

Statutory Review of sections 25A and 25B of the *Crimes Act* *1900 (NSW)*

Legal Aid NSW Submission to
Department of Justice NSW

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Table of Contents

About Legal Aid NSW	1
Introduction	1
New offences are unnecessary	2
Section 25B is unconstitutional	3
<i>Mandatory penalties are inappropriate for manslaughter</i>	4
<i>Mandatory penalties can lead to perverse sentencing outcomes</i>	4
<i>Mandatory penalties create costs for the justice system</i>	5
<i>The mandatory penalty provision is unnecessary</i>	5
Manslaughter is the correct label for one punch killings	6
A distinct offence for an intoxicated offender	7

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 33 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW provides state-wide criminal law services through the in-house Criminal Law Practice and funding to private practitioners. The Criminal Law Practice services cover the full range of criminal matters before the Local Courts,

District Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia.

Legal aid is available to applicants who are charged with offences under the *Crimes Act 1900* (NSW), including section 25A of that Act. Legal aid is also available for representation in sentencing proceedings and appeals against sentence.

Legal Aid NSW welcomes the opportunity to provide input into the Statutory Review of sections 25A and 25B of the *Crimes Act 1900*.

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Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to the Statutory Review of sections 25A and 25B of the *Crimes Act 1900* (“the provisions”).

At the outset it is acknowledged that the term given to the provisions - “one punch laws” - is a misnomer, given the wide variety of physical assaults causing death captured by the requisite physical element of the offences.

While sharing the concerns held by both Government and the community regarding alcohol-fuelled violence, Legal Aid NSW considers the concerns are better dealt with through other initiatives, including lock-out laws, enforcement of licence conditions for licensed premises, and improved late night transport options. The *Review of Amendments to the Liquor Act 2007 (NSW)* found that these changes had made the areas affected considerably safer.¹ The BOCSAR *Study on the effect of liquor licensing restrictions on assault: a quasi-experimental study in Sydney, Australia* has also shown a significant reduction in assaults in the Sydney CBD and Kings Cross of 45.1 and 20.3% respectively since January 2014.²

By contrast, there is no evidence to indicate the *Crimes Act* provisions have in any way contributed to their objective of impacting on drug and alcohol related street violence.³ The creation of new offences, increased sentences and mandatory sentences are not effective methods for reducing crime.⁴ Introduced without stakeholder or public consultation, the laws were, and remain, unnecessary. The provisions have the potential to cause perverse outcomes and grave injustice. Section 25B is unconstitutional.

Legal Aid NSW submits that the provisions should be repealed. In the alternative, section 25B should be repealed. Further and in any event, the provisions should be reviewed again in 3 years time in light of the so far limited available data about their operation.

We address these issues in further detail below.

¹ Ian Callinan *Review of Amendments to the Liquor Act 2007 (NSW)* at [17]. See also BOCSAR (2015) *Lockout and last drinks: the impact of the January 2014 liquor licence reforms on assaults in NSW, Australia*.

² Patricia Menendez, Kypros Kypri, Don Weatherburn (2016) *The effect of liquor licensing restrictions on assault: a quasi-experimental study in Sydney, Australia*. Addiction.

³ The Hon Barry O’Farrell, Second Reading Speech on introduction of the Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014, page 1

⁴ Adrian Hoel, Karen Gelb (2008) *Sentencing matters: mandatory sentencing* Sentencing Advisory Council (2008).

New offences are unnecessary

Legal Aid NSW considers that the new offences created by section 25A are unnecessary.

Section 25A creates specific offences for a particular type of assault causing death—that is, where the offender hits the victim, either with a part of the body or an object. Contrary to the description of the provisions on their introduction in Parliament as ‘a new offence for one-punch assaults’⁵ the existing offence of manslaughter by unlawful and dangerous act already criminalised one punch assaults causing death.

For that offence to be established, the prosecution must prove that the accused caused the death by a voluntary act that was unlawful and dangerous. The test for dangerousness is an objective one: that is, would a reasonable person in the accused’s position know that the act would expose another person to a risk of serious injury. It is not necessary for the Crown to prove that the accused intended to kill or inflict serious harm.

Between 1998 and 2013, there were at least 18 convictions for manslaughter after a one punch assault. In 17 of these matters, the offender pleaded guilty.⁶ In 2008, the Court of Criminal Appeal observed that ‘regrettably, single-blow manslaughter cases (by unlawful and dangerous act) are not rare in this State’.⁷

When introducing the Crimes and other Legislation Amendment (Assault and Intoxication) Bill 2014 the NSW Premier noted that to obtain a conviction for manslaughter, “the prosecution has to prove beyond reasonable doubt that the offender should have foreseen that, by doing what he or she did, the victim would be placed at risk of serious injury.” He further noted that a person will be held responsible for the new offence “even if the person does not intend or foresee the death of the other person, and even if the death was not reasonably foreseeable.”⁸

The second statement incorrectly characterises the offence of manslaughter as one that is limited to circumstances where death is reasonably foreseeable. The existing offence of manslaughter however does not require proof that the person intended or could foresee the death, or that the death was reasonably foreseeable. It only requires evidence that serious injury was foreseeable. In Western Australia, and other Code states, provisions criminalising assault causing death were introduced because the offence of manslaughter required the prosecution to prove that the death was reasonably foreseeable.⁹ This was never the case in NSW.

⁵ Footnote 3 above at page 2. Although the offence would encompass an assault made up of multiple punches or hits.

⁶ Julia Quilter “One-punch Laws, Mandatory Minimums and ‘Alcohol-Fuelled’ as an Aggravating Factor: Implications for NSW Criminal Law” (2014) 3 *Crime Justice Journal* 81, 87.

⁷ *Hopley v R* [2008] NSWCCA 105 at [46].

⁸ Footnote 3 above at page 2.

⁹ Julia Quilter “One-punch Laws, Mandatory Minimums and ‘Alcohol-Fuelled’ as an Aggravating Factor: Implications for NSW Criminal Law” (2014) 3 *Crime Justice Journal* 81, 86-87.

Section 25B is unconstitutional

Legal Aid NSW acknowledges that the courts have held that mandatory penalties, without more, are not unconstitutional.¹⁰ However section 25B is contrary to Chapter III of the Commonwealth Constitution because the sentencing process required by the section is repugnant to the judicial process in a fundamental degree, and distorts the institutional integrity of a court.

Section 25B does not simply narrow the range within which the judicial sentencing discretion may be exercised (as in the *Migration Act 1958* (Cth) section 233C, the subject of *Magaming*¹¹). Instead, it distorts the sentencing discretion in a manner that is contrary to the fundamental principle of equal justice, and impairs the institutional integrity of the courts that are required to apply it. It is therefore invalid.

Legal Aid NSW notes the validity of the provisions has not yet been tested in the High Court.¹²

Mandatory penalties

As a matter of principle, Legal Aid NSW strongly opposes mandatory penalties.

Justice requires proper consideration of all the circumstances of the offence and the offender.¹³ A fair sentence is arrived at when a judicial officer takes into account the factors set out in section 21A of the *Crimes (Sentencing Procedure) Act 1999*. Mandatory penalties restrict the judicial officer's ability to take these factors into account, and in some circumstances will produce excessive and unfair sentences.

The prescription of mandatory minimums is contrary to recommendations of the Australian Law Reform Commission, because they potentially offend against the principles of proportionality, parsimony and individualised justice.¹⁴

Further, mandatory sentencing breaches international human rights standards. In particular, the provisions breach Articles 9 and 14 of the International Covenant on Civil and Political Rights, to which Australia is a party. United Nations Committees have voiced concern over the disproportionate impact of mandatory sentencing on Indigenous Australians.¹⁵ On this basis, the United Nations Committee Against Torture recommended that Australia abolish mandatory sentencing.

¹⁰ *Magaming v The Queen* [2013] HCA 40 at [49].

¹¹ *Magaming v The Queen* [2013] HCA 40.

¹² We further note the decision of NSW Court of Criminal Appeal in *R v Garth* [2016] NSWCCA 2063.

¹³ Nicholas Cowdery, *Mandatory Sentencing* speech to the Sydney Law School (Distinguished Speakers Program) available at: www.ruleoflaw.org.au/wp-content/uploads/2014/05/Dist.-speakers-15-May-2014-Mandatory-Sentencing-paper1.pdf

¹⁴ ALRC Report *Same Time Same Crime* (2006) at [21.63]ff

¹⁵ See for example the United Nations Committee Against Torture, Concluding Observations of the Committee Against Torture: Australia, (April 2008) CAT/C/AUS/CO/1, page 8: Recommendation 5.4. As cited in Law Council of Australia *Mandatory Sentencing Discussion Paper* at page 31. Report is available at: www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS_Discussion_Paper_Final_web.pdf

Mandatory penalties are inappropriate for manslaughter

Mandatory penalties are particularly inappropriate for manslaughter cases. In *R v Merrick (No 5)* [2016] NSWSC 661, Wilson J commented that

It has long been recognised that of all serious offences, manslaughter attracts the widest range of possible sentences: R v Lavender [2005] HCA 37; (2005) 222 CLR 67 at [22] per Gleeson CJ, McHugh, Gummow and Hayne JJ. As was there stated, the culpability of a person convicted of manslaughter may fall just short of that of a person guilty of murder, or it may be such that a nominal penalty would suffice.¹⁶

Later in that decision, Wilson J said

No case is precisely like this one. No case exactly reflects the circumstances, objective and subjective, of this matter. No earlier sentence can dictate or even suggest the sentence to be imposed upon the offender for the crime he committed.¹⁷

Similarly, in *R v Field*¹⁸, Fullerton J stated:

It is no longer appropriate to for this Court to regard one-punch or single punch cases of manslaughter as constituting a single class of offence since the objective seriousness of each case may vary widely. It is essential that the particular case under consideration is the focus.¹⁹

Legal Aid NSW contends that these statements are also true of the offence in section 25A(2). While someone who assaults another and causes their death will, in many cases, be sentenced to a significant term of imprisonment, it is important for courts to have discretion to consider the objective and subjective features of a particular case to determine a just and commensurate sentence. Mandatory minimums prevent courts from doing this.

Mandatory penalties can lead to perverse sentencing outcomes

Retaining a separate offence with a mandatory minimum penalty could contribute to perverse sentencing outcomes. The following example was provided at the time the provisions were introduced:

An 18 year old with no criminal record is drinking in a bar when a drunken stranger hurls an insult at his girlfriend. After further taunts, the young man hits the stranger, who trips, hits his head on the edge of the bar and dies.

By contrast, a bikie gang member who, unaffected by alcohol, lies in wait for a rival gang member and punches him in the face, causing him to fall back and crack his head on the

¹⁶ *R v Merrick (No 5)* [2016] NSWSC 661 at [98].

¹⁷ *Ibid* at [103].

¹⁸ [2014] NSWSC 1797.

¹⁹ *Ibid* at [91].

pavement, and die, would not be subject to the mandatory minimum penalty. The young man in the first case will however receive a minimum sentence of 8 years jail.²⁰

In 2015 Irish tourist Barry Lyttle punched his brother causing a severe head injury and a coma that lasted more than a week.²¹ Mr Lyttle's contrition and remorse and pleas of leniency from the victim led a magistrate to sentence him to a suspended sentence for recklessly causing grievous bodily harm. Had the victim died, and had Mr Lyttle been intoxicated at the time of the incident, then he would have faced a minimum full time jail term of eight years. This would be an unjust and perverse outcome.

Mandatory penalties create costs for the justice system

The mandatory minimum penalty can produce unjust results, in that an offender whose offence is objectively more serious may receive the utilitarian discount of up to 25 per cent for an early guilty plea, while an offender whose offence is less serious, and who can show a number of mitigating factors, may not receive the full benefit of the discount.

This will discourage early guilty pleas and may mean that more trials will need to be held, at significant cost to Legal Aid NSW, the prosecutorial authorities, the judiciary, and the victim's family.

The mandatory penalty is also likely to encourage disputes regarding intoxication. Given the short time in which the provisions have been operating, it is not yet possible to demonstrate this effect.

The mandatory penalty provision is unnecessary

If the concern is to ensure condign punishment for one punch offenders, the mandatory penalty provision is unnecessary.

This was demonstrated by the appeal process in respect of the sentencing of Mr Kieran Loveridge whose case was, in part, the catalyst for the introduction of the provisions. Mr Loveridge's original sentence of seven years and two months, with a non parole period of five years and two months²² was increased on appeal to a sentence of ten years and six months with a non parole period of seven years. Intervention by Parliament, in the form of the mandatory sentence provision in section 25B, proved ultimately unnecessary in respect of the general deterrence effect of a lengthy jail sentence for a one punch attack.

Anecdotally, Legal Aid NSW lawyers report a general trend upward in sentences for one punch manslaughter offences. This feedback is supported by the following sentences:

- *McNeil* was sentenced to 10 years with a NPP of seven years six months (after a 25 per cent discount for a guilty plea).²³

²⁰Michaela Whitborn, 'Legal Eagles punch holes in mandatory sentence plan', Sydney Morning Herald, 23 January 2014.

²¹ <http://www.abc.net.au/news/2015-01-05/barry-lyttle-court-alleged-assault-kings-cross/6000114>

²² *R v Loveridge* [2013] NSWSC 1638.

²³ *R v McNeil* (No 4) [2015] NSWSC 1198.

- *Lambaditis* was sentenced to imprisonment for nine years with a NPP of six years nine months.²⁴
- *Merrick* was sentenced to imprisonment for 11 years, with a NPP of eight years three months.²⁵
- *Field* was sentenced to imprisonment for 10 years with a NPP of seven years six months.²⁶

In *Wood*, the offender pushed the victim over and her head struck the ground, causing her death. He was convicted of manslaughter by unlawful and dangerous act, and the Court of Criminal Appeal (“CCA”) increased his sentence to 11 years four months with a non parole period of eight years. The Court said:

*This Court has observed on many occasions that 'single-blow' manslaughter cases (by unlawful and dangerous act) are not rare in this State and need to be addressed by sentences that reflect the element of general deterrence: R v Carroll [2010] NSWCCA 55; (2010) 77 NSWLR 45; Loveridge at [103].*²⁷

These sentences indicated that heavy penalties will be imposed by the courts upon those convicted of one punch manslaughter, where the facts warrant it. Mandatory minimum penalties are unnecessary.

Manslaughter is the correct label for one punch killings

The labelling of offences has a communicative function. Manslaughter is known to be second only to murder as the most serious offence of violence. Creating a separate offence for one punch killings, and labelling them ‘assault causing death’, may imply that this type of killing is less serious. This is the case in the Western Australian *Criminal Code*, where murder and manslaughter are offences with a penalty of up to life imprisonment, while ‘unlawful assault causing death’ carries a maximum of ten years.²⁸

The creation of a separate offence for one punch killings also suggests that these offences are all essentially the same crime. However, the CCA has commented that

*it is not meaningful to speak of one-punch or single-punch manslaughter cases as constituting a single class of offences. The circumstances of these cases vary widely and attention must be given to the particular case before the sentencing court.*²⁹

²⁴ *Lambaditis v R* [2016] NSWCCA 117.

²⁵ *R v Merrick (No 5)* [2016] NSWSC 661.

²⁶ *R v Field* [2014] NSWSC 1797.

²⁷ *R v Wood* [2014] NSWCCA 184 [65].

²⁸ *Criminal Code* (WA) ss 279-281.

²⁹ *R v Loveridge* [2014] NSWCCA 120 at [215].

The fact that the dangerous act was a single punch will not always, or even usually, be the most important feature of a crime. Dealing with one punch killings under the general law of manslaughter would avoid an inappropriate focus on the precise method of killing.

A distinct offence for an intoxicated offender

Legal Aid NSW considers that the intoxication of the offender should not be an element of the offence. This is a novel and unnecessary feature of the section 25A(2) offence. Crimes of violence have historically been defined with regard to the violent act, the intention behind it and its consequences, rather than what might have ‘fuelled’ the act. As a matter of coherence and consistency, intoxication would be better dealt addressed at sentence, rather than as an element of the offence.

The only function of the separate offence appears to be to allow the imposition of a mandatory minimum penalty on the intoxicated offender, and to create a higher maximum, compared to the section 25A(1) offence. However, there is a logical flaw in the claim that a person who commits a violent act in full possession of his or her faculties should receive a more lenient punishment than a person who is disinhibited by alcohol.

Since 31 January 2014 the mitigating effect on sentence of an offender’s intoxicating has been significantly altered by the introduction of section 21A(5AA) in the *Crimes (Sentencing Procedure) Act 1999* (NSW). Intoxication is not treated by the courts as a matter in mitigation: see, for example, comments of the Court in *McNeil*.³⁰

The NSW Court of Criminal Appeal has also confirmed that:

It is well recognised that the commission of serious offences whilst under the influence of drugs or alcohol, by way of self-induced intoxication, provides no assistance to an offender by way of mitigation: s.21A(5AA) Crimes (Sentencing Procedure) Act 1999. Even before the commencement of that provision, courts around Australia had consistently rejected the proposition that intoxication can mitigate the seriousness of an offence or reduce an offender’s culpability: R v Loveridge [2014] NSWCCA 120; 243 A Crim R 31 at 59 [220].³¹

While there are some circumstances where intoxication might be seen as an aggravating factor—for example, where a person deliberately intoxicates him or herself in order to obtain the courage to commit a crime—these matters should be left to the courts to use their discretion in the particular cases, rather than using the blunt instrument of a separate offence with a mandatory minimum sentence.

³⁰ At [31] the Court remarked: “The offender’s intoxication is not something I take into account as in any way excusing or lessening his culpability for his crime. Its only relevance is to serve as part of the explanation for what occurred.”

³¹ *MM v R* [2016] NSWCCA 235 [96].