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

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Papers attached

1. 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;

2. 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;

3. J Quilter, 'The Thomas Kelly case: Why a "one punch" law is not the answer' (2014b) 38(1) *Criminal Law Journal* 16.

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CRIMINALISATION OF ALCOHOL-FUELLED VIOLENCE

One-Punch Laws

Julia Quilter

CONTENTS

INTRODUCTION

In this chapter I examine a recent development in the history of the criminalisation of fatal violence in Australia: the creation of a discrete homicide offence to address deaths that are caused in the context of a 'one-punch' assault. Until recently it was assumed that the category of assault-based killings for which a person should be held criminally responsible was covered by the various forms of murder and manslaughter that are defined in all Australian states and territories.[1] And yet, in 2014, New South Wales ('NSW'), Queensland and Victoria followed earlier moves by

1 See Paul Fairall, *Homicide: The Laws of Australia* (Thomson Reuters, 2012).

Western Australia ('WA') (2008) and the Northern Territory ('NT') (2012) in enacting various forms of assault causing death legislation.

This chapter has three parts. First, I provide an overview of the circumstances in which this significant development in Australian criminal law has occurred. Second, I identify the distinctive features of this new form of homicide, and compare the models that have been adopted in WA, NT, NSW, Queensland and Victoria. Third, I advance five arguments as to why we should be troubled by the manner in which criminalisation in the form of 'assault causing death' offences has been adopted:

1 There is a mismatch between the stated justification for these new offences – that is, to address 'alcohol-fuelled one-punch' violence – and the terms in which they have been drafted.
2 The offence definitions are complex, confusing and exemplify the vice of 'particularism' in criminal law drafting.
3 They *enact* populist outrage into the criminal statute books for short-term political advantage with insufficient attention paid to longer term legal and operational problems that are thus created.
4 They fail to consider the normative basis for criminalisation and disrupt the coherence of homicide offences in terms of relative culpability and the hierarchy of offence seriousness.
5 Without adequate justification, they create special rules for certain types of fatal harms that derogate from fundamental common law principles and statutory defences.

BACKGROUND

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 McArdele.[2] This Bill followed intense media publicity around three prosecutions for one-punch deaths.[3] 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 coverage of tragic killings of young men. In WA there were three such acquittals[4] whereas, in the NT it was a *conviction* for manslaughter that triggered popular support for the law.[5]

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[6]), and an intense

2 On this history see Julia Quilter, 'The Thomas Kelly case: Why a "One Punch" Law is not the Answer' (2014) 38(1) *Criminal Law Journal* 16, 18–21.
3 For further details see ibid 18–19.
4 On the three acquittals see ibid 19.
5 See *The Queen v Martyn* (2011) 30 NTLR 157 discussed in ibid 19.
6 Christie was assaulted on 31 December 2013 but remained in a coma until his family turned off life support on 13 January 2014.

media campaign around alcohol-fuelled violence generally and one-punch violence in particular,[7] 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.[8] 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.[9]

To date, the Australian Capital Territory ('ACT'), Tasmania and South Australia ('SA') SA[10] have not moved to introduce such offences, although there has been considerable community, political and media pressure to do so.[11]

DEFINING FEATURES

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.[12] 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[13]).

Table 6.1 summarises the major points of similarity and difference. Some general observations may be made about the development of these laws.

7 See Julia Quilter, 'Responses to the Death of Thomas Kelly: Taking Populism Seriously' (2013) 24(3) *Current Issues in Criminal Justice* 439; Julia Quilter, 'One Punch Laws, Mandatory Minimums and "Alcohol-Fuelled" as an Aggravated Factor: Implications for NSW Criminal Law' (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 81; and Julia Quilter 'Populism and Criminal Justice Policy: An Australian Case Study of Non-punitive Responses to Alcohol Related Violence' (2015) *Australian and New Zealand Journal of Criminology* (forthcoming).

8 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'.

9 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).

10 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).

11 See, eg, Megan Gorrey, 'Civic Assault Prompts Push for One-punch Laws in the ACT', *The Canberra Times*, 22 August 2014.

12 The NT offence provides that this component is strict liability: *Criminal Code Act* (NT) s 161A(2).

13 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.

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.[14] Second, compared with the earlier offences (WA and the 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

Mismatch between Stated Justifications and Resulting Laws

In each state or territory the primary justification for introducing this new form of homicide 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. For example, in the second reading speech to the Bill introducing the assault causing death offence, the then Premier O'Farrell stated the purpose was:

> to make our streets safer by introducing new measures to tackle drug- and alcohol-related violence. Recent months have seen a number of serious violent alcohol- and drug-fuelled assaults in the Sydney central business district [CBD] and elsewhere that shocked the community across the State. The New South Wales Government has heard the community's call for action. We are committed to continuing to address the drug- and alcohol-fuelled attacks on our streets and the increase in violence that is used in those attacks.[15]

In spite of the heavily rhetorical statements about the need for such laws to protect the community from 'alcohol-fuelled' one-punch violence, 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

14 The mooted SA provision (above n 10) also provides for an aggravated assault causing death offence while intoxicated.

15 New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 January 2014, 26621 (Barry O'Farrell). Similar statements about the need to address alcohol-fuelled one-punch violence are echoed in the passing of the Queensland's Safe Night Out Legislation Amendment Bill 2014 (see Queensland, *Parliamentary Debates*, Legislative Assembly, 6 June 2014, 2234 (Campbell Newman)) and the Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Bill 2014 (see Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2823–2824 (Robert Clark)).

TABLE 6.1 ASSAULT CAUSING DEATH OFFENCES IN AUSTRALIA

Jurisdiction	Nature of assault	Injury from assault?	Part of body specified?	Weapon included?
WA: *Criminal Code Act 1913* s 281 (2008)	'Unlawfully assaults' (s 281(1))	No	No	Yes: implied by unlawful assault (s 281(1))
NT: *Criminal Code* s 161A (2012)	'violent act' (s 161A(5)) involving the direct application of force of a violent nature	No	No	Yes: expressed (s 161A(5))
NSW: *Crimes Act 1900* s 25A (2014)	'intentionally hitting': s 25A(1)(a)	No	No	Yes: 'with an object held by the person' (25A(1)(a))
Qld: *Criminal Code* s 314A (2014)	'unlawful striking' strike 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 (s 314A(7))	No	Yes: head/ neck (s 314A(1))	Yes: 'with or without the use of a dangerous or offensive weapon or instrument' (s 314A(7))
Vic: *Crimes Act 1958* s 4A (2014)	'single punch or strike':'strike means a strike delivered with any part of the body' (s 4A(6))	Yes: 'injury to head or neck'	Yes: head/ neck (s 4A(1)(a))	No

Only one-punch?	Throwing?	Exclusions	Intoxication	Causation
No	Yes (implied)	No	No	'dies as a direct or indirect result of the assault' (s 281(1))
No	Yes (implied)	Yes (s 61A(4)) Conduct 'benefiting the other person' or 'part of a socially accepted function or activity' AND conduct was reasonable	No	Violent act 'causes the death' of 'the other person' or any other person (s 161A(1)(b)) with strict liability applying to causation (s 161A(2))
No	No	Yes: 'intentionally hitting' – excludes accidents	Yes: aggravating factor (s 25A(2))	'the person is killed as a result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault': no (s 25A(3))
No	No	Yes: striking 'done as part of a socially acceptable function or activity' AND it is 'reasonable in the circumstances' (s 314A(4))	No	No: 'directly or indirectly' (s 314A(7))
No: expressly not (s 4A(3))	No	No	No	Single punch or strike may cause death 'even if the injury from which the person dies is not the injury that the punch or strike itself caused to the person's head or neck but another injury resulting from an impact to the person's head or neck, or to another part of the person's body, caused by the punch or strike' (s 4A(4))

strikes (Victoria). In only one jurisdiction (NSW) is 'intoxication' a specific feature of the offence definition (as an aggravating factor).[16] 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.

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-based jurisdictions, the argument was made that there was a 'legal gap' that required filling because of the operation of the accident defence in the context of one-punch fatalities.[17] The accident defence precludes criminal responsibility for an event where it can be said to have occurred by 'accident', the test being that the result was unintended by the perpetrator and not reasonably foreseeable by an ordinary person.[18] Thus, where manslaughter is charged for a 'one-punch' killing the jury must be satisfied beyond reasonable doubt that the death from the punch was reasonably foreseeable by the ordinary person. This is a high threshold and may not be satisfied in such situations. 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.[19]

The point is illustrated by the Explanatory Notes to the Queensland Bill introducing the new offence of unlawful striking causing death:

> The creation of the new offence of unlawful striking causing death is to principally address the 'coward-punch' homicide cases.
>
> Currently, in Queensland, the offences charged in the circumstances of a fatal 'coward-punch' are murder and/or manslaughter. ... the operation of section 23(1)(b) of the Criminal Code poses a challenge to securing a conviction for manslaughter in cases involving a 'coward-punch'. Section 23(1)(b) will exempt an accused from criminal responsibility for the consequences of their actions (example, death resulting from a punch), if the consequence was not intended or foreseen by the offender and would not reasonably have been foreseen by an ordinary person.[20]

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 ('UDA') 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*?[21] Thus, 'dangerousness' requires 'an

16 Queensland's *Safe Night Out Legislation Amendment Act 2014* introduces an aggravating circumstance in ch 35A of being 'adversely affected by an intoxicating substance' for certain assault offences, not including unlawful striking causing death.

17 See John Elferink, 'Gap in Legislation Closed by One Punch Law' (Media Release, 28 November 2012); discussed in Quilter, 'One Punch Laws', above n 7.

18 *Kaporonowski v The Queen* (1973) 133 CLR 209, 231 (Gibbs J).

19 Quilter, above n 2.

20 Explanatory Notes, Safe Night Out Legislation Amendment Bill 2014, 4. Seven years earlier (2007), in a different political environment, when a similar law was first mooted in Queensland this reasoning was rejected: Quilter, above n 2, 18–19.

21 *Wilson v R* (1992) 174 CLR 313, 333.

appreciable risk of serious injury' from the punch but not, as in the code-based jurisdictions, that the death be reasonably foreseeable as a result of the punch.[22] The Victorian Attorney-General, however, argued that the common law test sets the bar too high for 'one-punch' (or 'coward punch') fatalities:

> Many coward's punch deaths are already successfully prosecuted under Victoria's existing manslaughter laws. However, in some cases it is difficult to prove that a single punch or strike was dangerous – in that it involved an appreciable risk of serious injury. The bill explicitly defines a punch or strike to the head or neck that causes injury as a dangerous act for the purpose of unlawful and dangerous act manslaughter.[23]

Yet, as has been 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 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[24] are likely to be 'dangerous' without the need for a deeming provision, as is 'intentionally hitting' a person, on numerous occasions, with an object.[25] 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 the defence of accident will be accepted.[26]

What should we make of the lack of alignment between the 'problem' (alcohol-fuelled one-punch killings and the apparent unavailability of manslaughter in such situations) and the 'solution' (variously defined forms of a new fatal violence offence)? First, I would argue that law-makers should have a better understanding of the legal definitions of manslaughter which may reduce the sense of necessity and urgency that has surrounded the introduction of 'one-punch' laws.[27] Second, the disconnect raises questions about the manner in which the *motif* of 'one-punch' killing (connoting random tragedy that has recently triggered greater outrage than other forms of fatal violence) has been deployed to effect a major change to Australian criminal laws, in ways that are likely to produce unintended legal and operational effects.[28] A one-punch fatality

22 Quilter, 'One Punch Laws', above n 7.

23 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2823–2824 (Robert Clark).

24 *Crimes Act 1958* (Vic) s 4A(1), 4A(3).

25 *Crimes Act 1900* (NSW) s 25A(1)(a).

26 *Criminal Code* (Qld) s 314A(1) and (7).

27 For misstatements of the law of manslaughter see the Victorian Attorney-General's second reading speech, which states that a defendant may 'plead ignorance' to knowing that one-punch may kill even though the test is an objective one (*Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2823 (Robert Clark)) and Premier O'Farrell's second reading speech states that to prosecute manslaughter it must be proven that the offender should have foreseen that, by doing what he or she did, the victim would be placed at risk of serious injury (NSW, *Parliamentary Debates*, Legislative Assembly, 30 January 2014, 2622 (Barry O'Farrell)).

28 This risk is graphically exemplified by the case of Saori Jones in WA *Western Australia v Jones* [2011] WASCSR 136, discussed in full in Quilter, above n 2, 25.

is an atypical and statistically insignificant form of fatal violence[29]– yet it has been utilised as a kind of 'pin up' case, to justify a radical and draconian extension of homicide laws. It is unclear what is so egregious about this particular form of fatal violence and why, if one-punch fatalities really were regarded as in need of special treatment, the legislatures have not drafted provisions that faithfully capture, and are confined to, the style of fatal violence on which the case for radical change was built.

The Vice of Particularism

Table 6.1 demonstrates a trend from general and wide offence definitions in the earlier laws (WA, NT) towards narrower definitions in the later laws (NSW, Queensland, Victoria). The latter are characterised by a tendency to describe in precise detail the sorts of assaults that will qualify as conduct forming the basis of an assault causing death charge. The WA provision is the broadest: *any* unlawful assault. This includes assaults by any part of the body and/or by an object or weapon held by the offender or thrown at the victim. Later I will problematise the *particularism* of the narrower definitions, but it is also worth noting that broad offence definitions also produce operational problems, including the capacity to draw within the purview of the provisions very serious domestic violence matters, with troubling sentencing consequence given that the WA offence carries a maximum penalty of 10 years.[30]

The more recently introduced offences (NSW, Queensland and Victoria) demonstrate the opposite problem: by confining the qualifying conduct to certain *kinds* of assaults they arbitrarily exclude other types of assaults (which may be equally fatal) and open up arguments as to whether particular conduct is included or excluded. 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'.[31] If regard is had to past cases of UDA 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, tackling, strangling, suffocation, asphyxiation, pushing, forcing, throwing, burning, bruising, shaking, and drowning.[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 (such as a rock, bar stool or beer bottle) at the person are excluded as the object must be 'held' by the person.

29 Quilter, above n 2; Jennifer Pilgrim, Dimitri Gerostamoulos and Olaf Drummer, '"King Hit" Fatalities in Australia, 2000–2012: The Role of Alcohol and Other Drugs' (2014) 136(1) *Drug and Alcohol Dependence* 119.

30 See Quilter, above n 2, 23–26.

31 See further Quilter, 'One Punch Laws', above n 7; and Quilter, 'Populism, above n 7, 93–97.

32 Ibid 95.

Shootings will also be excluded but a stabbing by an object held by the person may be covered by the offence. There is no principled basis for these distinctions and, certainly, the line is not drawn at a meaningful point in terms of objective seriousness.

Similar criticisms may be made of Queensland and Victoria. Section 314A of the *Criminal Code 1899* (Qld) requires three elements: a person unlawfully strikes another person; the strike is to the head/neck; and it 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.[33]

While avoiding the NSW failure to define 'hitting', the Queensland law, like that of 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 or her head on the road or footpath and die (that is, 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.

The Victorian law 'deems' certain acts to be 'dangerous' for the purposes of UDA 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[34]); 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',[35] thereby excluding a 'strike' by throwing an object. Unlike the NSW and Queensland provisions the Victorian definition also excludes strikes by an object/weapon.

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'.[36] The justification advanced in the second reading speech to the Bill for this specificity was that it would remove trivial instances (for example, a 'very light or playful slap to the head'[37]). Yet, given that no *mens rea* (subjective or objective) is required in relation to the consequence component

33 *Criminal Code 1899* (Qld) s 314A(7).

34 *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: 2.

35 *Crimes Act 1958* (Vic) s 4A(6).

36 *Crimes Act 1958* (Vic) s 4A(6) provides that 'injury' has the same meaning as in Subdivision 4.

37 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2824 (Robert Clark MP).

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.' 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 Department of Public Prosecutions ('DPP') has given notice of an intent to seek the MMS,[38] 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.[39] 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.[40]

The approach to offence drafting in NSW, Queensland and Victoria exhibits the vice of what Horder has called 'particularism':[41] 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'.[42] 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.[43] Certainly, it is likely that in any prosecution under Australia's newest homicide laws technical legal arguments will be raised about what types of conduct do (and do not) fit within the offence definitions.

Populism and Short-Term Political Gain

Interrogation of the reasons *behind* this definitional specificity reveals another troubling aspect of these legislative developments: they *enact* a form of populist outrage into the criminal statute books for short-term political advantage but with insufficient attention to longer term effects – both operational and symbolic. The laws introduced in NSW, Queensland and Victoria appear to have been deliberately drafted so as to capture the circumstances of specific events, behaviours and deaths that prompted the legislative action (for example, in NSW, the circumstances in

38 *Sentencing Act 1991* (Vic) s 9A(2).

39 *Sentencing Act 1991* (Vic) s 9C(3)(b).

40 Unlike other jurisdictions, however, s 4A does not limit the circumstances in which a punch or strike may be UDA dangerous for the purposes of manslaughter (s 4A(5)).

41 Jeremy Horder, 'Rethinking Non-fatal Offences Against the Person' (1994) 14(3) *Oxford Journal of Legal Studies* 335.

42 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.

43 R A Duff, 'Penal Communities' (1999) 1(1) *Punishment and Society* 27; R A Duff, *Punishment, Communication and Community* (Oxford University Press, 2001).

which Thomas Kelly and Daniel Christie were killed in Kings Cross in 2012 and 2014). The particularities of these tragedies, which caught the popular and media imagination, have been literally embedded in the legislation.[44]

The earliest assault causing death offence – *Criminal Code 1913* (WA) s 281 – uses relatively neutral and objective, legal language: 'If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.' By comparison, the offence introduced in NSW in 2014 closely resembles the circumstances in which Mr Kelly (and Mr Christie) was tragically killed, including the type of conduct constituting the 'assault' and the approach to defining 'causes the death'. Mr Kelly was punched in the head, which led him to fall to the ground and hit his head on the footpath and suffer massive brain injuries. Section 25A of the *Crimes Act 1900* states:

> (1) A person is guilty of an offence under this subsection if:
>
> (a) the person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and
>
> (b) the assault is not authorised or excused by law, and
>
> (c) the assault causes the death of the other person.
>
> Maximum penalty: Imprisonment for 20 years. ...
>
> (3) For the purposes of this section, an assault causes the death of a person whether the person is killed as a result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault.

'Hitting' is not a recognised legal term – it is not defined or used elsewhere in the *Crimes Act 1900* – and the definition of causation in s 25A(3) is very different in nature to the neutral legal language used in the WA law ('direct or indirect result'). Drafting appears to have been influenced by a desire to accurately capture and embed in legislation the precise wrong done to Mr Kelly, perhaps as a symbolic gesture of recognition of that specific, and very personal, tragedy. In approaching the matter of definition and drafting in this way, the Government gave itself a very powerful tool for asserting that it had been responsive to the media and public storm that developed over the summer of 2013–14.[45] The political gain for the Government was significant and immediate. The Government could confidently assert that it had listened to the community's outrage about the senseless killing of two young men, and could point to the precise point in the *Crimes Act* where the tragedy, and the ensuing demands for 'justice', had left their mark. If the tragedies that befell Mr Kelly and Mr Christie and their respective families were ever repeated in the future, the criminal law would have the 'perfect' vehicle for punishing the offender.

At an emotional level, the approach to drafting described here may be understandable. The problem, however, is that this does not constitute a sound basis for making the first major change to NSW homicide laws since 1951,[46] involving the creation of a new offence that can be expected to be a permanent inclusion in the statute books. The chief problem is that the idiosyncratic definition of assault causing death adopted risks excluding killings that are equally tragic, and

44 They have served as 'signal crimes' in a very literal sense: see Quilter, 'One Punch Laws', above 7.

45 Quilter, 'One Punch Laws', above n 7, 84–87.

46 When the offence of infanticide was introduced: Quilter, 'One Punch Laws', above n 7, 83.

where the offender is just as culpable but the death occurs in circumstances which do not fit the frame created by s 25A.

A similar desire to be seen to be responsive to popular expectations is evident in the Queensland and Victorian laws which focus even more closely on the punch/strike, which must 'land' to the victim's head/neck.[47] Again, references to a 'single punch or strike' are a departure from the legal language used commonly to define an assault, but resonate with and play to, the popular emotionalism that has been prominent in media coverage of one-punch fatalities. In Queensland, these considerations have even influenced the naming of the statute enacting the new offence: the *Safe Night Out Legislation Amendment Act 2014*. The language of the Victorian statute and offence is even more emotionally charged (as well as a misnomer[48]): the *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* with provision named, '4A Manslaughter – single punch or strike taken to be dangerous act'. These gestures are symbolically and operationally problematic.

On a symbolic level, the language used may be seen to (unintentionally) condone certain forms of male violence that do not fall within the pejoratively labelled new offence, and may also serve to further marginalise gendered *domestic* violence. By formally adopting, in the statute name, the recently developed colloquialism, 'coward's punch',[49] the Victorian Government aimed to produce an unambiguous declaration that the *very thing* which the wider community wanted to condemn – unprovoked, surprise and cowardly attacks – had been specifically criminalised. However, the corollary of conflating criminalised violence with the 'coward's punch' is an implication that there is a 'correct' (or non-cowardly) way of engaging in masculine violence, or a 'heroic' and approved way of fighting.[50]

The term 'coward's punch' connotes the innocent victim and describes a man (the offender) who did not play by the rules – failing to forewarn the victim so 'he' could 'square up' (boxing pose) and sort it out 'like a man' in a 'fair fight'. These messages are further underscored in Victoria by the provisions relating to MMS. Under the *Sentencing Act 1991* s 9C(3), prior to imposing the MMS a sentencing court must be satisfied, *inter alia*, that:

> (c) the victim was not expecting to be punched or struck by the offender; and
> (d) the offender knew that the victim was not expecting, or was probably not expecting, to be punched or struck by the offender.[51]

The implication is that the culpability that justifies a 10-year MMS is not the fact of using fatal violence, but the element of taking your opponent by *surprise*. It might be countered that the focus on surprise reflects the fact that it carries greater risk – that such a victim is more likely to

47 See *Criminal Code* (Qld) s 314A(1); *Crimes Act 1958* (Vic) s 4A(1).

48 As discussed above, the new provisions are not limited to a 'coward's punch' situation and see below n 49.

49 The term emerged in 2013–2014 to replace another colloquialism that was widely used to describe a random, surprise punch: a 'king hit'. The adoption of the phrase 'coward's punch' was a conscious disavowal of the implication that a 'king hit', with its royal connotations, might attract admiration or 'hero-worshipping'.

50 Presumably of the 'let's step outside and settle this like men' variety.

51 See also s 9C(4)–(5).

fall and suffer fatal injury. Nonetheless, it is hard to ignore the message conveyed by the legislative language: that there is a 'right' way to engage in male violence and harsh punishment awaits only those who do not follow the (unwritten) rules.

Another disturbing aspect of how assault causing death offences were constructed in Australia in 2014 is the focus on one-punch/coward's punch fatalities, in which the victim is inevitably another male, has the potential to further erase from public discourse a more prevalent form of male violence: domestic violence, perpetrated primarily against women. My study of NSW UDA manslaughter cases from 1998 to 2013 demonstrated that over a third were domestic manslaughters (34.9 per cent) by comparison, one-punch manslaughters comprised only 7.9 per cent of UDA manslaughters.[52] The focus of recent public, media and political outcry has been on male-to-male violence that occurs in public, or in/around licensed premises, and which is associated with intoxication.[53] Domestic violence that occurs in private settings (and which is often associated with intoxication) is rendered relatively invisible by these preoccupations.[54]

Ultimately, it is one thing for governments to take steps in order to be seen as responsive to community outrage and to show empathy and a solutions-oriented mindset. It is quite another to be willing to embed flaws in statutes that will most certainly become a focal point for technical arguments and contests in future cases. The new laws may have satisfied short-term electoral and populist urges for 'tough' solutions to one-punch fatalities. However, the greater risk is that the appearance of 'toughness' may prove to be no more than a façade on the first occasion that an accused person avoids conviction because the manner in which he caused the death of another is not considered to fall within the idiosyncratic definition of the offence. Community reassurance will very quickly become community disappointment.

Failure to Consider the Normative Basis for Criminalisation

The fourth 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.[55] Hierarchy analysis offers a valuable normative perspective for assessing the need or otherwise for a new 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,[56]

52 Quilter, 'One Punch Laws', above n 7, 94.

53 See Quilter, 'One Punch Laws', above n 7; and Quilter, 'Populism and Criminal Justice Policy', above n 7.

54 See also Crimes Amendment (Intoxication) Bill 2014 (NSW) (lapsed) which would have limited aggravated assault causing death offences in s 25A(2) and 11 other proposed new aggravated offences, to acts committed while 'intoxicated in public', further erasing intoxicated violence committed in private settings.

55 See Quilter, 'One Punch Laws', above n 7, 88–91; Quilter, above n 2, 16–23.

56 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); and Chapter 3.

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.[57]

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.[58] 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.[59] 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.[60] 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. Therefore, 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.[61] 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.

My comparative analysis of Australia's 'assault causing death' provisions aims to determine if a consistent and principled approach has been taken to 'positioning' such offences relative to other homicide offences (Table 6.2). Each offence has been categorised using the following indicators of hierarchy: statutory location, 'label', fault elements (conduct and consequence), treatment of defences, alternative verdicts, maximum penalty, and whether a MMS sentence applies.

Table 6.2 shows there are significant differences between the earlier (WA and the 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 compared to manslaughter and murder. Labels appropriately encapsulate differences in culpability ('unlawful assault causing death' and 'violent act causing death'). The no fault element (objective or subjective) is required for the consequence

57 Horder, above n 41; Andrew Ashworth, *Principles of Criminal Law* (7th edn, Oxford University Press, 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.

58 Quilter, above n 2, 21.

59 See Quilter, 'One Punch Laws', above n 7, 21–23.

60 Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter* (2008) ch 5, 'Involuntary Manslaughter: Options for Reform', [5.39]–[5.43].

61 See Quilter, 'One Punch Laws', above n 7, 23.

of death (unlike for murder and manslaughter), the accident defence being excluded in WA and strict liability applying to this component in the NT. One area of inconsistency with this third-tier status is that broad definitions of qualifying conduct in WA and the NT allow potentially very serious forms of violence to come within their purview. For example, as discussed above, in WA the 'assault causing death' offence has applied to serious domestic violence killings with resulting low sentences.[62] Such outcomes are inconsistent with the principle that, as a third-tier offence, the 'culpability of the accused should be at the lowest end of the scale'. As the LRCI said:

> 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.[63]

By comparison, the later regimes (NSW, Queensland and Victoria) employ a narrower definition of qualifying conduct (Table 6.1), but the defect here is that specificity does not correlate to culpability. Indeed, the types of 'minor acts' alluded to by the LRCI are expressly excluded from these offences.[64] More troubling is the fact that the seriousness indicia described in Table 6.2 suggest that 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[65] (not applicable to manslaughter) and the Victorian offence is located prior to manslaughter.

The pairing of a confined definition of assault with higher penalties might be regarded as justifiable if the increase in penalties correlated with more culpable forms of offending, but, as discussed above, it does not. Furthermore, when drafting an offence with an absolute liability component (for the consequence of death) we might expect to see a reduction in the maximum penalty (as in WA and the NT) but in NSW, Victoria and Queensland the legislatures have endorsed increased penalties and/or have resorted to the extraordinary measure of MMS.

In theory there may be a legitimate reason to single out and accurately label a third category of fatal violence – one less serious than murder and manslaughter, but still deserving of punishment as a form of homicide. However, in Australia, no law-maker has made this claim nor put it into practice in the drafting of the new offences. In fact, in the case of the most recently introduced laws (NSW, Queensland and Victoria), legislative drafting and sentencing arrangements, as well as the political rhetoric surrounding the introduction of these laws, suggest that one-punch killings

62 See Quilter, above n 2. The NT provision has not, to date, been used.

63 Law Reform Commission of Ireland, above n 60.

64 Eg, only *intentionally* hitting can be prosecuted in NSW; strikes/punches that do not cause injury to the victim's head/neck are excluded in Victoria; and there is an exception where the conduct is part of a socially acceptable function or activity in Queensland.

65 The s 314A offence has a mandated statutory minimum non-parole period of 80 per cent of the head sentence or 15 years, whichever is the lesser: *Criminal Code* (Qld) s 314A(5).

TABLE 6.2 ASSAULT CAUSING DEATH IN THE HIERARCHY OF OFFENCE SERIOUSNESS

Jurisdiction	Statutory 'location'	Label	*Mens rea* for conduct component
WA	In Pt V Offences against the person Ch XXVIII Homicide: s 279 Murder 1 s 280 Manslaughter 1 s 281 Unlawful assault causing death 1	'Unlawful assault causing death' (*Criminal Code 1913* s 281)	Yes
NT	In Pt VI Offences against the person Div 3 Homicide: s 156 Murders 160 Manslaughters 161A Violent act causing death	'Violent act causing death' (*Criminal Code* s 161A)	Yes
NSW	In Pt 3 Offences Against the Person Div 1 Homicide S 18 Murder and manslaughter defineds 24 Manslaughter – punishments 25A Assault causing death	'Assault causing death' (*Crimes Act 1900* s 25A)	Yes
Qld	In Pt 4 Acts Injurious to the public Not in Ch 28 Homicide In (new) Ch 28A Unlawful striking causing death Note: originally placed in Ch 28 after murder (s 302) and before manslaughter (s 303) as s 302A ('unlawful striking causing death')	'Unlawful striking causing death' (*Criminal Code* s 314A)	Yes

Absolute liability (AL)/strict liability (SL) for consequence of death	Defences/special rules	Alternative verdict (AV)	Maximum penalty	MMS
AL	Accident defence removed: 281(2)	Yes : AV to manslaughter	10 years (Cf. Murder: life; Manslaughter: life)	No
SL express	Consent no defence: s 161A (3) But special 'exemptions' in s 161A(4): D not criminal responsible if conduct is 'for the purpose of benefiting the other person' or is 'part of a socially acceptable function or activity' *and* the conduct was reasonable	No	16 years (Cf. murder: mandatory life; manslaughter: life)	No
AL	) s. Self-induced intoxication cannot be relied on (s 428E) but not self-induced intoxication or a significant cognitive impairment at the time the offence (not being a temporary self-induced impairment) are defences: s 25A(5)	Yes: AV to murder, manslaughter	20 years: s 25A(1) 25 years: s 25A(2) (Cf. murder: life; manslaughter: 25 years)	8 years for aggravated offence: s 25B
AL	Excludes: accident defence (s23(1)(b)); defence of prevention of repetition of insult (s 270); provocation (ss 268, 269) as s 314A(3) deems an assault is not an element of the offence.*But* D not criminally responsible if the act of striking the other person was: (a) done as part of a socially acceptablefunction or activity; and (b) reasonable in the circumstances (s 314A(4))	No	Life (Cf. murder and manslaughter: life)	No MMS, but MNPP: 80% of head sentence or 15 years, whichever is the lesser (s 314A(5))

(*continued*)

TABLE 6.2 ASSAULT CAUSING DEATH IN THE HIERARCHY OF OFFENCE SERIOUSNESS (*CONTINUED*)

Jurisdiction	Statutory 'location'	Label	*Mens rea* for conduct component
Vic	In Pt 1 Offences, Div 1 Offences against the person1 Homicide 3 Murder 3A Unintentional killing in the course of furtherance of a crime of violence 4 Alternative verdict of defensive homicide on charge for murder 4A Manslaughter – single punch or strike taken to be dangerous 5 Punishment of manslaughter	'Manslaughter – single punch or strike taken to be dangerous act' (*Crimes Act 1958* s 4A)	Yes Note: for the MMS to apply, sentencing court must be satisfied BRD that D intended to strike V to head/neck

BRD = beyond reasonable doubt; D = defendant; MMS = mandatory minimum sentences; MNPP = ? <author to supply> ; V = victim

are regarded as *more* serious than manslaughter. Worse still, this position has been advanced primarily through emotional and populist rhetoric, with a disturbing lack of regard for principled law reform and coherence in the criminal law.

Special Rules that Derogate from Fundamental Common Law Principles

Not only do these offences create a special category of homicide which does not conform to the hierarchy of fatality crimes, but they also introduce special or extraordinary rules that derogate from traditional common law principles, or treat this class of offenders in a special way by abrogating certain statutory rights/defences and imposing MMSs. Infringements on rights and liberties *may* be regarded as tolerable in relation to minor offences that do not carry significant prison terms. However, assault causing death is not such an offence, with a convicted person facing life imprisonment (Queensland) or a MMS of eight (NSW) or 10 years (Victoria). One might expect the full range of defences would be available at a trial when the stakes are this high, but access to defences has been expressly limited.

In theory, contemporary law-making processes are meant to include opportunities for legislative scrutiny committees to assess the impact of proposed laws on rights and liberties, to comment on the validity of the advanced justifications, and to invite amendments. Unfortunately,

Absolute liability (AL)/strict liability (SL) for consequence of death	Defences/special rules	Alternative verdict (AV)	Maximum penalty	MMS
AL	No exclusions	No	Manslaughter: 20 years (Cf. murder: life)	10 years if court satisfied BRD of aggravating matters in *Sentencing Act 1991* s 9C(3); and no 'special reasons' ((s 314A or s 10A).

such processes have failed in the case of recent assault causing death offences. Governments have shown disregard for the bodies that are meant to scrutinise statutory encroachments on rights and liberties. In addition, governments *and* (some) scrutiny committees have displayed a cavalier attitude towards the substantial erosions to fundamental concepts of criminal responsibility, showing themselves to be easily swayed by the asserted 'need' to protect the community from alcohol-fuelled violence. The political reality is that the legislative arm of government is dominated by the executive, meaning that, ultimately, the power of parliamentary scrutiny committees to influence the shape of new criminal laws is limited. Nonetheless, it is reasonable to expect such committees should approach their statutory responsibilities rigorously, interrogating fundamental departures and making strong recommendations in the face of such departures. In practice, there is little sense governments feel obliged to seriously defend major changes they are making to the criminal law. This is especially troubling when, as discussed, the 'reforms' being effected are deeply problematic. I will illustrate this point with examples from NSW, Queensland and Victoria.

In NSW, the extraordinary measure of MMS was invoked for the aggravated offence of assault causing death. This is only the second time in recent NSW history[66] that the policy of mandatory sentencing has been used, and yet it was done with great haste and without consultation or

66 Murdering a police officer in execution of his or her duties was the first, in 2011: *Crimes Act 1900* (NSW) s 19B.

scrutiny. There were a mere 10 days between announcement (21 January) to the legislation being fully operational (31 January), and there was no public consultation process or any apparent input from the NSW Law Reform Commission or other expert groups. Further, the legislation was passed by Parliament in one day without significant amendments. There is a wealth of research indicating mandatory sentencing produces injustice by fettering judicial discretion in the individual case.[67] Further problematic is the fact that the MMS attaches to the aggravating factor of 'intoxication' in s 25A(2), which has neither a proper definition[68] nor has any explanation been provided as to why such an aggravating factor is appropriate – including consideration of the nature of the relationship between alcohol and violence.[69] The only 'justification' offered is recourse to the general rhetoric of a need to protect the community from alcohol-fuelled violence.

For such a fundamental change to the criminal law of NSW – the first new homicide offence since 1951; only the second usage of MMS; and a controversial and ill-defined aggravating factor – one might have expected meaningful public consultation and close pre-enactment scrutiny for rights and liberties implications. In fact, there was no public consultation and NSW's parliamentary scrutiny body, the Legislation Review Committee,[70] was effectively bypassed. Only retrospectively (in late February 2014) did the committee scrutinise the 'Bill' (which was then an Act in force). The committee noted:

> Mandatory sentencing may lead to an unjust penalty, disproportionate to the offence committed. The Committee referred this matter to Parliament for further consideration.[71]

As modest as it is, this reference appears to have been ignored.

In Queensland, the 'unlawful striking causing death' offence abrogates the major defences usually applicable to similar serious offences by expressly removing the accident defence[72] and the excuse of being provoked and using reasonable force to prevent the repetition of an act or insult.[73] It also removes the defence of provocation,[74] bizarrely, by deeming an 'unlawful striking', a classic assault, not to be an assault. The Safe Night Out Legislation Amendment Bill 2014 was referred to the Legal Affairs and Community Safety Committee which is legislatively tasked

67 See Law Council of Australia, 'Policy Discussion Paper on Mandatory Sentencing' (Law Council of Australia, 2014).

68 On the failure to define 'intoxication' see Quilter, 'One Punch Laws', above n 7, 97–100.

69 The claimed 'causal' relationship between alcohol and violence is vigorously debated in the literature: see, eg, Cameron Duff, 'The Social Life of Drugs' (2013) 24(3) *International Journal of Drug Policy* 167; and Kari Lancaster et al, 'More than Problem-solving: Critical Reflections on the "Problematisation" of Alcohol-related Violence in Kings Cross' (2012) 31 *Drug and Alcohol Review* 925.

70 See *Legislation Review Act 1987* (NSW) s 8A(1)(b)(i).

71 NSW Parliament, Legislation Review Committee, *Legislation Review Digest No 50/55* (25 February 2014) viii, [50]–[51].

72 *Criminal Code* (Qld) s 23(1)(b).

73 *Criminal Code* (Qld) s 270. In NSW, the only remaining defences are self-defence (s 418), intoxication where it is not self-induced (s 25A(5)(a)) and if the accused had a significant cognitive impairment at the time the offence was alleged to have been committed (s 25A(5)(b)).

74 *Criminal Code* (Qld) ss 268, 269.

with considering the policies of the legislation and the application of 'fundamental legislative principles'.[75] These are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law', including the rights and co-liberties of individuals, and the institution of Parliament.[76]

On 18 August 2014, the committee provided its report to Parliament[77] which includes a final section detailing how the legislation affects those 'fundamental legislative principles'. In considering the s 314A offence and its abrogation of defences (previously available where manslaughter was charged on a 'one-punch' fatality), the committee simply noted:

> ... removing scope to excuse the conduct will affect the rights and liberties of individuals who are found guilty of breaching the offence provision as they will have a criminal record and be subject to a significant term of incarceration with a lengthy non-parole period.[78]

Despite the enormity of the recognised impact on rights and liberties, the committee made no recommendation for re-consideration or the articulation of a stronger justification for this extreme measure. The committee ultimately conclude in relation to s 314A:

> It should be noted that section 302A [now s 314A] only applies to the most extreme eventuality from unlawful striking, being the death of the person struck. Accordingly, to reflect the gravity of that consequence, harsh penalties are appropriate and appear commensurate with the policy aims of the legislation, being protection of the broader community from the consequences of alcohol and drug fuelled violence and the deterrence of such conduct.[79]

Disturbingly, there is little difference between the tenor of this assessment, and the rhetoric used by the Government to justify the new offence. Given that murder and manslaughter also deal with the very same 'extreme eventuality' (that is, death) it would have been reasonable to expect the committee to dig deeper beneath the surface of the Government's claims that 'assault causing death' warrants extraordinary treatment. Indeed, as discussed above in relation to offence hierarchy, the culpability of persons who commit murder (*intentional* killing) and manslaughter (*negligent* or objectively dangerous killings) is qualitatively greater than a person who commits assault causing death (where *no* fault element attaches to the consequence). These relativities appear to have been completely lost on the committee, which accepted the Government's assertion that one-punch killings are *so* serious as to justify the removal of defences that remain available to those charged with murder and manslaughter.

The Victorian offence has potentially the toughest penalty regime of all, with a MMS of 10 years.[80] It is part of an unusual sentencing regime requiring explanation. Where a sentencing court

75 Required by the *Parliament of Queensland Act 2001* (Qld) s 93(1).

76 See *Legislative Standards Act 1992* (Qld) s 4.

77 Queensland Parliament, Legal Affairs and Community Safety Committee, 'Safe Night Out Legislation Amendment Bill 2014', Report No 70 (2014).

78 Ibid 71.

79 Ibid.

80 *Sentencing Act 1991* (Vic) s 9C.

is to consider the MMS, the DPP must have first given notice of an intention to seek the MMS[81] and then the court must be satisfied beyond reasonable doubt of the matters in s 9C(3) being: (1) the victim's death was caused by a strike taken to be dangerous under s 4A(2); (2) the offender intended the strike be delivered to the victim's head/neck; (3) the victim was not expecting to be struck by the offender; and (4) the offender knew the victim was not expecting, or was probably not expecting to be struck by the offender. While the matter in s 9C(3)(a) is an element of s 4A, the others in (b)–(d) are not. Some of these may be difficult to prove and it is unclear how the sentencing court is to be satisfied of them. Must evidence from the trial be used or is it envisaged that a 'mini-trial' on sentence will occur? The legislation provides no guidance in this regard. This might be regarded as a desirable 'flaw' – if it means that MMSs are less likely to be imposed. Yet, as I noted above, it is problematic that what aggravates the offence is largely the element of surprise. If the sentencing court is satisfied of these matters, and no 'special reasons' exist under s 10A, the MMS of 10 years will be imposed.

Given that the Victorian model represents the toughest approach to sentencing, we might have expected the *Charter of Human Rights and Responsibilities Act 2006* (Vic) would be invoked to mitigate these draconian measures. Certainly, there was procedural compliance with the charter with the Attorney-General tabling the s 28 statement in introducing the Bill.[82] In relation to the MMS he concluded:

> In my view, these amendments are an appropriate response to the impact of violent crime in Victoria, in particular the so-called 'coward's punch' cases. As discussed further below, the bill does not limit human rights set out in the charter act because the provisions are strictly limited and directed at high-level offending, and they retain the court's discretion to depart from the statutory minimum where appropriate.[83]

In relation to whether MMS limits the right to 'Protection from cruel, inhuman or degrading punishment' (s 10 of the Charter), the Attorney found it did not:

> The factors that constitute manslaughter committed in circumstances of a single punch or strike are exhaustively listed and focus on the knowledge of the offender that the victim was not expecting or was probably not expecting the punch or strike. The factors focus on offending involving a high level of culpability where the offender attacks the victim when the victim is in an obviously defenceless state.[84]

Here, familiar rhetoric about the need to prevent 'coward's punch' violence is employed to justify imposing a severe MMS. As discussed above, it is difficult to reconcile the rhetoric – that a surprise one-punch attack involves a 'high level of culpability' – with the fact that far more serious forms of fatal violence (stabbings, brawl or bashing) will continue to be prosecuted as UDA manslaughter, to which no MMS attaches. The potency of the Victorian charter is not

81 *Sentencing Act 1991* (Vic) s 9A(2).

82 Under *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28, all new bills must be accompanied by a 'statement of compatibility' that indicates whether the bill is compatible with human rights.

83 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2823 (Robert Clark).

84 Ibid.

the subject of this chapter,[85] but this example illustrates how the charter's positive impact can be weak and how its normative standards can be appropriated into the justificatory discourse of governments to legitimise what are, in fact, major derogations from the rights, liberties and principles associated with our criminal justice system.

CONCLUSION

There is no doubt that creating new criminal offences and draconian sentencing regimes represents attention-grabbing public policy. The short-term political benefits are significant. Governments can confidently assert their 'tough on crime' credentials, and Oppositions seem compelled to follow their lead for fear of losing electoral ground. But what are we left with once the media coverage fades and the political heat shifts to new ground? What are the longer term implications for the integrity of Australian criminal law?

In this chapter, I have demonstrated that the recent addition of a new form of homicide in five Australian jurisdictions is troubling – in its own right, and as part of a wider trend of proliferating criminal offences.[86] In their determination to be visibly responsive to genuine community anxiety and anger about particular forms of violence (unprovoked, random, 'cowardly', public, alcohol-related), law-makers, notably in NSW, Queensland and Victoria, have been cavalier about the implications of adding the new offence of assault causing death to the criminal law statute books. They have endorsed offence definitions and sentencing regimes that have been drafted for their symbolism and affective resonance, rather than for their operational effectiveness and coherence with previously existing homicide offences. Reflective of a broader malaise, legislators have failed to display adequate regard for the importance of careful, principled and unhurried criminal law reform.

85 See James Kelly, 'A Difficult Dialogue: Statements of Compatibility and the Victorian Charter of Human Rights and Responsibilities Act' (2011) 46(2) *Australian Journal of Political* Science 257.

86 Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225; see also Chapter 2.

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One-punch Laws, Mandatory Minimums and 'Alcohol-Fuelled' as an Aggravating Factor: Implications for NSW Criminal Law

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Abstract

This article critically examines the New South Wales State Government's latest policy response to the problem of alcohol-related violence and anxiety about 'one punch' killings: the recently enacted *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW). Based on an analysis of both the circumstances out of which it emerged, and the terms in which the new offences of assault causing death and assault causing death while intoxicated have been defined, I argue that the Act represents another example of criminal law 'reform' that is devoid of principle, produces a lack of coherence in the criminal law and, in its operation, is unlikely to deliver on the promise of effective crime prevention in relation to alcohol-fuelled violence.

Keywords

Alcohol, violence, criminal law reform, penal populism, one-punch laws.

Introduction

On 30 January 2014 the New South Wales (NSW) Parliament added two new offences to the *Crimes Act 1900* (NSW): assault causing death, and an aggravated version of that offence where the offender is intoxicated at the time of committing the offence. For only the second time in recent history, the NSW Parliament included a mandatory minimum sentence (in relation to the aggravated offence).[2] This article critically analyses both the content of the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW) and the circumstance of its emergence and enactment. I argue that the Act represents another example of criminal law 'reform' that is devoid of principle, produces a lack of coherence in the criminal law and, in its operation, is unlikely to deliver on the promise of effective crime prevention in relation to alcohol-fuelled violence.

The analysis presented in this article is organised around five inter-related criticisms of the Act:

1. The speed with which the offence was announced and passed, in the context of an intense media and public campaign, reflected a classic knee-jerk 'law and order'

response with all the related pitfalls of poor drafting, lack of coherence and operational difficulty;
2. The adoption of an 'assault causing death' offence represents an example of 'policy transfer' from the Code jurisdictions in Australia to the common law States without proper 'translation';
3. The failure to give principled consideration to how the new offences relate to the hierarchy of existing fatality crimes in NSW contributes to a lack of coherence in the criminal law and undermines the principles of 'fair labelling';
4. The offence definition is complex, confusing and exemplifies the vice of 'particularism' in criminal law drafting; and
5. The framing of the offence is likely to lead to operational difficulties which will, in turn, lead to community disappointment as the high expectations for real action on 'one punch' deaths will not be met.

Before turning to each of these criticisms in turn, I will provide an overview of the legislation, and the background to its enactment.

Overview of the legislation

On 21 January 2014, NSW Premier Barry O'Farrell (2014a; see also Miller 2014) announced a 16-point plan to tackle drug and alcohol violence which included:

- A new one-punch law with an aggravated version having a 25 year maximum and an eight year mandatory minimum sentence where the offender is intoxicated by drugs and/or alcohol;
- New mandatory minimum sentences for certain violent offences where the offender is intoxicated by drugs and/or alcohol;[3]
- A maximum sentence increase from two years to 25 years for the illegal supply and possession of steroids;
- Increased on-the-spot fines for anti-social behaviour;
- Empowering police to conduct drug and alcohol testing on suspected offenders;
- Introduction of 1.30am lockouts and 3:00am last drinks across an expanded CBD precinct;
- New state-wide 10:00pm closing times for all bottle shops;
- Introduction of a risk-based licensing scheme with higher fees imposed for venues and outlets that have later trading hours, poor compliance histories or are in high risk locations;
- Free buses running every ten minutes from Sydney's Kings Cross to the city's CBD; and
- A freeze on granting new liquor licenses.

Just over a week later, on 30 January 2014, without any known public consultation from the NSW Law Reform Commission (NSWLRC) or other expert groups, Premier O'Farrell read for a second time the Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014 and the Liquor Amendment Bill 2014.[4] With alarming speed, the Bills were passed by both houses without substantial amendment and on the same day they were introduced. The *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* ('the Act') received assent and commenced operation the next day, 31 January 2014. Premier O'Farrell thereby achieved his wish, announced to the media and to Parliament in introducing the Bill, to have the provisions up and running for the weekend (O'Farrell 2014b). The *Liquor Amendment Act 2014* substantially came into force on 5 February 2014.

The two Acts introduce into law all elements of the 16-point Plan announced on 21 January 2014 – aside from the introduction of mandatory minimum sentences for a range of other

existing violent offences where the offender is intoxicated by drugs and/or alcohol.[5] While the focus of this article is on the new offence of assault causing death, it is noted that the Act also significantly increases the penalties for certain public order offences in the *Summary Offences Act 1988* (NSW) (notably raising the maximum penalty for the continuation of intoxication and disorderly behaviour following a move on direction in s 9 from 6 penalty units ($660) to 15 penalty units ($1650) and the penalty notice offences for offensive conduct (from $200 to $500), offensive language (from $200 to $500) and s 9 (from $200 to $1,100)). While these last amendments will not be addressed further in this paper, they are of great significance given the frequency with which they are charged, the lack of clarity over the legal elements of such offences (Quilter and McNamara 2013), and the possible impact on license disqualifications (for unpaid fines) and, ultimately, imprisonment for driving whilst disqualified.

Assault causing death: The offences

The Act introduces the basic offence of 'Assault causing death' in s 25A(1) and an aggravated version of that offence in s 25A(2) into the *Crimes Act 1900* (NSW) Pt 3, Div 1 'Homicide'. This amendment constitutes the first substantive change to the offence structure of homicide since 1951 when infanticide (s 22A) was inserted by the *Crimes (Amendment) Act 1951* (NSW). Section 25A is in the following terms:

25A Assault causing death

(1) A person is guilty of an offence under this subsection if:

(a) the person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and

(b) the assault is not authorised or excused by law, and

(c) the assault causes the death of the other person.

Maximum penalty: Imprisonment for 20 years.

(2) A person who is of or above the age of 18 years is guilty of an offence under this subsection if the person commits an offence under subsection (1) when the person is intoxicated.

Maximum penalty: Imprisonment for 25 years.

(3) For the purposes of this section, an assault causes the death of a person whether the person is killed as a result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault.

(4) In proceedings for an offence under subsection (1) or (2), it is not necessary to prove that the death was reasonably foreseeable.

(5) It is a defence in proceedings for an offence under subsection (2):

(a) if the intoxication of the accused was not self-induced (within the meaning of Part 11A), or

(b) if the accused had a significant cognitive impairment at the time the offence was alleged to have been committed (not being a temporary self-induced impairment).

(6) In proceedings for an offence under subsection (2):

(a) evidence may be given of the presence and concentration of any alcohol, drug or other substance in the accused's breath, blood or urine at the time of the alleged offence as determined by an analysis carried out in accordance with Division 4 of Part 10 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, and

(b) the accused is conclusively presumed to be intoxicated by alcohol if the prosecution proves in accordance with an analysis carried out in accordance with that Division that there was present in the accused's breath or blood a concentration of 0.15 grams or more of alcohol in 210 litres of breath or 100 millilitres of blood ... .

Background: Responding to a penal populist campaign

How was it that within the space of just over a week, without a public consultation process and without any apparent input from the NSW Law Reform Commission (NSWLRC) or other expert groups, the Government moved from the announcement of a 16-point plan to tackle alcohol-related violence to fully operational legislation which had exceptional features: invoking for only the second time in recent NSW history the policy of mandatory sentencing and constituting the first additional offence to the law of 'homicide' since 1951? I argue that the haste with which the legislation was drafted, passed and commenced is directly related to the intense media and public campaign that was triggered by the sentencing in November 2013 of Kieran Loveridge for the manslaughter of Thomas Kelly, a campaign that dramatically intensified over the summer of December/January 2014. It was within this context that a 'penal populist' (Bottoms 1995; Garland 2001; Lacey 2008; Roberts et al. 2003; Pratt 2007; Pratt and Eriksson 2013), 'law and order' response (Hogg and Brown 1998) was offered by the NSW Government in an attempt to quell community concern – a trend in crime policy development that has been discussed elsewhere (Brown 2013; Loughnan 2009, 2010).

The sentencing of Kieran Loveridge for the death of Thomas Kelly

On 8 November 2013, Justice Campbell sentenced Kieran Loveridge to a total of 7 years and 2 months for the combined manslaughter of Thomas Kelly and four other unrelated assaults, being 6 years for manslaughter (4 years non-parole period) and 1 year and 2 months for the assaults (*R v Loveridge* [2013] NSWSC 1638 at [14]-[18]). Over a year earlier, in July 2012, in an unprovoked attack, Mr Kelly had died from a single punch by Mr Loveridge, when he was walking on Victoria Street, Kings Cross. Mr Kelly fell to the ground, hitting his head on the pavement suffering massive head injuries and never regaining consciousness. The tragic death of Mr Kelly triggered an immediate and, until the sentencing of Loveridge in November 2013, a progressive populist campaign around the issue of alcohol-fuelled violence to which the NSW Government responded with an uncharacteristic multi-faceted and nuanced response (Quilter 2013; Quilter 2014a). The sentencing of Mr Loveridge, however, sparked immediate outrage from the family, the public, and the NSW Government, and a more punitive rhetoric entered the debate (for example, see Bibby 2013).

On the same day as Mr Loveridge's sentencing, the NSW Attorney General, Greg Smith SC MP, released a media statement asking the DPP to consider an appeal against the sentence handed down (Smith 2013a) and, by 12 November 2013, the Attorney General had announced a proposed so-called 'one punch' law for NSW:

> The proposed bill will be based on a Western Australian so-called 'one punch law' which carries a maximum penalty of 10 years – the laws I am proposing for NSW will carry a maximum penalty of 20 years imprisonment...
>
> The new offence and proposed penalty will send the strongest message to violent and drunken thugs that assaulting people is not a rite of passage on a boozy night out – your behaviour can have the most serious consequences and the community expects you to pay a heavy price for your actions. (Smith 2013b)

Soon after the sentence was handed down, the Kelly family started a petition to the NSW Premier[6] calling for minimum sentencing laws in cases of manslaughter. Broader support for these measures was found in the 'Enough is Enough' campaign[7] and a public rally was held in Sydney's Martin Place on 19 November 2013 calling for tougher and mandatory sentences for violent offenders (Wood 2013).

On 14 November 2013, the NSW Director of Public Prosecutions (DPP), Lloyd Babb SC, announced an appeal of Mr Loveridge's sentence for manifest inadequacy. He also indicated that he would ask the NSW Court of Criminal Appeal (NSWCCA) to issue a guideline judgment (Coulton 2013).

The Attorney-General's announcement of an apparently 'tough law and order' response with the new one-punch law together with the DPP's announcement of an appeal of Mr Loveridge's sentence for 'manifest inadequacy' and the application for a guideline judgment may have calmed public sentiment and slowed media agitation. However, following another serious one-punch assault (of 23-year-old Michael McEwen, at Bondi Beach, Sydney, on 14 December 2013, which put him in a coma for a week) and a one-punch assault on New Year's Eve that ultimately led to the death of 18-year-old Daniel Christie (eerily in King's Cross, very near the spot where Mr Kelly was killed in 2012), Sydney's two newspapers ran major campaigns in relation to alcohol-fuelled violence. *The Sydney Morning Herald* revived the 'Safer Sydney' campaign it had initiated after Mr Kelly's death, and *The Telegraph* ran the 'Enough' campaign.

In many critiques of penal populism, the allegation is often made that the media distorts the 'facts' and fails to provide information to the public in a balanced way so fostering punitive opinion (for example, see Roberts 2008). While it is not the subject of this article, it is important to note that both the Safer Sydney and Enough campaigns were not exclusively punitive in their treatment of the issue. While there was a more classic 'demonising' of recent offenders in a way that did not happen with Mr Loveridge – in particular, of Shaun McNeil who had been charged with assaulting Mr Christie (Fife-Yeomans and Wood 2014) – and calls for mandatory minimum sentencing, the campaigns also called for additional actions: the introduction of 'Newcastle-style' 1.00am lockout measures across the Sydney CBD; more public transport; public education on drinking (including *The Sydney Morning Herald* running a competition for the public to come up with a new creative advertising campaign similar to the 'Pinkie campaign' that targeted violent alcohol-related offending[8]); and risk-based licensing measures.

Victims' families were also prominent in the public discourse. For instance, after the assault on Mr Christie, the Kelly family expanded the original November 2013 petition to include calls for the following to be added as aggravating factors in sentencing: the offender being drunk at the time of committing the offence; the youth and inability of victims to defend themselves; and the offender being on a 'good behaviour bond' at the time of the offence. Robert McEwen, father of Michael McEwen, spoke out after his son was assaulted, calling for a number of measures which targeted alcohol-fuelled violence to be immediately adopted by the NSW Government including the 'Newcastle solution' and a national ban on political donations by the alcohol and gambling

industries.[9] At the funeral of Daniel Christie on 17 January 2014, his father, Michael, made an impassioned plea for young people to stop the violence (Dingle 2014).

Australia's two most senior political figures, Prime Minister Tony Abbott and the Governor-General, also weighed into the debate. Mr Abbott stated he was 'appalled' by the attacks in Sydney and said that there were essentially two problems:

> ... The first problem is the binge-drinking culture that seems to have become quite prevalent amongst youngsters in the last couple of decades.
>
> The second problem, and this is a truly insidious thing – this rise of the disturbed individual who goes out not looking for a fight, but looking for a victim. ...
>
> I think really, the police, the courts, the judges ought to absolutely throw the book at people who perpetrate this kind of gratuitous unprovoked violence. (ABC News 2014)

The Governor-General, Quentin Bryce, made the extraordinary decision to attend the funeral of Mr Christie, indicating that her presence was 'as an expression of the community's revulsion' of violence on Sydney's streets (Robertson 2014). After the funeral, she stated:

> As Governor-General and if I may say, as a parent for all parents, all grandmothers, all fathers and grandfathers there can be no place, no excuse, no tolerance for gratuitous violence in our society. ... It's unacceptable, and it's un-Australian. (Ralston 2014)

With the media running hard on the issue – and clearly backed by public opinion (exemplified by the multiplicity of letters to the Editor during the December/January 2014 period on the issue in both the *Sydney Morning Herald* and *The Telegraph*) – it is clear that there was enormous pressure for the NSW Government and particularly the Premier to act. Just one example indicative of the intensity of this campaign is *The Sydney Morning Herald* running an editorial comparing Premier O'Farrell's absence in the debate on alcohol-fuelled violence to the cartoon figure Where's Wally? (*The Sydney Morning Herald* Editorial 2014). It was within this pressured environment that the Premier announced his 16-point plan and followed only a week later with hastily and poorly drafted legislation (as will be discussed below), reflecting yet another example of a government being drawn to a 'law and order', simplistic penal populist response – but one that will ultimately fail to deliver what the public expect, including preventing crime.

It is noteworthy that the history of initiating and introducing one-punch laws in Australia (Quilter 2014b) demonstrates similar patterns of intense media coverage of, and public concern over, one-punch deaths and the introduction of hastily drafted assault causing death provisions. Against this 'tough on law and order' style of criminal law reform, it is notable that where more considered assessments of the need for such offences has been undertaken, in particular by law reform commissions in Australia, they have expressly recommended against their introduction (see Queensland Law Reform Commission 2008; Western Australian Law Reform Commission 2007; also Quilter 2014b).

Policy transferred but not translated

The second criticism is that the adoption by the NSW Government of an 'assault causing death' provision represents an ill-considered policy transfer from the Code jurisdictions to the common law States but without 'translation'. In the area of crime control, Newburn and Jones

have discussed the problems of 'policy transfer' to different contexts (Jones and Newburn 2002a, 2002b, 2005, 2006; Newburn 2002). Following this trend, here we see a specific policy addressing a perceived 'gap' in the law in the Code-based jurisdictions being 'transplanted' onto the very different context of the common law in NSW. However, there was neither a gap on the statute books in NSW nor an operational gap: manslaughter convictions were consistently achieved in NSW under existing laws.

Assault causing death provisions were introduced in the Code jurisdictions to fill a perceived 'gap' in the law's operation in the context of one-punch manslaughters (for example, see Elferink 2012). This is largely because of the operation of the 'accident' defence which applies in each of the Code jurisdictions for manslaughter (Quilter 2014b; Fairall 2012). The accident defence precludes criminal responsibility for an event where it can be said to have occurred by 'accident' – where an accident is determined by an objective test being a result that was not intended by the perpetrator and not reasonably foreseeable by an ordinary person (*Kaporonowski v The Queen* (1973) 133 CLR 209, 231 (Gibbs J)). Thus, where there is a one-punch manslaughter and the accident defence is raised, the jury must be satisfied beyond reasonable doubt that the death (that is, 'the event') from the one punch was reasonably foreseeable by the ordinary person. This is a very high threshold and often may not be satisfied in such situations. In other words, 'one punch' laws may be viewed as necessary in jurisdictions such as Western Australia (WA) not because manslaughter is viewed as too light but because manslaughter may not be available in such situations (Quilter 2014b).

By contrast, involuntary manslaughter and, relevantly, unlawful and dangerous act manslaughter, is defined differently in the common law States (including NSW) and with a lower threshold. For unlawful and dangerous act manslaughter in NSW, the Crown must prove beyond reasonable doubt that: the *death* of a person was caused by a positive (or deliberate) act of the offender that was unlawful (for example, an assault); the offender must intend to commit a breach of the criminal law as alleged; and the act must be dangerous. The most relevant aspect of these elements is the final one: that the act be dangerous. The test for dangerousness was set out in the High Court decision of *Wilson*, with this being an objective test: 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*? (*Wilson v R* (1992) 174 CLR 313, 333). In other words, the difference between the Code jurisdictions and the law in NSW (and the other common law States) is that the objective test of 'dangerousness' requires 'an appreciable risk of serious injury' (for instance, from the punch) but does not require, as in the Code jurisdictions, that the death be reasonably foreseeable as a result of the punch (Quilter 2014b; see also Tomsen and Crofts 2012).

To put it simply, in NSW, there was no legal gap that needed to be filled with a one-punch law. Furthermore, in NSW (and the other common law States), there is no defence of accident as there is in the Code jurisdiction, something that appears to have confused the drafters of the new offence. Thus, s 25A(4) of the Act expressly provides that it is not necessary to prove 'that the death was reasonably foreseeable' for an offence under s 25A(1) or (2). Presumably the new legislation was modelled on sub-s (2) of the equivalent Western Australian legislation, s 281 of the *Criminal Code Act 1913* which purports to exclude accident as a defence. However, that defence does not exist in NSW and thus the provision is redundant in this State.

Not only is there no 'gap' in the statute books for a 'one punch' law to fill in NSW, there is also no operational gap. Manslaughter convictions for one-punch manslaughters *are* being achieved. In a previous study, Quilter isolated 18 cases of what may be called 'one punch' manslaughters from 1998 to 2013 (Quilter 2014b). Significantly, in all but one case the matter did not proceed to trial with the offender pleading guilty to manslaughter.

The hierarchy of criminal offences

The third criticism to be made of the Act is the failure of the Government to give principled consideration to where assault causing death offences sit in the hierarchy of fatality crimes. Indeed, while the Australian Bureau of Statistics (ABS) has created a National Index Offence (NOI)[10] and a separate seriousness ranking was produced by the NSW Judicial Commission (MacKinnell, Poletti and Holmes 2010), there has been little scholarly analysis of the hierarchy of offence seriousness (Clarkson and Cunningham 2008; Davis and Kemp 1994; Walker 1978). This omission is significant as hierarchy analysis could be used as a normative, principled basis for assessing the need or otherwise for offence creation and drafting. That is, it could be an important additional dimension to the scholarship that has proliferated in the last decade on the legitimate limits of the criminal law (see, for example, Brown 2013; Duff et al. 2010; Husak 2008; Lacey 2009). The failure to consider 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 communicative function of the criminal law (Ashworth 2009; Chalmers and Leverick 2008; Duff 1999, 2000).

As mentioned above, no law reform commission in Australia has recommended the introduction of a 'one punch' law. One of the consequences of this is that the question of where offences like s 281 of the Western Australian Criminal Code and, now, s 25A of the *Crimes Act 1900* (NSW), sit in the hierarchy of fatality crimes, has received little attention. Such problems are exacerbated where new criminal offences are brought into being under conditions of haste and urgency as occurred in NSW in January 2014. The question of hierarchy is an important one to consider in order to assess whether there is a 'match' between the perceived need for a new offence and the nature of the offence itself, and so take account of the wider and longer-term implications of a contemplated change to the criminal law.

The Law Reform Commission of Ireland (LRCI) *did* recommend the introduction of a 'one punch' law as part of its review of homicide and manslaughter in 2008, and explicitly addressed the question of hierarchy. Consideration of the LRCI's analysis is illuminating (see Quilter 2014b). The LRCI recommended the introduction of a 'one punch' law on the basis that deaths caused in this way often involved insufficient culpability to warrant a manslaughter conviction (LRCI 2008). That is, a crime of assault causing death does not represent a *more* punitive response to one-punch deaths than manslaughter, but creates a less serious offence that reflects the reduced culpability. Therefore, in terms of the hierarchy or ladder of fatality crimes, assault causing death logically sits on the third tier, below manslaughter, with murder at the top. Although this approach to hierarchy was not articulated in the legislative debates surrounding s 281 of the *Criminal Code 1913* (WA) it has been confirmed by the Western Australian courts' application of the assault causing death offence: in the seriousness hierarchy of crimes causing death, the crime of unlawful assault causing death sits beneath manslaughter (see Quilter 2014b).

This comparative analysis indicates that the introduction of an assault causing death provision is not, by definition, inconsistent with the hierarchy of offences, but what is necessary is to appropriately encapsulate – in terms of 'label', penalty and conduct covered – where it sits on the seriousness hierarchy or ladder. Its logical location is on the third tier, below murder and manslaughter – because it has neither the subjective fault elements of murder nor the objective fault elements of manslaughter – and should be confined to the least culpable forms of fatal conduct. As a matter of principle, the offence should be defined accordingly. While the NSW offence arguably encapsulates an appropriate level of culpability in terms of the label ('Assault causing death'), as discussed in the following section of the article, it does not appropriately confine the relevant conduct to the least serious matters. Its location in Pt 3 'Offences Against the Person', Div 1 'Homicide' *after* s 24 (the punishment for manslaughter) is fitting but, as will

be discussed, the maximum penalties particularly in the case of the aggravated offence defined by s 25A(2), are out of sync with this hierarchy.

Although it is at odds with the 'get tough' 'law and order' rhetoric of the NSW Government, the maximum penalty assigned to the basic offence of assault causing death does adhere to this hierarchy: a one-punch fatality is a *less* serious crime than manslaughter and sits above that of an assault. Thus, the basic offence of assault causing death (s 25A(1)) has a maximum penalty of 20 years being less than the maximum of 25 years for manslaughter: see s 24. Furthermore, the s 25A(1) offence is a statutory alternative verdict to murder and manslaughter (s 25A(7)) and also to the s 25A(2) offence (see s 25A(8)).

The aggravated offence in s 25A(2) fits much less comfortably within the hierarchy. On the one hand, the offence remains a statutory alternative verdict to murder and manslaughter, suggesting it is lower in the seriousness hierarchy than both offences (s 25A(7)). On the other hand, the offence has the same maximum penalty as manslaughter but with the mandatory minimum sentence of 8 years (s 25B(1)),[11] which makes the offence potentially *more* serious than manslaughter, particularly when account is taken of sentencing statistics for manslaughter. For instance, the average sentence for the 18 one-punch manslaughter cases in Quilter's study (2014b) was 5 years and 2 months with an average non-parole period of 3 years and 3 months. The median sentence was 5 years and 11 months and the median non-parole period was 3 years and 6 months. The range of sentences was 3 years to 7 years (and the range of non-parole periods was 1 year 5 months to 5 years 8 months). Sentencing statistics provided to me by the Judicial Commission of New South Wales for the seven year period between April 2006 and March 2013 indicate that the median sentence for manslaughter is 7 years with sentences ranging from 36 months to more than 20 years. While it is difficult to draw any conclusions from the Judicial Information Research System (JIRS) sentencing statistics without knowing more about the individual cases, it is noteworthy that both the median one-punch sentences and the median sentences for manslaughter cases as a whole are below the 8-year mandatory minimum for s 25A(2) offences.

Furthermore, while a mandatory minimum is typically understood to be the minimum penalty in relation to a particular offence (see Roth 2014; also Hoel and Gelb 2008), in the case of s 25A(2) offences, s 25B(1) further indicates that the mandatory minimum period is the same as the minimum non-parole period (NPP) period of eight years for that offence:

> (1) A court is required to impose a sentence of imprisonment of not less than 8 years on a person guilty of an offence under section 25A(2). *Any non-parole period for the sentence is also required to be not less than 8 years* [emphasis added].

This reference to the minimum NPP was recommended by the Attorney-General in Parliament to make it clear that a court is required to set a NPP of eight years and not lower in respect of the s 25A(2) offence, presumably to ensure that the 8-year mandatory minimum could not be interpreted as a head sentence (Smith 2014). However, when this NPP period is read alongside s 44(1) and (2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the head sentence for an offender for a s 25A(2) offence will need to be one-third more than the 8-year mandatory minimum. This is because, unless the court is imposing an 'aggregate sentence',[12] s 44(1) requires the court to 'first set a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence)' and s 44(2) requires that 'the balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision).' In other words, where a court is not imposing an aggregate sentence (and does not find 'special circumstances'), a head sentence for the least serious s 25A(2) offence would be just over 10.5 years. In effect, the

new legislation mandates that fatal assaults where the offender is intoxicated are *necessarily* at the above-average end of the spectrum for manslaughter sentences. This is both inconsistent with s 25A's location on the third tier in the hierarchy of fatality crimes (beneath murder and manslaughter) and out of line with previous sentencing practice, particularly for one-punch fatality cases. It does, however, accord with the Government's stated objective of punishing severely violent offences committed in circumstances where the offender is intoxicated. As Premier O'Farrell made clear in the second reading speech:

> It is unacceptable to think it is okay to go out, get intoxicated, start a fight and throw a punch. This legislation means that people will face serious consequences .... (O'Farrell 2014b: 6)

It remains to be seen how the mandatory minimum for s 25A(2) offences may impact on sentencing practices for manslaughter. For example, will it produce the unintended consequence of inflating sentences for fatalities that do not fall within the scope of s 25A(1) or (2) as judges feel compelled to maintain the integrity of the culpability hierarchy which locates manslaughter *above* assault causing death?

While s 25A(2) may be out of line with the culpability hierarchy and sentencing practices for manslaughter, it may *not* be out of line with Parliament's provision of standard non-parole periods (SNPP) (*Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2)). The SNPP represents the non-parole period for an offence 'in the middle of the range of seriousness' 'taking into account only the objective factors affecting the relative seriousness of that offence' (*Crimes (Sentencing Procedure) Act 1999* s 54A(2)). While Parliament has not provided a SNPP for manslaughter, it has for other relevant crimes in the culpability hierarchy. For example, murder has a SNPP of 25 years for special classes of victims (including emergency service workers and children under 18 years) and 20 years in all other cases; s 33 of the *Crimes Act 1900* (NSW) (wounding with intent to do bodily harm or resist arrest) has a SNPP of 7 years; and s 35(2) (reckless causing of GBH) has a SNPP of 4 years (*Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2)).

While the SNPP does not take account of the aggravating and mitigating factors and any other matters permitted to be taken into account, arguably the SNPP assigned to offences positions them in the culpability hierarchy, with the SNPP for each of the assaults (ss 33 and 35) ranging from 4 to 7 years. While the two concepts (SNPP and mandatory minimum) are not the same, the mandatory minimum NPP for s 25A(2) offences places the aggravated offence above the SNPP for s 35(2) offences (4 years) and just above that for s 33 offences (7 years) – which, in terms of offence hierarchy, is where one would expect the s 25A(2) offence to be.

On 26 February 2014 Premier O'Farrell revised the original nine offences to which mandatory minimums would apply when committed in the circumstances of intoxication, to six[13] (that is, in addition to the new crime of assault causing death): see Crimes Amendment (Intoxication) Bill 2014 (the Bill). In addition, the Bill introduces a staggering *five new offences* if committed when 'intoxicated in public' (discussed in the final section of the article), none of which have mandatory minimums. These five new offences are indicated in Table 1. Table 1 also sets out the Government's planned likely increase in maximum penalties for the aggravated versions of those offences relative to the maximum penalty for the 'basic offence'; the mooted mandatory minimum for the aggravated offence; and the current SNPP for each of the 'basic offences' (that is, the current SNPP for the basic offence); and the new offences (see the Bill; O'Farrell 2014c). What Table 1 suggests is that little consideration has been given in terms of the seriousness hierarchy to the relationship between the mandatory minimums and the SNPPs for the basic offence. As Table 1 indicates, in most circumstances the mooted mandatory minimum for the aggravated offence is equivalent to the SNPP *for the basic offence* (where there is a SNPP).

However, there appears to be confusion in respect of the aggravated versions of ss 60(3A) and (3) offences. While the aggravated version of a s 60(3A) offence (to become s 60(3C)) has a maximum penalty two years more than the aggravated s 60(3) offence (to become s 60(3B)), they have been allocated the same mandatory minimum of 5 years: see the Bill Sch 1 cl [25].

Table 1: Comparison of basic and aggravated offences

Offence	*Current maximum for 'basic offence'*	*Predicted new maximim for aggrevated intoxicated offence*	*New mandatory minimum for aggravated offence*	*Standard non-parole periods for basic offence*
Murder police officer in execution of duties, ss 18, 19B	Life		Life[14]	25 (special class of victim/ victim under 18 years)
Murder, ss 18, 19A	Life	-	-	20 (all other cases)
Manslaughter, ss 18, 24	25	-	-	-
Aggravated assault causing death, s 25A(2)	25	-	8	-
Assault causing death, s 25A(1)	20	-	-	
Reckless GBH – in company, s 35(1) and when intoxicated s 35(1AA)	14	16	5	5
Assault police officer – reckless GBH or wounding (public disorder), s 60(3A) and when intoxicated s 60(3C)	14	16	5	-
Assault police officer – reckless GBH or wounding (not during public disorder), s 60(3) and when intoxicated s 60(3B)	12	14	5	5
Reckless GBH, 35(2) and when intoxicated s 35(1A)	10	12	4	4
Reckless wounding in company, s 35(3) and when intoxicated s 35(2A)	10	12	4	4
Affray s 93C(1) and when intoxicated s 93C(1A)	10	*12	-	
Reckless wounding, s 35(4) and when intoxicated s 35(3A)	7	9	3	3
Assault when in company, s 59(2) and when intoxicated s 59(3)	7	*9	-	
Assault police officer – when intoxicated occasions ABH s 60(2B)	-	*9	-	
Assault police officer – when intoxicated but no ABH s 60(1B)	-	*7	-	
Assault occasioning ABH, s 59(1) and new offence when intoxicated s 35(1A)	5	*7	-	

* New offences introduced in 2014 Bill which may apply if committed when 'intoxicated in public' and which do not have a mandatory minimum

Confusing and complex: The elements of s 25A

The fourth criticism of the Act is that s 25A has been drafted in a complex and confusing way. While an offence entitled 'Assault causing death' *could* carve out a legitimate space for a third tier of fatality offences, it should in substance accord with what Ashworth described as fair labelling. Ashworth explains that the concern of fair labelling:

> ... is to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking. (Ashworth 2009: 78; see also Chalmers and Leverick 2008)

The peculiar way in which s 25A has been drafted means that the offence created fails the principles of fair labelling and creates a further lack of coherence in the criminal law. These issues are exemplified in the basic offence which has defined the conduct in ways that are arbitrary and lack clarity. As will be discussed in the final section of the article, the aggravated version has also been drafted without sufficient precision as to the aggravating factor of intoxication. Both are problems that are likely to result in operational difficulty and will be discussed in turn.

The basic offence

For the basic offence under s 25A(1), the prosecution must prove beyond reasonable doubt the following elements:

1. an assault 'by intentionally hitting' the other person with any part of the person's body or with an object *held by* the person;
2. that the assault was not authorised or excused by law;[15] and
3. that the assault causes the death of the other person, where 'causes' is defined in s 25A(3).

The focus of this discussion will be in relation to element one. It is noted, however, that while element two does not present legal issues, element three may have unintentionally confined what 'causes the death of the other person', making the provision inapplicable in certain circumstances. Thus, s 25A(3) states that:

> *For the purposes of this section* [emphasis added], an assault causes the death of a person whether the person is killed as a result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault.

This definition of 'causes' is problematic as it may be that neither the injury resulting from the assault nor the hitting of the ground or object *causes* the death. This has been the case in a number of matters notably where the victim suffered a defect or where, following the assault, the victim died from another cause such as drowning.[16] While it has been the policy of the law to take your victim as you find him/her (*Blaue* [1975] 3 All ER 446, 450) (sometimes known as the 'egg shell skull rule') and so the victim's defect would not affect causation, the fact that s 25A(3) states '*[f]or the purposes of this section*' may suggest a legislative intention to define causation for this section and so oust the common law rule, effectively removing such deaths from the operation of this offence. This problem does not arise in the Western Australian equivalent which states 'dies as a direct or indirect result of the assault' (s 281(1)); it is not clear why this definition of 'causes' in the NSW offence was proffered but I suggest it is tied up with the particularities of Mr Kelly's death.

In the lead up to announcing the assault causing death offence (discussed above), the NSW Government indicated it would be modelled on the Western Australian equivalent (that is, *Criminal Code 1913* s 281). The NSW offence, however, departs in significant ways from that model both in terms of how 'cause the death' is defined and, as will be discussed below, the types of conduct that may constitute an 'assault' for the offence. Indeed, it would appear that the circumstances of Mr Kelly's tragic death in all their particularity – a blow to the head which led him to fall to the ground and hit his head on the footpath and suffer massive brain injuries – have exerted a greater influence on the wording of s 25A than the Western Australian law on which it was ostensibly modelled. Perhaps there was a desire to accurately capture and embed in legislation the precise wrong done to Mr Kelly, as a symbolic gesture of recognition of that specific tragedy. While explicable in those terms, it is not a sound basis for a major change to NSW homicide law. The chief problem is that the idiosyncratic definition of assault causing death (discussed below) which has been adopted in NSW risks excluding killings that are equally tragic, and where the offender is just as culpable, but the death occurs in circumstances which do not fit within the frame created by s 25A.

Arbitrarily confining the conduct to 'hitting'

Under the Western Australian provision *any form* of unlawful assault that either directly or indirectly causes the person's death satisfies the offence. The NSW provision confines the 'assault' element to 'intentionally hitting the other person with any part of the person's body or with an object held by the person'. It is unclear where the model for this aspect of the offence came from although I suggest it is based on the particular circumstances of Mr Kelly's death (and possibly also Mr Christie's). The offence is closer to, but not the same as, the Northern Territory (NT) provision which is based on a 'violent act' causing death (rather than simply an assault) in s 161A *Criminal Code* (NT). The Northern Territory provision defines 'conduct involving a violent act' in s 161A(5); however, there is no similar definition of the word 'hitting' in the NSW provision[17] or elsewhere in the *Crimes Act 1900*. It is also not a word used in any other section of the *Crimes Act 1900*[18] and I have not located any judicial consideration of that phrase.

As a matter of statutory construction, regard may be had to extrinsic material to confirm that the ordinary meaning is the meaning to be conveyed by the text (*Interpretation Act 1987* (NSW) s 34(1)(a)). The ordinary or common meaning of the word in the Oxford English Dictionary is:

> **Hitting**, n. – The action of hit v. in various senses; striking, impact, collision
> **Hitting**, adj. – That hits or strikes; striking
> **Hit**, v. – I. To get at or reach with a blow, to strike.[19]

The second reading speech may be used to confirm this meaning (*Interpretation Act 1987* s 34(2)(f)) and that speech indicates that the Act was modelled on the 'one punch' scenario:

> The Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014 introduces a new offence for *one-punch assaults* [emphasis added] where a person unlawfully assaults another who dies as a result of the assault, with a 20-year maximum sentence being introduced. Perpetrators of *one-punch killings* [emphasis added] have previously been prosecuted in New South Wales for manslaughter. This means that when the case goes to court the prosecution has to prove beyond reasonable doubt that the offender should have foreseen that, by doing what he or she did, the victim would be placed at risk of serious injury. (O'Farrell 2014b: 3)

This would suggest a fairly narrow focus but confirms the ordinary meaning of 'hitting' as a striking or blow; the fact that the hit can be by any part of the body or an object held by the

person, focuses on hits but clearly expands the ambit beyond that of simply a single punch. The question then is what types of behaviour are included or excluded by it?

It is likely to be some time before there is any judicial consideration of the word in s 25A(1); however, reference to NSW unlawful and dangerous act manslaughter cases – typically based on assaults – may highlight some of the issues.

To this end, the author has reviewed the 229 unlawful and dangerous act manslaughter cases in NSW from 1998-2013 by reference to the Public Defender's Office of NSW Sentencing Table for that offence.[20] Table 2 shows the most common 'categories' of unlawful and dangerous act manslaughter were assault (40.6 per cent or, together with one-punch assaults, 48.5 per cent, including both general and domestic assaults), followed by stabbings (which comprise 30.6 per cent) and shootings (12.7 per cent). One-punch manslaughters made up only 7.9 per cent, a small share of such matters. Note that domestic unlawful and dangerous act manslaughters (a combination of assaults, stabbings and shootings) account for 34.9 per cent of all cases.

Table 2: Types of unlawful and dangerous act manslaughter cases in NSW, 1998-2013

Type	*Number*	*Percentage*
Assault	93	40.6
(Domestic)	(41)	(17.9)
Stabbing	70	30.6
(Domestic)	(31)	(13.5)
Shooting	29	12.7
(Domestic)	(8)	(3.5)
One punch	18	7.9
Motor vehicle	8	3.5
Arson	5	2.2
Other	4	1.8
Drowning	2	0.9
Total	**229**	**100**
(Domestic)	**80**	**34.9**

At law a shooting (*Ryan v R* (1967) 121 CLR 205) and a stabbing amount to assaults (in their aggravated forms); however, typically they are categorised separately as (more serious) 'categories' of unlawful and dangerous act manslaughter. Such matters could be prosecuted under the Western Australian unlawful assault causing death offence as all that is required is an assault causing death. One criticism of the Western Australian provision (which may not apply to the NSW offence) is that the breadth of the conduct that can come within the offence has led to very serious deaths in Western Australia being prosecuted under it (see Quilter 2014b). It is unlikely that a shooting or stabbing would satisfy a '*hitting* the other person ... with an object *held by* the person' under s 25A(1). It is possible that the latter (a stabbing) may, but a creative legal argument would need to be constructed to show that a 'stab' constitutes a 'hitting' and this may depend on the way the knife or other object was used. For instance, was it applied in a stabbing action more akin to a hitting or was it 'pushed' or forced? The former (a shooting) is unlikely to constitute a hitting because the hit that causes the death comes from the bullet, not by an object held by the person. This means that perhaps appropriately in terms of the seriousness hierarchy and the principles of fair labelling, stabbings and shootings (being more than 40 per cent of the more serious cases currently prosecuted as manslaughter by unlawful and dangerous act) are ruled out of the ambit of s 25A offences, including the aggravated offence.

If we look further at the cases in relation to 'assaults', the most significant category in Table 2 of unlawful and dangerous act manslaughter (48.5 per cent, when one-punch manslaughter cases are included), the case law suggests a variety of behaviours constitute such assaults. The following words are applied in the cases to describe how the assault occurred: brawl (*Annakin* (1988) 37 A Crim R 131); group assault (*Avakian* [2003] NSWSC 1042); assault (*Kwon* [2004] NSWCCA 456; *Esposito* [2006] NSWSC 1454); stomping (*Willoughby* [2001] NSWSC 1015); bashing (*TJP* [1999] NSWCCA 408); striking (*Hyatt* [2000] NSWSC 774; *Grenenger* [1999] NSWSC 380); beating (*Sotheren* [2001] NSWSC 214); ramming (*Woodland* [2001] NSWSC 416); hitting (with an object) (*Benbow* [2009] NSWSC 1472; *Leung* [2013] NSWSC 259); one-punch (eg *R v Risteski* [1999] NSWSC 1248); kicking (*Bellamy* [2000] NSWSC 1217; *CW* [2011] NSWCCA 45; *DGP* [2010] NSWSC 1408); head-butt (*R v CK, TS* [2007] NSWSC 1424; *R v Carroll* (2008) 188 A Crim R 253); gouging (*Tillman* [2004] NSWSC 794); tackling (*Dean-Wilcocks* [2012] NSWSC 107); strangling (*Graham* [2000] NSWSC 1033); suffocated (*Masson* [2001] NSWSC 1037); asphyxiation (*Adamson* (2002) 132 A Crim R 511); pushing (*Wheatley* [2007] NSWSC 1182; *Zammit* [2008] NSWSC 317); forcing (*MD* [2005] NSWCCA 342; *Daniels* [2004] NSWSC 1201; *Jeffrey* [2009] NSWSC 202); throwing (*CK* [2004] NSWCCA 116); burning (*Byrne* [2001] NSWSC 1164); bruising (*Byrne* [2001] NSWSC 1164); shaking (*GJL* [2009] NSWDC 167); and drowning (*Laing* [2004] NSWSC 510).

While the case law indicates that these are different ways of carrying out an assault for the purposes of unlawful and dangerous act manslaughter, arguably only some will meet the criteria in s 25A. On the one hand, brawls, stomping, bashing, striking, kicking, beating and head-butts are likely to meet the criteria of an 'intentional hitting' of the person by any part of the person's body. On the other hand, an assault that occurs by way of gouging, pushing, forcing, throwing, tackling,[21] strangling, asphyxiation, burning, shaking and drowning, are unlikely to. There does not appear to be any principled basis for these distinctions – and certainly not in terms of where they sit on the scale of objective seriousness.

The assault is also confined under s 25A(1) to hitting by objects *held* by the person. This must, thereby, exclude an assault by 'throwing' an object (such as a rock, bar stool, brick, beer bottle or another object) at the person and, if a shooting were not excluded by the word hitting, it is likely to be excluded by the fact that the victim is hit by a bullet rather than the gun *which is held* by the person. This criterion may not, however, exclude stabbings as the object would be held by the person.

The introduction of the elements of 'hitting' and 'held by the person' may have been done to demarcate certain forms of conduct (such as shootings and stabbings) as more serious than the ambit of s 25A offences – and hence to be dealt with by way of murder or manslaughter. However, it does not explain why very serious brawls, bashings and group assaults may well be prosecuted under s 25A(1) with the lesser maximum penalty for the basic offence, whereas potentially less serious assaults causing death such as pushing or tackling cannot. Furthermore, removing assaults that occur by way of 'throwing' from the operation of s 25A seems arbitrary rather than based on any principle in relation to offence seriousness or otherwise. Conversely, what this means is that assaults leading to death that do not constitute 'intentionally hitting the other person with any part of the person's body or with an object held by the person' will need to be prosecuted as either manslaughter or murder, no matter the scale of seriousness of the conduct.

These aspects of the definition of s 25A exemplify the vice of what Horder (1994) called 'particularism': the inclusion of definitional detail that merely exemplifies rather than delimits wrongdoing. The problem with this approach 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' (Horder 1994: 340; see also Loughnan 2010: 20-1). In turn, this has the potential to undermine the communicative function of the criminal law (Duff 2000, 1999). It is likely that in any prosecution under s 25A, technical arguments will be made about what types of conduct do (not) fit within the offence with potentially unintended consequences.

There are three other ways that the drafting of this element potentially excludes less serious forms of assaults from the parameters of s 25A, which will be discussed in turn. Once again these raise questions about hierarchy, fair labelling and how these reforms create a lack of cohesion in the criminal law.

First, by confining assaults to 'hittings' the NSW offence excludes the common law form of 'assault' from the ambit of the *actus reus*. In NSW the common law contained two separate offences being assault (the threat of unlawful physical contact) and battery (the actual infliction of unlawful physical contact). These are now combined in the *Crimes Act 1900* (NSW) in the offence of 'common assault' in s 61. The offence in s 25A is restricted to 'assaults' based on the old form of 'battery' because there must be an assault by hitting the other person either with a part of the body or an object held by the person. This means that 'assaults' which involve creating the apprehension of imminent unlawful physical contact which lead to a person's death are excluded from the operation of s 25A. For example, the conduct in *R v Kerr* [2004] NSWSC 75 (Kirby J, 24 February 2004) could not be prosecuted under s 25A. In that matter the offender alighted from a train and, in an aggressive manner and swearing, approached a male sitting alone on a platform. The assault led the victim to jump onto the tracks where he was struck by a train. The offender was convicted of manslaughter by unlawful and dangerous act (see also *RIK* [2004] NSWCCA 282). Indeed, most 'escape' cases may not come within the parameters of s 25A. Consider the facts in one version of the Crown case in *Royall*, where Healey had a well-founded and reasonable apprehension that, if she remained in the bathroom, she would be subjected to life threatening violence from Royall, and so she jumped out of the window to escape and thereby died (*Royall* (1991) 172 CLR 378). Such 'psychic' assaults are excluded from the operation of s 25A(1); yet arguably they may represent a less serious form of assault to the actual infliction of unlawful physical contact and to that extent may be better suited – in terms of hierarchy of offence seriousness as discussed above – to an offence with a lower maximum to that of manslaughter.

Secondly, assaults under s 25A are also confined to assaults that involve 'intentionally hitting', presumably with the aim of removing assaults that occur 'by accident' (for example, jostling in a queue to get into a nightclub or at a crowded bar) from the ambit of the offence. This has the implication of ruling out assaults that occur recklessly. Thus, the *mens rea* for an assault is either intent or recklessness: an intent to effect unlawful contact or create the apprehension of imminent unlawful contact; or being *reckless as to whether his/her actions would effect* unlawful contact or create the apprehension of imminent unlawful contact – where recklessness means foresight of the possibility (*MacPherson v Brown* (1975) 12 SASR 184). It is unclear as to why the legislature has precluded 'hitting' that occurs recklessly from the scope of s 25A (for example, where a person swings a faux punch that lands because the accused trips or staggers as s/he is swinging). Such assaults are, in theory, not precluded from the more serious offence of manslaughter by unlawful and dangerous act.

Thirdly, the requirement that the assault occurs by *intentionally* hitting *the other person* may also rule out situations where the offender intends to hit one person but in fact hits another. For example, this is what occurred in the case of *Taiseni, Motuapuaka, Leota, Tuifua* [2007] NSWSC 1090. In that case, Leota was involved in an argument with the second victim over the use of a pool table and was ejected from the hotel but returned with his co-offenders and attacked the second victim. Motuapuaka swung a bar stool at the second victim but it fatally struck the first victim (a hotel employee) in the head (when the second victim ducked). The offenders pleaded

guilty to unlawful and dangerous act manslaughter. While such a situation is covered by the Western Australian provision (and in the Northern Territory, s 161A(1)(b)(ii) 'or any other person'), such conduct is likely to be excluded from the parameters of s 25A offences. Again, on one view, such conduct is less serious than that concerned with intentionally hitting the other person and may be more appropriately dealt with under the basic offence with a lower maximum penalty of 20 years rather than under manslaughter. Furthermore, the drafting of the offence as 'intentionally hitting *the other person*' appears to have excluded the general common law doctrine of transferred malice by expressly requiring that the intent to hit be attached to 'the other person' (not any person).[22]

The role of intoxication: Legally and operationally problematic

The fifth criticism of the legislation is the lack of clarity and operational constraints that surround the definition of 'intoxication'. Before turning to this issue, there is a larger question that is thrown into relief by the addition of s 25A(2) into NSW criminal law: is a person who commits the offence of assault causing death while intoxicated *more* morally culpable than a person who does so while stone cold sober? The NSW Government's position is unequivocally 'yes'. This normative position is controversial but so, I would argue, is the 'common sense' view (which routinely features in defence sentencing submissions) that violence can be rendered explicable because the offender was drunk, or that intoxicated violence is *less* morally culpable (see also Loughnan 2012). Indeed, there is an important debate to be had about whether or not 'intoxication' is an appropriate basis for distinguishing between more serious and less serious forms of criminal conduct in the context of offences of violence.

It is worth recognising that intoxication already renders conduct more culpable in some contexts, including driving offences. Moreover, this is an approach that has strong support in tohe wider community. For instance, a distinction applies in the driving context with the offence of dangerous driving occasioning death (s 52A) and its aggravated form (s 52A(2)) one of the aggravating circumstances being driving with the 'prescribed concentration of alcohol' (s 52A(7)), defined in s 52A(9):

> ***prescribed concentration of alcohol*** means a concentration of 0.15 grammes or more of alcohol in 210 litres of breath or 100 millilitres of blood.

The principled basis for introducing random breath-testing and other drink-driving related offences such as aggravated dangerous driving is found in studies that demonstrate the relationship between drinking and impaired (risky) driving.[23] Yet studies have also repeatedly demonstrated the link between alcohol, violence and a myriad of societal harms (including that alcohol increases risks).[24] The analogy may be imperfect, but if we see one-punch deaths as somewhat analogous to drink-driving fatalities, perhaps there *is* a question as to whether intoxication should be seen as an aggravating factor for certain other forms of violent conduct.[25]

Putting to one side the legitimacy or otherwise of distinguishing the basic and aggravated offences on the basis of intoxication, there are clear legal problems with the drafting of the aggravated offence in s 25A(2), particularly around the lack of clarity in what the term 'intoxicated' means.

The aggravated offence requires the 'basic offence' to be committed by a person over the age of 18 years who, at the time of committing the offence, was intoxicated. However, the Act provides limited guidance on what 'intoxicated' means aside from:

- Intoxication has the same meaning as in Pt 11A of the *Crimes Act 1900* being 'intoxication because of the influence of alcohol, a drug or any other substance' (s 428A);

- that in proceedings for an offence under s 25A(2), evidence regarding the concentration of alcohol, drug or other substance at the time of the alleged offence may be given as determined by an analysis carried out under the new Div 4, Pt 10, LEPRA (s 25A(6)(a)); and
- 'the accused is conclusively presumed to be intoxicated by alcohol' if the prosecution proves under an analysis carried out in accordance with Div 4, Pt 10, that the accused has a 0.15 grams or more of alcohol in 220 litres of breath or 100 millilitres of blood (s 25A(6)(b)) (being equivalent to the HRPCA amount).

In addition, the Premier's second reading speech to the Act, stated:

> The bill sets out ways in which the prosecution can prove intoxication. An accused person is presumed intoxicated if they have more than 0.15 grams or more of alcohol in 220 litres of breath or 100 millilitres of blood. *Where this is not available, or where drugs are suspected, other evidence may be considered, including the concentration of alcohol or drug in a person's breath or blood at the time of the offence and evidence from closed-circuit television [CCTV] footage, eye witnesses and police observations, all of which are consistent with the current provisions of the Crimes Act* [emphasis added]. (O'Farrell 2014b: 3)

The failure to define 'intoxicated' means that one of the significant difficulties with prosecutions under s 25A(2) is likely to be proving that, at the time the offence was committed, the person was in fact intoxicated. Aside from situations where a person is 'deemed' to be intoxicated by the prosecution proving, via an analysis carried out under Div 4, Pt 10 of LEPRA, that there was present in the accused's breath or blood a concentration of 0.15 grams or more of alcohol in 220 litres of breath or 100 millilitres of blood (such cases are likely to be rare, for the operational reasons discussed below), the legislation leaves a significant 'grey area' as to what is meant by intoxication either by alcohol or drugs. In other words, where the prosecution does not have 'conclusive' evidence of intoxication under s 25A(6)(b), it will be a matter of cobbling together evidence of eye witnesses, police and experts. Furthermore, with a mandatory 8-year minimum sentence (s 25B(1)) the consequence of conviction together with the fact that there is unlikely to be any incentive to plead to such offences, the defence will hotly contest this issue, putting the Crown to strict proof. Where pleas to unlawful and dangerous act manslaughter typically lead to an 'agreed statement of facts' for the purposes of sentencing including acknowledgment of agreed levels of alcohol or drug consumption, there are unlikely to be any admissions made by offenders in relation to intoxication for s 25A(2) charges.

This problem does not arise in other situations where intoxication is an aggravating factor. Thus, for the aggravated offence of dangerous driving occasioning death in s 52A, where the aggravating factor is driving with the 'prescribed concentration of alcohol' (s 52A(7)), as cited above, this has been clearly defined in s 52A(9).

The problem is also not solved by the mooted amended definition of 'intoxicated' in the Crimes Amendment (Intoxication) Bill 2014 (the Bill) which, if passed, would insert a definition of 'intoxicated in public'[26] into s 8A(3) of the *Crimes Act 1900* in the following terms:

> For the purposes of an aggravated intoxication offence, a person is intoxicated if:
>
> (a) the person's speech, balance, co-ordination or behaviour is noticeably affected as the result of the consumption or taking of alcohol or a narcotic drug (or any other intoxicating substance in conjunction with alcohol or a narcotic drug), or

(b) there was present in the person's breath or blood the prescribed concentration of alcohol (that is, 0.15 or above).

The Bill introducing this definition was read for a second time on 26 February 2014 and was passed by the Legislative Assembly on 6 March 2014 without amendment. If passed by the Legislative Council it will apply to the new assault causing death offence because s 25A(2) is defined to be an 'aggravated intoxication offence' in s 8A(1) of the Bill. Sub-section (a) of the definition above transplants the definition of 'intoxicated' from provisions found in other Acts which typically relate to a situation where a police officer is required to exercise a discretion as to whether a person is intoxicated before exercising other powers or charging an offence. Section 9(6) of the *Summary Offences Act 1988* (NSW) (the definition of intoxication for the offence of a continuation of intoxicated and disorderly behaviour following a move on direction), is indicative:

(6) For the purposes of this section, a person is ***intoxicated*** if:

(a) the person's speech, balance, co-ordination or behaviour is noticeably affected, and

(b) *it is reasonable in the circumstances to believe that* [emphasis added] the affected speech, balance, co-ordination or behaviour is the result of the consumption of alcohol or any drug.

Similar definitions are contained in the *Intoxicated Persons (Sobering Up Centres Trial) Act 2013* (NSW) s 4(2); *LEPRA* s 198(5); and *Liquor Act 2007* s 5(1).

The words 'it is reasonable in the circumstances to believe that ...' have been removed from the mooted definition to be applied to the s 25A(2) offence and replaced with '*as the result of the consumption or taking of alcohol or a narcotic drug ...*'. Such a definition of intoxication will be legally and operationally unworkable given it will be near impossible to prove that the behaviour (that is, the 'person's speech, balance, co-ordination or behaviour') is 'noticeably affected *as the result of* the consumption or taking of' alcohol or drugs. In other words, how could the Crown prove beyond reasonable doubt that the 'behaviour' identified was '*the* result of' the alcohol or drugs and not, for instance, some other reason (for example, tiredness, excitement, anger, fear and so on)?

Given that over-consumption of alcohol (and, to a lesser extent, other drugs) has been *the* focus of the construction of a 'problem' that needs to be 'fixed', it is surprising that the new legislation – and these mooted 'refinements' – create considerable uncertainty as to where the line will be drawn between consumption of alcohol/drugs that triggers s 25A(2) and consumption that does not. The new testing powers are also likely to be operationally difficult because of the time in which police have to undertake drug and alcohol testing under the new Div 4, Pt 10 of LEPRA. In the case of alcohol testing it must be undertaken within two hours 'after the commission of the alleged offences' (s 138F(3)) 'at or near the scene of the alleged offence or at a police station or other place at which the person is detained in connection with the offence' (s 138F(1)). For blood and urine samples for alcohol or drugs it must be within four hours after the commission of the offence (s 138G(3)) and a person may be taken to and detained at a hospital for the purpose of the taking of a blood or urine sample' (s 138G(4)).[27] Not only will it be difficult in some situations to define exactly when the offence was committed[28] and hence when time begins to run but, from an operational point of view, the time limits for obtaining samples dramatically confine the types of prosecutions that will be possible under s 25A(2).[29]

Indeed, it is likely that only offenders caught at the scene of the crime will be able to be tested within the relevant time frames. For instance, Mr Loveridge was arrested 11 days after the

offence was committed (a relatively short period of time in investigation terms for a homicide) when clearly it would not be possible to test him for alcohol or drugs. If s 25A(2) had been in existence, the Crown, if it sought to make out a case for this offence, would not have had access to the 'presumptive conclusion' of a 0.15 test, and so would have had to build evidence of Mr Loveridge's intoxication. Evidence that he had consumed alcohol would not be enough. In that case, it appears that the evidence of Mr Loveridge's intoxication that was available at his sentencing hearing was only available because it had been volunteered by him and formed part of an agreed statement of facts.[30] Such practices are unlikely to continue with a mandatory minimum of eight years being the outcome of a conviction. By contrast, it may have been possible to test Mr McNeil, in relation to his assault of Mr Christie, because he was arrested shortly after the assault and at the scene of the offence.

Not only does this indicate the difficulty police will have of carrying out drug and alcohol testing within the relevant time frames of the commission of the offence, but it is also likely to lead to an ad hoc system for prosecution where it may be purely chance that police are able to arrest the suspect and test for alcohol or drugs at the scene of the offence. This will introduce a significant element of randomness. In one instance, an offender may be charged with s 25A(2) because the offender is caught at the scene. In another, the offender is not caught until a week later, and while s/he may still be charged with s 25A(2), because of difficulties in proving 'intoxication', the Crown may accept a plea to s 25A(1) (with a 20 year maximum) – with the result that the offender is entitled to the relevant discount for an early guilty plea.

Given the difficulties in proving intoxication conclusively, it is likely that we will see *charges* to s 25A(2) (giving the appearance of a 'tough' response that satisfies what are said to be the community's expectations) but *pleas* to the lesser offence of s 25A(1). Studies of mandatory sentencing indicate that 'discretion' is not removed from the system; rather it is displaced often onto police and prosecutors, and significantly so in the area of charging and charge negotiation (Hoel and Gelb 2008). Further evidence that the acceptance of pleas is likely can be found in the study by Quilter (2014b) of one-punch manslaughters, which indicated that, in all cases but one, the matter did not proceed to trial, with the offender pleading guilty to manslaughter. In each of the 17 other cases, the offender received a discount of 20-25 per cent in recognition of the early plea (in accordance with *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(3)(k), 22 and *Thomson and Houlton* (2000) 49 NSWLR 389). Furthermore, in 10 of the matters, the offender was originally charged with murder but pleaded guilty to the less serious offence of manslaughter. An unintended consequence of the creation of a new basic offence and an aggravated version (similar to the hierarchy between murder and manslaughter) may mean that we could see charges to s 25A(2) offences but pleas to the basic offence which has a lesser maximum than manslaughter and to which no mandatory minimum applies. The ultimate effect may be a further *deflation* of sentences for these types of matters.

Conclusion

This article has made five inter-related criticisms of the *Crimes and other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW). Although the NSW Government claims to have 'listened' to community concerns and acted decisively, the unfortunate irony is that the operational difficulties to which the legislation will give rise are likely to result in widespread disappointment. The appearance of a tough and effective response to alcohol-fuelled violence may turn out to be illusory. It has been more than 60 years since the NSW Parliament substantially amended homicide offences in the *Crimes Act 1900* (NSW). The addition of two new forms of homicide in NSW – assault causing death, and assault causing death while intoxicated – should not have occurred in the context of a volatile knee-jerk reaction to genuine community anxiety about alcohol-fuelled violence, and with such haste that there was no opportunity for expert input, careful consideration or broader discussion. The legal and

operational problems that have been examined in this article could have been addressed prior to enactment if adequate time had been allowed for proper consultation, including with the NSW Law Reform Commission, and the NSW Parliament's Legislation Review Committee. Unfortunately, these problems will now fall to be resolved in the context of operational policing, prosecutorial discretion and the conduct of trials. These environments are not necessarily conducive to yielding sound interpretations of general application and leave no opportunity for the emergence of a considered opinion that further criminalisation or draconian penalties may not in fact be the best regulatory tool for addressing the problem of alcohol-related violence. The other problem is that the government has set high expectations for how one-punch deaths will be handled in the future and yet the legislation offers no guarantee that the harsh punishment promised by the government will be delivered in any given case.

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[2] The first was added in 2011 for murdering a police officer in execution of his or her duties and the mandatory penalty is life: *Crimes Act 1900* s 19B.

[3] Originally nine offences were mooted: assault occasioning actual bodily harm; assault occasioning actual bodily harm in company; assault of police officer in the execution of duty (not during a public disorder); reckless wounding; reckless wounding in company; reckless grievous bodily harm; reckless grievous bodily harm in company; affray; and sexual assault (see Roth 2014: 6).

[4] The *Liquor Amendment Act 2014* introduced: lockouts from 1.30am; cessation of liquor service at 3:00pm; imposition of similar licensing conditions as those already applied in Kings Cross to the expanded Sydney CBD Entertainment Precinct; an expanded freeze to the Sydney CBD Entertainment Precinct; an extension of temporary and long-term banning orders to the new Precinct; prohibition of takeaway liquor sales after 10:00pm; and a risk-based liquor licensing scheme (based on factors such as trading hours and records on previous assaults).

[5] The Crimes Amendment (Intoxication) Bill 2014 was read by the Premier for a second time on 26 February 2014 and passed by the Legislative Assembly on 6 March 2014. The Bill was substantially amended by the Legislative Council and returned to the Legislative Assembly on 19 March 2014 which rejected the amended Bill and returned it to the Legislative Council. The Legislative Council once again rejected the Bill on 26 March 2014. What becomes of this Bill remains to be seen but it is expected to be considered again in May 2014.

[6] See the petition at: change.org/thomaskelly. At the time of writing the petition has 144, 331 signatures and the website claims 'Victory'.

[7] 'Enough is Enough' is an antiviolence movement established by Ken Marslew following the 1995 murder of his 18-year-old son, Michael Marslew, during a pizza restaurant robbery (see http://enoughisenough.org.au/site/11/anti-violence).

[8] The Pinkie ad campaign successfully targeted and reduced speeding particularly of young men. The ad was said to slow them down by holding up a little pinkie finger and convincing them that if they sped, that's what people suspected about their genitals (Naggy 2014).

[9] Mr McEwen called for six matters: a targeted media campaign to tackle alcohol-fuelled violence like the 'pinkie ad'; the Newcastle solution; a database linking pubs and clubs to ensure repeat offenders who are thrown out of one venue are not admitted to another; change of bail and good behaviour bonds revoking the rights of a person who commits an alcohol-related crime to drink outside their home; introduce mandatory drug and alcohol-testing of violent offenders; and a national ban on political donations by the alcohol and gambling industries (McEwen 2014).

[10] The ABS released a National Offence Index (NOI) in 2003 and a second edition in July 2009. The NOI is Australia's most recognised offence seriousness index. See ABS (1997) *Australian Offence Classification* (ASOC), 1997 Cat.No.1234.0. Canberra: ABS; ABS (2003) *Criminal Courts, Australia 2001-02* Cat. No.4513.0 Canberra: ABS; ABS (*Australian Standard Offence Classification (ASOC), 2008* (2nd ed). Cat. NO.

1234.0. Canberra: ABS; ABS (2009) *National Offence Index 2009* Cat. No. 1234.0.55.001. Canberra: ABS; ABS (2010) *Criminal Courts, Australia 2008-09* Cat. No.4513.0 Canberra: ABS.

[11]This means that, unlike other provisions, such as in Victoria, there is no possibility of a judge finding 'special reasons' to reduce the mandatory minimum: see *Crimes Amendment (Gross Violence) Act 2012* (Vic). This Act amended the *Crimes Act 1958* (Vic) to introduce offences of 'gross violence' (ss 15A and B), and the *Sentencing Act 1991* (Vic) to provide a mandatory minimum of 4 years for such crimes, but with provision for a lesser sentence where the judge finds 'special reasons' (ss 10 and 10A).

[12]An aggregate sentence is where a court is 'sentencing an offender for more than one offence' and imposes an aggregate sentence of imprisonment with respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53A.

[13]The six offences are reckless GBH in company (s 35(1)); reckless GBH (s 35(2)); reckless wounding in company (s 35(3)); reckless wounding (s 35(4)); assault police officer – reckless GBH or wounding (public disorder) (s 60(3A)); assault police officer – reckless GBH or wounding (not during public disorder) (s 60(3)) (O'Farrell 2014c).

[14]This mandatory minimum is not new but was introduced in 2011.

[15]An assault is not authorised or excused by law if there is no consent to the assault or other lawful excuse.

[16]For instance in *R v Munter* [2009] NSWC 158, the 66-year-old victim of a one-punch manslaughter had a history of hypertension and potentially fatal heart disease. After the one punch he had a heart attack and died. See also *R v Irvine* [2008] NSWCCA 273, where the victim of a one-punch manslaughter suffered a congenital abnormality that contributed to his death; and *LAL, PN* [2007] NSWSC 445 in which the two offenders assaulted a taxi driver with moderate force but the victim suffered from heart disease and died from a heart attack. A manslaughter trial in NSW that recently returned a not guilty verdict involved a situation that would potentially be excluded. In this matter Chab Taleb (a former bouncer) was involved in a brawl with Jason Daep at the Pontoon nightclub in Cockle Bay and pushed Daep into the water where he drowned. In this case, Daep died not because of the injuries from the assault nor from hitting a hard surface, but from drowning.

[17]A definition of the word 'hitting' contained in the Crimes Amendment (Intoxication) Bill 2014. If the Bill is passed it will amend s 25A to insert the following definition of 'hits another person':

(2A) For the purposes of this section, a person hits another person if the person:
(a) hits the other person with any part of the person's body, or
(b) hits the other person with a thing worn or held by the person, or
(c) forces any part of the other person's body to hit the ground, a structure or other thing.

This new definition is likely to extend the types of behaviours that come within the ambit of s 25A including 'forcing', 'pushing', 'tackling' as discussed below.

[18]The word 'hit' is used once in the definition of 'violence' in s 93A of the *Crimes Act* in relation to riot or affray, ***violence*** means any violent conduct, so that:

(a) except for the purposes of section 93C, it includes violent conduct towards property as well as violent conduct towards persons, and
(b) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short).

[19]The Macquarie Dictionary defines '**Hit** –*verb* (*t*) **1.** to deal a blow or stroke; bring forcibly into collision.'

[20]The Public Defender's Office of NSW Sentencing Tables for unlawful and dangerous act manslaughter from 1998-2013; available at http://www.publicdefenders.lawlink.nsw.gov.au/pdo/public_defenders_manslaught_unlawful_dang_act.html?s=1001 (accessed 18 March 2014).

[21]A legal argument could perhaps be made that a tackling constitutes a 'collision' in the ordinary meaning of 'hitting' as noted above.

[22]Under the doctrine of transferred malice *mens rea* can be transferred to the defendant. Thus, where the defendant attacks someone with *mens rea* for a particular offence, misses, but nevertheless 'accidentally' brings about the *actus reus* for the *same* offence in relation to a different person, the *mens rea* and *actus reus* can, essentially be added together, and the offender can be convicted of the offence (Brown et al. 2011: 347). The doctrine, however, has been strongly criticised in the UK (see Brown 2011: 347). For s 25A offences, however, the offence confines the intentional hitting to *the other person* which seems to exclude the doctrine.

[23]For example, Homel 1997; Road Traffic Accidents in NSW 2001, Statistical Statement: Year ended 31 December 2001 (RTA Road Safety Strategy Branch, January 2003) reveals the high costs of drink-driving not only in terms of death or injury to drivers and other users of the roads, but also in terms of economic cost involving loss of earnings, decreased enjoyment of life, medical and hospital expenses, costs associated with damage or loss of personal property, and the public expenditure on the investigation and prosecution of offenders. See also RTA, Drink Driving: Problem Definition and Countermeasure Summary (August 2000) at 2.

[24]See, for example, above endnote 23; see also Quilter 2014b, where only four of the one-punch manslaughters did not involve significant alcohol and/or drug consumption.

[25]Perhaps one answer is that there is a generally applicable and scientifically proven correlation between drinking and driver impairment whereas the relationship between drinking and propensity to violence is less consistent. For instance, the NSWCCA indicated in the High Range PCA guideline judgment: 'it is axiomatic that the higher the concentration of alcohol in the blood the more likely it is that the person's ability to control and manage a motor vehicle will be adversely affected and the greater is the risk of the vehicle being involved in an accident. A blood alcohol reading within the "high range" increases the probability of the vehicle crashing by 25 times, that is 2,500 per cent: RTA, Drink Driving: Problem Definition and Countermeasure Summary (August 2000) at 2. In 2001 of 1,055 motor vehicle drivers and motorcycle riders killed or injured and who had a blood alcohol concentration over the legal limit, 50 per cent are in the high range; RTA Statistical Statement, above, at p iii.': *Application by the Attorney General Concerning the Offence of High Range Prescribed Content of Alcohol Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305 at [10]. Another aspect is that s 52A offences are ones of strict liability whereas s 25A offences (together with the nine other offences that are to be introduced in late February 2014) are *mens rea* offences.

[26]While not the subject of this article, it is troubling that the focus of the definition in the Bill is '*public*' intoxication. This clearly leaves unregulated any 'aggravated intoxicated offence' committed in a 'domestic' setting, be it domestic violence or neighbour or other private violence.

[27]It is noted that it is an offence to refuse to provide a blood or urine sample pursuant to s 138G, with a maximum penalty of 50 penalty units or imprisonment for 2 years, or both: LEPRA s 138H(1).

[28]Although it is noted that, under the Crimes Amendment (Intoxication) Bill 2014, the time of the commission of the offence will be amended to 'the police officer has reason to believe that the alleged offence was committed': Sch 2 cl [3] and [6].

[29]It is noted that the time periods will be extended under the Crimes Amendment (Intoxication) Bill 2014. Thus, for breath testing and analysis under LEPRA s 138F(3), instead of 2 hours after the commission of the offence it will be 'as soon as possible and within 2 hours after the police officer has reason to believe that the alleged offence was committed' and for blood and urine samples under LEPRA s 138G they may be conducted up to 12 hours after the 'police officer has reason to believe that the alleged offence was committed' (rather than the original four hours): see Sch 2 cl [6]. Furthermore, Sch 1 [2] will introduce a series of 'deeming' provisions into the *Crimes Act* s 8A(5) such that any concentration of alcohol or drug 6 hours after the alleged offence is deemed to be the concentration of alcohol at the time of the alleged offence.

[30]This is a common practice in one-punch manslaughter cases with 17 of the 18 such matters in NSW from 1998-2013 involving guilty pleas and, on sentence, an agreed statement of facts including in relation to the offender's level of intoxication. Indeed, of the one-punch manslaughter cases, only four did not involve either alcohol or drugs and in all cases evidence of intoxication or drugs came from the agreed statement of facts: see Quilter 2014b.

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The Thomas Kelly case: Why a "one punch" law is not the answer

Dr Julia Quilter*

The tragedy of a young man's death in King's Cross in 2012, and the perceived leniency of the sentence for manslaughter handed down to his killer in 2013, have ignited calls for a special criminal law to cover situations in which death results from a senseless act of violence: a specific "one punch" law. Through an examination of the operation of the existing one punch law in Western Australia, and the operation of manslaughter by unlawful and dangerous act in one punch fatality situations in New South Wales, this article argues that a new offence of assault causing death is neither necessary nor desirable. It concludes that a guideline judgment on one punch manslaughter offers a more appropriate and constructive path to responding to community concerns about alcohol-fuelled acts of fatal violence.

INTRODUCTION

In July 2012, Bowral teenager Thomas Kelly was king-hit and killed in Kings Cross by Kieran Loveridge in a senseless act of random, alcohol-fuelled violence. When Loveridge pleaded guilty to manslaughter (and four unrelated assaults that occurred on the same evening) in June 2013, many expected that he would receive a hefty prison sentence. When Justice Campbell sentenced him to a non-parole period (NPP) of four years for the manslaughter of Mr Kelly, the outrage from the media and public was immediate. The New South Wales government was also quick to react with a classic "law and order" response, proposing a new "one punch" law.

Through an examination of the history and operation of one punch laws in Australia, and an examination of the definition and operation of the New South Wales crime of unlawful and dangerous act manslaughter, this article argues that there are three reasons why a one punch law is not the answer. First, it is inaccurate to characterise a one punch law as filling a gap in New South Wales law regarding fatal violence; there is no gap of the sort that exists in the Code jurisdictions. Secondly, a one punch law may have problematic impacts on the way that the criminal law is used to respond to domestic (and other) homicides. Thirdly, such a law has the potential to *reduce* sentences in cases where death results from a single punch; the precise opposite effect of the government's stated justification for acting.

The article first provides an overview of Mr Kelly's death and Mr Loveridge's sentencing. It next examines the history and operation of so-called one punch laws in Australia, focusing on s 281 of the *Criminal Code 1913* (WA), and highlights reasons to be cautious about whether this approach provides an appropriate model for New South Wales. The article then examines the legal tests and operation of the New South Wales offence of unlawful and dangerous act manslaughter in relation to one punch deaths, with an emphasis on disproving the claim that there is a gap in the State's criminal law that needs to be filled with a one punch law. The last part of the article focuses on the perceived leniency of sentences in one punch manslaughter cases and explores whether a guideline judgment is an appropriate way forward.

THOMAS KELLY'S DEATH AND THE SENTENCING OF KIERAN LOVERIDGE

Just after 10pm on Saturday, 7 July 2012, 18-year-old Thomas Kelly alighted from a taxi to begin his first night out in Kings Cross, Sydney, with his girlfriend and another female friend. They had caught the taxi from Town Hall and intended to meet friends at a bar in Bayswater Road. Some minutes later

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when they were walking south along Victoria Street, in an unprovoked attack, Thomas was king-hit in the face as he talked on his mobile phone. He fell to the ground, hitting his head on the pavement. He was transported by ambulance to St Vincent's Hospital, Darlinghurst, where he received medical attention but never regained consciousness. On Monday evening, 9 July 2012, his family made the decision to terminate his life support.

The medical evidence admitted for the purposes of the sentencing proceedings is an important reminder of just how serious Mr Kelly's injuries were from that one punch:

> A CT scan of Thomas Kelly's head showed a massive fracture of the back of the skull ... It also showed brain injury in the left frontal area of the brain. At post mortem, laceration and haematoma were found on the right side of the back of the head overlying the basal skull fracture. The neuropathologist attributed this to a severe single blow to the back of the head, which I infer was caused by Thomas' head striking the pavement heavily. The injuries to the left front area of the brain were said to be consistent with a significant blow to the back of the head, giving rise to a contrecoup effect.[1]

On 18 July 2012, homicide detectives arrested Kieran Loveridge, 18 years of age, of Seven Hills in Western Sydney, and charged him with the murder of Thomas Kelly. He was ultimately also charged with four other assaults (three common assaults and one occasioning actual bodily harm) from unrelated events on that same Saturday night. Almost a year later, on 18 June 2013, Mr Loveridge pleaded guilty to the manslaughter of Mr Kelly and the assaults.

The plea and sentencing proceedings provided the facts regarding Mr Loveridge's alcohol-affected state. From the agreed statement of facts tendered in the proceedings, the judgment indicates that Mr Loveridge started drinking with two (or three) friends at around 5pm and by 7:30pm they had consumed between them a carton of two-dozen mixed drinks, each having an equivalent to 1.9 standard drinks. By this time, they had arrived in Darling Harbour by car where they went to a bar (having been previously denied entry to one) and drank further mixed drinks. They then caught a taxi to Kings Cross where they went to a bar in Darlinghurst Road shortly before 9pm. Campbell J found that "[d]espite the lack of precision in the evidence, I am satisfied beyond reasonable doubt that by 9:30pm on 7th July 2012, the offender was very drunk".[2] Shortly afterwards the first assault occasioning actual bodily harm was committed and thereafter the fatal blow to Mr Kelly was struck. (The three other assaults occurred afterwards.) These facts are not dissimilar to other one punch manslaughters in New South Wales, and it is within this context that renewed community concern over random alcohol-related violence should be understood.

On 8 November 2013, Campbell J sentenced Kieran Loveridge to a total of seven years and two months for the combined manslaughter and four assaults (six years for manslaughter with a four-year NPP, and one year and two months for the assaults) – with an effective NPP of five years and two months. The first date he will be eligible for parole is 18 November 2017. The sentence sparked immediate outrage from the family, the public and the State government.[3]

On the same day, 8 November 2013, the New South Wales Attorney-General, Greg Smith SC MP, released a media statement, asking the Director of Public Prosecutions (DPP) to consider an appeal against the sentence handed down, and four days later he announced a proposed so-called "one punch law" to be brought before State Parliament in the new year:

> The proposed bill will be based on a Western Australian so-called "one punch law" which carries a maximum penalty of 10 years – the laws I am proposing for New South Wales will carry a maximum penalty of 20 years imprisonment ...
>
> The new offence and proposed penalty will send the strongest message to violent and drunken thugs that assaulting people is not a rite of passage on a boozy night out – your behaviour can have the most serious consequences and the community expects you to pay a heavy price for your actions.

[1] *R v Loveridge* [2013] NSWSC 1638 at [16].

[2] *R v Loveridge* [2013] NSWSC 1638 at [11].

[3] See, for instance, Bibby P, "Four Years for a Life: Kelly Family's Outrage", *The Sydney Morning Herald* (8 November 2013).

> There is community support for creating an offence which explicitly recognises situations where an assault directly or indirectly causes the death of a person. It will also provide clarity about the appropriate charge in one punch situations.[4]

After citing the Western Australia provision the media release stated:

> The offence of manslaughter remains available for assaults where there is a foreseeable risk of serious injury, while the proposed new offence will apply to any assault which results in death.

In the evening of 14 November 2013, the New South Wales DPP, Lloyd Babb SC, announced he would appeal Mr Loveridge's sentence on the basis that it was "manifestly inadequate". He also indicated that he will ask the New South Wales Court of Criminal Appeal (NSWCCA) to issue a guideline judgment.[5]

It took the government just four days to propose the one punch law – without any known consultation from the New South Wales Law Reform Commission (NSWLRC) or other relevant interest groups[6] and without any apparent analysis of the operation of such laws – and, in spite of an appeal being announced by the DPP.[7]

ONE PUNCH LAWS IN AUSTRALIA

A one punch law was first mooted in Australia in August 2007 in the Queensland Parliament through a private member's Bill of the then Shadow Attorney-General and Shadow Minister for Justice, Mr Mark McArdele MP. This Bill followed intense media publicity around three prosecutions for one punch deaths – two of which led to acquittals (*R v Little* and *R v Moody*) and the other led to a plea to manslaughter.[8] In introducing the Bill, Mr McArdele referred to *Little* and *Moody* and explained that the Bill sought to respond to "community concern" in relation to one punch cases.[9] The Bill would have introduced an offence of "unlawful assault causing death" with a maximum sentence of seven years but failed to pass the Parliament. In the debate following the Second Reading, the Attorney-General outlined the government's reasons for opposing the Bill:

> [F]irstly, it adds nothing to the existing range of offences – to which significant penalties apply – able to be charged as alternatives to murder and manslaughter; secondly, the attempt to modify the accident

[4] Greg Smith SC MP, *Unlawful Assault Laws Proposed*, Media Release (12 November 2013). See also Greg Smith SC MP, *AG Asks DPP to Consider an Appeal*, Media Statement (8 November 2013).

[5] See Coultan M, "DPP to Appeal Sentence Given to Kieran Loveridge after Death of Thomas Kelly", *The Australian* (14 November 2013).

[6] The Law Society of New South Wales and the New South Wales Bar Association have both publicly opposed the proposed one punch law. See Law Society of New South Wales, *"King Hit" Issue Needs Guidance Not Legislation*, Media Release (13 November 2013); Patty A, "One-Punch Laws: Knee-Jerk Reaction that Protects Alcohol Industry", *The Sydney Morning Herald* (14 November 2013), quoting Phillip Boulten SC, President of the New South Wales Bar Association.

[7] It is noted that the Attorney-General indicated that he would press on with the one punch law and not await the outcome of any appeal in Mr Loveridge's matter: see Editorial, "New South Wales DPP to Appeal Loveridge Sentence", news.com.au (14 November 2013).

[8] The two trials that led to acquittals were: that of Jonathon Little who was acquitted of the one punch murder (and manslaughter) of David Stevens in March 2007. Secondly, that of William Moody who was acquitted in April 2007 of the manslaughter of Nigel Lee in a fight over a taxi in Brisbane in January 2005 which led Moody to punch Lee's face breaking his nasal bridge; Lee drowned in his own blood within minutes. The other high profile one punch death was that of 15-year-old Matthew Stanley who was killed by a punch outside an 18th birthday party in September 2006 in Brisbane; the 16-year-old offender pleaded guilty to manslaughter in 2007. See the discussion of these cases in Queensland Department of Justice and Attorney-General (DJAG), *Audit On Defences to Homicide: Accident and Provocation, Discussion Paper* (October 2007) pp 4-6; Dixon N, "Attacking the Accident Defence: Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld)", Queensland Parliamentary Library, Research Brief No 2007/31 (2007) pp 12-14. See further Queensland Law Reform Commission (QLRC), *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (September 2008) which discusses the *Little* and *Moody* cases at [6.10]-[6.23]. See also Burke L, "One Punch Can Start Moral Panic: An Analysis of News Items about Fatal Assaults in Queensland Between 23 September 2006 and 28 February 2009" (2010) 10 *Queensland University of Technology Law and Justice Journal* 87; Tomsen S and Crofts T, "Social and Cultural Meanings of Legal Responses to Homicide Among Men: Masculine Honour, Sexual Advances and Accidents" (2012) 45(3) *ANZ Journal of Criminology* 423.

[9] Queensland Legislative Assembly, *Parliamentary Debates, Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld)*, Second Reading Speech, Mark McArdle (9 August 2007) p 2465.

> defence may have an unintended effect on the availability of other defences; and, thirdly, it is premature to create a new offence or to consider any other changes to existing laws given that I am already reviewing the accident defence in homicide cases and am consulting on this issue.[10]

In terms of this third reason, the government had in May 2007 commissioned the Queensland Department of Justice and Attorney-General (DJAG) to undertake an audit of homicide trials to establish the nature and frequency of the reliance on the defences of accident and provocation.[11] The audit by DJAG reviewed a selection of homicide trials finalised between July 2002 and March 2007 and reported its findings in October 2007. It also invited the public to comment on the operation and use of the excuses of accident and provocation. On 2 April 2008, the Attorney-General and Minster for Justice asked the Queensland Law Reform Commission (QLRC) to review the defences of accident and provocation with the results of the DJAG audit and the public submissions. In September 2008, the QLRC presented its final report and specifically recommended against introducing such a law.[12]

One punch laws, however, were later enacted in Western Australia in 2008 and the Northern Territory in 2012. On both occasions, it followed similar intense media coverage of tragic killings of young men in circumstances very similar to the death of Thomas Kelly: a punch to the head leading to a fall and connection with a hard surface such as the pavement, with resulting massive brain injuries and the victim often never regaining consciousness. In Western Australia there were three such acquittals[13] whereas, in the Northern Territory, the death of Brett Meredith triggered popular support for the law even though it led to the conviction for manslaughter of Michael Martyn for the single punch death which occurred in a nightclub in Katherine in November 2011.[14]

One punch laws provide that where a person assaults another and that person dies either as a direct or indirect result of the assault, the person is guilty of the offence of "unlawful assault causing death" and is liable to imprisonment for up to 10 years in Western Australia and 16 years in the Northern Territory. Section 281 of the *Criminal Code Act 1913* (WA) provides:

> 281 Unlawful assault causing death
> (1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.
> (2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.

In the Second Reading Speech of the Bill introducing s 281, the Attorney-General, Mr James McGinty MP, made clear that the offence was modelled on the one punch situation:

> This new offence reinforces community expectations that violent attacks, such as a blow to the head, are not acceptable behaviour and will ensure that people are held accountable for the full consequences of their violent behaviour.[15]

A distinguishing feature of one punch laws like s 281 is that there is no fault element (subjective or objective) in relation to the consequence of death because the accident excuse is expressly excluded

[10] Queensland Legislative Assembly, *Parliamentary Debates, Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld)*, Hon Kerry Shine MP, Attorney-General (14 November 2007) p 4311. See also Dixon, n 8, p 1.

[11] Hon Kerry Shine MP, Attorney-General, *Audit of "Accident" Defence Cases in Queensland*, Ministerial Media Statement (20 May 2007). For the results of that study, see DJAG, n 8.

[12] QLRC, n 8, Recommendation [10-7] specifically recommends against an unlawful assault causing death offence. The QLRC's reasons are provided at pp 200-205 especially at [10.91]-[10.92] and state that responsibility for manslaughter should be based on "foreseeability of death" and that an unlawful assault causing death offence would not fit well within the existing structure and policy of the Code.

[13] The three acquittals were: the death of Dwayne Favazzo in a one punch assault in a mess hall at the Yandi Mine in the Pilbara in December 2006 by Paul Oakley who was found not guilty of manslaughter in 2007; the death of Skye Barkwith caused by Jake Becker in a one-punch incident outside the Greenwood Hotel in 2005, found not guilty in September 2007; and the death of Leon Robinson who was killed on Christmas Day by four teenagers who were acquitted in 2005 of his manslaughter. See also Tomsen and Crofts, n 8 at 432-434.

[14] See *The Queen v Martyn* (2011) 30 NTLR 157. Martyn was at first instance sentenced to three years and eight months with a one year and 10 months non-parole period. On appeal by the Crown that sentence was found to be manifestly inadequate and was set aside and Martyn resentenced to five years with a two years and six months non-parole period.

[15] Western Australia Legislative Assembly, *Parliamentary Debates*, James McGinty, Attorney-General (19 March 2008) p 1210.

by subs (2). The mere fact that death was *caused* (directly or indirectly) by the assault is sufficient.[16] In this respect, modern one punch laws resemble the old common law offence of battery manslaughter, which was abolished by the High Court two decades ago (discussed below).

It is noteworthy that as well as introducing s 281, the *Criminal Law Amendment (Homicide) Act 2008* (WA) also made a number of consequential changes to the law of homicide in Western Australia following recommendations by the Western Australian Law Reform Commission (WALRC). However, the WALRC did not recommend a one punch law be introduced in its final recommendations. Instead, the Commission recommended that s 294 of the Code (doing grievous bodily harm with an intention to do grievous bodily harm) be listed as a statutory alternative offence to manslaughter.[17] The WALRC (much like the QLRC) concluded that the current foreseeability test underpinning the accident defence (discussed below) is appropriate:

> Despite the difference between the Code and the common law in this context, the Commission has concluded that the current test for the defence of accident provides the appropriate minimum requirement for this category of manslaughter. The requirement that death was objectively reasonable and foreseeable ensures that there is a degree of correspondence between the blameworthy conduct of the accused and the resulting harm. If death was not reasonably foreseeable the accused could still be held criminally liable for any harm caused that *was* reasonably foreseeable.[18]

The Northern Territory one punch law was introduced by the *Criminal Code Amendment (Violent Act Causing Death) Act 2012* (NT) and is framed around the notion of a "violent act" causing death (rather than simply an assault). This Act amended the *Criminal Code Act* to introduce s 161A:

> 161A Violent act causing death
>
> (1) A person (the *defendant*) is guilty of the crime of a violent act causing death if:
>
> (a) the defendant engages in conduct involving a violent act to another person (the *other person*); and
>
> (b) that conduct causes the death of:
>
> (i) the other person; or
>
> (ii) any other person.
>
> Maximum penalty: Imprisonment for 16 years.
>
> (2) Strict liability applies to subsection (1)(b).
>
> (3) The defendant is criminally responsible for the crime even if the other person consented to the conduct mentioned in subsection (1)(a).
>
> (4) However, the defendant is not criminally responsible for the crime if:
>
> (a) the conduct involving the violent act is engaged in by the defendant:
>
> (i) for the purpose of benefiting the other person; or
>
> (ii) as part of a socially acceptable function or activity; and
>
> (b) having regard to the purpose, function or activity mentioned in paragraph (a), the conduct was reasonable.
>
> (5) In this section:
>
> *conduct involving a violent act* means conduct involving the direct application of force of a violent nature to a person, whether or not an offensive weapon is used in the application of the force.
>
> *Examples of the application of force of a violent nature A blow, hit, kick, punch or strike.*

The Northern Territory provision came into force on 21 December 2012 and has not to date been used. There was no law reform commission or other review prior to its introduction; rather, it was introduced as part of an election promise of the Country Liberal Party which won power in the August 2012 election.[19]

[16] In some respects they are also equivalent to constructive murder where culpability is constructed on the basis of the underlying crime and the resulting serious (fatal) consequence: *Ryan v The Queen* (1967) 121 CLR 205.

[17] WALRC, *Review of the Law of Homicide*, Final Report, Project No 97 (September 2007) pp 90-91.

[18] WALRC, n 17, p 90.

[19] See Erickson S, "'One Punch' Legislation Commenced in the Northern Territory" (2013) 38(1) *Alternative Law Journal* 58.

While there has been significant media coverage of tragic one punch deaths in these jurisdictions,[20] no Law Reform Commission in Australia has recommended the introduction of a specific one punch law – indeed, they have recommended against it, as discussed above.

Filling a gap?

A unique motivation for the introduction of one punch laws in Western Australia and the Northern Territory[21] (and their consideration in Queensland) is the perceived need to fill a "gap" in the Code jurisdictions where manslaughter is defined in a way that means it will usually not apply in one punch deaths. This is largely because of the operation of the defence of "accident" which applies in each of the Code jurisdictions. The defence of accident is found in s 23B of the *Criminal Code Act 1913* (WA), and relevantly provides:

> (1) This section is subject to the provisions in Chapter XXVII and section 444A relating to negligent acts and omissions.
>
> (2) A person is not criminally responsible for an event which occurs by accident.[22]

In law, an accident is determined by an objective test being a result that was not intended by the perpetrator and not reasonably foreseeable by an ordinary person. As Gibbs J stated in *Kaporonowski v The Queen*:

> an event occurs by accident within the meaning of the rule [accident defence] if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person.[23]

The accident defence is available where a particular offence does not express a specific intent for the crime – of which manslaughter is an example.[24] By contrast, murder under the Codes requires a specific intention and so the accident defence is not available.[25] This means that in the Code jurisdictions, where there is a one punch manslaughter and the accident defence is raised, the jury must be satisfied beyond reasonable doubt that the death (that is, "the event") from the one punch was reasonably foreseeable by the ordinary person. This is a very high threshold and often may not be satisfied in such situations.[26] Hence, one punch laws may be viewed as necessary in jurisdictions such as Western Australia, not because manslaughter is viewed as too light, but because manslaughter may not be available in one punch situations.

Hierarchical relationship to existing homicide offences

No law reform commission in Australia has recommended the introduction of a one punch law. One of the consequences of this is that the question of where offences like s 281 of the *Criminal Code* (WA) sit in the hierarchy of fatality crimes has received little attention. This is an important issue to consider in order to assess whether there is a "match" between the perceived need for an new offence and the nature of the offence itself. The Law Reform Commission of Ireland (LRCI), as part of its 2008 review of homicide and manslaughter, recommended the introduction of such a law. Its reasons for

[20] There has also been similar coverage in other jurisdictions, see for instance, in Victoria with the coverage of the death of cricketer David Hookes by security guard Zdravko Micevic, in a punch to the head outside a pub in St Kilda in 2004. Micevic was acquitted of manslaughter – he claimed that Hookes punched him first.

[21] The Attorney-General and Minister for Justice, John Elferink MP, spoke of the new law as filling a gap: *Gap in legislation Closed by One Punch Law*, Media Release (28 November 2012). Compare the comments of Russell Goldflam, the President of the Criminal Lawyers Association of the Northern Territory: Bevan M, "One Punch Legislation: Necessary Change or Reactionary Politics?", 702 ABC Sydney (13 November 2013).

[22] See also *Criminal Code* (Qld), s 23; *Criminal Code* (Tas), s 13 (chance); *Criminal Code* (NT), s 31.

[23] *Kaporonowski v The Queen* (1973) 133 CLR 209 at 231.

[24] See *Criminal Code Act 1913* (WA), ss 277, 280; *Criminal Code* (NT), s 160; *Criminal Code* (Qld), ss 300, 303; *Criminal Code Act 1924* (Tas), ss 153, 156, 159. See generally Fairall P, *Homicide: The Laws of Australia* (Lawbook Co, 2012) pp 238-243.

[25] See *Criminal Code* (WA) s 279(1); *Criminal Code* (NT), s 156(1); *Criminal Code* (Qld), s 302(1); *Criminal Code Act 1924* (Tas), s 157(1).

[26] See for instance the acquittals mentioned in n 8.

doing so are instructive for their insights about hierarchy, and so are quoted at length:

> [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.
>
> The Commission does, however, appreciate that the occurrence of death is a very serious consequence of unlawful conduct and should, therefore, be marked accordingly. It might well be traumatic for the families of victims who died as a result of deliberate assaults, albeit those which were minor in nature, if the perpetrator of the assault were only charged with, convicted of and sentenced for assault, rather than the more serious sounding offence of manslaughter. Thus, the Commission believes that rather than prosecuting such defendants with assault, as was the provisional recommendation in the *Consultation Paper*, it would be more appropriate to enact a new offence such as "assault causing death" which would be below involuntary manslaughter on the homicide ladder, but which would clearly mark the occurrence of death in the offence label.
>
> ... It would make more sense to treat this offence as a distinct new homicide offence below manslaughter. The fact of death should be captured within the label, as is the case in the road traffic offence of "dangerous driving causing death". The offence should only be prosecuted on indictment and have a higher sentencing maximum than for assault *simpliciter*. The Commission does not believe that the occurrence of death necessarily increases the culpability of the accused, but a fatality does undoubtedly give a much more serious dimension to the offence. Consequences matter. Accordingly, judges should be able to take into account the fact that a death (rather than merely a cut lip) was caused by a punch when imposing sentence. ...
>
> 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.* It is vital that a reasonable person in the defendant's shoes would not have foreseen death as a likely outcome of the assault. 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 sanctity of life by marking the death may be of benefit to the victim's family in dealing with their grief.[27]

The one punch law was recommended on the basis that manslaughter may otherwise punish assaults causing death too harshly – not the reverse.[28]

The type of matters which the LRCI suggests involve insufficient culpability to be treated as manslaughter were, in the past, covered by the old common law form of battery manslaughter which was abolished in New South Wales by the High Court in 1992. Battery manslaughter occurred where a defendant intentionally and unlawfully applied force that resulted in death if the force was applied with the intention of doing some physical injury of a minor character: that is, something less than grievous bodily harm, but not merely trivial harm. The High Court abolished this third category of manslaughter, on the basis that it was unnecessary. In *Wilson*, the majority (Mason CJ, Toohey, Gaudron and McHugh JJ) explained:

> The notion of manslaughter by the intentional infliction of some harm carries with it the consequence that a person may be convicted of manslaughter for an act which was neither intended nor likely to cause death ...
>
> Cases of death resulting from a serious assault, which would have fallen within battery manslaughter, will be covered by manslaughter by an unlawful and dangerous act. Cases of death resulting

[27] LRCI, *Homicide: Murder and Involuntary Manslaughter* (2008) Ch 5, "Involuntary Manslaughter: Options for Reform" at [5.39]-[5.43] (emphasis added).

[28] It is also noted that the Law Commission of England and Wales, in its homicide review, recommended that there be a new offence of reckless killing, and a new offence to replace the existing offence of "unlawful act manslaughter" of killing by gross carelessness, and that both should be alternative verdicts to murder: The Law Commission (England and Wales), *Legislating the Criminal Code: Involuntary Manslaughter*, Report No 237 (1996) at [5.13], [5.34], [5.55].

> unexpectedly from a comparatively minor assault, which also would have fallen within battery manslaughter, will be covered by the law as to assault. A conviction for manslaughter in such a situation does not reflect the principle that there should be a close correlation between moral culpability and legal responsibility, and is therefore inappropriate.[29]

The reasons given by the LRCI for creating an offence of assault causing death (together with the High Court's reasons for abolishing "battery manslaughter") demonstrate that one punch deaths sit below manslaughter in the culpability hierarchy – with murder sitting at the top, followed by manslaughter – and above those for an assault. This has been confirmed by the Western Australian courts' application of s 281, which has stated that, in the seriousness hierarchy of crimes causing death, the crime of unlawful assault causing death, sits beneath manslaughter. For example, in *Western Australia v JWRL* Heenan J observed:

> This offence, against s 281 of the Code, is the least culpable variety of the different crimes of homicide. That is not to say that it is not serious or that its consequences are not tragic, permanent and destructive but, rather, that Parliament has recognised that a crime of killing may occur which does not justify, from the point of view of the community at large, a range of penalties or sentences as severe as those applicable for more serious forms of homicide.[30]

Although the Court of Appeal subsequently took issue with Heenan J's suggestion that unlawful assault causing death is a less serious offence than culpable driving causing death, Martin CJ endorsed, and noted that the state did not object to "the observation that, generally speaking, contraventions of s 281 should be regarded as less serious than the offence of manslaughter".[31]

The same point about where one punch laws sit in the hierarchy of personal violence crimes was reinforced in *Western Australia v Warra* where Murray J characterised s 281 as more akin to an aggravated assault rather than a form of homicide. His Honour observed that s 281 is concerned with cases:

> where violence has been used against a deceased person which, without intention on the part of the offender, has caused the death in the sense that it has made a real contribution to causing the death of the deceased person. The *assaults are by that link with the death of the deceased made more serious* and the law views them more gravely than if they were unaccompanied by a consequence of that kind.[32]

In *Western Australia v Robinson*, Simmonds J described s 281 as a provision which:

> has made more serious an assault resulting in death than an assault without such a result ... [and] ... recognition by the law that assault with such a tragic consequence must be treated more seriously than other forms of assault, if not as seriously as manslaughter.[33]

The first note of caution, then, to be drawn from the experience of jurisdictions that have closely considered one punch laws (Ireland) or enacted one (Western Australia) is that, contrary to the "get tough" law and order rhetoric that has been prominent in New South Wales in the wake of Loveridge's sentencing, and evident in the New South Wales government's publicly stated intentions and motivations, a one punch fatality is a *less* serious crime than manslaughter and sits above that of an assault.

Unintended consequences: Western Australia's s 281 prosecutions for assault causing death

A second reason to be cautious about the introduction of a one punch law is that such laws can have unintended consequences; a point that is powerfully illustrated by the Western Australian experience. From 2008 to December 2012, there were 12 prosecutions for unlawful assault causing death under

[29] *Wilson v The Queen* (1992) 174 CLR 313 at 332-334; 61 A Crim R 63. Brennan, Deane and Dawson JJ similarly concluded that any offence of battery manslaughter would be subsumed in the crime of manslaughter by unlawful and dangerous act: at 342.

[30] *Western Australia v JWRL* (2009) 213 A Crim R 50 at [5]; [2009] WASC 392.

[31] *Western Australia v JWRL* (2009) 213 A Crim R 50 at [114]; [2009] WASC 392.

[32] *Western Australia v Warra* [2011] WASCSR 17 at [16] (emphasis added).

[33] *Western Australia v Robinson* [2011] WASCSR 59 at [8]-[9].

the new s 281. Eight of these matters were heard in the Supreme Court of Western Australia.[34] The remaining four matters were heard in the District Court of Western Australia.[35]

A summary of the findings from the author's analysis of these 12 matters is provided in Table 1.

TABLE 1 Table 1: Western Australian section 281 cases, 2008-2012

Case	One punch	Domestic violence	Alcohol/Drugs	Guilty plea	Sentence
Zyrucha	No	Yes	Yes	Yes	3 y 6 m
Indich	Yes	Yes	Yes	Yes	2 y 10 m
Mako	No	No	No	Yes	2 y 8 m
Anderson	No	Yes	Yes	Yes	3 y
JWRL	No	No	No	No	2 y suspended
Warra	No	Yes	Yes	Yes	5 y
Robinson	No	No	Yes	Yes	16 m
Jones	No	Yes	Yes	Yes	5 y
Blurton	Yes	No	Yes	Yes	2 y 6 m
Sinclair	Yes	No	Yes	Yes	20 m
Lillias	No	No	No	Yes	18 m suspended
Loo	Yes	No	Yes	Yes	2 y 6 m
Total	**4**	**5**	**9**	**11**	**2 y 9 m (average)**

Analysis of these cases reveals a number of features that seriously invite careful deliberation before an offence of this sort is introduced in New South Wales.

First, only a minority (four cases) of s 281 prosecutions involved a one punch killing scenario. Furthermore, none of these involved the classic random violence on public streets with which the one punch law controversy is usually associated. *Indich* involved a punch after the defendant became angry at his de facto partner for not making him a meal and in a context where there had been previous domestic violence. The punch caused internal injuries from which the victim later died. *Sinclair* involved a single push to the chest causing the victim to fall back and hit his head on a slab but the event occurred against a backdrop of several hours of animosity and argument involving family members drinking and socialising at a town camp. *Blurton* did involve a single unprovoked king-hit but the setting was the front porch of a residential home after the offender was asked to leave by a resident of the home – the victim happened to be visiting at the same time and was king-hit for no apparent reason. *Loo* involved one fatal blow in a context where the victim and offender were

[34] In reverse chronological order: *Western Australia v Lillias* [2012] WASCSR 100; *Western Australia v Jones* [2011] WASCSR 136; *Western Australia v Robinson* [2011] WASCSR 59; *Western Australia v Warra* [2011] WASCSR 17; *Western Australia v JWRL (a child)* [2010] WASCA 179; *Western Australia v Mako* (unreported, WASC, 63 of 2010); *Western Australia v Indich* (unreported, WASC, 211 of 2009); *Western Australia v Zyrucha* (unreported, WASC, 127 of 2009). Access to the sentencing remarks and judgments for these matters was provided by the Western Australia Supreme Court Library.

[35] In reverse chronological order: *Western Australia v Loo* (unreported, District Court, 41 of 2012); *Western Australia v Sinclair* (unreported, District Court, 385 of 2012); *Western Australia v Blurton* (unreported, District Court, 1517 of 2011); *Western Australia v Anderson* (unreported, District Court, 1082 of 2010). No sentencing remarks are publicly available for the four District Court decisions, and so the analysis of these cases is based on details contained in the Office of the Director of Public Prosecutions for Western Australia, *Schedule of s 281 Prosecutions*. The Schedule (current at 10 December 2012) is accessible at: http://www.dpp.wa.gov.au/_files/assault_occasioning_death.pdf.

known to each other, had been drinking and socialising for an extended period, and had become involved in an argument involving a third person who was the victim's de facto (and the offender's sister).[36]

Secondly, a wide variety of fatal violence fact scenarios have been brought within the terms of s 281. By way of example, three cases are noted. In *Mako* the defendant, a 76-year-old man, fatally assaulted an 83-year-old male victim (a friend and neighbour). Mako suffered delusions and thought that the victim was trying to poison him by spraying insecticide in the vicinity of the block of flats where they both lived. Soon after an argument, Mako went to the victim's flat and subjected him to a "serious and sustained attack".[37] In *Lillias*, an Aboriginal man caused the death of another man when he stabbed him in the thigh with a knife, after being urged by his family to carry out traditional punishment on the man. Although he was a person entitled to carry out payback under Aboriginal law, the defendant had been reluctant to carry out the punishment, but was threatened with violence if he did not. The defendant had been charged with manslaughter but a plea to assault causing death was accepted by the State. In *Anderson*, a two-year-old boy was having a sleepover with the offender, a relative. Anderson violently shook the child after he would not sleep and forcibly placed him on a couch where he was sluggish. The child later fell off the couch and subsequently died.

Thirdly, and most disturbingly, over 40% of the cases involved men killing their partners or ex-partners in circumstances where there had been a history of violence and abuse – that is, these were not isolated, "one-off" acts of violence.[38] The most well known of these domestic homicides is the death of Saori Jones.[39] Together with her ex-partner they had two small children. There was a history of domestic violence at the time of offending and the victim was living in a domestic violence refuge. As they had shared custody of the children, the victim visited her former partner's home with their 10-month-old child because their four-year-old was to spend the weekend with the offender. An argument ensued and the offender struck the victim in the temple with a clenched fist causing her to fall and hit the ground. The offender continued the attack as the victim lay on the floor until the cries of the four-year-old stopped him. The victim lay on the floor unresponsive and – presumably because of the youngest child's distress – the offender lifted her shirt to allow the 10-month-old to breastfeed. The offender then picked the victim up, showered her and cleaned the vomit and blood up and put her in bed covered with a blanket. The next morning she was dead. The offender left the victim's body in the house for 12 days but following reports of her being missing by the refuge, police went to the offender's house where he told them she had run away with another man. Finally, after a threat of a warrant, the police found the victim dead in the bed. The body of the victim was so badly decomposed that an autopsy could not determine the cause of death. The offender received a sentence of five years; the highest sentence recorded to date.

Finally, sentences have ranged between 18 months (suspended) and five years imprisonment, with an average sentence of two years and nine months (see Table 1 above).

[36] The case *JWRL* involved a single blow, but with a piece of wood, rather than a punch. JWRL was acquitted of murder but convicted of assault causing death under s 281. This matter has not been included as a one punch for the same reason that similar New South Wales manslaughter matters have been excluded (see below).

[37] *Western Australia v Mako* (unreported, WASC, 63 of 2010) at [41].

[38] See also Ball R, *Human Rights Implications of "Unlawful Assault Causing Death" Laws*, Presented at the Human Rights Centre (14 March 2012); Coutts S, "One Punch Can Change Your Life – and Hundreds of Others", *The Global Mail* (19 July 2012).

[39] *Western Australia v Jones* [2011] WASCSR 136. This case sparked outrage and a rally was held and a petition to amend the law. In 2012 what came to be known as "Saori's law" was introduced into the State Parliament through the *Criminal Code Amendment (Domestic Violence) Bill 2012* (WA). This Bill would have amended s 281 such that where the assault causing death was committed in "circumstances of aggravation", the maximum penalty for the offence would be raised to 20 years. (The amendment picked up the definition of "circumstances of aggravation" in s 221 of the *Criminal Code* which include "the offender was in a family and domestic relationship with the victim of the offence" and "a child was present when the offence was committed".) See the Explanatory Memorandum to the Bill. See also Mark McGowan (the Western Australia Labor Leader who introduced the Bill), *"Saori's Law" to Increase Sentences for Domestic Violence* (24 September 2012), http://www.markmcgowan.com.au/news/saoris-law-to-increase-sentences-for-domestic-violence-142. This amendment did not pass.

This snapshot of the Western Australian experience should, at the very least, discourage any hasty conclusion that a similar offence should be introduced in New South Wales. It demonstrates the wide spectrum of matters that can come within a supposed one punch law – with the random one punch scenario that was the catalyst for the law being the exception rather than the rule. This is because all that is required to be proven is an assault[40] which either directly or indirectly causes death. While the catalyst for the mooted New South Wales one punch offence was the (random) king-hit punch, as suggested in the New South Wales Attorney-General's media statement, the offence to be drafted is to be modelled on the Western Australia offence, and is likely to be equally broadly drawn and so likely to give rise to similar operational issues.

The unintended consequence of the broad way in which s 281 is drawn is that a range of matters that have little to do with the one punch scenario may be prosecuted under it. Of particular concern is the fact that s 281 has been regarded as an appropriate charge in several cases of very serious domestic violence killings. On the one hand, it is highly unlikely that the New South Wales government intends that a crime of assault causing death should be preferred in such cases. On the other hand, it is not hard to see the attractiveness of a plea to this lesser offence for both the offender and the prosecution – in this regard it is noted that 11 of the 12 s 281 cases summarised in Table 1 involved a guilty plea.[41] An offence of assault causing death has the potential to become a "protean" offence (like the existing offence of manslaughter in New South Wales, discussed below) with all the resulting implications for sentencing.

MANSLAUGHTER IN COMMON LAW STATES

It was noted above that one punch laws may be regarded as filling a gap in the Code-based jurisdictions which arises from the interplay of the definition of manslaughter and the defence of accident. In New South Wales, there is no such gap – neither at law ("on the books") nor in practice.

The definition of manslaughter by unlawful and dangerous act

In New South Wales (and the other common law States of Victoria and South Australia), there is no defence of accident.[42] Furthermore, (involuntary) manslaughter is defined differently, with a lower threshold. While there are two forms of involuntary manslaughter at common law, unlawful and dangerous act manslaughter and manslaughter by criminal negligence, only the former is relevant in one-punch situations.[43]

For manslaughter by unlawful and dangerous act, the Crown must prove beyond reasonable doubt that: the *death* of a person was caused by a positive (or deliberate) act[44] of the defendant that was unlawful[45] (the classic example of which is an assault); the defendant must intend to commit a breach of the criminal law as alleged; and the act must be dangerous. The most relevant aspect of these

[40] In New South Wales, an assault at common law originally contained two separate offences: assault being the threat of unlawful physical contact and battery being actual unlawful physical contact. These are now combined as the one offence in *Crimes Act 1900* (NSW), s 61. It is unclear whether "assault" would have this broader meaning under any new offence of assault causing death.

[41] The exception is *JWRL*, where the defendant was charged with murder and went to trial. It is not possible from the sentencing remarks and judgments to discern the original charge and whether it was for a more serious offence.

[42] It is noted that in New South Wales the definition of murder and manslaughter in s 18(2)(b) of the *Crimes Act 1900* (NSW) provides an excuse from criminal responsibility for murder if the deceased is killed "by misfortune only". This exception is different to the operation of an accident defence present in the Code jurisdictions.

[43] This is because manslaughter by criminal negligence requires the breach of a duty of care and typically there would not be a duty of care arising in one punch situations – unless one was derived by creating a "dangerous situation" (such as a head injury) and failing to assist in such circumstances (for example, by leaving the scene). The test regarding criminal negligence is also higher involving "such a great falling short of the standard of care which a reasonable man would have exercised and *which involved such a high risk that death or grievous bodily harm would follow* that the doing of the act merited criminal punishment": *Nydam v The Queen* [1977] VR 430 (emphasis added).

[44] Hence it does not include offences turning on negligence (*Andrews v DPP* [1937] AC 576) or omission (*R v Lowe* [1973] 1 QB 702).

[45] While the definition at common law of what amounts to "unlawful" is somewhat circular, the requirement that there must be something "unlawful" about the act is not satisfied by a mere breach of a regulatory or statutory provision: *R v Pullman* (1991)

elements for present purposes is the final element: that the act be dangerous. The test for dangerousness was set out in the High Court decision of *Wilson*. It is an objective test: would a reasonable person, in the position of the defendant, have appreciated that the unlawful act exposed the victim to an *appreciable risk of serious injury*? The majority stated in *Wilson*:

> It is better to speak of an unlawful and dangerous act carrying with it an appreciable risk of serious injury. A direction in those terms gives adequate recognition to the seriousness of manslaughter and to respect for human life, while preserving a clear distinction from murder.[46]

The difference between the Code jurisdictions and the law in New South Wales (and other common law States) is that the objective test of "dangerousness" requires "an appreciable risk of serious injury" (for instance, from the punch) – but does not require, as in the Code jurisdictions, that the death be reasonably foreseeable as a result of the punch.[47]

Manslaughter prosecutions for one punch deaths in New South Wales

Not only is there no "gap" in the statute books for a one punch law to fill, there is also no operational gap. Manslaughter convictions for one punch manslaughters *are* being achieved. Eighteen cases from 1998 to 2013 have been identified of what, for the purposes of this article, will be called one punch manslaughters, and will be discussed below.

Methodology

As to the methodology for choosing these cases, first, as Spigelman CJ stated in *R v Forbes*, manslaughter covers a wide variety of circumstances in its commission and a similarly broad spectrum of culpability: "[M]anslaughter is almost unique in its protean character as an offence … In its objective gravity it may vary, as has been pointed out, from a joke gone wrong to facts just short of murder."[48]

Nevertheless, it is possible to isolate certain "categories" of manslaughter. As Hulme J indicated in *R v Castle*:

> Cases in which a victim sustains an unintended head injury after falling to the ground because of a punch are, regrettably, not uncommon. Although all cases must be determined upon their own unique facts and circumstances, there are *types of manslaughter* that are more objectively seriously [than these].[49]

While no court has "established" the parameters of such categories, particularly in the sentencing context, categories of manslaughter have evolved by reference to the common practice of practitioners referring to similar cases in sentencing submissions and judges attempting to obtain consistency in sentencing by comparing like matters.

The Public Defenders Office of New South Wales has compiled a Schedule of unlawful and dangerous act manslaughter from 1998 to 2013 which uses the following categories: stabbing (including general, domestic, general juvenile and domestic juvenile); shooting (domestic and general); assault (general and general juvenile); assault – domestic (and domestic young child); motor vehicle; arson; drowning; and general/other.[50] For the purposes of this article, the categories have been

58 A Crim R 222. See also generally the discussion of unlawful and dangerous act manslaughter in Brown D et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (6th ed, Federation Press, 2011) pp 454-461; Bronitt S and McSherry B, *Principles of Criminal Law* (3rd ed, Lawbook Co, 2010) pp 553-537.

[46] *Wilson v The Queen* (1992) 174 CLR 313 at 333; 61 A Crim R 63. See also the Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* at [5-990].

[47] On this issue see also Tomsen and Crofts, n 8 at 430.

[48] *R v Forbes* (2005) 160 A Crim R 1 at [133]. See also *R v Blacklidge* (unreported, NSWCCA, No 60510 of 1995, Gleeson CJ, Grove and Ireland JJ, 12 December 1995) at 2-3.

[49] *R v Castle* [2012] NSWSC 1603 at [17] (emphasis added).

[50] These categories also include details as to whether the defendant was involved in a joint criminal enterprise or was an accessory, http://www.publicdefenders.lawlink.nsw.gov.au/pdo/public_defenders_manslaught_unlawful_dang_act.html?s=1001. *R v Loveridge* [2013] NSWSC 1638 has not yet been added to the Schedule; however, it has been included for the purposes of this study.

modified to create a separate category of one punch manslaughters and to aggregate all domestic violence manslaughters, including those involving domestic stabbings and shootings into the category "domestic assaults".

In reviewing the cases on this Schedule, the author of this article has identified 18 matters that can be grouped to form a separate one punch category. These cases comprise 11 cases involving a fatality from a single punch;[51] five cases where there was a punch followed either by another punch or a kick, or involving a head-butt.[52] Two cases were excluded where the fatal blow was struck by another object (a block of wood in one and a juicer in another) because these cases in their nature and in the way the blows were struck are fundamentally different to the other cases.[53]

While it is conceded that five of the cases used in this study involve more than one punch and two matters involve a head-butt, these cases have been included because, as will be discussed below, they involve similar issues and the application of similar sentencing principles to the strictly one punch matters. The cases involving blows delivered by a separate object have been excluded because it is important to ensure that the category "one punch manslaughter" does not become a generic description for fatal assaults and hence become misleading. As the Criminal Court of Appeal in the United Kingdom has stated:

> Following *Coleman*, a long line of fact-specific decisions has come, for reasons of convenience and shorthand, to be subsumed in the generic description, "one punch manslaughter". This description is apt to mislead unless it is indeed "strictly confined" to cases where death results from a *single blow with a bare hand or fist*.[54]

Characteristics of one punch manslaughters

A review of the one punch manslaughter cases with reference to the overall unlawful and dangerous act manslaughter cases reveals that while there is community concern around random one punch deaths (and sentences),[55] Table 2 shows that one punch manslaughters comprise a very small percentage of the overall group. They account for just under 8% of all unlawful and dangerous act manslaughters. By far the largest category of unlawful and dangerous act manslaughters is domestic assault matters (35%).[56]

[51] *R v Risteski* [1999] NSWSC 1248; *R v Irvine* [2008] NSWCCA 273; *R v O'Hare* [2003] NSWSC 652; *R v Maclurcan* [2003] NSWSC 799; *KT v The Queen* (2008) 182 A Crim R 571; [2008] NSWCCA 51; *R v Bashford* [2007] NSWSC 1380; *R v Smith* [2008] NSWSC 201; *Donaczy v The Queen* [2010] NSWCCA 143; *R v Castle* [2012] NSWSC 1603; *R v AJC* (2010) 207 A Crim R 307; [2010] NSWCCA 168; *R v Loveridge* [2013] NSWSC 1638.

[52] *R v Munter* [2009] NSWSC 158; *R v Greenhalgh* [2001] NSWCCA 437; *Hutchison v The Queen* [2010] NSWCCA 122; *Hopley v The Queen* [2008] NSWCCA 105. The cases involving a head-butt are *R v CK, TS* [2007] NSWSC 1424 and *R v Carroll* (2008) 188 A Crim R 253; *R v Carroll* (2010) 77 NSWLR 45.

[53] *R v Hyatt* [2000] NSWSC 774 involved a supervisor-supervisee relationship at work where the offender became frustrated and anxious about losing his job after an incident earlier in the morning where the deceased had been critical of his customer relations service and he thought his supervisor would inform his boss. *R v Leung* [2013] NSWSC 259 involved a homosexual domestic relationship which had been deteriorating for some time; the autopsy revealed 16 specific injuries to the deceased's body. Furthermore, in both cases the use of the billet of wood and the juicer container were more akin to assault with a weapon. A murder conviction has also been excluded both because it was a conviction for murder but also because the fatal blow was in the context of an ongoing fight: see *R v Miller* [2013] NSWSC 659.

[54] *Attorney-General's Reference (No 60 of 2009); R v Appleby* [2010] 2 Cr App R 46 at [8].

[55] See for instance the significant media attention following Mr Loveridge's sentence and evidenced by the hundreds of people who protested at the recent "Enough is Enough Anti Violence Movement" rally at lunchtime at Martin Place on 19 November 2013.

[56] Confirming other studies, for example, Ringland C and Rodwell L, "Domestic Homicide in New South Wales, January 2003 – June 2008" New South Wales BOCSAR, Issue Paper No 42 (October 2009); Mouzos J and Rushford C, "Family Homicide in Australia" (2003) (June) 255 *Trends and Issues in Crime and Criminal Justice* 1.

TABLE 2 Types of unlawful and dangerous act manslaughter in New South Wales, 1998-2013

Type	Number	%
Domestic assault	80	34.9
(Shooting)	(8)	(3.5)
(Stabbing)	(31)	(13.5)
Assault - general	52	22.7
Stabbing	39	17
Shooting	21	9.2
One punch	**18**	**7.9**
Motor vehicle	8	3.5
Arson	5	2.2
Other	4	1.8
Drowning	2	0.9
Total	**229**	**100**

Table 3 presents a summary of the data from the author's analysis of unlawful and dangerous act manslaughter cases in New South Wales from 1998 to 2013 that involved one punch deaths.

TABLE 3 New South Wales one punch manslaughter cases, 1998-2013

Case	One-punch	Alcohol/ drugs	Guilty plea	Sentence	Public street	Stranger#	Random	Pro-voked (by V)
Risteski	Y	Y	Y	MT: 3 y 6 m; AT: 2 y 4 m	N	Y	Y	Y
Irvine	Y	N	Y	3 y (NPP 2 y PD)	Y	Y	Y	Y
O'Hare	Y	Y	Y	6 y (NPP 3 y 6 m)	Y	Y	Y	N
Maclur-can	Y	N	Y	3 y (NPP 17 m)	Y	N	Y	N
KT	Y	N	Y	6 y (NPP 4 y)	Y	Y	Y	Y
Bashford	Y	Y	Y	5 y 3 m (NPP 3 y 6 m)	Y	Y	Y	Y
Smith	Y	Y	Y	3 y 9 m (NPP 2 y 6 m)	Y	Y	Y	N
Donaczy	Y	Y	Y	6 y (NPP 3 y 6 m)	Y	Y	Y	N

TABLE 3 *continued*

Case	One-punch	Alcohol/ drugs	Guilty plea	Sentence	Public street	Stranger#	Random	Pro-voked (by V)
Castle	Y	Y	Y	7 y 6 m (NPP 5 y 8 m)	Y	Y	Y	N
AJC	Y	N	Y	2 y 6 m (NPP 18 m PD); Cr AA 3 y (NPP 1 y 9 m PD)	N	Y	Y (5 min plan)	N
Lov-eridge	Y	Y	Y	6 y (NPP 4 y)	Y	Y	Y	N
Green-halgh	N	Y	Y	8 y (NPP 4 y 6 m); AA: 6 y 9 m, (NPP 4 y 6 m)	N	N	Y	Y
Munter	N	N	Y	3 y 3 m (NPP 18 m)	Y	Y	Y	Y
Hutchi-son	N	Y	Y	7 y 6 m (NPP 5 y 6 m)	N	Y	Y	Y
Hopley	N	Y	N	5 y (NPP 3 y)	Y	Y	Y	N^
CK*	N	Y	Y	CK 6 y (NPP 4 y)	Y	Y	Y	N
TS*	N	Y	Y	TCS 6 y (NPP 3 y 6 m)	Y	Y	Y	N
Carroll	N	Y	Y	3 y (NPP 18 m PD)	Y	Y	Y	Y
Total	**11**	**13**	**17**	**Average: 5 y 1.9 m (NPP 3 y 2 m)**	**14**	**16**	**18**	**8**

This category may include situations where the person was drinking at the same hotel/bar during the course of the evening but otherwise was unknown to the offender
^ In this case the NSWCCA found that there was provoking behaviour from other friends of the victim but not the victim himself
* Heard jointly

By analysing these 18 matters, it is possible to identify a number of typical features of one punch manslaughters as follows.

All of the matters involved male offenders and male victims (aside from *Castle* where it was a female victim) with the majority being strangers (only two were not). The average age of offenders was 26 years and approximately 60% were under 25 years. Four cases involved minors[57] and in another two cases the offenders were 18 years old.[58] The relative youth of these offenders of course has significant implications for sentencing. Excessive alcohol consumption by the offender was

[57] *KT* (16 years); *AJC* (17 years); *CK, TS* (both 15 years).

[58] *Irvine, Loveridge.*

present in 80% of matters – that is, only five matters did not involve alcohol as a relevant factor in the offence.[59] For example, one offender "was involved in a drinking bout over a period of something like two days";[60] in another the offender had drunk "at least 15 schooners, or more" before the offence was committed;[61] in another, the offender shared a bottle of port with his girlfriend on the way into Sydney and then consumed four Wild Turkey Bourbons at a hotel and a further "four or five spirits drinks" at the house of an acquaintance;[62] and in another the offender drank over a period of approximately 10 hours (at his sister's house, in a bar/hotel and on the street) prior to the offence being committed.[63]

By far the most common place for the offence to occur was on a public street. Only four were not, of which one occurred inside the Sydney Casino, one in a bar/hotel, one at a fair, and only one in a home (an apartment). Furthermore, the offence was often committed after leaving a hotel/bar (or on the premises) after significant amounts of alcohol was consumed.[64]

Significantly, in all but one case, the matters did not proceed to trial with the offenders pleading guilty to manslaughter. In each of the 17 other cases, the offender received a discount of 20%-25% in recognition of the early plea.[65] Furthermore, in 10 of the matters, the offender was originally charged with murder but pleaded guilty to manslaughter.[66] In terms of other mitigating features, in each case the assault causing death was random in the sense that there was no planning and in all but three cases (*Castle*, *Greenlagh* and *Hyatt*), remorse was found. In a majority of cases, the sentencing judge assessed that there were strong prospects of rehabilitation[67] and that the offender was unlikely to re-offend. This means that in a majority of one punch manslaughter cases, six of the 13 mitigating factors set out in s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) were present, and most significantly, in all but one case the discount for an early plea was given. Furthermore, aside from some offenders having a record of previous relevant convictions, very few to no aggravating factors in s 21A(2) were present in these offences.[68]

[59] *Irvine*, *Maclurcan*, *KT*, *Munter*, and *Castle*, but the latter involved illegal drugs.

[60] *R v Greenhalgh* [2001] NSWSC 272 at [2].

[61] See *Donaczy v The Queen* [2010] NSWCCA 143 at [15].

[62] See *R v O'Hare* [2003] NSWSC 652 at [7], [9].

[63] *R v Bashford* [2007] NSWSC 1380.

[64] *Risteski*, *Irvine*, *O'Hare*, *Bashford*, *Smith*, *Donaczy*, *Loveridge*, *Carroll*, *Hopely*.

[65] See *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 21A(3)(k), 22; *R v Thomson* (2000) 49 NSWLR 383.

[66] Of the other matters: in *Irvine*, *Hopley* and *Hutchison* there is no mention of the original charge and so it is assumed that it was manslaughter; in *Donacrzy*, *Carroll*, *AJC* and *CK*, *TS*, the original charge was manslaughter.

[67] This is a mitigating factor under *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(3)(h). See *Risteski*, *Irvine*, *O'Hare*, *Maclurcan*, *Bashford*, *Smith*, *Castle* (although in this case the prospects of successful rehabilitation were considered to be only "reasonable": at [41]), *AJC*, *Loveridge*, *Hopely*, *CK*, *TS*; *Carroll*; *KT*; and *Munter*. The prospects of rehabilitation were unstated in *Donaczy* and *Greenhalgh*. The relative youth of many of the offenders was also an important factor in sentencing.

[68] The court is not to have additional regard to any aggravating factors in *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2) during sentencing if it is an element of the offence (ss 21A(b) and 21A(g) are elements of any offence of manslaughter. In addition to prior convictions, the only aggravating factors in s 21A(2) that came up in these cases were: three matters involving the offender being on conditional liberty at the time of the offence (the offenders in *Loveridge*; *Bashford* and *CK* were each on a good behaviour bond); in two (*O'Hare* and *KT*) the victim was elderly; in one (*CK*, *TS*) the offence was both committed in company and in the presence of children under 18 years.

The analysis also demonstrates that there is no pattern of successful Crown appeals in these cases, there being only three on the basis of "manifest inadequacy" all of which were allowed but with little resulting change to the original sentences.[69] While there were five appeals against the severity of sentence, only one was allowed.[70]

The average sentence for the 18 one punch manslaughter cases was five years and two months with an average NPP of three years and three months. The median sentence was five years and 11 months and the median NPP was three years and six months. The range of sentences was three to seven years (and the range of NPPs was one year and five months to five years and eight months). Sentencing statistics provided to the author by the Judicial Commission of New South Wales for the seven-year period between April 2006 and March 2013[71] indicate that the median sentence for murder is 22 years with sentences imposed ranging from 10 years to life.[72] By contrast, for manslaughter the median sentence is seven years with sentences ranging from 36 months to more than 20 years. Clearly, there is a substantial difference in sentencing for manslaughter as opposed to murder with significantly lower sentences for manslaughter and a much greater range.[73] While it is difficult to draw any conclusions from the Judicial Information Research System (JIRS) sentencing statistics without knowing more about the individual cases, the one punch sentences are below the median sentence for manslaughter cases as a whole.

Herein lies the real issue from the public and government point of view. The "problem" is not one of a gap in the criminal law, such as might be remedied by a one punch law modelled on s 281 of the *Criminal Code 1913* (WA). The problem is the length of sentences for manslaughter and the perceived leniency of sentences handed down in one punch manslaughter cases. There is no reason to believe, however, that introducing a general offence of assault causing death with a *lower* maximum than manslaughter – potentially drawing in the full-spectrum of culpable behaviour as seen in Western Australia – is going to change what are perceived to be low sentences for one punch deaths. Arguably, with a lower maximum penalty, such an offence may deflate sentences further. Indeed, as discussed earlier in this article, in the view of the LRCI this was precisely the reason for introducing such an offence – that is, to recognise that assaults causing death sat beneath manslaughter in the culpability hierarchy and above (non-fatal) assault.

At this point it is, however, worth noting that while Parliament has not provided a standard non-parole period (SNPP) for manslaughter, it has for other relevant matters in the "culpability hierarchy". Thus, murder has a SNPP of 25 years (for special classes of victims including emergency service workers and children under 18 years) and 20 years in all other cases. Offences under s 33 of the *Crimes Act 1900* (NSW) (wounding with intent to do bodily harm or resist arrest) have a SNPP of seven years; for s 35(1) offences (reckless causing of grievous bodily harm in company) it is five years, and for s 35(2) (reckless causing of grievous bodily harm) it is four years.[74] The SNPP refers to the middle of the range of seriousness for an offence taking into account only the objective factors affecting the relative seriousness of that offence (s 54A(2)). Arguably, however, the assigned SNPPs position these offences in the culpability hierarchy – with the SNPP for each of the assaults (ss 33 and 35) ranging from four to seven years. While median sentences for one punch manslaughters, in

[69] In *Irvine* while the appeal was allowed the sentenced was not changed; in *AJC* the sentence was increased from two years and six months with a NPP of 18 months periodic detention to three years with a NPP of one year and nine months periodic detention. In *Carroll*, while the appeal was allowed, the original sentence of three years with a NPP of 18 months to be served by way of periodic detention was replaced with a further 18 months suspended sentence due the hardship with the appeal process, and the combined periods of periodic and full-time imprisonment already served.

[70] See *KT*; *Donaczy*; *Hutchison*; *Hopley*; and *Greenhalgh* (appeal allowed).

[71] It is noted that the statistics for murder offences are after the introduction of SNPPs and do not include sentences where there was a child victim.

[72] See also Keane J and Poletti P, *Sentenced Homicides in New South Wales 1994-2001*, JIRS Research Monograph No 23 (January 2004).

[73] It is noted that for the period 1998-2012, sentencing patterns for manslaughter have not changed significantly: see *Scott v The Queen* (2011) 213 A Crim R 407 at [67]; [2011] NSWCCA 221; *R v Castle* [2012] NSWSC 1603 at [43] (Hulme J).

[74] See *Crimes (Sentencing Procedure) Act 1999* (NSW), s 54A(2) and Table "Standard non-parole period".

addition to the objective seriousness of the matter, take account of both aggravating and mitigating subjective considerations, the median NPP (three years and six months) is lower than the SNPP for s 35(2) offences (four years) and well below that for s 33 offences (seven years).

SENTENCING FOR MANSLAUGHTER IN NEW SOUTH WALES: THE EFFICACY OF A GUIDELINE JUDGMENT

Given the protean nature of the offence of manslaughter, it is unlikely that Parliament will enact a SNPP period for the offence as a whole. One option,[75] however, is for the NSWCCA to hand down a guideline judgment for one punch fatal assaults, as requested by the New South Wales DPP in addition to appealing Mr Loveridge's sentence. Exactly what such a guideline would be in respect of is unclear[76] and what type of guideline – for instance, a quantative[77] or a qualitative[78] guideline judgment.

The factors that are normally used to assess whether or not a guideline judgment is warranted are:

(a) perceptions of the prevalence of the offence;

(b) emergent patterns of sentences which are either too harsh or too lenient;

(c) inconsistency in sentence quantification;

(d) the requirements of general deterrence; and

(e) a need to highlight relevant sentencing principles and practices.[79]

It is unlikely, given the analysis presented above regarding the typical features of one punch manslaughters (including their lack of prevalence, no pattern of successful Crown or Defence appeals or inconsistency in sentencing quantification), that the first three matters could be made out. Furthermore, a number of sentencing principles in these matters are well settled with regard to the maximum penalty of 25 years,[80] and that every case of manslaughter involves the unlawful/felonious taking of a life.[81] In terms of the seriousness of the offence, there is a range of factors commonly

[75] Another (controversial) option is the introduction of a mandatory sentence; though, for a compelling argument against mandatory sentencing by the New South Wales Attorney-General Greg Smith, see: "Debate Needed to Consider Ramifications of Mandatory Sentencing", *The Sydney Morning Herald* (11 November 2013).

[76] A "guideline judgment" is relevantly defined in the *Crimes (Sentencing Procedure) Act 1999* (NSW), s 36(b) to include "classes of offences ... particular classes of offenders (but not a particular offender)" which may be possibilities.

[77] Such as that given in *R v Jurisic* (1998) 45 NSWLR 209; 101 A Crim R 259 in respect of dangerous driving as reformulated in *R v Whyte* (2002) 55 NSWLR 252 at [252]; 134 A Crim R 53 and *R v Henry* (1999) 46 NSWLR 346; 106 A Crim R 149 in respect of armed robbery.

[78] Such as that given in *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 at [9]; 137 A Crim R 180; *R v Thomson* (2000) 49 NSWLR 383 at [160]; *Application by the Attorney General Concerning the Offence of High Range Prescribed Content of Alcohol Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305 at [146]; 147 A Crim R 546.

[79] The NSWCCA in *R v Ponfield* (1999) 48 NSWLR 327 referred to the first four circumstances and other guideline judgments have also referred to some or all of these circumstances: *R v Henry* (1999) 46 NSWLR 346 at 366; 106 A Crim R 149; *R v Wong; R v Leung* (1999) 48 NSWLR 340 at 360, 362; 108 A Crim R 531; *R v Jurisic* (1998) 45 NSWLR 209 at 223, 229-230; 101 A Crim R 259. In relation to the fifth point see *Henry* at [119] where Spigelman CJ said: "[P]rior to the present hearing, the pattern of sentencing by trial judges and this Court's precedents on appeal, have never been reviewed in a systematic way. It is one of the advantages of a system of guideline judgements that this Court can review its own prior decisions from the perspective of ensuring consistency in the guidance it gives to trial judges. The pressures on the Court do not necessarily permit it to review its own decisions from this perspective in the normal course." See also *Jurisic* where Wood CJ at CL referred to the assistance guideline judgments can offer to busy sentencing judges and legal practitioners by tagging selected decisions as guideline judgments (at 233); and Spigelman CJ, extra-curially, spoke of the "announcement effect" of guideline judgments: Spigelman JJ, "Sentencing Guideline Judgements" (1999) 73 ALJ 876 at 880.

[80] *Crimes Act 1900* (NSW), s 24.

[81] See for instance *R v Blacklidge* (unreported, NSWCCA, No 60510 of 1995, 12 December 1995) where Gleeson CJ observed "the Court has repeatedly stressed that what is involved in every case of manslaughter is the felonious taking of a human life. That is the starting point for a consideration of the appropriate penalty, and a key element in the assessment of the gravity of the objective circumstances of the case: *R v Dodd* (1991) 57 A Crim R 349; *R v Hill* (1981) 3 A Crim R 397 at 402 ...".

considered including an analysis of the type of punch and force used;[82] the nature of the victim relative to the offender;[83] whether the victim suffered from a pre-existing physical defect;[84] and whether there was any provocation by the victim.[85]

In reviewing the cases, however, a tension can be seen in relation to the practices of the courts in evaluating where these offences sit in terms of their relative objective seriousness (as a category of manslaughter) and the need for the sentence to account appropriately for general deterrence. Thus, while each case will ultimately turn on its facts, a line of authority indicates that one punch deaths are viewed "objectively at the lower end of the range of criminal conduct within that offence [manslaughter]".[86] Yet this approach is at odds with the perceived need for general deterrence (s 3A(b)), denunciation (s 3A(f)), and retribution which is commonly articulated as necessary in these matters. For example, McClellan CJ at CL stated in *KT*:

> However, there is considerable force in the view that, notwithstanding the youth of the offenders, the decisions of the courts for this type of offence have *provided a range of penalty which fails to adequately reflect the need for general deterrence and retribution.* The recent experience of this Court indicates that the range of penalties imposed on young offenders who *commit random acts of violence resulting in death may not have been sufficient to deter others from similar irresponsible criminal behaviour.* In my opinion although the circumstances of an individual offence and offender must always be considered, this Court should in future *accept that more significant penalties may be required when sentencing offenders for this type of offence.*[87]

Significantly, the importance of the violence being perpetrated in a public place after the consumption of alcohol – characteristic of a majority of one punch manslaughters – is said to make the offence a serious one for which adequate punishment is required particularly for general deterrence.[88]

There appears, therefore, to be a disjuncture between the practice of viewing these matters objectively at the lower end of the range of seriousness and the emphasis on the need for general deterrence (denunciation and retribution) in relation to violent offences perpetrated in public places particularly after the consumption of alcohol. It is also noted that in some cases the public nature of the commission of the offence is used to assess the objective seriousness of the offence producing further possibilities for a conflict in sentencing principles.[89] These tensions are reflected in the judgment of *R v CK, TS*:

> I pause to observe that, in terms of the objective gravity of this offence, it matters little that the offenders each inflicted violence upon the victim once or twice. The real gravamen of the offence lay in this entirely senseless, unprovoked, callous assault upon a young man, minding his own business in the company of his friends, in a public place.

[82] For example, was it a hand, fist; a half-hearted blow unlikely to topple or a full force hit, or king-hit? A headbutt aggravates the matter: see *CK, TS*; or *Carroll*.

[83] See for instance *R v O'Hare* [2003] NSWSC 652 at [35].

[84] See *Munter*, where the victim suffered a history of hypertension and it was found that the death could have occurred at any time although was likely to have been brought on by the altercation; or where the fall in part was attributable to the victim's intoxicated state (see *Hutchison*). See also *R v Coleman* (1992) 95 Cr App R 159 at 164.

[85] See *O'Hare*.

[86] See *R v Bashford* [2007] NSWSC 1380 at [50]. See also *R v Maclurcan* [2003] NSWSC 799 at [25]; *Hutchison v The Queen* [2010] NSWCCA 122 at [6]; *R v Loveridge* [2013] NSWSC 1638 at [62]; *R v Munter* [2009] NSWSC 158 at [17]; *R v Castle* [2012] NSWSC 1603 at [17]; *R v CK, TS* [2007] NSWSC 1424 at [13], [15].

[87] *KT v The Queen* (2008) 182 A Crim R 571 at [41]; [2008] NSWCCA 51 (emphasis added). See also *R v Smith* [2008] NSWSC 201 at [15], [18]-[19]; *R v O'Hare* [2003] NSWSC 652 at [35]; *R v Carroll* (2010) 77 NSWLR 45 at [60]-[61]; *Donaczy v The Queen* [2010] NSWCCA 143 at [53]-[54]; *R v Munter* [2009] NSWSC 158 at [16]; *R v Loveridge* [2013] NSWSC 1638 at [67]; *Hopley v The Queen* [2008] NSWCCA 105 at [47]; *R v Risteski* [1999] NSWSC 1248 at [23]; *R v Castle* [2012] NSWSC 1603 at [36].

[88] *Hopley v The Queen* [2008] NSWCCA 105 at [53]; *R v Carroll* (2010) 77 NSWLR 45 at [60]; *Donaczy*.

[89] See Adams J in *R v Greenhalgh* [2001] NSWCCA 437 at [13]; *R v O'Hare* [2003] NSWSC 652 at [35], [37].

> ... Some attempt must be made however, to mark the objective gravity of the offence, constituted by the unlawful taking of a human life, with a sentence that reflects the principles of punishment, retribution, deterrence, protection of the community, and the rehabilitation of the offenders.
>
> Whilst the starting point in this sentencing exercise is the unlawful taking of a human life, the sentence to be imposed at law is constrained by the basis upon which the plea has been entered. *The law demands that the offenders be sentenced for an offence that is, objectively speaking, at the lower end of the available range*, the upper limit of which is the maximum penalty. That maximum penalty encompasses a very broad range of manslaughter offences, including manslaughter offences that would otherwise be characterised as murder, but for the presence of a mental illness in the offender, or provocation, or excessive self-defence.[90]

This particular tension has recently been addressed in the United Kingdom through specific sentencing guidelines for one punch manslaughters. Two factors were seen as necessary reasons for the court issuing the guidelines. First, the need to protect the public from gratuitous public violence on the streets by viewing this as a significant aggravating factor in sentencing:

> an additional feature of manslaughter cases which has come to be seen as a significant aggravating feature of any such case is the public impact of violence on the streets, whether in city centres, or residential areas. ...
>
> ...the manslaughter cases with which we are concerned involved gratuitous unprovoked violence in the streets of the kind which seriously discourages law-abiding citizens from walking their streets, particularly at night, and gives the city and town centres over to the kind of drunken robbery with which we have become familiar, and a worried perception among decent citizens that it is not safe to walk the streets at night.[91]

Secondly, the guidelines were seen as necessary to give force to the new legislative focus enacted by the *Criminal Justice Act 2003* (UK), on the harm caused when assessing the seriousness of an offence. Thus, s 143(1) of that Act provides:

> 143 Determining the seriousness of an offence
>
> In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.

In the sentencing guideline, the Criminal Court of Appeal stated that what must now be recognised: "is that specific attention must [following the 2003 amendment] also be paid to the consequences of [t]his crime."[92] The court noted that harm in manslaughter is always at the highest level – that is, death – and that this should lead to an "increased level of sentencing" in one punch manslaughters.[93]

Despite these guidelines being introduced, it should be noted that sentences for one punch manslaughters have been significantly lower in the United Kingdom than those in New South Wales. Assessing a long line of authorities in *R v Furby*, the court indicated:

> To summarise these authorities, *Coleman*, where a sentence of *12 months was imposed is the starting point* where there is a guilty plea and no aggravating circumstances. But where there are aggravating circumstances an appropriate sentence *can rise as high as four years*, depending on the particular facts. Getting drunk and resorting to violent behaviour under the influence of drink will be a significant aggravating factor, particularly where the violence occurs in a public place.[94]

While *Furby* was decided prior to the issuing of the sentencing guidelines, the guideline was issued within the context where sentences for one punch manslaughter in the United Kingdom had

[90] *R v CK, TS* [2007] NSWSC 1424 at [13]-[15] (emphasis added).

[91] See *Attorney General's Reference (No 60 of 2009)*; *R v Appelby* [2010] 2 Cr App R 46 at [12].

[92] *Attorney General's Reference (No 60 of 2009); R v Appelby* [2010] 2 Cr App R 46 at [13].

[93] *Attorney General's Reference (No 60 of 2009); R v Appelby* [2010] 2 Cr App R 46 at [14], [18]. On the importance of taking harm seriously in the assessment of culpability, see Crofts P, *Wickedness and Crime: Laws of Homicide and Malice* (Routledge, 2013) p 245.

[94] *R v Furby* [2005] 2 Cr App R (S) 8 at [28] (emphasis added); see also at [23]. Prior to the issuing of the sentencing guidelines, *R v Coleman* (1992) 95 Cr App R 159 was viewed as the pivotal case for the sentencing range in one punch manslaughters.

been low, by New South Wales standards: a starting point of 12 months with the top of the range being four years. While sentences have risen following the issuing of the guidelines,[95] New South Wales sentences for one punch manslaughters are already above the top of that range – and certainly equivalent or more than those sentences handed-down post guidelines.

CONCLUSION

That the senseless loss of a young man's life should prompt calls that "something must be done" is entirely understandable. Indeed, in the months following Thomas Kelly's death, the New South Wales government responded laudably with a multi-faceted and nuanced strategy for reducing alcohol-related violence.[96] Unfortunately, following the sentencing of Kieran Loveridge for the one punch manslaughter of Thomas Kelly, the government appears to have reverted to a knee-jerk style of criminal law reform that is primarily concerned with the appearance of looking tough on law and order.

This article has demonstrated, through an examination of the operation of s 281 of the *Criminal Code 1913* (WA), and the operation of manslaughter by unlawful and dangerous act in one punch fatality situations in New South Wales, that a new offence of assault causing death is neither necessary nor desirable. Most disturbingly, there is a real danger that such an offence will come to be employed in relation to a broad range of intentional killings, including serious domestic violence deaths, and that such crimes will be punished less severely than their seriousness warrants.

Noting that a Crown appeal against the sentence handed down to Loveridge is still on foot, the underlying anxiety brought to wider attention by the Thomas Kelly tragedy is the adequacy of sentencing practices in relation to one punch manslaughter cases, not the adequacy of the list of criminal offences in New South Wales. It follows that a guideline judgment on one punch manslaughter offers a more appropriate and constructive path to responding to community concerns about alcohol-fuelled acts of fatal violence.

POSTSCRIPT

Shortly after the completion and acceptance of this article in December 2013, the focus on alcohol-fuelled violence in New South Wales intensified and took a further direction. Following a serious one-punch assault (of 23-year-old Michael McEwen, at Bondi Beach on 14 December 2013) and a another one-punch assault on New Year's Eve leading to the death of 18-year-old Daniel Christie (in King's Cross, very near the spot where Thomas Kelly was killed in 2012), Sydney's two newspapers ran major campaigns over the summer period. *The Sydney Morning Herald* revived the "Safer Sydney" campaign it had initiated after Thomas Kelly's death, and *The Telegraph* ran the "Enough" campaign. Both called for: the introduction of "Newcastle-style" 1.00 am lockout measures across the Sydney CBD; more public transport; public education on drinking; risk-based licensing measures; as well as mandatory minimum sentencing. The Kelly family were also active during this time, starting a petition to the New South Wales Premier[97] calling for minimum sentencing laws in cases of manslaughter. After the assault on Daniel Christie, the list of demands in the petition was expanded to include calls for the following to be added as aggravating factors in sentencing: if the offender was drunk at the time of committing the offence; the youth and inability of a victim to defend themselves; and if the offender was on a "good behaviour bond" at the time of the offence.

[95] See, for instance, the following post-guideline one punch appeals: *R v Duckworth* [2013] 1 Cr App R (S) 83 quashing an original sentence of eight years and substituting one of six years; *R v Folkes* [2011] 2 Cr App R (S) 76 where the appeal on the basis that a sentence of three years was manifestly excessive was dismissed; *R v G* [2011] EWCA Crim 486 at [15] where an appeal by a 17-year-old offender sentenced to seven years (being four years with extended licence period of three years) for being manifestly excessive was found to be a "severe sentence, but it was clearly passed in the light of *Appleby*" and was not manifestly excessive or wrong in principle. These post-guidelines sentences are if anything, less than those currently being given in New South Wales one punch manslaughters.

[96] See Quilter J, "Responses to the Death of Thomas Kelly: Taking Populism Seriously" (2013) 24(3) *Current Issues in Criminal Justice* 439; Quilter J, "Populism and Criminal Justice Policy: An Australian Case Study of Non-Punitive Responses to Alcohol-Related Violence" (2014) *Australian & New Zealand Journal of Criminology*, forthcoming.

[97] See the petition at Change.org, www.change.org/thomaskelly.

On 21 January 2014, Premier O'Farrell responded with a 16-point plan to tackle drug and alcohol violence. The plan incorporates many of the initiatives of the media campaigns but goes further, particularly in respect of the scope of the punitive measures announced. The Plan includes:

- a new one-punch law with a 25-year maximum and an eight-year mandatory minimum sentence where the offender is intoxicated by drugs and/or alcohol;
- new mandatory minimum sentences for violent offences (including assault, affray and sexual assault) where the offender is intoxicated by drugs and/or alcohol;
- an increase from two years to 25 years' maximum sentence for the illegal supply and possession of steroids;
- increased on-the-spot fines for anti-social behaviour (for example, from $150 to $500 for offensive language and from $200 to $500 for offensive behaviour);
- empowering police to conduct drug and alcohol testing on suspected offenders;
- introduction of 1.30 am lockouts and 3.00 am last drinks across an expanded CBD precinct;
- new State-wide 10.00 pm closing times for all bottle shops;
- introduction of a risk-based licensing scheme with higher fees imposed for venues and outlets that have later trading hours, poor compliance histories or are in high risk locations;
- free buses running every 10 minutes from King's Cross to the CBD; and
- a freeze on granting new liquor licenses.[98]

A Bill is expected to come before the New South Wales Parliament on 30 January 2014 in respect of the minimum mandatory sentence for assault causing death. Legislation regarding the other measures outlined in the Plan is expected to be introduced into Parliament in February 2014.

[98] Hon Barry O'Farrell MP, *Lockouts & Mandatory Minimums to Be Introduced to Tackle Drug and Alcohol Violence*, Media Release (21 January 2014); Miller P, "NSW Response to Alcohol-Related Violence is an Important First Step", *The Conversation* (22 January 2014).