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

* BA, LLB, PhD; School of Law, University of Wollongong. This article was made possible by a grant under the Legal Intersections Research Centre Small Grants Scheme at the University of Wollongong. The author would also like to thank Luke McNamara for his thoughtful comments on an earlier draft.

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).