 'uninformed by research evidence', their effectiveness is not subjected to evaluation, and they are 'often designed (despite appearances) to allay public concern about crime rather than to do something to reduce it'.[7]

It is possible to detect a counter-trend in the timing and speed of the creation of new offences. By way of contrast with the 'bikie' legislation, some new offences are created following considered reflection, evaluation and in consultation with different Australian jurisdictions. Indeed, coordination between jurisdictions on criminal laws appears to be on the increase. An illustration is the new offence of drink and food spiking, now part of NSW and Victorian law. In 2008, following the publication of a report by the Model Criminal Law

REFERENCES

1. Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116, *Law Quarterly Review* 225, 225.

2. See *Crimes Amendment (Drink and Food Spiking) Act 2008* (NSW), *Crimes (Criminal Organisations Control) Act 2009* (NSW), *Law Enforcement Legislation Amendment (Public Safety) Act 2005* (NSW), and *Crimes Amendment (Rock Throwing) Act 2008* (NSW), respectively and *Crimes Act 1900* (NSW) in general.

3. See, eg, the offence of drink and food spiking has been introduced in Victoria: see *Crimes Legislation Amendment (Food and Drink Spiking) Act 2008* (Vic).

4. See, eg, David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001) and Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (2008).

5. Garland, above n 4, 111–112.

6. Ibid 112.

7. Don Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (2004) 29.

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Officers Committee on the issue, both the NSW and Victorian governments introduced new offences. The new offences had the benefit of considered reflection and expert evaluation. The NSW provision provides that causing a person to consume drink or food containing an intoxicating substance, and intending that person to be harmed by the consumption of it, is an offence.[8] The Victorian legislature drafted a new offence under the *Summary Offences Act 1966* (Vic) dealing with the spiking of another person's food or drink and extending the existing offence in the *Crimes Act 1958* (Vic) of administering a drug.[9] As was observed in debate in the Victorian parliament, it is important to take a national approach to a type of offensive behaviour that extends beyond state borders.[10] As well overcoming the jurisdictional limitations of state-based law, this sort of offence creation yields the kind of benefits usually derived from the larger synthesising and systematising projects of law reformers and law reform commissions.[11]

However, the hasty creation of new offences has a further consequence in addition to the adverse effect on the quality of the laws identified by Weatherburn. More nebulous but equally significant, the consequence is that repeatedly responding to social problems with new offences calls into question the adequacy of existing provisions. In turn this compromises the legitimacy or status of the criminal law. As well as risking over- or ineffective criminalisation, the all-too-quick recourse to criminal law and process ignores alternative, less coercive methods of social control, such as the civil law, and runs the risk of reducing the moral weight of a criminal conviction. Where the creation of new offences is accompanied by the expansion of police powers (such as after the Cronulla riots, discussed below), this reinforces the sense of inadequacy of existing law enforcement powers and procedures.

Expansion of law enforcement powers

A second feature of the now-popular mode of offence creation is that some new offences appear hand-in-glove with expanded law enforcement powers. An illustration is the NSW legislature's response to the Cronulla riots in Sydney in late 2005. Constructing the issue as one of law and order rather than, say, racism, the then NSW Premier reacted swiftly, recalling Parliament and passing statutory amendments to police powers legislation and criminal law. The new laws contained in the *Law Enforcement Legislation Amendment (Public Safety) Act 2005* (NSW) provided for enhanced police powers to prevent or defuse large-scale public disorder. The enhancement of police powers related to search and seizure, restrictions on the public consumption of alcohol and public access to certain areas.[12] These new powers were originally subject to a 'sunset clause' (2 years after they were enacted) but, just before they expired, they were made permanent. In addition, parliament created a new offence — assault during a large-scale public disorder — with a higher maximum penalty than assault, and passed amendments to the *Bail Act 1978* (NSW) to create a presumption against bail where an individual is charged with this offence.[13] As the example of the Cronulla riots shows, there are close and intricate links between criminal law, procedure, enforcement and punishment in the current era.

Changes to the laws of evidence and procedure

Changes to the applicable laws of evidence and procedure have characterised several offences created in recent years. An illustration is provided by the *Crimes (Criminal Organisations Control) Act 2009* (NSW),[14] the 'bikie' legislation, mentioned above. This Act makes it possible for the police to apply to proscribe organisations and to make association between members of those organisations an offence if a significant number — measured in terms of numbers or influence — of its members associate to plan or engage in serious criminal activity and the organisation represents a risk to public safety and order. Once an organisation is proscribed, a control order can be issued preventing any association between a controlled member and another controlled member.[15] Despite the serious consequences for individuals under the Act, it makes significant compromises to the applicable rules of evidence and procedure. Even though a breach of a control order is a criminal offence, the crucial stage of taking evidence and deciding the terms of the order occurs in the civil context, where the standard of proof is the balance of probabilities. Further, evidence used in making an organisation a 'declared organisation' or issuing a control order may be 'protected' and kept secret from the people affected by the orders.[16]

These provisions represent a weakening of the standard criminal procedural protections and expose the slippery slope to large-scale erosion of formal and substantive protections in the criminal law. Despite the post-9/11 political rhetoric depicting terrorism as an exceptional offence, requiring exceptional legal responses, the *Crimes (Criminal Organisations Control)*

8. See s 38A *Crimes Act 1900* (NSW). Conviction for this offence is punishable by imprisonment for up to 2 years or a significant fine.

9. See s 41H *Summary Offences Act 1966* (Vic) and s 53(2) *Crimes Act 1958* (Vic) (which now provides that it is an offence to administer a drug with the intention of rendering that person incapable of resistance and thereby enabling a person to commit an indecent act with that person).

10. Victoria, *Parliamentary Debates*, Legislative Assembly, 4 December 2008, Col 4947 (Ms Joanne Duncan).

11. Pre-eminent examples of such systematising projects include the *Thefts Acts 1968* and *1978* (UK) and perhaps now in NSW, the *Crimes Amendment (Fraud, Identity and Forgery) Bill 2009* (NSW) which aims to modernise and simplify the existing fraud and forgery provisions in the *Crimes Act 1900* (NSW) with a view to deleting the obsolete and redundant provisions and replacing them with provisions based broadly on the Model Criminal Code.

12. See Part 6A *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

13. See s 59A *Crimes Act 1900* (NSW) and s 8D *Bail Act 1978* (NSW). This conduct was already covered by existing offences of riot and affray.

14. This legislation was based on the South Australian *Serious and Organised Crime (Control) Act 2008* (SA). Since the passage of the NSW Act, there have been moves to introduce similar legislation in other jurisdictions: see, eg, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* (Cth).

15. A breach of a control order is a criminal offence punishable by imprisonment for up to 2 years or 5 years for a second offence: s 26(1).

16. For further discussion of this Act, see Arlie Loughnan, 'The Legislation We Had to Have? The *Crimes (Criminal Organisations Control) Act* 2009 (NSW)' (2009) 40(3) *Current Issues in Criminal Justice* 457.

Act 2009 (NSW) shows that counter-terrorism laws have become a model for legislative regimes concerning other types of offending. Anti-terrorism laws outlaw membership of proscribed organisations, criminalise individuals who associate with members of such organisations, place burdens on the accused as opposed to requiring that the prosecution prove all points in their case, and provide for the use of secret evidence at trial.[17] So does the NSW 'bikie' legislation. Both within and beyond terrorism laws, it seems that standard criminal procedural protections have been sacrificed in order to facilitate prosecution and conviction.

Increased use of preparatory offences

The third feature of the distinctive mode of offence creation and construction is the increased popularity of preparatory offences. Preparatory offences criminalise conduct that constitutes preparation towards another, more serious offence. An example of a recently created preparatory offence is one of the Commonwealth terrorism offences: possessing a thing connected with 'preparation for, the engagement of a person in, or assistance in a terrorist act'.[18] Another example is the legislation recently passed by the NSW parliament to create new offences relating to the supply of spray cans to children and the possession of spray cans by children.[19] The rise of preparatory offences is evident both within and beyond anti-terrorism offences and seems to reflect the perceived difficulties of relying on inchoate or incomplete offences (such as attempt) and accessorial liability to criminalise would-be illegal activity or its assistance or encouragement.[20]

Some preparatory offences might be justified on the basis of the necessity of police intervention to prevent future harm occurring — although such justification should ideally be based on real chances of preventing the wrongful conduct as opposed to inability or unwillingness to prove other, more serious offences. However it seems possible that the criminal law has come to extend beyond appropriate boundaries, running the risk of over- or ineffective criminalisation. For instance, it is arguable that the 'bikie' legislation, discussed above, infringes on freedom of association, inappropriately bringing within the criminal law otherwise lawful actions.[21] Regardless, viewed in the context of what has been depicted as an emerging form of criminal justice that is focused on risk, security and prevention, preparatory offences seem destined to have only increasing significance over time.[22]

The rise of 'particularism'

The last feature of the new mode of offence creation and construction seems to have gone largely unnoticed: this is specificity or 'particularism'. 'Particularism' has been defined as a phenomenon in the drafting of offences where the particular wording of offences provides 'the definitional detail that merely exemplifies rather than delimits wrongdoing'.[23] It lies at the other extreme from the systematised approach reflected in the offence of drink and food spiking, discussed above.

A striking example of 'particularism' is provided by the offence of rock throwing, which was introduced in NSW in May 2008 after a number of high-profile incidents in Sydney.[24] In introducing the Bill in his second reading speech, the NSW Attorney-General stated that:

> The bill recognises and responds to well-founded community concerns about the abhorrent practice of rock throwing by introducing a new five-year, stand-alone offence for throwing objects at vehicles or vessels.[25]

Although he acknowledged that there were already a range of offences (such as assault) 'with tough penalties' that could apply to individual incidents of rock throwing, the Attorney-General stated that a new offence was needed to ensure that there was 'now a full suite of charge options available to the police'.[26]

17. For a discussion of Commonwealth anti-terrorism legislation, see Michael Head, 'Counter-Terrorism Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666.

18. See *Criminal Code Act 1995* (Cth) s 101.4(1).

19. See Graffiti Control Amendment Bill 2009 (NSW). This Bill was passed on 25 November and is currently awaiting assent. It doubles the maximum penalty that may be imposed for defacing or damaging property from 6 to 12 months imprisonment.

20. For discussion, see Bernadette McSherry, 'Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (2009) 35.

21. Recently, the criminal association laws have recently been criticised by the United Nations Office of Drugs and Crime on this basis among others: see <abc.net.au/news/stories/2009/09/03/2676126.htm> at 29 January 2010.

22. For discussion, see Lucia Zedner, 'Pre-crime and post-criminology?' (2007) 11(2) *Theoretical Criminology* 261, 262 and Victor Tadros, 'Crimes and Security' (2008) 71(6) *Modern Law Review* 940.

23. Jeremy Horder, 'Rethinking Non-Fatal Offences Against the Person' (1994) 14(3) *Oxford Journal of Legal Studies* 335, 338.

24. A similar offence was introduced to South Australia in September 2006 and at the time of writing, the WA Labor Party has called on the Coalition government of that state to create a similar offence: see <wa.alp.org.au/news/0609/25-02.php>.

25. NSW, Legislative Council, 7 May 2008 (The Hon John Hatzistergos, Attorney General and Minister for Justice).

26. Ibid.

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This offence is problematic because it exacerbates the ad hoc aspect of the criminal law and reduces its coherency.[27] Here, coherency refers to the internal logic and order of the criminal law. The existence of other offences that covered the action of throwing rocks means that the serious nature of the conduct does not of itself warrant the creation of a new offence. In addition, the offence compromises the communicative power of the criminal law. By defining actions as crimes, the law:

> formally declares that they are wrongs in terms of the community's own values and, further, that they are 'public' wrongs that properly concern the community and that must be formally recognised and condemned as such by the community.[28]

Thus, like punishment that follows a conviction for a criminal offence, the criminal law has a communicative function, as a 'set of authoritative declarations and demands'.[29] What then constitutes good, effective or ideal communication through criminal law prohibitions? Ashworth has argued that the law should uphold the 'principle of fair labelling', ensuring that:

> widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking.[30]

Similarly, Jeremy Horder has argued that, in order to avoid the 'vice' of 'particularism', legislators should draft offences at an appropriate level of generality that 'the definition of the offence will *itself* give us an accurate moral grasp of what the defendant has done'.[31]

It is not clear that the offence of rock throwing delineates something morally (as opposed to factually) distinct about the proscribed conduct. As the Model Criminal Code Officers' Committee has written in the context of drink spiking,

> *overwhelmingly, the point is to have general overarching principled offences instead of enacting a new offence every time a new social problem appears*, thus avoiding a multitude of specific, overlapping and confusing offences'.[32]

It seems that offences such as rock throwing do not enhance (and perhaps even diminish) the communicative power of the criminal law and any punishment following conviction. This represents a far from satisfactory development in the criminal law.

Conclusion

The creation of new criminal offences has become an all-too-prominent feature of parliamentary activity in NSW in recent years. When viewed together, it is possible to detect across these disparate legislative enactments features amounting to a distinctive mode of offence creation and construction which has come to occupy a position of prominence in the current era. The creation of new offences in this mode exacerbates the discordant and unsystematic character of the criminal law corpus, while at the same time calling into question the adequacy of existing provisions and compromising the communicative power of the criminal law. Their construction reduces the status and communicative power of criminal law. At the least, it would seem that such legislative enactments squander the moral and social power of criminal law prohibitions. At most, it might be that the 'particularism' of certain new offences reflects an absence of generalisable norms and standards of conduct in our national community. This in turn hints at increasing moral fragmentation and disunity within contemporary Australia. If real, this feature of the landscape has manifold social, political and legal implications.

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27. Another example of the creation of new offences at the expense of coherency may be found in NSW sexual offences law. Following the high-profile gang rapes of the early 2000s, the NSW parliament enacted an new offence — aggravated sexual assault in company — despite the fact that this type of conduct was already covered by an existing offence (aggravated sexual assault): see s 61JA *Crimes Act 1900* (NSW) and s 61J *Crimes Act 1900* (NSW).

28. R Antony Duff, *Punishment, Communication and Community* (2000) 58. See also R Antony Duff, 'Penal Communities' (1999) 1(1) *Punishment & Society* 27.

29. Ibid at 67.

30. Andrew Ashworth, *Principles of Criminal Law* (5th ed, 2006) 88. See also James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217.

31. Jeremy Horder, above n 23, 338–339 (emphasis in original).

32. Model Criminal Code Officers' Committee, *Discussion Paper: Drink Spiking* (April 2006) 11 (emphasis in original).