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Keywords

implications, nsw, criminal, law, factor, aggravating, fuelled, punch, alcohol, one, minimums, mandatory, laws

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

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Abstract

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

Keywords

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

Introduction

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

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

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

response with all the related pitfalls of poor drafting, lack of coherence and operational difficulty;

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

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

Overview of the legislation

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

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

Just over a week later, on 30 January 2014, without any known public consultation from the NSW Law Reform Commission (NSWLRC) or other expert groups, Premier O'Farrell read for a second time the Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014 and the Liquor Amendment Bill 2014.⁴ With alarming speed, the Bills were passed by both houses without substantial amendment and on the same day they were introduced. The *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* ('the Act') received assent and commenced operation the next day, 31 January 2014. Premier O'Farrell thereby achieved his wish, announced to the media and to Parliament in introducing the Bill, to have the provisions up and running for the weekend (O'Farrell 2014b). The *Liquor Amendment Act 2014* substantially came into force on 5 February 2014.

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

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

Assault causing death: The offences

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

25A Assault causing death

- (1) A person is guilty of an offence under this subsection if:
 - (a) the person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and
 - (b) the assault is not authorised or excused by law, and
 - (c) the assault causes the death of the other person.

Maximum penalty: Imprisonment for 20 years.

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

Maximum penalty: Imprisonment for 25 years.

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

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

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

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

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

- (6) In proceedings for an offence under subsection (2):
- (a) evidence may be given of the presence and concentration of any alcohol, drug or other substance in the accused's breath, blood or urine at the time of the alleged offence as determined by an analysis carried out in accordance with Division 4 of Part 10 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, and
 - (b) the accused is conclusively presumed to be intoxicated by alcohol if the prosecution proves in accordance with an analysis carried out in accordance with that Division that there was present in the accused's breath or blood a concentration of 0.15 grams or more of alcohol in 210 litres of breath or 100 millilitres of blood ...

Background: Responding to a penal populist campaign

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

The sentencing of Kieran Loveridge for the death of Thomas Kelly

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

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

The proposed bill will be based on a Western Australian so-called 'one punch law' which carries a maximum penalty of 10 years – the laws I am proposing for NSW will carry a maximum penalty of 20 years imprisonment...

The new offence and proposed penalty will send the strongest message to violent and drunken thugs that assaulting people is not a rite of passage on a boozy night out – your behaviour can have the most serious consequences and the community expects you to pay a heavy price for your actions. (Smith 2013b)

Soon after the sentence was handed down, the Kelly family started a petition to the NSW Premier⁶ calling for minimum sentencing laws in cases of manslaughter. Broader support for these measures was found in the 'Enough is Enough' campaign⁷ and a public rally was held in Sydney's Martin Place on 19 November 2013 calling for tougher and mandatory sentences for violent offenders (Wood 2013).

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

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

In many critiques of penal populism, the allegation is often made that the media distorts the 'facts' and fails to provide information to the public in a balanced way so fostering punitive opinion (for example, see Roberts 2008). While it is not the subject of this article, it is important to note that both the Safer Sydney and Enough campaigns were not exclusively punitive in their treatment of the issue. While there was a more classic 'demonising' of recent offenders in a way that did not happen with Mr Loveridge – in particular, of Shaun McNeil who had been charged with assaulting Mr Christie (Fife-Yeomans and Wood 2014) – and calls for mandatory minimum sentencing, the campaigns also called for additional actions: the introduction of 'Newcastle-style' 1.00am lockout measures across the Sydney CBD; more public transport; public education on drinking (including *The Sydney Morning Herald* running a competition for the public to come up with a new creative advertising campaign similar to the 'Pinkie campaign' that targeted violent alcohol-related offending⁸); and risk-based licensing measures.

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

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

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

... The first problem is the binge-drinking culture that seems to have become quite prevalent amongst youngsters in the last couple of decades.

The second problem, and this is a truly insidious thing – this rise of the disturbed individual who goes out not looking for a fight, but looking for a victim. ...

I think really, the police, the courts, the judges ought to absolutely throw the book at people who perpetrate this kind of gratuitous unprovoked violence. (ABC News 2014)

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

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

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

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

Policy transferred but not translated

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

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

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

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

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

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

The hierarchy of criminal offences

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On 26 February 2014 Premier O'Farrell revised the original nine offences to which mandatory minimums would apply when committed in the circumstances of intoxication, to six¹³ (that is, in addition to the new crime of assault causing death): see Crimes Amendment (Intoxication) Bill 2014 (the Bill). In addition, the Bill introduces a staggering *five new offences* if committed when 'intoxicated in public' (discussed in the final section of the article), none of which have mandatory minimums. These five new offences are indicated in Table 1. Table 1 also sets out the Government's planned likely increase in maximum penalties for the aggravated versions of those offences relative to the maximum penalty for the 'basic offence'; the mooted mandatory minimum for the aggravated offence; and the current SNPP for each of the 'basic offences' (that is, the current SNPP for the basic offence); and the new offences (see the Bill; O'Farrell 2014c). What Table 1 suggests is that little consideration has been given in terms of the seriousness hierarchy to the relationship between the mandatory minimums and the SNPPs for the basic offence. As Table 1 indicates, in most circumstances the mooted mandatory minimum for the aggravated offence is equivalent to the SNPP *for the basic offence* (where there is a SNPP).

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

Table 1: Comparison of basic and aggravated offences

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

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

Confusing and complex: The elements of s 25A

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

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

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

The basic offence

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

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

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

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

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

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

Arbitrarily confining the conduct to 'hitting'

Under the Western Australian provision *any form* of unlawful assault that either directly or indirectly causes the person's death satisfies the offence. The NSW provision confines the 'assault' element to 'intentionally hitting the other person with any part of the person's body or with an object held by the person'. It is unclear where the model for this aspect of the offence came from although I suggest it is based on the particular circumstances of Mr Kelly's death (and possibly also Mr Christie's). The offence is closer to, but not the same as, the Northern Territory (NT) provision which is based on a 'violent act' causing death (rather than simply an assault) in s 161A *Criminal Code* (NT). The Northern Territory provision defines 'conduct involving a violent act' in s 161A(5); however, there is no similar definition of the word 'hitting' in the NSW provision¹⁷ or elsewhere in the *Crimes Act 1900*. It is also not a word used in any other section of the *Crimes Act 1900*¹⁸ and I have not located any judicial consideration of that phrase.

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

Hitting, n. – The action of hit v. in various senses; striking, impact, collision

Hitting, adj. – That hits or strikes; striking

Hit, v. – I. To get at or reach with a blow, to strike.¹⁹

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

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

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

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

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

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

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

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

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

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

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

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

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

These aspects of the definition of s 25A exemplify the vice of what Horder (1994) called ‘particularism’: the inclusion of definitional detail that merely exemplifies rather than delimits wrongdoing. The problem with this approach is that: ‘[v]ery precise specification of the modes of responsibility opens up the possibility of unmeritorious technical argument’ over which conduct falls within the offence and creates ‘arbitrary distinctions between [that conduct]

included and those left out' (Horder 1994: 340; see also Loughnan 2010: 20-1). In turn, this has the potential to undermine the communicative function of the criminal law (Duff 2000, 1999). It is likely that in any prosecution under s 25A, technical arguments will be made about what types of conduct do (not) fit within the offence with potentially unintended consequences.

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

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

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

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

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

The role of intoxication: Legally and operationally problematic

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

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

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

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

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

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

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

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

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

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

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

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

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

For the purposes of an aggravated intoxication offence, a person is intoxicated if:

- (a) the person's speech, balance, co-ordination or behaviour is noticeably affected as the result of the consumption or taking of alcohol or a narcotic drug (or any other intoxicating substance in conjunction with alcohol or a narcotic drug), or

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

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

- (6) For the purposes of this section, a person is *intoxicated* if:
 - (a) the person's speech, balance, co-ordination or behaviour is noticeably affected, and
 - (b) *it is reasonable in the circumstances to believe that* [emphasis added] the affected speech, balance, co-ordination or behaviour is the result of the consumption of alcohol or any drug.

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

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

Given that over-consumption of alcohol (and, to a lesser extent, other drugs) has been *the* focus of the construction of a 'problem' that needs to be 'fixed', it is surprising that the new legislation – and these mooted 'refinements' – create considerable uncertainty as to where the line will be drawn between consumption of alcohol/drugs that triggers s 25A(2) and consumption that does not. The new testing powers are also likely to be operationally difficult because of the time in which police have to undertake drug and alcohol testing under the new Div 4, Pt 10 of *LEPRA*. In the case of alcohol testing it must be undertaken within two hours 'after the commission of the alleged offences' (s 138F(3)) 'at or near the scene of the alleged offence or at a police station or other place at which the person is detained in connection with the offence' (s 138F(1)). For blood and urine samples for alcohol or drugs it must be within four hours after the commission of the offence (s 138G(3)) and a person may be taken to and detained at a hospital for the purpose of the taking of a blood or urine sample' (s 138G(4)).²⁷ Not only will it be difficult in some situations to define exactly when the offence was committed²⁸ and hence when time begins to run but, from an operational point of view, the time limits for obtaining samples dramatically confine the types of prosecutions that will be possible under s 25A(2).²⁹

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

- ¹¹This means that, unlike other provisions, such as in Victoria, there is no possibility of a judge finding 'special reasons' to reduce the mandatory minimum: see *Crimes Amendment (Gross Violence) Act 2012* (Vic). This Act amended the *Crimes Act 1958* (Vic) to introduce offences of 'gross violence' (ss 15A and B), and the *Sentencing Act 1991* (Vic) to provide a mandatory minimum of 4 years for such crimes, but with provision for a lesser sentence where the judge finds 'special reasons' (ss 10 and 10A).
- ¹²An aggregate sentence is where a court is 'sentencing an offender for more than one offence' and imposes an aggregate sentence of imprisonment with respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53A.
- ¹³The six offences are reckless GBH in company (s 35(1)); reckless GBH (s 35(2)); reckless wounding in company (s 35(3)); reckless wounding (s 35(4)); assault police officer – reckless GBH or wounding (public disorder) (s 60(3A)); assault police officer – reckless GBH or wounding (not during public disorder) (s 60(3)) (O'Farrell 2014c).
- ¹⁴This mandatory minimum is not new but was introduced in 2011.
- ¹⁵An assault is not authorised or excused by law if there is no consent to the assault or other lawful excuse.
- ¹⁶For instance in *R v Munter* [2009] NSWSC 158, the 66-year-old victim of a one-punch manslaughter had a history of hypertension and potentially fatal heart disease. After the one punch he had a heart attack and died. See also *R v Irvine* [2008] NSWCCA 273, where the victim of a one-punch manslaughter suffered a congenital abnormality that contributed to his death; and *LAL, PN* [2007] NSWSC 445 in which the two offenders assaulted a taxi driver with moderate force but the victim suffered from heart disease and died from a heart attack. A manslaughter trial in NSW that recently returned a not guilty verdict involved a situation that would potentially be excluded. In this matter Chab Taleb (a former bouncer) was involved in a brawl with Jason Daep at the Pontoon nightclub in Cockle Bay and pushed Daep into the water where he drowned. In this case, Daep died not because of the injuries from the assault nor from hitting a hard surface, but from drowning.
- ¹⁷A definition of the word 'hitting' contained in the Crimes Amendment (Intoxication) Bill 2014. If the Bill is passed it will amend s 25A to insert the following definition of 'hits another person':
 (2A) For the purposes of this section, a person hits another person if the person:
 (a) hits the other person with any part of the person's body, or
 (b) hits the other person with a thing worn or held by the person, or
 (c) forces any part of the other person's body to hit the ground, a structure or other thing.
 This new definition is likely to extend the types of behaviours that come within the ambit of s 25A including 'forcing', 'pushing', 'tackling' as discussed below.
- ¹⁸The word 'hit' is used once in the definition of 'violence' in s 93A of the *Crimes Act* in relation to riot or affray, **violence** means any violent conduct, so that:
 (a) except for the purposes of section 93C, it includes violent conduct towards property as well as violent conduct towards persons, and
 (b) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short).
- ¹⁹The Macquarie Dictionary defines '**Hit** –verb (t) 1. to deal a blow or stroke; bring forcibly into collision.'
- ²⁰The Public Defender's Office of NSW Sentencing Tables for unlawful and dangerous act manslaughter from 1998-2013; available at http://www.publicdefenders.lawlink.nsw.gov.au/pdo/public_defenders_manslaught_unlawful_dang_act.html?s=1001 (accessed 18 March 2014).
- ²¹A legal argument could perhaps be made that a tackling constitutes a 'collision' in the ordinary meaning of 'hitting' as noted above.
- ²²Under the doctrine of transferred malice *mens rea* can be transferred to the defendant. Thus, where the defendant attacks someone with *mens rea* for a particular offence, misses, but nevertheless 'accidentally' brings about the *actus reus* for the same offence in relation to a different person, the *mens rea* and *actus reus* can, essentially be added together, and the offender can be convicted of the offence (Brown et al. 2011: 347). The doctrine, however, has been strongly criticised in the UK (see Brown 2011: 347). For s 25A offences, however, the offence confines the intentional hitting to *the other person* which seems to exclude the doctrine.

- ²³For example, Homel 1997; Road Traffic Accidents in NSW 2001, Statistical Statement: Year ended 31 December 2001 (RTA Road Safety Strategy Branch, January 2003) reveals the high costs of drink-driving not only in terms of death or injury to drivers and other users of the roads, but also in terms of economic cost involving loss of earnings, decreased enjoyment of life, medical and hospital expenses, costs associated with damage or loss of personal property, and the public expenditure on the investigation and prosecution of offenders. See also RTA, Drink Driving: Problem Definition and Countermeasure Summary (August 2000) at 2.
- ²⁴See, for example, above endnote 23; see also Quilter 2014b, where only four of the one-punch manslaughters did not involve significant alcohol and/or drug consumption.
- ²⁵Perhaps one answer is that there is a generally applicable and scientifically proven correlation between drinking and driver impairment whereas the relationship between drinking and propensity to violence is less consistent. For instance, the NSWCCA indicated in the High Range PCA guideline judgment: 'it is axiomatic that the higher the concentration of alcohol in the blood the more likely it is that the person's ability to control and manage a motor vehicle will be adversely affected and the greater is the risk of the vehicle being involved in an accident. A blood alcohol reading within the "high range" increases the probability of the vehicle crashing by 25 times, that is 2,500 per cent: RTA, Drink Driving: Problem Definition and Countermeasure Summary (August 2000) at 2. In 2001 of 1,055 motor vehicle drivers and motorcycle riders killed or injured and who had a blood alcohol concentration over the legal limit, 50 per cent are in the high range; RTA Statistical Statement, above, at p iii.: *Application by the Attorney General Concerning the Offence of High Range Prescribed Content of Alcohol Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305 at [10]. Another aspect is that s 52A offences are ones of strict liability whereas s 25A offences (together with the nine other offences that are to be introduced in late February 2014) are *mens rea* offences.
- ²⁶While not the subject of this article, it is troubling that the focus of the definition in the Bill is 'public' intoxication. This clearly leaves unregulated any 'aggravated intoxicated offence' committed in a 'domestic' setting, be it domestic violence or neighbour or other private violence.
- ²⁷It is noted that it is an offence to refuse to provide a blood or urine sample pursuant to s 138G, with a maximum penalty of 50 penalty units or imprisonment for 2 years, or both: LEPR s 138H(1).
- ²⁸Although it is noted that, under the Crimes Amendment (Intoxication) Bill 2014, the time of the commission of the offence will be amended to 'the police officer has reason to believe that the alleged offence was committed': Sch 2 cl [3] and [6].
- ²⁹It is noted that the time periods will be extended under the Crimes Amendment (Intoxication) Bill 2014. Thus, for breath testing and analysis under LEPR s 138F(3), instead of 2 hours after the commission of the offence it will be 'as soon as possible and within 2 hours after the police officer has reason to believe that the alleged offence was committed' and for blood and urine samples under LEPR s 138G they may be conducted up to 12 hours after the 'police officer has reason to believe that the alleged offence was committed' (rather than the original four hours): see Sch 2 cl [6]. Furthermore, Sch 1 [2] will introduce a series of 'deeming' provisions into the *Crimes Act* s 8A(5) such that any concentration of alcohol or drug 6 hours after the alleged offence is deemed to be the concentration of alcohol at the time of the alleged offence.
- ³⁰This is a common practice in one-punch manslaughter cases with 17 of the 18 such matters in NSW from 1998-2013 involving guilty pleas and, on sentence, an agreed statement of facts including in relation to the offender's level of intoxication. Indeed, of the one-punch manslaughter cases, only four did not involve either alcohol or drugs and in all cases evidence of intoxication or drugs came from the agreed statement of facts: see Quilter 2014b.

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