A LEGAL AND SOCIAL ANALYSIS OF 'ONE PUNCH' CASES IN WESTERN AUSTRALIA

CATHERINE FERGUSON AND RACHEL ROBSON*

I INTRODUCTION

As a result of increasing violence, particularly prevalent in the North Bridge entertainment area in Perth,[1] in August 2008 a new offence was added to the Western Australian *Criminal Code 1913* (WA).[2] The formal terminology for this new offence is 'unlawful assault causing death.' Colloquially it was referred to as 'One Punch' legislation; a term that has recently moved through other colloquial terms such as 'King Hit' and currently 'Coward's Punch.' The change in colloquial terminology was an effort to stigmatise the behaviour in the eyes of young men, the targeted population of the legislation according to government and media reports.

Amendments to the *WA Code* were established in the *Criminal Law Amendment (Homicide) Act 2008* (WA), which made a range of other significant changes to homicide law in Western Australia (WA). Many of the amendments were the result of recommendations made by the Law Reform Commission of Western Australia (LRCWA) in its 2007 report.[3] The new offence was introduced after a number of violent attacks that had resulted in the death of a victim and where the accused was acquitted of manslaughter as the intention to kill and the foreseeability of the death could not be proved. The new offence dispensed with the notion of foreseeability and intention, providing that criminal responsibility would still attach to the offender even if the offender did not intend the death of the victim, and even if the death was unforeseeable.[4]

* Catherine Ferguson is a lecturer and researcher within the Faculty of Business and Law, Edith Cowan University, Perth, WA. Rachel Robson is a final year law (honours) student, Edith Cowan University, Perth, WA.

[1] Vincent Hughes and Ben Thompson, *Is Your House in Order? Re-visiting Liquor Licensing Practises and the Establishment of an Entertainment Precinct in Northbridge* (Research Report prepared for the Commissioner of Police, Western Australian Police, 2009) 14.

[2] Hereafter *WA Code.*

[3] Western Australian Law Reform Commission, *Review of the Law of Homicide: An Issues Paper*, Discussion Paper, Project No 97 (2007) <http://www.lrc.justice.wa.gov.au/P/project_97.aspx>

[4] *WA Code* s 281(2).

The offence of unlawful assault causing death was not a recommendation of the LRCWA,[5] but was introduced as a result of public pressure and the WA State Government's need to be seen to be 'tough on crime.'[6] The introduction in 2012 of similar legislation in the Northern Territory (NT)[7] and in 2014 in New South Wales (NSW)[8] and Victoria[9] also appeared to be the result of intense media and public campaigning,[10] despite academic opinion that the existing criminal law did not require a 'one punch' law.[11]

This article considers some of the legal implications and unintended consequences of the WA legislation and uses the process of content analysis to analyse 12 cases of unlawful assault causing death that have passed through the WA court system, where the accused has either pled guilty or been found guilty of unlawful assault causing death. In 11 of the 12 cases, the offender pled guilty. The cases analysed in this article were identified from the records of the WA Office of the Director of Public Prosecutions[12] and the Judges Sentencing Remarks (JSRs). This allowed an analysis of several aspects of the case, including the offender's background (gender and age), details of the victim, the relationship between the victim and the offender, location of the offence, the sentence applied and the mitigating and aggravating circumstances taken into consideration in the sentencing. Legal aspects in relation to intention and foreseeability are also presented.

---

[5] Julia Quilter, 'The Thomas Kelly Case: Why a "One Punch" Law is Not the Answer' (2014) 38 *Criminal Law Journal* 16, 20.

[6] Julia Quilter, 'Responses to the Death of Thomas Kelly: Taking Populism Seriously' (2013) 24(3) *Current Issues in Criminal Justice* 439, 441.

[7] *Criminal Code Amendment (Violent Act Causing Death) Act 2012* (NT); Sue Erickson, 'One Punch Commenced in the Northern Territory' (2013) 38 (1) *Alternative Law Journal* 58.

[8] *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW).

[9] *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* (Vic). The Act amended the *Crimes Act 1958* (Vic) and the *Sentencing Act 1991* (Vic), with the significant change being that one punch deaths would carry with them a non-parole period of 10 years jail. During the Second Reading Speech, the Victorian Parliament shared many of the same sentiments expressed by the WA Parliament, acknowledging that the proposed changes increased the severity of the penalty for one punch deaths in order to guarantee that the offenders would go to jail for at least 10 years for fatal acts of violence. See, Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2824 (R Clark).

[10] Julia Quilter, 'One-punch Laws, Mandatory Minimums and 'Alcohol-Fuelled' as an Aggravating Factor: Implications for NSW Criminal Law (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 81, 81-83.

[11] Quilter, above n 5, 26-27. Quilter explains that the existing legislation is already capable of dealing with the 'one punch' attacks, and that, unlike the Code jurisdictions, there is no gap to fill regarding the defence of accident.

[12] Office of the Director of Public Prosecutions for Western Australia, *Schedule of s 281 Prosecutions*. The Schedule (current at 1 January 2014) is accessible at: <http://www.dpp.wa.gov.au/_files/assault_occasioning_death.pdf>.

II THE INTENTION OF THE WEST AUSTRALIAN PARLIAMENT

The Parliamentary intention of introducing this law into WA was to target street male-to-male violence[13] which had increased by 71% between the years of 2005 and 2009 in the Northbridge entertainment precinct.[14] The male-to-male violence aspect of the legislation was noted in the JSRs in *Western Australia v Anderson*[15] and *Western Australia v Mako*[16] that '…the offence was introduced to deal with so called "one punch" homicides, where an offender punches a victim who falls, hits their head on the ground and dies …'[17]. Although many of the references to this offence in the Second Reading of the *Criminal Law Amendment (Homicide) Bill 2008* (WA) used the term 'one punch',[18] the language used in s 281 of the *WA Code* is not to a specific 'one punch' assault; it is to 'assault' generally, thus encompassing the actions or conduct that fall within the definition of assault in the *WA Code*.[19] In other words, the way in which the WA legislation is phrased allows it to encompass other forms of assault (not only one punch) that result in the victim's death.

The Second Reading of the Bill continued over several sessions and suggested that the provision of s 281 would have a deterrent effect on such assaults. However, in the *Parliamentary Debates* on 6 May 2008 the following comment was made: 'On the surface it looks as though the legislation deals with one punch homicide situations, but a Pandora's box is being opened up almost by stealth in the way in which this legislation could be interpreted.'[20] On 18 June 2008 it was also observed that:

> This is the so-called one punch homicide provision. As members will note, we are about to agree to this clause with virtually no debate, which is interesting in that the government's spin machine, which is

---

[13] ABC Radio National, 'One Punch Solution Risks Missing the Target' *Law Report*, 19 November 2013 (Damien Carrick, Ralph Kelly and Julia Quilter) <http://www.abc.net.au/radionational/programs/lawreport/one-punch-solution-risks-missing-the-target/5099954#transcript>.

[14] Hughes and Thompson, above n 1, 14.

[15] Unreported, District Court of Western Australia, Wager DCJ, 10 September 2010) ('*Anderson*').

[16] [2010] WASC 63 (1 September 2010) ('*Mako*').

[17] *Mako* [2010] WASC 63 (1 September 2010) [32]. See also Western Australia, *Parliamentary Debates*, Legislative Council, 15 May 2008, 3123e (Sue Ellery); Western Australia, *Parliamentary Debates*, Legislative Council, 18 June 2008, 4028 (Simon O'Brien).

[18] Western Australia, *Parliamentary Debates,* Legislative Assembly, 19 March 2008, 1209c (J A McGinty).

[19] *WA Code* s 222.

[20] Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 May 2008, 2438 (M J Cooper).

> dealing so effectively with the gas crisis and other things, would have us believe that proposed new section 281 is the beginning and end of this Bill in response to public concern about so-called one-punch homicides going unpunished. [21]

The joint media statement issued by the WA Premier and Attorney General on 3 August 2008 indicated that a media campaign would be developed to make people aware of the consequences of 'one punch' attacks.[22]

As suggested from the *Parliamentary Debates* on 6 May 2008, s 281 has opened a Pandora's box and the intended target population, that is, young men swinging punches, is not the population that is being found guilty of this offence. The terminology used in the *WA Code*, 'unlawful assault causing death', has allowed it to be applied across a number of different circumstances, in particular, domestic violence, or intimate partner violence.[23]

A 2012 Human Rights Briefing Paper[24] considered the rights of women in relation to the use of this offence in cases where domestic violence has been present. Offenders tried and sentenced under this legislation may receive a shorter sentence than if charged and found guilty of manslaughter, for which the maximum sentence is greater.[25] Shorter sentences are likely to be applied due to the hierarchy of homicide offences in which murder is the highest, followed by manslaughter and then unlawful assault causing death. Rachel Ball indicated that a number of cases that have resulted in convictions under this legislation have involved inter-partner or domestic violence and that the application of the unlawful assault causing death rather than the higher offences reduces the value of the lives of women. This situation was also identified in Quilter's analysis of the WA data.[26] However, this new offence with its dispensation of intention and foreseeability has been found to be useful to bring perpetrators of violence to account

---

[21] Western Australia, *Parliamentary Debates*, Legislative Council, 18 June 2008, 4028 (Simon O'Brien).

[22] Alan Carpenter and Jim McGinty, 'Campaign Promotes Tough New One Punch Laws' (Media Statement, 3 August 2008).

[23] Jane Cullen, 'WA's 'One Punch' Law: Solution to a Complex Social Problem or a Way Out for Perpetrators of Domestic Violence?' (2014) 2(1) *Griffith Journal of Law & Human Dignity* 53, 54-55.

[24] Rachel Ball, Human Rights Implications of 'Unlawful Assault Causing Death Laws (Briefing Paper, Human Rights Law Centre, 2012) <www.hrlc.org.au/files/Assault-causing-death-HRLC-briefing-paper.pdf>.

[25] The possible maximum sentence for the offence of manslaughter is life imprisonment, provided in s 280 of the *WA Code.*

[26] Quilter, above n 5, 24-25.

and to be punished where previously a defence of accident[27] may have resulted in no punishment.

In describing the intention of this legislation, the WA government's media releases indicated that it was targeted at young males who frequented entertainment areas and who were often severely intoxicated. This notion has been replicated in the media in both NSW and Victoria when discussing the introduction of their legislation. There is a culture in Australia of masculinity that supports physical violence and which is 'both culturally respected and partly excused in law'.[28] Tomsen and Crofts suggest that there is still a socially acceptable masculine response to insult and that is to resort to violence.[29] This sensitivity to insults has been reported in men from lower socioeconomic groups who indicated a need to respond aggressively to insults and in some instances demonstrate their masculinity by not avoiding a physical conflict.[30] Sensitivity to insults is enhanced when alcohol has been used.[31] In an analysis of coward's punch deaths across Australia, Pilgrim, Gerostamoulos, and Drummer reported that 90 cases were identified within the years of 2000 to 2012. Taking a victimology approach, almost 80% of the deaths were those of young men who were under the influence of alcohol or drugs; with the majority affected by alcohol. The median age of these victims was 33 years with a range of 5 to 78 years.[32] Of the 90 cases only four involved female victims.

Several statements on the introduction of legislation across Australia have suggested that 'one punch' legislation will make people think about throwing that punch that might kill, however social science research indicates a relationship between alcohol and violence,[33] and between alcohol and lack of thinking.[34] Such research indicates that

---

[27] *WA Code* s 23B(2).

[28] Stephen Tomsen and Thomas Crofts, 'Social and Cultural Meanings of Legal Responses to Homicide Among Men: Masculine Honour, Sexual Advances and Accidents' (2012) 45(3) *Australian and New Zealand Journal of Criminology* 423, 424.

[29] Ibid.

[30] Stephen Tomsen, 'Boozers and Bouncers': Masculine Conflict, Disengagement and the Contemporary Governance of Drinking-Related Violence and Disorder' (2005) 38(3) *The Australian and New Zealand Journal of Criminology* 283, 284-285, 290-291.

[31] Tomsen and Crofts, above n 28, 434.

[32] Jennifer Pilgrim, Dimitri Gerostamoulos and Olaf Drummer, 'King Hit Fatalities in Australia, 2000 - 2012: The Role of Alcohol and Other Drugs' (2014) *Drug and Alcohol Dependence* 119, 120.

[33] Joseph Boden, David Fergusson and John Horwood, 'Alcohol Misuse and Violent Behaviour: Findings from a 30-year Longitudinal Study' (2012) 122 (1-2) *Drug and Alcohol Dependence* 135, 135 – 136.

[34] Claude Steele and Lillian Southwick, 'Alcohol and Social Behaviour I: The Psychology of Drunken Excess' (1985) 48 *Journal of Personality and Social Psychology* 18, 19; Shantha

this aspect of thinking before throwing a punch is unlikely to be addressed by the legislation as drunken young men do not think about the consequences of their actions. However, the culture of male violence needs to be addressed at a societal level[35] and cultural change takes time,[36] sometimes over several generations unless hastened by specific action. Therefore, the deterrence effect of the legislation is at the very least doubtful.

Recent concerns have emerged that the 'one punch' laws are simply not effective.[37] Presently, the evidence and cases from WA demonstrate that the provision of unlawful assault causing death has not achieved what was intended by Parliament. As is demonstrated in the social analysis of the WA cases included in this paper, the majority of cases involving the offence of unlawful assault causing death occur in very different environments to the believed or expected environment of the entertainment sector with young men fuelled by alcohol.[38] Another concern is the pattern of sentencing in the 'one punch' cases. The case law demonstrates that the sentences imposed are significantly less than what the provision can provide. This is surprising considering section 281 is void of several legal considerations, thus increasing the severity of the offence and the likelihood of convictions.

III HISTORY OF THE 'ONE PUNCH' LAWS ACROSS AUSTRALIA

The first appearance in Australia of a law designed to specifically capture the one punch assaults originated in Queensland.[39] In 2007, two men died after being punched to the head.[40] The offenders were charged with manslaughter under the Queensland *Criminal Code Act*

Rajaratnam, Jennifer Redman and Michael Lenne, 'Intoxication and Criminal Behaviour' (2000) 7(1) *Psychiatry, Psychology and Law*, 59, 65.

[35] John Anderson, 'The Conversation: Mandatory Sentences Can't Deliver Justice or Stop One-Punch Killings', *The Conversation* (online), 21 August 2014 <http://www.theconversation.com/mandatory-sentences-can't-deliver-justice-or-stop-one-punch-killings-30647>.

[36] Jan Rotmans, Rene Kemp and Marjolein Van Asselt, 'More Evolution than Revolution: Transition Management in Public Policy' (2001) 3(1) *Foresight* 15, 18-19.

[37] Aleisha Orr, 'Could there be a one-punch law rethink?', *WA Today* (online), 31 January 2014 <http://www.watoday.com.au/wa-news/could-there-be-a-one-punch-law-rethink-in-wa-20140131-31rta.html>; Erickson, above n 7, 58; 'One Punch Laws – Mandatory Sentences for Drunken Violence a 'Recipe for Injustice' say NSW legal experts', *ABC News* (online), 23 January 2014 <http://www.abc.net.au/news/2014-01-22/one-punch-mandatory-sentences-27a-recipe-for-injustice27/5212462>.

[38] Quilter, above n 5, 23 – 25.

[39] Ibid 18.

[40] Ibid. David Stevens died after being punched by Jonathan Little, and little more than a month later, Nigel Lee died after being punched during a fight with William Moody.

1889 (Qld),[41] but were acquitted in each case on the grounds that the outcome was not foreseeable.[42] It was here that discussions regarding a 'gap' in the existing legislation began.[43] The public response was largely fuelled by anger that there was no justice for the deaths of two young men, and that the system should be reviewed to remedy any flaws.[44] The political response was the production of a Bill that, if it had passed, would have amended the *Queensland Code* to add a new offence of unlawful assault causing death.[45] The then Queensland Government commissioned the Queensland Law Reform Commission (QLRC) to investigate and produce its findings on the applicability of an unlawful assault causing death provision.[46] The result was that the QLRC advised against such a law as they found that the proposed provision would not 'fit well within the existing structure and policy of the Code'.[47] The references to this concern were targeted at the existing manslaughter provision, which required foreseeability of death in order to operate. The proposed provision of unlawful assault causing death would have removed the foreseeability requirement.[48]

The failure of the original one punch provision in Queensland did not deter other Australian jurisdictions from a legislative response to quell community concerns with WA being the first Australian jurisdiction to enact a one punch law. As was the case in Queensland, the introduction of the Bill appeared to be in response to the concern in the community regarding several 'one punch' deaths. In each case the offender was charged under s 280 of the *WA Code* and was acquitted.[49] Like in Queensland, the acquittals resulted in public and political debate to resolve this 'gap' in the existing WA criminal law legislation.[50] In 2008, following a review of WA's homicide laws, a new homicide offence was inserted into the *WA Code*, with the same name as the proposed Queensland provision had had: unlawful assault causing death.[51] The new provision was enacted even though the

[41] Hereafter *Queensland Code*.
[42] *Queensland Code* s 23(10(b)(ii) provides that 'an ordinary person would not reasonably foresee as a possible consequence'.
[43] Quilter, above n 5, 21.
[44] Cullen, above n 23, 58.
[45] *Criminal Code (Assault Causing Death) Amendment Bill 2007* (Qld).
[46] Quilter, above n 5, 16, 19.
[47] Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation,* Report No 64 (2008) 200-205 [10.91]-[10.92].
[48] Cullen, above n 23, 58; Quilter, above n 5, 21.
[49] Cullen, above n 23, 56-57.
[50] Ibid 57.
[51] Quilter, above n 5, 19-20.

Western Australian Law Reform Commission did not support the establishment of this new offence.[52]

Other Australian jurisdictions shared concerns similar to those expressed by WA, regarding the 'one punch' deaths. In 2013, Thomas Kelly died from a 'one punch' attack. The offender, Kieran Loveridge, received a 4-year sentence of imprisonment for the manslaughter of Thomas Kelly.[53] In response, a NSW one-punch law modelled on the WA provision was suggested.[54] The media statement made by the NSW Attorney General captures the concerns and intent behind such a provision as that suggested by the WA Parliament:

> The new offence and proposed penalty will send the strongest message to violent and drunken thugs that assaulting people is not a rite of passage on a boozy night out…the community expects you to pay a heavy price for your actions.[55]

IV THE GAP IN A MANSLAUGHTER CHARGE

As previously mentioned, prior to the drafting of s 281, offenders of 'one punch' or 'king hit' attacks were charged under s 280 of the *WA Code* – the manslaughter provision. The 'gap' that is referred to is the possibility of acquittal from a charge of manslaughter on the grounds of the defence of accident.[56] Section 280 of the *WA Code* provides 'If a person unlawfully kills another person under such circumstances such as to not constitute murder, the person is guilty of manslaughter and is liable to imprisonment for life.' 'Kill' is defined in s 270 of the *WA Code*, and is relatively uncontentious. For the purposes of the homicide provisions, a person is said to have killed another person if they cause another person's death by direct or indirect means.[57] In WA, a killing is unlawful unless 'authorised, justified or excused by law.'[58] If a killing is authorised, justified or excused by law, then criminal responsibility is detached from the offender.

---

[52] Western Australian Law Reform Commission, *Review of the Law of Homicide*, Final Report, Project No 97 (2007) 90-91.
[53] *R v Loveridge* [2013] NSWSC 1638 [79] (Campbell J).
[54] Quilter, above n 5, 17.
[55] Greg Smith SC MP, *Unlawful Assault Laws Proposed*, Media Release (12 November 2013) quoted in Quilter, above n 5, 18.
[56] Cullen, above n 23, 56.
[57] *WA Code* s 270.
[58] Ibid s 268.

The manslaughter provision in the *WA Code* provides that manslaughter is an unlawful killing, but in circumstances that do not constitute murder.[59] There are three types of murder in s 279 of the *WA Code* with intention being a necessary element for the first two listed types of murder.[60] The first type requires intent to kill,[61] and the second type requires the intent to harm or endanger a person.[62] If intention is not proved, and if the death is not the result of the prosecution of an unlawful purpose,[63] which is the third type of murder in WA, then it is likely that the unlawful killing falls under the manslaughter provision.[64]

A requirement that needs to be met to sustain a conviction of a charge of a type of unlawful killing, whether it is murder or manslaughter, is that the death that occurred must have been a reasonably foreseeable outcome that resulted from the actions of the offender.[65] The bar was set at a very high level,[66] with even a slight doubt capable of breaking down a charge of manslaughter. The insertion of s 281 into the *WA Code* was qualified in order to remove the possibility of acquittal by recourse to the defence of accident.[67]

V THE LEGAL FRAMEWORK

Section 281 of the *WA Code* provides:

> (1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.
> (2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.

In comparison to the other homicide offences in the *WA Code*, unlawful assault causing death is seen as the least serious homicide offence.[68] In

---

[59] Ibid s 280.
[60] Eric Colvin and John McKechnie, '*Criminal Law in Queensland and Western Australia Cases and Commentary*' (LexisNexis Butterworths Australia 6th edition 2012) 71 [4.20] – [4.21].
[61] *WA Code* s 279(1)(a).
[62] Ibid s 279(1)(b).
[63] Ibid s 279(1)(c).
[64] Thomas Crofts and Kelly Burton, '*The Criminal Codes Commentary and Materials*' (Thomson Reuters Australia 6th ed 2009) 92 [3.500].
[65] Quilter, above n 5, 21.
[66] Ibid.
[67] Ibid 19-20.
[68] *Western Australia v JWRL* [2009] WASC 392 [5] (Heenan J).

the hierarchy of homicide offences in WA, murder is the most serious homicide offence, with manslaughter sitting just beneath murder. Unlawful assault causing death sits at the bottom.[69] Where unlawful assault causing death is placed on the hierarchy is determined by its maximum penalty. Both murder and manslaughter hold a maximum penalty of life imprisonment[70] whereas the maximum sentence for unlawful assault causing death is 10 years imprisonment.[71] Although all homicide offences result in death, the lower maximum penalty awarded for unlawful assault causing death implies that Parliament recognised that the offence was not as serious as the other homicide offences in the *WA Code*. Consequentially, there is no justification for a penalty that is comparable to the penalty for murder or manslaughter.[72] Section 281 is a truly unique homicide provision – in addition to a substantially lesser maximum penalty than the other homicide offences, the provision requires a type of conduct (an unlawful assault),[73] and has excluded the fault elements of intention and foreseeability.[74] These unique qualities not only broaden the scope of the provision but seek to 'close the gap' discussed above.

A *Unlawful Assault*

For the purposes of s 281 of the *WA Code*, the death does not need to arise from the direct result of the assault. As seen in subsection (1), liability extends to a death that occurs from an indirect result of the assault.[75] Assault is defined in s 222 of the *WA Code*, as direct or indirect striking, touching, moving or application of force to a person without their consent. The definition of assault extends to cover attempts and threats of force, through the use of bodily acts or gestures where there is an existing ability for the perpetrator to affect the purpose of the attempt or threat of force.[76] As seen from this definition, an assault for the purposes of the *WA Code* is a broad concept, encompassing a number of actions. The use of the element of assault in s 281 means that any action that may constitute an assault will be captured, extending the operation of s 281 far beyond the restraints of applying to a 'one punch' attack.

---

[69] Quilter, above n 5, 23.
[70] *WA Code* ss 279(4), 280.
[71] Ibid s 281(1).
[72] *Western Australia v JWRL* [2009] WASC 392 [5] (Heenan J).
[73] *WA Code* s 281(1).
[74] Ibid s 281(2).
[75] Ibid s 281(1).
[76] The final paragraph in s 222 of the *WA Code* provides that the application of force includes the application of 'heat, light, electrical force, gas odour or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort'.

B *Foreseeability, Intention and Accident*

The determination of criminal responsibility is through the application of fault elements, such as foreseeability and intention. Reasonable foreseeability is a common law test, dealing with causal responsibility.[77] While an accused may be held criminally responsible for their conduct, a determination of foreseeability will provide direction to the level of consequence for the actions of the accused.[78] It is a prospective test, asking if the event that occurred was 'a possible consequence' of the actions of the accused.[79] If this is answered in the affirmative, then the event will have been foreseeable.[80] In the case of homicide the test can be defined as determining if it is reasonably foreseeable that the death that resulted was a natural consequence of the accused's conduct.[81]

Intention, which is the second fault element excluded from s 281, can be characterised in several ways. It has been identified that when a person intends something, they will act to bring that intention into reality.[82] Intention can also be the doing of an act that will almost certainly have a specific result;[83] thus, 'intention is the act or determining mentally on some result.'[84] Intention and foreseeability are inextricably linked - when an event is reasonably foreseeable, intention may be a reasonable inference.[85] Intention can result from the knowledge of probable consequences, which is relevant when considering the commission of specific acts. If an individual does an act, with the knowledge that such an act may result in specific consequences, then the individual may be regarded as having formed the intention for those consequences to occur.[86]

When it comes to s 281, intention is irrelevant in determining criminal responsibility. However, there is some ambiguity in the express irrelevance of intention from the provision of unlawful assault causing death. As stated above, if a person has the knowledge that from the

---

[77] Eric Colvin, 'Causation in Criminal Law' (1989) 1(2) *Bond Law Review* 253, 259.
[78] *Royall v The Queen* (1991) 172 CLR 378 [3] (Brennan J).
[79] *Schmidt v Western Ausstralia* [2013] WASCA 201 [78] (30 August 2013) (Martin CJ).
[80] Ibid.
[81] *Royall v The Queen* (1991) 172 CLR 378 [3] (Brennan J), quoting *Roberts* (1971) 56 Cr App R 95, 102 (Stephenson LJ).
[82] *Peters v The Queen* (1998) 192 CLR 493; *R v Wilmot (No 2)* [1985] 2 Qd R 413 (Connolly J). This is also known as direct or purpose intention.
[83] *Peters v The Queen* (1998) 192 CLR 493 (McHugh J). This is also known as oblique or knowledge intention.
[84] *R v Ping* [2005] QCA 472 [29] (Chesterman J).
[85] *Schmidt v Western Ausstralia* [2013] WASCA 201 [79] (30 August 2013) (Martin CJ).
[86] *R v Crabbe* (1985) 156 CLR 464 [8].

commission of an act, certain consequences may result, then they are deemed to have formed an intent to achieve those consequences.[87] With the case of unlawful assault causing death, if a person punches another person, knowing that it is probable that the person may die as a result of the punch, then they are already deemed to have the intent to kill that person. This raises a contentious question of whether or not the implication of intention in those circumstances would amount to murder in the *WA Code*. Such considerations are outside the scope of this article, although the question revolves around the determination of whether or not the offender believed the event of death to be 'possible' or probable', with only the latter able to imply intent.[88]

The importance of the exclusion of foreseeability and intention from s 281 is determined by reference to the effect of the exclusion, which ensures that the defence of accident cannot be a consideration for a charge of unlawful assault causing death. As foreseeability is the 'touchstone of accident,'[89] it is crucial in determining whether the defence of accident can excuse the criminal responsibility of the accused, because if it is established that the death was reasonably foreseeable, the defence of accident will be excluded.[90] Likewise, if intent is formed, then the argument that the event was an accident collapses – there cannot be 'accidents' fuelled by intention.[91] The absence of these two fault elements eliminates a means of assessing the relationship between the offender's conduct and the resulting death.[92] Under s 281, criminal responsibility will attach to an offender, regardless of whether or not the death is foreseeable and regardless of what the offender intended.[93]

VI ONE PUNCH IN AUSTRALIA

The various 'one punch' provisions in Australia and their particular features are outlined in Table 1. Presently only the Australian Capital Territory (ACT), South Australia (SA), and Tasmania have not enacted a 'one punch' provision into their criminal law legislation.[94]

[87] Ibid.
[88] Ibid.
[89] Toby Nisbet, 'The Scope of the Provocation defence and Consent in Code Jurisdictions' (2012) 36 *Criminal Law Journal* 356, 358.
[90] *Kaporonovski v The Queen* (1973) 133 CLR 209, 231 (Gibbs J).
[91] Ibid.
[92] Western Australian Law Reform Commission, above n 52, 90.
[93] *WA Code* s 281(2).
[94] At the time of writing, the authors could not locate any news or information that indicated that these jurisdictions might be considering the enactment of a 'one punch' provision into their existing criminal law legislation.

Some discussion is warranted on the Victorian provision. The addition of s 4A to the *Victorian Crimes Act* seeks to amend the manslaughter provision provided in s 5. As a result, the Victorian legislation does not have a separate provision but has extended their manslaughter offence. The one punch provision provides that the act of a 'single punch or strike' is deemed a 'dangerous act for the purposes of the law relating to manslaughter.'[95] This can be contrasted to the other jurisdictions, whose one punch provisions stand as offences in their own right.

A *The Language of One Punch*

An issue regarding the Australian 'one punch' provisions is that, although marketed as 'one punch' laws by the media,[96] with the consequence being that the general public refers to these laws by this colloquial term, no Australian jurisdiction has expressly named their provision 'one punch' (see Table 1). Despite this, some jurisdictions have attempted to capture the notion of 'one punch' in their provisions. Queensland uses the language of 'unlawful striking,' with Victoria using the words 'single punch or strike'.

The WA provision is far removed from distilling the notion of 'one punch' when looking at the title of the provision. The use of the words 'unlawful assault causing death' is broad, both in name and effect. The NSW provision is also far removed from the colloquial language of one punch with reference to assault, as is the Northern Territory's provision, which refers to a 'violent act' in the *Criminal Code Act 1983* (NT).[97]

However, unlike WA and NSW, the NT provision attempts to incorporate the notion of 'one punch' within the meaning of 'violent act', which includes a 'punch'.[98] This is in contrast to the WA provision,

---

[95] *Victorian Crimes Act* s 4A(2).

[96] Christopher Knaus, 'New Study Reveals Alcohol, Not Drugs, Major Factor in One-Punch Assaults', *The Canberra Times* (online), 11 March 2014 <http://www.canberratimes.com.au/act-news/new-study-reveals-alcohol-not-drugs-major-factor-in-onepunch-assaults-20140310-34i1o.html>; Nicholas Cowdery, 'The Folly of Our Penalties: Opinion', *ABC News* (online), 8 January 2015 <http://www.abc.net.au/news/2015-01-08/cowdery-the-folly-of-our-one-punch-penalties/6006044>; Joanna Menagh, 'Man on Trial Accused of Killing Irishman With One Punch in Kebab Shop', *ABC News* (online), 11 May 2015 <http://www.abc.net.au/news/2015-05-21/man-convicted-of-one-punch-death/6487038>.

[97] Hereafter *NT Code*.

[98] *NT Code* s 161A(5).

as the definition of an assault in the *WA Code* does not refer to the conduct of a 'punch'.[99]

B *Disregarding Fault Elements*

Each jurisdiction that has enacted a 'one punch' law has attached different considerations or disregarded particular elements to the provision. As stated, the WA provision has expressly removed the fault elements of intention and foreseeability.

As seen from Table 1, the WA provision is not unique in this regard, as the NT and Queensland have also eliminated the elements of foreseeability and intention from their one punch laws. The NT one punch provision, s 161A Violent Act Causing Death, excludes the fault elements of intention and foreseeability by expressly providing that an offender will be 'strictly liable' for the deceased's death.[100] The strict liability provision in the *NT Code* operates to exclude the 'fault elements' (which include foreseeability and intention) from the physical elements of an offence.[101]

Queensland also disregards the fault elements of foreseeability and intention by use of another provision. The Queensland one punch provision, provided in s 314A, excludes the operation of s 23(1)(b), which relates to foreseeability and intention.[102]

The NSW assault causing death provision differs from the other one punch provisions in Australia as the *Crimes Act 1900* (NSW)[103] expressly states that there must be an assault that occurs from an intentional hit.[104] However, in accordance with WA, NT, and Queensland, the element of foreseeability is expressly discarded as a consideration from the NSW assault causing death provision.[105]

---

[99] *WA Code* s 222.
[100] *NT Code* s 161A(1), (2).
[101] Ibid s 43AN. The fault elements are provided in s 43AH(1). Intention is expressly included as a fault element for the purpose of the *NT Code*. However, there is no reference to foreseeability; rather, the reference is to 'knowledge'. The fault element of knowledge is then provided for in s 43AJ, with the same test of foreseeability in WA.
[102] The defence of a use of force to prevent the repetition of an insult in s 270 of the *Queensland Code* is also removed as a consideration from s 314A(2).
[103] Hereafter *NSW Crimes Act*.
[104] *NSW Crimes Act* s 25(1)(a).
[105] Ibid s 25(4).

C *The Required Conduct*

The significance of the inclusion or exclusion of the fault elements of foreseeability and intention are one of several considerations that can be made when determining the scope of the one punch provisions. The act that is required to invoke the relevant provision (according to the jurisdiction) can significantly increase the likelihood of liability. Each provision is different in the amount of required conduct. The NT provision is narrower in its scope, as it requires a 'violent act', which involves the 'direct application of force.'[106] The WA provision is broader in its operation, requiring an unlawful assault,[107] which includes both indirect and direct application.[108] Likewise, the NSW assault causing death provision is broad in scope, also requiring an assault to invoke the provision.[109] The required conduct for the Queensland one punch provision is quite restricted in comparison to the NT and WA provisions. The required conduct for s 314A of the *Queensland Code* is limited to 'striking' of the 'head or neck' of another person.[110] Similarly, the Victorian provision also has a limited scope, referring only to punching or striking a person's head or neck.[111]

When compared to the other 'one punch' provisions in Australia, the WA provision appears to have the broadest operation. Not only are the elements of intention and foreseeability eliminated as considerations from s 281 of the *WA Code*, but the requirement in s 281 of 'unlawful assault' consequentially has the effect of widening the scope of the required conduct to invoke the provision. Although the NSW provision also maintains a broad range of conduct through the term 'assault', it requires the element of intention, which somewhat limits its application. The WA legislation is unique in its scope, and, as determined through a review of Judges Sentencing Remarks ('JSRs') from the WA Supreme Court and the WA District Court, s 281 is capturing a variety of conduct that results in death, including circumstances of domestic violence.

---

[106] *NT Code* s 161A(5). This subsection further specifies that a hit, blow, kick, punch or strike is conduct of a violent nature.
[107] *WA Code* s 281(1).
[108] Ibid s 222.
[109] *NSW Crimes Act* s 25A(1).
[110] *Queensland Code* s 314A(1).
[111] *Victorian Crimes Act* s 4A.

VII SENTENCING ISSUES

A review of the WA unlawful assault causing death cases discussed below revealed that there has not yet been a case where the maximum penalty of 10 years has been imposed. The application of sentencing in WA is governed by the *Sentencing Act 1995* (WA).[112] The principle of sentencing is provided in s 6, and states that the sentence administered must be equivalent to the severity of the offence,[113] which is determined on a case-by-case basis.

The *WA Sentencing Act* provides that when determining an appropriate sentence the circumstances of the commission of the offence, including any vulnerability of the victim, aggravating factors and mitigating factors are all considerations.[114] An aggravating factor is a factor that the court believes to increase the liability of the offender,[115] whereas a mitigating factor is any factor the court believes to decrease the offender's liability.[116] With the unlawful assault causing death case studies, remorse appeared to be a consistent mitigating factor. Although intention is excluded from s 281, intention has been implied into considerations of remorse. In the case of *Western Australia v Loo*,[117] the judge, in his sentencing remarks, stated to the convicted, 'You did not intend or expect your punch to cause him his death or to cause him serious injury.'[118] Likewise, the lack of intention was the subject of comment in *Western Australia v Jones*[119] and *Western Australia v Lillias*.[120] In the case of *Western Australia v Indich*,[121] the sentencing judge actually noted that there was no intent to kill.[122] Later, during these considerations, the sentencing judge commented on the remorse and regret that the accused had shown for the death of the victim.[123] The sentence imposed on Indich was two years and 10 months.[124]

---

[112] Hereafter *WA Sentencing Act*.
[113] *WA Sentencing Act* s 6(1)
[114] Ibid s 6(2)(a) – (d).
[115] Ibid s 7(1).
[116] Ibid s 8(1).
[117] Unreported, District Court of Western Australia, Martino DCJ, 27 November 2012 ('*Loo*').
[118] Ibid 3.
[119] [2011] WASCSR 136 ('*Jones*').
[120] [2012] WASCSR 100 ('*Lillias*').
[121] [2010] WASC 211 (13 January 2010) ('*Indich*').
[122] Ibid [9].
[123] Ibid [16].
[124] Ibid [19] - [22].

Sentencing a person for the commission of an offence is a means of holding them accountable for their actions.[125] The removal of intention as a consideration to the provision of s 281 was to ensure that people are held accountable for their violence, no matter what was intended. However, when it comes to sentencing for s 281, a lack of intention in the offender appears to be viewed as evidence of remorse, which is a commonly applied mitigating factor in sentencing. Therefore, the offender's culpability is lessened, and a lower sentence justified.

In the cases examined for this article, the highest sentence received was five years imprisonment without parole (only half of the maximum statutory penalty), and the lowest term of imprisonment received was 16 months. This is without taking into account the two year suspended sentence in 2010,[126] and the 18 months suspended sentence in 2012.[127] The highest sentence was given to an offender in a severe case of intimate partner violence, which prompted considerable social comment, especially from those who work with victims of such violence.[128] Additionally, a proposal was prepared for consideration in the WA parliament that unlawful assault causing death in circumstances of intimate partner violence should be more highly penalised than other cases. However, this proposal did not proceed to law.[129]

VIII METHODOLOGY OF THE SOCIAL ANALYSIS OF WA CASES

A *Cases*

Twelve cases were identified from a document of the Office of the Director of Public Prosecutions[130]. These 12 cases were tried between the commencement of the legislation in 2008 and 31 December 2013. Interestingly, there were no convictions for this offence during 2013, the reason for which is unclear. The twelve cases represent those that have been found guilty of unlawful assault causing death per s 281 of

---

[125] This is captured by the principle of sentencing in s 6(1) of the *WA Sentencing Act*, which provides that 'a sentence imposed on an offender must be commensurate with the seriousness of the offence.'

[126] *Western Australia v JWRL (a child)* [2010] WASCA 179.

[127] [2012] WASCSR 100.

[128] Rachel Ball, Human Rights Implications of 'Unlawful Assault Causing Death Laws (Briefing Paper, Human Rights Law Centre, 2012) <www.hrlc.org.au/files/Assault-causing-death-HRLC-briefing-paper.pdf>.

[129] Cullen, above n 23, 67 - 68.

[130] Office of the Director of Public Prosecutions for Western Australia, *Schedule of s 281 Prosecutions*. The Schedule (current at 1 January 2014) is accessible at: <http://www.dpp.wa.gov.au/_files/assault_occasioning_death.pdf>.

the *WA Code*. The researchers wrote to both the WA District Court and the WA Supreme Court to obtain the Judges' Sentencing Remarks (JSRs), which were provided. The individual cases reveal the discrepancies between the intent of the legislation and reality. One limitation of this research is that the information obtained has been extracted from JSRs and there may be additional circumstances of both the offender and the victim that were not mentioned. The researchers were diligent in ensuring that extrapolation from the facts did not occur.

B *Procedure*

The JSRs were read to extract information that facilitated descriptions of those sentenced under s 281 of the *WA Code*. Descriptions of the perpetrators, victims, and circumstances of the offence were analysed to note similarities and dissimilarities across the cases. One of the aims of undertaking this analysis was to consider the reality of the cases against the intentions of the West Australian Parliament for the introduction of the legislation. The intention of the legislation was to address the issue of deaths resulting from alcohol affected young men assaulting each other in entertainment areas.

C *Results and findings*

1 *Demographics of offenders*

All offenders sentenced under this legislation to date are male. The age of offenders ranged from 18 years to 78 years of age. Mean age is calculated at 37 years. Given the wide range of age (60 years) the median age was also calculated as 34.5 years. Nine of the 12 offenders had a history of violent offending and seven cases indicated mental health issues, in particular, substance abuse.

Guilty pleas were made by 11 of the 12 offenders and this may be the result of the legislation making intention and foreseeability of the outcome irrelevant. If offenders insisted that they were not guilty, the charge of manslaughter with higher penalties may have been applied.

2 *Demographics of victims*

Five of the victims were female. The age of victims ranged from 2 years to 83 years of age. In five cases the age of the victim was not mentioned in the JSRs. The average age of victims excluding the 2 year old and the 83 year old was 29.6 years (six victims). Four of the victims were

substance affected at the time of their death. The demographics of the WA victims are quite different to those of the Australia wide study on one punch deaths.[131]

3 *Relationships between victim and offenders*

Four of the twelve victims were de facto or estranged intimate partners (females), four were family members, and three were known to the offender (acquaintances). It is unclear in the final case whether the offender and victim were known to each other. In *Anderson*,[132] the victim was a two-year old boy, who was not punched, but treated roughly by his uncle. Again these dynamics are quite different to the Australia wide study where over one third of the victims did not know the offender.[133]

4 *Location of Offence*

Interestingly although the legislation appeared, according to government and media statements, to be introduced in an effort to reduce male-to-male violence in inner city locations, none of the offences occurred in such circumstances. In seven of the 12 cases the offence occurred in a suburb of Perth. Five offences occurred in country locations. Eight offences occurred in a residence, two in parks, one in the street outside the victim's home, and one at an Aboriginal camp. The location of the WA cases is again different to those cited in the Australian study in which approximately one third of the cases occurred near licensed premises including nightclubs.[134]

5 *Sentences*

Sentences ranged from 16 months to 60 months with an average term of 32.72 months (excluding the suspended sentences). Nine of the 12 offenders were eligible for parole. Two offenders received suspended sentences (18 months and 24 months respectively).

(a) Reason for sentence (imprisonment)
In three cases (*Loo*, *Anderson* and *Western Australia v Blurton*[135]) the judge referred to general deterrence, and indicated that the sentence should send a message to the community about violence and its

[131] Pilgrim, Gerostamoulos and Drummer, above n 32, 120.
[132] Unreported, District Court of Western Australia, Wager DCJ, 10 September 2010.
[133] Pilgrim, Gerostamoulos and Drummer, above n 32, 120.
[134] Ibid.
[135] Unreported, District Court of Western Australia, Curthoys DCJ, 23 February 2012 ('*Blurton*').

potential results.[136] In *Western Australia v Sinclair*[137] specific deterrence was referred to[138] and in *Jones* both specific and general deterrence was mentioned.[139] There was also an implicit rather than explicit mention of deterrence in *Lillias*.[140] In *Western Australia v Robinson*,[141] the Judge mentioned all aspects of sentencing (deterrence, rehabilitation, punishment, and community protection).[142] In *Indich*, the Judge referred to the offender's potential for rehabilitation.[143] Therefore the most commonly mentioned reason for the sentence was general deterrence.

6 *Mitigating circumstances for sentencing*

a) Aboriginality

Six of the offenders are identified as Aboriginal from the information recorded in the JSRs. There is another offender whose surname suggests that he may be Aboriginal. This means that between 50% and 58% of offenders charged with this offence are or may be Aboriginal. Aboriginality may be considered a mitigating circumstance given the inequalities that Aboriginal peoples suffer across a range of education, health and social aspects of life.[144]

(b) Traditional punishment

It was indicated in one case that the offender was potentially subject to traditional punishment.[145] In *Lillias*, the Judge also raised the issue of leniency as a result of the potential threat of tribal punishment.[146] Traditional punishment was also taken into consideration in *Robinson*, whose sentence was reduced by the amount of time already spent in custody, making the offender immediately eligible to apply for parole.[147]

(c) Remorse

The legislation took away intention and foreseeability however a number of the JSRs made statements about intention and foreseeability

[136] *Loo*, 4 – 5; *Anderson*, 12; *Blurton*, 4.
[137] Unreported, District Court of Western Australia, Bowden DCJ, 25 May 2012 ('*Sinclair*').
[138] *Sinclair*, 6 – 7.
[139] *Jones* [24].
[140] *Lillias* [17].
[141] [2011] WASCSR 59 ('*Robinson*').
[142] *Robinson* [47].
[143] *Indich* [17] – [18].
[144] *Munda v Western Australia* (2013) 249 CLR 600; [2013] HCA 38.
[145] *Sinclair*, 5.
[146] *Lillias* [4] – [6], [10], [19].
[147] *Robinson* [21] – [25].

which then led on to the offenders' displays or statements of remorse. From the context of these statements within the JSRs, it would appear that remorse was taken as a strong mitigating factor, resulting in reduced terms of imprisonment (or in two cases a suspended sentence).

Mitigating and aggravating factors in sentencing give effect to the fact that no two offenders, or offences, are the same. Remorse may well be a relevant mitigating factor, being displayed easily through the offending parties' later actions, such as cooperating with the police and making a guilty plea. This was highlighted in *Jones*, where the sentencing judge noted that the offender's actions after he killed the deceased showed a lack of remorse.[148] Remorse as a mitigating factor highlights that despite a person's actions, the outcome of death may well have been an accident, and accident is not a defence under s 281 of the *WA Code*. The intent behind s 281 was to punish the conduct as well as the outcome, and to hold the offenders accountable for their conduct. The result of sentencing with s 281 is that punishment for the offenders' actions is so mitigated as to drastically reduce the sentence, despite the conduct of using intentional force to the victim, force that led to the victim's death.

(d) Mental Health Issues

In five cases there was no mention of specific mental health issues, suggesting no mitigation in relation to the offence. In other cases specific issues were mentioned although these were not always considered mitigating circumstances. More specifically, the JSR in relation to the oldest offender indicated that he was suffering from a delusional disorder, which most likely affected his perceptions and behaviour, resulting in his attack on his elderly neighbour. The 78 year old still received a prison sentence of 2 years and 8 months. Another offender had been prescribed anti-psychotic medication but had not been taking it for two months preceding the attack. In this case the offender was under the influence of methylamphetamine at the time of the attack. Three of the offenders were reported to have serious and ongoing issues with alcohol. Being affected by self-inflicted substances is not considered as a mitigating circumstance in sentencing.

7 *Aggravating circumstances for sentencing*

(a) Previous criminal history and violent offences

Nine of the 12 cases also reported prior offences. Two of those who did not have prior offences included both the youngest and oldest offenders. Eight of the offenders had a history of violent offences; the

[148] *Jones* [2], [7] – [10].

remaining case indicated prior offences but did not specify their nature. Where the deaths for which the offenders were sentenced involved domestic violence, a history of such violence was evident from previous charges mentioned.

D *Discussion of the Social Analysis of the WA Cases*

The Parliamentary debate records and media statements of the WA government imply that s 281 was introduced to reduce male to male drunken violence in entertainment areas with a view to providing increased community safety. Of the individuals who have been sentenced under this legislation, only one fits the intended population of young men violently assaulting each other (*JWRL*), but even then, the circumstances of this assault in a local park do not fit with the expected locations of unlawful assaults causing death. There are discrepancies between the reasons provided by the WA government for the enactment of the offence and the demographics and circumstances of those who have been tried and found guilty under s 281.

In the analysis of the JSRs for the 12 offenders who had been found guilty of unlawful assault causing death in WA, the reality is quite different to the expectations. It would appear that s 281 has had unintended consequences that are revealed in the descriptions of the offenders found guilty under s 281 and the circumstances in which the offences occurred. The majority of the offenders found guilty under s 281 of the *WA Code* are male, aged in mid-30's, with a history of substance misuse, a history of violence and, in particular, intimate partner violence. This description is markedly different from that which appeared to be intended – male, aged 18 – 30, no ethnicity mentioned, drunk or under the influence of drugs. Aboriginal peoples' over representation in the prison system is well established with approximately 40% of the WA adult male prisoner population being Aboriginal.[149] Of the offenders found guilty of unlawful assault causing death 50% of those sentenced were identified as Aboriginal.

Additionally, the demographics of the victims are quite different to those cited in media and government statements on the introduction of the legislation and to those victims examined in Australia wide research.[150] Victims were both male and female and ranged in age from

[149] Department of Corrective Services, *Monthly Graphical Report, Adult Prisoner Population*, (June 2014) <http://www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/statistics/mg-report-1406.pdf>.
[150] Pilgrim, Gerostamoulos and Drummer, above n 32, 120.

two years to 83 years of age. In most instances the offender knew the victim, and eight of the 12 cases were clearly intimate partner violence or family violence. It is interesting that within the WA cases that covered six years there were five female victims whereas Pilgrim, Gerostamoulos and Drummer[151] reported only four cases in their Australia wide research that reviewed one punch deaths between 2000 and 2012. Female victims are over-represented in the WA data.

The maximum sentence that may be applied for this offence is 10 years. Even with a 25% reduction for a guilty plea, the maximum sentence would be seven and a half years[152] (90 months). The average sentence applied has been 32.72 months ranging from 16 months to five years. Two offenders received suspended sentences and the majority of offenders were eligible for parole which means that they will possibly serve shorter prison sentences. In reading the JSRs, it is evident that the sentencing judges take into account mitigating and aggravating circumstances. Several offenders were acknowledged as 'traditional' Aboriginal men and tribal punishment was explicitly mentioned (but not sanctioned) in a number of the cases. In *Lillias* the judge indicated quite clearly that because of threats of tribal punishment, the sentence applied was lenient: 'In fact those threats mean that you receive a lot of leniency from this Court.'[153]

The sentences applied are well below the maximum ten years available under the legislation. Although the WA JSRs mention a discount for a guilty plea, and it is common practice to discount by 25% of the sentence, the amount of discount has not been stated in each case and this may be a reason why the WA sentences appear low. Other benefits to the offenders of pleading guilty to unlawful assault causing death are discussed below.

Guilty pleas to unlawful assault causing death were made by 11 of the 12 offenders and this ensured that some form of punishment was applied. Pleading not guilty may have resulted in a trial that found that the offender had intended or could have foreseen the outcome and therefore the offence could be considered manslaughter or murder with higher sentences being applied. In some cases pleading guilty to a lesser charge with a lower penalty may be an attractive option for the offender. However, these lower sentences have also attracted the attention of women's interest groups in relation to the intimate partner violence aspect whereby offenders may, by pleading guilty to the lesser

[151] Ibid.
[152] *WA Sentencing Act* s 9AA.
[153] *Lillias*, 5.

charge of unlawful assault causing death, avoid the longer sentences applied when charged and found guilty of manslaughter or murder[154]. However the proof required for intention to kill and/or the foreseeability of death has been reported to sometimes result in offenders being found 'not guilty' and therefore no punishment is applied, and this was one of the reasons for the introduction of the legislation for unlawful assault causing death.[155] Therefore, whilst not within the intention of the legislation, intimate partner violence offences may have become more liable to punishment, but the use of the unlawful assault causing death may result in lower sentences. A balance between any conviction and an appropriate charge needs to be considered. Four of the 12 cases in this paper were clearly cases of intimate partner violence, with a further four involving other family members.

It would appear that the language used in the WA legislation has enabled the legislation to have wide ranging effects with unintended consequences. The *Parliamentary Debates* of 6 May 2008, regarding s 281, clearly indicated an intention to address the one punch deaths.[156] The very open wording of s 281 has not been addressed in the public domain where the legislation is still referred to as 'one punch', 'king hit', or 'coward's punch' and it is likely that unless particularly affected by the legislation the public will not know the true extent or effects of the legislation. Interestingly both the NSW and Victorian legislation has been framed in a more direct or targeted way, with clear descriptions of the actions that are chargeable.

IX CONCLUSION

The unlawful assault causing death legislation in WA does not appear to have addressed the social issue that it was intended to address and what has been cited in the media as its intention: that is, that young men using violence against each other in entertainment precincts would be held accountable for their actions and the expectation that there would be a reduction in violent crime amongst young men in entertainment centres. Although the figures for assault in Perth city have reduced considerably between 2008 and 2014 there has been a range of measures introduced that may have had an effect such as increased policing in the area and licencing restrictions. The literature on deterrence suggests that it is unlikely that the reduction is due to

[154] Ball, above n 24.
[155] Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 May 2008.
[156] Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 May 2008.

the legislation as many assaults occur when the offender is intoxicated and less able to determine potential consequences of their actions.[157] The legislation is, however, providing greater opportunities for the punishment of offenders who may otherwise be found not guilty of more serious charges such as manslaughter or murder where intention to kill and the foreseeability of the results of the actions taken by the offender need to be proven to substantiate a guilty verdict.

The characteristics of the victims are also quite diverse. Five of the victims were female and the ages of victims ranged from 2 years to 83 years of age. Four of the victims were substance affected at the time of their death. The demographic information on the victims also does not fit with the public statements of young males perpetrating violence on each other and the perception that in many instances the victim was also intoxicated. There are concerns also expressed by feminist groups that the offence of unlawful assault causing death allows offenders (especially those involved in intimate partner violence) to plead guilty to the lesser charge and thereby receive a lesser sentence.

It is interesting that many of the Judges in handing down the sentence refer to the lack of intention or foreseeability. As the legislation clearly excludes these aspects, one would not expect these comments to be made in terms of sentencing and remorse. The reason for these issues being raised is not clear and it may be that the Judges are reinforcing the exclusion of intention or foreseeability from their deliberations or it may be that they have intuitively still not come to terms with these major alterations to WA criminal law. There have been calls for the WA legislation[158] to be reviewed and, in terms of its 'success' and unintended consequences, the findings in this paper suggest that a review is appropriate.

Postscript

Just after this paper was reviewed for publication the authors located a JSR for a case in which the offender was a 22 year-old Aboriginal woman who stabbed her de facto partner whilst intoxicated with both alcohol and cannabis.[159] Both offender and victim had been drinking

[157] Claude Steele and Lillian Southwick, 'Alcohol and Social Behaviour 1: The Psychology of Drunken Excess' (1985) 48(1) *Journal of Personality and Social Psychology* 18; Shantha Rajaratnam, Jennifer Redman and Michael Lenne, 'Intoxication and criminal behaviour' (2000) 7(1) *Psychiatry, Psychology and Law,* 59.

[158] Quilter, above n 5, 36; Cullen, above n 24, 67 – 68; Aleisha Orr, 'Could There Be a One-Punch Law Rethink?', *WA Today* (online), 31 January 2014 <http://www.watoday.com.au/wa-news/could-there-be-a-one-punch-law-rethink-in-wa-20140131-31rta.html>.

[159] *Western Australia v Woodley* [2015] WASCSR 114.

heavily and had argued. The man returned to the house to pack his belongings to leave the home and during a struggle he was stabbed in the chest with a kitchen knife.[160] The offender was originally charged with manslaughter and during the course of her trial changed her plea to guilty for unlawful assault causing death. This case highlights a range of issues presented in the paper about the location of offences, and the extension of the legislation to situations of intimate partner violence. The offender had been subjected to previously documented intimate partner violence and this was mentioned as a mitigating factor.[161] In this case the offender was sentenced to four years imprisonment with an opportunity for parole after 2 years.[162] The sentencing remarks indicate that the offender did not intend to kill the victim but that the death was foreseeable.[163]

[160] Ibid [6]-[14].
[161] Ibid [27]-[28].
[162] Ibid [39].
[163] Ibid [36].