

EDITORIAL

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Relationships, particularly those characterised by power, are central to the criminal law. Most evident is the relationship between the individual and the Crown.¹ The Crown creates an 'offence',² investigates its alleged breach,³ sentences the offender by a judge it appoints,⁴ detains the individual in its facilities and determines when they are paroled. While there are safeguards and guarantees that are aimed at mitigating the Crown's power over the individual,⁵ it is nonetheless apparent that dynamics of power are embedded into the relationship between the individual and the Crown throughout the criminal process.

Another important relationship characterised by power is that of the defendant and the complainant. These power dynamics are most obvious in offences occurring in intimate or familial relationships, such as domestic violence, as '[p]erpetrators exert power and dominance over victim-survivors using patterns of abusive behaviours over time that create fear and deny liberty and autonomy'.⁶ However, imbalances of power are still present in offences committed against strangers, for example, the power of the 'group' in adolescent co-offending.⁷

Relationships of power have been explored by the *University of New South Wales Law Journal* ('*Journal*') once before. Issue 37(1), published in 2014, was a

* Editor, Issue 48(2).

1 Throughout this Editorial, 'Crown' is used broadly to refer to the State or Commonwealth, rather than in its narrower sense as referring solely to the prosecution.

2 Luke McNamara et al, 'Understanding *Processes* of Criminalisation: Insights from an Australian Study of Criminal Law-Making' (2021) 21(3) *Criminology and Criminal Justice* 387 <<https://doi.org/10.1177/1748895819868519>>.

3 Vicki Sentas and Michael Grewcock, 'Criminal Law as Police Power: Serious Crime, Unsafe Protest and Risks to Public Safety' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 75 <<https://doi.org/10.5204/ijcjsd.v7i3.554>>.

4 See generally Jye Beardow, 'Instinctive Synthesis and the Rule of Law Critique: Unlocking Aladdin's Cave' (2022) 47(4) *Alternative Law Journal* 266 <<https://doi.org/10.1177/1037969X221124227>>.

5 See 'Minimum Guarantees in Criminal Proceedings: Public Sector Guidance Sheet', *Attorney-General's Department* (Web Page) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/minimum-guarantees-criminal-proceedings>>.

6 Standing Council of Attorneys-General, 'National Principles to Address Coercive Control in Family and Domestic Violence' (22 September 2023) 1 <<https://www.ag.gov.au/system/files/2023-09/national-principles-to-address-coercive-control-family-and-domestic-violence.PDF>>.

7 See, eg, Sally-Ann Ashton and Anna Bussu, 'The Social Dynamics of Adolescent Co-offending' (2022) 23(3) *Youth Justice* 350 <<https://doi.org/10.1177/14732254221136044>>.

part-thematic Issue titled ‘Miscarriages of Justice in the Criminal Law’. Its articles explored the criminal trial and the unjust outcomes that can result when processes are abused. In doing so, it highlighted some of the material negative consequences that can result from a mismanagement of the relationship of power between the Crown and the defendant.

It should be acknowledged that the power dynamics in the relationships individuals have with each other and with the Crown cannot always be presumed to be negative. When used appropriately, the criminal law, and the power the Crown wields through it, serve a valid function in ensuring the effective governance of society. This is particularly important where the criminal law is used to protect the powerless. The problem lies when the criminal law is not used appropriately, or is not fit for purpose, and the power it provides to the Crown results in detriment to vulnerable groups. When this occurs, the voices of those disproportionately affected risk being silenced. This reality is what inspired the thematic component of Issue 48(2). Academic scholarship offers an important medium through which the voices of those who are disproportionately impacted can be leveraged and heard. The articles that comprise the thematic component of this Issue do just that.

Kicking off the thematic component, Lisanne Adam explores the dynamics of power present between police and individuals by examining the admissibility of confessions elicited by the covert policing ‘Mr Big Method’. Adam reveals that the misuse of this technique can lead to the admission of unreliable ‘Mr Big Confessions’ in criminal proceedings that may result in wrongful convictions. She concludes with a proposal for legislative reform to safeguard against this. AJ George, Vicki Lowik, Nichola Corbett-Jarvis and Emma Turley examine Scotland’s failed juryless trial pilot and the Australian Law Reform Commission’s proposals for reform of sexual assault proceedings using Pierre Bourdieu’s sociological concepts of power relations. This is followed by Ingrid Matthews and Nigel Stobbs’ article which examines the patriarchal paradigms of power that are present from inception to implementation of the recent affirmative consent reforms. They situate the criminal law as a function of colonial white patriarchy unfit for the purpose of stopping male violence.

In his article, Christopher Rudge draws attention to the 15,000 social security criminal convictions recorded against innocent people between 1991 and 2011. In doing so, he provides a voice for these forgotten victims and highlights the negative consequences of the Crown’s power when it is misused against the individual. Lisa N Billington closes out the thematic component of Issue 48(2) by calling attention to the oppression of Kanaky’s Indigenous-led independence movement at the hands of the French. France’s use of colonial criminal law to pursue Kanak erasure offers a stark demonstration of silencing by imperial powers. In doing so, she provides an opportunity for us to reflect on the parallels that can be observed in the treatment of Aboriginal and Torres Strait Islander peoples in Australia.

While the articles that comprise the general component of Issue 48(2) may not focus on the criminal law, they still draw attention to important dynamics of power in the legal system more broadly. Esther Erlings and Laura Grenfell begin the general component by engaging with the complex legal landscape of social

care detention and Australia's reluctance to recognise the issue. They highlight that while *Public Advocate v C, B*⁸ may be viewed as a step towards the recognition of social care detention, subsequent developments may create further risks and fewer protections for care providers and receivers, who have less power. Katrine Del Villar, Ruthie Jeanneret and Ben P White argue against the state residence criterion of eligibility for voluntary assisted dying, which places a burden on patients and health professionals. They recommend this requirement be repealed which would have the positive advantages of legal and practical simplicity, avoid concerns about unconstitutionality and bring Australia in line with international approaches. Both articles platform instances where the law's powers are operating detrimentally against vulnerable groups and advocate for positive changes to prevent this.

Anjalee de Silva and Christine Parker explore how hate speech against women is amplified by social media platforms' power. Further, social media platforms' push for self-governance and self-regulation indicates their authorisation of such sex-based vilification. Naomi Burstyner and Genevieve Grant provide an empirical profile of coronial litigation in Australia and from this identify opportunities for greater review of the management of these cases to meet the needs of the parties for whom these proceedings are high-stakes. In the context of coronial litigation, courts can be said to hold significant power in lessening or worsening a party's experience of grief. Neera Bhatia and Julian Koplin close out Issue 48(2) with a discussion of the ethical, legal and social implications of different forms of offering payment for egg donation in Australia. In defining reimbursement, compensation and inducement, and presenting their own proposals for payments, they highlight how financial payments can be used in ways that avoid abuses of power in this context.

The publication of Issue 48(2) was truly a team effort. First and foremost, I must extend my sincerest thanks to the 20 authors whose work fills these pages. Issue 48(2) would not exist without your immense hard work and I am truly grateful for your cooperation, dedication and patience throughout the editorial and publication process. Legal scholarship has a pivotal role in drawing attention to issues that have not previously been explored and serving as a platform for voices that have not previously been heard. It has been my privilege to work alongside you in doing so. I hope that we have done your work justice. I also extend my thanks to the anonymous peer reviewers who volunteered their time to provide these authors with helpful suggestions on how to refine their articles.

The other vital contribution to Issue 48(2) was that of Karly Warner, the Chief Executive Officer of the Aboriginal Legal Service (NSW/ACT) ('ALS') and Chair of the National Aboriginal and Torres Strait Islander Legal Services. I am sincerely grateful to Karly for her engaging Foreword that begins Issue 48(2) and for delivering an equally insightful keynote address at the Issue's launch. Her Foreword platforms the disadvantage that Aboriginal and Torres Strait Islander communities in particular face under the criminal law and highlights the importance of organisations such as the ALS in serving these communities. Her discussion of

movement lawyering and suggested steps for practitioners who hope to support Aboriginal and Torres Strait Islander peoples provide an actionable plan that I am sure will inspire many to advocate and work towards change.

The *Journal* would not exist without the ongoing support of our premier sponsors: Allens, Corrs Chambers Westgarth, Herbert Smith Freehills Kramer and King & Wood Mallesons. Thank you for your ongoing commitment to supporting legal discourse on important issues that can have very real consequences. I extend a special thanks to Allens for their hospitality in hosting the launch of Issue 48(2).

I extend my sincere thanks to Kerry Cooke, our typesetter, and Peta Lee, our cover designer, for their tireless efforts in putting the final touches on this Issue. Thank you also to Alaina Fang for her beautiful artwork. You have taken direction from a very uncreative mind (me) and created a beautiful piece that represents the various levels of power at play within our justice system.

The *Journal* would not be the institution it is today without the generous support of the UNSW Law & Justice Faculty. In particular, I would like to thank the Faculty's Dean, Professor Andrew Lynch, who has long been the *Journal's* most steadfast supporter and has never failed to sing its praises from the rooftops. Likewise, thank you to the *Journal's* Faculty Advisors, Professors Rosalind Dixon and Gary Edmond, for your continued commitment to answer any questions we have and support all of our endeavours. I also would like to thank Associate Professor Helen Gibbon who provided invaluable advice in the conceptualisation of the thematic component of this Issue.

My biggest thanks must go to the *Journal's* Editorial Board, or more fondly named, our 'Boardies'. You were given the difficult task of editing the articles of this Issue largely during the university trimester and I am truly grateful for your dedication to the *Journal* and attention to the detail of the *Australian Guide to Legal Citation* during that time. Put simply, without your efforts, this Issue would not be possible. I joined the Editorial Board in my first year of university and have been lucky enough to meet and work with many fellow Boardies throughout the years. The *Journal's* student-run nature is truly unique and, in my opinion, very impressive. I am forever grateful for your collegiality and friendship throughout the years. I am looking forward to following all that you each achieve in the future.

I would like to especially thank a particular subset of the Editorial Board, the Executive Committee. I have been fortunate enough to experience working with members of both the Volume 47 and Volume 48 Executive Committees in the last 13 months. To the 2024 Executive Committee – Sharanya Murthy, Brad Marzol, Jak Yasuda, Rowan Gray, Rachel Luo and Marcella De Torres – thank you for your warm welcome, laughter and endless support. I am incredibly grateful for our friendship, which I hope I contributed to building with Sharanya in our unofficial 'Social Committee'. To the 2025 Executive Committee – O'felia Zhao, Fiona Shah, Sophie Nguyen, Bisesh Belbase, Grace Leow, Dean Cheong Foo, Elysia Lau and James Elliott – thank you for your words of wisdom and for helping me bring this Issue over the finish line. I am looking forward to seeing all that you achieve over the next year. The Executive Committees of both 2024 and 2025 hold dear places in my heart and have made late nights of editing enjoyable. I will miss working alongside you all.

My penultimate thanks must go to my friends. I am incredibly lucky to say that I have many, even after my endless rants about the editing I must urgently do. Thank you for your continued patience with me, your attempts to understand the niche citation rules I am talking about and for never failing to put a smile on my face. You have been constant lights during this journey.

Last, but certainly not least, I would like to thank my family. This role has certainly not been easy, and I am forever grateful for your continued support that has allowed me to flourish at every stage. I would especially like to thank my mum. Your selfless love and dedication are something I will always admire. I am the woman I am today because of you and I am forever grateful for that.

The *Journal* has been a defining part of my university experience, and I am truly grateful for everything it has given me. While my time on the Board may be ending, my involvement with the *Journal* will not, as I will forever be one of its most ardent supporters. As far as this Issue goes, I have confidence that it will show you the importance of shining a light on all voices, whether it be within the criminal justice system or more broadly. I hope you all enjoy its contents as much as I enjoyed contributing to them.