THE UNIVERSITY OF SYDNEY

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# CrimNet

## Sydney Institute of Criminology

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## In this issue



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# More COVID-19 Criminology

A fortnight is a long time in COVID-19 Criminology. The *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* was passed by the NSW Parliament on 24 March 2020 and commenced on assent on 25 March 2020. Additional Public Health Orders and regulations have been made, new court arrangements have been announced and case law is emerging on COVID-19's impact on the criminal justice system.

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**CRIMINALISING COVID-19 EXPOSURE**
**Additional Public Health Orders**

To address the spread of COVID-19, additional orders have been made by the NSW Minister for Health under s.7 of the *Public Health Act 2010* (NSW).

The Public Health (COVID-19 Self-Isolation) Order 2020 provides that a person diagnosed with COVID-19 must comply with directions to attend hospital or reside at designated premises until the person is assessed by a medical practitioner to be free of the virus. Until medically cleared, the person must not leave the premises except to obtain medical care or medical supplies, or in any other emergency situation. The person also must not permit any other person to enter the premises, unless the other person usually resides there, is attending for medical or emergency purposes, or to deliver food or essential items.

The Public Health (COVID-19 Air Transportation Quarantine) Order 2020 provides that people arriving in NSW by aircraft must either go directly to a quarantine facility specified by the Commissioner of Police or go directly to a medical facility for treatment: cl.5(1). This direction does not apply to flight crew of an aircraft or people in transit: cl.5(3). The Public Health (COVID-19 Maritime Quarantine) Order 2020 makes similar provisions in relation to people arriving by sea.

The Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020, which commenced on 31 March 2020, and was amended on 3 April 2020, consolidates some of the previous Public Health Orders and includes additional restrictions. It directs that a person must not, without reasonable excuse, leave the person's place of residence: cl.5(1). This direction does not apply to a person who is homeless: cl.5(5). Examples of a reasonable excuse include obtaining food or other goods or services, travelling for the purposes of work or education if it is not possible to do this from home, exercising or for medical or caring purposes:

cl.5(2); Schedule 1.

Clause 6(1) directs that a person may not participate in a gathering of more than two persons in public. This direction does not apply to members of the same household, gatherings for work purposes, weddings at which there are no more than five people, funerals at which there are no more than ten people, gatherings to facilitate moving to new premises, the provision of care or assistance to a vulnerable person or emergency assistance, or a gathering necessary to fulfil a legal obligation, such as attending court or complying with bail conditions: cl.6(2).

Clause 7(1) extends earlier orders concerning the closure of premises, including pubs, restaurants and cafes, indoor recreational facilities, entertainment venues, religious services and beauty salons, with certain exceptions such as take-away food services. Public swimming pools, gaming lounges, strip clubs, outdoor playground and gymnasium equipment and skate parks are closed: cl.7(2). Open houses and face-to-face auctions are prohibited: cl.7(3).

Clause 8(1) prohibits gatherings of 500 or more people in outdoor spaces and I00 people or more in indoor spaces, and in any event, the premises must allow for at least four square metres of space for each person in attendance, other than in residential premises: cl.8(2)(a) and for essential gatherings, such as gatherings at airports, hospitals and supermarkets, as set out in Schedule 2.

Breach of any Public Health Order is an offence, carrying a maximum penalty of imprisonment for six months and/or a fine in the case of an individual and significant fines for corporations: s.10.

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**RELEVANCE OF COVID-19 TO BAIL APPLICATIONS**
**Risk to inmates and delay in proceedings**

In ***Rakielbakhour v DPP*** [2020] NSWSC 323, the NSW Supreme Court granted conditional bail to the applicant, who was charged with common assault and assault occasioning actual bodily harm in a domestic violence context. The applicant is alleged to have punched the victim (his wife) to the face and body, before striking her to the face and head with a hair dryer. Although the police attended the home shortly after the incident and observed fresh injuries, the victim indicated she did not wish to give evidence in criminal proceedings and gave an exculpatory account of how she came to sustain her injuries.

As Hamill J observed, 'The existence of the COVID-19 pandemic creates a challenge for the criminal justice and penal systems of a kind not experienced in recent decades, if ever, in Australian law.' His Honour made the following findings:

- prisons are particularly susceptible to the rapid spread of the virus and it is difficult if not impossible to enforce or facilitate restrictions on social contact being observed in the community
- inmates are currently subject to more onerous custodial conditions than usual, including the suspension of social visits
- many criminal cases are being adjourned
- inmates may be experiencing anxiety about the spread of the virus in prisons should cases emerge
- the emergency legislation introduced in NSW reflects the gravity of the situation.

His Honour held that these matters were relevant to the determination of the release application, applying s.18(1) of the *Bail Act 2013* (NSW), particularly the applicant's need to protect himself from infection, the anticipated delays and the strain on facilities for legal visits via video-link.

**Read the Supreme Court decision here.**

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**SELF-ISOLATION OF LEGAL COUNSEL DURING TRIAL**
**Appeal from trial judge's refusal to discharge jury**

In ***Kahil v R*** [2020] NSWCCA 56, the appellant challenged the refusal of a judge to discharge the jury in a trial when his legal counsel said he needed to self-isolate and was therefore unable to continue as trial counsel. The appellant was being tried in the District Court for conspiracy to import a border-controlled precursor contrary to Commonwealth legislation. On the seventh day of trial, the appellant's counsel applied for leave to withdraw from the trial due to his age (69 years), his compromised immune system and recent proximity to the appellant, who had exhibited flu-like symptoms. Counsel also asked that the jury be discharged and the trial aborted. The Crown supported the application but the trial judge refused. Counsel subsequently withdrew (despite the trial judge refusing leave for him to do so), leaving the matter in the hands of his instructing solicitor, who had not previously appeared in a jury trial. The appellant appealed to the NSW Court of Criminal Appeal against the refusal to discharge the jury under s.5F(3) of the *Criminal Appeal Act 1912*.

Adamson J said that it was plain the solicitor could not reasonably be expected to continue the trial. The withdrawal of trial counsel left the appellant without adequate representation through no fault of his own. The only legally reasonable conclusion was that the trial of the appellant would likely be unfair if he was required to continue without competent representation. Harrison and Button JJ agreed. The appeal was allowed and an order was made for the jury to be discharged and the trial vacated.

Read the Court of Criminal Appeal's decision here.

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**NEW LOCAL COURT LISTING ARRANGEMENTS**

In a Memorandum, Listing Adjustments during COVID-19 Pandemic (No. 5), the Chief Magistrate of NSW issued new arrangements for the Local Court to take effect from 30 March 2020. These new arrangements include the following:

- Field Court Attendance Notices and Future Court Attendance Notices (ie. matters where no issue of bail arises) are to be listed 3 months into the future
- Sentencing is to be deferred for at least 8 weeks in cases where a custodial outcome is likely
- Legally representatives may 'appear' by way of email
- All appearances by persons in custody are to be by Audio Visual Link (AVL).
- Defended hearings cannot be heard where the defendant is in custody and these matters will require re-listing. 'At such time the Court will entertain an application for release recognizing that a lengthy period of continuing

custody in the Local Court may result in a period of incarceration that would exceed the ultimate penalty that would have otherwise applied should the defendant have been found guilty at an earlier time.'

- The Local Court will accept a plea and sentencing submissions from a legally represented defendant that are in writing or by email. The physical appearance by the defendant or their legal representative will not be required unless the Court determines that it is necessary. This should only arise in matters where the court considers a conditional release order or community corrections order.
- Where the defendant is in custody bail refused, sentencing proceedings may take place by AVL from within a correctional centre. Where possible the legal representative may also appear by AVL.
- Legal representatives can flag the likelihood of an application under s.32 of the *Mental Health (Forensic Provisions) Act 1990* by email. In this situation the court should be asked to adjourn the proceedings for at least 8 weeks.
- Defended summary hearings are to be adjourned for a period of 3months at which time the position in relation to the impact of the pandemic will be reassessed.

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**EMERGENCY RELEASE OF NSW PRISONERS**
**Does the legislation strike the right balance?**

**Impact on prisoners**

New s.276(1) of the *Crimes (Administration of Sentences) Act 1999*, introduced under the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* allows the Corrective Services Commissioner to grant parole to an inmate belonging to a category prescribed by the Regulations if the Commissioner is 'satisfied that releasing the inmate on parole is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic.' The *Crimes (Administration of Sentences) Amendment (COVID-19) Regulation 2020* commenced on 3 April 2020. It amends the *Crimes (Administration of Sentences) Regulation 2014* to prescribe the following categories of inmate for the purposes of s.276(1): (a) an inmate whose health is at higher risk during the COVID-19 pandemic because of an existing medical condition or vulnerability, other than an excluded inmate, and (b) an inmate whose earliest possible release date is within 12 months, other than an excluded inmate: cl.330(1). 'Excluded inmates' are national security interest inmates and inmates with certain classifications: cl.330(3).

In an article in The Conversation, Professor Thalia Anthony considers the emergency legislation with respect to the release of prisoners under new Part 15 of the *Crimes (Administration of Sentences) Act 1999* (NSW) and identifies some obstacles to the legislation achieving its objectives of protecting inmates, prison staff and the community. Critically, the legislation fails to require that COVID-19 be considered when bail and sentencing decisions are made. Professor Anthony suggests the Corrective Services Commissioner could exercise a discretion to refuse to accept new prisoners at the point of entry into a correctional centre. Professor Anthony makes the case for release being based on the health needs of prisoners and the interests of community safety in managing the health risks presented by the pandemic, rather than focusing on criteria that discriminates against Indigenous people, those with mental health issues and the socio-economically deprived. **Read the article here.**

Resources for criminal lawyers on COVID-19, compiled by the NSW Public Defenders Office, are available here.

# Relevance of infanticide plea to sentencing for murder

**The Queen v Guode [2020] HCA 8**

The respondent drove her four children into a lake with the intention of killing them and herself. Three of the children died. The respondent pleaded guilty to one count of infanticide, two counts of murder and one count of attempted murder. Infanticide is an offence in Victoria where the balance of a woman's mind was disturbed because of a disorder arising from giving birth to the deceased child within the preceding two years. It carries a maximum penalty of five years' imprisonment. At the proceedings on sentence, expert medical evidence was presented that the respondent was suffering from a severe depression and a post-traumatic stress disorder (arising from her experiences as refugee from South Sudan) at the time of the offences.

The respondent was sentenced in the Supreme Court of Victoria to a total term of 26 years and 6 months' imprisonment with a non-parole period of 20 years for the four offences. The Victorian Court of Appeal upheld an appeal by the respondent on the basis that the sentencing judge should have given greater weight to the respondent's mental condition when imposing sentences for the murders and the attempted murder. The Court of Appeal imposed a total effective sentence of 18 years' imprisonment and a non-parole period of 14 years. The Crown appealed to the High Court on the sole ground that the Court erred by taking into account an irrelevant consideration (the plea to infanticide) when assessing whether the sentences originally imposed were manifestly excessive.

By majority (Kiefel CJ, Gageler and Nettle JJ), the High Court upheld the Crown's appeal. The Victorian Legislature had rejected a 2004 recommendation by the Victorian Law Reform Commission to extend the offence of infanticide to circumstances where older children are killed. It was an error for the Court of Appeal to have treated the Crown's acceptance of the plea to infanticide as amounting to a concession regarding the respondent's state of mind, permitting the charges of murder and attempted murder to be viewed through the 'lens' of infanticide. Although the mental condition underpinning the infanticide was likely to be the same as that underpinning the other charges, the requirement of infanticide that an individual woman's 'balance of mind' was 'disturbed' was distinctive, and

not sufficiently specific about the nature and gravity of an individual's mental condition, to satisfy the requirement to consider the principles in *R v Verdins* (2007) 16 VR 269 (concerning mental illness) when handing down sentences for the other offences.

The minority (Gordon and Edelman JJ) concluded that the Court of Appeal had not made the 'basic' error of allowing the specific case of infanticide to influence the evaluation of the sentences for the other offences and had only concluded that the respondent's mental impairment was relevant to the sentencing for all offences. The minority would have dismissed the appeal.

In *Manifest Madness* (2012), Sydney Institute of Criminology Co-Director Professor Arlie Loughnan critiques infanticide as an example of the gendered character of abnormality as it is constructed within criminal law. Professor Loughnan observes that the decision in *Guode* 'demonstrates the genuine difficulties entailed in sentencing infanticide pleas and convictions' and reflects on the difficulty arising from 'the arcane language of the infanticide provision; a "disturbance" of the "balance of mind" does not represent a modern psychiatric diagnosis, and as the High Court noted, it does not capture the nature and quality of the mental impairment sufficiently precisely.'

**Read the High Court's judgment here.**

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# Fear of crime in inner Sydney and Victoria

Reducing fear of crime has become a significant issue for policy makers, the police and academics. Fear of crime may be categorised as either 'functional' or 'dysfunctional' depending on the extent to which the fear itself – and any precautions taken by the individual to address it – negatively impact on the individual's quality of life.

Two recent publications explore fear of crime in Australian society. In '**Functional and dysfunctional fear of crime in inner Sydney: Findings from the quantitative component of a mixed-methods study**' (2020) *Australian & New Zealand Journal of Criminology*, Murray Lee, Jonathan Jackson and Justin R Ellis describe a project involving a survey of 409 randomly selected people residing in the City of Sydney Local Government Area in 2016. Thirteen focus groups were

also conducted across the area. Participants were asked about whether or not they had worried about being burgled or harassed, physically assaulted or sexually assaulted in public in the past year – and if, how frequently this occurred. Almost half the participants reported worrying about one or more of the four categories of crime on a least a weekly basis. There was a sizeable minority who indicated that they worry about crime on at least a weekly basis. Respondents were also asked questions designed to measure collective efficacy (perceptions of how supportive the local community was and how trustworthy neighbours were) and social control (the community's reliability in dealing with the possibility of offending behaviours). The article concludes with some thoughts on the role of environmental cues in shifting people's functional response to perceived risk to dysfunctional patterning of emotions in people's daily lives.

**Social Cohesion and Pro-Social Responses to Perceptions of Crime: Victorian Report**, by Murray Lee, Rebecca Wilkes, Jonathan Jackson, Chloe Keel, Justin Ellis, Rodney Blake, Sophie Norman and Brenda Lin, reports on the findings of a project examining perceptions of crime and fear across a range of Victorian communities. This study is based on the accounts of 2,862 survey participants across 70 residential communities and 15 focus groups with 69 individuals. A majority of respondents did not worry about crime at all during the previous 12 months and did not believe they would be a victim of crime in the next 12 months. The report reveals that worry about crime is a function of the level of crime in a given neighbourhood, but perceptions of risk do not neatly align with crime rates. Respondents were less worried about crime when they perceived others in their community would engage in crime prevention efforts. The report identifies a number of strategic considerations, including targeted crime and safety messaging, the development of crime prevention initiatives aimed at community building, encouraging greater connections between the justice system and the community, and establishing and maintaining partnerships with local governments and organisations.

Read the article concerning the inner Sydney study here and the Victorian report here.

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## New publications

### Report Crossover Kids: Vulnerable Children in the Youth Justice System Report 2

**Children at the Intersection of Child Protection and Youth Justice across Victoria**

The Victorian Sentencing Advisory Council has released the second of three reports examining the child protection backgrounds of sentenced and diverted children in Victoria.

The 'Crossover Kids' project focusses on 5,063 children who were sentenced or diverted in the Victorian Children's Court in the calendar years 2016 and 2017.

Report 1 found that 1,938 of these children were ‘crossover kids’ in that they were the subject of at least one report to the Victoria Child Protection Service, whether before, at the time of, or after their offending.

Report 2 studies the 1,938 ‘crossover kids’ in more detail, including:

- how many were known to child protection before they first offended;
- their child protection histories, care histories and types of offending;
- whether there were differences in the number of crossover children dealt with in regional and metropolitan courts across Victoria, including how many were Aboriginal and Torres Strait Islander Children and how many sentenced children were aged 10-13 at first sentence or diversion.

The report’s key findings are set out in the Facts Sheet here. Read the full report here.

## Trends & Issues Policing repeat domestic violence: Would focused deterrence work in Australia?

**Australian Institute of Criminology**

Focussed deterrence was originally conceived in the United States to tackle youth gun homicides. It has since been adapted as a way of responding to high-risk domestic violence cases. The approach involves establishing inter-agency networks that target identified offenders and provide support for victims. Prominent community members are recruited to remind the offender that abusive behaviour will not be tolerated. Intimate Partner Violence Intervention (‘IPVI’) pilots based on focussed deterrence in US communities have demonstrated some success.

This AIC study identifies factors indicating that the conditions necessary to implement a focused deterrence approach to domestic violence are present in Australia. A relatively small proportion of domestic violence offenders are responsible for a disproportionate number of incidents, suggesting that more intensive interventions should be directed at serious repeat offenders. Swift responses during the highest risk period may provide the best opportunity to protect victims. A focussed deterrence approach is not unlike some contemporary policing responses that have been implemented in Australia. It is nevertheless necessary to consider potential challenges to implementation and to develop an approach supported by willing partners.

**Read the *Trends & Issues* Paper here.**

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# Jobs and opportunities

## Job Principal Policy Manager, Victims Services (NSW)

Victims Services, part of the NSW Department of Communities and Justice, is seeking a Principal Policy Manager. Victims Services provides support services to

victims of crime which include information, referrals and advice, counselling, financial support for immediate needs and economic loss, as well as recognition payments where applicable. Victims Services also delivers a number of other programs to victims across the justice system

The Principal Policy Manager provides direction for the development of policy and recommendations for emerging issues and plays a major and direct liaison role with key stakeholders to support and implement key initiatives and policies relating to victims of crime. The role leads a team that provides policy advice on operational issues associated with the delivery of services by Victims Services as well as on broader policy initiatives across the criminal justice system.

Applications close Sunday **19 April 2020**. **For more information and to apply, visit the 'I work for NSW' website here.**

## Job Chief Crown Prosecutor, London (South), Crown Prosecution Service

The Crown Prosecution Service (CPS) prosecutes criminal cases that have been investigated by the police and other investigative organisations in England and Wales.

The CPS is seeking a new Chief Crown Prosecutor for the London South area. The role is responsible for all the CPS's activity in the region, which includes overseeing the quality of the legal decisions made, managing resources, working closely with key stakeholders in the criminal justice system and ensuring performance targets are met. The ideal individual will be a senior successful lawyer with a track record in the criminal law arena. The position is open to applicants from the UK, the Commonwealth, European Economic Area (EEA) and certain non-EEA nationals.

Applications close Sunday, **3 May 2020**. **For more information, visit the website here.**

## Abstracts Special Issue of Australian Feminist Law Journal

**Positioning the Politics of Consent in Law and History**

Recent years have witnessed a global explosion of discourse around sexuality focusing on debate over the boundaries between legitimate and illegitimate sex under the banner of the #metoo campaign. In this context of genuine confusion in distinguishing the benign from the violent, concepts of consent are taken to promise clear, fixed boundaries on the relationship between power and desire, distinguishing between good and bad sex, and making sexual behaviour and intention legible to both law and society. If consent is the problem, then it's also our only imaginable solution.

This special issue of the AFLJ, to be published in December 2020, reconsiders and reformulates feminist and other critiques of consent. Widening the debate beyond sex and sexual assault, it questions consent as the solution and asks us to imagine beyond its boundaries. Consent operates as a conceptual pivot between the legitimate and the illegitimate beyond intimacy: in imperial treaties, in doctor's surgeries, on social media and in the very act of a handshake we see

consent working its ‘moral magic.’ Drawing on the work of theorists such as Carole Pateman, Linda Alcoff, Judith Butler and Wendy Brown, this issue will unpack the theoretical origins of consent, its historical uses and its contemporary application in a range of legal and non-legal fora, including by asking:

- What role did consent play in colonisation and in the formation of liberal democracies both theoretically and on the ground?
- How does consent constitute and legitimate authority?
- How does consent inform ideas about the legal subject as split between body and mind, as capable of contracting out the use of the property in its person, as Locke argued?
- Was consent a language or gesture that was intelligible between Indigenous people and colonisers – part of the permeable language of law understood on both sides of the frontier? Or did it simply authorise violence?
- How does consent enable medical interventions in non-normative bodies and minds?

This special issue builds on a successful symposium of the same title held jointly by the Legal Intersections Research Centre at the University of Wollongong and the Feminist Legal Research Groups at UTS Law.

Abstracts of no more than 300 words should be submitted to the Editor, Nan Seuffert, at nseuffer@uow.edu.au by **15 April 2020**.

## Nominations 2020 ANZSOC Awards

The Australian and New Zealand Society of Criminology ('ANZSOC') confers a number of Awards each year.  The following are now open for nominations:

- New Scholar Prize
- Adam Sutton Crime Prevention Award
- Allan van Zyl Memorial Award
- David Biles Correctional Research Award
- Indigenous Justice Award
- Award for Excellence in Teaching
- Undergraduate Student Paper Award
- Best Honours or Masters Thesis in Criminology Award
- PhD Student Paper Award.

Nominations for awards should be made in writing, accompanied by documentation supporting all aspects of eligibility for the award, and be submitted by email to secretary@anzsoc.org by **30 April 2020.** Applicants for Awards may nominate themselves, but may only submit one application in any given year. A number of ANZSOC Awards are for members only. **For more information visit the website here.**

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# Events, seminars and conferences

## Event promotion Cancellation and postponement of events

CrimNet will suspend promotion of all events in accordance with orders by the Minister for Health to address the spread of COVID-19, and otherwise to promote the protection and safety of staff, students and the general community both within and outside the State of NSW.

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