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### Responses to the death of Thomas Kelly: taking populism seriously

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### Abstract

This comment explores the range of responses to Thomas Kelly's death. Mr Kelly suffered fatal head injuries after being king-hit in the face when walking down the street in Kings Cross, Sydney, in July 2012. It is argued that these responses form a populist and far more nuanced response than the more typical 'law and order' reactions of state governments witnessed in the past, making us think about taking populism more seriously.

### Keywords

era2015, kelly, populism, taking, seriously, responses, thomas, death

### Disciplines

Arts and Humanities | Law

### Publication Details

Quilter, J. Ann. (2013). Responses to the death of Thomas Kelly: taking populism seriously. *Current Issues in Criminal Justice*, 24 (3), 439-448.

# *Contemporary Comment*

## *Responses to the Death of Thomas Kelly: Taking Populism Seriously*

Julia Quilter\*

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### *Abstract*

This comment explores the range of responses to Thomas Kelly's death. Mr Kelly suffered fatal head injuries after being king-hit in the face when walking down the street in Kings Cross, Sydney, in July 2012. It is argued that these responses form a populist and far more nuanced response than the more typical 'law and order' reactions of state governments witnessed in the past, making us think about taking populism more seriously.

### **Introduction**

There has been much debate in the scholarly literature over the increasing trend in many Western countries since the 1980s towards punitive and populist penal policies and sentencing laws (Garland 2001; Pratt 2006; Lacey 2008). One issue foregrounded in these debates is that the typical response to a specific event which has generated community or popular outrage has been a classic punitive 'law and order' response (Hogg and Brown 1998), usually involving the creation of new offences and/or increased police powers (Ashworth 2000; Garland 2001; Loughnan 2009). In this comment, by exploring the range of responses to the death of Thomas Kelly in Sydney in July 2012 — and identifying the distinctive themes in this set of responses — I want to consider instead the possibility for populism to be used more creatively or, as Russell Hogg has recently argued, to 'decouple' the populist from its 'punitive partner' in order to take populism more seriously (2013). In doing so, I will discuss the multiplicity of regulatory responses that are available to tackle any one event or problem and note the importance of recognising that 'populism' does not have a pre-existing or pre-ordained content.

### **The death of Thomas Kelly: Textbook criminal justice?**

Just after 10pm on Saturday, 7 July 2012, Thomas Kelly, 18 years of age, was walking with his girlfriend down Victoria Street in Kings Cross, New South Wales, when in an apparently unprovoked attack he was king-hit in the face as he talked on his mobile phone. He fell to

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the ground, hitting his head on the footpath, and as a result received serious head injuries. He never regained consciousness and died on Monday evening, 9 July 2012, at St Vincent's Hospital, Darlinghurst.

On Wednesday, 18 July 2012, at approximately 7.30pm, Homicide Detectives arrested Kieran Loveridge, 18 years of age, of Seven Hills in western Sydney, and just before midnight charged him with the murder of Thomas Kelly. He was also charged with three other assaults (assault occasioning actual bodily harm and two separate counts of assault) from unrelated events on Saturday, 7 July 2012. (In September 2012, a fourth assault charge was laid against Mr Loveridge.) Mr Loveridge faced Burwood Local Court on 19 July 2012 but did not apply for bail. In a violent and bizarre twist, one of Mr Loveridge's supporters king-hit a camera man outside the courtroom and was arrested and charged with assault.

On first look this seems to be a 'classic' case of fatal violence and a 'textbook' case of the criminal law at work and succeeding. The ultimate crime was allegedly committed (murder); the life of a young person was tragically stolen away and in typical circumstances: a king-hit to the head, leading the victim to make contact with the footpath, resulting in serious head injuries and ultimately death in a notorious part of Sydney, Kings Cross. (Actually, in many respects Mr Kelly's death is atypical: it was not particularly late at night; the events did not occur at or near licensed premises; there appears to be no previous relationship between Mr Kelly and Mr Loveridge; nor was Mr Kelly affected by alcohol.) And it is a story of triumph for the police: less than two weeks after the death, they arrested and charged a man with murder. A terrible crime was committed and the criminal justice system has worked.

But the case of Thomas Kelly is much more than this. It is also a story of the absolute limitations of the criminal law; its complete inadequacy to prevent these types of incidents *before* they occur; and its inability to protect innocent individuals from random violence.

Let's go back a bit to the scene of the crime. A night out in Kings Cross — most young people will have one. Mr Kelly was walking in what is known as the notorious 'Golden Mile'. Kings Cross is home to one of the highest concentrations of licensed premises, strip joints, prostitution, drugs and late-night trading venues in the state. It is a melting-pot in which midnight is apparently 'pumpkin hour', as Assistant Commissioner Mark Murdoch described:

Those who stay out after midnight are either going to become one of two things; they are going to be a victim or an offender, the way things are going ... Young men go out with the intention of belting someone. They haven't had a good night out unless they have been in a fight ... Whether that's them marking their territory or trying to prove how tough they are, that never used to happen. People used to go out, have a drink, have a good time and go home (Ralston and McKenny 2012a:1).

Yet, notably, the police did not characterise Mr Kelly's death as a classic law-and-order problem. Over time there were some calls for 'crack-downs', but the discussion and rhetoric following the incident has not emphasised the typical cries for new criminal offences, more police power and more police resources. Indeed, if anything, the police have actively shifted the emphasis from the domain of criminal law and policing. For instance, Assistant Commissioner Murdoch summed up the problems as 'too many venues, their late night trading and the lack of public transport options to get people home' (Ralston and McKenny 2012a:1). These problems, he said, were known to the state government, local council, the venues and the relevant agencies and now was the time to 'stop the buck-passing and get on with fixing it' (Ralston and McKenny 2012a:1). Assistant Commissioner Murdoch continued: 'We get all these people up to Kings Cross ... and then we turn the

transport off ... and there is just no motivation for people to leave the area and go home' (Ralston and McKenny 2012a:1).

The shift in discourse is notable given that, time and again, we have seen the classic 'knee-jerk' reaction of politicians to an arbitrary crime, frequently involving the introduction of (often poorly crafted) new criminal offences or increased penalties. For example, the New South Wales Government's response to the death of Anthony Zervas during a bikie brawl at Sydney Airport in March 2009 was the introduction of the *Crimes (Criminal Organisations Control) Act 2009* (NSW); and we saw the introduction of a new offence of throwing rocks and other objects at vehicles by the *Crimes Amendment (Rock Throwing) Act 2008* (NSW) in response to Peter Hodgkins throwing a rock off a bridge in Kiama in 2007, leading to serious injuries to Nicole Miller (see also Loughnan 2009). Most recently, the Government's response at the beginning of 2012 to a series of drive-by shootings was the introduction of new offences (for example, firing a firearm at a dwelling) and new consorting laws in the *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW). These instances reflect a perceived need for the government to be seen to be 'doing something tough', rather than taking the time and resources to explore the relevant causes and effects — the hallmarks of a classic 'penal populism' response.

But the response to Thomas Kelly's death was different. Perhaps it was the absolute randomness of his death, the waste of such a young life and the dignity of his parents (Ralph and Kathy Kelly) that turned their son's death into a resonating tragedy and the need to respond *differently*, not just with more law and order. Perhaps it is this that has provided the conditions for other voices to be more popularly heard — a moment for the 'punitiveness' to be decoupled from 'populism' (Hogg 2013).

## **A snap-shot of a populist response**

The following is a snap-shot of some of these responses and the voices, solutions and agencies involved.

### ***Public forum on violence in Kings Cross***

On Tuesday, 17 July 2012, less than 10 days after Mr Kelly's death, a packed public forum was held on Safer Sydney at the Town Hall. A broad range of representatives attended, from politicians (including Malcolm Turnbull MP, George Souris JP MP and Lord Mayor Clover Moore), police (including Assistant Commissioner Murdoch), the Director of NSW Bureau of Crime Statistics and Research ('BOCSAR'), Don Weatherburn, representatives from the hotel industry (including Doug Grand, Kings Cross Licensing, and Paul Nicolou, NSW CEO of Australian Hotels Association), to business owners and an estimated 600 community members. At the forum there were a number of themes consistently raised in relation to the problems in Kings Cross, including the lack of late-night public transport, the late-night trading hours and density of venues in the area, and excessive alcohol consumption.

### ***Lord Mayor, Clover Moore***

Less than a week after Mr Kelly's death, Lord Mayor Clover Moore released an 'eight steps' plan to make Kings Cross safer. The steps focused on a co-ordinated plan around public transport, particularly on Friday and Saturday night, and reform to liquor and planning legislation (Moore 2012).

### ***Director of NSW BOCSAR, Don Weatherburn***

Don Weatherburn, who has presided over numerous recent studies relating to the problems of alcohol-related violence (Burgess and Moffatt 2011) and the responsible service of alcohol (Donnelly 2012), was also very visible and vocal in the media debates in the days after Mr Kelly's death. At the public forum he made it clear that drugs (such as methamphetamines) were not the issue in Kings Cross, but alcohol was. He indicated that 86 per cent of assaults that occur within a 500-metre radius of Kings Cross are alcohol related; that violence is concentrated on two streets: Darlinghurst Road and Bayswater Road; and that the violence occurs between the hours of 12am and 3am. Mr Weatherburn stated that:

[T]he main options which are known to work, and are in the power of state and local governments to effect, are restrictions on trading hours and days of sale, restrictions on liquor outlet density and vigorous police enforcement of responsible service of alcohol laws' (Davies 2012:1).

### ***Last Drinks campaign and alcohol restrictions***

The Coalition of Concerned Emergency Services Workers (composed of nurses, ambulance officers, doctors and police) was also very vocal in debates following Mr Kelly's death, calling for the institution of the Last Drinks campaign in Kings Cross. The Last Drinks measures were adopted in Newcastle in 2008 to reduce alcohol-related violence. The Campaign's main measures include the imposition of a lockout from 1am on all hotels and bringing forward the closing time for venues to 3am; a prohibition on the sale of shots and mixed drinks stronger than five per cent alcohol by volume after 10pm; a prohibition on the sale of more than four drinks to any patron at one time; and a requirement to provide free water stations on every bar (Coalition of Concerned Emergency Services Workers 2010:3–4). The results of the Newcastle trial are reported to have led to a 29 per cent reduction in assaults after dark (2010:4).

In addition to the Last Drinks campaign, Anthony Shakeshaft, Deputy Director National, Drug and Alcohol Research Centre, UNSW, joined the debates arguing that we need to attack the root causes of alcohol-related violence. He stated the drivers of excessive drinking are availability of alcohol, advertising and price (Shakeshaft 2012:9). He argued that there needs to be change to all three drivers: reducing the number and late-night nature of liquor suppliers; a ban on advertising and sponsorship of alcohol as occurred with tobacco; and price increases for alcohol (Shakeshaft 2012:9; see also Shakeshaft et al 2011).

### ***Spotlight on '3 strikes' legislation***

Mr Kelly's death also led to a focus on the (in)effectiveness of enforcement of the recent '3 strikes and you're out' legislation (see the *Liquor Amendment (3 Strikes) Act 2011* (NSW), which amended the *Liquor Act 2007* (NSW) in 2011, inserting a new pt 9A into the Act, 'Disciplinary action — 3 strikes'). While the amendments were introduced under a rhetoric of getting tough on venues that repeatedly breached the terms of their licences, in the wake of Mr Kelly's death, the strike register maintained by the Office of Liquor, Gaming and Racing showed that only 12 venues state-wide had been found to have committed a breach since the legislation was introduced — and none of these was within Sydney's CBD, which is a known alcohol-violence related hot-spot (Ralston and McKenny 2012b:1).

### *Designing Out Crime*

Following Mr Kelly's death, the Centre for Designing Out Crime, UTS, raised the profile of its 'Way Finding Late at Night' project — a partnership project with the Department of Attorney General and Justice. The Way Finding project attempts to 'implement a design solution that would retain the party atmosphere of Kings Cross while minimising alcohol-related offences' (Designing Out Crime 2012). One of the solutions offered by the project was the introduction of temporary signage and street wardens to help (alcohol-affected) patrons navigate their way around and away from Kings Cross.

### *State planning and liquor laws*

The death of Mr Kelly also generated a debate about the problems with the relationship between the state government agency responsible for approving liquor licences (the Office of Liquor, Gaming and Racing via the Independent Liquor and Gaming Authority) and the approval processes for development applications for such venues by local councils. In discussing her plan for the area (see above), Lord Mayor Moore argued that there are issues to do with a lack of guidance in New South Wales as to what 'cumulative impact and saturation' is regarding licensing venues and the fact that a council cannot currently reject applications on the basis that there are already too many venues. She has called for changes to licensing and planning laws so councils can say when an area has reached 'saturation point' in terms of the number of late night venues, such as in Kings Cross.

### *Real Heroes Walk Away*

Finally, on 26 July 2012, News Ltd launched its Real Heroes Walk Away campaign in response to Mr Kelly's death. The campaign aims particularly to change how young people, especially young men aged 15–25 years, see violence. The campaign argues: 'It's up to individuals to take responsibility for their actions and think before throwing a punch that could end another's life and ruin their own' (McIlveen 2012). The message is simple: 'When trouble starts, walk away. There is nothing heroic about getting involved in a fight. Heroes don't escalate violent situations, they defuse them' (McIlveen 2012).

In September 2012, Ralph Kelly endorsed the Real Heroes Walk Away campaign, urging all Australians to support it. At the time of writing, nearly 11 000 people had signed the petition, including the Prime Minister and the Opposition Leader.

## **Reflections on this populist response**

There are a number of points to be made about this snap-shot of responses to Mr Kelly's death. First, they reflect a refreshing appreciation of the complexity of the social issues that were implicated in this tragedy.

Second, many of the people and agencies referred to above have been working for years on these issues with significant knowledge and experience, yet with very little traction. Mr Kelly's death seems to have been usefully appropriated as a 'vehicle' to enable these voices to 'cut through' in positive ways.

Third, when we analyse the content of the debate — the focus on alcohol-related violence and the role of licensed venues and the lack of late-night public transport — arguably it is only tangentially related to Mr Kelly's death. Mr Kelly does not appear to have died after a big night out at or near a licensed venue; he was not affected by alcohol; it was relatively

early in the evening (10pm); and he did not have a chance to ‘walk away’ — and the facts about the perpetrator are yet to emerge. Yet Mr Kelly’s death has almost become a synecdoche, ‘standing in’ for alcohol-related violence in Kings Cross.

Fourth, in the early days and weeks following Mr Kelly’s death there was no identifiable attempt to shift the debate back to a more traditional (narrow and punitive) law-and-order focus. Ironically, in the immediate aftermath, it was only Paul Nicolaou, NSW Chief Executive of the Australian Hotels Association, who attempted to suggest that greater policing in the area would solve the issues, calling for a New York-style zero tolerance on crime in Kings Cross (*Sydney Morning Herald* 2012:1).

Finally, while I have emphasised above the multiplicity of regulation, agencies and voices that have formed this populist response in the wake of Mr Kelly’s death, it seems that there is at least one voice that has been virtually absent from the field. And that is the young people who are often the ones visiting Kings Cross; the ones in danger both of offending and being attacked. Young people, in particular, are attracted to Kings Cross, a night out there being almost a rite of passage — and for some, added to this might be a first ‘adult’ experience. In all of the positive discussion about how to make Kings Cross ‘safer’, its venues more responsible — to ‘clean it up’ — it begs the question: what is the drive, the desire, particularly of young people, to go to Kings Cross? Surely part of the allure of Kings Cross is precisely that it appears the antithesis of safety and responsibility. It seems to me that this begs the question of whether this drive or desire eludes regulation. This issue is clearly aged and gendered (primarily masculinity is in question) and we need to start hearing from the young people frequenting Kings Cross.

## **Can populism make a difference? The NSW Government response**

What then has been the up-shot of all of this debate? How has the New South Wales Government responded? Initially, there were two main phases of the Government’s response: the first, announced on 15 August 2012, primarily related to proposed amendments to licence conditions for venues in Kings Cross; the second, announced on 18 September 2012, involves a more multi-faceted plan around three areas: compliance and enforcement, transport, and people and places. The Government then passed legislation in relation to these proposals in November 2012.

### ***The 15 August 2012 response***

In the month following Mr Kelly’s death, an audit was undertaken of the venues in Kings Cross by the Office of Liquor, Gaming and Racing. This revealed disparities in the registers of the 58 licensed venues in the Kings Cross Precinct Liquor Accord, with the number of people being refused service of alcohol because they were drunk being far fewer than the number of people removed from hotels for being drunk. In response to public pressure and this audit, on 15 August 2012, the Government, through the Minister for Tourism, Major Events, Hospitality and Racing, the Hon George Souris, notified the Kings Cross licensed venues of a raft of proposed changes to their licence conditions (Souris 2012).

Many of these proposed new conditions incorporate features of the Last Drinks measures, including that on Friday and Saturday nights:

- shots, doubles, and ready-to-drink beverages (over five per cent alcohol) will not be sold after midnight;

- no-one will be able to buy more than four alcoholic drinks at a time after midnight;
- from 11pm, two Responsible Service of Alcohol Marshals must be on duty in each venue; and
- no alcohol will be sold or supplied in the hour before closing.

Note that on 31 August 2012, the licensee of one of the largest venues in Kings Cross, the Kings Cross Hotel, successfully sought an injunction in the Supreme Court against the proposed restrictions, arguing for the right to be given the raw data from police and NSW BOCSAR upon which the government restrictions were said to be based: *Lewis v Director-General Department of Trade and Investment, Regional Infrastructure and Services* [2012] NSWSC 1044. The State successfully appealed on 12 September 2012, with the New South Wales Court of Appeal (McColl, Meagher JJA, Sackville AJA) finding that the report provided to the respondent by the Government disclosed the substance of the raw material and, as such, there was no denial of procedural fairness: see *Director-General, Department of Trade and Investment, Regional Infrastructure and Services v Lewis* [2012] NSWCA 436.

Another proposed change to licence conditions includes a requirement that venues trading past midnight maintain digital CCTV systems covering entries/exits and footpaths immediately adjacent to the venue and all publicly accessible areas within the venue.

Finally, the New South Wales Government announced a package of alcohol education campaigns to target irresponsible alcohol consumption, including a campaign aimed at educating young people (16–29 years of age) about the risks of associated binge or excessive drinking and public drunkenness and a campaign to engage the broader community about how and why we drink and the ways negative drinking behaviours can be addressed.

### *The 18 September 2012 response*

On 18 September 2012, Premier O’Farrell announced the ‘NSW Government Response to Issues in Kings Cross’ (New South Wales Government 2012). The plan is set out under three headings: ‘Compliance and Enforcement’, ‘Transport’, and ‘People and Places’.

In relation to compliance and enforcement, the Government announced an expanded boundary for the Kings Cross Precinct to prevent the growth of licensed premises venues in Macleay Road, Potts Point, and along William Street. The 15 August licence conditions will extend to all late-night trading licensed premises in that area. Also announced was a freeze on new liquor licences for a further three years in the area, and that all venues in the Precinct would be required to implement linked ID scanners, to confirm and record identities of banned persons.

In relation to transport, the Government’s plan includes improvements to the taxi rank on Bayswater Road to increase the safety of taxi services; a trial of pre-paid taxis; an extension of late-night bus services (eight bus services per hour from Kings Cross to the CBD from 1am–5am); and improved ‘signage and way-finding’ for patrons in Kings Cross (New South Wales Government 2012:4).

In relation to ‘People and Places’, the plan includes a police officer being stationed in the Sydney CCTV control room every Friday and Saturday night; the delivery (in conjunction with the City of Sydney Council) of a co-ordinated education and public information campaign on risky drinking, transport services and complaints systems; and support for the Kings Cross Festival, to encourage a diversity of people to visit Kings Cross.

### *The legislation: November 2012*

Just over a month later (24 October 2012), the Hon George Souris read for a second time the Liquor Amendment (Kings Cross Plan of Management) Bill 2012 (NSW). The Bill received assent on 20 November 2012 and the Act commenced on 7 December 2012. This Act amended both the *Liquor Act 2007* (NSW) and the *Liquor Regulation 2008* (NSW), primarily introducing the liquor licence conditions announced by the 15 August 2012 response, together with legislating for the expansion of the boundaries of the 'Kings Cross Precinct' foreshadowed on 18 September (on the latter, see *Liquor Act 2007*(NSW) s 4A and sch 2). In terms of the liquor licence conditions, s 116A of the *Liquor Act 2007* now provides for the regulations to prescribe conditions for licences for premises in the Kings Cross Precinct. These conditions may include prohibitions/restrictions on each of: the use of glass, the sale of certain types of liquor, and the sale or supply of liquor in certain circumstances or times (see *Liquor Act 2007* s 116A(2)(a)–(c)).

The amended *Liquor Regulation 2008* now prescribes such conditions in pt 5A, 'Special licence conditions for premises in Kings Cross precinct'. In particular, the following conditions have been imposed on these premises: service of alcohol to cease one hour before late closing time on weekends (cl 53C); 'time outs' for certain premises regarding the sale of liquor (cl 53D); a prohibition on the use of glass for serving alcohol during general late trading periods (cl 53E); a prohibition on certain drinks and types of liquor during weekend late trading period (cl 53F); a requirement for responsible service of alcohol marshals during weekend late trading period (cl 53G); maintenance of CCTV systems on premises (cl 53H); and 'round the clock' incident registers to be maintained (cl 53I). These conditions effectively introduce the promises announced by the Government in the 15 August response.

Interestingly, other conditions imposed by the amendments to the *Liquor Regulation 2008* include requirements for premises and staff to promote late-night transport options (cl 53M), to promote on premises any campaign conducted by NSW Police about patron responsibility in relation to alcohol (cl 53N), and for premises to maintain a record of the amount of alcohol sold or supplied during particular hours (cl 53O).

The big concession the New South Wales Government's legislation appears to have made to the powerful liquor industry is to allow licensees to apply for exemptions to some of the aforementioned conditions – being cl 53E (use of glasses), 53F (types of drinks) and 53H (maintenance of CCTV systems). Clause 53P(2) now provides that such exemptions may be granted where the Director-General is satisfied that:

- (a) the exemption is unlikely to result in an increase in the level of alcohol-related violence or anti-social behaviour or other alcohol-related harm in the Kings Cross precinct, and
- (b) measures other than the specified condition to which the exemption relates are in place on the subject premises and that such measures will be effective in reducing the risk of alcohol-related violence or anti-social behaviour in or about the subject premises.

It remains to be seen how many applications will be made and how many exemptions granted.

## **Conclusion**

While some more classic law-and-order mechanisms crept back into the 18 September plan and the ensuing legislation (for example, supplementary policing at peak times and

empowerment of police usage of drug detection dogs without warrant in Kings Cross; the latter being introduced by the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 148(1)(e)), the New South Wales Government's responses represent an undoubtedly populist, but far more nuanced, response than we have traditionally seen from state governments in the past. This must surely make us think about taking populism more seriously, for its content is clearly not pre-existing and inherently reactionary (Hogg 2013). As Hogg has argued, we should stop treating populism as a deviant or aberrant political form, and instead grasp it 'as a positive political rationality' (2012) that may be put to good effect.

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