MEASURES TO REDUCE ALCOHOL AND DRUG-RELATED VIOLENCE

Name: Dr Julia Quilter
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The Committee Manager  
Committee on Law and Safety  
Parliament House  
Macquarie St  
Sydney NSW 2000  
(Submitted electronically)

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To The Committee Manager

Re: Legislative Assembly Committee on Law and Safety Inquiry into 'Measures to Reduce alcohol and Drug-Related Violence': Submission on Assault Causing Death and Fines for Anti-Social Behaviour

This submission relates to the Committee’s Terms of Reference numbers 2-5. In particular, the submission deals with two aspects of the NSW Government’s plan to tackle drug and alcohol-related violence announced on 21 January 2014: the introduction of an Assault Causing Death (‘ACD’) offence with an aggravated version whilst intoxicated; and increased on-the-spot fines for anti-social behaviour.¹ These two initiatives were introduced by the Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014 (NSW) (‘the Act’) which was passed by the NSW Parliament on 30 January 2014.

The submission is divided into parts 1 and 2 dealing respectively with these issues.

Part 1: Assault Causing Death Offence and Aggravated Assault Causing Death

With alarming speed the Act was passed by both houses of Parliament without substantial amendment and on the same day the Bill was introduced. 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’. A mandatory minimum sentence of 8 years attaches to the aggravated version (s 25B) – being only the second time in recent NSW history that the policy of mandatory sentencing has been invoked.² This amendment also constitutes the first substantive change to the offence structure of homicide since 1951 when infanticide (s 22A) was inserted.

² The first was in 2011 with the introduction of a mandatory minimum sentence for murdering a police officer in execution of his/her duties: Crimes Act 1900 (NSW) s 19B.
This submission is critical of the Government’s introduction of the ACD offences for the following interrelated reasons.\(^3\)

First, the speed and timing 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 which will be discussed further below. From announcement on 21 January 2014 to fully operational legislation on 31 January 2014, the process took a mere 10 days. There was no known public consultation including input from the NSW Law Reform Commission (NSWLRC) or other expert groups and the legislation was passed without substantial amendments. The result has been poorly crafted and operationally problematic offences (see Quilter 2014a at 84-86). This is no way to tackle a series of complex legal issues or produce law ‘reform’.

The second criticism is that the usage of an ACD offence represents an ill-considered policy transfer from the Code based jurisdictions without proper translation onto the common law of NSW. ACD offences have been mooted or introduced in the Code-based jurisdictions as follows: mooted but not enacted in Queensland in 2007; introduced in WA in 2008; and in NT in 2012 (see also Quilter 2014b at 19-21). These provisions were introduced largely to address a perceived ‘gap’ in the Code-based laws because of the operation of the ‘defence of accident’ (see Quilter 2014a at 87; 2014b at 21). NSW, a common law State, does not have a defence of accident and hence legally there was no gap for this offence to fill.\(^4\) Furthermore, there was no operational gap: manslaughter convictions were consistently achieved in NSW under existing laws (see Quilter 2014b at 16-33).

Thirdly, no principled consideration has been given to where ACD offences sit in the hierarchy of fatality crimes. No Australian law reform commission has recommended the introduction of an ACD offence - indeed, they have recommended against (see Quilter 2014b at 16-21). One of the consequences of this is that the question of where such an offence sits in the hierarchy of fatality crimes has received little attention in Australia. The question of hierarchy is an important one to determine if there is a ‘match’ between the perceived need for a new offence and the nature of the offence itself – thereby analysing the wider and longer-term implications of contemplated change to the criminal law. Overseas, the Law Reform Commission of Ireland (LRCI) recommended 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.\(^5\) The

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\(^3\) These criticisms are detailed at length in Julia Quilter, ‘One Punch Laws, Mandatory Minimums and “Alcohol-Fuelled” as an Aggravated Factor: Implications for NSW criminal law’ (2014a) 3(1) International Journal for Crime, Justice and Social Democracy 81-106 (Appendix 1); see also Julia Quilter, ‘The Thomas Kelly case: Why a “one punch” law is not the answer’ (2014b) 38(1) Criminal Law Journal 16-37 (Appendix 2).

\(^4\) Something the drafters appear to be confused by – expressly excluding the defence of accident in s 25A(4), a defence that does not exist in NSW.

LRCSI recommended the inclusion of such an offence on the basis that deaths caused in this way often involved insufficient culpability to warrant a manslaughter conviction (see also Quilter 2014b at 21-23). That is, a crime of ACD does not represent a more punitive response to one-punch deaths than manslaughter but creates a less serious offence that reflects the reduced culpability of the offender. As a result, such offences sit below manslaughter, with murder at the top of the hierarchy or ladder of fatality crimes. This has been confirmed by the Western Australian courts' application of its ACD offence (see Quilter 2014b at 23).

The basic offence in s 25A(1) accords with this hierarchy. It is a statutory alternative verdict to murder and manslaughter and has a lesser maximum penalty of 20 years than manslaughter which is 25 years (Crimes Act 1900 (NSW) s 24). The aggravated offence, while a statutory alternative verdict to murder and manslaughter, however, has the same 25 year maximum penalty to manslaughter. The mandatory minimum sentence of 8 years for the aggravated offence means though that the legislation mandates that such offences sit above manslaughter. This is because the median sentences for manslaughter are 7 years (see Quilter 2014a at 89). There does not appear to have been any considered or principled analysis of the question of hierarchy in drafting this aggravated offence. Ultimately, this will contribute to a further lack of coherence and inconsistency in sentencing in the criminal law. For instance, does a sentencing judge now have to give consideration to the mandatory minimum sentence in s 25B, in determining an unlawful and dangerous act manslaughter offence? This lack of coherence is especially problematic given that homicide offences are some of the most serious on the NSW statute books.

The fourth criticism, is that s 25A has been drafted in a complex and confusing way. One example of this is the fact that the 'assault' element of the offence has been arbitrarily confined 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 – it does not follow the WA or NT precedents. An analysis of the unlawful and dangerous act manslaughter cases in NSW from 1998-2013 (see Quilter 2014a at 94-5) demonstrates that this aspect of the offence may have the unintended consequence of removing many 'assaults' from the operation of s 25A. The introduction of the element of 'hitting' (a term not elsewhere used in the Crimes Act 1900 and does not appear to be a 'legal' term or term of art) may have been 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 charges. However, it does not explain why very serious brawls, bashings and group assaults may well be prosecuted under s 25A(1) whereas less serious assaults that cause death such as pushing or tackling may not. Furthermore, removing assaults that occur by way of 'throwing' (an object such as a bar stool, beer bottle or rock) 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. This element of the offence is also likely to lead to technical legal arguments as to which types of conduct do (not) fit within the offence with potentially unintended consequences. Further discussion of the legal problems with the elements of s 25A, including how 'causation' has been confined in s 25A(3), are discussed in Quilter 2014a at 92-97.

The fifth criticism, is the lack of clarity and operational constraints surrounding the concept of 'intoxication' in s 25A(2). The term is not defined in the offence – nor is it usefully defined elsewhere in the Crimes Act 1900. There is only a 'conclusive presumption' of intoxication (s 25A(6)) in the exceptional circumstance where the accused person has his/her breath or blood/urine tested within the relevant timeframes (respectively 2 or 4 hours) and it is at the High Range PCA level (0.15). The Act does not tell us anything about how lesser amounts of intoxication are to be proven or if they amount to intoxication for the purposes of the aggravated offence. It is also to be remembered that it will be the exception rather than the rule that an accused person is caught at the scene of the offence or within the relevant time-frames required for sampling under Div 4, Pt 10 of Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) and specifically ss 138F and 138G. For example, it is noted that Kieran Loveridge was arrested 11 days after Thomas Kelly was killed.

Given that over-consumption of alcohol has been the focus of the construction of a 'problem' that needs to be 'fixed', it is surprising that the new legislation – and mooted refinements that have not yet passed Parliament – creates 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.

Sixthly, the aggravated offence in s 25A(2) is problematic because it assumes a stable and consistent relationship between alcohol and violence that is not evidenced in other literature. Alcohol produces many 'effects' only some of which include violence. If the aggravated offence is triggered, however, there is no possibility for the defence to argue that the assault causing death resulted by virtue of other reasons (such as anger or other) – it assumes that the crime is by definition 'fuelled' by alcohol. In so doing, a degree of agency is ascribed to the substance 'itself' – indeed, the trope 'alcohol-fuelled violence' which has been used throughout debates on the issue, suggests that it is the 'alcohol' that fuels the violence – therein producing a set of problematic ideas about the agency and effect of alcohol with little reference to the other factors that constitute acts of violence. For instance, in my study of the one-punch manslaughter cases in NSW from 1998-2013 the sentencing remarks in these cases consistently referred to the offender's anger-management issues (Quilter 2014b). The ACD legislation does nothing to address these important triggers for violence. Worse, by taking a

\footnote{See Crimes Amendment (Intoxication) Bill 2014, Sch 1, cl [2] which would insert s 8A(2)(a) into the Crimes Act 1900. For a discussion of the issues related to this definition of intoxication, see Quilter 2014a at 99-100.}

\footnote{See for instance Cameron Duff, 'The social life of drugs' (2013) 24 International Journal of Drug Policy 167; Catherine Smyth, 'Alcohol and violence – exploring the relationship' (2013) 13(4) Drugs and Alcohol Today 258; Antony Morgan and Amanda McAtamney, 'Key issues in alcohol related violence (Research in practice no. 4, Australian Institute of Criminology, December 2009).}
simplistic view of the relationship between alcohol and violence, this legislation may obfuscate important policy considerations and the reasons or ‘causes’ of such violence. This has the capacity to set back our understanding of how and why violence really happens.

Finally, the focus of much of the debate and the Government’s policy initiatives in this area since the death of Thomas Kelly in July 2012 have been on the role of public intoxicated violence, particularly in-and-around licensed premises. This focus was at a point when such assaults were stable or declining – and continue to decline. This has the potential to erase private (intoxicated) violence and treat it less seriously – reinforcing the age-old view that violence done in private, largely to women, is less visible and less serious. Furthermore, this is at a time when such violence is on the rise.

A different legal approach to the problem of one-punch assaults causing death has been taken in the UK. A number of low sentences for alcohol-related manslaughter convictions in the UK led the Court of Criminal Appeal to adopt sentencing guidelines in such matters: see Attorney-General’s Reference (no 60 of 2009); R v Appleby [2010] 2 Cr App 46 (see also Quilter 2014b at 33-36). Two factors were said to be necessary reasons for the court issuing the guidelines which may be instructive in the NSW context. First, the need to protect the public from gratuitous public violence on the streets by viewing this as a significant aggravating factor in sentencing:

...an additional feature of manslaughter cases which has come to be seen as a significant aggravating feature of any such case is the public impact of violence on the streets, whether in city centres, or residential areas. ....

...the manslaughter cases with which we are concerned involved gratuitous unprovoked violence in the streets of the kind which seriously discourages law-abiding citizens from walking their streets, particularly at night, and gives the city and town centres over to the kind of drunken robbery with which we have become familiar, and a worried perception among decent citizens that it is not safe to walk the streets at night.

Secondly, the guidelines were seen as necessary to give force to the new legislative focus enacted by the Criminal Justice Act 2003 (UK), on the harm caused when assessing the seriousness of an offence. Thus, s 143(1) of that Act provides:

143 Determining the seriousness of an offence
In considering the seriousness of any offence, the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.

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9 See Attorney General’s Reference (No 60 of 2009); R v Appleby [2010] 2 Cr App R 46 at [12].
In the sentencing guideline, the Criminal Court of Appeal stated that what must now be recognised: "is that specific attention must [following the 2003 amendment] also be paid to the consequences of [this crime]." (at [13]) The court noted that harm in manslaughter is always at the highest level - that is, death - and that this should lead to an "increased level of sentencing" in one punch manslaughters (at [14], [18]).

This guideline was recently referred to by the NSWCCA in R v Loveridge [2014] NSWCCA 120 at [208]-[213]. While the UK guideline only focuses on public alcohol-related violence, it is submitted that a guideline judgment dealing with one-punch manslaughters is a preferable way to address this form of offending. Such a guideline judgment could be either quantitative or qualitative. A guideline judgment provides consistency in sentencing and structures the sentencing exercise. Guidelines have previously been successfully used to tackle offences for which there has been concern over lenient or inconsistent sentencing, where there is a specific need for general deterrence or to highlight relevant sentencing principles and practices. Such an approach is preferable to the introduction of a specific offence - particularly where, as in NSW, the offence has been poorly drafted, is operationally problematic and includes a mandatory minimum sentence which has the potential to create significant injustice.

**Part 2: Increased Fines for Anti-Social Behaviour**

The fifth point of the NSW Government plan to tackle alcohol related violence announced in January 2014 was to introduce significantly increased penalties for so-called anti-social offences. Three offences in the Summary Offences Act 1988 (NSW) were specifically targeted: ss 4 (offensive conduct), 4A (offensive language) and 9 (Continuation of intoxicated and disorderly behaviour following move on direction).

The Act increased the penalties for these public order offences 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)).

These amendments are problematic for the following reasons:

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10 Prior to the introduction of the ACD legislation the NSW DPP was to seek a guideline judgement in relation to one-punch manslaughters.


• These offences are charged in high numbers each year. In 2011 there were more than 15,000 ‘public order offence’ charges finalised in the NSW Local Court; 40% were for offensive language (2,240) or offensive conduct (3,929) [see NSW BOCSAR, 2012; Quilter & McNamara 2013]. Since 2007, Police have had the option of issuing a CIN for ss 4 and 4A offences. In 2012, there were 5612 charges and 6808 CINs for ss 4 and 4A offences. The Ombudsman found in a review of the first 9-months operation of the state-wide CIN scheme, that 70% of CINs issued during the review period (Nov 07 to July 08), were for offensive conduct or offensive language;

• There is no clarity over the legal elements of such offences (see Quilter and McNamara 2013);

• The offences rely on a vague ‘offensiveness’ standard;

• The significant increase in the penalty notice offences greatly exceeds the suggested ratio to the maximum penalty by the NSWLRC Report being 25% of the maximum court fine for that offence;

• These offences are known to have a disproportionate impact on indigenous persons (Quilter & McNamara 2013). For instance, the Ombudsman 2009 Report found 70% of the CINs issued during the review period (Nov 07 to July 08) were for offensive conduct/language, and 83% of the CINs issued were to Aboriginal persons for offensive conduct/language; and

• The possible impact on license disqualifications (for unpaid fines) and, ultimately, imprisonment for driving whilst disqualified, particularly for indigenous persons in country or regional areas is significant and cause for great concern.

Unlike changes to liquor license conditions which apply only to an expanded CBD precinct, these increased fines apply generally throughout NSW – and with ‘Sydney prices’. It is also submitted that the issues raised by such offences are better dealt with by tackling the ‘causes’ of such crimes. For example, the NSW BOCSAR has indicated that 50% of offensive conduct charges relate to public

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A preferable solution is the provision of a greater number of public toilets.19

Conclusion

For the first 18 months following Thomas Kelly's death, the NSW Government engaged in a non-punitive, nuanced response to alcohol-related violence.20 These measures are to be commended and should be continued. In relation to the more punitive measures of the ACD legislation and increased fines for anti-social behavior these are unlikely to prevent alcohol-related violence but have the capacity to result in considerable injustice. As I have said elsewhere (Quilter 2014a at 100-1):

"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 [ACD] 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

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18 Jacqui Fitzgerald, 'On-the-Spot-Fines and offending: Has the NSW Criminal Infringement Notice scheme increased legal actions for public order offences and shoplifting?' Paper presented at Australian & New Zealand Society of Criminology Conference, Brisbane, 3 October 2013
19 As the City of Sydney has recently done with 'pop-up urinals': James Robertson, 'Sydney Rate-payers to pay a pretty penny for pop-up urinals' The Sydney Morning Herald 8 April 2014 accessible at http://www.smh.com.au/nsw/sydney-ratepayers-to-spend-a-pretty-penny-on-popup-urinals-20140408-36any.html
legislation offers no guarantee that the harsh punishment promised by the government will be delivered in any given case."

If the Committee thought it would assist, I am available to give oral evidence at a public hearing.

Dr Julia Quilter
Senior Lecturer

School of Law
University of Wollongong NSW 2522
Australia +61 2 4221 4290
Fax: +61 2 4221 3188
Email: jquilter@uow.edu.au
Twitter: @jquilter3