Understanding processes of criminalisation: Insights from an Australian study of criminal law-making

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Abstract
Criminalisation theory scholars have examined important questions regarding what behaviours should be criminalised and why. More recently, greater attention has been paid to linking normative accounts with empirical and historicised analyses of criminalisation practices. Building on recent work on modalities of criminalisation as a methodological tool for contextual criminalisation research, this article introduces a second analytical approach for better understanding how criminal laws are made: processes of criminalisation. We discuss the findings of a pilot study of 143 criminal law statutes enacted in three Australian jurisdictions (New South Wales, Queensland, Victoria) from 2012–2017. We conclude that a processes approach supports a nuanced appreciation of the conditions under which criminal law statutes are produced, and facilitates scrutiny of whether legislative enactments are evidence-based and a product of meaningful consultation and genuine democratic participation in law-making.

Keywords
Australia, criminal law, criminalisation theory, process

Introduction
New criminal laws are often criticised not only for their content (including allegations of over-criminalisation), but for how they came to be enacted. While such criticisms frequently embody implied normative positions on how criminal laws should be made, relatively little attention has been paid to understanding and unpacking the nature and significance of different pre-enactment processes. This article argues that criminalisation scholarship benefits from such an analysis and introduces a new conceptual framework for so doing. It forms part of a large-scale empirical study of Australian experiences with criminalisation and criminal law-making (McNamara, 2015; McNamara et al., 2018). We emphasise experiences (plural) not only to recognise variations over time, and subject matter, but also because under Australia’s federal constitutional structure, the legislature in each of Australia’s six states and two territories has general criminal law-making responsibility, and the Commonwealth Parliament can also enact criminal laws pursuant to its enumerated powers under s 51 of the Australian Constitution.

An important foundational phase of the larger project’s research design is the development of the conceptual and methodological tools which Lacey (2009) has argued are essential for large-scale historicised and empirical criminalisation scholarship. In earlier work, we have developed and piloted a concept of modalities of criminalisation to capture and analyse not only instances of offence creation and provision for harsher punishment (i.e. the obvious target of assertions about over-criminalisation and the extension of criminal laws beyond normative limits), but also the multiple other ways in which legislation can influence the reach of criminal justice institutions and the intensity of surveillance, policing and penal practices (McNamara et al., 2018).

In this article, our aim is to introduce and demonstrate the utility of a second organising concept for criminalisation research: processes of criminalisation. A robust account of criminalisation must address not only the nature of the criminal laws that emerge from legislatures (and their post-enactment operation) but also the pre-enactment
circumstances that produce them. Disquiet about contemporary criminal law-making is not only associated with concerns about what criminal law is produced but also with concerns about how it is made (Ashworth, 2000).

There is a rich criminological literature on the emergence and making of criminal laws, including such classics as Gusfield’s (1963) account of the prohibition laws in America, *Symbolic Crusade*; Becker’s (1963) analysis of the criminalisation of marijuana, *Outsiders*; and Carson’s (1974) study of 19th-century factories legislation. Cohen’s (1974; rev ed., 2002) *Folk Devils and Moral Panics* also influenced a substantial body of criminological research and theorising which deployed the concept of moral panic in the explanation of dramatic shifts in social, legal and policy responses to crime. Sociological concepts like moral entrepreneurship and moral panic have made an enormous contribution to our understanding of criminal law-making, but this work has tended to be centrally concerned with the social, cultural and political forces driving change (including the role of the media and interest groups), in particular areas of criminal law and criminal justice administration, usually involving high profile crimes (‘signal crimes’: Innes, 2014) and events. Most of the critical punishment and society scholarship concerned with the rise of mass incarceration, penal excess, the carceral state and penal populism has shared this broadly sociological focus (Garland, 2001; Pratt, 2007; Simon, 2007).

More recent work directs closer attention to the institutional processes involved and how varying state constitutional frameworks, electoral systems and bureaucratic structures influence penal change. Garland (2013) advocates more attention to ‘the specific processes that “translate” social causes into penal effects, examining how these transmission processes operate in different jurisdictions, whether as barrier, modifier, or multiplier’ (Garland 2013: 483; also Barker, 2009; Miller, 2008). We share Garland’s emphasis on analysing the role of institutional processes and seek to apply it to the study of criminalisation, albeit here we are primarily focussed on the workings and effects of even more prosaic, and often informal, processes operating in relation to particular instances of criminal law-making. Our approach seeks to foreground the legal and political processes through which criminal laws are made. An understanding of processes, we contend, can make an important contribution to understanding ‘the various institutional, political and social dynamics that underpin the constitution of criminal law at particular times and in particular places’ (Lacey, 2013: 28; Farmer, 2016).

‘The processes of criminalisation concept’ section of this article introduces our framework for analysing processes of criminalisation. In the section ‘Pilot study of criminal law-making processes in three Australian states’, we demonstrate how the concept can be deployed empirically, via a pilot study of criminal laws passed in three Australian jurisdictions – New South Wales (NSW), Queensland and Victoria – between 2012 and 2017. We present basic quantitative data on the relative frequency of different processes and their correlation to particular ‘sites’ of criminalisation and demonstrate the qualitative utility of a processes analysis via a discussion of selected examples. Our aim is not simply to produce a typology for categorising criminal law as an end in itself. We seek to provide a foundation for critical assessment of the relationship between process and the ‘quality’ of laws produced. This will enable richer qualitative analyses of the evolution of the criminal law, with sensitivity to temporal and geographical/
jurisdictional differences, as well as differences in the processes that adjust the parameters of criminalisation in relation to different types of harms and risks.

The processes of criminalisation concept

We approach the topic of criminal law-making with a determination to ground our analysis in observation of what does happen rather than what should happen. There is a place for pointing out (undesirable) departures from an idealised ‘textbook’ account of the law-making process. A good deal of criminalisation scholarship singles out ‘law and order’ style criminal law-making for criticism (Hogg and Brown, 1998; Brown, 2013; Brown and Quilter, 2014; McNamara and Quilter, 2016; Quilter, 2015). ‘Quick fix’ reactions to a ‘crisis’ are emblematic of penal populism (Pratt, 2007). They often fail to respect expectations that reform should be evidence-based, unhurried, deliberative and consultative; involve meaningful pre-enactment scrutiny and quality debate in Parliament; and evince a genuine commitment to post-enactment monitoring and evaluation. However, not all criminalisation results from a law and order approach. Processes of criminal law-making are more diverse.

To support grounded empirical and historicised analysis of criminal law-making, we have developed a typology for describing and analysing the multiple paths that can account for the enactment of any given criminal law statute, thereby illuminating the processes by which criminal laws are commonly made. The typology has six categories:

1. Judge-made
2. Single-stage, executive-driven
3. Internal government agency initiative
4. Mandated statutory review
5. Government appointed inquiry/review
6. Independent review by standing commission/committee

Our typology offers a mechanism for preliminary assessment of the relative frequency of different processes, and whether and how different processes of law-making correlate with particular areas of criminal justice policy and law reform. As we explain below, one of the interesting findings of our pilot study of Australian criminal law-making is that there are noteworthy differences between different types of harm and risk (e.g. domestic violence, motor vehicle use, public order) in terms of the process by which legislation comes to be amended.

A processes approach is a starting point for analysis of how criminal laws get made, rather than a basis for definitive conclusions. It opens up questions about the relative merits of different processes of criminal law-making. If statutory amendments affecting a particular criminal law ‘site’ are more likely to result from unhurried and independent law reform commission investigation than quick decisions made by Cabinet, a question is raised: are the resulting laws qualitatively ‘better’ – whether in terms of consistency with principles of criminal responsibility or due process, effectiveness or other criteria (Duff et al., 2014)?
There will be aspects of the lead-up to enactment of a criminal law statute that are not revealed by our (largely institutional ‘who is shaping the change?’) processes analysis. We do not attempt to uncover the multiple factors that influence the demand for, and content of, particular statutes (e.g. stakeholder/interest group lobbying, election promises, party policy, politician personality and media attention/pressure), but to identify and categorise the processes which underlie particular instances of criminal law-making.

It is important to distinguish between the trigger for a particular legislative change (e.g. a tragic fatality) and the process by which a bill is developed and enacted. At times there will be a significant relationship between the trigger and the manner in which the legislative response is formulated, but the existence of a discrete catalyst does not necessarily determine the process adopted. An incident may trigger a hastily enacted legislative change, or it may, for example, trigger a government referral of the matter to an independent inquiry. To be clear, in the current study, we did not attempt to identify the ‘trigger(s)’ for specific instances of criminal law-making.

A key criterion of differentiation between our six process categories relates to control of the process: institutionally, who is driving and influencing determinations of whether and how there should be an adjustment to the criminalisation status quo. The level of control exercised by executive government is part of this criterion. Other considerations include the speed with which the reform proposal is developed and implemented, the number of stages involved in the process, the degree of openness and transparency, and the extent of consultation with individuals and organisations outside executive government.

**Judge-made**

This process relates to developments arising from criminal case litigation, including judicial changes to the definition of common law offences and principles (such as manslaughter and complicity in some Australian states). We recognise that such law-making is not simply judge controlled but is a product of the adversarial criminal justice system which incorporates a range of actors and factors. Decisions about which matters to charge, initiate and defend, as well as submissions and arguments, and jury verdicts, play a role in shaping the parameters of this process of criminal law-making.

We include in this process instances where the legislature effectively ‘codifies’ a common law decision. For example, in the area of sexual assault law in NSW, the statutory definition of consent in NSW adopts the definition of consent endorsed by Justice Simpson in *R v Clark* (unreported, NSWCCA, 18 April 1998): ‘free and voluntary agreement’ (*Crimes Act 1900* (NSW) s 61HE). This process does not include instances where the legislature overturns a judicial decision through legislation or instances where a court decision alerts the executive government to a limit in current legislative powers (e.g. police powers in relation to bail) and the legislature moves to provide a legislative basis for the power in question. These are instances where the court decision may have ‘triggered’ the legislative response but it is not the process by which the particular criminal law is made.
Single-stage executive-driven

This category is designed to capture those instances where criminal law-making happened relatively quickly and was driven by the inner circles of executive government (such as Premier’s Department and/or Cabinet) with limited or no opportunity for public consultation or independent input from experts and other stakeholders. It includes law-making that critics often describe (pejoratively) as ‘law and order’-inspired. The single-stage executive-driven process of criminal law-making may follow a tragic fatality involving an ‘ideal victim’ (Christie, 1986); that is, a ‘signal crime’ in Innes’ (2014) terms.

Given that our approach at this stage in our project is primarily empirical, rather than normative, we have deliberately adopted a new neutral phrase ‘single-stage executive-driven’ to describe this category in our processes typology. Contrary to the familiar critique, criminal law-making in this way may be anything but irrational. A decision to enact a particular law may reflect a very deliberate political imperative or rationality. For example, a government may perceive a challenge to its legitimacy or authority, as a result of pressures brought to bear by the media or other communities of influence, and a new statute may be a politically effective solution to the particular ‘crisis’ at hand and a way of being seen to be responsive. Also, although bills that emerge according to this process may be read as pure and unmediated politics, they may have been influenced by legal and drafting expertise within government (e.g. the Solicitor General, Parliamentary Counsel).

Internal government agency

Some criminal law statutes have their origins in the discussions and workings of one or more government departments. Such criminal law changes typically proceed on the basis of internal deliberation within the group with carriage of the matter, with little or no external consultation. They are generally reflective of dominant intra-departmental imperatives and policy priorities, including those influenced by a range of factors, such as ideological commitments and budgetary efficiency. The process is relatively opaque in terms of the ‘outside’ attention it receives (e.g. by the media, scholars, legal profession, nongovernmental organisations (NGOs)) and the fact that agencies themselves tend not to ‘advertise’ their workings.

Mandated statutory review

One of the techniques that governments sometimes employ when introducing controversial criminal legislation is to include in the statute a mandatory requirement for the operation of the new provision to be reviewed by either the Minister responsible for the legislation or other agency (e.g. the NSW Ombudsman). Such reviews are commonly carried out between 1 and 3 years after enactment of the legislation and typically contain recommendations to the government as to what, if any, legislative amendments should occur. This process is distinguished from processes 5 and 6 (below) in that the category refers to reviews overseen by a government department (typically, the Department of Justice/Attorney General) rather than an independent inquiry. However, unlike our third
process, the department statutory review process typically involves some external consultation, opportunities for submission and so on.

**Government appointed inquiry/review**

This process is designed to describe situations in which the government establishes and publicly announces a formal inquiry, typically conducted by a former politician or retired judge. For example, in 2017, the Victorian Government appointed former Justice of the Supreme Court of Victoria, the Hon Paul Coghlan QC to conduct a review into Victoria’s bail system (Coghlan, 2017) following an attack in Bourke Street Mall (a busy pedestrian mall in Melbourne’s CBD) in which a man, who was at the time on bail, drove a car into the Mall killing five people (*ABC News*, 2017). As this example demonstrates, the trigger for establishing such a review is often a specific tragic fatality or other serious crimes. On other occasions, significant media criticism of a relevant law or a particular decision has been the catalyst for a review of this type (e.g. Hatzistergos, 2014).

The non-government identity of the person charged with responsibility for the inquiry provides a degree of independence from executive government (relative, at least to ‘in house’ statutory review process 4). There is usually some opportunity for external input (e.g. by way of submissions) but not necessarily the wide consultation and research usually associated with process 6. Time-frames for such reviews are relatively short – measured in months rather than years. This feature and the visibility that goes with the formal announcement of an inquiry are important parts of the political appeal of this option.

**Independent review by standing commission/committee**

This process of criminal law-making typically involves a detailed and careful review undertaken by an expert organisation that is (relatively) independent of executive government. An example is legislation that results from the recommendations of a law reform commission or a royal commission of inquiry. It may also encompass standing committees that have inquiry functions, such as parliamentary committees. Commissions or committees associated with this process enjoy a high degree of formal (often statutory) independence, which typically gives their recommendations an additional ‘arm’s-length’ authority.

Transparency and visibility are relatively high – typically reflected in publicised terms of reference, widely circulated calls for submissions, consideration of a wide body of scholarly or other evidence, deliberation over received submissions, public consultation and receipt of (oral) evidence by stakeholders. The end product is usually a public report which contains a set of recommendations, to which the government responds.

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We have resisted the urge to produce a more fine-grained typology with a larger number of categories. Any attempt to be overly prescriptive will produce artificial results (and disagreement). On balance, we have determined that it is preferable to adopt a shorter list of categories, struck at a higher level of generality, and to recognise that the
boundaries between the named processes are porous rather than fixed, and that the ‘categori-
es’ are not necessarily mutually exclusive. We also regard the typology, at this early stage in its development and deployment, as fluid and open to future adaptation and refinement.

Pilot study of criminal law-making processes in three Australian states

Method

In a recent pilot study of the concept of modalities of criminalisation (McNamara et al., 2018), we collected all criminal law statutes related to 10 selected criminalisation sites enacted by the legislatures of NSW, Queensland and Victoria during the period 2012–2016: (1) homicide, (2) sexual assault, (3) domestic violence, (4) alcohol-related violence and public order, (5) drugs, (6) consorting and association, (7) fraud and financial crime, (8) driving offences, (9) bail and (10) parole. We define ‘criminal law statute’ broadly to cover legislation governing offences and penalties, police powers (and the powers of other state criminal justice agencies) and criminal procedure.

For the purpose of this article, we have drawn on the same dataset of criminalisation statutes from three Australian jurisdictions, augmented with additional statutes from 2017, to produce a 6-year period covering 2012–2017. Our aim was to generate a dataset that illustrated contemporary criminal law-making practices, over a sufficiently long period of time to avoid the data being skewed by a single dominant criminal justice reform policy or election promise. We conducted online searches of the parliamentary (Hansard) records for each of the three jurisdictions in relation to all statutes that met the above timeframe and subject criteria. The resulting dataset includes 143 criminalisation statutes that were enacted in the review period: 54 in NSW; 62 in Victoria and 27 in Queensland (see Table 1).

Each statute was reviewed and coded by a member of the research team using the processes typology framework. The coding process involved reading relevant sections of statutes, as well as explanatory memoranda and second reading speeches, in order to identify the criminalisation site (e.g. homicide, sexual assault, etc.) affected and the process (or processes) that most accurately described the lead-up to the statute in question. Coders recorded the site(s) affected by the legislation (e.g. homicide, sexual assault; domestic violence, etc.) and the process that preceded each statute (e.g. assigning the statute a ‘3’ (internal government agency) or a ‘6’ (independent review commission/committee)). Wherever possible, we attempted to give each statute a single process characterisation, but in a small number of instances, more than one process was discerned as having played a significant part and so a dual process characterisation was unavoidable.

In order to verify initial coding, cross-checking was conducted by another member of the research team. Where there was ambiguity or uncertainty in relation to the coding of a particular Act or process, this was resolved in discussions involving the wider research team to maximise accuracy and ensure overall consistency.
Limitations

Our pilot study uses a sample of criminal law-making that is relatively small (143 statutes), time-bound (6-year period) and jurisdiction-specific (three Australian states). We have made no attempt to attach statistical significance to the modest quantitative analysis we have undertaken, and our findings do not support wider generalisations about the nature of criminal law-making in NSW, Queensland and Victoria, let alone other Australian jurisdictions.

We also acknowledge the limitations of relying on official public domain sources as the basis for our assessment of the process associated with a particular bill. Second reading speeches are a form of political discourse. They do not always provide an explicit account of the process by which the bill came to be introduced in the legislature. When explanations are offered, it is appropriate to recognise that the account offered by the Minister introducing the bill may involve representations that serve the political needs of the government of the day. We did not attempt to interrogate the accuracy of the government’s claims about the process that produced the bill. For example, if a bill was attributed to the work of a law reform commission report, for the purpose of this pilot study, we did not analyse how closely the bill matched the commission’s recommendations.

Table 1. Criminalisation statutes passed: NSW, Queensland and Victoria (2012–2017).

| Jurisdiction | Year | Number |
|--------------|------|--------|
| NSW          | 2012 | 10     |
|              | 2013 | 13     |
|              | 2014 | 12     |
|              | 2015 | 3      |
|              | 2016 | 7      |
|              | 2017 | 9      |
|              | Total| 54     |
| Victoria     | 2012 | 7      |
|              | 2013 | 8      |
|              | 2014 | 13     |
|              | 2015 | 4      |
|              | 2016 | 11     |
|              | 2017 | 19     |
|              | Total| 62     |
| Queensland   | 2012 | 3      |
|              | 2013 | 8      |
|              | 2014 | 3      |
|              | 2015 | 2      |
|              | 2016 | 4      |
|              | 2017 | 7      |
|              | Total| 27     |
| Overall total|      | 143    |

NSW: New South Wales.
We recognise that our pilot study cannot capture situations where, for example, a reference was given to a law reform commission, but the government determines not to introduce any legislation. Such occasions are an important part of the story of criminalisation and will need to be addressed in future work. We also recognise that our process categorisations do not allow us to comment on the degree of similarity between recommendations made in a report (whether made, for example, by a mandated statutory review, a government appointed inquiry or a law reform commission reference) and those adopted by the government in enacting the relevant statutory amendment. As part of our larger study of criminalisation, we aim to provide such finer-grained, nuanced assessments.

Finally, we emphasise that it was not our aim to reach definitive conclusions about the nature of Australian criminal law-making, or to produce results that could be verified by replication in future studies. Rather, our primary aim has been to introduce and demonstrate a novel conceptual and methodological tool that opens up, rather than forecloses, opportunities for rich qualitative socio-legal studies of criminalisation.

Discussion of results

Before turning to our key findings, we note that during the review period for our three-jurisdiction pilot study, some ‘sites’ were less touched by legislative reform than others. There were relatively few legislative amendments affecting, for example, illicit drugs and financial crime.

Finally, some ostensibly discrete sites were affected by a variety of types of legislative enactments – both directly and indirectly. For example, the parameters of the criminalisation of homicide are affected not only by statutes creating homicide offences or changes to penalties. They are affected also by changes to defences (e.g. Corrections Amendment (Abolition of Defensive Homicide) Act 2014 (Victoria)), appeals and trial procedures (e.g. Criminal Law Amendment Act 2012 (Queensland)); victim impact statements (e.g. Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act 2014 (NSW)); and high risk offender (HRO) regimes (e.g. Crimes (High Risk Offenders) Amendment Act 2016 (NSW)). Similarly, the contours of sexual assault laws may be shaped by reforms to adult and child sexual offences and penalties, and serious sex offender (SSO)/HRO regimes, as well as procedural amendments such as protections for witnesses giving evidence.

Our overall quantitative findings regarding the representation of the six processes in statutes enacted in the study’s review period are summarised in Table 2.6

Consistent with the significant scholarship critiquing governments for ‘quick fix’ responses to perceived harms and risks, the most frequent process in operation across the statutes in our dataset was process 2: one-stage executive-driven (88 instances). It was the most common process in Queensland and Victoria, but not in NSW. More surprising was the relative frequency of process 3: internal government agency initiated criminal law reform (56 times). Although very rare in Queensland (just one instance), this process was the most common in NSW (36 times) and the second most common in Victoria (19). This is a process of criminal law-making which is relatively invisible, conducted largely ‘in house’ within one or more government departments or allied agencies (such as...
VicRoads). Finally, governments are often criticised for making criminal laws in haste, without a sufficient evidence base or adequate consultation outside executive government (e.g. Law Council of Australia, 2019). It is, therefore, noteworthy that on 59 occasions, legislation followed a government appointed inquiry (28) or a review undertaken by a law reform commission, or other relatively independent body (31).

Another important set of results relates to the relationship between sites and processes, which revealed some interesting correlations. Put simply, certain processes were more common in relation to some sites than others. For some sites, legislative change was more likely to result from processes that involved a level of independent inquiry, evidence gathering, consultation and due deliberation. For others, legislation was more likely to be enacted after a fast policy-to-law decision, driven by Cabinet, influenced by penal populism and political expediency.

**Domestic violence.** Of the 143 statutes in our study, 25 addressed domestic violence – a significant 17% of the total number of statutes passed during the review period. For present purposes, even more revealing than the volume of domestic violence–related law-making is the fact that only 3 of 25 instances were the product of single-stage executive-driven reform. In almost 90% of cases, the legislation was the product of an internal government agency, a mandated statutory review or recommendations produced by a government appointed inquiry or independent commission or committee (i.e. processes 3–6). It follows that, on average, and relative to other sites in our study, domestic violence reforms were more likely to be considered, evidence-based, principled and the product of wide stakeholder consultation, attracting bi-partisan political support for the legislative changes. At face value, this appears to be a positive finding. However, it does invite discussion of why this is so. Unfortunately, domestic violence tragedies occur regularly and attract media attention (including during the study period), so it is noteworthy that they have not triggered the sort of urgent reactions that are common in some other contexts. Furthermore, domestic violence is a site of traditional

| Process                                      | NSW | Queensland | Victoria | Total |
|----------------------------------------------|-----|------------|----------|-------|
| 1. Judge-made                                | 0   | 0          | 1        | 1     |
| 2. One-stage executive-driven                | 22  | 35         | 31       | 88    |
| 3. Internal government agency initiated      | 36  | 1          | 19       | 56    |
| 4. Mandated statutory review                 | 7   | 0          | 3        | 10    |
| 5. Government appointed inquiry              | 8   | 15         | 5        | 28    |
| 6. Independent review commission/committee   | 15  | 2          | 14       | 31    |

NSW: New South Wales.

This total adds up to more than the total number of statutes in the study because some statutes were the product of more than one of the six processes in our typology, either because amendments to one site involved more than one influential process (and forced single characterisation would have been misleading) or because one statute contains multiple amendments affecting different sites and was ‘coded’ more than once to reflect the operative processes.
under-criminalisation (substantive and operational). There is a widely recognised need for a more appropriate and effective use of the criminal law, even if there is disagreement about how best to proceed.

We found a stark difference between the prevalence of evidence-based, deliberative and consultative processes in relation to domestic violence, and the processes behind criminal law-making affecting alcohol-related violence and disorder, and organised crime ‘gangs’. Twenty-one of the 27 legislative changes concerned with alcohol-related violence and public order (78%), and 10 of 12 of the consorting/association changes (83%) were the product of process 2: single-stage executive-driven. Consorting and other association-based criminalisation expansion are controversial – because they involve pre-emptive criminalisation and punish on the basis of risk rather than demonstrated harm. It might be expected that such steps would be taken only after careful evidence gathering and assessment, and due consultation. But the opposite is often true.

One possible explanation for the difference is that contemporary criminal law reforms directed at domestic violence prevention are preceded by decades of sustained research and experimentation about demonstrable criminal justice failures and how best to respond to domestic violence (e.g. Stark, 2007); measured evidence-based approaches to legislative change are both possible and expected. By contrast, the close attention paid to ‘alcohol-fuelled violence’ (Quilter, 2015) and ‘outlaw motorcycle gangs’ (McNamara and Quilter, 2016) during the review period appears to have had more to do with extant political circumstances and expediency than a research-based case for action. Such lines of inquiry – opened up by a preliminary quantitative processes analyses – are precisely the sort of matters to pursue in future qualitative socio-legal work.

**Homicide.** Almost half of the homicide-related statutory amendments in NSW, Queensland and Victoria during 2012–2017 were the product of one-stage executive-controlled criminalisation processes (10 of 21 instances). Given that homicide is widely regarded as the most serious of criminal offences, it might have been expected to be subject to more considered deliberative processes. Yet, legislative amendments introducing new homicide offences (assault causing death in NSW; unlawful striking in Queensland) and penalty increases (mandatory minimum sentences for one-punch fatalities in NSW and Victoria) were all introduced swiftly without input from an independent inquiry or wider consultation. Those instances of homicide-related legislative change that did result from processes 5 and 6 in our typology tended to have significant overlap with the domestic violence site – such as changes to the defence of provocation in NSW – a site where, as we noted above, independent review processes were the norm.

**Sexual assault.** Sexual assault was a high volume site of criminal law-making during the review period (32 instances). It might have been expected that legislative amendments to sexual assault would result from similar processes to those observed in relation to domestic violence, with a preponderance of changes associated with government appointed inquiries and independent law reform commissions. However, the results were more mixed. There were approximately equal occurrences of processes 2–6 in NSW and Victoria, while in Queensland all recorded amendments (5 instances) were one-stage executive-driven. This likely reflects the fact that the sexual assault site includes a range of
statutes, including those affecting not only adult sexual assault but also child sexual offences and sentencing, as well as amendments relating to SSO/HRO schemes. Many of the legislative amendments related to SSO/HRO regimes or child sexual assault resulted from one-stage executive-driven processes, though not exclusively so. A number of new offences (e.g. failing to protect a child from sexual offences; grooming offences) were the result of recommendations from independent inquiries. For example, the offence of grooming for sexual conduct with a child under 16 which was added to the Crimes Act 1958 (Victoria) by the Crimes Amendment (Grooming) Act 2013 (Victoria) had its origin in recommendations from the Parliament of Victoria, Family and Community Development Committee (2013).

**Consorting/association.** Concern about the activities of ‘organised crime’ and ‘outlaw motor-cycle gangs’ (Lauchs, 2018) has generated a range of criminalisation measures in the last decade, including control order regimes borrowed from the anti-terrorism context (e.g. Crimes (Criminal Organisations Control) Act 2012 (NSW)) and the revival of laws that criminalise ‘consorting’ with ‘known criminals’ (discussed below). A significant number of such statutes were passed during 2012–2017, with the stated intention of facilitating early intervention and disruption of the planning of criminal activities.

As noted above, most of these changes were the product of one-stage executive-driven processes, often with significant police force/service input. This means that significant and controversial expansions of the parameters of criminalisation – including to ‘pre-crime’ activity – have occurred without the benefit of input from outside expertise or wider consultation. For example, the Crimes Amendment (Consorting and Organised Crime) Act 2012 (NSW), inter alia, revised (and increased the penalty for) the old offence of consorting (McNamara and Quilter, 2016: 10–14). The justification for the revived consorting offence in NSW was that it would assist the police to disrupt the activities of organised crime gangs, and ‘outlaw motorcycle gangs’ in particular (Loughnan, 2019; Smith, 2012). That the legislation was directed at a demonised target (‘bikies’), who were likely to attract little public sympathy (McNamara and Quilter, 2016: 13), was part of what made the legislation easy to justify to the electorate – a characteristic of contexts in which governments tend to employ one-stage executive-driven processes. This statute was also enacted with haste: the Crimes Amendment (Consorting and Organised Crime) Bill 2012 was introduced in the NSW Legislative Assembly on 14 February 2012 (3 weeks after a Daily Telegraph editorial calling for action (Daily Telegraph Editorial, 2012)), passed by both Houses on 7 March 2012, and with assent on 14 March 2012.

**Motor vehicle/driving.** We chose to include motor vehicle/driving as one of our criminalisation sites because it is an area of the criminal law that has received little scholarly attention. While many (though not all) motor vehicle–related offences are ‘minor’, attracting relatively modest penalties, the volume of offending and enforcement means that the cumulative impact of the criminal law is enormous. During the review period for our study, there were 14 statutory amendments affecting the motor vehicle site. The majority of these (10) were internal government agency initiatives, and the remaining four were single-stage executive-driven. The latter were typically associated with a ‘trigger’ event, in the form of a tragic road fatality or accident (e.g. Criminal Law Amendment
Act 2012 (Queensland)) or in relation to particular ‘demonised’ drivers (‘hoons’, repeat drink drivers) (e.g. Road Transport Amendment (Licence Disqualification on Conviction) Act 2013 (NSW)). By contrast, changes to licence demerit point regimes and other driver-sanctions, such as number plate confiscation and wheel-clamping (e.g. Road Safety and Sentencing Acts Amendment Act 2013 (Victoria)), were the product of internal government agency processes that are relatively invisible. Although they may appear mundane and not necessarily deserving of wide consultation and associated deliberation, such changes are likely to affect a large number of people given the frequency of vehicle usage and motor vehicle–related offending. Although individually modest, the cumulative effect of fines and other associated forms of punishment is large (Quilter and Hogg, 2018). As noted earlier, we think that criminalisation scholarship, and criticism of how governments deploy their criminal law-making powers, should ensure that attention is paid to both principle and practice. A new law may be considered egregious on its face – for example, because it pre-emptively criminalises perceived risk rather than harm caused – but its practical impact may be minimal, if it is rarely or never invoked. Another amendment may raise few eyebrows, such is the modest nature of the adjustment it makes, but if regularly enforced, the operational change to the parameters of criminalisation may be substantial. This is often true of driving offences, and it is also often true of bail and parole.

**Bail and parole.** Here, we highlight two key findings. First, so-called ‘procedural’ aspects of criminal justice, like pre-trial bail decisions and conditions, and post-sentence release decisions and conditions, can be ignored in discussions about criminalisation (and the potential for over-criminalisation). In our previous work on modalities of criminalisation (McNamara et al., 2018), we made the case for a ‘thick’ and variegated concept of criminalisation that includes such laws and practices. Our processes analysis vindicates this approach: we identified 24 statutes affecting bail and 18 statutes affecting parole.

Second, against a tendency for bail and parole to be perceived (with attendant criticism) as sites of highly politicised, rushed punitive criminal law-making (Brown and Quilter, 2014; Freiberg and et al., 2018), our analysis suggests the situation is more complex and requires a more nuanced understanding. Certainly, our study contains clear instances of ‘quick fix’ legislative change triggered by tragic events. For example, parolee Yacqub Khayre’s fatal shooting of Mr Hao (and the causing of injury to three police officers) was the catalyst for a national agreement to establish presumptions against parole for offenders who have demonstrated support for/have links to terrorist activity (e.g. Terrorism Legislation Amendment (Police Powers & Parole) Act 2017 (NSW)). However, other statutory changes in the review period of our study resulted from a range of different processes. While 9 changes to bail laws and 9 changes to parole laws involved the one-stage executive-driven process, another 15 statutes (9 for bail, 6 for parole) were the result of a government appointed inquiry or the work of an independent review commission/committee. For example, in NSW, in June 2011, the NSW Law Reform Commission was given broad terms of reference to conduct an inquiry ‘to develop a legislative framework that provides access to bail in appropriate cases’, with no known preceding ‘tragedy’ or media controversy. The final report (NSW Law Reform Commission, 2012) was the basis for the Bail Act 2013 (NSW).
A final insight supported by our findings on bail and parole is that even a thorough, evidence-based, deliberative, consultative (i.e. ‘high quality’) process does not insulate resulting statutory amendments from (sometimes fast-moving) changes in the political climate. The *Bail Act 2013* (NSW), based largely on recommendations contained in the NSW Law Reform Commission (2012) report referred to above, was widely seen as a significant improvement on the bail law regime it replaced. And yet, within 5 weeks of the *Bail Act 2013* (NSW) coming into force, a media frenzy over a small number of high profile bail decisions triggered a dramatic U-turn by the NSW Government, the establishment of a quick-fire (in our terms, ‘process 5’) review by former NSW Attorney-General John Hatzistergos and the ‘sabotage’ (Brown and Quilter, 2014) of progressive bail reforms via the *Bail Amendment Act 2014* (NSW).

**Further observations**

Our pilot suggests that processes of criminal law-making are more diverse than is typically recognised in critiques of over-criminalisation. All paths to statutory change warrant recognition and analysis. Here we offer five further observations.

First, although our pilot findings draw attention to the need to confront the diversity of processes by which criminal laws are enacted, we have also shown that there *is* an empirical foundation to the regularly voiced concern that too much criminal law-making occurs in haste, according to imperatives that are more focused on political expediency and perceived electoral advantage. Furthermore, this style of law-making is more common in relation to behaviours and risks that are associated with high social anxiety and fear, including contexts where this social reaction does not necessarily map to evidence of crime frequency or seriousness (e.g. the activities of bikie gangs, the perpetration of one-punch fatal assaults). Whether this adds up to substantive over-criminalisation requires further research on the operation of such laws. In some instances, such laws may be rarely invoked. The anti-bikie control order regime established by the *Crimes (Criminal Organisations Control) Act 2012* (NSW) is an example of a hugely controversial measure that was never formally used (NSW Ombudsman, 2016: 3). This example illustrates one of the features of criminal law-making on the single-stage executive-driven process: the intended audience and desired effects of the change may have little to do with long-term change in the practical operational parameters of criminalisation and much to do with a rhetorical message at the time of enactment. In these contexts, ‘speed’ of enactment is constructed as symbolising a government that takes community concerns seriously and is ‘in control’ of crime problems.

Second, our findings prompt reflection about the concept of *urgency* in crime-related public policy. What conditions and factors combine to produce an atmosphere that suggests urgent adjustment of the parameters of criminalisation is necessary? In contrast to topics such as organised crime, public order and alcohol-related violence, our findings suggest that, at least in *process* terms, domestic violence law reform is not seen as urgent in the same way. Ironically, the crisis of domestic violence has never been more visible in Australian society and politics. It is striking that while one-punchers, outlaw motorcycle gangs, terrorists, sex offenders and other demonised groups are often subject to quick-fix legislative changes (including draconian offences and penalties and other
pre- and post-conviction restrictions on liberty), the hallmarks of legislative change in relation to domestic violence are quite different: processes are unhurried and evidenced-based, involving thorough consultation with experts and stakeholders. Returning to a theme introduced above, given the scale of the problem of domestic violence (and the frequency of domestic violence fatalities), it is important to investigate why law-making directed at prevention in this area appears to be less ‘urgent’ than law-making directed at ‘one punch’ fatalities (Quilter, 2015, 2019). In part, this may be explained by lessons learned from previous criminal law reform initiatives, including the negative unintended consequences that may arise for women victims of domestic violence if the criminal law is the focus of law and policy reform (Coker and Macquoid, 2015; Goodmark, 2018). Nevertheless it may appear ironic that, to date, slow, deliberate, consultative processes seem to have failed to radically improve the quality of protection and justice enjoyed by victims of domestic violence. It may be that, if even the most considered criminal law reforms fail to make a significant positive change, alternative legal and social approaches need to be prioritised (Goodmark, 2018; Smart, 1989).

Third, our findings draw attention to the different operational scales of different legislative changes and to the way that this reality may influence choice of processes. Bail and parole, associated as they are in the popular imaginary with grave risk of harm, could be prime candidates for opportunistic, speedy, executive-driven statutory change – and they often are. However, change in these areas in the period we reviewed was more likely to be the result of a process, involving less haste, some independence and at least some consultation. This may be because there is much at stake when it comes to change to bail and parole laws. Such changes have the potential to affect large numbers of accused and convicted persons across a wide range of offences, with significant operational and financial implications for government.

Fourth, our pilot analysis underscores the need to link qualitative judgement about the relative merits of different processes to empirical research on the operation of laws which purport to change the parameters of criminalisation. One of the surprising findings in our study was just how many statutory changes arise from processes internal to government public services. The relatively opaque nature of such processes may raise suspicions that such laws may be qualitatively poorer, for not having had the benefit of transparency, non-government expertise and democratic participation. But a final quality assessment cannot be made without collecting and analysing data on how the resulting amendments operate.

Finally, an important local contextual factor that was evident, even in the relatively short period of our pilot study, was changes of government. This occurred in both Queensland (Labour to LNP in 2012; LNP to Labour in 2015) and Victoria (Coalition to Labour in 2014), and can influence both what criminal laws are made and the process by which they are made. What promises were made at the last election? Which interest groups were advocating for change? Who resisted? Which advocacy/activist campaigns preceded the bill? What alliances were involved? In addition to the election cycle, a number of the instances of law-making in this study illustrate the role that ephemeral events (including ‘moral panics’ (Cohen, 2002)) can play in shaping the criminal law. In federal multi-jurisdictions like Australia, it is also necessary to take account of
country-specific constitutional frameworks for criminal law-making, including via the influence of (intra-national) cross-jurisdictional ‘borrowing’ (McNamara and Quilter, 2016, 2018).

**Conclusion**

The primary aim of this article was to explain and ‘road-test’ a new conceptual and methodological paradigm for conducting criminalisation research, centred on the identification and analysis of processes of criminalisation. We have attempted to show that a processes approach, and a modalities approach (McNamara et al., 2018), can be valuable components of the suite of qualitative data collection and analysis methods needed to produce rich empirical and historicised accounts of criminalisation in particular settings.

A processes approach has considerable potential as a methodological tool for comparative criminology and comparative penality (Newburn et al., 2018), and investigations into the extent to which criminal law-making is the product of local and culturally specific forces and/or the product of factors associated with, and criminal justice policy trends in, late modernity across the globe (Garland, 2001, 2013; McSherry et al., 2009; O’Malley, 2010). We are mindful, though, of avoiding ‘grand narratives’ that can tend to paper over the specificities of context that are often associated with a jurisdiction’s criminal law-making (Egger, 2004). Indeed, we regard attentiveness to (local) processes as a valuable constraint on such tendencies and an essential ingredient in the production of historicised and empirically grounded accounts of crime-focused governance (Simon, 2007) and criminal law-based ‘security projects’ (Farmer, 2014; Valverde, 2014). In turn, the processes approach offers a valuable tool for conducting comparative research as between jurisdictions that are subject to many of the same ‘global’ social forces but whose criminal laws and penal outcomes may vary in important ways (Goodman et al., 2017; Tubex et al., 2015).

To summarise, a processes approach can facilitate more rigorous and transparent assessment of the quality of decisions and actions that expand or contract different modalities of criminalisation, including scrutiny of the extent to which particular legislative enactments are evidence-based and a product of meaningful consultation and genuine democratic participation in law-making. It opens up further examination of whether there is a relationship between the processes by which criminal laws are shaped and reshaped and their effectiveness and impact – intended and unintended.

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Notes

1. We note that between 1999 and 2017, a number of reviews of this type were undertaken by the Office of the New South Wales (NSW) Ombudsman – an independent statutory authority under the Ombudsman Act 1974 (NSW).

2. We acknowledge that a parliamentary committee whose members are elected politicians is qualitatively different from a statutory law reform commission. However, we have located such bodies in process 6 because of important characteristics like transparency and consultation that distinguish their work from law-making processes dominated by the executive.

3. A full list of statutes is on file with the corresponding author.

4. If a statute was of general application – for example, a change to criminal procedure that could be expected to affect multiple sites – it was assigned to an ‘other’ site category.

5. Given the unique nature of the first process in our typology (judge-made), we recognise that it was unlikely to feature much in the statute-focused pilot exercise, but it will be a useful tool in future research applications in Australia and other jurisdictions where criminal law is still, to some extent, a matter of common law.

6. More detailed tables summarising data on the frequency with which particular processes were identified in relation to specific sites of criminalisation are on file with the corresponding author.

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