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30 March 2016

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [alcohol.violence.sen@aph.gov.au](mailto:alcohol.violence.sen@aph.gov.au)

To: The Committee Secretary

**Re: Inquiry into the need for a nationally-consistent approach to alcohol-fuelled violence**

1. Thank you for your email dated 10 February 2016, inviting A/Prof Quilter to contribute to this important reference.
2. The Senate has asked the Legal and Constitutional Affairs References Committee ('the Committee') to inquire into, and report on, the general topic of:

The need for a nationally-consistent approach, negotiated, developed and delivered by the Federal Government together with all state and territory governments, to address and reduce alcohol-fuelled violence, including one-punch related deaths and injuries across Australia

The referral requires particular attention to be given to:

- (a) the current status of state and territory laws relating to:
  - (i) bail requirements and penalties surrounding alcohol-related violence, and
  - (ii) liquor licensing, including the effectiveness of lockout laws and alcohol service laws;
- (b) the effectiveness of the current state and territory:
  - (i) training requirements of persons working within the hospitality industry and other related industries, and
  - (ii) educational and other information campaigns designed to reduce alcohol-related violence;
- (c) the viability of a national strategy to ensure adoption and delivery of the most effective measures, including harmonisation of laws and delivery of education and awareness across the country, and funding model options for a national strategy;
- (d) whether a judicial commission in each state and territory would ensure consistency in judgments relating to alcohol-related violence in line with community standards; and
- (e) any other related matter.

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3. This submission deals with three matters that are relevant to the general topic of the reference, as well as to a number of the enumerated specific terms of reference:

- A. the need for a nationally consistent approach to defining ‘intoxication’ for criminal law purposes (relevant to the general reference and ToR (a)(i), (b)(i) and (c));
- B. the need for a nationally consistent approach to one-punch related deaths and injuries (relevant to general reference and ToR (a)(i)); and
- C. current law and practice in relation to the sentencing of offenders who were intoxicated at the time of the commission of the offence (relevant to general reference and ToR (a)(i) and (d)).

#### **A. THE NEED FOR A NATIONALLY-CONSISTENT APPROACH TO DEFINING INTOXICATION**

4. We submit that there is an important preliminary issue that must be addressed in relation to the need for a nationally-consistent approach to addressing and reducing alcohol-fuelled violence: what constitutes ‘alcohol-fuelled’ violence? The phrase ‘alcohol-fuelled violence’ while resonating in recent media, political and community discourses, is not a phrase known to the law and particularly the criminal law. The more commonly used expression for criminal law purposes is ‘intoxication’. However, as will be discussed below, this expression has defied easy definition in the law. We submit that any nationally-consistent approach should first grapple with the question of defining ‘intoxication’ for legal purposes. In addition, we note that, while this Inquiry refers to ‘alcohol-fuelled’ violence, Australian criminal law statutory provisions are frequently concerned with intoxication by alcohol as well as intoxication caused by other drugs. Care needs to be taken in relation to this Inquiry as the legal concept of ‘intoxication’ is now wider and more complex than when it was limited to the effects of alcohol consumption.

#### **Defining Intoxication**

5. The *Macquarie Dictionary* defines the noun ‘intoxication’ as ‘inebriation’ or ‘drunkenness’ or, more expansively, as ‘overpowering action or effect upon the mind’.<sup>1</sup> None of these definitions provide much guidance about how much a person must have consumed, or how incapacitated they must be in order that his/her state qualifies as ‘intoxicated’. In many social settings, and in general conversations, such specificity is relatively unimportant, and we have developed a number of colloquialisms to describe varying degrees of intoxication (eg from ‘happy’ and ‘tipsy’ to ‘smashed’, ‘legless’ and ‘paralytic’).<sup>2</sup> However, where criminal punishment or the deployment of coercive state powers is a consequence of the label ‘intoxicated’ being applied, it is reasonable to expect that the line of demarcation should be drawn with clarity.

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<sup>1</sup>*Macquarie Dictionary* <https://www.macquariedictionary.com.au/>

<sup>2</sup> For a much longer list, see H G Levine, ‘The Vocabulary of Drunkenness’ (1981) 42 *Journal of Studies on Alcohol* 1038.

6. A 2015 pilot study undertaken by the authors (together with Prof Room and Dr Seear)<sup>3</sup> found, however, that current Australian criminal laws on intoxication are chaotic and confusing.<sup>4</sup> We identified over 500 different criminal law provisions in Australia that attach significance to ‘intoxication’ for a broad range of *purposes*, including coercive police powers, definition of offences and defences, and the determination of sentences.

7. We found that there is no single or widely accepted definition of ‘intoxication’ in Australian criminal laws. Under-definition is widespread with approximately 41% of criminal law provisions attaching significance to intoxication containing *no definition* of intoxication or a very *limited definition* (typically, simply to include the effects of other drugs as well as alcohol eg s 428A of the *Crimes Act 1900* (NSW): “‘intoxication’ means intoxication because of the influence of alcohol, a drug or any other substance”). Under-definition is especially common in criminal laws concerned with public order offences and police powers. While it might be argued that a flexible approach to definition is appropriate in this context – given the need for ‘on-the-spot’ risk assessments – it is also important to recognise the potential for disproportionate impact on already marginalised individuals and communities, particularly Aboriginal and Torres Strait Islander persons.<sup>5</sup>

8. Where an attempt *is* made to distinguish sobriety (or ‘acceptable’ levels of alcohol consumption) from alcohol (and other drug) consumption of a sufficient magnitude to warrant the intervention of the criminal law, multiple different forms of language are used to this end. The pilot study found significant variation both within jurisdictions and nationally as to how intoxication is defined as well as differences between statutes in the same jurisdiction. It identified more than 50 different legislative words and phrases that were designed to demarcate a level of ‘intoxication’ that triggered criminal law legislation in one way or another.<sup>6</sup> To some extent, the variations may be explained by different drafting language having been preferred in different jurisdictions at different points in time. However, there is no obvious justification for their simultaneous operation today, and it seems very likely that operational inconsistencies will occur.

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<sup>3</sup> The study was supported by a grant from the Australian Institute of Criminology (AIC) through the Criminology Research Grants Program.

<sup>4</sup> J Quilter, L McNamara, K Seear & R Room, ‘Criminal Law and the Effects of Alcohol and Other Drugs: A National Study of the Significance of “Intoxication” Under Australian Legislation’ (2016) 39(3) *UNSW Law Journal* (forthcoming).

<sup>5</sup> *NAAJA Ltd v Northern Territory* [2015] HCA 41; J Hunyor, ‘Imprison Me NT: Paperless Arrests and the Rise of Executive Power in the Northern Territory’ (2015) 8(21) *Indig Law Bulletin* 3; T Anthony ‘Paperless arrests are a sure-fire trigger for more deaths in custody’ *The Conversation*, 28 May; L McNamara & J Quilter, ‘The “Bikie Effect” and other Forms of Demonisation: the Origins and Effects of Hyper-criminalisation’ (2016) *Law in Context* (Special Issue on Criminal Law and Criminalisation) (forthcoming); Queensland Crime and Misconduct Commission, *Police Move-on Powers: A CMC Review of their Use* (2010); Queensland Crime and Misconduct Commission, *Policing Public Order: a Review of the Public Nuisance Offence* (2008); NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009); T Walsh, ‘Poverty, Police and the Offence of Public Nuisance’ (2008) 20(2) *Bond Law Review* 198; T Walsh, ‘Policing Disadvantage: Giving Voice to Those Affected by the Politics of Law and Order’ (2008) 33 (3) *Alternative Law Journal* 160; L McNamara and J Quilter, ‘Public Intoxication in NSW: The Contours of Criminalisation’ (2015) 37(1) *Sydney Law Review* 1; J Quilter & L McNamara, ‘Time to Define “the Cornerstone of Public Order Legislation”’: The Elements of Offensive Conduct and Language under the *Summary Offences Act 1988* (NSW)’ (2013) 36(2) *University of New South Wales Law Journal* 534.

<sup>6</sup> Quilter et al, above n 4.

9. The pilot study also found that the multiplicity of phrases in Australian criminal laws that attempt to draw a line between sobriety (or ‘acceptable’ levels of alcohol consumption) and intoxication are in fact poorly adapted to the task. For example, language that purports to describe a level of impairment that warrants the criminal law label ‘intoxicated’ might give the appearance of relative precision, but, on closer inspection, they are frequently circular and unhelpful in defining a legal category of intoxication. For example, what does it mean to say that a victim of sexual assault must be ‘*substantially* intoxicated’ before her/his intoxication may be relied upon to vitiate consent (*Crimes Act 1900* (NSW) s 61HA(6)(a))? And how is this to be proven? How is it possible to determine whether a person’s ‘*mind is disordered* by intoxication or *stupefaction*’ (*Criminal Code* (WA), s 28)? Curiously, some provisions appear to set a standard that is *higher* than appears warranted given the magnitude of ‘risk’ associated with intoxication in the circumstances of the activity in question (eg s 29(1) of the *Firearms Act 1977* (SA), which provides that it is an offence for a person to handle a firearm at a time when the person is ‘*so much under the influence* of intoxicating liquor or a drug as to be *incapable of exercising effective control* of the firearm ...’ (emphasis added)).

10. Only a minority of statutory provisions articulate meaningful behavioural criteria for making assessments about whether a person is intoxicated. In such cases, a commonly used (and copied) test provides that a person is intoxicated if:

- (a) the person’s speech, balance, coordination or behaviour appears to be noticeably impaired; and
- (b) it is reasonable in the circumstances to believe the impairment results from the consumption or use of alcohol or a drug. (*Police Administration Act 1978* (NT), s 127A)

Originally developed in the liquor licensing context as the standard for determining when licensees should stop serving alcohol to patrons (eg *Liquor Control Reform Act 2008* (Vic) s 3AB(1); *Liquor Act 1992* (Qld), s 9A), this formulation has been more widely adopted in recent years in legislation governing public order offences and police powers (eg, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 198(5); *Police Administration Act 1978* (NT), s 127A). Even with the benefit of additional guidelines of the sort that are provided by governments to licensees,<sup>7</sup> observation-based assessment of intoxication is a ‘complex interpretive exercise’,<sup>8</sup> and there is reason to be doubtful about the capacity of decision-makers (eg police officers, licensed premises staff) to reliably estimate a person’s intoxication.<sup>9</sup>

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<sup>7</sup> For example, Western Australian Department of Racing, Gaming and Liquor, *Identifying the Signs of Intoxication* (Perth: Government of WA, 2010); NSW Department of Justice, *Intoxication Guidelines* (Sydney: NSW Trade and Investment, 2015).

<sup>8</sup> A Pennay, ‘Identifying Intoxication: Challenges and Complexities’ in E Manton, R Room & M Thorn M (eds), *Stemming the Tide of Alcohol: Liquor Licensing and the Public Interest* (Canberra: FARE, 2014); S MacLean, A Pennay & S Callinan, *The relationship between blood alcohol content and harm for non-drivers: a systematic review* (Melbourne: Turning Point Alcohol and Drug Centre, 2012).

<sup>9</sup> S Rubenzer, ‘Judging Intoxication’ (2011) 29(1) *Behavioral Sciences and the Law* 116-137. There is, however, evidence that well-executed Standardised Field Sobriety Tests (first developed by the US Department of Transportation’s National Highway Traffic Safety Administration in the late 1970s of the type employed by some US law enforcement authorities are a reasonably reliable method for assessing BAC and impairment (NHTSA, *Standardized Field Sobriety Test (SFST) Validated at BACS Below 0.10 Percent*, No 196 (US Department of Transportation, NHTSA, March 1999), and may also be employed in relation to other drugs (M Lenné, T Triggs and M Regan, *Cannabis And Road Safety: A Review Of Recent Epidemiological, Driver Impairment, And Drug Screening Literature* (Monash University Accident Research Centre, December 2004); C Stough et al, *An evaluation of the Standardised Field Sobriety Tests for the detection of impairment associated*

11. Although familiar because of their use in the driving offences context, *biological detection* approaches to defining intoxication (eg offences based on prescribed concentrations of alcohol (PCA) or blood alcohol concentrations (BAC)) are relatively rare in Australian criminal laws (15% of total statutory provisions).<sup>10</sup>

### **Intoxication from drugs other than alcohol**

12. A further complication with the concept of ‘intoxication’ in Australian criminal law is that many statutory provisions encompass both *alcohol* intoxication and intoxication caused by the consumption of other drugs. While historically the criminal law was concerned with the effects of alcohol specifically, and the preferred legislative terminology were terms such as ‘drunk’, ‘drunkenness’ and ‘inebrates’, over time, governments have sought to bring other drugs within the scope of the concept of intoxication. There are significant jurisdictional differences in how legislatures attempt to achieve this expansive definition of intoxication. For example, in Queensland, for criminal law and policing purposes, the state of ‘intoxication’ may arise from the consumption of alcohol or a long list of other *proscribed* drugs (such as cocaine, heroin, methylamphetamine, and since 2014,<sup>11</sup> steroid drugs such as stanozolol). Some states (eg Tasmania) have enacted ‘parallel’ provisions to define an offence based on alcohol *and* an offence based on other drugs. It is rare, however, for legislation to expressly identify the particular drugs (other than alcohol) that can give rise to intoxication. This blanket approach belies the obvious fact that different drugs have different effects, including depressant, stimulant and hallucinogenic effects.<sup>12</sup>

13. In addition, while the criminal law typically demands that *degrees* of alcohol intoxication be measured (eg BAC or PCA levels), equivalent provisions concerned with illicit drugs define intoxication with reference to the mere *presence* of a (prohibited) drug in a person’s system – no matter how much was consumed, by what means and when. The policy argument might be that while alcohol is a legal drug, where the drug is illegal there is no need to set particular limits since the law is more about determining moral culpability, and mere presence is, arguably, morally equivalent to *excessive* consumption of the legal drug, alcohol. However, if the rationale for the provision in question is a concern to manage the risks associated with *impairment*, whether this results in an incapacity to perform a function (eg driving) or reduced inhibition leading to an increased risk of violence, this argument lacks power.<sup>13</sup> We note that in February 2016 a Magistrate in the NSW Local Court dismissed a charge of ‘drug (cannabis) driving’ in a case where the accused gave evidence that he had consumed cannabis nine days before the time at which he was subjected to a random roadside test. Magistrate Heilpern found that the accused had an honest and reasonable belief that the drug was no longer in his system.<sup>14</sup>

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*with cannabis with and without alcohol*, Monograph No 17 (National Drug Law Enforcement Research Fund, 2006). At a minimum they offer a framework against which the decision-maker can defend or justify his/her assessment.

<sup>10</sup> Quilter et al, above n 4.

<sup>11</sup> See *Drugs Misuse Regulation 1987* (Qld), Sch 1, amended by the *Safe Night Out Legislation Amendment Act 2014* (Qld).

<sup>12</sup> T Babor, R Campbell, R Room & J Saunders, *Lexicon of alcohol and drug terms* (World Health Organization, 1994).

<sup>13</sup> K Woolf K et al, *Driving Under the Influence of Drugs* (Report from the Expert Panel on Drug Driving, UK Department for Transport, 2013).

<sup>14</sup> *Police v Carrall* (unreported, NSW Local Court, Lismore, 1 February 2016).

14. If the rationale for the inclusion of drugs other than alcohol in the definition of intoxication is said to be that consumption carries an enhanced risk of violence, it is necessary to confront the fact that evidence of a causal relationship between the most popular illicit drugs and violence is equivocal.<sup>15</sup>

### **Recommendations?**

15. The authors are currently engaged in further research on these issues. We do not submit that a single definition of intoxication for all criminal law purposes is realistic or desirable. The multiplicity of *purposes* for which significance is attached to intoxication in criminal law statutes, the different *contexts* in which relevant laws operate, and the effects (or assumed effects) of alcohol and other drugs (AOD) that are foregrounded in different statutes, all militate against such simplicity. For example, in the driving context, where safety is the primary motivation and the evidence on the relationship between intoxication and driving ability is relatively clear, biological detection of a prescribed concentration of alcohol has been widely accepted as a legitimate approach to defining intoxication and attaching penal consequences. In the public order context, the precise concentration of alcohol (or other drugs) in a person's system is arguably less important than the question of whether their presence is sufficiently disruptive, threatening or otherwise problematic that criminal justice intervention is warranted. On the other hand, it does not necessarily follow that *any* degree of intoxication should be regarded as a proxy for anti-social or dangerous behaviour.

16. We recommend that serious consideration should be given to the national standardisation of legislative terminology. We recognise that this will be a challenging exercise, given that we also found that there is no one characterisation of AOD and their effects in Australian criminal law, and no single rationale for the attachment of significance to intoxication. In some contexts, the capacity for AOD to impair cognitive function is recognised as a factor relevant to rules governing criminal responsibility. In other contexts, the cognitive impairment effects of AOD are ignored in favour of moral judgments about the culpability of persons who allow themselves to become intoxicated to the extent that they pose a greater risk of engaging in violent behaviour than if they abstained from drinking (or drank less) alcohol, or refrained from consuming illicit drugs. In others still, the *risks* that are considered to be associated with AOD are foregrounded and represent the basis for criminalising intoxication (or, in some cases, consumption).

17. Where circumstances demand that assessment based on observed behaviour is the more appropriate (or feasible) approach, we make two recommendations: i) uniform adoption of expressly stated criteria for making the assessment that a person is intoxicated; and ii) a commitment by police forces to educating the wider community about how police officers are trained to assess intoxication, what criteria are used (especially where, as is often the case currently, the legislation provides no guidance), and how the exercise of intoxication-related powers is reviewed and monitored by police agencies. The latter would be especially valuable in the public order context, and inspire greater confidence about the quality of 'on-the-spot' decision making.

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<sup>15</sup> S Boles & K Miotto, 'Substance abuse and violence: a review of the literature' (2003) 8 *Aggression and Violent Behavior* 155-174.

18. Further research is required to cautiously investigate whether the biological detection model could be more widely adopted, beyond the driving context, and potentially including contexts where the purpose in question is to address the increased risk of violence associated with alcohol intoxication. For instance, since experimental studies show a significant increase in aggressive behaviour at above a blood-alcohol limit of about 0.10%, it has been suggested that a BAC limit at or near this level be set as the operational definition of intoxication in enforcing prohibitions on selling alcohol to the already intoxicated.<sup>16</sup>

19. In relation to the effects of drugs other than alcohol we submit that the policy objective of deterring certain drugs (so long as they remain prohibited substances) needs to be disentangled from the separate question of the capacity of drugs (like cannabis, 'ice', cocaine, and 'ecstasy') to produce cognitive and/or behavioural effects and risks that are relevant to the administration of criminal justice. At the same time, policy-makers must confront the fact that 'legal' prescription drugs (such as diazepam (valium)) can also have impairment effects.<sup>17</sup>

## **B. NEED FOR A NATIONALLY-CONSISTENT APPROACH TO ONE-PUNCH RELATED DEATHS?**

20. In this part of the submission, drawing on the work of one of the authors,<sup>18</sup> we outline the current criminal law approaches to one-punch fatalities in Australia, the problems with these regimes and finally, make brief recommendations as to our suggested approach to so-called one-punch fatalities.

### **Current Australian Criminal Law Approaches to One-Punch Fatalities<sup>19</sup>**

21. A one-punch law was first mooted in Australia in 2007 in the Queensland Parliament through a private member's Bill by then Shadow Attorney-General, Mark McArdle.<sup>20</sup> This Bill followed intense media publicity around three prosecutions for one-punch deaths.<sup>21</sup> The Bill was opposed by the Government and did not pass. It did not take long, however, before one-punch laws were enacted in WA (2008) in *Criminal Code Act 1913* s 281 and the NT (2012) in *Criminal Code Act* s 161A. On both occasions, it followed similar intense media

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<sup>16</sup> Penny, above n 8.

<sup>17</sup> Woolf, above n 13; D Shoebridge, 'Roadside drug testing shouldn't ignore the commonly used drugs that impair driving', *SMH*, 19 October 2015. Roadside drug testing shouldn't ignore the commonly used drugs that impair driving: prescription medication, *Sydney Morning Herald*, 19 October, <http://www.smh.com.au/comment/roadside-drug-testing-shouldnt-ignore-the-commonly-used-drugs-that-impair-driving-prescription-medication-20151019-gkcfex.html>

<sup>18</sup> See in particular, J Quilter 'Criminalisation of Alcohol Fuelled Violence: One-Punch Laws' in T Crofts & A Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015a) pp 82-104; J Quilter, 'One Punch Laws, Mandatory Minimums and "Alcohol-Fuelled" as an Aggravating Factor: Implications for NSW criminal law' (2014a) 3(1) *International Journal for Crime, Justice and Social Democracy* 81; J Quilter, 'The Thomas Kelly case: Why a "one punch" law is not the answer' (2014b) 38(1) *Criminal Law Journal* 16. These references are attached to this submission. See also J Quilter, 'Responses to the Death of Thomas Kelly: Taking Populism Seriously' (2013) 24(3) *Current Issues in Criminal Justice* 439; J Quilter, 'Populism and criminal justice policy: An Australian case study of non-punitive responses to alcohol related violence' (2015b) 48(1) *Australian and New Zealand Journal of Criminology* 24.

<sup>19</sup> This section is drawn largely from Quilter 2015a, above n 18.

<sup>20</sup> On this history see Quilter 2014b, above n 18, 18-21.

<sup>21</sup> For further details see *ibid* 18-19.

coverage of tragic killings of young men. In WA there were three such acquittals<sup>22</sup> whereas, in the NT it was a *conviction* for manslaughter that triggered popular support for the law.<sup>23</sup>

22. A new round of ‘one-punch’ offence creation occurred in 2014. In NSW, following the one-punch deaths of Thomas Kelly (July 2012) and Daniel Christie (January 2014<sup>24</sup>), and an intense media campaign around alcohol-fuelled violence generally and one-punch violence in particular,<sup>25</sup> the NSW Parliament on 30 January 2014 passed a new ‘assault causing death’ offence which came into force the next day (31 January): *Crimes Act 1900* (NSW) s 25A. On 26 August, Queensland followed suit. The *Safe Night Out Legislation Amendment Act 2014* (Qld) added a new Ch 28A ‘Unlawful striking causing death’ to the *Criminal Code* with the offence having the same name and being contained in s 314A.<sup>26</sup> On 18 September, Victoria passed the *Sentencing Amendment (Coward’s Punch Manslaughter and Other Matters) Act 2014* which, inter alia, deems a ‘single punch or strike to be dangerous’ for the purpose of unlawful and dangerous act manslaughter in the *Crimes Act 1958* (Vic) s 4A.<sup>27</sup>

23. To date, the ACT, Tasmania and SA<sup>28</sup> have not moved to introduce such offences, although there has been considerable community, political and media pressure to do so.<sup>29</sup>

### Defining features

24. While there are differences between the various Australian ‘one-punch’ laws, the essence of the new offences is that where a person assaults another and causes that person’s death, the person is guilty of what is, in effect, a new homicide offence. Importantly, unlike murder and manslaughter, there is no fault element (subjective or objective) in relation to the consequence of death. The mere fact that death is *caused* by the assault is sufficient, making this component of the offence one of absolute liability.<sup>30</sup> The penalties for this new form of homicide range from 10 years (WA) to life imprisonment (Queensland), with two jurisdictions imposing mandatory minimum sentences (MMS) (10 years in Victoria and eight in NSW<sup>31</sup>).<sup>32</sup>

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<sup>22</sup> On the three acquittals see *ibid* 19.

<sup>23</sup> See *The Queen v Martyn* (2011) 30 NTLR 157 discussed in *ibid* 19.

<sup>24</sup> Christie was assaulted on 31 December 2013 but remained in a coma until his family turned off life support on 13 January 2014.

<sup>25</sup> See Quilter 2013, 2015a, 2015b, above n 18.

<sup>26</sup> Originally the offence was s 302A, ch 28 ‘Homicide’ after s 302 (murder). Late amendments to the Bill relocated the offence to the newly created ch 28A ‘Unlawful striking causing death’.

<sup>27</sup> On recent Victorian high profile deaths see Appendix A in Paige Darby, ‘Research Note on One-Punch Laws and the *Sentencing Amendment (Coward’s Punch Manslaughter and Other Matters) Bill 2014*’ (Parliamentary Library & Information Service, Department of Parliamentary Services, Parliament of Victoria, September 2014, No 3).

<sup>28</sup> Although the SA Family First Legislative Councillor, Robert Brokenshire MP, introduced a private member’s bill containing a similar offence regime to NSW: see *Criminal Law Consolidation (Assaults Causing Death) Amendment Bill 2014* (lapsed).

<sup>29</sup> See for example, Alexandra Beech, ‘One-punch attacks: Call for 25-year jail sentence in ACT in case of victim’s death’ 666ABC Canberra, 22 January 2016 at <http://www.abc.net.au/news/2016-01-22/one-punch-attacks-liberals-call-for-25-year-jail-terms-in-act/7106856>

<sup>30</sup> The NT offence provides that this component is strict liability: *Criminal Code Act* (NT) s 161A(2).

<sup>31</sup> The MMS in NSW applies to an offender who is intoxicated: *Crimes Act 1900* (NSW), ss 25A(2), 25B. See Julia Quilter, ‘More Law and Order on the Run’ (2014) 39(1) *Alternative Law Journal* 50.

<sup>32</sup> Further detail on the major points of similarity and difference between these laws are summarised in Table 6.1 in Quilter 2015a, above n 18.



25. Some general observations may be made about the development of these laws. First, the heavily rhetorical focus on ‘one-punch’, particularly ‘alcohol-fuelled’, fatalities is not reflected in the drafted provisions. In no instance is the conduct confined to a *single* punch or even to a *punch*. Furthermore, in only one jurisdiction (NSW) is ‘intoxication’ a relevant factor in the offence.<sup>33</sup> Secondly, compared with the earlier offences (WA and NT), which are defined in broad terms, the most recently introduced offences (NSW, Queensland and Victoria) adopt a narrow approach to the type of violent conduct that falls within the offence definition. Finally, there appears to be an inverse relationship between the specificity with which the proscribed conduct is described and the penalty that attaches: the more narrowly confined offences have significantly higher penalties.

### **Problems with the current laws**

26. While Quilter has previously set out the problems with the current Australian legal approaches to one-punch fatalities,<sup>34</sup> this submission highlights three issues in particular from that research.

#### *Mismatch between stated justification and resulting laws*

27. In each State or Territory the primary justification for introducing a new form of homicide (various forms of assault causing death) was the need to address the problem of ‘one-punch’ fatalities. In the case of the more recently enacted laws there was a particular focus on *alcohol-fuelled* one-punch fatalities.

28. In spite of often heavily rhetorical statements about the need for such laws to protect the community from ‘alcohol-fuelled’ one-punch violence,<sup>35</sup> no jurisdiction has confined the assault to a single punch, or indeed, a punch. The qualifying conduct is variously defined: *any* ‘unlawful assault’ (WA); any ‘violent act’ (including application of any form of direct force whether or not by an offensive weapon) (NT); ‘intentionally hitting’ ‘with any part of the person’s body or with an object held by the person’ (NSW); any ‘unlawful striking’ ‘by punching or kicking, or by otherwise hitting using any part of the body, with or without the use of a dangerous or offensive weapon or instrument’ (Queensland); and a ‘punch or strike’ ‘delivered with any part of the body’ to the head/neck which causes injury to that area whether by a single strike or one of a series of strikes (Victoria). In only one jurisdiction (NSW) is ‘intoxication’ a specific feature of the offence definition (as an aggravating factor).<sup>36</sup> In the majority (WA, NT, Queensland and Victoria) this justificatory ‘context’ – the need to address alcohol-fuelled violence – has been omitted from the laws altogether. It neither features as part of the offence definition nor as a sentencing factor.

29. The mismatch between the rhetorical *rationale* for introducing ‘one-punch’ laws and the manner in which they have been drafted is even more problematic when we consider the doctrinal reasoning that was also advanced for introducing this special form of homicide. In the Code jurisdictions, the argument was made that there was a ‘legal gap’ that required

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<sup>33</sup> The mooted SA provision (see above n 28) also provided for an aggravated assault causing death offence whilst intoxicated.

<sup>34</sup> See in particular Quilter 2014a and 2015a, above n 18.

<sup>35</sup> See Quilter 2015a, above n 18, 85-90.

<sup>36</sup> Queensland’s *Safe Night Out Legislation Amendment Act 2014*, introduces an aggravating circumstance in ch 35A being ‘adversely affected by an intoxicating substance’ for certain assault offences not including unlawful striking causing death.

filling because of the operation of the accident defence in the context of one-punch fatalities.<sup>37</sup> The argument advanced is that a ‘one-punch’ law is necessary in jurisdictions such as WA and Queensland, not because manslaughter is viewed as too lenient but because manslaughter may not be available in such situations.<sup>38</sup> In the common law States, the argument was advanced that a one-punch fatality may not meet the legal test for ‘dangerousness’ for unlawful and dangerous act manslaughter: would the reasonable person, in the position of the defendant, have appreciated that the unlawful act exposed the victim to an *appreciable risk of serious injury*?<sup>39</sup> Thus, ‘dangerousness’ requires ‘an appreciable risk of serious injury’ from the punch but not, as in the Code jurisdictions, that the death be reasonably foreseeable as a result of the punch.<sup>40</sup> For example, the Victorian Attorney General, argued that the common law test sets the bar too high for ‘one-punch’ fatalities.<sup>41</sup>

30. Yet, as discussed above, in no jurisdiction has the offence been confined either to a ‘single’ punch or, indeed, to a punch. It is clear that the provisions go well beyond the stated justification of dealing with one-punch fatalities. Furthermore, the breadth and potential seriousness of the conduct that may be prosecuted within the terms of the provisions (discussed further below) undermines the claimed justification for creating such offences. That is, manslaughter would clearly be available to prosecute much of the conduct that could now be brought within the purview of the new offences. For example, a ‘series of punches or strikes’ to a person particularly to the head/neck<sup>42</sup> are likely to be ‘dangerous’ without the need for a deeming provision, as is ‘intentionally hitting’ a person, on numerous occasions, with an object.<sup>43</sup> It is also difficult to imagine that where a person strikes someone with a dangerous weapon on a number of occasions to the head/neck that the defence of accident will be accepted.<sup>44</sup>

### *The vice of particularism*

31. The more recently introduced offences (NSW, Queensland and Victoria) demonstrate a trend towards narrower offence definitions confining the qualifying conduct to certain *kinds* of assaults.<sup>45</sup> This is problematic as it arbitrarily excludes other types of assaults (which may be equally fatal) and opens up arguments as to whether particular conduct is included or excluded within the offence. For example, the NSW law arbitrarily confines the ‘assault’ element to conduct that amounts to ‘intentionally hitting the other person with any part of the person’s body or with an object held by the person’.<sup>46</sup> If regard is had to past cases of unlawful and dangerous act manslaughter it becomes clear that there are numerous ways that a fatal ‘assault’ may occur: shooting; stabbing; brawls; group assault; assault; stomping; bashing; striking; one-punch; beating; ramming; hitting; kicking; head-butts; gouging;

<sup>37</sup> See John Elferink, ‘Gap in Legislation Closed by One Punch Law’ (Media Release, 28 November 2012); discussed in Quilter 2014a, above n 18.

<sup>38</sup> Discussed further in Quilter 2014b, above n 18.

<sup>39</sup> *Wilson v R* (1992) 174 CLR 313, 333.

<sup>40</sup> Quilter 2014a, above n 18.

<sup>41</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2823-2824 (Robert Clark).

<sup>42</sup> *Crimes Act 1958* (Vic) s 4A(3).

<sup>43</sup> *Crimes Act 1900* (NSW) s 25A(1)(a).

<sup>44</sup> *Criminal Code* (Qld) ss 314A(1) and (7).

<sup>45</sup> It is noted that the reverse criticism can be made about the earlier laws (WA and NT), namely that the broad offence definitions contained in these provisions produces operational problems, including the capacity to draw within the purview of the provisions very serious domestic violence matters, with troubling sentencing consequences given that the WA offence, for example, only carries a maximum penalty of 10 years: see Quilter 2014b, above n 18, 23-26.

<sup>46</sup> See further Quilter 2014a, above n 18, and Quilter 2015b, above n 18, 93-97.

tackling; strangling; suffocation; asphyxiation; pushing; forcing; throwing; burning; bruising; shaking; and drowning.<sup>47</sup>

32. The focus of the NSW offence on ‘intentionally hitting’ means that a range of these ‘assaults’ will be included but others are arbitrarily excluded. Thus, on the one hand, very serious assaults such as brawls, stomping, bashing, striking, kicking, beating and head-butts are likely to meet the criteria of ‘intentional hitting’ in s 25A of the *Crimes Act 1900*. On the other hand, assaults that occur by way of gouging, pushing, forcing, throwing, tackling, strangling, asphyxiation, burning, shaking and drowning, are unlikely to qualify. Similarly, assaults by ‘throwing’ an object (eg rock, bar stool, beer bottle) at the person are excluded as the object must be ‘held’ by the person. There is no principled basis for these distinctions and, certainly, the line is not drawn at a meaningful point in terms of the objective seriousness of the offence.

33. Similar criticisms may be made of Queensland and Victoria. Section 314A of the *Criminal Code (Qld)* requires three elements: a person unlawfully strikes another person; the strike is to the head/neck; and causes the death of the other person. ‘Strike’ is defined:

**strike**, a person, means directly apply force to the person by punching or kicking, or by otherwise hitting using any part of the body, with or without the use of a dangerous or offensive weapon or instrument.<sup>48</sup>

While avoiding the NSW failure to define ‘hitting’, the Queensland law, like NSW, arbitrarily removes striking by throwing an object. The Queensland provision contains a further element of specificity: the strike must ‘land’ on the victim’s head/neck. Thus, a strike to the chest causing a victim to fall backwards and hit his/her head on the road or footpath and die (ie reminiscent of a ‘classic’ one-punch attack) will not fall within the definition of unlawful striking causing death. The Queensland law also excludes a number of other fatal assaults identified above largely depending on where the strike ‘lands’. Furthermore, the specificity of the Queensland definition is likely to invite evidentiary challenges to the Crown’s capacity to prove that the strike was to the head/neck and/or to establish causation. For example, where an assault includes a punch to the head and a strike to the chest, but it is the latter that makes the victim topple over and hit a hard surface and suffer fatal injuries, it is doubtful that it can be said that the strike to the head/neck was the direct or indirect cause of death.

34. The Victorian law ‘deems’ certain acts to be ‘dangerous’ for the purposes of unlawful and dangerous act manslaughter. While it has similar problems to the NSW and Queensland laws, it may produce exclusions that are even more arbitrary. The four elements of the s 4A deeming provision are: a single punch/strike (which may be part of a series of punches/strikes<sup>49</sup>); delivered to the head/neck; that by itself causes an injury to the head/neck; and which cause the person’s death. A ‘strike’ is defined as ‘a strike delivered with any part of the body’,<sup>50</sup> thereby excluding a ‘strike’ by throwing an object. Unlike the NSW and Queensland provisions the Victorian definition also excludes strikes by an object/weapon.

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<sup>47</sup> Quilter 2014a, above n 18, 95.

<sup>48</sup> *Criminal Code (Qld)* s 314A(7).

<sup>49</sup> *Crimes Act 1958 (Vic)* s 4A(3). The Explanatory Notes provide that the prosecution must identify a single punch or strike as the act that caused the victim’s death and if it cannot, the common law test of dangerousness will apply: at 2.

<sup>50</sup> *Crimes Act 1958 (Vic)* s 4A(6).

35. In Victoria, as in Queensland, the punch/strike must ‘land’ on the head/neck, excluding fatal assaults that involve blows to other parts of the body raising similar causation issues to Queensland. The Victorian law goes further by requiring the punch/strike to the head/neck to cause ‘injury’.<sup>51</sup> The justification advanced in the second reading speech to the Bill for this specificity was that it would remove trivial instances (eg a ‘very light or playful slap to the head’<sup>52</sup>). Yet, given that no *mens rea* (subjective or objective) is required in relation to the consequence component of these new assault causing death offences, it is unclear why it is only ‘strikes’ to the head/neck which cause injury to those regions that fall within the parameters of the offence. Furthermore, proving that the strike caused ‘injury’ may be difficult given its nebulous and victim-referential definition in s 15: ‘*injury* includes unconsciousness, hysteria, pain and any substantial impairment of bodily function.’ Query how any of these states can be proven when the victim is dead? Finally, where a defendant is found guilty of the offence and the DPP has given notice of an intent to seek the MMS,<sup>53</sup> the sentencing court needs to be satisfied beyond reasonable doubt of the matters set out in s 9C(3) of the *Sentencing Act 1991* (Vic), which include that the offender ‘*intended* that the punch/strike be delivered to the victim’s head/neck’.<sup>54</sup> Again, this demonstrates a very narrow and arbitrary focus. Where a defendant *intends* to kick the victim in the chest but misses and it ‘lands’ on the victim’s neck, the defendant may be convicted of the offence but no MMS can be imposed. It is also unclear how this is to be proven given that an ‘intent’ to punch/strike the victim’s head/neck is not an element of s 4A.<sup>55</sup>

36. The approach to offence drafting in NSW, Queensland and Victoria exhibits the vice of what Horder has called ‘particularism’:<sup>56</sup> the inclusion of definitional detail that merely exemplifies rather than delimits wrongdoing. The problem with this approach, as argued above, is that: ‘[v]ery precise specification of the modes of responsibility opens up the possibility of unmeritorious technical argument’ over which conduct falls within the offence and creates ‘arbitrary distinctions between [that conduct] included and those left out’.<sup>57</sup> Not only is there the danger that this will produce unintended outcomes in particular cases, but, more generally, the communicative function of the criminal law may be undermined.<sup>58</sup> Certainly, it is likely that in any prosecution under Australia’s newest homicide laws, that technical legal arguments will be raised about what types of conduct do (and do not) fit within the offence definitions.

#### *Failure to consider the normative basis for criminalisation*

37. Another problem with how assault causing death offences have been drafted is a failure to give principled consideration to where they sit in the hierarchy of fatality crimes.<sup>59</sup> Hierarchy analysis offers a valuable normative perspective for assessing the need or otherwise for a new

<sup>51</sup> *Crimes Act 1958* (Vic) s 4A(6) provides that ‘injury’ has the same meaning as in Subdivision 4.

<sup>52</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2824 (Robert Clark MP).

<sup>53</sup> *Sentencing Act 1991* (Vic) s 9A(2).

<sup>54</sup> *Sentencing Act 1991* (Vic) s 9C(3)(b).

<sup>55</sup> Unlike other jurisdictions, however, s 4A does not limit the circumstances in which a punch or strike may be unlawful and dangerous for the purposes of manslaughter (s 4A(5)).

<sup>56</sup> Jeremy Horder, ‘Rethinking Non-fatal Offences Against the Person’ (1994) 14(3) *Oxford Journal of Legal Studies* 335.

<sup>57</sup> *Ibid* 340. See also Arlie Loughnan, ‘Drink Spiking and Rock Throwing: The Creation and Construction of Criminal Offences in the Current era’ (2010) 35(1) *Alternative Law Journal* 18, 20-21.

<sup>58</sup> RA Duff, ‘Penal Communities’ (1999) 1(1) *Punishment and Society* 27; RA Duff, *Punishment, Communication and Community* (Oxford University Press, 2001).

<sup>59</sup> See Quilter 2014ab, above n 18, 88-91; Quilter 2014b, above n 18, 16-23.

offence (and, if so, the manner in which it should be defined), and for evaluating the broader, longer-term implications of a contemplated change to the criminal law. Although they have tended to be under-appreciated, hierarchy considerations offer an important dimension to the normative scholarship that has proliferated in the last decade on the legitimate limits of the criminal law,<sup>60</sup> and could improve the quality and integrity of law reform decision-making. Unfortunately, there is little evidence that attention has been paid to hierarchy in the conception and drafting of recently introduced assault causing death offences in Australia. A failure to address the hierarchy of offence seriousness contributes to a lack of coherence in the criminal law and undermines the principles of ‘fair labelling’ which play an important part in the communicative function of the criminal law.<sup>61</sup>

38. No law reform commission in Australia has recommended the introduction of a ‘one-punch’ law – in fact, they have recommended against such a course of action.<sup>62</sup> Analysis of the approach to hierarchy adopted by an overseas law reform body that *did* recommend the introduction of a ‘one-punch’ law is revealing.<sup>63</sup> In 2008 the Law Reform Commission of Ireland (LRCI) recommended introducing an assault causing death offence, as part of its review of homicide and manslaughter. It did so on the basis that a one-punch death often involved insufficient culpability to warrant a manslaughter conviction.<sup>64</sup> For the LRCI, a crime of assault causing death did not represent a *more* punitive response to one-punch deaths than manslaughter, but a *less* serious offence reflecting reduced culpability. As the LRCI said:

[T]he Commission is still of the opinion that the most problematic aspect of unlawful and dangerous act manslaughter is that it punishes very harshly people who deliberately perpetrate minor assaults and thereby unforeseeably cause death, due perhaps to an unexpected physical weakness in the victim. The Commission thinks that minor acts of deliberate violence (such as the ‘shove in the supermarket queue’ scenario) which unforeseeably result in fatalities should be removed from the scope of unlawful and dangerous act manslaughter because where deliberate wrongdoing is concerned they are truly at the low end of the scale. In many ‘single punch’ type cases there would be no prosecution for assault had a fatality not occurred; prosecution for manslaughter following a minor assault hinges on an ‘accident’ — the chance outcome — of death.

...

For the new offence to come into play the culpability of the accused *should be at the lowest end of the scale where deliberate wrongdoing is concerned*. ...The main purpose of introducing a new statutory offence of ‘assault causing death’ would be to mark the fact that death was caused in the context of a minor assault. Recognising the

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<sup>60</sup> See, eg David Brown, ‘Criminalisation and Normative Theory’ (2013) 25(2) *Current Issues in Criminal Justice* 605; Doug Husak, *Overcriminalisation* (Oxford University Press, 2008); Antony et al (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010). See also L McNamara, ‘Criminalisation Research in Australia: Building a Foundation for Normative Theorising and Principled Law Reform’ in T Crofts & A Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) pp 33-54.

<sup>61</sup> Horder, above n 41; Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 7<sup>th</sup> ed, 2013), 78-9; James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71(2) *Modern Law Review* 217; Duff, ‘Penal Communities’, above n 43.

<sup>62</sup> Quilter 2014b, above n 18, 21.

<sup>63</sup> See Quilter 2014b, above n 18, 21-23.

<sup>64</sup> Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter* (2008) ch 5, ‘Involuntary Manslaughter: Options for Reform’ at [5.39]-[5.43].

sanctity of life by marking the death may be of benefit to the victim's family in dealing with their grief.<sup>65</sup>

39. In terms of the hierarchy of fatality crimes, assault causing death logically sits on the third tier, below manslaughter (tier two), and murder (tier one). This approach to the hierarchical position of assault causing death was adopted in Australia's first such law, in WA, where the maximum penalty is 10 years, and where the courts have confirmed that such crimes sit beneath manslaughter in the seriousness hierarchy of fatality crimes.<sup>66</sup> This is its logical position – on the third tier – because it has neither the subjective fault elements of murder nor the objective fault elements of manslaughter. It should be confined to the least culpable forms of fatal conduct and, as a matter of principle the offence should be defined accordingly.

40. Comparative analysis of the hierarchy of Australia's assault causing death provisions by one of the authors,<sup>67</sup> demonstrates significant differences between the earlier (WA and NT) offences, and the later (NSW, Queensland and Victorian) regimes. Consistent with the principles endorsed above, the WA and NT offences are located squarely on a 'third tier' of fatality crimes – with significantly lesser maximum penalties comparatively to manslaughter and murder. By comparison, the later regimes (NSW, Queensland and Victoria) are more troubling having a number of seriousness indicia that indicate in NSW, Queensland and Victoria assault causing death has been placed on a 'second tier' of fatality offences – above manslaughter. For example, the maximum penalty is equivalent to murder and manslaughter in Queensland, and equivalent to manslaughter in Victoria and NSW (for the aggravated offence). Victoria and NSW impose a MMS<sup>68</sup> (not applicable to manslaughter) and the Victorian offence is located prior to manslaughter.

*Legally, can there said to be a one-punch category?*

41. As the discussion above indicates, the drafting of the recent assault causing death offences, is not confined to a single-punch or even a punch. In addition, the authors note that the NSW Court of Criminal Appeal (NSWCCA) has recently expressed the view that there is no category of manslaughter denoted by a 'one-punch' or 'single-punch' element or characteristic.<sup>69</sup> This is because the circumstances of such cases vary widely:

... it is not meaningful to speak of one-punch or single-punch manslaughter cases as constituting a single class of offences. The circumstances of these cases vary widely...<sup>70</sup>

Instead, '...attention must be given to the particular case before the sentencing court'.<sup>71</sup>

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<sup>65</sup> Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter* (2008), Chapter 5 'Involuntary Manslaughter: Options for Reform', [5.39]-[5.43], emphasis added.

<sup>66</sup> See Quilter 2014b, above n 18, 23.

<sup>67</sup> See Quilter 2015a, above n 18, 95-100 especially Table 6.2.

<sup>68</sup> Section 314A offence has a mandated statutory minimum non-parole period of 80% of the head sentence or 15 years, whichever is the lesser: *Criminal Code* (Qld) s 314A(5).

<sup>69</sup> *R v Loveridge* [2014] NSWCCA 120 at [215].

<sup>70</sup> *R v Loveridge* [2014] NSWCCA 120 at [215].

<sup>71</sup> *R v Loveridge* [2014] NSWCCA 120 at [215].

42. In stating this, the NSWCCA was echoing statements made earlier by appellate courts in the United Kingdom.<sup>72</sup> For example, in *R v Loveridge* (at [208]) the NSWCCA state:

*In Reference By the Attorney General Under Section 36 Criminal Justice Act 1988* [2005] EWCA Crim 812, Judge LJ (Hallett J and Sir Charles Mantell agreeing) observed, at [10], that "*It is in truth not realistic to treat what is described as one punch manslaughter as comprising a single identical set of circumstances*", with cases involving death resulting from a single blow varying greatly in their seriousness. (emphasis in original)

43. It is submitted that legally it is problematic to speak of a 'category' of so called 'one-punch' fatalities. This Inquiry, therefore, should carefully assess the appropriateness or otherwise of using the terminology of 'one-punch' fatalities.

### **Recommendations**

44. It is submitted that so-called one-punch fatalities are adequately covered by the various forms of murder and manslaughter defined in all Australian states and territories. Recent moves by legislatures to introduce a new form of homicide (forms of assault causing death offences) were unnecessary and have produced legal and operational complexity to the law. It is, therefore, recommended that no further offences regarding assault causing death should be added to the statute books.

45. Should this Inquiry find there is a need for a nationally consistent 'one-punch law', the authors submit that it should be drafted in a way that squarely places it within a third category of fatal violence – that is, one less serious than murder and manslaughter.

### **C. CURRENT LAW AND PRACTICE IN RELATION TO THE SENTENCING OF INTOXICATED OFFENDERS**

46. In this part of the submission we outline current approaches to sentencing intoxicated offenders.

#### **Mitigation?**

47. Australian courts consistently articulate a 'general rule' that intoxication per se does not operate as a mitigating factor.<sup>73</sup>

48. (We note that since 2014, this approach – ie that intoxication *not* be treated as a mitigating factor – has been mandated by legislation in NSW and Queensland: *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(5AA), as amended by the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW); *Penalties and Sentences Act 1992* (Qld) s 9A, as amended by the *Safe Night Out Legislation Amendment Act 2014* (Qld).)

49. Despite the 'general rule' noted above, our review of appellate decisions handed down in the period 2010-2014 shows that Australian courts recognise a number of circumstances in which intoxication may operate as an 'indirect' mitigating factor:

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<sup>72</sup> *R v Loveridge* [2014] NSWCCA 120 at [208]-[213].

<sup>73</sup> For example: *Arthars & Plater* [2013] VSCA 258; *Prince* [2013] NSWCCA 274.

1. in support of the characterisation of the offender's conduct as 'out of character';<sup>74</sup>
2. in support of the characterisation of the offender's conduct as spontaneous/unplanned;<sup>75</sup>
3. where the offender's AOD use and intoxication on the occasion in question is associated with dependency/addiction or mental illness (or cognitive impairment);<sup>76</sup>  
or
4. where the offender's intoxication is located in a wider context of disadvantage, specifically, Indigenous community disadvantage.<sup>77</sup>

50. More tentatively, given the ambiguous language often used by courts, we would add a fifth category: where intoxication is said to 'explain' an offence.<sup>78</sup> We suggest that where a sentencing or appellate court uses language that emphasises the role of intoxication in the offending behaviour (thereby 'explaining' the offence) there is an implied reduction in the offender's culpability. The logic appears to be that the person would not have offended if s/he had been sober.

51. The precise meaning of the 'out of character' *exception* is hard to discern from the case law, and there appears to be some variation in how it is conceived and applied. To a lesser extent, the same may be said of the degree of deliberation (unplanned) 'exception'. We also observed that when intoxication evidence is presented alongside or in association with evidence of mental illness, courts face the challenging task of 'disentangling' the two issues, and making a very difficult (probably impossible) determination as to which factor played the greater role in the offending behaviour.<sup>79</sup>

52. Courts are regularly required to grapple with the complex relationship between mental illness, AOD use and criminal offending. In the sentencing context, the intoxication/mental illness relationship may take a number of forms:

- (i) A mental illness may have been exacerbated by AOD consumption;
- (ii) A mental illness may have contributed to AOD abuse;
- (iii) AOD use may have triggered the mental illness;
- (iv) AOD abuse may constitute the diagnosed mental illness (eg drug dependence disorder); and
- (v) A mental illness may have contributed to AOD abuse (eg 'self-medication' for coping with mental illness symptoms).

53. Judges struggle with the task of separating the offender's intoxication from his/her mental illness and determining the role that each played in the offending behaviour. A recurring ground of appeal in our study was that the sentencing judge had placed too much weight on mental illness rather than attribute the behaviour to intoxication (ie in the context of a Crown appeal that the sentence was inadequate), or vice versa (in the context of a defence appeal against severity).

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<sup>74</sup> For example: *Hasan* (2010) 222 A Crim R 306; *GWM* [2012] NSWCCA 240.

<sup>75</sup> For example: *GWM* [2012] NSWCCA 240.

<sup>76</sup> For example: *Chandler* [2012] NSWCCA 135; *Bennett* [2011] VSCA 253.

<sup>77</sup> *Bugmy* (2013) 249 CLR 571; *Munda* (2013) 249 CLR 600.

<sup>78</sup> For example: *Bourke* [2010] NSWCCA 22; *Mendes* (2012) 221 A Crim R 161.

<sup>79</sup> For example: *Chandler* [2012] NSWCCA 135.



54. In *Chandler* [2012] NSWCCA 135 the Court emphasised that, although it is difficult to do so, the two factors of intoxication and mental illness must be ‘disentangled’.<sup>80</sup> Although artificial in many respects (and perhaps impossible), the driver appears to be that mental illness is consistently regarded as a mitigating factor (due to decreased moral culpability, and a reduced need for general deterrence<sup>81</sup>) whereas, intoxication is generally not regarded as mitigating. In a number of cases, courts were faced with a complex mixture of intoxication and mental illness (and sometimes cognitive impairment) evidence.<sup>82</sup> In *Adzioski* [2013] NSWCCA 69 (where the offender suffered from schizophrenia) the Court said:

While the level of the applicant’s intoxication might provide a complete answer to the offending, his Honour regarded such a result as overly simplistic in that it might artificially deny the presence of the underlying mental health condition. His Honour concluded that the answer was likely to involve a synthesis of all of those factors. ([35])

### Aggravation?

55. The case law recognises that offender intoxication may *aggravate* the sentence in at least two circumstances. The first is where the person is ‘recklessly’ intoxicated: s/he knows (based on previous experiences) that when s/he consumes alcohol (and/or other drugs) that s/he is at greater risk of offending or becoming violent.<sup>83</sup> Although aggravation in such circumstances appears consonant with (subjective) principles of criminal responsibility, it is unclear what evidence needs to be before the sentencing court before an offender can be regarded as having been ‘recklessly’ intoxicated. Should there be evidence of previous offending? Is evidence of previous (AOD-related) offending? Or will evidence of previous AOD abuse or addiction be sufficient? (If so, how are ‘abuse and ‘addiction’ defined?<sup>84</sup>) Must it be shown that the offender had insight about the role of AOD consumption in his/her criminal behaviour? Or is such a person ‘deemed’ to have such insight, by virtue of past offending while intoxicated?

56. The second circumstance in which the cases we examined suggested that intoxication may be an aggravating factor, is where the crime in question takes the form of ‘random’ street violence. Without expressly naming *public* intoxication as an aggravating factor, courts have indicated that such cases give rise to a greater need for specific and general deterrence.<sup>85</sup> For example, in *R v Loveridge* the NSWCCA undertook a lengthy discussion of various cases (especially from the UK) which featured violence,<sup>86</sup> committed in a public area or street<sup>87</sup> that were fuelled by alcohol and drugs.<sup>88</sup> The NSWCCA indicated that cases involving such violence will give rise to a need for an ‘emphatic sentencing response’:

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<sup>80</sup> *Chandler* [2012] NSWCCA 135, [56]-[59].

<sup>81</sup> Note, however, that sometimes the nexus between an offender’s mental illness and criminal offending is regarded as requiring greater specific deterrence and a need for protecting the public.

<sup>82</sup> For example: *MDZ* [2011] NSWCCA 243; *George* [2013] NSWCCA 263.

<sup>83</sup> For example: *Mendes* (2012) 221 A Crim R 161 at [75]; *Gosland & McDonald* [2013] VSCA 269.

<sup>84</sup> K Seear & S Fraser, ‘Beyond criminal law: The multiple constitution of addiction in Australian legislation’ 92(14) 22(5) *Addiction Research & Theory* 438-450.

<sup>85</sup> For examples: *Hards* [2013] VSCA 119; *Loveridge* [2014] NSWCCA 120.

<sup>86</sup> See *R v Loveridge* [2014] NSWCCA 120 at [101], [103], [105], [107], [122], [152], [156], [168], [203], [206], [207], [209], [209], [210], [212], [213], [216], [219], [234] and [267].

<sup>87</sup> See *R v Loveridge* [2014] NSWCCA 120 at [101], [103], [105], [107], [122], [156], [168], [206], [208], [209], [210], [212], [213], [216], [219], [269], [275] and [281].

<sup>88</sup> See *R v Loveridge* [2014] NSWCCA 120 at [101], [102], [103], [105], [107], [120], [122], [204], [210], [216] and [218].

...the commission of offences of violence, including manslaughter, in the context of alcohol fuelled conduct in a public street or public place is of great concern to the community, and calls for an emphatic sentencing response to give particular effect to the need for denunciation, punishment and general deterrence.<sup>89</sup>

57. The NSWCCA also attached significance to other features of the type of violence in question: that the attack was unprovoked (or that the victim was innocent);<sup>90</sup> that the violence was gratuitous;<sup>91</sup> and that the victim was randomly selected, without warning.<sup>92</sup> It seems that, when these additional elements are present, the seriousness of the offence is increased:

The use of lethal force against a vulnerable, unsuspecting and innocent victim on a public street in the course of alcohol fuelled aggression accompanied, as it was, by other nonfatal attacks by the Respondent upon vulnerable, unsuspecting and innocent citizens in the crowded streets of King Cross on a Saturday evening, called for the express and demonstrable application of the element of general deterrence as a powerful factor on sentence in this case.<sup>93</sup>

58. One of the authors has recently conducted research on the effect the decision in *R v Loveridge* has had on sentencing in matters involving these features.<sup>94</sup> That research indicates that subsequent sentences have increased considerably.<sup>95</sup>

59. Finally, we note that the NSW Sentencing Council has recently examined a proposal that intoxication be treated as a ‘mandatory’ aggravating factor where ‘the offence involved violence because the offender was taking, inhaling or being affected by a narcotic drug, alcohol or any other intoxicating substance’.<sup>96</sup> In relation to that proposal, we submitted (with Dr Seear and Prof Room) that, among other things, the relationship between AOD and violence is complex and multi-factorial raising doubt about the validity of any criminal law reform that attributes special status to the role of AOD consumption as predictably or singularly causal.

60. It is noted that the NSW Sentencing Council ultimately recommended against adopting intoxication as a mandatory aggravating factor in sentencing.<sup>97</sup> The Council stated:

[2.23] Noting the strong opposition to the proposal expressed by stakeholders we are not convinced that the proposal would have a significant impact on deterring alcohol

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<sup>89</sup> *R v Loveridge* [2014] NSWCCA 120 at [215] & [216] (emphasis added).

<sup>90</sup> *R v Loveridge* [2014] NSWCCA 120 at [102], [105], [203] [208] & [210].

<sup>91</sup> *R v Loveridge* [2014] NSWCCA 120 at [152], [208], [209], [210] & [213].

<sup>92</sup> *R v Loveridge* [2014] NSWCCA 120 at [102], [105], [122], [152], [156].

<sup>93</sup> *R v Loveridge* [2014] NSWCCA 120 at [105].

<sup>94</sup> See J Quilter, ‘Alcohol-Fuelled Public Violence: the *Loveridge* Effect’ (paper presented at *Criminal Law Reform: Past, Present and Future*, 3<sup>rd</sup> Annual Australian Criminal Law Workshop, UTS, 18th February 2016).

<sup>95</sup> The author identified 9 cases involving one-punch fatalities since *Loveridge* displaying these characteristics and found that the head sentence in these cases was, on average, 3 years and 9 months higher, and the median increased by 3 years and 1 month, to sentences in a previous study of one-punch cases: see Quilter 2014b, above n 18. In terms of the non-parole period, the average increase since *Loveridge* was 3 years and 2 months whereas the median increase was 3 years and three months.

<sup>96</sup> NSW Sentencing Council, ‘Alcohol and drug fuelled violence’ (August 2015). While this report was prepared in August 2015 and forwarded to the NSW Attorney General it was only publicly released in March 2016.

<sup>97</sup> The NSW Sentencing Council ultimately recommended against adopting the proposal to include intoxication as a mandatory aggravating factor: see *Ibid* at [0.5], [0.7] and ch 2 ‘A new aggravating factor’.

and drug fuelled violence. It may also have a number of negative unintended consequences, even if adjusted to take into account some of the more technical objections to the use of particular terms.

[2.24] We are particularly concerned that the proposal would be difficult for the prosecution to prove, and add to the complexity of sentencing hearings. Its potential to reduce guilty pleas and distort agreed facts would also have significant negative consequences for the criminal justice system.

[2.25] Even were it to be successfully applied in a significant number of cases, the real possibility that the proposal would increase the prison population, and impact disproportionately on Aboriginal people and Torres Strait Islanders, without having a significant impact on crime, means that we do not support the proposal.

Please feel free to contact us should you require any further information.

Sincerely

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