

One Punch Laws and Judicial Responses to Alcohol-Fuelled Public Violence

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Overview

- **PART ONE:** recent development of *legislative* 'one-punch laws'
- **PART TWO:** trends and issues in prosecutions and sentences under new homicide laws
- **PART THREE:** recent sentencing decisions in NSW manslaughter cases following the NSWCCA decision of *Loveridge*.

PART 1: Australian 'Assault Causing Death' Laws

- **QLD in 2007:** first mooted but rejected
- **WA enacted first in 2008:** 'Unlawful assault causing death' *Criminal Code Act 1913 (WA)* s 281
- **NT in 2012:** 'Violent act causing death' *Criminal Code Act (NT)* s 161A
- **NSW Jan 2014:** 'Assault causing death' *Crimes Act 1900 (NSW)* s 25A
- **QLD Aug 2014:** 'Unlawful striking causing death' *Criminal Code (Qld)* s 314A
- **VIC Sept 2014:** 'single punch taken to be dangerous' *Crimes Act 1958 (Vic)* s 4A.

Defining Features

- **Conduct:** an assault (variously defined) -> causes death
- **No fault element** for consequence of death
- **Max penalties** range significantly:
 - WA: 10 years but 20 years since 2017
 - NT: 16 years
 - NSW: basic offence 20 years; 25 years for aggravated version + MMS 8 years
 - QLD: life + serve 80% of HS or 15 years, whichever is lesser
 - VIC: 20 years + MMS 10 years *Sentencing Act 1991* s 9C applies

Table 1: Assault Causing Death Offences in Australia

Jurisdiction	Nature of assault	Part of body specified?	Assault with weapon included?	Only one-punch?	Intox.	Causation
WA: Criminal Code Act 1913 s 281 (2008)	'Unlawfully assaults': s 281(1)	N	Y: implied by unlawful assault: s 281(1)	N	N	'dies as a direct or indirect result of the assault' (s 281(1))
NT: Criminal Code, s 161A (2012)	'violent act': s 161A(5) involving the direct application of force of a violent nature	N	Y: expressed, s 161A(5)	N	N	violent act 'causes the death' of 'the other person' (s 161A(1)(b)) with strict liability applying to causation (s 161A(2))
NSW: Crimes Act 1900, s 25A (2014)	'intentionally hitting': s 25A(1)(a)	N	Y: 'with an object held by the person' s 25A(1)(a)	N	Y: agg. factor s 25A(2)	'the person is killed as a result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault': N: s 25A(3)
Qld: Criminal Code s 314A (2014)	'unlawful striking': 314A(7) strike, ...means directly apply force to the person by punching or kicking, or by otherwise hitting using any part of the body, with or without the use of a dangerous or offensive weapon or instrument.	Y: head/neck (s 314A(1))	Y: 'with or without the use of a dangerous or offensive weapon or instrument' (314A(7))	N	N	N: 'directly or indirectly' (s 314A(7))
Vic: Crimes Act 1958, s 4A (2014)	'single punch or strike': s 4A(6) 'strike means a strike delivered with any part of the body'	Y: head/neck (s 4A(1)(a))	N	N: expressly not: s 4A(3)	N	Causation 'even if the injury from which the person dies is not the injury that the punch or strike itself caused to the person's head or neck but another injury resulting from an impact to the person's head or neck, or to another part of the person's body, caused by the punch or strike': s 4A(4)

Observations re Drafting

1. Mismatch Between Rational and Form

1. Not confined to 'one' *punch*:

- WA: *any* 'unlawful assault'
- NT: *any* 'violent act' (incl any form of direct force whether by an offensive weapon)
- NSW: 'intentionally hitting' 'with any part of the person's body or with an object held by the person'
- Qld: *any* 'unlawful striking' 'by punching or kicking, or by otherwise hitting using any part of the body, with or without the use of a dangerous or offensive weapon or instrument'
- Vic: a 'punch or strike' 'delivered with any part of the body' to the head/neck which causes injury to that area whether by a single strike or one of a series of strikes

2. **Intoxication**: Only NSW includes as specific feature of offence definition

2. Incoherence Regarding Hierarchy

- **LRC of Ireland:** third tier below murder & manslaughter
- **WA/NT:** third tier max penalty & case law but note seriousness of assaults
- **NSW:** s 25A(1) second tier; 25A(2) arguably above manslaughter re MMS?
- **Qld:** second-tier above manslaughter?
- **Vic:** second-tier if MMS applies?

3. Other issues including departures from CL principles

1. Causation:

- Eg NSW s 25A(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.*'

2. Intoxication:

- Eg 25A(6)(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 ... [the relevant provisions of LEPRA 2002] 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.

PART 2: OPERATION OF THE LAWS

1. Impact on the prosecution of fatal domestic violence – WA
2. Impact on Indigenous offenders – NT
3. Net-widening: variety of forms of fatal violence prosecuted - WA and NSW
4. Other issues incl statutory alterations to CL principles – NSW
5. Effects on charging, pleas and alternative verdicts – NSW, Vic & Qld
6. Sentencing outcomes – All

1. Impact on the prosecution of fatal domestic violence - WA

- Broad definition of conduct: 'unlawful assault'
- Just over 30% of matters = DV
- Low sentences
- 2017 maximum penalty increased to 20 years: *Restraining Orders and Related Legislation Amendment (Family Violence) Act 2016* (WA)

2. Impact on Indigenous Offenders – NT

... He [Mr Wilson] and others were essentially engaged in a very prolonged bout of drinking for a period of two weeks at various locations around Darwin.

... Mr Wilson told his counsel he commenced drinking at the age of 20 and would only drink when in Darwin or when he had access to alcohol. He has abstained from alcohol and from drinking for long periods, which remains possible because he has primarily lived in remote and dry communities. That pattern of abstention would tend to be borne out by his lack of a previous criminal record. It is to his credit that he has not previously been dealt with for other criminal offences.

... Clearly, Mr Wilson was drunk. ... The Court was told the toxicology report in the committal brief reveals the deceased had a blood alcohol level of .240 percent. That reading may well be somewhat comparable to the alcohol level of others in the group, including this offender.

That he was highly intoxicated does not mitigate the offending. *It hardly needs repeating, but I will repeat it, alcohol-fuelled violence is one of the major problems in the Northern Territory. The Court sees cases of great harm constantly creating misery all around.* General deterrence has particular relevance to this offending, especially given the violence was perpetrated against a woman. ...

This was an ugly assault on a vulnerable woman; vulnerable because she was intoxicated. He had no right to assault her. (*The Queen v Jessie Wilson* (Unreported, NT Supreme Court, transcript of proceedings, 12/04/2017, Blokland J))

3. Net-widening: variety of forms of fatal violence prosecuted

This is a somewhat atypical case in some ways in that it does not involve young men who are intoxicated but rather a middle aged man of good character when sober at a workplace who seemingly just lost the plot and unfortunately rather than the consequence being what would be the more normal consequence of a few punches to the head, the consequence was the loss of life of Mr Canning. Hence, instead of facing a charge of assault carrying a maximum penalty of two years, he is facing a charge of assault causing death carrying a maximum penalty of 20 years and the Canning family are bereaved of a loved one.

Strong (Unreported, District Court, 29 September 2017, Ellis J)

4. Statutory Alterations to CL principles: (a) Causation

A critical word here is "directly". In *Andrew v R* [2000] NSWCCA 310, is an example of the Court of Criminal Appeal, reminding Judges, when giving the common law direction as to causation that it is wrong to suggest to the jury they should search for the principal cause of death:

"...it was an error to instruct the jury to determine the cause of death by making a selection from various acts left to them by the trial judge for this purpose. "[I]t is a misapplication of principle to attempt to search for a principal cause of death": *R v Mofatt*. [2000] NSWCCA 174, per Wood CJ at CL at [66]. A fortiori, the cause of death." At [60].

But with s 25 A the legislature has set in s 25A (3) what must be proved to establish causation. The section commences with the words "For the purposes of this section ..." By incorporating a causation clause the legislature has evinced clear intention that the common law be displaced. A further example of that intention is the confining of the assault to "intentional hitting."

Accordingly, any direction to the jury must keep the jury's focus on the words of the subsection. Were I to include in the direction the words "substantial or significant contribution to the death" I would be in error. (*Domio* [2018] NSWDC 16 at [4])

4. Statutory Alterations Cont'd

(b) Intoxication

...I also directed them [the jury] that *"intoxicated"* is an ordinary English word, in common parlance, with its ordinary English meaning in court.

Based upon the straightforward definition to be found in each Dictionary, and with the consent of the parties, I suggested to the jury that the concept of a person being intoxicated by alcohol could be expressed more plainly as the person being *"drunk"*.

I also suggested to the jury that the concept of being intoxicated by alcohol involves something more than a person having a small amount of alcohol in his or her body, without it affecting that person, or with it affecting him or her only to a very small degree.

Finally, I went on to suggest to the jury that, as a matter of common English usage, a person who is merely tipsy or *"happy"* would not be thought of as intoxicated.

R v Johnson (No 4) [2017] NSWSC 609 at [10]-[11].

5. Charging, Pleas and Alternative Verdicts

The primary count alleged that the offender had murdered Kenneth Matthews (the deceased); the second count explicitly averred the manslaughter of the same person; and the third and fourth counts alleged assault causing the death, in its aggravated and non-aggravated forms, of the same person. The offender pleaded not guilty to all counts, and a trial by jury of six weeks' duration ensued.

R v Johnson (No 4) [2017] NSWSC 609 at [2].

Manslaughter sentence: 6 years; NPP 4 years

5. Charging, Pleas and Alternative Verdicts Cont'd

I note that the elements of this particular offence *are also capable of constituting the elements of an offence of manslaughter*. I note that the maximum penalty for manslaughter is 25 years but the maximum penalty for this particular offence is 20 years. I have had regard to the principle in *De Simoni* which indicates that a court should avoid dealing with a matter in a way which would involve taking into account aspects of the case which would constitute a more serious charge carrying a higher penalty. *That situation is somewhat complicated here because in my view there are no real differences between the elements of the offences*. What I will do to ensure that the penalty to be imposed is reflected against the maximum penalty of 20 years rather than against the maximum penalty of 25 years is to note that essentially, the elements of the offence entail an assault causing death and that it is a consequence driven offence in much the same way as driving in a manner dangerous causing death is regarded as a consequence driven offence.

Strong (Unreported, NSW District Court, 29 September 2017, Ellis J)

6. Sentencing Outcomes

- **Low sentences:**
 - WA median head sentence: 2 years, 8 months
 - NT median head sentence: 4 years, 6 months (NPP of 2 yrs, 5 months)
- **MMS:**
 - NSW unsuccessful constitutional challenge
 - Potential for injustice

6. Sentencing Outcomes cont'd: Qld's special rule

If I were sentencing for manslaughter on the facts in this case, I would have begun with a sentence of seven years' imprisonment, recognising your youth and psychological state, and I would then have set an eligibility for parole date at about a third of that to allow for your plea of guilty, cooperation with justice and the remorse that you have shown ...

That's not, of course, now open in this case. Instead, recognising those factors, I would impose a sentence of six years' imprisonment. But it is a matter of agreement between both the Crown and your counsel that the sentence should be reduced by a period of 26 months, to reflect the period that you have actually spent in custody. I do not intend to do that with mathematical precision. Instead, I recognise that feature by sentencing you to four years' imprisonment. I order that you not be released from imprisonment until you have served 80 per cent of that term.

Mayot (Unreported, Queensland Supreme Court, 6 March 2017, Holmes CJ)

6. Sentencing Outcomes cont'd: *Sentencing Act 1991 (Vic) s 9C*

(3) Subsection (2) applies to the court [MMS 10 years] in sentencing the offender only if the court is satisfied beyond reasonable doubt that—

(a) the victim's death was caused by a punch or strike that, under section 4A(2) of the Crimes Act 1958, is taken to be a dangerous act for the purposes of the law relating to manslaughter by an unlawful and dangerous act; and

(b) the offender intended that the punch or strike be delivered to the victim's head or neck; and

(c) the victim was not expecting to be punched or struck by the offender; and

(d) the offender knew that the victim was not expecting, or was probably not expecting, to be punched or struck by the offender.

PART 3: Sentencing in NSW Manslaughter Cases - *Loveridge*

- *R v Loveridge* [2013] NSWSC 1638
- *R v Loveridge* [2014] NSWCCA 120

PART 3: Recent NSW Manslaughter Sentencing Decisions (July 2014-Jan 2018)

- *R v Wood* [2014] NSWCCA 184
- *R v Dyer* [2014] NSWSC 1809
- *R v Lambaditis* [2015] NSWSC 746 (upheld: *Lambaditis v R* [2016] NSWCCA 117)
- *R v Field* [2014] NSWSC 1797
- *R v Lane (No 3)* [2015] NSWSC 118
- *R v McNeil (No 4)* [2015] NSWSC 1198
- *R v Matthews* [2015] NSWSC 49
- *R v McKnight (No 4)* [2014] NSWSC 1029
- *BH v R* [2016] NSWCCA 290
- *R v Merrick (No.5)* [2016] NSWSC 661
- *R v Tanks* [2016] NSWSC 519
- *R v Johnson (No.5)* [2017] NSWSC 1169
- *R v Grogan* [2017] NSWSC 378
- *R v Jones* [2017] NSWSC 19

Table 2: NSW manslaughter cases 1998-2013

Case	One-punch	Alcohol/drugs	Guilty plea	Sentence	Public street	Stranger#	Randomly Selected	Provoked (by V)
Risteski	Y	Y	Y	MT: 3 y 6 m; AT: 2 y 4 m	N	Y	Y	Y
Irvine	Y	N	Y	3 y (NPP 2 y PD)	Y	Y	Y	Y
O'Hare	Y	Y	Y	6 y (NPP 3 y 6 m)	Y	Y	Y	N
Maclurcan	Y	N	Y	3 y (NPP 17 m)	Y	N	Y	N
KT	Y	N	Y	6 y (NPP 4 y)	Y	Y	Y	Y
Bashford	Y	Y	Y	5 y 3 m (NPP 3 y 6 m)	Y	Y	Y	Y
Smith	Y	Y	Y	3 y 9 m (NPP 2 y 6 m)	Y	Y	Y	N
Donaczy	Y	Y	Y	6 y (NPP 3 y 6 m)	Y	Y	Y	N
Castle	Y	Y	Y	7 y 6 m (NPP 5 y 8 m)	Y	Y	Y	N
AJC	Y	N	Y	2 y 6 m (NPP 18 m PD); Cr AA 3 y (NPP 1 y 9 m PD)	N	Y	Y (5 min plan)	N
Loveridge	Y	Y	Y	6 y (NPP 4 y)	Y	Y	Y	N
Greenhalgh	N	Y	Y	8 y (NPP 4 y 6 m); AA: 6 y 9 m, (NPP 4 y 6 m)	N	N	Y	Y
Munter	N	N	Y	3 y 3 m (NPP 18 m)	Y	Y	Y	Y
Hutchison	N	Y	Y	7 y 6 m (NPP 5 y 6 m)	N	Y	Y	Y
Hopley	N	Y	N	5 y (NPP 3 y)	Y	Y	Y	N^
CK	N	Y	Y	CK 6 y (NPP 4 y)	Y	Y	Y	N
TS	N	Y	Y	TCS 6 y (NPP 3 y 6 m)	Y	Y	Y	N
Carroll	N	Y	Y	3 y (NPP 18 m PD)	Y	Y	Y	Y
Total	11	13	17	Average: 5 y 1.9 m (NPP 3 y 2 m)	14	16	18	8

Table 3: NSW manslaughter cases 2014-2017

Case	One-Punch	Alcohol/Drugs	Guilty Plea	Sentence	Public Location	Stranger	Unplanned	Randomly selected	Provoked (by V)
Loveridge	Y	Y	Y (25%)	<u>SP</u> : 14y <u>HS</u> : 10y 6m <u>NPP</u> : 7y	Y	Y	Y	Y	N
Dyer	Y	N	Y (15%)	<u>SP</u> : 7y 8m <u>HS</u> : 6y 6m <u>NPP</u> : 3y 9m	Y	Y	Y	N	Y
Lambaditis	Y	Y	Y (25%)	<u>SP</u> : 12y <u>HS</u> : 9y <u>NPP</u> : 6y 9m	Y	Y	Y	N	N
Field	Y	N	N	<u>SP</u> : <u>HS</u> : 10y <u>NPP</u> : 7y 6m	Y	Y	Y	Y	N
Lane	N	Y	Y (15%)	<u>SP</u> : 10y <u>HS</u> : 8y 6m <u>NPP</u> : 6y 4m	Y	Y	Y	N	Y
McNeil	Y	Y	Y (25%)	<u>SP</u> : 12y <u>HS</u> : 9y <u>NPP</u> : 6y 9m	Y	Y	Y	N	N
Wood	Y	Y	Y (5%)	<u>SP</u> : 12y <u>HS</u> : 11y 4m <u>NPP</u> : 8y	Y	Y	Y	N	N
Matthews	N	Y	Y (25%)	<u>SP</u> : 10y <u>HS</u> : 7y 6m <u>NPP</u> : 5y	Y	N	Y	N	Y
McKnight	N	Y	Y (25%)	<u>SP</u> : 10y 8m <u>HS</u> : 8y <u>NPP</u> : 6y	Y	Y	Y	N	N
Merrick	Y	Y	N	<u>SP</u> : <u>HS</u> : 11y <u>NPP</u> : 8y 3m	Y	N	Y	N	N
BH	Y	N	Y (25%)	<u>SP</u> : 7y <u>HS</u> : 5y 3m <u>NPP</u> : 3y 11m	Y	Y	Y	Y	Y
Tanks	N	Y	Y (25%)	<u>SP</u> : 9y 8m <u>HS</u> : 7y 3m^ <u>NPP</u> : 4y	N	Y	Y	N	N
Grogan	Y	N	Y (20%)	<u>SP</u> : 12y <u>HS</u> : 9y 6m <u>NPP</u> : 6y 6m	N	N	Y	N	N
Jones	Y	N	Y (15%)	<u>SP</u> : 11y 9m <u>HS</u> : 10y <u>NPP</u> : 6y	Y	Y	Y	Y	N
Johnson	N	Y	N* (not accepted)	<u>SP</u> : 7y 6m <u>HS</u> : 6y <u>NPP</u> : 4y	Y	Y	Y	N	Y
Total/Average	10	10	12	<u>SP</u> : 10y 5m <u>HS</u> : 8y 5m <u>NPP</u> : 6y	13	12	15	4	5

Table 4: Comparison of Mean and Median sentences pre- and post- *Loveridge*

	Mean			Median		
	Pre-Loveridge	Post-Loveridge	Increase	Pre-Loveridge	Post-Loveridge	Increase
Starting Point	6y 10m	10y 5m	3y 7m	7y 6m	10y 8m	3y 2m
Head Sentence	5y 2m	8y 5m	3y 3m	5y 11m	9y	3y 1m
Non-Parole Period	3y 2m	6y	2y 10m	3y 6m	6y 4m	2y 10m