

Criminalisation

- Cohen (1988): “Criminalisation is the process of identifying an act deemed dangerous to the dominant social order and designating it as criminally punishable.”
- Husak (2008): problems of overcriminalisation
- Hogg and Brown (1998): law and order ‘commonsense’; “the ‘taken-for-granted’ starting point for what should be done about crime”.
- Pratt (2007): penal populism
- Williams (1983): “A crime (or offence) is a legal wrong that can be followed by criminal proceedings which may result in a punishment.”
- Ashworth (2000): when new offences should be created.
- Hogg (1983): power and production of knowledge about crime (forms the commonsense centre of criminal justice)
- Lee (2007): fear of crime is a discourse borne of research and pollsters conducted in a certain way
- Criminal statistics?
- Hay (1975): history of criminal law; “a ruling-class conspiracy”
- Paul Barry (SMH, 2000): social class; Alan Bond’s release after 1298 days in jail for fraud worth \$16.2 m *cf.* a young Aboriginal man sentenced to 1 year for stealing food worth \$23.

Colonialism and Indigenous Peoples

- Reynolds (1987): a de-facto decriminalisation of murder and rape based on race; dehumanising Aborigines
- Rowley (1972): “stringent and special penalties for Aborigines”
- Royal Commission into Aboriginal Deaths in Custody (1989): “[colonial policies] not only wrecked individual lives but is seen by many Aborigines as falling squarely within the modern definition of genocide.”
- Australian Human Rights and Equal Opportunities Commission (HREOC): somewhere between 1/3 and 1/10 Aboriginal children removed; the removals were criminogenic.
 - o Removal from family and institutionalisation
 - o Loss of personal identity and security
- Blagg (2008): “we should view Aboriginal Australia as constituting... a separate society, or domain, with its own distinctive laws... which have to be accepted, and respected, in difference.”
- Cunneen (2001): explaining Aboriginal overrepresentation
 - o Offending patterns (incl. recidivism); policing (discretion); the law (discrimination); judicial decision-making; spatial factors (environment and location); cultural difference; socioeconomic factors; resistance

Justifications for Criminal Laws

- **Public/private**
 - o Blackstone (1765; 1979): individual rights/interests v. civil duties/interests; behaviour in public v. behaviour in private
 - o E.g. *Human Rights (Sexual Conduct) Act 1994* (Cth)
- **Harm**
 - o Hunter, Saunders and Williamson: harm in pornography?
 - o Hillyard and Tombs (2004): social harm – physical harm, financial/economic harm, emotional/psychological harm, cultural safety.
 - o **# Duff**: “the Harm Principle ceases to set substantial independent constraints on the scope of the criminal law.”
- **Morality**
 - o Devlin (1965): immoral conduct undermines shared beliefs essential to social cohesion (and therefore should be criminalised)
 - o **# Hart (1962)**: the claim that society depended on shared moral beliefs is not proved; positive morality (behaviour regarded as immoral); critical morality (used to assess conduct for immorality)
- **Offensiveness**: element of publicness
- **Social Reaction**
 - o Durkheim (1933): key feature of crime is reaction of social audience; “We do not reprove it because it is a crime, but it is a crime because we reprove it.”
- **Moral Panics**
 - o Hall et al. (1978): defines moral panic; moral panic about ‘mugging’ in 1972-3.
 - o Poynting et al. (2005): “Central to moments of moral panic was the creation of a folk devil, an object of hostility that could bear the brunt of social anger and be seen as the wrongdoer or cause of the social condition.”
 - o Lumby (1999): “moral panics are equally strategies for defining identity and collective interest in an increasingly pluralist world...”
- **Normative Theories**
 - o Duff (2007): communicative theory; citizenship
 - o Husak (2008): internal (defendant)/external (citizen) constraints of criminalisation
 - o **# Naffine (2009)**: challenges ‘core’ crimes, e.g. rape
 - o Loughnan (2010): speed/timing; expansion police powers; changes to laws; preparatory offences; ‘particularism’; e.g. rock throwing, drink spiking.

Discretion in the Criminal Process

- Davies (1969): hidden nature or low visibility of discretion should be brought out and regulated.
- Sallmann and Willis: discretion should be “exercised in an open and fair manner... according to publicly available principles and guidelines.”
- McConville et al. (1991): “The suspect population is constructed on the basis of... police – rather than legal – rules and principles.”
- S 28F LEPRA: move on powers
- Chan et al. (2004): Young Offenders Act 1997 largely successful; warnings, cautions and conferences instead of court.
- Wright v McQualter (1970) per Kerr J: “the role of the courts is simply to decide the question of guilt or innocence... it is for other parts of the structure... to deal with the problems... of selective law-enforcement.”
- The Commonwealth Policy: “a prosecution should not proceed if there is no reasonable prospect of a conviction being secured.” E.g. the Chaser Case.

The Tiers of Justice

- **Structure of the Criminal Courts System**
 - o Magistrates/Local: summary matters; committal hearings; 98% of criminal cases
 - o Supreme/District Courts
 - o Appellate Courts: Local to District or Supreme; District/Supreme to CCA; Supreme to High Court.
 - Crown cannot appeal against acquittal unless with fresh and compelling evidence (for offences with life imprisonment) or original trial was tainted (for offences 15 years +)
- McBarnet (1981): due process ruled out of lower courts due to image of triviality; 98% of criminal cases exempt from due process of law.
- Mack and Roach Anleu (2007): time pressures in local courts; cases take 15 secs to less than 15 mins.
- Mack and Roach Anleu (2010): impartiality and judicial demeanour; majority routine, impersonal.
- Carlen (1976): “A magistrates’ court is a very formal and ritualistic social setting”; acoustics; layout.
- Criminal Procedure Act 1986: Table 1 offences triable summarily unless elected on indictment with jury; Table 2 offences triable summarily unless elected on indictment without jury right; expansion of summary jurisdiction.