Research Note on One-Punch Laws and the Sentencing Amendment (Coward’s Punch Manslaughter and Other Matters) Bill 2014

Executive Summary

- This Research Note provides background material on ‘one-punch’ (aka ‘coward punch’ or ‘king hit’) assaults causing death, with a focus on the experiences of other jurisdictions in creating new offences to cover such acts.

- One-punch laws have been introduced in New South Wales, Western Australia and the Northern Territory. They are currently pending introduction in Queensland and a private members Bill sits before the South Australian Parliament.

- This paper focusses on the experiences of NSW and WA in introducing one-punch assault causing death laws.

- The provisions of the Sentencing Amendment (Coward’s Punch Manslaughter and Other Matters) Bill 2014 are also discussed in detail.

- Some statistics on one-punch fatalities and sentencing for manslaughter are provided to illustrate the current situation.

- A list of key resources and media articles are also provided for further reading.
Introduction

On 17 August 2014, Premier Napthine and Attorney-General Robert Clark announced that the Victorian Government would be introducing minimum non-parole periods for one-punch attacks that result in death.1 The Sentencing Amendment (Coward’s Punch Manslaughter and Other Matters) Bill 2014 was introduced on 19 August 2014, and second read by the Attorney-General in the Victorian Legislative Assembly on 20 August 2014.2 He stated that ‘The Bill will ensure adult offenders who cause death by inflicting a coward’s punch or in circumstances of gang gross violence will go to jail for at least 10 years, unless the court decides that a genuinely special reason applies’.3

This Research Note presents background information on one-punch laws, including the experiences of other jurisdictions, sentencing statistics, and analysis of the key provisions of the Bill.

Background

The call for mandatory minimum sentences for one-punch assaults causing death in Victoria gained momentum following a series of high-profile incidents over the past few years, public petitions and campaigns around alcohol-fuelled violence, and the introduction of assault causing death offences in other jurisdictions.4 In particular, the New Year’s Eve attack on Daniel Christie in Sydney at the end of 2013 focussed national attention on the issue.5 At the time, the Victorian Opposition announced that a Labor Government would introduce a new assault causing death offence with a maximum penalty of 20 years if they won the November 2014 election.6

Currently, in Victoria and other common law jurisdictions, one-punch assaults causing death are usually charged under the common law offence of manslaughter by unlawful and dangerous act. For such an offence, a person must have deliberately and intentionally committed an unlawful act and that act must be dangerous (for example, assault).7 According to the High Court, the test for dangerousness is objective,

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3 Ibid., p. 2824.
whereby a reasonable person would have seen that there was an ‘appreciable risk of serious injury’ as a result of the act (however, the specific injury caused does not need to have been foreseen).  

Conversely, in the Criminal Code jurisdictions, for the charge of manslaughter to be successful, it must have been reasonably foreseeable that the actions of the accused would result in death, otherwise the accused would be acquitted on the defence of accident. Thus, it has been argued that this higher threshold of reasonable foreseeability of death required in the Code jurisdictions led to a need for an offence representing lower culpability and punishment than manslaughter, but more serious than assault. One-punch laws may therefore be necessary, ‘not because manslaughter is viewed as too light, but because manslaughter may not be available in one punch situations’.

In this way, assault causing death provisions operate in a way similar to that of battery manslaughter, which used to exist at common law. Battery manslaughter was abolished by the High Court in 1992 in Wilson v The Queen as the court considered that serious assaults causing death should be prosecuted under unlawful and dangerous act manslaughter, and any assaults not dangerous enough to be covered by that offence should be prosecuted under assault laws as ‘a conviction for manslaughter in such a situation does not reflect the principle that there should be a close correlation between moral culpability and legal responsibility, and is therefore inappropriate’.

Thus, the offence of manslaughter encompasses a variety of acts on the spectrum of culpability ranging from vicious attacks that border on murder (but lack the intent to kill) through to involuntary or negligent manslaughter. On this spectrum of fatal offences, one punch with no intention to kill falls on the lower end of culpability. However, community outrage and a need for both specific and general deterrence has led to arguments that current sentencing practices do not reflect the seriousness of one-punch offences. In particular, some commentators have argued that the judiciary is too focused on individual mitigating factors while failing to give weight to the ‘just desserts’ a one-punch aggressor should receive, with calls to introduce mandatory minimum sentencing to ensure one-punch offenders go to jail for a significant amount of time.

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9 Criminal Code (also known as the Griffith Code) jurisdictions have all their criminal offences statutorily codified (WA, Qld, Tas, NT, ACT and Cth). In common law jurisdictions (NSW, Vic and SA), the criminal statutes set out the most common offences, but are supplemented by common law (and some offences, such as manslaughter by unlawful and dangerous act, only exist at common law).
12 ibid., pp. 22-23.
For arguments for and against mandatory minimum sentences, see the Library’s Research Brief on the Crimes Amendment (Gross Violence) Bill 2012. For examples of sentencing considerations in regard to one-punch assaults causing death see Appendix A. Further examples of one-punch statistics across Australia, and manslaughter sentencing snapshots in Victoria are provided in the Statistics section of this Research Note.

**What the Bill Proposes**

The Bill creates a mandatory minimum sentence of a ten-year non-parole period for one-punch manslaughter by making amendments to the Crimes Act 1958 to encompass one-punch deaths within unlawful and dangerous act manslaughter, and the Sentencing Act 1991 to impose a mandatory minimum sentence for manslaughter committed in certain circumstances.

**Single Punch Manslaughter**

The Bill inserts a new section 4A into the Crimes Act to determine that for the purposes of manslaughter by unlawful and dangerous act, a single punch or strike delivered to a person’s head or neck that causes injury to the head or neck constitutes a dangerous act. The provisions clarify that a punch may be covered by the new section even if it is part of a series of punches, and the death may be caused by the punch even if the death was the result of an injury from another impact caused by the punch/strike (i.e., where a victim falls and hits their head on the road after being hit). As noted above, such punches would already be prosecuted under manslaughter by unlawful and dangerous act, although the new provisions remove any uncertainty (see also Appendix A).

**Mandatory Minimum Sentences**

The major reforms of the Bill are to the Sentencing Act through the insertion of three new sections which specify that where circumstances of manslaughter by single punch or strike, or manslaughter in circumstances of gross violence, arise a custodial sentence with a non-parole period of ten years must be imposed (proposed sections 9B and 9C of the Sentencing Act). However, there are a number of hurdles to overcome before the sentencing judge is required to impose the mandatory minimum sentence for either of these two new statutory varieties of manslaughter, after a jury has convicted the accused of manslaughter.

Proposed section 9A requires the Director of Public Prosecutions to give notice that the prosecution intends to seek the mandatory minimum non-parole period of ten

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years. Further, under sections 9B and 9C, following conviction and the notice served by the DPP, the sentencing judge must be satisfied that certain factors exist, and other special circumstances that negate the mandatory sentence must not exist. Specifically, under section 9C(3) for manslaughter by single strike, the sentencing judge must be convinced beyond a reasonable doubt that the victim’s death was caused by the punch or strike, the offender intended that the punch or strike be delivered to the victim’s head or neck, the victim was not expecting to be punched or struck by the offender, and the offender knew that the victim was not expecting to be punched or struck by the offender. The facts that the victim was involved in a confrontation with the offender or that the offender warned the victim of the punch/strike immediately before hitting the victim, does not necessarily mean that the victim was expecting the punch or strike (sections 9C(4) and (5)).

These elements require the sentencing judge to be convinced of many subjective factors, evidence of which would need to be presented at either the trial or sentencing stage, and which may be at issue (particularly given the victim is dead). They also introduce quite specific intention elements into the sentencing stage (in contrast to the objective framing of the new offence provisions inserted in to the Crimes Act). If the prosecution cannot satisfy the court beyond reasonable doubt of any one of these factors, the court can choose not to impose the mandatory minimum sentence, even though at the trial stage the offender has been found guilty of manslaughter by single punch or strike.

Under section 10A, which applies to all mandatory minimum sentences, the court may decide a special reason not to impose the minimum sentence exists. For example, where the offender is aged between 18 and 21, and can prove on the balance of probabilities that they are psychosocially immature.

In relation to the hierarchy of offences, the proposed provisions operate as aggravating circumstances in cases of manslaughter and so one-punch manslaughter sits above manslaughter but below murder. The maximum penalty provision is the same as that for manslaughter (section 5 of the Crimes Act), however the ten-year mandatory minimum non-parole period places one-punch manslaughter significantly higher in the hierarchy given the average non-parole period for manslaughter convictions fluctuates around five years (see Statistics). Notably, no other fatal offences involve a mandatory minimum sentence, although murder will be subject to a baseline sentence of 25 years upon the commencement of the Sentencing Amendment (Baseline Sentences) Act 2014.

Manslaughter in Circumstances of Gross Violence

The first mandatory minimum sentences in the Sentencing Act were inserted in 2013 in order to impose a non-parole period of four years for two new offences: intentionally causing serious injury and recklessly causing serious injury, in

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circumstances of gross violence (sections 15A and 15B respectively). However, there are slight differences in how gross violence circumstances operate for these offences and the new provisions on gross violence in relation to manslaughter: for serious injury offences any one of the criteria may be satisfied to invoke the mandatory minimum sentence; for manslaughter at least two elements must be satisfied including that the offender was acting with two or more other persons.

Thus, for example, an offender may receive a mandatory minimum sentence of four years for intentionally or recklessly causing serious injury in circumstances of gross violence if they planned in advance to use an offensive weapon and proceeded to inflict the serious injury with that weapon, but if the victim died from that injury the offender would not have committed manslaughter in circumstances of gross violence (and be liable for the mandatory minimum sentence of ten years) unless they acted in the company of, or in joint criminal enterprise with, two or more persons. This reflects the intention, which the Attorney-General stated in his second reading speech, that the gross violence manslaughter provisions are aimed at gang violence.

Statistics

Manslaughter Sentencing in Victoria

Keeping in mind that the offence of manslaughter encompasses a variety of acts on the spectrum of culpability and dangerousness, the most recent sentencing snapshot of manslaughter produced by the Sentencing Advisory Council (2007–08 to 2011–12) indicates that average non-parole periods have ranged from 5.5 years in 2008–09 to 4.83 years in 2011–12. Of the 86 people who received a term of imprisonment for manslaughter during that period, the longest non-parole period given was ten years (received by two offenders) and the most common non-parole period was between six and seven years (received by 15 offenders). Thus, based on current statistics, a mandatory minimum non-parole period of ten years sits at the extreme end of current sentencing practices for manslaughter.

Looking back, the longest non-parole period given for manslaughter between 1998–99 and 2003–04 was eight years, and the longest non-parole period given between 2003–04 and 2007–08 was 13 years (four offenders of the 85 who were sentenced to imprisonment for manslaughter from 2003–04 to 2007–08 were given non-parole periods of ten years or more including two with ten years, one with 12 years and one with 13 years).

18 See: Lesman, et al. (2013) op. cit.
19 Clark (2014) op. cit., p. 2824.
See also Appendix A for examples of sentencing remarks in relation to cases of one-punch assaults causing death.

One-punch fatalities

A 2014 publication led by Jennifer Pilgrim at the Monash University Department of Forensic Medicine reviewed ‘king hit’ fatalities in Australia from 2000 to 2012 and identified 90 incidents, including 24 from Victoria. Overall, an equal number of fatalities occurred in a hotel/pub as in a public space (24 each), however some of the incidents in public spaces occurred shortly after the deceased had left a licensed venue.

Figure 1: Location of ‘king hit’ fatalities, 2000–2012

Of the 67 cases for which toxicology reports were available, 53 involved the use of alcohol or other drugs. However it is worth noting that, of these 67 cases for which bare details of the incident were provided, at least seven would not be covered by the proposed laws as they involved a push or punch to the torso which caused the fatal injury (as opposed to a strike to the head).


23 ibid., p. 121.
24 ibid., pp. 121–129.
25 See cases 3, 6, 20, 28, 53, 57 and 59, ibid., pp. 122–129.
Experiences of Other Jurisdictions

This section provides explores the experiences of Western Australia (WA) and New South Wales (NSW) in introducing one-punch assault causing death offences. In 2008, WA was the first jurisdiction to introduce a specific offence for one-punch assaults causing death. As a Code jurisdiction it provides a useful example of how unlawful assault causing death provisions can operate to fill a perceived gap in homicide law. New South Wales introduced assault causing death provisions in January 2014, and as a common law jurisdiction, analysis of its experience highlights potential issues with new offences for assault causing death in other common law jurisdictions. Brief descriptions of the NT provisions, and recent developments in Queensland and South Australia are also provided.

Western Australia

Under s 281 of the WA Criminal Code, a person who ‘unlawfully assaults a person who dies as a direct or indirect result of the assault’ is liable to a maximum penalty of ten years imprisonment. The section also excludes any application of the accident defence, and clarifies that death as a result of the assault does not need to be reasonably foreseeable.

In September 2007, the Law Reform Commission of Western Australian delivered its final report of its review into homicide laws. The Commission described the perceived gap in the WA Criminal Code as desirable, and preferred extending existing provisions such as intentionally doing grievous bodily harm as alternative convictions to manslaughter:

Despite the difference between the Code and the common law in this context, the Commission has concluded that the current test for the defence of accident provides the appropriate minimum requirement for this category of manslaughter. The requirement that death was objectively reasonably foreseeable ensures that there is a degree of correspondence between the blameworthy conduct of the accused and the resulting harm. If death was not reasonably foreseeable the accused could still be held criminally liable for any harm caused that was reasonably foreseeable.

The Criminal Law Amendment (Homicide) Bill 2008 was introduced on 19 March 2008 in response to this report, representing a major overhaul of homicide laws. However, while it followed the recommendations of the Commission in regard to reforms to murder, the WA Government chose to insert the new offence of unlawful assault causing death rather than extending existing assault and grievous bodily harm provisions as alternative offences to manslaughter.

27 Law Reform Commission of Western Australia (2007) op. cit., p. 90.
In his second reading speech, WA Attorney-General the Hon. Jim McGinty stated that the new offence ‘reinforces community expectations that violent attacks, such as a blow to the head, are not acceptable behaviour and will ensure that people are held accountable for the full consequences of their violent behaviour’.\(^{29}\)

With a maximum penalty of ten years imprisonment, unlawful assault causing death represents the lowest level of culpability for homicide offences (compared to the maximum penalty of life imprisonment for s 279 murder and s 280 manslaughter), while being more serious than other assault offences (such as s 317 assault causing bodily harm with a penalty of three years imprisonment and a $36,000 fine, or s 317A(b) assault with intent to do grievous bodily harm with a penalty of imprisonment of five years).\(^{30}\)

### Unlawful Assault Causing Death Convictions in Western Australia

In practice, convictions for assault causing death have differed from the intended application of s 281 to one-punch assaults. A list of cases prosecuted under s 281 since its introduction and prior to 1 January 2014, indicates that only 12 cases have been prosecuted under s 281.\(^{31}\) According to research compiled by Dr Julia Quilter of the University of Wollongong, only four of these cases involved a single punch assault, none of which were in the context of public violence (but rather private arguments).\(^{32}\) Five of the 12 cases (or more than 40 per cent) involved men killing their partners after a history of domestic violence.\(^{33}\)

Eleven of the 12 cases involved a guilty plea, which demonstrates the attractiveness of pleading guilty to a homicide offence that attracts a maximum penalty of 10 years, as

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\(^{31}\) Director of Public Prosecutions, Western Australia (2014) Unlawful Assault Occasioning Death, DPP, 1 January.


\(^{33}\) ibid., p. 25.
opposed to going to trial for manslaughter. Further, these cases have attracted an average sentence of two years and nine months, the combination of which the Human Rights Law Centre has highlighted as of concern:

The Human Rights Law Centre considers that the extremely short sentences that have been applied to perpetrators of domestic violence homicide in accordance with the unlawful assault causing death offence may constitute a violation of the right to life and the associated obligations to ensure the right to life on an equal basis between men and women.

The particularly troubling case of Saori Jones who died after a vicious assault from her ex-partner in front of their two young children—for which her partner received a sentence of five years with three years non-parole (the longest sentence to be imposed under s 281 so far)—led to a public campaign to increase penalties under the law. The Criminal Code Amendment (Domestic Violence) Bill 2012, known as Saori’s Law, was introduced as a private members Bill on 24 October 2012 with an aim to increase the maximum penalty for s 281 offences to 20 years imprisonment in ‘circumstances of aggravation’, although it was never debated.

New South Wales

The Thomas Kelly Case

In July 2012, Thomas Kelly died from a single punch delivered by Kieran Loveridge in an unprovoked attack in Sydney’s Kings Cross, after he hit his head on the pavement and sustained serious head injuries. His death triggered an extensive campaign against alcohol-fuelled violence and, after his sentencing in November 2013, this evolved into calls for harsher penalties for unprovoked one-punch attacks, including minimum sentences for one-punch deaths. Following the death of Daniel Christie in a very similar attack on New Year’s Eve 2013, the debate regained intensity with both the Sydney Morning Herald and The Daily Telegraph running specific campaigns against alcohol-fuelled attacks.

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34 ibid., p. 26.
In January 2014, the NSW Parliament inserted sections 25A and 25B into the Crimes Act 1900 (NSW) in order to create offences in relation to one-punch deaths. The Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014 was introduced in the NSW Legislative Assembly on 30 January 2014, passed by both Houses on the same day, and assented to on 31 January 2014 (coming into operation on the same day). The Bill introduced the new offence of assault causing death, an aggravated version of that offence if the offender was intoxicated, and also increased pecuniary penalties for certain public order offences. It was introduced in cognate with the Liquor Amendment Bill 2014, as part of a package of initiatives that heightened regulations around the sale of alcohol, including a lock-out after 1.30pm coupled with 3am last drinks at all venues in the Sydney CBD Entertainment Precinct.

**Assault Causing Death in New South Wales**

Under section 25A(1) of the Crimes Act, where a person intentionally hits another person with any part of their body or with an object held by them, and that assault causes the death of the other person, they are guilty of assault causing death, punishable by a maximum penalty of 20 years imprisonment. If, at the time of the assault, the accused was intoxicated, a maximum penalty of 25 years may be imposed (section 25A(2)), with a mandatory minimum sentence of a non-parole period of eight years (section 25B).

**Figure 3. Assault causing death in the NSW Crimes Act**

<table>
<thead>
<tr>
<th>25A</th>
<th>Assault causing death</th>
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<tbody>
<tr>
<td>(1) A person is guilty of an offence under this subsection if:</td>
<td></td>
</tr>
<tr>
<td>(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</td>
<td></td>
</tr>
<tr>
<td>(b) the assault is not authorised or excused by law, and</td>
<td></td>
</tr>
<tr>
<td>(c) the assault causes the death of the other person.</td>
<td></td>
</tr>
<tr>
<td>Maximum penalty: Imprisonment for 20 years.</td>
<td></td>
</tr>
<tr>
<td>(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.</td>
<td></td>
</tr>
<tr>
<td>Maximum penalty: Imprisonment for 25 years.</td>
<td></td>
</tr>
</tbody>
</table>

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43 This is one of only two offences in the NSW Crimes Act that has a mandatory minimum sentence, the other being a mandatory penalty of life for murdering a police officer in the execution of his or her duties (section 19B). See: Quilter (2014) ‘One-punch laws, mandatory minimums and “alcohol-fuelled” as an aggravating factor’, op. cit., pp. 81, 101.
In determining whether the accused was intoxicated at the time of the offence, an alcohol concentration of 0.15g or more of alcohol in 210 litres of breath or 100 millilitres of blood, would lead to the accused being conclusively presumed to be intoxicated, although evidence may be given of the presence and concentration of any alcohol/drug/substance at the time of the alleged offence (section 25A(6)), including CCTV footage and eyewitness observations.44

The death may have been caused by the assault either as a result of the direct injuries received or from 'hitting the ground or an object as a consequence of the assault' (section 25A(3)). The provisions also confirm the common law position that death does not have to have been a reasonably foreseeable consequence of the act (section 25A(4)).

The NSW Context

The NSW context differs significantly to Victoria in a number of ways. In particular, while Victoria has undergone much reform in the area of fatal offences, the 2014 amendments to the NSW Crimes Act were the first changes to the structure of homicide offences since the creation of infanticide as an offence in 1951, and were seen by some as a missed opportunity for comprehensive reform.45 Further, the NSW Attorney-General had directed the Court of Appeal of the NSW Supreme Court to give a guideline judgment on one-punch manslaughter, an option available in Victoria under the Sentencing Act since 2004, but yet to be utilised for any matter.46

However, there are also similarities between Victoria and NSW. Both are common law jurisdictions, where without a specific one-punch offence, such assaults causing death can still be tried under manslaughter by unlawful and dangerous act. Further, neither jurisdiction employed their law reform commissions or other expert groups to review or consult on possible one-punch offence provisions, and sought to introduce statutory minimum sentences to increase the length of imprisonment from that currently being given to perpetrators of one-punch assaults that cause death.

Key Issues Around Assault Causing Death in NSW

Quilter identifies three main issues with a one-punch law in NSW: firstly there is no gap that needs to be filled with a new offence, either at law or operationally, in common law jurisdictions (NSW, SA and Vic) as there is in the Code jurisdictions (Qld, WA, Tas, ACT and NT); secondly there could be unintended consequences for

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46 Victoria’s first guideline judgement, on the extended use of community correction orders (CCOs), is pending in the Court of Appeal. See: Supreme Court of Victoria (2014) Historic Application Before Court of Appeal, media release, 30 July.
manslaughter committed in circumstances of domestic violence (as has been the case in WA); and, laws specifically designed to apply to single punch incidents can actually reduce the length of sentences in those instances, which goes against community sentiment.\textsuperscript{47}

In reference to the first of these issues, Quilter states that convictions and sentences of imprisonment were being achieved in NSW prior to the creation of a new offence.\textsuperscript{48} In particular, she identified 18 instances of one-punch manslaughter cases from 1998 to 2013, with an average sentence length of five years and 1.9 months, and an average non-parole period of three years and two months.\textsuperscript{49} These sentences were reduced in 17 of the 18 cases due to a guilty plea, of which 10 had been originally charged with murder but pleaded guilty to the lesser offence of manslaughter.\textsuperscript{50} This highlights the probable outcome of creating a basic offence of assault causing death and an aggravated version that attracts a mandatory minimum sentence, in that discretion will be displaced from the sentencing stage to the plea stage and offenders will have an incentive to plead guilty to the non-aggravated version of the offence to avoid the mandatory minimum sentence (thereby further deflating average sentences for these types of offences).\textsuperscript{51}

Quilter has also identified a number of issues with the drafting of the NSW provisions including the location of the offence in the hierarchy of seriousness of homicide offences:

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.\textsuperscript{52}

She argues that the basic offence fits within this hierarchy, but the mandatory minimum of eight years for the aggravated offence places it above the average manslaughter offence.\textsuperscript{53} She states that this is an issue because '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'.\textsuperscript{54}

Finally, Quilter notes difficulties in interpretation and application of the new provisions given how specifically they have been drafted:

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.


\textsuperscript{48} ibid., p. 27.

\textsuperscript{49} ibid., pp. 29–30.

\textsuperscript{50} Quilter (2014) ‘One-punch laws, mandatory minimums and “alcohol-fuelled” as an aggravating factor’, op. cit., p. 100.

\textsuperscript{51} ibid.

\textsuperscript{52} ibid., p. 88.

\textsuperscript{53} ibid., pp. 88–89.

\textsuperscript{54} ibid., p. 88.
While explicable in those terms, it is not a sound basis for a major change to NSW homicide law.\textsuperscript{55}

For example, ‘hitting’ is a problematic term to include in the provision as it does not exist elsewhere in criminal provisions, nor has it been judicially considered.\textsuperscript{56} Further, the ‘particularism’ of such a term means that any prosecution under the offence will be likely to involve overly technical arguments around whether specific actions fall within or outside the provisions.\textsuperscript{57}

Intention is also an issue in that it rules out certain types of common law assaults, such as reckless assault, that involve no intention to hit. Both the NSW provisions and the Victorian Bill require intention to be directed at the victim, which may exclude incidents where the offender intends to hit a certain person and instead hits another.\textsuperscript{58}

Further, in the Victorian provisions the intention of the offender must be to deliver the punch or strike to a specific part of the victim’s body (head or neck), which may be contested by the offender and could rule out any punches to the head that caused death where the offender had no specific intention or had an intention that the punch would strike another part of the victim’s body.

\textbf{Consideration in Other Jurisdictions}

\textit{Northern Territory}

The Northern Territory Government introduced the \textit{Criminal Code Amendment (Violent Act Causing Death) Bill 2012} on 31 October 2012, which created the new offence of violent act causing death (s 161A of the \textit{Criminal Code}).\textsuperscript{59} The offence is a strict liability offence in that any person who engages in conduct involving a violent act that causes the death of another person is liable to a maximum penalty of 16 years imprisonment. For the purposes of the offence, conduct involving a violent act is defined as follows (s 161A(5)):

\begin{quote}
\textit{conduct involving a violent act} means conduct involving the direct application of force of a violent nature to a person, whether or not an offensive weapon is used in the application of the force.
Examples of the application of force of a violent nature
A blow, hit, kick, punch or strike.
\end{quote}

As at the beginning of 2014, the new offence had not yet been applied by the courts.\textsuperscript{60}

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\textsuperscript{55} ibid., p. 93.
\textsuperscript{56} ibid., p. 93.
\textsuperscript{57} ibid., pp. 95–96.
\textsuperscript{60} For further discussion on the NT provisions see: Quilter (2014) ‘The Thomas Kelly case’, op. cit. p. 20.
\end{flushright}
Queensland

Queensland Premier Campbell Newman introduced the Safe Night Out Legislation Amendment Bill 2014 into the Queensland Parliament on 6 June 2014. According to the Premier’s introduction speech, the Bill forms part of the Queensland Government’s Safe Night Out Strategy, described as ‘a comprehensive action plan to tackle alcohol and drug fuelled violence in Queensland’. The Bill introduces the new offence of unlawful striking causing death into the Queensland Criminal Code (new section 302A), with the harshest maximum penalty currently in any of the jurisdictions of life imprisonment, with a non-parole period of the lesser of either 80 per cent of the sentence or 15 years. In the hierarchy of offences, and structure of the criminal code, the new offence sits next to murder.

The new offence applies to ‘a person who unlawfully strikes another person to the head or neck, causing the death of the other person’ (section 302A(1)). Notably, the provisions specifically exclude the defence of provocation from the offence (a defence that no longer exists in Victoria) and a specific definition of strike is inserted to mean (section 302A(7)):

strike, a person, means directly apply force to the person by punching or kicking, or by otherwise hitting using any part of the body, with or without the use of a dangerous or offensive weapon or instrument.

The Bill was referred to the Parliamentary Committee on Legal Affairs and Community Safety, which delivered its report on 18 August 2014. The Committee recommended that the Bill be passed, and sought clarification on how some of the other measures such as drug and alcohol assessment and the ID scanning policy would operate. In terms of the offence of unlawful striking causing death, the Committee noted that submissions from the alcohol industry were generally supportive of increased penalties for unacceptable behaviour in and around licensed premises, but the submissions from legal bodies raised concerns about the necessity of the new offence and the appropriate mechanisms for dealing with ‘coward punches’. Nonetheless, the Committee considered the inclusion of the new offence was ‘warranted’.

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64 ibid., p. vii.
65 ibid., pp. 7–12; In 2008, the Queensland Law Reform Commission recommended against introducing a new provision to cover manslaughter by unlawful and dangerous act as exists in the common law jurisdictions as it was of the view that manslaughter should be based on the foreseeability of death. See: Queensland Law Reform Commission (2008) A Review of the Excuse of Accident and the Defence of Provocation, report no. 64, QLRC, September, pp. 205–207.
66 ibid., p. 12.
South Australia

The Hon. Robert Brokenshire, a former Liberal Party minister and current member of the Legislative Council representing Family First, introduced a private member’s Bill on 6 August 2014 titled Criminal Law Consolidation (Assaults Causing Death) Amendment Bill 2014. The Bill proposes a new offence of assault causing death committed while intoxicated (proposed section 22A of the Criminal Law Consolidation Act 1935), punishable by a mandatory minimum sentence of 8 years imprisonment and a maximum penalty of 25 years imprisonment. The Bill has not been debated.  

**Coward Punches—Key Resources***


*Journal articles without hyperlinks are available from the Library.

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Coward Punches—Recent Media

- C. Politi (2014) ‘My son’s life was ended in a split second: The pain that won’t go away’, Sunday Herald Sun, 17 August, p. 6.
- A. Humpage (2014) ‘Bid to halt violence: Student holds forum to discuss the consequences of just one punch’, Melton Leader, 1 July, p. 3.
Coward Punches—Recent Media Cont...

- B. McHenry (2014) ‘One-punch laws should be about more than politics’, Geelong Advertiser, 5 February, p. 14
## Appendix A: Examples of One Punch Causing Death Cases in Victoria

<table>
<thead>
<tr>
<th>Case</th>
<th>Details</th>
<th>Sentencing remarks</th>
<th>Sentence</th>
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<tbody>
<tr>
<td><strong>R v Parker [2013] VSC 479</strong></td>
<td>Victim tried to calm offender down after he got aggressive towards ex-girlfriend in the street. Offender punched victim, who fell to the ground and hit head on concrete.</td>
<td>[49] There appears to be a persisting view about, despite all the publicity and media campaigns by the police and government, that it’s ‘just a punch’. [50] A punch kills. We have numerous examples, people just walking along the street, minding their own business, or trying to be helpful, or just the wrong time and place. One punch and one death that follows. This is not television, this is not a video game, this is real life, we have fragile bodies that break, and fragile heads that break with even more dire consequences. [51] All of the men, particularly the young men of our society ought to come and sit here on this bench and look at the sad eyes that populate this court, the sad eyes of children, parents, partners, and friends who have lost someone they love and treasure because someone lost their temper, or got a bit angry or was showing off. One punch and hundreds of people’s lives are destroyed. Because nothing ever makes it better, time can dull the pain, but it never makes it better. That is what you have to live with – what you have inflicted upon these people for the rest of their lives. … [53] The crime of manslaughter is serious and this is an example that falls within the middle of the range in terms of seriousness, it is not at the lower end, nor is it at the higher end, but in my view falls somewhere in the middle of the range. [54] I have to take into account in your favour your plea of guilty, the early stage at which it was entered, your remorse, your prospects of rehabilitation which I find to be reasonable, provided you undertake significant steps to deal with your anger issues, your very difficult childhood, your age and background and your psychological problems, which I find to be not particularly significant in light of your current treatment. Equally I need to consider the matters of both general and specific deterrence, which are of importance in this case, the need for just and appropriate punishment together with the contents of the victim impacts statements, as well as the other matters to which I have already referred to determine the appropriate sentence.</td>
<td>8 years and 6 months imprisonment (inc. 8 years for manslaughter), with non-parole period of 6 years and 3 months. Discounted due to guilty plea from 9 years and 9 months imprisonment with a non-parole period of 7 years and 6 months.</td>
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<td><strong>JPR v R [2012] VSCA 50</strong></td>
<td>Two groups of youths approached each other after drinking. Offender</td>
<td>[50] Having regard to the nature of the offending, as well as the applicant’s age, co-operation with authorities and early plea, genuine remorse, lack of criminal record or any subsequent offending, and good prospects of rehabilitation, I am persuaded that the learned sentencing judge placed too</td>
<td>3 years detention in a Youth Justice</td>
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delivered one punch to the victim's jaw, who fell back and hit head on road. Victim went home, but was taken to the hospital the next day, and subsequently died from brain injuries. Victim and offender both 17. Offender presented himself to police after learning of victim's death. Sentence of 6 years imprisonment with non-parole period of 4 years appealed as manifestly excessive.

Heitanen v The Queen [2012] VSCA 173

Altercation between friends after day of drinking. As victim was walking away, he looked over shoulder at offender, who struck him in the jaw. Victim immediately passed out. Appeal of manifestly excessive sentence dismissed.

[4] The appellant came before the sentencing judge with an unimpressive 20-year record of prior convictions, a significant number of which were for crimes of violence. His last conviction, for recklessly causing injury, was imposed less than two years before he killed Mr Rowe. Details of his prior criminal history are fully set out in the sentencing judge's sentencing remarks. At the time he struck the deceased, the appellant had consumed a considerable amount of alcohol. The two men had been pig hunting together and the appellant had consumed both Bourbon and beer whilst hunting and subsequently.

[5] The appellant has expressed remorse for having killed Mr Rowe and, as evidence of that, pleaded guilty to manslaughter at a very early stage in this proceeding. His remorse was also noted and accepted by a psychologist who examined him and wrote a report which was before the sentencing judge. His remorse and his early plea of guilty were clearly taken into account by the sentencing judge in reaching the sentence which she imposed as was the fact that the relatives of the deceased man were spared the emotional and psychological trauma of going through a trial by that plea. There is no doubt that the death of Mr Rowe was solely the responsibility of the appellant and that that responsibility would have been amply demonstrated had the matter proceeded to trial.

[6] In imposing the sentence which she did, the sentencing judge referred to the devastating effect much weight on the factors of general deterrence and denunciation, such as to lead him to impose a sentence that was outside the range reasonably open to him. To say that, is not to ignore the terrible pain and suffering of the Lowe family.

Centre.
Discounted due to guilty plea from 6 years imprisonment with a non-parole period of 4 years.

10 years imprisonment with non-parole period of 7 years.
on the deceased’s family which the appellant’s conduct had had and she expressed reservations as to his prospects of rehabilitation, saying that she was ‘pessimistic’ about those prospects although there was some hope of his turning his life around.

…

[14] The appellant’s attack on the deceased in this case was cowardly, unprovoked and executed in circumstances where the deceased had made it abundantly clear that he wanted no part in the violent confrontation which the appellant sought. Despite its being effected by a single punch, the appellant’s killing of the deceased was a serious example of unlawful and dangerous act manslaughter. It deserved condign punishment, which the sentencing judge imposed. There was no error in her Honour’s approach to the sentencing task, nor was there any error in the sentence she ultimately imposed. It was not manifestly excessive. This ground should be rejected.

| **R v Polutele**  
| **[2011] VSC 381** | Three friends attacked a patron leaving a pub, including smashing a bottle over the victim’s head, the offender was separated from victim by bouncers/bystanders. While victim was distracted by assault from another person, offender ran back and struck offender to the side of the head, causing him to become unconscious and hit his head on the kerb. Friend proceeded to kick/stomp victim while on the ground. |
| | [31] You are responsible for the death of an innocent young man. You became involved in the assault upon him for no other reason than to assist your friends in their unprovoked attack. It is said on your behalf that this should be understood as a case of misguided loyalty, but I do not consider that a mitigating factor in your favour. You and your two friends brutally attacked an innocent young man who posed no threat to you or to them. |
| | [32] At nearly 25 years old, you are still relatively young and your rehabilitation is important. But, as Whelan J said when sentencing Fostar Akoteu, drug and alcohol fuelled violence by young men is a serious social problem and the community expects a stern response to it. You and other young men must be deterred from such behaviour and general deterrence is a significant sentencing consideration. |
| | [33] As far as your prospects of rehabilitation are concerned, as counsel said, it is significant that you have recognised your problems relating to alcohol and substance abuse and are prepared to address them. He pointed out that your offending has occurred when you were intoxicated. You have undertaken courses in prison relating to drug and alcohol abuse and anger management and the like. |
| | [34] You had been previously convicted for recklessly causing serious injury by knocking a man out and you were still serving a suspended sentence of imprisonment for that crime but that did not deter you from offending. Indeed, you seemed proud of having rendered Mr Aguiar unconscious with one punch. Once again, you had become involved in a serious assault for no better reason than to assist your companions. You later demonstrated your callous disregard for Cain Aguiar’s well being and for the law by boasting about your act to Stephen Zappia. There is a need for specific |

| | 10 years imprisonment, with non-parole period of 7 years. |
| **R v Freeman**  
| **2010** VSC 346 | Deterrence in your case. | ![Table](image) |
| Offender pushed and shouted names at victim for some time, ending in a punch that knocked victim unconscious before hitting head on ground. Victim had intellectual disability/learning difficulties. | ![Content](content) |
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| **R v Christopher Docking**  
| **Sentence**  
| **2010** VSC 566 | ![Table](image) |
| After drinking all day, offender went to victim’s house at 2am to confront him over an argument between the victim and offender’s daughter, and punched him. Victim later died in hospital from cerebral bleeding. | ![Content](content) |
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**R v Freeman**  
2010 VSC 346

You had been released from prison some five weeks prior to this incident occurring. You were, on your own statements to the police and the psychiatrists, immediately thereafter consuming large quantities of alcohol and drugs as well as using your legal medication.

You were 28. You were not a young offender. You were not naïve. The death of Lorenzo Marchetta is a tragedy, a true tragedy for all concerned. For the Marchetta family it is an irreparable tragedy. They have lost a son and a brother that they all adored. The kind, gentle Lorenzo.

…

I act upon the basis that prison may be more difficult for you than the average prisoner, on the basis of your prior problem in prison, and your anxiety and depression, and will reflect that in the sentence imposed.

…

Balancing all of the matters to which I have referred, including your personal circumstances, general and specific deterrence, both of which have a real significance in this case, and the need to impose a just and appropriate sentence, I sentence you to be imprisoned for eight years and six months and direct that you are to serve six years before being eligible for parole. I do not believe that it is appropriate to impose a longer than normal parole period, as you were only five weeks out of prison when this offending occurred, and you had appeared to have gained little insight into your alcohol or drug problems at that stage.

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**R v Christopher Docking**  
Sentence  
2010 VSC 566

Mr Langslow submitted that there is a broad range of offending that can amount to manslaughter and that your conduct in this case falls at the low end of the scale. I agree there is a very broad range of conduct than can amount to manslaughter. However, you committed this offence in circumstances where your attack on Michael Miller was unprovoked and in his own home at 2:00 am. You were not defending yourself and you were affected by liquor. You had recently committed other violent offences. In my opinion this is an offence closer to middle of the range of conduct that constitutes this form of manslaughter.

…

Given the pattern of alcohol abuse and offending which have marked your history, it would be a good idea if you did not drink again and if you took advantage of any treatment both in custody and after your release to help you achieve that. For the benefit of both yourself and the protection of the community I strongly recommend that since you have indicated a willingness to have further...
<table>
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<tr>
<th><strong>R v E J C</strong> [2008] VSC 474</th>
<th>Two 17 year-olds in verbal fight at end of house party. Offender grabbed victim’s collar and delivered one or two ‘jabs’ to the head, causing victim to fall back and hit head on concrete footpath. Victim died from brain injury two days later.</th>
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<td></td>
<td>[26] It is said first and I accept, that manslaughter is an offence which embraces a very wide range of circumstances and degrees of moral culpability. Your case is not one involving the use of a weapon, or a protracted or a group attack. It is one which involves a tragic accident in the sense that the punch thrown by you was not thrown with any intention to cause its ultimate consequences. Nevertheless the punch itself was not accidental and you must face its consequences. …</td>
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<td>[46] I am left with the difficult task of deciding what sentence is appropriate.</td>
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<tr>
<td></td>
<td>[47] Such sentence must embody a public denunciation of the unlawful taking of the life of Jack Ellis, reflecting the sanctity and value of human life to our society.</td>
</tr>
<tr>
<td></td>
<td>[48] It must also embody an element of general deterrence, directed to demonstrating that the Court on behalf of society does not regard late night fist fights between young people as in any way acceptable.</td>
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<tr>
<td></td>
<td>[49] As against these matters, I must balance those circumstances of the offence which render your conduct less culpable and most significantly your youth and prospects of rehabilitation.</td>
</tr>
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<td></td>
<td>[50] In my view you have demonstrated an ability to mature and live a good and useful life. In the course of your life you have had to confront the breakdown of your immediate family, difficulties associated with your aboriginality, Type 1 diabetes, deaths within your immediate family, and a regime of strict bail conditions over the last two years. You have done so and succeeded in building a number of positive relationships in a balanced way, by way of employment, within your extended family, in your community and with a steady girlfriend. Further you have no other convictions.</td>
</tr>
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<td></td>
<td>[51] I am satisfied that your prospects of rehabilitation are good and that conversely a custodial sentence in adult prison would be adverse to those prospects.</td>
</tr>
<tr>
<td></td>
<td>3 years detention in a Youth Justice Centre</td>
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</tbody>
</table>
**R v Pota [2007] VSCA 198**

After verbal exchange between two groups of people on a train platform, offender punched victim, who then died from injuries sustained from hitting head on platform. Jury acquitted offender of manslaughter by unlawful and dangerous act, and instead found him guilty of recklessly causing serious injury. Appeal dismissed.

[37] However, the fact remained that the conduct by the appellant in this case was serious. He had approached the victim over some distance. There was little, if any, provocation offered to the appellant. At the time the appellant struck Barnett, the latter was in a particularly vulnerable position, bending forward on the edge of a railway platform. The blow was struck with some force. The appellant’s act had tragic consequences. The appellant had had previously brought home to him, in no uncertain terms, that the type of conduct in which he engaged on the night in question was completely unacceptable to society. He had previously been given, repeatedly, opportunities to reform, and had turned his back on them. (This was also conceded on the plea.) As I have stated, the type of offending in this case is all too prevalent. So, too, are the tragic and irreversible consequences which ensue when young men, often fuelled by alcohol, roam the streets, and turn on defenceless victims.

[38] The judge expressly acknowledged that the appellant, at last, has shown some remorse, and has, hopefully, begun to turn the corner towards reform. However, those circumstances cannot, in a case such as this, set at nought the obligation of the Court to impose severe sentences, in order to play a necessary role in setting appropriate standards of conduct for the community, and in deterring the type of conduct which occurred in this case. Notwithstanding the mitigating factors discussed by his Honour, the circumstances of the case called for the imposition of a substantial custodial sentence. Accordingly, in my view, the sentence imposed on this case could not be said to be manifestly excessive.

[39] Nor do I accept that the sentence in this case could only have been appropriate had the appellant been convicted of manslaughter or intentionally causing serious injury. There have been recent observations by this Court relating to the range of sentences which may be appropriate in cases of manslaughter and intentionally causing serious injury.

**R v Leatham [2006] VSC 315**

Two best friends drinking together, fought when victim decided to leave. Offender approached victim from behind, and when victim swung around quickly offender thought victim was going to punch him. Offender responded with a punch to the

[31] Unless there were very significant mitigating factors present in a manslaughter case a sentence of three years imprisonment would normally be regarded as very lenient, perhaps too lenient. However, I am constrained to agree with your counsel that this case is exceptional and that justice can be served by the imposition of a gaol sentence which is capable of being suspended.

[32] The law requires a court to impose an immediate custodial sentence only if no other sentencing option can properly fulfil the objects for which the sentence is to be imposed. This sentencing principle applies with particular force to young offenders with no prior criminal history and the probability of effective rehabilitation. You fall into this category of offender. The evidence is very strong that you will not offend again.

6 years imprisonment, with non-parole period of 4 years.

3 years imprisonment, with a non-parole period of 2 years (suspended for 3 years).
| **R v Natan Kaplan [2005] VSC 372** | Victim refused entry to night club. Offender (friend of bouncer) pursued victim who was leaving scene. Offender called to victim who turned around and offender struck victim with one punch to the chin. Victim fell and hit head on pavement. | [6] I accept that this is a manslaughter which is not towards the upper end of the scale of seriousness. You were acting relatively spontaneously. You had no weapon. You struck only one blow. What occurred took no more than a few seconds. On the other hand, you were a fit and sober man. You were under no threat. Benjamin Smith was an unsuspecting, vulnerable, intoxicated victim. He was punched when he was walking away from trouble. This was not just an unlucky punch in the course of a spontaneous fight.  

...  

[8] There are a number of aspects to your background that suggest that you are likely to be a good rehabilitation prospect. You are now 23 years of age. In February 2004, you were 21. You were born in Lithuania. You came to Australia when still a young child. You have been raised by your mother. You have helped her raise your half-sister. You have helped your mother in other ways. You have a good study and work record. You married earlier this year. You have a very young daughter. I have read the many letters commending your good qualities. You have good supports in the community.  

[9] You have had one prior appearance before the courts which I treat as immaterial. You have no prior history of violence.  

[10] I am prepared to accept that there is some remorse. I do so, despite some earlier contrary indications, in the light of the evidence of your mother and the contents of some of the letters.  

[11] Your youth is an important mitigating consideration, to be allowed for both as to the head sentence and as to the non-parole period. | 5 years imprisonment, with non-parole period of 3 years. |
| **R v Heriban [2005] VSC 73** | Offender punched victim while the victim was in the process of robbing the offender’s house. The victim fell to the ground, and the offender later punched and kicked him while on the ground. | [6] The circumstances which may give rise to the offence of manslaughter do involve a wide range of degrees of culpability which is reflected in a wide range of penalties. It seems to me that the circumstances of this offence involve less culpability on your part than is often the case for manslaughter by unlawful and dangerous act. You responded to a burglary by punching the burglar in the face. However, you were not attempting to arrest the burglar or prevent his flight, you did not contact the police, either before or after your assault, and you participated in the abandonment of the deceased at a remote location after you had assaulted him.  

[7] You were significantly affected by alcohol at the time. In my view, this circumstance does not reduce your culpability, although it might explain the disinhibition that led you to punch the victim. | 3 years imprisonment, with a non-parole period of 2 years. |
and another person put victim's body in victim's ute and drove him to a remote bush track and crashed ute into tree. Initial punch determined as cause of death.

deceased when he revealed himself.

…

[14] In mitigation, your counsel put the following matters:

1. You had never sought to evade responsibility for what had happened, either in the covertly recorded conversation with Mr Brunner, the record of interview, or the re-enactment.
2. You pleaded guilty, and had indicated a preparedness to plead guilty to manslaughter once the medical evidence as to the cause of death was known.
3. Whilst manslaughter is a serious offence, the fact that the assault occurred in the course of a burglary was a matter to be taken into account in mitigation.
4. The deceased's death was caused by the fall rather than the blow itself, and otherwise the injuries suffered by the deceased were minor.
5. The fact that you returned to the vehicle the next morning with your brother and your daughter confirmed that you had no idea that the deceased had suffered serious injury the night before.
6. The deceased's criminal record is extensive and includes numerous burglaries and thefts. Your counsel referred to the fact that you were acquainted with the deceased and suggested that his record was relevant as indicating why you were so annoyed.
7. Your background is that of a hard-working person of good reputation. Numerous people have written references for you and two gave evidence on oath on your plea. You have no prior history of violence.
8. Your children are at a vulnerable age and the sooner you are reunited with them the better.
9. You have expressed genuine remorse

R v Dempsey [2001] VSC 123

Father killed 12-week-old son by punch to the head, probably under the influence of ice.

[7] I have on many occasions when handing down sentences upon persons who have through unlawful actions brought about the death of another, referred to the inviolability of human life as a fundamental precept of our society and our law. When the life lost is that of a child for whose welfare the perpetrator was as parent, guardian and simply as an adult human being personally responsible, the situation must be viewed very gravely. After all, the true value of any community must be assessed in terms of the degree of genuine recognition that it gives to the rights and dignity of its most vulnerable and disadvantaged members. The courts, in my opinion, have an obligation through the sentences that they impose upon persons who act as you have done, to endeavour to protect those who are so exposed, be they young or old, against the violent abuse of physical power. Perpetrators who criminally beat or otherwise hurt children as a means of relieving their own sense of frustration or anger must anticipate the possibility that the law will respond in a

9 years imprisonment, with non-parole period of 7 years.
fashion designed to vindicate the victim’s rights and demonstrate the commitment of the society, which they represent, to its stated values.

…

[18] Whilst for a number of reasons, to which I have referred, including some possible underlying mental instability and the strength of your drug addiction, I consider the significance of general deterrence as a sentencing consideration must be lessened in your case, it nevertheless possesses importance as the courts endeavour to dissuade those who may be inclined to engage in such violence. I am not, however, of the view that specific deterrence needs to be taken into account.

[19] I have no reason to doubt that you experience genuine remorse. I suspect that that sense will increase with the passage of time, as you contemplate the terrible legacy of distress and anguish that you have left for others, including your wife and your other children. In your case, as in many that come before this court, there are a number of persons who can properly be described as victims.

[20] I have had regard to the sentences that have been handed down in this jurisdiction over recent years upon persons who have committed the crime of manslaughter, bearing in mind that they can be only of limited assistance as each case and each offender must be separately considered.

[21] I have taken into account in your favour your plea of guilty and the length of time since your arrest that you have awaited the determination of this matter.

[22] It is reasonable to have regard, I think, to the likelihood that you will probably serve the totality of your period of incarceration in the more restrictive environment of a protection unit, and that too must be taken into account.
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