MEASURES TO REDUCE ALCOHOL AND DRUG-RELATED VIOLENCE

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TIME TO DEFINE ‘THE CORNERSTONE OF PUBLIC ORDER LEGISLATION’: THE ELEMENTS OF OFFENSIVE CONDUCT AND LANGUAGE UNDER THE SUMMARY OFFENCES ACT 1988 (NSW)

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I INTRODUCTION

This article addresses a contradiction that has long been at the heart of the criminal law concerned with ‘public order’. Although crimes such as offensive conduct and offensive language are amongst the most frequently prosecuted offences in Australia, their legal nature is poorly understood and rarely the subject of judicial scrutiny or academic explanation. In the context of ongoing controversy over whether such offences have a legitimate place on the statute books, we confront this oversight. This article draws on the High Court of Australia’s decision in He Kaw Teh v The Queen¹ to lay out a methodology for construing the elements of a statutory offence, and then employs this approach to produce a recommended interpretation of the elements of sections 4 and 4A of the Summary Offences Act 1988 (NSW).

* This article has its origins in our work as criminal law teachers, and in our respective lead contributions to the public order chapters of criminal law textbooks: Donna Spears, Julia Quilter and Clive Harfield, Criminal Law for Common Law States (LexisNexis Butterworths, 2011) ch 8; David Brown et al, Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales (Federation Press, 5th ed, 2011) ch 8. We would like to thank our teaching colleagues, students and co-authors for the many stimulating conversations we have had over the years on the topic of public order offences generally, and offensive conduct/language laws in particular.

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¹ (1985) 157 CLR 523 (‘He Kaw Teh’).
Brown et al have observed that:

The cornerstone of public order legislation is usually a provision that permits police to act where behaviour in a public place is regarded as offensive, insulting, abusive or indecent. Such provisions are inevitably vague and open-ended, with the characterisation of the behaviour left to the discretion of the police in the first instance, and subsequently to the discretion of magistrates.\(^2\)

In New South Wales (‘NSW’), the ‘cornerstone’ is provided by sections 4 and 4A of the *Summary Offences Act 1988* (NSW). Certainly the characteristics of vagueness and open-endedness, and susceptibility to discretion, to which Brown et al refer, are evident in the definitions of offensive conduct and offensive language. The legitimacy of these laws, and equivalent laws in other jurisdictions,\(^3\) has long been a topic of debate, and appropriately so.\(^4\) More than 40 years ago, Frank Walker MP (later Attorney-General of NSW) observed, in relation to the Summary Offences Bill 1970 (NSW):

One of the most arbitrary and dangerous aspects of the bill is the proliferation of vague, uncertain dragnet offences such as are to be found in … the definition of unseemly words and later in the bill in provisions dealing with offensive behaviour.

Any practising criminal lawyer will say that such terminology operates only to give the widest possible latitude to the police and the magistrates, and thereby constitutes a serious blow to the liberty of the citizen to be free from arbitrary arrest and arbitrary prosecution. I submit that this vague terminology is jurisprudentially unsound. Certainty is the very essence of the criminal law. Every man has the right to know whether his actions at a given time are or are not criminal. Sweeping, dragnet terminology means that a particular act will be legal or illegal according to the subjective opinions of the police officers and magistrates involved.\(^5\)

A decade later, Doreen McBarnet coined the phrase ‘ideology of triviality’ to capture the air of relative unimportance that pervades the high volume lower courts of the criminal justice system.\(^6\) A related dimension of McBarnet’s

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\(^3\) See *Summary Offences Act 1953* (SA) ss 7(1)(a) (behave ‘in a disorderly or offensive manner’), (1)(c) (use of ‘offensive language’); *Summary Offences Act 1966* (Vic) ss 17(1)(c) (use of ‘profane indecent or obscene language or threatening abusive or insulting words’), (1)(d) (behave ‘in a riotous indecent offensive or insulting manner’); *Summary Offences Act 2005* (Qld) s 6(1) (general offence of ‘public nuisance’ which includes behaving in an ‘offensive way’), s 6(2)(a)(ii), such as using offensive language (s 6(3)(a)); *Crimes Act 1900* (ACT) s 392 (offensive behaviour); *Police Offences Act 1935* (Tas) ss 13 (offence of ‘public annoyance’ which includes behaving in an ‘offensive … manner’ (s 13(1)(a))), 21 (offence of ‘prohibited behaviour’ which includes wilfully behaving in an ‘offensive’ manner); *Criminal Code Act 1913* (WA) s 74A(2) (behaving in a ‘disorderly manner’ including using ‘offensive … language’ (s 74A(1)(a)) and an ‘offensive … manner’ (s 74A(1)(b))); *Summary Offences Act (NT)* s 47(a) (offensive conduct including ‘offensive … behaviour’ or using ‘obscene language’).


\(^6\) Doreen J McBarnet, *Conviction: Law, the State and the Construction of Justice* (MacMillan, 1983) 143.
analysis is the idea of ‘legal relevance’ – the assumption that ‘the offences dealt with in the lower courts do not involve much law or require much legal expertise or advocacy.’ As McBarnet counters: ‘[i]t is not in the nature of drunkenness, breach of the peace or petty theft to be less susceptible than fraud, burglary or murder to complex legal argument; it is rather in the nature of the procedure by which they are tried.’

We would add to McBarnet’s list of ‘lesser’ crimes a pair that are amongst the most frequently prosecuted on the NSW statute books – offensive conduct and offensive language under sections 4 and 4A of the Summary Offences Act 1988 (NSW). During 2012, 5612 charges for these two offences were finalised in the Local Court of NSW,9 and 6808 people were issued with a Criminal Infringement Notice (‘CIN’) in relation to alleged breaches of sections 4 and 4A.

How is it that for two crimes that are enforced more than 12 000 times annually, and more than two decades after their current statutory formulation was endorsed by the NSW Parliament, it remains unclear what the elements of the crime are, and no comprehensive guidance on the elements of sections 4 and 4A has emanated from the Supreme Court of NSW? It is not our intention to lay blame at the feet of the judiciary or the ranks of criminal law practitioners. The ‘blind spot’ that motivates this article is also evident amongst academic lawyers. Public order offences are still routinely ignored in criminal law textbooks.11 In those works that do take offensive conduct and offensive language seriously as aspects of the criminal law to which students should be exposed, the tendency is to (rightly) problematise the operation of such laws, and to point, without offering solutions, to the uncertainty that exists.12 The scholarly literature that addresses the topic of offensive conduct and language crimes – much of which is excellent – tends to focus on the operation of these laws, often informed by illuminating historical, sociological and criminological perspectives, and with an

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7 Ibid 147.
8 Ibid 148.
10 Unpublished New South Wales recorded crime statistics for 2012 provided by the NSW Bureau of Crime Statistics and Research (on file with the authors).
12 See Brown et al, above n 2, 763; Bronitt and McSherry, above n 4, 842 5. For a notable exception, see Spears, Quilter and Harfield, above n 4, 154 72.
explicit normative reformist agenda. Sections 4 and 4A of the Summary Offences Act 1988 (NSW) have not, to this point, been the subject of close doctrinal analysis or exegesis, particularly in relation to fault (as opposed to conduct) elements.

In this article we approach the neglected crimes of offensive conduct and language, influenced by the insights of scholars such as McBarnet, adopting a still critical, but also pragmatic, perspective, by asking the following questions: can we tolerate any longer the uncertainty that surrounds the parameters of charges under sections 4 and 4A that yield thousands of convictions every year, and that, in the case of offensive conduct, carries the possibility of incarceration? If the answer to this question is ‘no’ (and we believe it is), is it possible to articulate with greater precision the boundaries of this area of ‘criminality’? With courage and caution in equal measure, we assert that it is both possible and desirable to do so, and, in this article, we outline an approach to doing so.

In our view, every criminal offence should be capable of clear articulation in terms of conduct and fault elements – especially offences that are charged in high volumes every year and which are controversial inclusions in the statute books. We are not naive about the possibility of achieving absolute clarity and certainty in this or, indeed, any other law. Such ‘perfection’ is unrealistic given, among many other considerations, the nature of legal language and the (often contested)

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14 As will be discussed in more detail in Part III below, offensive language and conduct laws are controversial for reasons that include free speech infringement and their disproportionate impact on already marginalised individuals and communities (most notably, Indigenous Australians).
processes of interpretation that are involved in deriving meaning,\textsuperscript{15} and the effect of discretion in decision-making.\textsuperscript{16} That said, certain unresolved ambiguities in the definition of offensive conduct and offensive language under the \textit{Summary Offences Act 1988} (NSW) can be remedied and ought to be. We are prepared to be bold in our proffered interpretations in the hope that, even if they are wrong, this article will nonetheless prompt wider engagement with questions that have escaped rigorous academic and judicial scrutiny for too long.

The legitimacy of criminal offences such as those defined by sections 4 and 4A – that turn on the concept of \textit{offensiveness} – has rightly been the subject of rigorous critique, including by eminent criminal law theorists.\textsuperscript{17} For what it is worth, our own normative position is unambiguous: offensiveness has no place in Australian law as a basis for criminality and any offences that turn on an offensiveness standard (including sections 4 and 4A) should be abolished immediately. But it is not our aim in this article to prosecute this position; a position that has already attracted much scholarly attention.\textsuperscript{18} Rather, our aim is to confront the reality that sections 4 and 4A not only \textit{remain} on the statute books in NSW, but they have been \textit{entrenched} there for decades, and continue to be \textit{actively enforced}. As long as this is the case, an attempt must be made to elicit judicial guidance in relation to the scope and elements of sections 4 and 4A of the \textit{Summary Offences Act 1988} (NSW). While our proposals for interpreting these offences do not deliver abolition, they do have the potential to at least provide a legal foundation for defending charges and narrowing the scope of sections 4 and 4A, thereby reducing (if not removing) the demonstrable risks of over-policing and over-criminalisation which have too often been realised in NSW.

The body of this article is in three parts. Part II introduces the statutory provisions which define offensive conduct and offensive language, including a brief examination of the historical evolution of this form of public order offence. Part III deals with the operation of the laws, highlighting a number of concerns that have been raised about their reach in practice, including their disproportionate impact on Aboriginal people in NSW. Part IV sets out a methodology for construing statutory offences which we then apply to sections 4 and 4A of the \textit{Summary Offences Act 1988} (NSW) with reference to the known case law.

\begin{itemize}
\item \textsuperscript{16} Brown et al, above n 2, 119.
\item \textsuperscript{17} See, eg, Andrew Von Hirsch and A P Simester (eds), \textit{Incivilities: Regulating Offensive Behaviour} (Hart, 2006). See also Jeremy Waldron, \textit{The Harm in Hate Speech} (Harvard University Press, 2012) ch 5 (in the context of hate speech laws).
\item \textsuperscript{18} Von Hirsch and Simester, above n 17; Brown et al, above n 2, 763; Bronitt and McSherry, above n 4, 842 5.
\end{itemize}
II THE LEGISLATION

The crimes of offensive conduct and offensive language are found in part 2 division 1 ‘Offensive behaviour’, sections 4 and 4A respectively, of the Summary Offences Act 1988 (NSW). The offences contained in this division cover a broad range of behaviour, including offensive conduct and language (sections 4 and 4A), obscene exposure (section 5), damaging fountains (section 7), damaging or desecrating protected places (section 8) and violent disorder (section 11A).

Sections 4 and 4A provide:

4 Offensive conduct
(1) A person must not conduct himself or herself in an offensive manner in or near, or within view or hearing from, a public place or a school. Maximum penalty: 6 penalty units or imprisonment for 3 months.
(2) A person does not conduct himself or herself in an offensive manner as referred to in subsection (1) merely by using offensive language.
(3) It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.

4A Offensive language
(1) A person must not use offensive language in or near, or within hearing from, a public place or a school. Maximum penalty: 6 penalty units.
(2) It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.
(3) Instead of imposing a fine on a person, the court:
   (a) may make an order under section 8 (1) of the Crimes (Sentencing Procedure) Act 1999 directing the person to perform community service work, or
   (b) may make an order under section 5 (1) of the Children (Community Service Orders) Act 1987 requiring the person to perform community service work, as the case requires.
(6) However, the maximum number of hours of community service work that a person may be required to perform under an order in respect of an offence under this section is 100 hours.

These statutory formulations of offensive conduct and language are the latest iterations of offences which date back, in Australia, to the mid-19th century. A full historical account is beyond the scope of this paper, but it is worth noting that the common law and early legislation did not criminalise offensiveness per se but included a public disorder or ‘breach of the peace’

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19 See generally Brown et al, above n 2, 749-52. See also Lennan, ‘The Development of Language Laws in Nineteenth Century New South Wales’, above n 13.
component. That is, they required proof that the conduct was intended, or reasonably likely to ‘provoke unlawful physical retaliation’.  

Section 6 of the *Vagrancy Acts 1851* (NSW) is illustrative:

> And be it enacted That any person who shall use any threatening abusive or insulting words or behaviour in any public street thoroughfare or place with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned shall forfeit and pay on conviction in a summary way by any Justice of the Peace any sum not exceeding five pounds and in default of immediate payment shall be committed to the common gaol or house of correction for any period not exceeding three calendar months.

By 1908, the ‘intent to provoke a breach of the peace’ element had been removed and the word ‘offensive’ was added to ‘the string of adjectives used to describe prohibited behaviour.’ In our view, this omission substantially changed both the nature of the offence and its justification. Specifically, it blurred the edges of the criminal law’s reach and expanded the opportunity for the police, and the courts, to regulate conduct that had previously been regarded as beyond the legitimate limits of the state’s authority to intervene and punish; that is, conduct which does not cause harm or carry the risk of harm. It is one of the reasons that offensive conduct and language laws, in their current formulation, have attracted criticism for being overly broad.

### A Constitutional Question?

The permissibility, and constitutional validity, of broadly drawn public order offences that do not contain a ‘breach of the peace’ element were considered by the High Court in *Coleman v Power.* Prior to the repeal of the statute in 2005, section 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) created an offence similar to section 4A of the *Summary Offences Act 1988* (NSW): using ‘insulting words to any person’ (emphasis added) in a public place. Like the offences defined by sections 4 and 4A in NSW, Queensland’s insulting words offence had once contained a breach of the peace component, but it was removed in 1931.

A majority of the High Court found that the breadth of the offence defined by section 7(1)(d) was constitutionally unacceptable. Justice McHugh ruled that section 7(1)(d) was invalid by virtue of inconsistency with the implied freedom of political communication which, since 1997, the High Court has held to be implicit in the *Australian Constitution.* Justices Gummow, Hayne and Kirby

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20 To use the phrase preferred by Gummow and Hayne JJ in *Coleman v Power* (2004) 220 CLR 1, 77 [193]. This case is discussed further below.
21 Brown et al, above n 2, 752.
22 On harm as a justification for criminalisation, see ibid 76.
24 Replaced by a ‘public nuisance’ offence, now found in s 6 of the *Summary Offences Act 2005* (Qld).
‘saved’ the provision from invalidity by narrowly construing the scope of the offence so that it only covered conduct where the words used were ‘either ... intended to provoke unlawful physical retaliation, or they are reasonably likely to provoke unlawful physical retaliation from either the person to whom they are directed or some other who hears the words uttered’ – that is, by reading in a ‘breach of the peace’ element. This conclusion was supported by both the specific constitutional principles established in Lange, as well as broader free speech considerations. Justices Gummow and Hayne observed:

[Section] 7(1)(d) creates a criminal offence. The offence which it creates restricts freedom of speech. That freedom is not, and never has been, absolute. But in confining the limits of the freedom, a legislature must mark the boundary it sets with clarity. Fundamental common law rights are not to be eroded or curtailed save by clear words.

In Coleman v Power none of the High Court judges considered the implications of their analysis for the offensive conduct and offensive language laws which continue to operate in other Australian states and territories. Future scrutiny is likely, however, particularly given that, as Gleeson CJ noted, some such offences (and this list includes sections 4 and 4A in NSW) do not have a ‘breach of the peace’ element.

The matter has not yet been addressed by the courts in NSW, but has been considered on one occasion by the Supreme Court of Victoria. In Ferguson v Walkley Harper J considered the implications of Coleman v Power for the offence of using insulting words in a public place contrary to section 17(1)(c) of the Summary Offences Act 1966 (Vic). On an appeal against conviction by Norman Ferguson, an Aboriginal man, Harper J dismissed the suggestion that the High Court’s decision in Coleman v Power required him to conclude that criminal punishment for offensive or insulting words must be limited to

27 Coleman v Power (2004) 220 CLR 1, 74 [183] (Gummow and Hayne JJ). See also at 98 9 (Kirby J).
28 Ibid 75 [185]. Tamara Walsh has suggested that the High Court’s decision had little immediate effect on the way in which the police were responding to ‘offensive’ behaviour, notwithstanding the intent evident in several of the judgments to ‘rein in’ the scope of offensiveness based crimes, specifically, the offence of ‘public nuisance’ now found in s 6 of the Summary Offences Act 2005 (Qld). See Tamara Walsh, ‘The Impact of Coleman v Power on the Policing, Defence and Sentencing of Public Nuisance Cases in Queensland’ (2006) 30 Melbourne University Law Review 191.
29 Coleman v Power (2004) 220 CLR 1, 23 [8] (Gleeson CJ). Roger Douglas has suggested that the High Court’s decision might prompt further constitutional challenges:

The decision may also have implications for other, overlapping, public order offences. Insofar as they apply to political discourse, abusive language laws would also seem to be bad except insofar as the abuse is calculated to produce a breach of the peace. There is no obvious reason why, by analogy with Coleman v Power they should not be so read down. Offensive language laws would fall foul of the constitutional freedom insofar as they enabled people to be prosecuted for offensive non-verbal political communications. Sooner or later, anti-censorship campaigners will challenge the constitutionality of indecent language/behaviour laws: Roger Douglas, ‘The Constitutional Freedom to Insult: The Insignificance of Coleman v Power’ (2005) 16 Public Law Review 23, 27. See also Dennis, above n 13, 6. For further commentary on Coleman v Power, see Elisa Arcioni, ‘Developments in Free Speech Law in Australia: Coleman and Mulholland’ (2005) 33 Federal Law Review 333.

situations where the words are intended or reasonably likely to provoke unlawful retaliation. He preferred the approach of Gleeson CJ in *Coleman v Power* – one of the minority justices who did not strike down or read down section 7(1)(d) – who held that the offence could be made out where the insulting words were ‘intended or likely to provoke a forceful response’ or where ‘the use of the language, in the place where it is spoken, to a person of that kind, is contrary to contemporary standards of public good order’.31

By contrast, in New Zealand, the courts have interpreted the comparable offence as requiring a breach of the peace element. In *Morse v The Police* the Supreme Court of New Zealand, influenced by the protection of freedom of expression in section 14 of the *Bill of Rights Act 1990* (NZ), held that the offence of behaving ‘in an offensive or disorderly manner … in or within view of any public place’ under section 4(1)(a) of the Summary Offences Act 1981 (NZ) requires proof of a *disruption of public order* (and not mere offensiveness).32

**III  OPERATION OF THE LAWS**

The manner and frequency with which offensive conduct and offensive language offences have been enforced in NSW, add further weight to the case for clarification of their elements. By any measure, sections 4 and 4A of the Summary Offences Act 1988 (NSW) are ‘high volume’ criminal offences. A large proportion of the public order charges which are heard in the Local Court each year relate to offensive conduct or offensive language. In 2012, more than 14 000 ‘public order offence’ charges were finalised in the NSW Local Court and almost 40 per cent of these were charges of offensive language (1830) or offensive behaviour (3782).33

Opportunities for both scrutiny of the circumstances in which charges are laid and close examination of the legal elements of the offences have been rare given that offensive conduct and language charges, as with most summary offences, attract high rates of guilty pleas.34 The relative ‘invisibility’ of these offences from judicial consideration, has been exacerbated more recently by the introduction of the CIN scheme. Since 2007, NSW Police have had the option of

31 *Coleman v Power* (2004) 220 CLR 1, 26 [14] (Gleeson CJ). The constitutional validity of other laws creating offences broadly relating to offensive conduct have also been questioned recently, based on the implied freedom of political communication. In *Monis v The Queen* (2013) 295 ALR 259 the High Court split 3:3 on the question of the validity of the offence under s 471.12 of the Criminal Code 1995 (Cth) of using a postal service in a way that is, amongst others things, offensive. The result of the deadlock was that decision under appeal  a decision of the New South Wales Court of Appeal upholding the legislation was affirmed. In *A-G (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197 the High Court overturned the Full Court of the Supreme Court of South Australia’s finding of invalidity in relation to a City of Adelaide law that prohibited touting for business, or conducting any survey or opinion poll on a road in a way that “preach[es], canvass[es], harangue[s]”.


33 NSW Bureau of Crime Statistics and Research, above n 9, 21.

proceeding in relation to alleged breaches of sections 4 and 4A of the *Summary Offences Act 1988* (NSW) by way of issuing a CIN (which is a penalty notice or 'on the spot' fine).

In 2008, the first full year of operation of the statewide availability of CINs, 4078 CINs were issued for offensive conduct and 2023 CINs were issued for offensive language and, as will be discussed below, with no equivalent reduction in court attendances for these offences. In a review of the first nine months of operation of the statewide CIN scheme, the NSW Ombudsman found that 70 per cent of the CINs issued during the review period (November 2007 to July 2008), were for offensive conduct or offensive language. These figures clearly speak volumes and the concerns raised by the Ombudsman in relation to the use of CINs for these offences will be addressed below. The latest available data suggest that the high volume use of CINs has continued: 4760 persons were issued with a CIN in relation to section 4 and 2048 persons were issued with a CIN in relation to section 4A in 2012.

### A Impact on Aboriginal People and Communities

In addition to the frequency with which section 4 and 4A charges are laid, and CINs issued, it is not possible to discuss the operation of these offences without addressing the disproportionate impact of offensive conduct and offensive language laws on Aboriginal people. The evidence is overwhelming and disturbing. In its 1982 *Study of Street Offences by Aborigines*, the Anti-Discrimination Board of NSW found evidence of over-representation of Aboriginal people, particularly in rural, regional and remote parts of the state. Based on an examination of court appearances in 10 NSW towns with high Aboriginal populations (including a 1978 sample and a 1980 sample) the Board found that ‘Aborigines charged with minor offences in public places greatly outnumber non-Aborigines.’ Using unseemly words – the equivalent of what is today section 4A of the *Summary Offences Act 1988* (NSW) – was the most common type of offence (56 per cent in 1978 and 61 per cent in 1980). The Board noted that ‘[t]he words “fuck” and “cunt”, used singly or together, accounted for 94 per cent of the charges of using unseemly words in 1980. The

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35 *Criminal Procedure Act 1986* (NSW) s 333; *Criminal Procedure Regulation 2010* (NSW) sch 3. The penalty amount is $200 for offensive conduct and $150 for offensive language.


37 Ibid 52.

38 See also Methven, above n 13.

39 Unpublished New South Wales recorded crime statistics for 2012 provided by the NSW Bureau of Crime Statistics and Research (on file with the authors).

40 This section draws on material written by McNamara for Brown et al, above n 2, 754 5.

41 Anti Discrimination Board of New South Wales, above n 5, iv.

42 Ibid 48 9.
target or victim of this verbal abuse was most frequently a member of the police force. … Liquor was a factor in about two thirds of cases.43

A similar picture of over-representation of Aboriginal people emerged from a 1990s study of offensive language and offensive behaviour charges conducted by the NSW Bureau of Crime Statistics and Research (‘BOCSAR’). Robert Jochelson found that the four local government areas in NSW with the highest percentages of Aborigines in their populations (Brewarrina (42 per cent), Walgett (18 per cent), Bourke (23 per cent) and Central Darling (25 per cent)), had the highest rates of Local Court appearances for offensive language.44 Narratives taken from police reports on arrests for offensive language and offensive behaviour revealed that

the principal distinguishing feature of the majority of incidents of offensive behaviour and offensive language is excessive alcohol consumption and/or interpersonal conflict of some kind. In the high Aboriginal country area this conflict often involves seemingly ritual confrontations between police and Aboriginal people over swearing in public places or at police themselves. Sometimes the person reported for offensive behaviour and/or offensive language seems to have taken the initiative in provoking the confrontation. Sometimes the confrontation occurs when police question or attempt to detain an Aboriginal person in relation to matters unrelated to offensive behaviour or, alternatively, when police attend an altercation or dispute among Aboriginal people or between non-Aboriginal and Aboriginal people. In circumstances where police are called to an incident, charges of offensive behaviour and/or offensive language appear most likely to ensue when police find themselves unable to calm a situation or when they themselves become the subject of abuse.45

These patterns of overrepresentation of Aboriginal people particularly in country areas and charges being laid largely in relation to confrontations with police continued through the 1990s and 2000s despite the Royal Commission into Aboriginal Deaths in Custody (‘RCIADIC’) recommending that ‘[t]he use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest and charge.’46 BOCSAR data from the 2000s on the distribution of offensive behaviour and offensive language charges across NSW suggests a continuation of the patterns described above.47 Recent reports by the NSW Ombudsman and the NSW Law Reform Commission (discussed below) provide further evidence in support of this assessment.

At first glance, the increased use of CINs during the last decade, as an alternative to arrest or other modes of initiation for selected offences, including minor public order offences, might be seen as consistent with the underlying objectives of the RCIADIC’s recommendations. In fact, the statewide availability

43 Ibid v.
44 Jochelson, above n 13, 9.
of CINs since 2007 has heightened concerns about the disproportionate impact of offensive conduct and offensive language laws on Aboriginal people. A 2009 report completed by the NSW Ombudsman concluded that 83 per cent of the CINs issued to Aboriginal persons were for offensive conduct or language. The Ombudsman addressed concerns that the availability of CINs for public order offences like offensive conduct and offensive language might be having a net-widening effect:

With half of all adult offensive conduct and offensive language incidents detected in NSW now resulting in CINs, there can be no doubt that the scheme is having a major impact on how police deal with these offences. Overall legal actions in relation to these two offences are increasing, and Aboriginal people remain significantly overrepresented in relation to both.

The initial state-wide data indicates that CINs are contributing to a significant net increase in legal action taken on offensive language and offensive conduct incidents. That is, some offenders are being diverted from court, but the early data indicates that the decreases in court appearances are being eclipsed by the very high numbers of minor offenders now being fined for those offences.

The problem of inadequate scrutiny of the circumstances in which CINs are issued to Aboriginal people for offensive conduct and offensive language is heightened by the Ombudsman’s finding that ‘Aboriginal people are less likely to request a review or elect to have the matter heard at court’, in a context where overall rates of review request and court election are already very low.

In its recent report on penalty notices, the NSW Law Reform Commission raised similar concerns about the net-widening effect after finding that since the statewide introduction of CINs in 2007 there has been a 23 per cent increase in ‘contacts’ for offensive language.

In its submission to the NSW Ombudsman, the Law Society of NSW suggested that ‘much of the language on which charges or CINs are based is not offensive at law.’ The Ombudsman found support for this claim, stating that ‘[a]lmost two-thirds of the offensive language CINs that we audited for the report were issued for language or were in circumstances where the recipient may have had a sufficient defence if the matter was heard at court.’

48 NSW Ombudsman, above n 36, 56.
49 Ibid 71.
50 Ibid Foreword.
51 Ibid 115.
52 New South Wales Law Reform Commission, above n 47. In its 2012 report on penalty notices, the New South Wales Law Reform Commission recommended that ‘[r]eview by a senior police officer of Criminal Infringement Notices issued for offensive language and offensive conduct should be mandatory and should not depend on application’: at 306.
53 Ibid 294. This includes Court Attendance Notices (‘CANs’), Youth Conferences, Young Offenders Act cautions and warnings, Infringement Notices and CINs: at 294 n 50.
54 Ibid.
55 NSW Ombudsman, above n 36, 62.
56 Ibid 9.
The NSW Law Reform Commission echoed this finding:

In consultations for this inquiry we were told by lawyers representing clients issued with CINs and penalty notices for offensive language that they often tried to persuade clients to court-elect but that they were unwilling to do so and paid their penalty even if they believed that the offence was not made out.57

The Commission questioned whether it was appropriate to allow enforcement by penalty notice in the case of ‘offences that require judgment in relation to matters involving community standards, such as “offensiveness”’;58 investigated whether offensive conduct and offensive language should be removed from the CINs scheme;59 and gave serious consideration to recommending the abolition of offensive language.60 Ultimately, the Commission stopped short of this final consideration, recommending instead that ‘the offence of offensive language in the Summary Offences Act … should be further investigated as a matter of urgency’ and that ‘[t]he offence of offensive conduct … be similarly considered.’61

So long as sections 4 and 4A remain on the statute books, the evidence gathered by both the NSW Ombudsman (2009) and the NSW Reform Commission (2012) in relation to the operation of these provisions reinforces our conviction that an attempt must be made to elicit judicial guidance in relation to the scope and elements of sections 4 and 4A of the Summary Offences Act 1988 (NSW). It is true that ‘these offences are rarely challenged in court’,62 but this fact cannot be taken as a justification for accepting the status quo. While it may currently be the case that ‘little binding precedent is available’,63 this gap should be remedied. Indeed, the fact that the enforcement of offensive conduct and offensive language laws is frequently ‘hidden’ from arm’s length scrutiny (ie beyond the police) makes it especially important that clarification be provided.

In this regard, the Ombudsman noted in its 2009 report that it had previously recommended “in a 2005 report on an earlier CINs trial”,64 that the NSW Police should provide ‘clear guidance … on what does and does not constitute offensive language and conduct’ so that officers can determine whether a CIN is ‘the appropriate intervention’.65 The Ombudsman described the Police Force’s response to this recommendation:

In response to Recommendation 5, the NSW Police Force initially undertook to issue a Law Note providing guidance on existing case law regarding whether the language used is offensive, but noting that any decision on ‘whether to lay a charge, issue a CAN, issue a CIN or issue a caution is a matter for the exercise of

57 New South Wales Law Reform Commission, above n 47, 296.
58 Ibid 299.
60 Ibid 308 11.
61 Ibid 311.
63 Ibid.
65 NSW Ombudsman, above n 36, 63.
discretion by the individual officer’. After further consideration, police subsequently advised that there was insufficient recent and authoritative case law in this area to support a Law Note that provided further clarification to frontline officers in this area, and instead included two case studies in materials used to train officers on the appropriate use of CINs.66

There is something deeply unsatisfactory about this explanation. Judicial guidance is long overdue, and, in the absence of adequate internal police force guidance to officers, critically important.

IV  A SUGGESTED APPROACH TO SECTIONS 4 AND 4A

This part of the article is in three sections. First, drawing on the High Court decision of He Kaw Teh,67 and the judgment of Brennan J in particular, we set out a methodological approach for construing the elements for statutory offences generally. Following McBarnet,68 we advocate this approach because, contrary to assumptions about the relative simplicity of ‘lesser crimes’, many statutory offences (typically dealt with in the Local Court) are legally very complicated. In particular, they raise questions about whether mens rea is required for a particular actus reus component or whether the element is strict or absolute. Many of these issues are rarely judicially considered whether in the Local Court – perhaps an unsurprising result given the ‘ideology of triviality’ that pervades the jurisdiction69 and with its high volume case load of summary offences (along with indictable offences triable summarily70) – or at an appellate level. However, it is precisely because judicial consideration has been uncommon that we advocate for attention and clarification. The methodology we set out here provides precision in identifying the relevant actus reus (prohibited conduct or physical elements) and mens rea (fault or mental elements), if any. Secondly, we will apply this approach to sections 4 and 4A with reference to the known case law and, finally, provide a suggested approach as to how the elements should be construed.

A  Methodology

Despite the proliferation of statutory offences that do not necessarily conform to the classic actus reus and correlating mens rea formula, it is appropriate, and necessary in our view, to approach the construction of all criminal offences by asking: what constitutes the actus reus; and what, if any, is the correlating mens rea requirement? Relatively minor summary offences, like offensive conduct and offensive language, are no less deserving of rigorous technical analysis of their elements than serious indictable offences, like drug importation. Indeed, because

66 Ibid (emphasis added).
68 McBarnet, above n 6, 147 50.
69 Ibid 143.
70 Criminal Procedure Act 1986 (NSW) sch 1.
of the paucity of case law construing such offences the need for such analysis may be even greater.

1 Actus Reus

Following *He Kaw Teh*, the actus reus of an offence may be broken down into:

- the act or conduct (act, series of acts or omissions or a combination, or a state of affairs);
- the circumstances (or context) in which the conduct is performed (or omission made); and
- the results or consequences of the conduct.

Not all offences will have a circumstance and/or consequence component but all will have an act or conduct aspect. According to Brennan J, ‘[t]hese elements – conduct, circumstances and results – are what Dixon CJ in *Vallance v The Queen* called “the external elements necessary to form the crime.”’

In relation to circumstance components, Brennan J drew a further distinction, which we think is often overlooked, and which is central to our analysis of sections 4 and 4A. According to Brennan J a circumstance, as an element of an offence, may be either a circumstance that is an integral part of the act or a circumstance that attends the doing of an act. Justice Brennan gives the example of rape from the English case of *Director of Public Prosecutions v Morgan*. In the speeches in the House of Lords, the external elements of the offence were treated as sexual intercourse (conduct/act) and non-consent (integral circumstance). These were said to be integral parts of the whole act.

Similarly, Brennan J found that the offence (as it then was) under consideration in *He Kaw Teh* – importing ‘prohibited imports’ contrary to section 233B(1) of the *Customs Act 1901* (Cth) – comprised an act (of importing) with an integral circumstance (narcotic goods). By contrast, the offence of assaulting a member of the police force in the due execution of his or her duty – the offence considered by the High Court in *R v Reynhoudt* – was found by the majority in that case as having an actus reus comprising an assault (act) of a police officer in execution of duty (attendant circumstance).

As we will discuss below, the distinction between circumstances that are integral and those that are attendant will not always be an easy one to draw. However, the implications of how a circumstance component is characterised can

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72 Ibid 571, 575.
74 *He Kaw Teh* (1985) 157 CLR 523, 571 2.
75 Ibid 584.
76 (1962) 107 CLR 381. It is noted, however, that Brennan J doubted whether this was correct and it is likely that since *He Kaw Teh*, if the High Court were to reconsider the issue, that proof of knowledge or recklessness would be required: *He Kaw Teh* (1985) 157 CLR 523, 574. See also Brown et al, above n 2, 675.
be great. Most notably, Brennan J argues in *He Kaw Teh* that while an *integral* circumstance may readily require the mental element of ‘knowledge’, an *attendant* circumstance may not.77

### 2 Mens Rea

There is a presumption in the common law that all criminal offences require proof of mens rea in relation to each element of actus reus.78 That presumption may be displaced in certain circumstances, in which case a ‘lesser’ fault element may attach to a particular actus reus component or it may attract no fault element at all (ie absolute liability). Mens rea, of course, refers to ‘guilty mind’, however, as Brennan J said in *He Kaw Teh*:

> It is one thing to say that mens rea is an element of an offence; it is another thing to say precisely what is the state of mind that is required. … The particular mental states that apply to the several external elements of an offence must be distinguished, not only as a matter of legal analysis, but in order to maintain tolerable harmony between the criminal law and human experience.79

Typically the relevant mens rea for the corresponding actus reus components are: intent for the act/conduct; knowledge or recklessness for a circumstance; and intent, recklessness or knowledge for the consequence component.80

### 3 Rebutting the Presumption

The case of *He Kaw Teh* makes it clear that the presumption of mens rea may be rebutted where to do so would be more consonant with the purpose of the Act. The case establishes that three considerations in particular are to be taken into account: the words of the statute; the subject matter with which the statute deals; and the utility of imposing strict liability.81

**(a) Words of the Statute**

The offence must be analysed to determine whether the legislature has either clearly expressed an intention that mens rea is required or there is a necessary implication that it is so required.82 Where an offence contains words such as ‘knowingly’, ‘dishonestly’ or ‘willfully’ it will be difficult to displace the presumption of mens rea. The absence of such words, however, does not imply that the offence is one of strict or absolute liability. An analysis should be made not only of the relevant provision but also the context in which the offence is to be found.

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77 *He Kaw Teh* (1985) 157 CLR 523, 571.
78 *Sherras v De Rutzen* [1895] 1 QB 918, 921 (Wright J); *He Kaw Teh* (1985) 157 CLR 523, 528 (Gibbs CJ), 565 6, 582 (Brennan J).
80 Ibid 568 (Brennan J).
81 Ibid 528 30 (Gibbs CJ), 566 8 (Brennan J).
82 Ibid 529 (Gibbs CJ), 566 (Brennan J).
(b) Subject Matter

Where the offence may be said to be what Gibbs CJ and Brennan J referred to as ‘truly criminal’, as opposed to regulatory, it is more likely that mens rea is required.83 This dichotomy is not unproblematic; it is vaguely drawn,84 and there has been little subsequent judicial clarification. For present purposes it should not be too readily assumed that a relatively minor (or ‘trivial’) offence should necessarily be regarded as regulatory in nature, rather than ‘truly criminal’. The fact that an offence is enforced via conventional criminal justice system agents and processes – including the involvement of police in apprehension, charge and prosecution – is a consideration that tends to militate against a ‘merely regulatory’ categorisation.85

Other subject matter indicia that may be relevant to the task of determining the applicable mens rea include the penalty for the offence and the moral or public obloquy that the person may suffer if convicted of the offence.86 Generally, an offence that may result in a term of imprisonment – particularly a substantial one – is more likely to be an offence of mens rea as opposed to an offence punishable by a fine.

(c) Utility of Imposing Strict Liability

The third consideration was described by Gibbs CJ in He Kaw Teh as an inquiry into whether putting the defendant under strict liability will assist in the enforcement of the regulations, indicating that there must be something that the accused can do in order to avoid the relevant unlawful conduct: ‘[c]learly, however, no good purpose would be served by punishing a person who had taken reasonable care and yet had unknowingly been an innocent agent to import narcotics.’87

In relation to this third consideration, Brennan J stated:

However grave the mischief at which a statute is aimed may be, the presumption is that the statute does not impose criminal liability without mens rea unless the purpose of the statute is not merely to deter a person from engaging in prohibited conduct but to compel him to take preventive measures to avoid the possibility that, without deliberate conduct on his part, the external elements of the offence might occur. A statute is not so construed unless effective precautions can be taken to avoid the possibility of the occurrence of the external elements of the offence. … The requirement of mens rea is at once a reflection of the purpose of the statute and a humane protection for persons who unwittingly engage in prohibited conduct.88

83 Ibid 530 (Gibbs CJ), 566 7 (Brennan J).
85 In these terms, the offences defined by ss 4 and 4A of the Summary Offences Act 1988 (NSW) may be distinguished from an offence such as selling unsafe food under s 14 of the Food Act 2003 (NSW), which is part of a food safety regime where the primary regulatory strategy is standards compliance and the relevant enforcement body is the NSW Food Authority.
86 He Kaw Teh (1985) 157 CLR 523, 530 (Gibbs CJ), 583 (Brennan J).
87 Ibid 530.
88 Ibid 567 8 (emphasis added).
4 The Integral/Attendant Circumstance Distinction

In He Kow Teh, Brennan J held that where a circumstance is integral to the act, there is a strong presumption that the relevant mens rea will be intent or knowledge. By contrast, where the circumstance is attendant, it may be that a lesser mental state applies. That is, the presumption is weaker, and more easily displaced, in the case of an attendant circumstance:

[I]f there be a legislative intention to apply a mental element to the circumstances different from the mental element applicable to the act involved in the offence, it is necessary to decide what circumstances are defined to be an integral part of the act (to which intent and therefore knowledge will ordinarily apply) and what circumstances are defined to be merely attendant (to which no mental element may be intended to apply or to which a mental element less than knowledge may be intended to apply).89

As intent is the mental state ordinarily required in respect of the doing of an act involved in the commission of an offence, any mental state less than knowledge would not be presumed to apply to the circumstances which give that act its character. A mental state less than knowledge can apply more readily to circumstances attendant on the occurrence of an act involved in the commission of an offence being circumstances which make the act criminal. The absence of an exculpatory belief can apply to such circumstances where the prima facie requirement (knowledge) is excluded.90

…

In our view, the key question can be put as follows: is the circumstance in question essential to giving the conduct in question its criminal character? If yes, the circumstance is integral. If no, the circumstance is attendant. Or to put it another way: is it meaningful to talk of the conduct being criminal in the absence of the said circumstance? If no, the circumstance is integral. If yes, the circumstance is attendant.

Justice Brennan applied his reasoning to the offence of importing a ‘prohibited import’ contrary to section 233B(1), and found that:

Importing simpliciter is not an act nor is it defined to be a prohibited act in par. (b). Importing narcotic goods is an act; it is the act referred to in par. (b). The character of the act involved in the offence depends on the nature of the object imported. The paragraph thus impliedly requires an intent to do the prohibited act – importing narcotic goods – and thus requires knowledge of the nature of the object imported. It is impossible to divide the act involved in an offence under par. (b) into an act and circumstances attendant on its occurrence. The external elements of an offence under par. (b), unlike the offence considered in Reynhoudt, cannot be divided. An intention ‘to do the whole act that is prohibited’ – the view of Dixon CJ in Reynhoudt – is, in my opinion, the only view which the language of par. (b) permits.91

Following Brennan J, we suggest that where a circumstance is integral to the act, the relevant mens rea should be knowledge. If the circumstance is attendant to the act, while there is a presumption of knowledge, the corresponding fault element may be interpreted as strict or absolute – if this is more consonant with

89 Ibid 570 1 (Brennan J) (emphasis added).
90 Ibid 575 6 (Brennan J) (emphasis added).
91 Ibid 584 (citations omitted).
the purpose of the Act taking into account the words of the statute; the subject matter with which the statute deals; and the utility of imposing strict liability.\textsuperscript{92}

As we will explain below, this analysis has important implications for clarifying the elements of the offences defined by sections 4 and 4A of the \textit{Summary Offences Act 1988} (NSW).

\textbf{B Construing Offensive Language and Conduct: The Case Law}

Applying this methodology to sections 4 and 4A of the \textit{Summary Offences Act 1988} (NSW), the actus reus may be broken down into three elements; a conduct component and two circumstance components:

- conduct or language (the act/conduct);
- the conduct or language is offensive (the first circumstance); and
- the conduct was \textit{in or near or within view or hearing from a public place} or school or that the speech was \textit{in or near or within hearing from a public place or school} – referred to in this article as the ‘proximity’ requirement (the second circumstance).

We note that this distinction – between the two different circumstance components in the definition of offensive conduct and language – is often glossed in the case law and academic commentary.\textsuperscript{93}

In relation to the first circumstance, following Brennan J in \textit{He Kaw Teh}, we argue that it is the offensive nature of the act (conduct or speech), which gives it its criminal character. Offensiveness is an essential precondition of the act potentially attracting the attention of the criminal law. As such, we take the view that the circumstance of ‘offensive’ is \textit{integral} to the act – it not being possible to divide the conduct involved in the offence into an act and circumstance attendant on its occurrence. By contrast, the second circumstance – proximity – may be viewed as a circumstance \textit{attendant} on the occurrence of the act.

We argue this because whether or not the conduct or language was offensive is the primary determinant of the criminality of behaviour – hence the categorisation of this element as integral. However, whether or not the conduct or language could be seen in or heard from a public place is a secondary consideration which goes to the desirability, utility and practicality of holding the accused to account for his or her breach of society’s offensiveness standard. While it is a necessary element of the offence it does not go to the heart of the accused’s culpability. It follows that proximity is appropriately characterised as an attendant circumstance.

Thus, the actus reus of the offences defined by sections 4 and 4A are: speech or conduct committed voluntarily (act/conduct); offensiveness (integral circumstance); and relevant proximity to or in a public place (attendant circumstance). Later in this article, we will consider the consequences of our

\textsuperscript{92} See \textit{He Kaw Teh} (1985) 157 CLR 523, 528 (Gibbs CJ), 566 8 (Brennan J).

proffered categorisation of actus reus components for how we view the correlating mens rea.

1 The Act: Conduct or Speech

The first element to be proved is that the person engages in either conduct (behaviour) or speech (language or words). As the case law demonstrates, there is an enormous variety of conduct or speech that may potentially fall within this aspect of the actus reus. For example, it may include wearing a t-shirt that includes swear words (‘Too Drunk To Fuck’), climbing onto a pedestal of a statue and hanging a political placard over it (‘I will not fight in Vietnam’), as well as the more garden variety cases involving a person swearing, typically at a police officer, in a public place.

As with any conduct/act component of the actus reus, it must be committed voluntarily.

2 Circumstance One: ‘Offensiveness’

‘Offensiveness’ is not defined in the Summary Offences Act 1988 (NSW) but its meaning has been developed through the case law. Although, as discussed in Part III of this article, concerns have been raised about how the test of offensiveness is applied in particular circumstances, the preferred interpretation of this element of the offences defined by sections 4 and 4A has been well canvassed in the case law, and clearly explained in the academic commentary.

For the sake of completeness, and before moving onto the key remaining area of uncertainty – the fault elements for offensive conduct/language – we will summarise the guidance that has been provided by the case law.

(a) Objective Test of the Reasonable Person

It is well settled that the test for whether something is ‘offensive’ is an objective one of the reasonable person. It has been said that something is offensive if it is such as is calculated to wound the feelings, or arouse anger, resentment, disgust, or outrage in the mind of a reasonable man, notwithstanding that no member of the public is present, or (if there be members of the public present) that nobody is offended …

The reasonable person is said to be ‘reasonably tolerant and understanding, and reasonably contemporary in his reactions’. As a result, it is not necessary for the prosecution to prove that a particular person was in fact offended,
although such evidence is admissible and, indeed, it may be difficult to prove the offence without it.\textsuperscript{101}

This does not, however, mean that the context (including how words were spoken, the time of day or night, or whether the offence occurred after police entered a highly charged environment) and potential audience are irrelevant in determining whether something is objectively offensive.\textsuperscript{102} Something done or said in one context (such as a pub) may not be offensive, but if done in another may well be so (such as in a playground with young children about).

\textbf{(b) Changing Community Standards}

What is objectively offensive may also change over time with changes in community standards. This is particularly apparent with swear words such as ‘fuck’.\textsuperscript{103}

3 \textbf{Circumstance Two: Proximity}

We are of the view that the second circumstance, which requires that the offensive language or conduct be committed in or with some proximity to a public place, is an attendant circumstance. The required proximity to, and the concept of, ‘public place’ are discussed separately below.

Under section 4 the offensive conduct must be committed ‘in or near, or within view or hearing from, a public place or a school’, whereas for an offensive language charge under s 4A the language must be used ‘in or near, or within hearing from, a public place or a school’.

The meaning of ‘public place’ is exclusively defined in section 3(1) of the \textbf{Summary Offences Act 1988} (NSW) as:

(a) a place (whether or not covered by water), or

(b) a part of premises,

that is open to the public, or is used by the public whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons, but does not include a school.

This statutory definition\textsuperscript{104} is broad and focuses on whether the public use or go to the place, regardless of whether it is a private premises or only a small number or class of persons use the place.\textsuperscript{105}

\textsuperscript{101} Connolly \textit{v} Willis [1984] 1 NSWLR 373, 384 (Wood J).

\textsuperscript{102} Hortin \textit{v} Rowbottom (1993) 61 SASR 313, 322 (Mullighan J); Connolly \textit{v} Willis [1984] 1 NSWLR 373, 379 (Wood J); See also Spears, Quilter and Harfield, above n 4, 156.

\textsuperscript{103} Police \textit{v} Butler [2003] NSWLC 2, [6], [22], [34], [37] (Magistrate Heilpern); David Heilpern, ‘Police \textit{v} Shannon Thomas Dunn, Dubbo Local Court’ (1999) 24 \textit{Alternative Law Journal} 238. See also Brown et al, above n 2, 755  60; New South Wales Law Reform Commission, above n 47, 297  9.

\textsuperscript{104} The definition in s 3(3) expressly excludes the definition of public place in s 8 of the \textbf{Crimes Act 1900} (NSW). It is noted that there are separate definitions of ‘premises’, ‘school’ and ‘vehicle’ in s 3(1); see also s 3(2).

\textsuperscript{105} Re Camp [1975] 1 NSWLR 452, 454 (The Court); McIvor \textit{v} Garlick [1972] VR 129, 133  6 (Newton J). For further discussion of the significant case law on what may constitute a public place, see Spears, Quilter and Harfield, above n 4, 164  5.
There is no requirement that a person be in the public place at the time the offence is committed. This is because of the ‘protective’ purpose of the legislation: the public should know they are protected from offensive language in public or within hearing of such places.

4 Mens Rea

As discussed above, offensive conduct or language charges involve three actus reus components: an act/conduct (speech or behaviour) and two circumstance components (the conduct or language is offensive and the conduct or language is in or within the required proximity to a public place). While the case law discussed above does not break the offences down in this way, there is sufficient judicial consideration of each of these conduct elements to provide relevant guidance. The same cannot be said about mens rea.

In spite of the frequency with which offensive conduct and language charges are laid or penalty notices issued, the law regarding the mens rea for these offences is unsettled. Part of the problem lies in the paucity of NSW appellate authority on the issue. In addition, the authorities that are available, whether from NSW or other Australian jurisdictions, tend to conflate what should be discrete questions about the fault element (if any) that attaches to each component of the actus reus into a global inquiry as to whether the offence is one of mens rea. Consistent with the principles laid down in He Kaw Teh, we argue that a more nuanced approach is required; one that identifies what, if any, mental state applies to each component of the actus reus. It is for this reason that we have considered in detail above how the conduct elements of offensive conduct and language should be construed. This is an essential first step in order to be able to assess what, if any, correlating fault component should be regarded as constituting an element of the crime.

(a) Mens Rea as to Conduct

The NSW Court of Criminal Appeal has never effectively considered the question of the mens rea for the offences defined by sections 4 and 4A of the Summary Offences Act 1988 (NSW). The only relevant guidance comes from a very small number of cases stated to single judges of the Supreme Court of NSW on appeal from the Local Court. In the one reported decision, Jeffs v Graham, Yeldham J considered an appeal against an offensive conduct conviction under the predecessor legislation to sections 4 and 4A of the Summary Offences Act 1988 (NSW). The presence or absence of a person in the place may, however, be relevant to penalty.

106 Stutsel v Reid (1990) 20 NSWLR 661, 663 (Loveday J). The presence or absence of a person in the place may, however, be relevant to penalty.
107 Ibid 664 (Loveday J); see Jolly v R (2009) 9 DCLR (NSW) 225, 230 [22] (Cogswell DCJ).
109 See, eg, Jeffs v Graham (1987) 8 NSWLR 292; Pregelj (1987) 88 FLR 346; Pfeifer (1997) 68 SASR 285. Each of these cases is discussed below.
110 See also Patterson v Alsleben (Unreported, New South Wales Supreme Court, Newman JA, 5 June 1990); Dennis, above n 13, 8 9.
Offences Act 1988 (NSW), namely section 5 of the Offences in Public Places Act 1979 (NSW). The phrase ‘shall not conduct himself or herself’ (a phrase not relevantly different to the wording of sections 4 and 4A: ‘must not conduct himself or herself’ and ‘must not use offensive language’) was held to ‘require at least that there should be a voluntary act by the person charged.’\textsuperscript{112} Justice Yeldham ruled that the offence ‘does at least require the Crown to prove beyond reasonable doubt that the person charged had voluntarily engaged in the conduct complained of.’\textsuperscript{113} It appears that the term ‘voluntary’ may have been used here as a synonym for intentional, but Yeldham J only seemed to require this mens rea in respect of the act/conduct component of the actus reus. In other words, the prosecution must prove that the accused intended to speak (in the case of offensive language) or behave intentionally (in the case of offensive conduct). This is of course a very minimal requirement and would rarely be in issue. The question of mens rea in relation to what we have identified as the two circumstance components of the actus reus for offensive conduct and offensive language offences was not considered in Jeffs v Graham.\textsuperscript{114} The resulting ambiguity is one of the consequences of the traditional tendency not to subject public order offences to the same sort of precise technical scrutiny and exegesis that is commonplace in relation to more serious crimes.

The NSW Court of Criminal Appeal has not considered the question, and so it appears to remain an open question as to whether mens rea is required for the two circumstance components. Below we discuss the two primary but conflicting interstate authorities dealing with mens rea in offensive language and behaviour offences.

(b) Offensiveness: Strict Liability vs Intent

The issue of whether the circumstance of ‘offensiveness’ requires a mens rea element was considered in the South Australian case of Pfeifer.\textsuperscript{115} Pfeifer was charged with behaving in an offensive manner contrary to section 7(1)(a) of the Summary Offences Act 1953 (SA) for wearing a T-shirt (given to him by his mother) in a shopping mall, with the name of the band ‘Dead Kennedys’ and the words ‘Too Drunk To Fuck’. In considering whether the offence required a mental element, applying He Kaw Teh, Doyle CJ (Debelle and Lander JJ agreeing) held that the presumption of mens rea had been rebutted and that the offence was one of strict liability. Thus, the prosecution must prove that the relevant conduct is offensive and that the person did not honestly and reasonably believe that the conduct was not offensive. Chief Justice Doyle held:

\textsuperscript{112} Ibid 295.
\textsuperscript{113} Ibid 296.
\textsuperscript{114} The Supreme Court considered the question again in Patterson v Ableben (Unreported, New South Wales Supreme Court, Newman JA, 5 June 1990), but Newman JA appears primarily to have adopted the ambiguous terminology used by Yeldham J (‘voluntary’ when presumably intentional is meant), and failed to differentiate between the different actus reus components in relation to which He Kaw Teh requires discrete fault element inquiries to be made.
\textsuperscript{115} (1997) 68 SASR 285.
It appears to me to be a provision intended to protect members of society from disturbance and annoyance through offensive behaviour, intended to prevent the sort of disputes and disturbances that might arise if such behaviour is not prevented by law with the consequence that members of society react to it or resist it in other ways. To convict only those who intentionally or knowingly offend will achieve a good deal, but does not go that extra step of requiring members of society to take care to ensure that they do not breach generally accepted standards of behaviour.\footnote{Ibid 292.}


In South Australia, therefore, it would appear to be established that this offence (or more precisely the element of offensiveness) is one of strict liability.

It is important to note that the offence in South Australia differs from the NSW provision, in respect of the second circumstance relating to location or proximity. The South Australian offence requires that the person is \textit{in} a public place whereas the NSW provision is broader capturing conduct committed within the relevant proximity to a public place (the second circumstance). We would argue, therefore, that Doyle CJ has only addressed the circumstance element of ‘offensiveness’, finding it to be a strict liability component.

In \textit{Pregelj}, the Northern Territory Court of Criminal Appeal construed a provision more similar to the offences defined by section 4 of the \textit{Summary Offences Act 1988} (NSW).\footnote{(1987) 88 FLR 346.} Section 47(a) of the \textit{Summary Offences Act} (NT), relevantly, makes it an offence to engage in ‘offensive … behaviour … in or within the hearing or view of any person in any … public place’. In this case, a police officer was walking along a foot-lane at approximately 8.50pm, when he saw through a lit bedroom window a naked white man having sexual intercourse on the floor of the room with a naked Aboriginal female. The facts indicate that the house was seven or eight metres from the lane; there was a one metre fence separating the lane from the house; and the bottom of the window was close to the floor. Justice Nader concluded that ‘there was evidence, to be inferred from each of them [the appellants] saying that they thought they were out of sight behind a wall (to which I have referred), that the appellants did give thought to the possibility of being seen from outside the house.’\footnote{Ibid 349 (Nader J).}

By contrast to the decision in \textit{Pfeifer}, the Court (Nader, Kearney and Rice JJ) held that the offence is one of mens rea. While the separate judgments of Nader and Rice JJ (Kearney J concurring with the orders of Nader J) do not expressly articulate their conclusions in these terms, we would argue that each focuses on a different circumstance component in coming to their findings.

On the one hand, Nader J, after applying \textit{He Kaw Teh}, appears to focus on the circumstance of ‘offensiveness’ stating that ‘offensive behaviour’ requires that the accused intended to offend:
The gravamen of offensive behaviour is the offending of another person, and the offending must be intended ... having taken precautions to conceal themselves, they did not intend to offend, nor did they foresee the possibility of offending anyone. By ‘intent to offend’, I mean ‘do an act with knowledge that the activity would, or at least could, offend’.121

On the other hand, Rice J, having found that the act of sexual intercourse per se could not be said to be offensive but was rather a ‘natural and lawful human behaviour’, focused on the second circumstance, ‘within the view of any person’.122 Thus, Rice J held that section 47 was only intended to proscribe sexual intercourse in circumstances where the conduct was intended to be viewed by others. This imports an element of ‘prurience’ into the conduct.123

C A Suggested Approach to Mens Rea in NSW

The above discussion indicates that while it is clear that under sections 4 and 4A of the Summary Offences Act 1988 (NSW) there must be an intent to perform the relevant conduct, it is an open question as to what, if any, mental state applies to the two circumstance components of the actus reus: offensiveness and proximity. The South Australian decision of Pfeifer points in the direction of the circumstance of ‘offensiveness’ being a strict liability component, whereas Justice Nader’s decision in Pregelj points in the opposite direction, indicating that it requires an intent to offend – meaning knowledge (or recklessness) that the relevant conduct is offensive. In terms of the circumstance of proximity, Pfeifer provides no guidance and Justice Rice’s judgment in Pregelj points to a requirement that the Crown must prove that the accused intended to be in, within view or hearing of a public place whilst performing the relevant conduct.

In the absence of judicial guidance in NSW, and given the conflicting nature of the authority from South Australia and the Northern Territory, we venture our own interpretation of the corresponding mens rea elements as follows (drawing on Justice Brennan’s distinction in He Kaw Teh between circumstances that are integral and those that are attendant to the act).

First, following Jeffs v Graham there must be an intention to perform the act/conduct. This component seems settled.

Secondly, as argued above, we regard the first circumstance – ‘offensiveness’ – as integral to the act. Clearly, the mere act of speaking or engaging in some form of conduct is not what is prohibited by sections 4 and 4A. Rather, it is only when the speech or conduct (the act) has the attribute of being offensive (the integral circumstance) that the speech or conduct might, assuming all other elements are satisfied, be regarded as criminal in character. In our view, therefore, it is not possible to divide the core conduct element into an act and a circumstance attendant on its occurrence. This appears to have been the conclusion reached by Nader J in Pregelj:

121 Ibid 360 1.
122 Ibid 367.
123 Ibid 368.
Behaviour that does not offend, at least potentially, cannot be offensive. Behaviour, offensive in other circumstances, committed in complete privacy cannot be offensive. It cannot be in the nature of any conduct to be offensive without including in the definition of the conduct the circumstances which render it offensive. Therefore, on one view of it, the offending of a person, actually or potentially, is an integral element of the proscribed conduct.\footnote{Ibid 360.}

Following Justice Brennan’s approach in \textit{He Kaw Teh} – that an integral circumstance component of the actus reus of an offence attracts the same \textit{mens rea} presumption as the physical act component (discussed above) – we argue that a charge under sections 4 or 4A should not be regarded as made out unless there is evidence of an intention to do the \textit{whole act} – being the physical act plus the integral circumstance. It follows that it is an element of the offences defined by sections 4 and 4A that the accused knew – or foresaw that it was possible (that is, was reckless) – that the conduct or language was offensive.

This conclusion is supported not only by an application of the integral/attendant circumstance distinction embraced by Brennan J in \textit{He Kaw Teh}, but via reasoning from the ‘first principles’ approach to identifying the fault element(s) of a statutory offence, including the presumption of mens rea for which \textit{He Kaw Teh} still stands as Australia’s leading authority. Thus, the word ‘offensive’ has been defined in the case law (discussed above) as ‘such as is \textit{calculated} to wound the feelings, or arouse anger, resentment, disgust, or outrage in the mind of a reasonable man.’\footnote{Inglis \textit{v} Fish [1961] VR 607, 611 (Pape J) (emphasis added). See also Spears, Quitter and Harfield, above n 4, 155.} The word ‘calculated’ imports the notion of intention.\footnote{See also Dennis, above n 13, 4, 8.} Therefore, we argue that there is a necessary implication that the word ‘offensive’ connotes mens rea.

We conclude\footnote{Justice Yeldham came to a similar conclusion in \textit{Jeffs v Graham} (1987) 8 NSWLR 292, 295.} this even though there are a number of other offences contained in part 2 division 1 (in which sections 4 and 4A fall), which expressly provide for a mens rea requirement (‘wilfully’ being used in sections 5 (‘obscene exposure’), 6 (‘obstructing traffic’), 7 (‘damaging fountains’), and 8(2) (‘damaging or desecrating protected places’)) while sections 4 and 4A are silent on the question.\footnote{The offences contained in ss 6A (‘unauthorised entry of vehicle or boat’), 8A (‘climbing on or jumping from buildings and other structures’), 9 (‘continuation of intoxicated and disorderly behaviour following move on direction’), 11 (‘possession of liquor by minors’) and 11A (‘violent disorder’) are also silent as to mens rea.} Furthermore, our conclusion that mens rea is required for the circumstance of ‘offensiveness’ is not swayed by the availability in sections 4(3) and 4A(2) of a defence of ‘reasonable excuse for conducting himself or herself in the manner alleged’. Certainly the presence of a ‘reasonable excuse’ defence is relevant to the statutory construction exercise, but it is not determinative. As Yeldham J held in \textit{Jeffs v Graham}, the provision of a defence of ‘reasonable excuse’...
While the subject matter, particularly in terms of penalty (which is at the lesser end of the spectrum of criminal penalties), may point towards a rebuttal of the presumption, the final test of the utility of imposing strict liability in our view does not. Both Pregelj and Pfeifer demonstrate that a strict liability standard would carry a real risk that ‘luckless’ persons – that is, those ‘who unwittingly engage in prohibited conduct’ (such as two adults engaged in consensual sexual activity in their home or a young man wearing a t-shirt that was a birthday gift from his mother, carrying the name of a song by one of his favourite bands) could be caught by the offence. As the quote above from Brennan J in He Kaw Teh suggests, the utility test goes to the general fairness in the operation of the law: ‘[t]he requirement of mens rea is at once a reflection of the purpose of the statute and a humane protection for persons who unwittingly engage in prohibited conduct.’

Furthermore, the broader context of the potential unfairness that surrounds the operation of offensive conduct and offensive language laws (discussed in Part III of this article) provides additional support for the conclusion that rebuttal of the presumption in favour of mens rea is not justified.

Finally, as to the actus reus element of proximity, we have argued above that it should be regarded as a circumstance attendant upon the act; not integral to it.

Justice Brennan held in He Kaw Teh that the strong presumption in favour of mens rea for an integral circumstance element is weaker in the case of an attendant circumstance. However, it is still necessary to determine whether the (weaker) presumption should be regarded as rebutted, taking into account the words of the statute, the subject matter, and the utility of imposing strict liability.

Our conclusion is that this aspect of the actus reus – ie the proximity requirement – for the offences defined by sections 4 and 4A involves strict liability. There is nothing in the words or subject matter of the offences that suggest that knowledge is required in relation to this element and the utility of a strict liability reading is evident. It will generally be within the power of an individual to take reasonable steps to determine whether their conduct or language is taking place in or near or within view or hearing of a public place or school. That is, the protective purpose of the legislation is advanced by creating an obligation on individuals to take reasonable care in relation to proximity. Arguably, a potentially ‘luckless’ accused in relation to this circumstance may be able to utilise the reasonable excuse defence for so conducting himself or herself under sections 4(3) or 4A(2).

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131 And who were not aware they could be seen from outside and who had made an effort to position the rug on which they were lying accordingly.
133 He Kaw Teh (1985) 157 CLR 523, 568 (emphasis added).
134 For instance, such as in Pregelj, where the accused thought they had taken steps not to be seen.
Drawing a different conclusion as to the fault element that attaches to two different circumstance components may be regarded as unusual. However, it would be a mistake to assume that all circumstance elements should be considered as of equal significance to the criminality of the conduct in question. As we argued above, the offensiveness and proximity elements of the offences defined by sections 4 and 4A play different roles in establishing the boundaries of the proscribed conduct. The ‘reading in’ of two different fault elements in relation to two different circumstance components is clearly contemplated by Justice Brennan’s analysis in *He Kaw Teh* and is, in our view, a justifiable and appropriate conclusion in relation to the crimes of offensive conduct and offensive language.\(^\text{135}\)

## V CONCLUSION

Granted, the manner in which the offences defined by sections 4 and 4A of the *Summary Offences Act 1988* (NSW) are enforced – CINs and high volume guilty pleas in the Local Court – affords relatively limited opportunities for detailed judicial examination. Nonetheless, we have argued in this article that it is unacceptable that, for two crimes that are enforced more than 12,000 times each year in NSW, frequently in controversial circumstances, it remains unclear what the elements of the crimes are. Clarification would be welcome in a number of quarters. First, students in criminal law courses and practising criminal lawyers would not be left to grapple with the applicability of the opaque discussion of the elements of offensive conduct by the NSW Supreme Court,\(^\text{136}\) and to extrapolate from appellate rulings on comparable (but not identical) offences in the Northern Territory\(^\text{137}\) and South Australia.\(^\text{138}\) Secondly, and more importantly, as recognised recently by the NSW Ombudsman and the NSW Law Reform Commission,\(^\text{139}\) police officers who make critical decisions every day about the scope of sections 4 and 4A, and their applicability to behaviour they encounter, would receive much needed guidance. The guidance they currently receive is

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\(^\text{135}\) Note that the equivalent provision in the Tasmanian *Police Offences Act 1935* has expressly provided for different fault elements in relation to the two circumstances of offensiveness and proximity:

21 Prohibited behaviour

  A person must not, wilfully and without reasonable excuse, do any act or behave in a manner that a reasonable person is likely to find indecent or offensive in all the circumstances, if that person knew or should have known that his or her conduct was being, or may have been, viewed by another person.

  Penalty: Fine not exceeding 50 penalty units or imprisonment for a term not exceeding 12 months, or both.

Therefore, \(s\) 21 requires that the accused *wilfully* act in an offensive manner (the offensiveness circumstance) while requiring either that he or she *knew* or *should have known* that the conduct could be viewed (the circumstance of proximity).\(^\text{136}\)


\(^\text{137}\) *Pregelj* (1987) 88 FLR 346.


\(^\text{139}\) See above Part III.
demonstrably inadequate, producing real risks of over-policing and over-criminalisation. We believe this situation is untenable and ought to be challenged and resolved. Finally, and most importantly, individuals stung by the harshness and possible unfairness of a penalty notice or charge for allegedly breaching sections 4 or 4A would, with the benefit of a clear and comprehensive articulation of the elements of the offence, have the option (not easily exercised, we concede) of contesting the police assertion that their conduct or language was criminal. Everyone who faces the prospect of criminal punishment should be given this opportunity. Even those charged with ‘trivial’ crimes.
Offensiveness as a basis for legal liability in Australia is not new, but it was the subject of unprecedented scrutiny in the wake of the release of the former Labor government’s Human Rights and Anti-Discrimination Bill in November 2012. But if the 2012 Bill generated such anxiety because it contemplated treating offensive comments as a form of discrimination and therefore a civil wrong, why is there not even greater anxiety about the presence on our statute books of laws that expose people to criminal sanctions based on the same standard? For example, under s 4A of the Summary Offences Act 1988 (NSW), ‘A person must not use offensive language in or near, or within hearing from, a public place or a school.’ Comparable laws are on the books in every Australian state and territory. The aims of this article are to draw attention to a major blind spot in the recent Australian debate about offensiveness as a basis for legal liability, and to address an important law and policy question: is there any longer a place in Australia for laws that criminalise public conduct or language that is deemed to be offensive? Although it stopped short of formally reaching this conclusion, a recent report of the NSW Law Reform Commission (‘NSWLRC’)

catalogues compelling evidence that the answer is no.

Offensiveness on the radar: Human Rights and Anti-Discrimination Bill 2012

From the day in November 2012 when the then ALP federal government released its exposure draft Human Rights and Anti-Discrimination Bill the proposal was under attack. The primary objectives of the Bill were to harmonise four existing federal anti-discrimination statutes, and to extend protection to sexual orientation, religion and a number of other grounds. While a number of elements of the Bill were criticised by opponents, the most trenchant criticism — voiced loudly and aggressively by the Liberal National coalition Opposition (now government) and the conservative think tank, the Institute of Public Affairs — was directed at a relatively minor component of the reform package: the fact that the Bill would have included, within the scope of both unlawful racial vilification and unlawful discrimination, conduct which is offensive.

First, s 51 of the Bill would have carried over from the existing Racial Discrimination Act 1975 (Cth) (the provision (s 18C) that makes it unlawful to engage in racial vilification — defined as public conduct that is likely to ‘offend, insult, humiliate or intimidate’ a person or group on the basis of the person or group’s race. Second, s 19(2)(b) of the Bill would have expanded the definition of unlawful discrimination (applicable to all protected grounds, not just race) to include ‘conduct that offends, insults or intimidates’.

In February 2013 the then Labor government announced that s 19(2)(b) would be excised from the Bill, but the criticism continued. On 19 March 2013 the Attorney-General announced that the whole Bill would be shelved and further work done on the task of applying ‘meticulous attention’ to ‘striking the appropriate balance between the right to freedom of speech and the right to be protected from discrimination.’

The gist of the objection, to which the then government eventually yielded, was that in a liberal democracy, restrictions on expression and communication should only be imposed where the need is great. It follows, so the argument goes, that speech which is merely offensive should be beyond the regulatory reach of the state.

By the time the Human Rights and Anti-Discrimination Bill was released in November 2012, an active debate about legislative restrictions on ‘free speech’ was already in full swing following the Federal Court of Australia’s 2011 ruling that Andrew Bolt had breached the ‘offend, insult, humiliate or intimidate’ standard in s 18C of the current Racial Discrimination Act 1975 (Cth) by comments in his Herald Sun newspaper column about ‘fair-skinned Aboriginal people’. In a speech entitled ‘Freedom Wars’, delivered to the Institute of Public Affairs (‘IPA’) in August 2012, the then Leader of the Opposition (now Prime Minister), Tony Abbott, cited the adverse finding against Bolt as evidence that s 18C went too far:

Expression or advocacy should never be unlawful merely because it is offensive. It ought to be inconceivable that a commentator offering an opinion should fall foul of the law rather than a wave of criticism. This is not a matter of agreeing or disagreeing with Bolt. It’s a matter of an expansive or a repressive view of the right to free speech.

In December 2012, the former Chief Justice of New South Wales, the Hon Jim Spigelman AC QC used the occasion of the Australian Human Rights Commission’s Human Rights Day Oration to express his view that the federal government’s proposals went too far. Spigelman endorsed the view of Professor Jeremy Waldron, outlined in his 2012 book The Harm in Hate Speech, that ‘[p]rotecting people’s feelings against offence is not an appropriate objective for the law.’

Spigelman said:
None of the voices of concern recognised that offensiveness is already the key standard in relation to a range of existing Australian laws.

I agree with Professor Waldron. His detailed analysis supports the proposition that declaring, relevantly speech, to be unlawful, because it causes offence, goes too far. The freedom to offend is an integral component of freedom of speech. There is no right not to be offended.

Whether or not one agrees with critics of the Bolt decision or the former Chief Justice of NSW, few would doubt that the merits of laws that turn on a standard of ‘offensiveness’ should be the subject of robust debate and scrutiny. There is an important issue at stake regarding the legitimate limits of the state’s power to characterise certain types of expression as unlawful — and to provide for sanctions where the line that the state draws is overstepped.

While we agree that this debate should continue — within the judiciary, within parliament, and across the wider community — we want to highlight what we see as a large blind spot in the national debate that raged during 2012/13. None of the voices of concern recognised that offensiveness is already the key standard in relation to a range of existing Australian laws. Free speech advocates were perfectly entitled to take aim at a federal government law reform proposal that the state draws is overstepped.

Criminal offensiveness

Criminalisation is generally regarded as the most draconian form of state regulation — because it involves the greatest social stigma and can result in the deprivation of a person’s liberty (ie imprisonment). If offensiveness is problematic as a basis for the attribution of civil liability, how much more problematic is offensiveness as the basis for exposing a person to criminal conviction and punishment? For that is exactly what happens more than 10 000 times every year, in New South Wales alone, where police enforce the prohibitions on offensive conduct (s 4) and offensive language (s 4A) that are contained in the Summary Offences Act 1988 (NSW).

Under s 4 of the Summary Offences Act 1988 (NSW), it is an offence to behave in an ‘offensive manner’ in or near a public place or school. Section 4A creates a separate offence of using offensive language in or near, or within hearing from, a public place or school. Both are criminal offences. The maximum penalty for offensive conduct is three month imprisonment. The maximum penalty for offensive language is a fine of 6 penalty units ($660). Since 2007 police have had the option of responding to alleged breaches of both ss 4 and 4A of the Summary Offences Act 1988 (NSW) by way of issuing a Court Infringement Notice (‘CIN’) — $200 for offensive conduct and $150 for offensive language.

It might be assumed that, in the context of public order legislation, something more than mere offensiveness must be needed to support a criminal conviction under ss 4 or 4A. Perhaps some evidence that the conduct in question was inflammatory and there was a risk of violent retaliation or some other dangerous escalation? There is no such requirement under NSW law. There once was. NSW’s original ‘unseemly words’ statute — the Vagrancy Act 1851 — also required proof of a likely breach of the peace. This requirement was removed over a century ago and does not feature in the current legislation. All that is currently required is that the conduct be regarded as offensive, from the perspective of a ‘reasonable person’.

The permissibility (and constitutional validity) of broadly drawn public order offences that do not contain a ‘breach of the peace’ element was considered by the High Court in 2004. In Coleman v Power three judges found the only way that the offence of using insulting words in a public place could avoid a ruling of invalidity for breaching the implied freedom of political communication was by narrowly construing the scope of the offence so that it only covered conduct where the words used were ‘either intended to provoke unlawful physical retaliation, or were reasonably likely to do so’ — that is, by reading in a ‘breach of the peace’ element.

The High Court has not yet been called on to consider whether a similar construction is warranted in the case of public order offences, like those in the Summary Offences Act 1988 (NSW), that turn on a test of offensiveness. Notably, in 2011, when the Supreme Court of New Zealand was confronted with this very question in relation to the offence of behaving in an offensive or disorderly manner in a public place under s 4(1) of the Summary Offences Act 1981 (NZ), it responded by ‘reading in’ a breach of the peace requirement. In Morse the Court held the criminalisation of offensiveness per se was unacceptable in a society which is committed to protecting freedom of expression — a commitment enshrined in s 19 of New Zealand’s Bill of Rights Act 1990. A charge could not be sustained unless there was evidence that the accused’s conduct, in addition to being offensive (in the

[References omitted for brevity]
sense of being upsetting or distasteful) also carried the risk of disrupting order in a public place.

Another recent decision of the High Court of Australia suggests that it may not be too much longer before the question of the validity of public order laws that use an offensiveness standard in determining criminality is the subject of constitutional adjudication. In Monis v The Queen,19 the High Court was divided 3:3 on whether the offence, under s 471.12 of the Criminal Code (Cth), of using a postal service in a way that is ‘menacing, harassing or offensive’20 conflicts with the implied freedom of political communication which the Court has previously found to reside in the Australian Constitution. All six members of the Court interpreted the word ‘offensive’ narrowly. For example, Chief Justice French, one of the three Justices to conclude that the legislation was invalid, endorsed the view that offensive meant ‘calculated or likely to arouse significant anger, significant outrage, disgust or hatred in the mind of a reasonable person in all the circumstances’.21 Justices Crennan, Kiefel and Bell, the three who found the legislation to be valid, defined offensive as limited to ‘seriously offensive communications’ which were ‘likely to cause a significant emotional reaction or psychological response.’22 However, the Court was divided on the question of whether s 471.12, so construed, was constitutionally valid. For three judges, including Chief Justice French, even when it was interpreted narrowly, the fact that this particular criminal offence turned on an offensiveness standard was an unjustifiable restriction on Australia’s implied freedom of political communication.23 Justices Crennan, Kiefel and Bell disagreed,24 and so, with the Court evenly divided, the appeal was dismissed25 and s 471.12 remains part of Australian law — at least for the time being.

Problems with offensive conduct and language

Concerns about the presence of ss 4 and 4A of the Summary Offences Act on the NSW statute books — and of equivalent laws nationally — stem not simply from an abstract philosophical perspective on the importance of free speech and the importance of curtailing the state’s incursions into expression and communication. These laws ‘bite’ every day; and they bite in large numbers. In a typical year, NSW police lay more than 5000 charges for offensive conduct or offensive language, and, in addition, issue a similar or larger number of ‘on the spot’ fines (formally known, in NSW, as CINs) for these crimes. In 2012 this added up to more than 12 000 occasions when a person is brought within the reach of the NSW criminal justice system because their behaviour was deemed to be ‘offensive’.26

For more than 30 years, numerous studies have raised concerns about the operation of offensive conduct and language laws in NSW.27 These studies have identified three major problems with public order offences which turn on the concept of offensiveness.

The first is an issue of scope and definition. The concept of ‘offensive’ is vague and ill-defined and susceptible to subjective interpretation. The courts have produced a test that poses more questions than it answers. Conduct is (objectively) offensive if it is likely: to wound the feelings, or arouse anger, resentment, disgust, or outrage in the mind of a reasonable man, notwithstanding that no member of the public is present, or (if there be members of the public present) that nobody is offended…28

It is extremely difficult to produce a single community standard with which to assess which conduct or language is sufficiently objectionable to warrant being labelled as criminally offensive, not least because such norms are never static over time, and a variety of views will always exist. Attitudes towards swearing are illustrative. Many offensive language charges or CINs arise from cases of swearing in public — commonly at police officers, the significance of which will be discussed below.

The NSWLRC has questioned whether, given the ubiquity of swearing in popular culture, it is any longer appropriate to sanction such language via the criminal law:

While some people may object to these words, the case for making their use an offence must be weakened considerably by the frequency of their appearance in popular songs, television programs, novels, radio and even in public discourse. … If there is no community consensus as to what language or form of insult is offensive, it is difficult to see how police can legitimately be requested to apply this offence consistently, and how people can be expected to anticipate the criminal justice system’s response to their language.29

The second problem, flowing from the first, is that the enforcement of offences like those contained in ss 4 and 4A of the Summary Offences Act 1988 (NSW) involves a great deal of police discretion, and this can produce inconsistency and unfairness. It is the police who are, on the ground, in a given instance, frequently the first arbiters of whether the offensiveness line has been crossed. They are also often the final arbiters — given the increasing use of penalty notices for offensive conduct and language, and given that even where charges are laid, the high proportion of guilty pleas in local courts means that magistrates are rarely required to rule on whether the behaviour was offensive or whether other elements of the crime have been proven. A related operational concern arises from the fact that it is frequently the case that the offensive language which gives rise to a criminal charge or CIN is directed at the police officer who invokes the law and who is the arbiter of offensiveness. That is, a police officer is frequently both ‘victim’ and ‘judge, jury and executioner’.

The Commission was cognisant of the potential for a conflict of interest in these circumstances:

In consultation, issuing agencies told us that they considered offensive language and conduct as open to abuse as these offences require a judgment by an issuing officer about an offence committed against him or herself. We were told
If offensiveness is problematic as a basis for the attribution of civil liability, how much more problematic is offensiveness as the basis for exposing a person to criminal conviction and punishment?

that this amounted to a conflict of interest – in effect, the victim was issuing the punishment.\textsuperscript{30}

In the landmark television documentary, ’Cop It Sweet’, which first aired on ABC Television in 1992,\textsuperscript{31} film-maker Jenny Brockie famously captured the hypocrisy of police officers arresting an Aboriginal man for using precisely the same language (swear words) that they were shown using in their dealings with members of the public. It appears that, more than two decades on, the hypocrisy, and resulting injustice, persist. The NSWLRC noted:

During consultations the view was repeatedly expressed that the issue of CINs for offensive language in this context brings the justice system into disrepute, since those who receive CINs for this offence hear those who issue the CIN using the same language themselves. They therefore adjudge the issue of a CIN to be an exercise in power not an exercise of justice.\textsuperscript{32}

The third problem — which flows from the first two problems of ill-definition and lack of scrutiny of police discretion — is that such laws have been shown to have a disproportionate effect on marginalised groups, and Aboriginal people in particular.\textsuperscript{33} The NSWLRC noted that ‘in many situations where offensive language is used it reflects either poor communication skills by the user, or intellectual or mental impairment.’\textsuperscript{34} Intoxication is also often a contributing factor.\textsuperscript{35} Aboriginal people are frequently the targets of both criminal charges and CINs, a pattern which has been entrenched for decades.\textsuperscript{36} In 2009 the NSW Ombudsman noted that ‘Overall legal actions in relation to these two offences [s 4 offensive conduct and s 4A offensive language] are increasing, and Aboriginal people remain significantly overrepresented in relation to both’.\textsuperscript{37}

The NSWLRC gave serious consideration to recommending the abolition of offensive language (which it regarded as more problematic than offensive conduct). The Commission summarised the arguments in favour of abolition as:

- the indeterminacy of the offence and the risk of its inconsistent application;
- the fact that language that would once have been offensive is now an everyday matter, and it is no longer supportable to criminalise it;
- the disproportionate representation of vulnerable people, particularly Aboriginal people, in the application of this offence;
- the fact that frequently it is the victim (usually a police officer) who prosecutes the offence; the availability of other offences, such as offensive conduct and resisting police; and
- the relatively minimal harm caused by this offence.\textsuperscript{38}

Ultimately, the Commission stopped short of taking this step,\textsuperscript{39} recommending instead that ‘the offence of offensive language in the Summary Offences Act … should be further investigated as a matter of urgency’ and that ‘the offence of offensive conduct be similarly considered.’\textsuperscript{40}

Conclusion

The NSWLRC is right. Offences like ss 4 and 4A of the Summary Offences Act 1988 (NSW) — and their equivalents in other states and territories — can no longer be defended as having a legitimate place on the statute books of any Australian state or territory. The point is not that the conduct or language which gives rise to public order charges or penalty notices is desirable or legitimate. For example, despite their ubiquity, there are swear words that some people would prefer not to hear, or would prefer their children not to hear. In addition, it is safe to assume that very few people (police officers included) enjoy being sworn at in the course of their employment. Rather, the point is that criminalisation is far too blunt a mechanism for expressing the displeasure which some in our society might want to express to those who behave or speak ‘offensively’ when they are in public; especially when the evidence tells us that the operation of offensive conduct and offensive language laws is harsh and often unfair. These days, the police have numerous other ‘street sweeping’ tools at their disposal, including the power to direct individuals to ‘move along’.\textsuperscript{41} Such measures are not without their problems,\textsuperscript{42} but they have the benefit of facilitating police intervention without necessarily criminalising the public behaviour that is deemed to be socially undesirable.

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32. NSWLRC, above n 2, 299-300.
33. On the operation of offensive conduct and language laws in NSW, see Quilter and McNamara, above n 1, 542-47.
34. NSWLRC, above n 2, 301.
36. NSW Anti-Discrimination Board, Study of Street Offences by Aborigines (1982).
37. NSW Ombudsman, above n 26, 71.
38. NSWLRC, above n 2, 308.
39. The Commission did not consider it appropriate to make a formal recommendation for abolition because this option had not been canvassed by the Commission during the consultation process: Ibid 311.
40. Ibid and see rec 10.3.
41. See, eg, Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) s 197.
Populism and criminal justice policy: An Australian case study of non-punitive responses to alcohol-related violence

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What is This?
Populism and criminal justice policy: An Australian case study of non-punitive responses to alcohol-related violence

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Abstract
Populism is widely regarded in the literature as a negative and inherently punitive influence on criminal justice policy. This article challenges this view and highlights the ways in which populism can produce forms of citizen engagement in the criminal justice context that are new and progressive. These possibilities are illustrated through a close analysis of the responses to a single instance of ‘random’ fatal violence: the killing of Thomas Kelly in King’s Cross, Sydney, in 2012. This case study shows how a populist campaign powerfully realigned political allegiances to call for, and achieve, real and enduring action from the New South Wales Government in addressing alcohol-related violence.

Keywords
Alcohol, crime, populism, reform, violence

Introduction
This article is written against the well-documented background of declining citizen participation in traditional and organised forms of democracy (from political parties to the trade union movement) (Stoker, 2006) including in Australia (Alexander, 2013; Koziol, 2013), together with the general decline in trust in politicians, existing political processes and the legitimacy of professional judgement including the judiciary and expert opinion (Allen & Hough, 2008; Pratt, 2008; Stoker, 2006). Against this background this article aims to explore how citizens engage politically in new and progressive ways, particularly in the criminal justice context. In doing so, I take as a starting point the most significant influence on contemporary criminal justice policy, ‘penal populism’. Most scholars analysing penal populism are generally critical of it – and, given the alarming explosion in prison populations across Western countries, for good reason. Critics of penal populism focus on its emotive and rhetorical style, arguing that these should be eschewed in favour of a more rational crime policy debate (Roberts & Stalans, 1997) to be held in alternative

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forums away from tabloid journalism and electoral politics (Hutton, 2008). A central goal is to better inform the public about criminal justice issues and a typical strategy is to criticise the media for distorting the facts and presenting stories in an unbalanced way.

Such goals and strategies may well be worthy ones, however, against this grain, I am interested to explore how ‘populism’ might be constructively engaged rather than banished, and decoupled from its punitive ‘penal’ partner (Hogg, 2013). In doing so, to be clear, my own normative position is opposed to the punitive ‘law and order’ responses generated by penal populism and to the conservative right-wing agendas of recent populist movements such as Pauline Hanson’s One Nation Party in Australia or the Tea Party in the US. That said, by drawing on the work of scholars such as Canovan (1981, 1999, 2005), Kazin (1998) and Laclau (2007), my argument is that populism does not have a pre-ordained ideological content but may be viewed as a set of tools that can be put to use in a systematic way. In particular, I am interested in the potentially progressive and non-punitive role the emotions, rhetoric and the media may play in a populist campaign in order to influence criminal justice policy. I analyse these issues through a close reading of the responses to the death of Thomas Kelly, in Sydney, Australia in July 2012. Mr Kelly’s tragic death resonated with the community at large triggering a powerful populist campaign of a very different non-punitive nature. Mr Kelly became a ‘popular identity’ unifying a series of otherwise differential claims (Laclau, 2007), voices, interests and organisations and powerfully realigning political allegiances – notably those of the police with emergency service workers and away from ‘law and order’ politics – in a campaign directed at alcohol-related violence. Through ‘Thomas Kelly’ this campaign called for (and obtained) real and enduring action from the New South Wales (NSW) Government. My rationale for a case study examination of a specific local campaign is that much can be learned about populism’s potential to inform constructive policy making from a close examination of the dynamics, nuance and specificity of a particular campaign, and that the insights that are made possible from a close reading of this instance have wider relevance and application.

This article is in three parts. The first part discusses penal populism and its critiques before turning to the structural features of populist movements generally. The second part of the article turns to the Thomas Kelly case study and provides an overview of the Government’s responses to his death. The final part of the article, explores the populist campaign that underpinned the ‘call to action’ to the Government.

Penal populism and populism

While the social, economic and cultural conditions of possibility of penal populism are beyond the scope of this article (e.g. Dzur, 2010; Garland, 2000, 2001; Pratt, 2007, 2008; Roberts, Stalans, Indermaur, & Hough, 2003), it is arguably the most significant influence on contemporary criminal justice policy in modern society (Pratt, 2007; cf. Pratt & Eriksson, 2013). It is ‘intended to convey the notion of politicians tapping into and using for their own purposes, what they believe to be the public’s generally punitive stance’ (Bottoms, 1995, p. 40). As such, penal populism is most commonly associated with the trend in many Western countries (US, UK, NZ and Australia) since the 1980s towards punitive and populist penal policies and sentencing laws (Garland, 2001; Lacey, 2008; Pratt, 2007; Roberts et al., 2003). Penal populism equates effective punishment with
severity and particularly in the form of incarceration (Dzur, 2012; Pratt, 2007). The overwhelming significance of this policy approach is evidenced by the significant expansion of the prison population across many Western countries since the 1990s – and this, ironically and sadly, precisely at a time when crime rates are falling across those same countries (cf, Matthews, 2005; Pratt, 2007; Pratt & Eriksson, 2013).

If exploding prison populations are the most worrying outcome of penal populism, ‘law and order’ legislative responses are their predominant cause (Hogg & Brown, 1998). A typical way such ‘law and order’ responses arise is after a specific event that generates community or popular outrage (Loughnan, 2009; Roberts et al., 2003) the government responds by introducing (often poorly crafted) new criminal offences or increased penalties. There have been numerous examples of such ‘knee-jerk’ reactions in the Australian state of NSW. A recent illustration is the Government’s response to a series of drive by shootings by introducing new offences (e.g. firing a fire arm at a dwelling) and new consorting laws in the *Crimes Amendment (Consorting and Organised Crime) Act 2012* (for other examples see Brown, 2013; Loughnan, 2009).

Another manifestation of penal populism is that in response to alleged leniency in sentencing and parole determinations, governments have introduced various forms of legislation that attempt to fetter judicial discretion and prolong custodial or supervisory orders (Roberts et al., 2003). Some examples include: ‘three strikes legislation’; mandatory and minimum sentencing; standard non-parole periods; serious sex offender restraining orders and notification and registration schemes; and continuing detention orders. Increasing imprisonment rates and ‘law and order’ responses such as these are the primary responses offered by penal populism (see also Freiberg, 2008; Roberts et al., 2003). As will be discussed further below, these simplistic political responses fail to deliver what the public expect, including preventing crime.

These trends reflect the punitive aspect of penal populism, which is to be lamented, but the latter term in the phrase – populism – captures an important constitutive change in the relations between politicians and publics (Hogg, 2013; Pratt, 2007; Roberts, 2008; Roberts & Stalans, 1997). Since the 1980s the close relationship between governments and public servants (such as corrections departments and penal reform groups) and other related criminal justice professionals in the establishment of penal policy has been eroded (Loader, 2006; Pratt, 2007, 2008; Roberts, 2008). Where once, the public were largely bystanders in relation to criminal justice policy, today politicians, particularly through focus groups, are keen to track voter sentiment and align themselves and their policies with such public opinion. This reconfigured relationship has been accentuated by the 24-hour news cycle, and the rise of the victims’ movement (Freiberg & Gelb, 2008; Hogg, 2013; Pratt, 2007; Roberts, 2008). As Pratt has said (2007, p. 32):

> Penal populism revolves around the idea that the public are not mere dummies but can and should have a significant influence on penal affairs governments not only just listen to them but are also keen to strike up alliances with them or even be led by them.

Other examples of this reconfigured relationship include the consultative role accorded to the public in sentencing commissions in the US and in some Sentencing Advisory Councils in Australia (Freiberg & Gelb, 2008).
In addition to centring the public, penal populism operates through a highly rhetorical and emotive style. This contrasts strongly with the previous more rational, formal and administrative processes of criminal justice officials and experts (Dzur, 2012; Garland, 2000, 2001) who also, unlike the current climate of politicising crime, aimed to keep crime and criminal justice policy out of the political realm (Garland, 2000; Loader, 2006; Newburn, 2007). The language of penal populism is characterised by its ‘commonsensical anti-intellectual’ style (Pratt, 2007, p. 17). For example, laws named specifically after victims (Megan’s law, Sarah’s law and Zoe’s law) or popular slogans ‘three strikes legislation’ or ‘serious sex offender legislation’. The language not only embeds the ‘public’ (particularly victims) but its emotive rhetoric plays to the sentiment of the broader public.

‘Remedies’ to penal populism

Primarily because of its association with rising prison populations, penal populism has attracted significant criticisms (e.g. Lacey, 2008; Pratt, 2007; Roberts et al., 2003). A recurring theme in critiques is the suggestion that the solution is to foster a more informed public, through greater public education in an attempt to make the public less punitive. Studies, for instance, demonstrate that the methodology used to survey the public affects the results – and while this is true generally of all surveying it is specifically so in relation to surveys on crime and punishment. For instance, using deliberative polling techniques or conducting attitude change research, demonstrates that the public are less punitive in their responses to punishment and more inclined towards rehabilitation and other alternatives to incarceration when they are given more information and can debate policy issues (e.g. Cullen, Fisher, & Applegate, 2000; Hutton, 2005, 2008; Roberts & Hough, 2002). Furthermore, studies evidence that public opinion is not stable or monolithic but is more ‘contradictory, nuanced and fragile – that there is support both for punitiveness but also more constructive community based solutions’ (Hutton, 2005, p. 254). As such it is argued that greater public education and consultation can change punitive attitudes and, as will be discussed below, will lead to more rational penal policy.

Leading on from this, many critics of penal populism argue that penal policy should eschew popular emotionalism and replace it with a more rational crime policy based on reliable (usually statistical) information (Hutton, 2008; Pratt, 2008; Roberts, 2008). This would have the effect of overcoming current distorted political and media communications. For example, Roberts and Stalans (1997, pp. 291, 294) argue, it is:

Incumbent upon the criminal justice system to strive to educate the public to a greater degree than at present. (emphasis added)

... the public can only be expected to rationally participate in the debate over criminal justice policy when they have an accurate idea of the extent of the problem, and the relative effectiveness (and costs) of various solutions. (See also Hutton, 2008, emphasis added)

These sentiments are echoed in Roberts, Stalans, Indermaur and Hough’s later five country study of Australia, New Zealand, Canada, the US and the UK (Roberts
et al., 2003), where the authors argue that penal populism involves the exploitation of misinformed opinion in the pursuit of electoral advantage. It is argued that ‘[i]nformed opinion’ of both politicians and the public (p. 161) is the answer (see also Roberts & Stalans, 1997). A properly informed public, it is argued, will lead to a more rational debate based on evidence, replacing the current emotionalism (Roberts et al., 2003, p. 14). As Hutton claims (2008, pp. 212, 213):

\[\ldots\] The political challenge is to find a means of involving the public in penal policy making in a forum that creates space for rational debate away from the harsh spotlight of tabloid journalism and electoral politics.

The two chief so-called weaknesses of penal populism, the uninformed nature of the public and the emotive aspect, it is argued, should be fixed with ‘accurate information and by casting out the emotive as irrelevant. It is not per se concerned with the centring of the public; rather it is the public’s ‘uninformed’ nature that is the problem. The media is a typical target with calls for it to stop distorting the ‘facts’ and to provide information to the public in a more balanced way (Roberts, 2008, p. 27).

While these goals may well be important, as Hogg has argued, they nevertheless seem to evade rather than engage with the realities of contemporary penal politics (2013, p. 109) – and not least the important role that the media and new social media technologies now play in such debates. Like Hogg (2013), it is also unclear to me whether a more rational, informed policy approach will occupy anything other than a secondary role. Indeed, this seems to be conceded by Roberts et al. (2003, p. 164):

\[\ldots\] It is now clear that against the emotional and dramatic appeal of populist crime policy, ‘rational’ information based and ‘criminological’ perspectives are often considered irrelevant. People are not satisfied by what appears to be cold rationalism.

As will be discussed below, I take issue with these suggested ‘remedies’, instead exploring the progressive possibilities of populism including its style – how it can be harnessed for different ends. As Garland (2000, 2001) and others (Hutton, 2005) have recognised, attitudes to crime are culturally produced and include complex emotional and symbolic elements; they are not simply about ‘the facts’ or about ‘accurate information’ (Garland, 2000, p. 364):

Our attitudes to crime – our fears and resentments, but also our common sense narratives and understandings – become settled cultural facts that are sustained and reproduced by cultural scripts and not by criminological research or official data. (Garland, 2000, p. 368)

The provision of greater information to the public (and politicians) in a ‘rational’ way will not simply fix the problem (Hutton, 2005, p. 253), since attitudes to crime and punishment reflect, at least in part, broader anxieties and insecurities, and are thus not directly connected to accurate information about crime and punishment (Hutton, 2005, pp. 253, 254). To that end, we know statistically that crime has been declining during the very period (from the mid-1990s) in which penal populist policies has taken hold. This is a known statistical fact but has done little to curb punitive policies.
It is also important to recognise that dispassionate, statistical, rational debate is often less than compelling or meaningful to human agents (Freiberg, 2001, p. 266). It is necessary, as I will discuss further below, to engage with the emotional and symbolic elements of crime. Freiberg (2001) has made a similar point arguing that ‘rational’ crime policy is insufficient – crime policy must tap the deeper psycho-social forces which have driven penal populism (p. 266) which the ‘dispassionate/scientific’ manner fails to capture or address. He argues that while uncertainty, instability and complexity may have fuelled the punitive aspect of current criminal justice policies, people have positive feelings about harmony, order, predictability and stability (see also Garland, 2000; Loader, 2006; Pratt, 2008). Crime policies should tap these emotions and enact social conditions that foster them, particularly social cohesion:

Sentencing is as much about politics as it is about law or criminology. It is as much about the emotional, affective and symbolic elements of crime, order and safety as it is about the rational, effective and instrumental aspects of law making, judging and the disposition of offenders. (Freiberg, 2008, p. 148)

Other solutions to the rise of penal populism are argued to be the establishment of independent bodies (such as sentencing councils or penal policy boards) and improving confidence in professionals and experts (Lacey, 2008; Pratt, 2008; see also Dzur, 2010). These solutions have been suggested based on studies of countries that have ‘escaped’ the punitive aspect of penal populism such as the Nordic countries studied by Pratt and Eriksson (2013). Such countries have higher levels of respect for professionals and utilise independent bodies for setting criminal justice policy. My concern with these solutions, as I will discuss in the next part of this article, is that they fail to recognise the important role that the public can and have played historically in populist movements (Dzur, 2010, 2012) and it elides the contemporary political landscape in which the public has assumed a significant role in criminal justice policy formation. It seems to me that it is simply too late to go back to the safety of professional experts – as appealing as that may be for an academic!

As the name suggests, penal populism may be viewed as a form of populism (or perhaps more appropriately what Taggart (2000) calls ‘new populism’). What populist movements all have in common, is a claim to represent ‘the people’. My argument is that penal populism fails the people not because it centres the public (for how could that be a failing) nor because of its emotional and rhetorical style, but because it rarely produces the effects it allegedly aims to produce. We know that increasing incarceration rates does not lead to reductions in crime nor is there any evidence that it leads to a stronger sense of safety. By defining complex social problems as ‘law and order’ issues and by operating primarily through blunt legislative instruments (such as the creation of new offences) or increasing police powers and resources, penal populism fails to respond adequately to the complexity of the issues involved. In the next section, by looking more closely at the structural features of populism (including its focus on the people and its rhetorical and emotional style), I am interested in the possibilities of harnessing its positive potential for criminal justice debates (Hogg, 2013). I want to explore the potential for a genuinely populist response which is multi-faceted and nuanced – an approach which includes mechanisms within and outside criminal law and policing.
**Populism**

While many today associate populism with conservative right-wing movements such as Pauline Hanson’s One Nation Party or the Tea Party in the US, populism has been utilised by all sides of the political spectrum. As documented by Canovan (1981) and others, populism historically was associated with a series of progressive movements – whether those of agrarian populism (farmer’s radicalism such as the US People’s Party; the peasant movements in the East European Green Rising; intellectual agrarian socialism in the *narodniki*) or political populisms (such as populist democracies calling for referendums and ‘participation’). Kazin’s (1998) historical study from the 19th century roots of populism in the US through to today, also powerfully charts that it was only from the late 1940s that populism began its migration from Left to Right wing and only from the 1960s did conservatives begin to grasp its electoral potential (Kazin, 1998, p. 5).

What this demonstrates is, as Laclau has argued (2007, p. 176):

> Populism is not a fixed constellation but a series of discursive resources which can be put to very different uses. *It is thus a set of resources available to a plurality of actors, in a more or less systematic way.* (emphasis added)

In other words, populism does not have a pre-ordained ideological content but may be viewed as a set of tools that can be put to use in a systematic way. As such, attempts at defining populism on an ‘ideological’ basis have failed (Laclau, 2007).

While attempts at definitional precision based on ideology may fail, it is possible to outline some of its broad features (see also Hogg, 2013). What all populist movements (including penal populism) have in common is at heart a claim to represent ‘the people’. While who ‘the people’ are, is a complicated and often contested question, it is also a mark of ‘its political usefulness; captured at different times by many different political causes, it has been stretched to fit their different shapes’ (Canovan, 2005, p. 3). As Canovan (2005) has discussed, ‘the people’ encompasses the ‘whole political community’ but also some smaller often excluded group, the common or ordinary person (p. 90).

While the appeal to the notion of ‘the people’ is clearly an important rhetorical source of legitimacy for populist causes, my own interest is in harnessing the possible constructive participatory element that this may provide. At a point when formal democratic participation (including membership of trade unions and political parties) is at all-time lows including in Australia (Alexander, 2013; Koziol, 2013; Stoker, 2006), it seems crucial to develop a civic capacity, a sense of ‘public work’. Dzur (2010, 2012) speaks of this as ‘thick populism’ – a sense of ownership and public responsibility for public work and policy making.

The style of populism is reflective of its claim to represent the people, it being characterised by simple direct language – a distrust of jargon and experts – and a willingness to communicate in a tabloid way (Canovan, 1981, 1999; Kazin, 1998). This enables a reduction of the complexity of the issues presented to the people – something that has become characteristic of contemporary politics generally (Arditi, 2007, p. 62).

Canovan (1999) has described the mood of populism as having a revivalist flavour, powered by the enthusiasm that draws normally un-political people into the political arena. It plays to the emotions which are often heightened by populist movements being
led by a charismatic leader (Canovan, 2005, p. 89). The centrality of a leader (symbol or identity) for most populist movements will be discussed further below. Populism is described as having an episodic character which means it can often be short-lived (Canovan, 2005, p. 89; Taggart, 2000, p. 5). It has also been described as having an antagonistic, insurgent method emerging at times of crisis (Hogg, 2013; Taggart, 2000). As an antagonistic force, populism, therefore, has the capacity to disturb and renew the political process (Arditi, 2007, p. 52) – it functions within democracy but can also endanger its framework (Arditi, 2007). As discussed above, my interest is on how it may be a force for renewing the political.

Many of these general features of populism are elaborated in the work of Laclau (2007). Laclau’s work, while dense, is useful as he attributes a number of structural features to any populist rationality. I will focus on four here which I will then use in relation to analysing the Thomas Kelly case study.

If a populist movement is to emerge, Laclau (2007) argues that first an ‘internal antagonistic frontier’ must be formed dividing society into two camps – separating the ‘people’ from power. In doing so, populism ‘simplifies’ the political space, replacing a complex set of differences by a stark dichotomy whose two poles are necessarily imprecise (Laclau, 2007, p. 18). This simplification of the political landscape allows for a binary to be established, in traditional political terms, between ‘the people’ and the (mis-guided or corrupt) elites but more commonly today, between ‘us’ and ‘them’.

Secondly, there must be a unification of a plurality of demands in what Laclau (2007) calls an equivalential chain. For Laclau the smallest unit of analysis is the ‘social demand’ – meaning, in English, both request and claim. When a demand in the sense of a request is not satisfied it becomes a claim and may be put together with other unsatisfied demands (e.g. an initial request for better wages when unsatisfied may be put together with other such demands such as problems with water, health and schooling). If the situation remains unchanged there is an accumulation of unfulfilled demands and an increasing inability of the institutional system to absorb them in a differential way (i.e. in isolation from the others) and this is when Laclau says, an equivalential relation is established between them. Importantly, when they form an equivalential chain they may begin to constitute a broader social subjectivity that Laclau (2007) calls popular demands – they begin to constitute the ‘people’ as a potential historical actor (p. 74) and as the ultimate source of political authority.

Thirdly, the equivalential chain must be consolidated through the construction of a popular identity which is something more than the simple sum of the equivalential links. The popular identity is usually one of the individual demands from the equivalential links which comes to embody the totality of the series – it operates through a synecdochal structure. This demand remains a particular demand yet it also becomes the signifier of a wider universality embracing all of the heterogeneous demands. Laclau (2007) argues that the popular identity (whether word or image) is, however, an empty signifier – it can now name a much greater universality – and this popular symbol or identity actively constitutes the unity rather than passively expressing a previously given one. For example, the words ‘justice’ or ‘freedom’ have an undifferentiated fullness – they are not abstract terms but in the strictest sense are empty and can be invested with a multiplicity of demands. Importantly, grievances which have nothing to do with such demands can nevertheless be expressed through them.
Finally, populism works on the affective/emotional realm and this is often found most troubling about populism (and penal populism, as discussed above): that it operates on the emotions, through suggestibility and in and on the ‘crowd’. Instead of starting with a model of political rationality which sees populism in terms of what it lacks – vagueness, anti-intellectualism, pure rhetoric – Laclau (2007), drawing on the work of post-structuralists who have argued that there is no fixed meaning between a signifier and signified, sees vagueness, imprecision and rhetoric as preconditions to constructing relevant political meanings.

In the next two parts to this article, I want to explore the structure of populism within the context of a case study into the responses to the death of Thomas Kelly. These responses constitute a populist event in Laclau’s (2007) terms, and it illustrates that populism in a criminal justice context need not have a solely or primarily punitive nature. This case study is informed by a reading and analysis of key texts: media stories relating to Thomas Kelly for the period from Thomas Kelly’s death to September 2013 searched via Factiva which includes coverage of all major tabloid and broadsheets in Australia; Hansard speeches and debates; legislation enacted; relevant Ministerial Press Releases and other related documents; City of Sydney management plans and Lord Mayor Press Releases; and analysis of the documents of related organisations (such as the Australian Medical Association (AMA), the Coalition of Concerned Emergency Services Workers, Foundation for Alcohol Research Education (FARE) and the Police Association).

**Responses to the death of Thomas Kelly**

Just after 10 p.m. on Saturday, 7 July 2012, Thomas Kelly, 18 years of age, alighted from a taxi to begin his first night out in Kings Cross, Sydney, with his girlfriend. Some minutes later when they were walking down Victoria Street, in an unprovoked attack, Mr Kelly was king-hit in the face as he talked on his mobile phone near the Mercure Hotel, not far from the iconic ‘Coke’ sign in the place locals refer to as ‘the Cross’. He fell to the ground, hitting his head on the footpath, resulting in serious head injuries. He was transported by ambulance to St Vincent’s Hospital, Darlinghurst, where he received medical attention but never regained consciousness. On Monday evening, 9 July 2012, his family made the heart-wrenching decision to terminate his life support – they did so in time for his organs to be donated to others.

On Wednesday, 18 July 2012, at approximately 7.30 p.m. Homicide Detectives arrested Kieran Loveridge, 18 years of age, of Seven Hills in Western Sydney, and just before midnight charged him with the murder of Thomas Kelly. He was ultimately also charged with four other assaults from unrelated events on Saturday, 7 July 2012. Almost a year later, on 18 June 2013, Mr Loveridge pleaded guilty to the manslaughter of Mr Kelly and the four other assaults that occurred on the same evening he king-hit Mr Kelly. On 8 November 2013, Justice Campbell sentenced Mr Loveridge to a total of 7 years and 2 months for the combined manslaughter and four assaults being, 6 years for manslaughter (4 years non-parole period) and 1 year and 2 months for the assaults – with an effective non-parole period of 5 years and 2 months. The first date he will be eligible for parole is 18 November 2017 (R v Loveridge [2013] NSWSC 1638, [79]-[80]).
As a result of the sentencing proceedings, we now know more about the facts of the evening and particularly regarding Mr Loveridge’s alcohol affected state. From the agreed statement of facts tendered in the proceedings, the judgment (Loveridge at [9]) indicates that Mr Loveridge began drinking with two (or three) friends at around 5 p.m. and by 7:30 p.m. they had consumed between them a carton of two-dozen mixed drinks, each having an equivalent to 1.9 standard drinks. By this time, they had arrived in Darling Harbour by car where they went to a bar and drank further mixed drinks. They then caught a taxi to Kings Cross where they went to a bar in Darlington Road shortly before 9 p.m. Justice Campbell found, ‘[d]espite the lack of precision in the evidence, I am satisfied beyond reasonable doubt that by 9:30 pm on 7th July 2012, the offender was very drunk’ (Loveridge at [11]). Shortly afterwards the first assault occasioning actual bodily harm was committed and thereafter the fatal blow to Mr Kelly was struck. (The three other assaults occurred afterwards: Loveridge at [19].)

As will be discussed below, it is significant given that the populist campaign from its outset focused on alcohol-related violence, that at the time of the events in July 2012 and, as far as this author is aware, until the agreed statement of facts was tendered in the sentencing proceedings in September 2013, that information about Mr Loveridge’s drunken state was not made ‘public’ — either via the media, police, governmental or other discourses. In July 2012 when Mr Kelly was killed until the sentencing proceedings, whether or not Mr Loveridge was affected by drugs (such as methamphetamines) or alcohol or a combination of both was unknown (e.g. see Fife-Yeomans & Budd, 2012; Nicholls, 2012a; ‘When innocence meets primal savagery’, 2012). Furthermore, prior to the sentencing hearing very little attention was paid to Mr Loveridge in the media. There was no reporting on his background, criminal record and the fact that he was on conditional liberty at the time of committing the offence. Arguably, this was because legal proceedings were on-foot but this was also significant because, as will be discussed below, it allowed the focus of the populist campaign to remain on alcohol-related violence without shifting the debate back to a more narrow and punitive focus on ‘individual’ responsibility (particularly, that of Loveridge).

Even in the absence of the media representing an ‘ideal offender’ (Christie, 1986) the circumstances of Thomas Kelly’s death had all the hallmarks of an event that would trigger a classic penal populist response: a specific event involving an ‘innocent life’ being taken, generating community outrage. However, as will be discussed below, classic ‘law and order’ responses did not take centre stage during this period; rather, we have witnessed what the Government described as a ‘whole-of-government response’ (O’Farrell, 2012a, p. 15301; see also Quilter, 2013) to Mr Kelly’s death. There were four main phases to this response.

**The whole-of-government response**

1. **The audit**

The first phase was announced less than 10 days after Mr Kelly died, on 18 July 2012, and involved an immediate audit by the NSW Office of Liquor Gaming and Racing (OLGR) of the Responsible Service of Alcohol (RSA) registers of all 58 late trading...
licensed venues in Kings Cross. As will be discussed below, it was significant that the Government’s first response to Mr Kelly’s death was made by the OLGR – not by the Minister for Police or the Attorney General as would be more typical in a ‘law and order’ response. The audit announced was to have two stages. The first being to look at ‘the nature and substance of incidents that have been occurring at Kings Cross licensed venues and the adequacy of existing incident and RSA reporting at each venue’ (Souris, 2012a). The second phase was to compare the registers with police incident reports and Bureau of Crime Statistics and Research (BOCSAR) data to check for under-reporting of violent incidents (Souris, 2012b). The implication was that these venues might be covering up irresponsible service of alcohol and worse, under-reporting violent incidents, whether to avoid the ‘Three Strikes Legislation’ or to avoid the ‘Violent Venues Scheme’ or for some other improper purpose. In this way, in undertaking the audit, a very public link was made by the Government between venues in the Kings Cross Precinct and alcohol-related violence.

2. Liquor licence conditions and education campaigns

The second phase of the Government’s response followed quickly after the audit. On 15 August 2012, the same day a formal tribute was made to Thomas Kelly in Parliament (Blair, 2012), the Premier moved to introduce a raft of restrictive licence conditions on the licensed venues in the Kings Cross Precinct. The licence restrictions were justified on the basis that the audit had uncovered ‘a large disparity’ in the registers of many venues (O’Farrell, 2012a). The conditions announced by the Premier among other things, importantly imposed restrictions on the type and amount of alcohol that could be sold on Friday and Saturday nights after midnight together with introducing new CCTV conditions covering entries/exits for venues trading past midnight (O’Farrell, 2012a, p. 13824; see also Souris, 2012c). These conditions, as will be discussed below, pick up and introduce measures advocated for by the Coalition of Concerned Emergency Services Workers (2010) (composed of police, nurses, doctors and ambulance officers) in their Last Drinks Campaign.

On the same day as the licence conditions were announced by the Premier, George Souris JP MP, Minister for Tourism, Major Events, Hospitality and Racing also announced three alcohol education campaigns to be undertaken by the Government via the NSW Ministry of Health and OLGR (Souris, 2012d, p. 13826). The Minister attributed these initiatives to a ‘pledge’ given to David Anstee, a close friend of the Kelly family, who, on the family’s behalf, was seeking ways to solve the problem of alcohol-related violence (Souris, 2012d, p. 13826). Thomas Kelly’s father joined the Minister for the launch of the third education campaign (a resource developed by the OLGR and ultimately entitled, ‘Out Tonight? Party Right’) on 14 February 2013 (Souris, 2013a).

3. The 18 September 2012 response

The next month, on 18 September 2012, Premier O’Farrell announced the NSW Government’s 10-point plan for ‘Cleaning up the Cross’ (O’Farrell, 2012d).
This 10-point plan needs to be read alongside the September 2012 ‘NSW Government Response to Issues in Kings Cross’ (the Response) (NSW Government, 2012) which extends and further details the 10-point plan. These plans set out a multi-faceted agenda incorporating responses under Compliance and Enforcement; Transport; and People and Places. Each of these areas of the Response sets the Government’s legislative and other agendas in relation to intervention into alcohol-related violence in Kings Cross for the year to come and I will refer to these initiatives in more detail below.

4. The ‘Legislative’ phase, September 2012–October 2013

While it would be wrong to characterise the Government’s actions as only legislative during this phase, nevertheless in the 12 months since announcing the Response a staggering seven pieces of legislation have been passed with explicit regard to Mr Kelly’s death. In discussing the Response below, I make reference, where relevant, to the legislation introduced by the Government or action taken, to accomplish the plan in the period.

The first area, ‘Compliance and Enforcement’, was the most extensive with the Government’s Response including:

- an expanded boundary for the Kings Cross Precinct and a freeze on new liquor licences for a further 3 years in the area (until 24 December 2015). These plans became law a mere 2 months later with the passing on 20 November 2012 of the Liquor Amendment (Kings Cross Plan of Management) Act 2012 which commenced operation on 7 December 2012.
- prescribing the restrictive liquor licence conditions announced on 15 August 2012 through the Liquor Amendment (Kings Cross Plan of Management) Act 2012. This Act amended both the Liquor Act 2007 and the Liquor Regulation 2008 to prescribe in pt 5A the ‘Special licence conditions for premises in Kings Cross precinct’. These conditions were also extended to all late night trading venues within the expanded Kings Cross Precinct.
- implementation of linked ID scanners, to confirm and record identities of banned persons entering premises in the Kings Cross Precinct. These measures were incorporated into the Liquor Amendment (Kings Cross Plan of Management) Act 2013, which received assent on 23 October 2013 and commenced operation on 6 December 2013. This Act amended the Liquor Act 2007 and the Liquor Regulation 2008 to provide for the ID scanning of all patrons who enter high risk venues in the Kings Cross Precinct and for two new types of banning orders (a 48-hour ban and a 12-months ban) that will prohibit certain persons from entering licensed premises in Kings Cross (see Liquor Act 2007 ss 116AA-116AF; Liquor Regulation 2008 cls 40 A, 41 A and 53Q).
- the creation of a small bar licence defined as ‘a bar catering for 60 or fewer patrons’ to ‘promote diversity’ and create a different ‘business model for the industry’ (Souris, 2012e). This initiative was enacted through the Liquor Amendment (Small Bars) Act 2013 (commencing on 1 July 2013).
the trial of a sobering-up centre to service the precinct. In the end, three 12-
month trial sobering-up centres were created when the Intoxicated Persons
(Sobering Up Centres Trial) Act 2013 commenced operation on 24 May 2013.

Supplementary policing at peak times, the cost of which to be contributed to by
licensed premises in Kings Cross.

All relevant staff of Kings Cross licensed venues to transition to Mandatory
RSA Competency Cards by 1 March 2013 (enacted in the Liquor Amendment
(Kings Cross Plan of Management) Act 2012). A power to revoke
RSA Competency Cards where an employee has committed a serious breach
of their obligations to RSA was also enacted in the recent Liquor Amendment
(Kings Cross Plan of Management) Act 2013 which amended the Liquor
Regulation 2008 (NSW) inserting the power in cl 39AA and commencing oper-
ation on 6 December 2013.

‘Operation Rushmore’ led by NSW Police to ‘target alcohol-related crime,
anti-social behaviour and violent behaviour in public spaces in the lead-up
to and over summer in Kings Cross’ (O’Farrell, 2012d). The first such ‘blitz’
occurred on Friday 28 September 2012 and continued over the October 2012
long weekend.

the use of drug detection dogs by police without warrant in Kings Cross and on all
metropolitan and inter-city train lines. Ultimately, the Law Enforcement (Powers
and Responsibilities) Amendment (Kings Cross and Railway Drug Detection) Act
2012 provided for these measures which received assent on 29 October 2012.

The second part of the September 2012 Response, ‘Transport’, included: improve-
ments to the major taxi rank servicing Kings Cross to increase the safety of taxi services;
a trial of pre-paid taxis; an extension of late night bus services and improved ‘signage
and way-finding’ for patrons in the Cross (NSW Government, 2012, p. 4). The pre-paid
taxi legislation was introduced by Regulation and commenced on 12 October 2012: Pre-
Paid Taxi Legislation: Passenger Transport Amendment (Kings Cross Taxi Fare Pre-
payment) Regulation 2012 amending the Passenger Transport Regulation 2007. The
Mayor also announced the city had been given $200,000 from the federal government
to install dedicated CCTV and improved lighting at the major taxi rank on Bayswater
Road taxi servicing Kings Cross.

The final part of the Response, ‘People and Places’, included: a police officer being
stationed in the Sydney CCTV control room every Friday and Saturday night; the
delivery (in conjunction with the City of Sydney Council) of a co-ordinated education
and public information campaign on risky drinking, transport services and complaints
systems; and support for the Kings Cross Festival in early November 2012, to encourage
a diversity of people to use the Cross.

The point of this detailed catalogue is to highlight the fact that, in the 15 months after
Thomas Kelly was killed, the Government pursued a sophisticated and multi-faceted
policy programme to deal with the problem of alcohol-related violence in Kings Cross. I
want to draw attention to the remarkable nature of this response and what is particularly
noteworthy is that it is a dramatic departure from the typical ‘law and order’ responses
we have historically witnessed in NSW when a specific event triggers community out-
rage. Indeed, of the seven pieces of legislation passed between Mr Kelly’s death and late
2013, only one could be said to be of the classic penal populist kind – the use of drug detection dogs without warrant.

In the next part of this article, I want to explore the important question to which this account gives rise: how did a single act of extreme violence trigger such a multi-faceted and nuanced response by the Government to the problem(s) of alcohol-related violence? Moreover, what were the conditions that made it possible for this to happen when one might have expected (given the history in NSW) a classic penal populist/law and order response? The first point to recognise is that prior to Mr Kelly’s death, the problem of alcohol-related violence in Kings Cross had been the subject of research, media coverage and political discussion. While in the period prior to Mr Kelly’s death (January 2007–December 2011) reported rates for violent offences declined and non-domestic assaults were stable in the Sydney area (Goh & Moffatt, 2011), the NSW Government’s Violent Venues Scheme and the Three Strikes Legislation (discussed above) demonstrate that the government was already addressing the relationship between alcohol-related violence and licensed premises. The need for complex and nuanced responses specifically in the Kings Cross Precinct was well articulated by Clover Moore, the Lord Mayor of the City of Sydney, and then member for Sydney in the NSW Parliament, during the debate in October 2011 about the Three Strikes Bill:

Sydney has a thriving nightlife but it needs to be safe for everyone. Alcohol related violence and antisocial behaviour are a serious ongoing problem, particularly in the inner city. In Kings Cross last year the City of Sydney recorded 80 violent incidents in just one hour between 1.00 a.m. and 2.00 a.m. on a Sunday and police tell me such incidents are happening every week end. Making our night time economy safe is a priority. Our current approaches are very limited and crime safety experts, police, emergency workers, venue patrons and city residents all want something to be done. Having high quality, well managed and safe late trading premises is central to our reputation as a safe place to visit. (Moore, 2011, p. 6711)

In other words, the problem of alcohol-related violence in Kings Cross did not come into being in July 2012. However, prior to Mr Kelly’s death there had not been a cohesive focus for the range of disparate issues associated with the problem in Kings Cross. Following Mr Kelly’s death, as will be discussed below, a populist movement of a non-punitive variety took hold of the debate unified around his popular identity. In the discussion below, I will organise the telling of the story behind the Government’s response around four key themes, drawing on Laclau (2007) and other accounts of populism: the role of the media; the unifying effect of the emotions; the importance of populist rhetoric; and finally, the consolidation of the campaign through a popular identity.

The populist campaign
The framing power of the media

The media are often targeted in critiques of penal populism for misinforming the public and fostering punitive attitudes. The coverage following Mr Kelly’s death in July 2012 was anything but. The media campaign during the first 4–6 weeks after his death was prolific and I make mention of only four examples of the many, to illustrate how the
media was actively involved in framing the problem and, subsequently, the solutions, as one of alcohol-related violence.

Less than a week after Mr Kelly’s death, on 12 July 2012, Fairfax launched its Safer Sydney campaign to ‘champion civility over thuggishness and rudeness, to restore Sydney as a safe place’ (‘Editorial: Enough is enough with Kings Cross lawlessness’, 2012). Thereafter, stories relating to Mr Kelly’s death and what quickly became synonymous with it, alcohol-fuelled violence, were led under the banner ‘Safer Sydney’. Five days later on 17 July 2012, Fairfax hosted a packed public forum as part of the ‘Safer Sydney’ campaign, on ‘How to tackle violence on the city’s streets after dark?’, at the Town Hall (the Forum). This event had been widely advertised through the Sydney Morning Herald under the ‘Safer Sydney’ banner. A broad range of representatives included politicians (Malcolm Turnbull MP (the federal MP for the area), George Souris JP MP (the Minister with responsibility for hospitality and liquor licensing) and Lord Mayor Clover Moore), police (including Assistant Commissioner Mark Murdoch), the Director of the NSW Bureau of Crime Statistics and Research (BOCSAR), Don Weatherburn, representatives from the hotel industry (including Doug Grand, Kings Cross Licensing, and Paul Nicolau, NSW CEO of Australian Hotels Association), business owners and an estimated 600 community members. Notably, the typical Government leaders for law and order crises (the Attorney General and Police Minister) were not present. The event was streamed live over the internet and what quickly became clear was that the majority attending the Forum believed that ‘alcohol’ and its availability were the problem. This was made explicit when Assistant Commissioner Murdoch, to a roar of applause from the audience, said:

I’m going to cut straight to the chase. It’s the abuse and availability of alcohol that’s the problem. (Moore M., 2012)

Weatherburn backed up this claim, making it clear that drugs (such as methamphetamines) were not the issue in the Cross but rather alcohol was. He indicated that 86% of assaults that occur within a 500 metre radius of Kings Cross are alcohol related; that violence is concentrated on two streets, Darlinghurst Road and Bayswater Road; and that the violence occurs between the hours of 12 a.m. and 3 a.m. (Davies, 2012, p. 1).

The Forum also usefully articulated a series of related issues exacerbating the problems with alcohol and top of that list was the lack of public transport in the area. As Turnbull said at the Forum:

It’s clearly nuts to have venues trading, people up there drinking until three or four in the morning and having the last train ending at a quarter to two. (Tovey, 2012a)

Assistant Commissioner Murdoch had previously articulated this problem:

We get all these people up to Kings Cross and they stay there because the places stay open and then we turn the transport off...and there is just no motivation for people to leave the area and go home. (Ralston & McKenny, 2012, p. 1)

Other related issues that emerged from the Forum were the late-night trading hours and density of venues in the area and excessive alcohol consumption. This Forum operated
to frame the mood and themes for the ensuing debates that focused squarely on the need for a multi-faceted, co-ordinated response to alcohol-related violence.

On 16 July 2013, the ABC’s 7:30 Report ran, ‘What does a night in Kings Cross look like?’ making mention of Thomas Kelly’s death as the cause for the segment. Adam Harvey of the ABC, spent the night in the Cross and spoke with a broad range of persons from young people going out that night, to police including Assistant Commissioner Murdoch, owners of nightclubs, Doug Grand from Kings Cross Licensing, private security guards, the Kings Cross Residents Association and the Head of Emergency at St Vincent’s Hospital. Again the most explicit themes to emerge from the segment were the lack of late night transport, excessive alcohol consumption, Australia’s drinking culture and its relationship to alcohol-related violence.

Finally, on 26 July 2012, News Ltd launched its Real Heroes Walk Away campaign. Mr Kelly’s death was again the catalyst for the campaign which is aimed particularly at young men aged 15–25 years. The message is a simple one: ‘When trouble starts, walk away. There is nothing heroic about getting involved in a fight. Heroes don’t escalate violent situations, they defuse them’ (McIlveen, 2012). The focus of the campaign was clearly on ‘preventative’ strategies not punitive measures. In September 2012, Ralph Kelly endorsed the Real Heroes Walk Away campaign, urging all Australians to support it.

Importantly, in these early days and until the sentencing of Mr Loveridge, there was no attempt in the media or otherwise to shift the debate back to a more traditional (and narrow) law-and-order focus. The police certainly did not try to own the issue as a ‘law and order’ one and there were no cries made for more police powers and resources. For instance, Assistant Commissioner Murdoch summed up the problems as ‘too many venues, their late night trading and the lack of public transport options to get people home’ (Ralston & McKenny, 2012, p. 1). These problems he said were known to the state government, local council, the venues and the relevant agencies and now was the time to ‘stop the buck-passing and get on with fixing it’ (Ralston & McKenny, 2012, p. 1). Ironically, in the immediate aftermath of Mr Kelly’s death, it was only the NSW Chief Executive of the Australian Hotels Association, who attempted to suggest that greater policing in the area would solve the issues, calling for a New York-style zero tolerance on crime in the Cross (Murphy & Moore, 2012, p. 1). This was never accepted as the appropriate solution nor did the Government act upon the suggestion.

Emotion as a unifying force

One of the suggested ‘remedies’ to penal populism discussed above, is to eschew popular emotionalism and return to a more rational crime policy debate. As I have also argued above, this approach fails to mobilise the potentially positive and progressive role that popular emotionalism may play. When we look at the public discourses in the immediate aftermath of Thomas Kelly’s death it is clear that an emotional driver lay behind the momentum to do something positive. Mr Kelly’s death was variously described not only as a tragedy (Nicholls, 2012b), a senseless death (Souris, 2012d, p. 13826), a ‘shocking death’ (Upton, 2012, p. 15310), one provoking sadness (Upton, 2012, p. 15310), sympathy (Taylor, 2012) and grief (Tovey, 2012b) but also
anger, revulsion (Clark, 2012) and outrage (O’Connor, 2012). Often at such moments a more polarising and demonising economy enters the public discourse as discussed in part one of this article, but what became a common feature in this instance, particularly through representations in the media, was that these emotions operated to unify the people against a common ‘enemy’ of ‘alcohol-fuelled violence’. Such sentiments are reflected in the Premier’s announcement in Parliament of the 15 August 2012 licence conditions:

Mr Matt Kean: My question is addressed to the Premier. What is the Government’s response to the recent audit of licensed late trading venues in Kings Cross?

Mr Barry O’Farrell: I thank the member for Hornsby for his question. I know the answer to this question will be of interest to everybody following the tragic death last month of Thomas Kelly. Whether it is because we go there, or because our children or our grandchildren go there, or because we care about what happens in our city, concerns about the safety of people who visit Kings Cross are an issue for almost every one of us. The alcohol and drug fuelled incidents that occur at Kings Cross and their impacts upon innocent individuals and their families are a blight upon this city…

[after announcing new measures to curb alcohol related violence in Kings Cross]

…the Government makes no apologies for seeking to improve the safety and amenity of Kings Cross. The memory of Thomas Kelly deserves no less. (O’Farrell, 2012a, pp. 13823 13824)

From a very early point, the emotional responses to Mr Kelly’s death did not lead to a punitive public but for a call for real and enduring action:

Enough with the hand wringing that goes back generations. The city demands action. Local and state governments, too ready to shrug impotently at a problem beyond any one agency to remedy, must put heads and resources together, looking not at policing and entertainment venue planning in isolation but how each buttresses the other. . . . An event sometimes shakes society from its slumber, demanding action over indignation. The death of Thomas Kelly . . . is one such event. (‘Editorial: Enough is enough with Kings Cross lawlessness, 2012)

Polling results undertaken by the FARE released on 30 August 2012 ahead of a community forum that evening to discuss alcohol-related violence following Mr Kelly’s death, backed up this call. The polling indicated that 77% of adults in NSW believe more needs to be done to reduce alcohol harms and 80% of NSW adults believe NSW has a problem with excess drinking and alcohol abuse. The results also showed that there is a perception that government, the alcohol industry, and pubs and clubs are not doing enough to address the problem (FARE, 2012a). FARE claimed the NSW ‘community is united in its desire for action to tackle alcohol-related problems’ (FARE, 2012b).

This call for action was also echoed by a range of professionals and organisations. For instance, the Coalition of Concerned Emergency Services Workers (2010) called for
real action through the institution of the restrictive measures of the Last Drinks campaign which had been successfully used in Newcastle in 2008 to reduce alcohol-related assaults. These measures include: the imposition of a lockout from 1 a.m. on all hotels and bringing forward the closing time for venues to 3 a.m.; a prohibition on the sale of shots and mixed drinks stronger than 5% alcohol by volume after 10 p.m. and a prohibition on the sale of more than four drinks to any patron at one time and a requirement to provide free water stations on every bar (Coalition of Concerned Emergency Services Workers, 2010, pp. 3, 4). These measures were also supported by the two peak bodies respectively for doctors and police, the AMA (O’Connor, 2012) and the Police Association (Weber, 2012). FARE called for the Government to address the problem of alcohol harms NSW-wide through its 10 Point Plan to Reduce Alcohol Harms in NSW released on 25 August 2012. The 10 points include restrictions on trading hours, density of venues, pricing of alcohol and introducing appropriate transport (FARE, 2012a). The National Drug and Alcohol Research Centre, UNSW, argued for the need to attack the causes of alcohol-related violence: the availability of alcohol; advertising; and price (Shakeshaft, 2012, p. 9).

Finally, these calls were echoed in Parliament:

The Government is determined to ensure that the tragic death of Thomas Kelly leads to action from not just the State Government but also the City of Sydney to minimise the chances of such an incident happening again. (O’Farrell, 2012e, p. 16979; see also Brookes, 2012, p. 16368; MacDonald, 2013, p. 23367)

These voices significantly overlapped in relation to the key problem of addressing alcohol and its (over)availability. This focus was also powerfully legitimised by Mr Kelly’s family. Unlike the many times when a family who loses a loved one to a crime is presented in the media as grief stricken but also wanting ‘justice’/retribution, Mr Kelly’s family made it clear from the outset that they wanted their son’s life to ‘make a difference’; for something good to come of this. Since Thomas’ death, the Kelly’s have advocated for strategies to reduce alcohol-related violence, perhaps most notably in establishing the Thomas Kelly Youth Foundation in December 2012.18 On its website, the Foundation appeals to ‘the people’ to take action against alcohol-fuelled violence. While populist, it is without the punitive edge, calling for ‘real change’, listing policing and sentencing as strategies but also stating ‘We need effective measures to address the issue in a meaningful and long-term manner’ and calling on the state government to ‘reduce the trading hours of licensed venues, set limits on the number of new liquor licences and provide the community with a greater say in the determination of new liquor licences’.

Importantly, the action called for across the spectrum was for a more nuanced, complex and enduring response, in stark contrast to the often ‘big splash’, but minimal effect, law and order responses we are used to seeing from state governments.

**Rhetorical devices**

From an early point the campaign came to be known by the powerful popular trope of ‘alcohol-fuelled violence’ – often replacing the more accurate descriptor ‘alcohol-related
violence’ evoking the empirical link that has been demonstrated to exist between alcohol and violence (e.g. Burgess & Moffatt, 2011). This expression was used in the press, by related organisations and in the Parliament. As post-structuralists and others have argued language does not simply describe a pre-existing reality but is involved in actively constructing it. The trope, ‘alcohol-fuelled violence’, was important for three reasons relating to how it contributed to constructing ‘the problem’ and the solutions to follow.

First, the expression ‘alcohol-fuelled violence’ operates rhetorically to posit ‘alcohol’ as the problem and those that ‘fuel’ it as the enemy – arguably the liquor industry. In this way, rhetorically the problem was framed almost from the outset as one that related to alcohol and those who (irresponsibly) supply it. Returning to Laclau’s (2007) work, this simplified the political landscape replacing a complex set of issues with a single problem. It also operated to produce a binary between ‘the people’ (as described by the Premier above) and the liquor industry which will be discussed further below.

Second, while the language was populist and emotionally charged, linguistically the language does not foster the classic punitive outcomes often associated with penal populist rhetoric such as ‘three strikes’ legislation. The trope, ‘alcohol-fuelled violence’, if anything operates to remove individual responsibility that could have triggered a more classic demonising of such individuals as Mr Loveridge or others who commit similar acts of violence. As has been discussed above, this is consistent with the fact that prior to the sentencing proceedings, Mr Loveridge was not discussed in the media stories about Mr Kelly’s death and certainly no reference was made to his criminal past. The refrain ‘alcohol-fuelled violence’ suggests that these are not bad people per se – they are our sons, our grandsons, our relations as the quote from the Premier above suggests – it is rather the ‘alcohol’ that fuels them to act violently and those doing the ‘fuelling’ are to blame.

Finally, and perhaps most importantly, having rhetorically framed the debate as one relating to alcohol and its supply, this provided the conditions of possibility for the more nuanced solutions documented above – and, importantly, made other more punitive responses unintelligible. As the overview of the Government’s responses demonstrates, in the 15 months after Mr Kelly’s death the emphasis was on the availability (and strength) of alcohol and the role licensed venues in Kings Cross (irresponsibly) play in fostering that availability. This was the resonating message in undertaking the audit and in its results; it was the reason for the licence conditions being imposed in the Kings Cross Precinct; for the creation of the small bar licence and the implementation of ID scanners.

The power of this campaign to frame the debate and its solutions as one about alcohol is reflected in the fact that in the early days following Mr Kelly’s death, it was the Minister for Tourism and Hospitality, Souris JP MP who appeared as the face of the Government at the Forum (discussed above) and in so many of the media and Parliamentary debates that followed. More typically, a killing would be framed as a law and order issue, with the classic custodians being the Minister for Police or the Attorney General – yet we heard little from them in this campaign. By contrast, after Mr Kelly’s death, 20 of the 40 official media releases from the Minister for Tourism and Hospitality refer directly to Mr Kelly and/or to alcohol-related violence.
The successful nature of the campaign is demonstrated in the distance Souris JP MP travelled from his first comments 10 days after the death of Mr Kelly:

[Souris JP MP] said it was possible the incident [Mr Kelly’s death] was unrelated to alcohol and that licensing should not be the sole focus.

I want to be careful not to create a scenario in Sydney where we drive a lot of the industry underground,…

Mr Souris described Mr Kelly’s death as ‘very sad and unfortunate’ but pointed out that the assault occurred at the relatively early time of 10pm. ‘It wasn’t at a licensed venue, it wasn’t immediately at the front door of a licensed venue,’ he said. (Nicholls, 2012a)

The contrast between these early words and what the Government did in the subsequent 15 months is testimony to just how effective the campaign was. It is also a reflection of the potential power of mobilising the public’s emotions and the power of rhetoric. If we look at Mr Kelly’s death ‘rationally’ as is often advocated by critics of penal populism, are not Souris’ conclusions correct? Could the nuanced and multi-faceted response have been advocated? Mr Kelly did not die after a big night out at or near a licensed venue; he was not affected by alcohol; it was relatively early in the evening (10 p.m.); he did not have problems with transport; he did not have a chance to walk away and it was only in September 2013 that the perpetrator’s alcohol affected state (none of which appears to have been consumed in the Kings Cross Precinct) became public knowledge. Rationally, the solutions we have witnessed have been only tangentially related to the circumstances of Mr Kelly’s death. Added to all of this, is the fact that assaults at or near licensed premises during the same period have been declining (Goh & Moffatt, 2012, 2013; Snowball & Spratley, 2013).

Popular identity

The above discussion makes it clear that there were a large number of voices and organisations involved in this campaign, many of whom have different agendas, represent different interests and have been working for years on these issues with significant knowledge and experience, yet often with little traction. How was it possible to bring them all together at a particular moment and to keep them united for a sustained period with a primary goal of tackling ‘alcohol-fuelled violence’? I would suggest, in Laclau’s (2007) terms, that Mr Kelly became the ‘popular identity’ unifying what was otherwise a series of differential claims – arguments over planning and licensing laws; public transport; education campaigns; restrictions on availability and type of alcohol, etc. It is also important that through this process political alignments are reconfigured – for instance, the police are often aligned with ‘law and order’ campaigns but here were realigned with doctors and other emergency service workers in relation to harm minimisation strategies.

Thomas Kelly was the true innocent, the ‘ideal victim’ (Christie, 1986); he was simply in the wrong place at the wrong time, and everyone could relate to the randomness of the attack. Mr Kelly could be anyone’s son, brother, partner, husband and grandson. For so many news stories though, we know very little about Thomas Kelly, other than he was a
young man who was just beginning to ‘find his feet’ when he was tragically killed. Yet in this gap, Thomas Kelly has been ‘filled’, in Laclau’s (2007) terms, and comes to have an undifferentiated fullness invested with a multiplicity of demands which he unifies in the fight against alcohol-related violence. If we evaluate the content of the different claims and responses as discussed above, these claims were arguably only tangentially related to Mr Kelly’s death. Yet very quickly he became the popular identity for this campaign, a synecdoche, ‘standing in’ for, alcohol-related violence in the Cross.

The collocations of ‘Thomas Kelly’ with alcohol-related violence are numerous to the point where in the public discourse his name stands in for it (and vice versa). As Gross, Moore, and Threadgold (2007) argue, to ‘collocate’ is not simply to ‘co-occur’ but rather phrases co-occur because they are seen to belong to the same field or subject matter, share meanings and to belong together (p. 25). Nowhere is this connection made more explicit than in Parliament where his name is mentioned in relation to literally every piece of legislation passed by the Government in its response to alcohol-related violence. The examples are numerous,20 and here I mention only the Premier’s link between Mr Kelly and the Government’s legislative measures to combat alcohol-related violence in the Cross:

**Gabrielle Upton:** My question is addressed to the Premier. What are the latest developments in the Government’s efforts to clean up Kings Cross?

**Mr Barry O’Farrell:** I thank the member for Vaucluse for her question and for her interest in this important matter, which was brought into sharp relief by the death of Thomas Kelly in July. The Government is determined to do what it can to ensure that such an event is not repeated. Yesterday legislation was passed by this Parliament to help achieve our goal of trying to minimise the risks faced by people young and old who simply want to head off to Kings Cross to have a good night out. The Liquor Amendment (Kings Cross Plan of Management) Bill 2012 implements the first stage of the Government’s response to the death of Thomas Kelly and will be in place in time for the summer holidays, next month. (O’Farrell, 2012e)

Mr Kelly’s popular identity continues to symbolise this campaign through the work of the Thomas Kelly Youth Foundation. The Foundation’s three major initiatives since formation include: a citizen’s jury to make recommendations to Parliament on ‘How we can ensure we have a vibrant and safe Sydney nightlife?’ commencing in February 2014; the development of a ‘TAKE KARE Safe Zone’ in Darlinghurst for intoxicated youths to seek assistance (in the form of water, calls to family/friends, thongs to replace high heels, transport or even hospitalisation);21 and finally, funding for 10 additional CCTV cameras to be known as ‘TK: Take Kare’ – TK being Thomas’ nickname among his friends. Each of these initiatives in Thomas Kelly’s name continue to symbolise the campaign against alcohol-related violence.

**Conclusion**

In this article, I have argued that populism is not by definition a punitive influence on crime prevention policy. The Thomas Kelly case study illustrates that populism can have a constructive impact on government policy and legislation. The central role that a
populist campaign played in framing the problem and, subsequently, the solutions, as one of ‘alcohol-related violence’ produced the conditions of possibility for the nuanced and complex set of responses made by the NSW Government. It also provided the conditions for a powerful realignment of the police with other emergency service workers away from ‘law and order’ politics and towards harm minimisation strategies. This case study invites further research into alcohol-related violence and other crime problems, in order to shed further light on the optimal conditions for generating constructive policy responses that are informed by non-punitive populism. Key insights offered by the Thomas Kelly case study are to take seriously rather than dismiss the rhetoric of populism and the potential of centring the emotions, the role of the media and the unifying power of a popular identity.

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Notes

1. The author is indebted to Hogg’s most recent work which drew attention to Laclau’s thesis on populism (see Hogg, 2013, pp. 113, 114).
2. Kings Cross has a long standing reputation as a ‘party precinct’ of Sydney; the Lord Mayor has indicated that on an average Saturday, Darlinghurst Rd (one of the main streets in the Cross) has 21,600 people from 11 p.m. to 3 a.m. (Moore C., 2012; see also Souris, 2012f, p. 16401).
3. A ‘king hit’ is ‘generally characterized by a single blow to the head, incapacitating a victim causing them to fall to the ground becoming unconscious. This may be either due to the punch itself, or as a result of the impact between the head and the ground’ (Pilgrim, Gerostamoulos, & Drummer, 2013).
4. For a discussion of the outrage that the sentence provoked and the NSW Government’s ‘law and order’ response to the sentence, see Quilter (2014a and 2014b).
5. Indeed, the secrecy that appears to have surrounded this information is reflected in the fact that the Australian Hotels Association (AHA) NSW branch submitted an application to NSW Police seeking a copy of the background to Mr Kelly’s death including Mr Loveridge’s movements prior to and following the assaults (Davies, 2013).
6. Until Justice Campbell’s judgement was handed down on 8 November 2013, the media did not report on Mr Loveridge’s background including his criminal record which included offences of taking and driving a car without the consent of the owner, damaging property, assaulting an officer and affray. More importantly, Mr Loveridge had a record for violence (assault occasioning actual bodily harm) and was on conditional liberty at the time of committing the manslaughter: see R v Loveridge [2013], [25] [29]. Had this background information been released it is possible that the progressive populist campaign may have taken a different turn. Certainly, events following Mr Loveridge’s sentence have demonstrated a more typical punitive response by the media, the public and the NSW Government: see Quilter (2014a). By way of comparison it is noted that a very different media, public and governmental response...
arose in relation to the (almost) contemporaneous rape and murder of Jill Meagher in September 2012 in Melbourne, Victoria. The perpetrator of that crime, Adrian Bayley, was on parole at the time of the offence and had a long criminal record including for sexual violence—so much so that he was named a ‘recidivist violent sexual offender’ by Nettle JA in sentencing Bayley: see *The Queen v Bayley* [2013] VSCA 295, [17]. In addition to the very punitive response by the public to this offender, the Victorian Government focused on problems with the parole system generally responding with a more typical ‘law and order’ response: see, for instance, *Callinan* (2013); and the *Justice Legislation Amendment (Cancellation of Parole and Other Matters) Act 2013* (Vic).

7. After the sentencing of Mr Loveridge, the discourse changed to a more classic ‘law and order’ one discussed in Quilter, 2014a and 2014b.

8. See the *Liquor Amendment (3 Strikes) Act 2011* which inserted a new pt 9A, ‘Disciplinary action – 3 strikes’ into the *Liquor Act 2007*. This enabled the Independent Liquor and Gaming Authority to impose restrictions on licences including suspension and cancellation according to the number of strikes.

9. The violent venues list relates to the number of recorded violent incidents at a venue and once certain thresholds are reached (commencing with more than 12 18) certain licence restrictions are imposed by the OLGR.

10. It is noted that the AHA attempted to prevent these conditions being made law with one of the largest venues in the Cross, seeking and obtaining at first instance, an injunction in the Supreme Court. The state successfully appealed the injunction: see *Director General Department of Trade & Investment, Regional Infrastructure and Services v Lewis* [2012] NSWCA 436.

11. For further detail on the conditions see *Quilter* (2013). It is noted that the big concession made to the liquor industry was the incorporation of provisions to exempt certain licensees on application: see cl 53E, 53F and 53H.

12. In Parliament on 15 November 2012, O’Farrell indicated that 32 new route 999 bus services every weekend to and from Kings Cross had been introduced, being 200 additional bus services, and that the N100 express NightRide had offered an additional 16 late night weekend services carrying around 1000 people out of the Cross to connect with other transport services.

13. While there was no particular upswing in reported violence offences in the Sydney area in the two years leading up to Mr Kelly’s death (see Goh & Moffatt, 2011), there was a strong focus in the research on the correlation between the density of licensed premises generally (but also specifically in Kings Cross) and assaults: see for instance, Donnelly, Pynton, Weatherburn, Bamford, and Nottage (2006); Urbis JHD (2006); Fleming (2008); Fitzgerald, Mason, and Borzycki (2010); Burgess and Moffatt (2011); Shakeshaft, Love, and Wood (2011); Payne and Gaffney (2012).

14. A Factiva search of major Australian media stories on alcohol and violence in Kings Cross reveals that between 1 July 2013 and 30 June 2012 there were approximately 30 stories significantly less than the 180 stories in the following year (1 July 2012 30 June 2012) which includes the period after Mr Kelly’s death. Analysing these articles indicates that some of the initiatives introduced by the NSW Government following Mr Kelly’s death had been under discussion in some form in this earlier period. For example, articles relate to: the NSW license freeze for Kings Cross pending a study commissioned by NSWOLGR on the effects of density of venues on assault, drink driving and anti social behaviour (Silmalis, 2012); police concerns over glassing incidents including in Kings Cross (see Chambers & Klein, 2011); calls by the police and other groups for the institution of the Last Drinks measures in Kings Cross (Hansen, 2011); discussion of the NSW Government’s Three Strikes legislation and the Violent Venues Scheme (see Nicholl, 2011); discussion of small bars as a solution to alcohol related violence (see Olding, 2012) and the formalisation of the Kings Cross Licensing...
Accord Association with its members proposing to formalise a list of banned people from venues, introduction of ID scanners as a requirement of entry and a radio network with premises being able to alert private security and police of trouble (see Howden, 2011). It is noted that many of these initiatives were later taken up in the NSW Government’s response to Mr Kelly’s death.


16. Although it is also noted that in the period prior to Mr Kelly’s death Kings Cross featured as a ‘success’ story when Souris MP indicated, ‘For the first time there are no level 1 or level 2 venues in Kings Cross’ on the Violent Venues list (Souris, 2011, p. 7737).

17. This is very different to the media coverage of similar one punch deaths in Queensland between 2006 and 2009 as documented by Burke who describes the media as setting off a ‘moral panic’ about youth behaviour: see Burke (2010).

18. The Thomas Kelly Youth Foundation was launched with great fanfare as a fundraiser at The Star Casino, Sydney, on 19 September 2013 with celebrities, performers, politicians, the media and the academy.

19. In asserting this, the author is not, however, naïve as to the power exercised by the liquor industry over the Government. The concessions made to the liquor industry in relation to the recent sale and promotion of alcohol guidelines is just one example: see NSW Office Liquor, Gaming & Racing, 2013.

20. For other collocations of the name ‘Thomas Kelly’ with government initiatives see the Premier’s announcement of the liquor licence restrictions (O’Farrell, 2012a, p. 13823); the discussion of the Kings Cross Management Plan (O’Farrell, 2012c, p. 15301 and 2012e, p. 16979; see also Souris, 2012f, p. 16401); the announcement of the Government’s alcohol education campaigns (Souris, 2012d, p. 13826); the discussion of initiatives to improve transport to Kings Cross (O’Farrell, 2012b, p. 13970); the explicit mention in debate in relation to the Alcohol Beverages Advertising Prohibition Bill 2013; the motion by Upton to support the NSW Government action in addressing alcohol and drug related violence in Kings Cross (Upton, 2012, p. 15310); in relation to the Liquor Amendment (Small Bars) Bill 2013 (Issa, 2013, p. 18293); and in relation to the Law Enforcement (Powers and Responsibilities) Amendment (Kings Cross and Railway Drug Detection) Bill 2012. Even where his name is not expressly used in Parliament, it is evoked from the collocation with ‘alcohol related violence’. See for example, reference in the second reading speech to the Intoxicated Persons (Sobering Up Centres Trial) Bill 2013 (Gallacher, 2013, p. 18741) and the discussion of the Liquor Amendment (Small Bars) Bill 2013 (Souris, 2013b, p. 18293).

21. These may be compared with the ‘Chill Out Zones’ used in Queensland as part of the Drink Safe Precincts trial: see Queensland Government, Department of Premier & Cabinet 2013.

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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;
- 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. 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. 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).
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 boozey night out – your behaviour can have the most serious consequences and the community expects you to pay a heavy price for your actions. (Smith 2013b)

Soon after the sentence was handed down, the Kelly family started a petition to the NSW Premier calling for minimum sentencing laws in cases of manslaughter. Broader support for these measures was found in the ‘Enough is Enough’ campaign 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 ‘demonsing’ of recent offenders in a way that did not happen with Mr Loveridge – in particular, of Shaun McNeil who had been charged with assaulting Mr Christie (Fife-Yeomans and Wood 2014) – and calls for mandatory minimum sentencing, the campaigns also called for additional actions: the introduction of ‘Newcastle-style’ 1.00am lockout measures across the Sydney CBD; more public transport; public education on drinking (including The Sydney Morning Herald running a competition for the public to come up with a new creative advertising campaign similar to the ‘Pinkie campaign’ that targeted violent alcohol-related offending); 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
At the funeral of Daniel Christie on 17 January 2014, his father, Michael, made an impassioned plea for young people to stop the violence (Dingle 2014).

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

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

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

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

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

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

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

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

**Policy transferred but not translated**

The second criticism is that the adoption by the NSW Government of an ‘assault causing death’ provision represents an ill-considered policy transfer from the Code jurisdictions to the common law States but without ‘translation’. In the area of crime control, Newburn and Jones...
have discussed the problems of 'policy transfer' to different contexts (Jones and Newburn 2002a, 2002b, 2005, 2006; Newburn 2002). Following this trend, here we see a specific policy addressing a perceived 'gap' in the law in the Code-based jurisdictions being 'transplanted' onto the very different context of the common law in NSW. However, there was neither a gap on the statute books in NSW nor an operational gap: manslaughter convictions were consistently achieved in NSW under existing laws.

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

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

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

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

The third criticism to be made of the Act is the failure of the Government to give principled consideration to where assault causing death offences sit in the hierarchy of fatality crimes. Indeed, while the Australian Bureau of Statistics (ABS) has created a National Index Offence (NOI) 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 mercy 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**

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

* 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 ‘for 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. 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 stabings (which comprise 30.6 per cent) and shootings (12.7 per cent). One-punch manslaughters made up only 7.9 per cent, a small share of such matters. Note that domestic unlawful and dangerous act manslaughters (a combination of assaults, stabings 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

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

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, stabings 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.

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, 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):

\[
\text{prescribed concentration of alcohol} \text{ means a concentration of 0.15 grammes or more of alcohol in 210 litres of breath or 100 millilitres of blood.}
\]

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

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

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

- Intoxication has the same meaning as in Pt 11A of the Crimes Act 1900 being ‘intoxication because of the influence of alcohol, a drug or any other substance’ (s 428A);
that in proceedings for an offence under s 25A(2), evidence regarding the concentration of alcohol, drug or other substance at the time of the alleged offence may be given as determined by an analysis carried out under the new Div 4, Pt 10, LEPRA (s 25A(6)(a)); and

- 'the accused is conclusively presumed to be intoxicated by alcohol' if the prosecution proves under an analysis carried out in accordance with Div 4, Pt 10, that the accused has a 0.15 grams or more of alcohol in 220 litres of breath or 100 millilitres of blood (s 25A(6)(b)) (being equivalent to the HRPCA amount).

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

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

The failure to define ‘intoxicated’ means that one of the significant difficulties with prosecutions under s 25A(2) is likely to be proving that, at the time the offence was committed, the person was in fact intoxicated. Aside from situations where a person is ‘deemed’ to be intoxicated by the prosecution proving, via an analysis carried out under Div 4, Pt 10 of LEPRA, that there was present in the accused’s breath or blood a concentration of 0.15 grams or more of alcohol in 220 litres of breath or 100 millilitres of blood (such cases are likely to be rare, for the operational reasons discussed below), the legislation leaves a significant ‘grey area’ as to what is meant by intoxication either by alcohol or drugs. In other words, where the prosecution does not have ‘conclusive’ evidence of intoxication under s 25A(6)(b), it will be a matter of cobbled 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 19B(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. 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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1 The author thanks the participants of the Criminal Law Workshop (held at Sydney University, 14-15 February 2014) for their helpful comments on an earlier paper. The author also thanks Luke McNamara for his thoughtful comments on a draft of this paper.
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://enoughisenoough.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).
1999

This means that, unlike other provisions, such as in Victoria, there is no possibility of a judge finding ‘special reasons’ to reduce the mandatory minimum: see Crimes Amendment (Gross Violence) Act 2012 (Vic). This Act amended the Crimes Act 1958 (Vic) to introduce offences of ‘gross violence’ (ss 15A and B), and the Sentencing Act 1991 (Vic) to provide a mandatory minimum of 4 years for such crimes, but with provision for a lesser sentence where the judge finds ‘special reasons’ (ss 10 and 10A). An aggregate sentence is where a court is ‘sentencing an offender for more than one offence’ and imposes an aggregate sentence of imprisonment with respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each: Crimes (Sentencing Procedure) Act 1999 (NSW) s 53A.

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

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

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

For instance in R v Munter [2009] NSWCC 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.

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

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

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

The word ‘hit’ is used once in the definition of ‘violence’ in s 93A of the Crimes Act in relation to riot or affray, violence means any violent conduct, so that:
(a) except for the purposes of section 93C, it includes violent conduct towards property as well as violent conduct towards persons, and
(b) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short).

The Macquarie Dictionary defines 'Hit – verb (†) 1. to deal a blow or stroke; bring forcibly into collision.'


A legal argument could perhaps be made that a tackling constitutes a ‘collision’ in the ordinary meaning of ‘hitting’ as noted above.

Under the doctrine of transferred malice mens rea can be transferred to the defendant. Thus, where the defendant attacks someone with mens rea for a particular offence, misses, but nevertheless ‘accidentally’ brings about the actus reus for the same offence in relation to a different person, the mens rea and actus reus can, essentially be added together, and the offender can be convicted of the offence (Brown et al. 2011: 347). The doctrine, however, has been strongly criticised in the UK (see Brown 2011: 347). For s 25A offences, however, the offence confines the intentional hitting to the other person which seems to exclude the doctrine.
For example, Homel 1997; Road Traffic Accidents in NSW 2001, Statistical Statement: Year ended 31 December 2001 (RTA Road Safety Strategy Branch, January 2003) reveals the high costs of drink-driving not only in terms of death or injury to drivers and other users of the roads, but also in terms of economic cost involving loss of earnings, decreased enjoyment of life, medical and hospital expenses, costs associated with damage or loss of personal property, and the public expenditure on the investigation and prosecution of offenders. See also RTA, Drink Driving: Problem Definition and Countermeasure Summary (August 2000) at 2.

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

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

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

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

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

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

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

References


