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WA'S 'ONE-PUNCH' LAW: SOLUTION TO A COMPLEX SOCIAL PROBLEM OR EASY WAY OUT FOR PERPETRATORS OF DOMESTIC VIOLENCE?

JANE CULLEN*

This article traces the history of Western Australia's controversial 'one-punch law' and questions whether it has achieved the purpose for which it was enacted. The legislation was enacted in 2008 as a downgraded homicide alternative to murder and manslaughter following a spate of fatal one-punch attacks. It occupies s 281 of the Western Australian Criminal Code under the title 'unlawful assault occasioning death'. As its name suggests, the one-punch law was created specifically to punish committers of fatal one-punch assaults. Hence, its creators did not consider if and how it might apply in the punishment of recidivist domestic violence perpetrators. With both the Northern Territory and New South Wales governments also recently enacting similar legislation, review of the major shortcoming of Western Australia's one-punch law is warranted. As part of the review I give recognition to four West Australian women who suffered enduring physical violence at the hand of their male partners, each meeting their death by that same hand. The common thread with these women is that the Director of Public Prosecutions did not charge their killers with manslaughter, even though each case had sufficient supporting evidence. Instead, their killers were afforded the opportunity to plead guilty under s 281. Subsequently, all four abusers pleaded guilty at the earliest possible court date, and each received a prison term of five years or less. Given the elements of s 281 and the maximum penalty attached, I seriously question its place in the conviction and punishment of perpetrators of intimate partner homicides, especially when such killings are preceded by long-term abuse.

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I INTRODUCTION

Across the globe, industrialised urban areas with a thriving nightlife are frequently plagued by antisocial behaviour and alcohol-fuelled violence.¹ It is within these locations, at nocturnal hours that violent acts, such as one-punch assaults, typically occur.² As for the phrase, “one-punch death”, it is essentially a colloquial description for the type of killing in which death is caused by a single punch, also known as a “king hit”. Alcohol-related violence is a probable consequence of two interrelated trends that feature in post-industrialised urban areas — the expanding night-time economy and

¹ Dick Hobbs et al, 'Violent hypocrisy: Governance and the Night-Time Economy' (2005) 2(2) *European Journal of Criminology*, 162.

² See, eg, 'Police say one-punch assaults too prevalent', *ABC News* (online), 21 October 2008 <<http://www.abc.net.au/news/stories/2008/10/21/2397073.htm>>; Mark Furler, 'When will we learn that one punch can kill?' *Sunshine Coast Daily* (online), 1 April 2008 <<http://www.sunshinecoastdaily.com.au/news/punch-kill/364931/>>. Among the one punch deaths in the media spotlight over the last decade is Sunshine Coast teenager Matthew Stanley, who died of massive head injuries after receiving a single punch in September 2006. His juvenile attacker was sentenced to five years in jail: Christine Kellett, 'Bottle shops 'like a toy store'' *Brisbane Times* (online), 16 November 2007 <<http://www.brisbanetimes.com.au/news/queensland/bottle-shops-like-a-toy-store/2007/11/16/1194766930529.html>>; Dexter Williams, who died after being punched in the face in July 2007, and whose attacker, a Navy seaman, was found not guilty of unlawful killing, but guilty of causing grievous bodily harm, and was sentenced to three years in prison: Todd Tardy, 'Sailor jailed for three years for one punch death', *ABC News* (online), 23 May 2008 <<http://www.abc.net.au/news/stories/2008/05/23/2253817.htm>>; and Mark Fryer, who died in Albany, Western Australia in October 2008 from a single punch, and whose attacker, Derek Loo, was convicted of unlawful assault occasioning death four years later when medical evidence clarified the victim's cause of death: Jacob Kagi, 'Man jailed over punch which killed his sister's partner', *ABC News* (online), 27 November 2012 <<http://www.abc.net.au/news/2012-11-27/albany-man-sentenced-to-jail-over-one-punch-death/4395056>>.

continuous deregulation of licensed venues.³ Research suggests that physical aggression arising between males is often linked to issues of masculinity and protection of self-esteem.⁴ When such issues arise, intoxicated men are often quick to respond violently, giving little consideration to the consequences of their actions.⁵

In the codified criminal jurisdictions (Northern Territory, Queensland, Tasmania, and Western Australia), the excuse of accident applies to manslaughter if the victim's death is unintended and unforeseen, and would not be reasonably foreseeable to an ordinary person.⁶ The short timeframe leading up to one-punch attacks, combined with the perpetrator's lack of intention to kill and the victim's unexpected death, means the law excuses the killer of liability on the basis that death was accidental. This legal "loophole" became apparent in multiple Western Australian and Queensland cases occurring over the past decade. In one case after another, one-punch killers walked free after being acquitted by juries who found the deaths to be accidental.⁷ These acquittals received significant media attention and were met with widespread community outrage, prompting calls for homicide law reform within the coded criminal law jurisdictions. Whilst the Queensland Government declined to enact a law specific to one-punch homicides, the Western Australia Government proceeded to enact the new 'unlawful assault occasioning death' offence. The offence was inserted into s 281 of the Western Australian Criminal Code as part of the state's extensive homicide law reform in 2008. In what could be described as a radical break from long-standing legal tradition, the new homicide offence requires no mental element or question of foreseeability, and carries a maximum prison sentence of 10 years.⁸

In 2012, some four years after its enactment, Western Australia's one-punch law captured media attention and prompted community concern all over again. The reason for the controversy this time, however, related to its application in domestic violence

³ Hobbs, above n 1, 162.

⁴ 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 & New Zealand Journal of Criminology*, 423.

⁵ *Ibid* 424.

⁶ *Kaporonovski v R* (1973) 133 CLR 209; *Criminal Code Act 1913* (WA); *Criminal Code 1899* (Qld) s 23.

⁷ *R v Little* (Unreported, Department of Justice and Attorney-General, 2007) ('Little'); *R v Moody* (Unreported, Department of Justice and Attorney-General, 2007) ('Moody'); *The State of Western Australia v Becker* (Unreported, District Court of Western Australia, 2007) ('Becker'); *The State of Western Australia v Oakley* (Unreported, District Court of Western Australia, 2007) ('Oakley').

⁸ *Criminal Code Act 1913* (WA) s 281.

('DV') cases. By the end of 2011, four of the eight offenders convicted under the law were recidivist DV perpetrators charged with killing their female partners. This article will argue that the one-punch law should not be used to convict killers who have a history of inflicting violence on a domestic partner prior to killing that partner. This is because the maximum sentence attached to s 281 does not reflect DV perpetrators' level of criminal liability the same way that it does one-punch offenders. To support these assertions, I will first examine the circumstances leading up to the creation of Western Australia's one-punch law. A brief comparative analysis of the Queensland Government's response to pressure for the creation of a similar law will then be given before I explore the justice issues that arise when s 281 is used to convict perpetrators of intimate partner homicides.

II ONE-PUNCH KILLINGS AND THE EXCUSE OF ACCIDENT

Assaults that involve punching and kicking are the type of assaults whereby the accident excuse will be most likely raised.⁹ When applied, accident operates as a complete defence, exonerating the accused of criminal responsibility. Historically, the excuse has existed since the enactment of Queensland and Western Australia's criminal codes in 1899 and 1902 respectively. The excuse also exists in the Tasmanian and Northern Territory criminal codes.¹⁰ When facing manslaughter charges, the accused can raise the excuse if the victim's death was unforeseen by them and would not be foreseeable to the ordinary and reasonable person.¹¹ The Western Australian statute, to which the three other codified states have equivalent provisions, provides that 'the test for criminal responsibility under s 23 is ... whether the death was such an unlikely consequence of that act that an ordinary person would not reasonably have foreseen it'.¹²

In the context of fatal one-punch assaults, the accident defence became problematic for prosecutors, who often failed to negate the excuse. The result was a number of

⁹ Colleen Davis, 'Intoxicated Victims and the Excuse of Accident' (2009) 16 *James Cook University Law Review* 42.

¹⁰ *Criminal Code Act 1983* (NT) s 31(1)(a); *Criminal Code Act 1924* (Tas) s 13(1).

¹¹ *Criminal Code Act 1913* (WA) s 23; *Criminal Code* (Qld) s 23(1)(b). The position is derived from the common law: *R v Van Den Bemd* [1994] 179 CLR 137.

¹² *Criminal Code Act 1913* (WA) s 23.

acquittals, which led to widespread public outrage.¹³ The problem was highlighted in both Western Australia and Queensland by a number of cases decided in 2007.

III BLOODSHED IN WA: COMMUNITY OUTRAGE AND DEMAND FOR REFORM

In Western Australia, the difficulty faced by prosecutors in securing a conviction for one-punch killings was highlighted by three highly publicised cases decided between September 2007 and March 2008. *WA v Becker* involved the death of 17-year-old Skye Barkwith after he was punched by 21-year-old Jake Becker.¹⁴ The punch caused Barkwith to fall and strike his head on the concrete, suffering a fractured skull and brain injuries which caused his death. At trial, Becker raised the excuse of accident, claiming that death was not foreseen nor a foreseeable consequence of his punch. The jury agreed, acquitting him of manslaughter.¹⁵

Weeks later, the acquittal of mine worker Paul Oakley for the manslaughter of Dwayne Favazzo, also resulting from a single punch, was met with media criticism and community outrage.¹⁶ After being punched by Oakley, 27-year-old Favazzo stumbled backwards and hit his head on the ground, dying shortly afterwards in hospital. Three months after Oakley was acquitted, Shawn Perrella was also acquitted of the manslaughter of 45-year-old father of three Neil Collette. Collette's cause of death was almost identical to Favazzo's.¹⁷

¹³ Leanne Edmiston and Jodie Munro O'Brien, 'Families Robbed', *The Courier-Mail* (Brisbane), 2 May 2007, 16; Amanda Watt, 'Man admits unprovoked bashing death, walks free', *The Courier Mail* (online), 2 April 2007 <<http://www.news.com.au/national/man-admits-unprovoked-bashing-death-walks-free/story-e6frfkp9-111113263738>>; Luke Eliot, 'Justice system failed Skye: McGinty', *The West Australian* (online), 12 September 2007 <<http://netk.net.au/WA/WA26.asp>>.

¹⁴ *Becker* (Unreported, District Court of Western Australia, 2007).

¹⁵ Eliot, above n 13.

¹⁶ 'The Western Australian government may introduce one punch laws', *Perth Now* (online), 31 October 2007 <<http://www.perthnow.com.au/news/punching-deaths-spark-law-call/story-e6frg12c-111114775205>>.

¹⁷ *Oakley* (Unreported, District Court of Western Australia, 2007); Vanessa Williams, 'Tough laws for 'one-punch' crimes', *WA Today* (online), August 3 2008 <<http://www.watoday.com.au/wa-news/tough-laws-for-onepunch-crimes-20080803-3p7p.html>>; *The State of Western Australia v Perrella* (Unreported, District Court of Western Australia, 2008); 'Man cleared of one punch manslaughter charge', *ABC Premium News* (online), 27 March 2008 <<http://www.abc.net.au/news/2008-03-27/man-cleared-of-one-punch-manslaughter-charge/2385088>>; 'WA to consider 'one punch' law', *The Sydney Morning Herald* (online), 1 November 2007 <<http://www.smh.com.au/news/National/WA-to-consider-one-punch-law/2007/11/01/1193619033921.html>>; 'DPP denies 'one punch' laws taking too long', *ABC News* (online), 31 October 2007 <<http://www.abc.net.au/news/2007-10-31/dpp-denies-one-punch-laws-taking-too-long/711730>>.

Victims' families were left feeling thwarted by the justice system, and appealed to Parliament to amend the law to prevent similar incidents from occurring in the future.¹⁸ The acquittals soon became a heated political issue, leading to government inquiries regarding the creation of an additional homicide offence to murder and manslaughter.¹⁹

IV CLOSING THE LOOPHOLE: WESTERN AUSTRALIA'S LEGAL EXPERIMENT

In 2005, the Law Reform Commission of Western Australia ('LRCWA') reviewed the state's homicide laws and recommended amendments. However, the Commission recommended that the accident excuse should not be changed because creating a homicide offence that removed its use may produce undesired outcomes.²⁰ The Western Australian Government's proposed one-punch law, as set out in the Criminal Law Amendment (Homicide) Bill,²¹ would essentially do this. The Bill containing the new homicide offence 'unlawful assault occasioning death' was quickly passed through Parliament and became law in August 2008. The decision to enact the new law, despite the Commission advising against it, clearly shows the powerful influence of politics and the media on the law-making process, and is a move that some commentators have criticised as being a 'knee-jerk response in the heat of the moment'.²²

V QUEENSLAND'S RESPONSE: THE 'ONE-PUNCH CAN KILL' CAMPAIGN

Meanwhile, in Queensland, similar cases were causing a public backlash. *R v Little* and *R v Moody* were two controversial Supreme Court decisions of 2007 that concerned fatal violence between young men who had been drinking heavily.²³ The victims, David Stevens and Nigel Lee, both died after being punched. Stevens and Lee were both found to have large quantities of alcohol in their blood, which post-mortem examination

¹⁸ Williams, above n 17, [1]: 'The State Government has responded to the plea for justice from families of the one-punch victims with the launch of a new campaign and a new law which means tougher sentences for offenders'.

¹⁹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, 1209–12 (Jim McGinty).

²⁰ The Law Reform Commission of Western Australia, 'Review of the Law of Homicide: Final Report', Project 97 (September 2007) 156.

²¹ Criminal Law Amendment (Homicide) Bill 2008 (WA), 12.

²² See Tomsen and Crofts, above n 4, 432.

²³ *Moody* (Unreported, Department of Justice and Attorney-General, 2007); *Little* (Unreported, Department of Justice and Attorney-General, 2007).

revealed to be a contributing factor to their deaths. The offenders, Little and Moody, each raised the excuse of accident and both were acquitted of manslaughter.²⁴

The acquittals in *Little* and *Moody* resulted in ‘enormous public disquiet’,²⁵ prompting a review by the Attorney-General’s department and the Queensland Law Reform Commission into the law of homicide.²⁶ Ultimately, the Commission recommended against any changes to the law simply because one or two cases had produced outcomes the public perceived as unacceptable. Referring to the proposed ‘Assault Causing Death’ offence, the Commission warned that ‘an amendment to the law designed to remedy an injustice in one case, may result in serious injustice in other cases’.²⁷

The failed law reform attempt in Queensland did not mean the issue of fatal one-punch assaults was ignored. In December 2007, the Queensland Government launched a public education campaign called ‘One Punch Can Kill’.²⁸ The government’s move aligned the issue with modern public health campaigns similar to those targeting smoking, drugs and unsafe sex, and made it less of a legal issue.²⁹ The rationale for campaigns such as ‘One Punch Can Kill’ is to filter the said message through the public consciousness so that the notion would eventually become common knowledge to all.³⁰ It was anticipated that, given the level of publicity afforded to the campaign, the message could extend to jury deliberations and have an impact on legal findings.³¹ If the consequences of one-punch were clearly understood by members of juries to include a death, then one-punch killings would now be reasonably foreseeable.³² Similarly, it would become considerably

²⁴ Watt, above n 13; ‘Two acquittals concern QLD opposition’, *The Sydney Morning Herald* (online), 3 May 2007 <<http://news.smh.com.au/national/two-acquittals-concern-qld-opposition-20070503-atl.html>>.

²⁵ ‘Two acquittals concern QLD opposition’, *The Sydney Morning Herald* (online), 3 May 2007 <<http://news.smh.com.au/national/two-acquittals-concern-qld-opposition-20070503-atl.html>>.

²⁶ Department of Justice and the Attorney-General, ‘Audit on Defences to Homicide: Accident and Provocation’ (Discussion Paper No 1, Queensland Government, October 2007).

²⁷ Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (2008); Queensland, *Parliamentary Debates*, Legislative Assembly, 14 November 2007, 4311 (Kerry Shine, Attorney-General).

²⁸ Queensland Government, *One Punch Can Kill* (2010) One Punch Can Kill <<http://www.onepunchcankill.qld.gov.au/>>.

²⁹ Tomsen and Crofts, above n 4, 431.

³⁰ *Ibid.*

³¹ *Ibid.*

³² Jonty Bush, ‘The smallest act of violence can have fatal consequences’ on *The Punch: Australia’s Best Conversation* (30 July 2012) <<http://www.thepunch.com.au/articles/the-smallest-act-of-violence-can-have-fatal-consequences/>>.

more difficult for accused to claim ignorance of the campaign and hence lack of foresight. Subsequently, juries would be less likely to acquit on the basis of accident.³³

Two particular cases support the value of this theory. Just six months after the campaign was launched, 29-year-old Mark Urch died after being punched by backpacker Daniel Dean. Charged with manslaughter, Dean raised the excuse of accident at trial. However in contrast to the pre-campaign cases of *Moody* and *Little*, the jury found that it was foreseeable for a punch to cause death and convicted Dean of manslaughter. Dean was sentenced to seven years in prison.³⁴ Also in 2009, Wally Hung was convicted of manslaughter for the one-punch attack that resulted in the death of rugby player Todd Parnell.³⁵ During police questioning, Hung was asked whether he was aware of the 'One Punch Can Kill' campaign and of the meaning of its message. Hung admitted to the police that he was aware of the campaign and its message.³⁶ Hence at trial, prosecutors could demonstrate that not only was Parnell's death reasonably foreseeable, but also foreseen by Hung when he threw the punch. Hung raised both the excuse of accident and self-defence. Both were unsuccessful and he was convicted of manslaughter.

VI THE ONE-PUNCH LAW'S EARLY YEARS: A REVIEW

Returning to Western Australia, I will now review some early convictions under the one-punch law. The first conviction was that of a teenager, who cannot be identified due to the fact he was 17 at the time of offending, in the case of *The State of Western Australia v JWRL*.³⁷ The case is interesting as it demonstrates the beginning of a "pattern" that appeared to emerge in relation to prosecutorial use of s 281. Of the first eight convictions secured between December 2009 and September 2011, not one of these offenders could be considered the characteristic assailant that one-punch law-makers sought to punish. If we refer back to the "spate" of killings referred to in sections I, III and V, the recipe for a fatal one-punch assault has previously included a nightclub district, pub-type vicinity or social gathering, offender and victim intoxication, and the

³³ *Ibid.*

³⁴ *R v Dean* [2009] QCA 309 (16 October 2009) ('*Dean*'); Bruce Mckean, 'Backpacker found guilty', *The Daily Mercury* (online), 19 February 2009 <<http://www.dailymercury.com.au/news/guilty-manslaughter-daniel-dean-mark-urch/172614/>>; 'Seven years jail for manslaughter', *The Whitsunday Times* (online), 26 February 2009 <<http://www.whitsundaytimes.com.au/news/seven-years-jail-for-manslaughter/176003/>>.

³⁵ *R v Hung* [2012] QCA 341 ('*Hung*'), 3 (Holmes J).

³⁶ *Ibid* 5 (Holmes J).

³⁷ *The State of Western Australia v JWRL* [No 4] [2009] WASC 392 ('*JWRL*').

victim dying as a result of a punch. In the case of *JWRL*, the victim Steven Rowe died from head injuries sustained after the offender, JWRL, hit him in the head with a piece of wood. In other words, Rowe did not die from being punched, or from his head impacting on any concrete. JWRL was charged with both murder and manslaughter, but was acquitted. JWRL was then charged under s 281 and subsequently found guilty of unlawful assault occasioning death in October 2009.³⁸

The circumstances of the next case to be prosecuted under the one-punch law were even further from the legislators' objectives than *JWRL*. In December 2009, s 281 was used to convict a 31-year-old man for killing his intimate partner.³⁹ The offender, Steven Zyrucha, had a long history of poly-drug abuse and an extensive violent criminal record, highlighted by convictions of aggravated armed robbery and possession of weapons and drugs. He lived in a de-facto relationship with the victim, Angela Taylor, and her two children from a previous relationship. The family had involvement with Department of Child Protection. In August 2008, Zyrucha and the victim were on a two-day drug binge, involving a number of different illicit and prescription drugs. One day into the binge, Taylor, who was intoxicated by drugs, crashed her car with her children as passengers. An ambulance was called, but Taylor appeared to be uninjured from the crash, and so was allowed to leave the hospital. Upon returning home, she was repeatedly attacked by Zyrucha, evident by the severity, number, and distribution of injuries to her body. That evening they both fell asleep, and when he awoke, Zyrucha discovered Taylor had stopped breathing. He called an ambulance but when the paramedics arrived she had died.⁴⁰

Due to the nature of DV, in that it generally happens "behind closed doors" and often without any eyewitnesses, killings that occur in these circumstances are especially difficult to prosecute.⁴¹ In the *Zyrucha* case, the only evidence available as to what

³⁸ *JWRL* [No 4] [2009] WASC 392; David Prestipino, 'Rowe attacker cleared of manslaughter', *WA Today* (online) 30 October 2009 <<http://www.watoday.com.au/wa-news/rowe-attacker-cleared-of-manslaughter-20091029-hnnu.html>>.

³⁹ *The State of Western Australia v Zyrucha* (Unreported, Supreme Court of Western Australia, 2009) ('*Zyrucha*').

⁴⁰ The information described in this paragraph are established facts from *Zyrucha* and have been retrieved from: Office of the Director of Public Prosecutions for Western Australia, *Unlawful Assault Occasioning Death* (1 January 2014) Supreme Court of Western Australia <http://www.dpp.wa.gov.au/_files/assault_occasioning_death.pdf>. They are referred to by Heenan J in sentencing in *The State of Western Australia v JWRL* [No 4] [2009] WASC 392.

⁴¹ Renée Römken and Katinka Lünemann, 'Getting Behind Closed doors: New Developments in Legislation to Prevent Domestic Violence' (2008) 32(2) *International Journal of Comparative and Applied Criminal Justice* 173.

happened was the offender's admissions and the victim's injuries. Since Taylor had no visible injuries when she was taken to hospital the previous day after her car accident, it is only logical that the numerous injuries found on her body the next day were a result of Zyrucha's repeated attacks. However, prosecutors believed this constituted insufficient evidence to secure a murder or manslaughter conviction,⁴² and offered Zyrucha — a recidivist offender and domestic abuser awaiting trial for murder — a plea bargain under the one-punch law. Not surprisingly, Zyrucha accepted the deal, pleading guilty at the earliest available opportunity.⁴³ He was sentenced immediately, becoming the first person sentenced under the law,⁴⁴ and he received a prison sentence of three-and-a-half years. This included the time he had already spent in custody, making him eligible for release on parole just 12 months later. At sentencing Justice Simmonds commented of Zyrucha's abuse of his partner — 'reigning blows when she (Angela Taylor) was in a defenceless and weakened condition is appalling'.⁴⁵ However, his Honour did note that Zyrucha had no intention to cause harm to his victim in a way likely to cause death, this being a large factor in sentencing. The other key factor was the conflicted medical evidence in relation to the victim's drug intoxication and underlying illness (sarcoidosis).⁴⁶

Despite the court accepting Zyrucha's lack of intention to kill Taylor, the facts of the case beg the question: Just how much damage can someone inflict upon their intimate partner before the "lack of intention" card can no longer be played? Zyrucha repeatedly attacked his much smaller victim who 1) had just been in a major car accident and 2) suffered an underlying medical illness. Perhaps the Director of Public Prosecutions ('DPP') could have argued that one does not perpetrate this type of violence, on multiple occasions, without intention to cause grievous bodily harm.

⁴² Office of the Director of Public Prosecutions for Western Australia, above n 40; Daniel Emerson, 'One-punch killers had form: study', *The West Australian* (online), 16 August 2012 <<https://au.news.yahoo.com/a/14561675/onepunch-killers-form-study/>>.

⁴³ Giordano Stolley, 'Wife basher sentence under one punch law', *The West Australian* (online), 3 December 2009 <<https://au.news.yahoo.com/a/6546699/wife-basher-sentence-under-one-punch-law/>>.

⁴⁴ *JWRL* was still awaiting sentencing at the time that Zyrucha was sentenced under s 281.

⁴⁵ Todd Cardy, 'Man jailed for three years for one-punch death of defacto partner', *The Sunday Times* (online), 4 December 2009 <<http://www.perthnow.com.au/news/western-australia/man-jailed-for-three-years-for-one-punch-death-of-defacto-partner/story-e6frg143-1225807103783>>.

⁴⁶ Office of the Director of Public Prosecutions for Western Australia, above n 40, 16–17.

Another case concerning a history of domestic violence that attracted s 281 was *The State of Western Australia v Indich*.⁴⁷ Occurring within the same month as *Zyrucha* (December 2009) the case of *Indich* involves the death of Indich's de-facto partner after he forcefully punched her in the ribs because he was angry that she had eaten a meal without making one for him. Indich had previously been convicted of assault against the same victim, for which he had been placed on a Conditional Release Order.⁴⁸ Therefore, the assault breached this order. As a result of the punch the victim suffered two broken ribs and a ruptured spleen, which led to bleeding in her abdominal cavity. The victim was taken to hospital where her spleen was successfully removed, however she died of post-operative complications due to underlying medical conditions (heart disease, diabetes, and asthma). In court, it was established that Indich punched the defenceless victim in a deliberate and unprovoked attack, and this exacerbated her existing health issues and thus caused her death. He was charged under s 281 to which he pleaded guilty at the earliest opportunity. He received a prison sentence of two years and 10 months with parole eligibility.⁴⁹

Most noteworthy about the *Indich* case is, on the facts, there does not seem to be a clear reason why the Crown did not pursue a manslaughter conviction. The DPP's notes on the case point out that the victim's death was neither foreseeable nor intended due to her underlying medical condition. If Indich had been charged with manslaughter, he would have probably raised the accident excuse.⁵⁰ However, on close examination of the facts of the case, it is likely the defence would have failed because ss 23B(3)–(4) of the *Criminal Code* (WA) provide that the defence cannot be used if 'death or grievous body harm is directly caused to a victim by another person's act that involves a deliberate use of force, but what not have occurred but for an abnormality, defect or weakness in the victim'.⁵¹

The causative link between Indich's punch and his partner's death was established in the facts of the case. The court held that Indich's deliberate act of punching her and

⁴⁷ *The State of Western Australia v Indich* (Unreported, Supreme Court of Western Australia, 2009) ('*Indich*').

⁴⁸ *Sentencing Act 1995* (WA) ss 47–52.

⁴⁹ The information described in this paragraph are established facts from the case of *Indich* and have been retrieved from Office of the Director of Public Prosecutions for Western Australia, above n 40; Western Australia, *Parliamentary Debates*, Legislative Council, 16 May 2012, 2575 (Sue Ellery).

⁵⁰ *Criminal Code Act 1913* (WA) s 23B(2).

⁵¹ The meaning of 'defect, weakness or abnormality' was interpreted by the Queensland Court of Appeal in only one case: *R v Steindl* [2002] 2 Qd R 542, 546 (McMurdo P). In law, this is known as the "eggshell skull" rule. Codified in *Criminal Code Act 1913* (WA) s 23B(3)–(4); see also *Criminal Code 1899* (Qld) s 23(1)(a).

rupturing her spleen exacerbated her existing health issues and this caused her death.⁵² Indeed, a person without such underlying health issues may probably not have died from post-complications after having their ruptured spleen removed. However, due to the victim's illnesses, the trauma caused by the punch — lacerated spleen, broken ribs, bleeding to the abdominal cavity, and surgery — meant she had weaknesses that made her far more susceptible to death. In *R v Steindl*,⁵³ the only case to date that explores the meaning of 'abnormality, defect or weakness', the phrase was held to include consequences of trauma and disease.⁵⁴ Surely this would extend to the victim's underlying heart disease, diabetes and asthma. Referring to the Macquarie Dictionary, President McMurdo found the definition of weakness to mean 'a state or quality of being weak; feebleness; a weak point, as in a person's character; a slight fault or defect'.⁵⁵ In light of *Steindl*, it would be expected that the facts in *Indich* would give rise to a manslaughter conviction because ss 23B(3)–(4) would negate Indich's claim of accident. Had he been convicted of manslaughter,⁵⁶ Indich could have been facing a maximum term of life imprisonment, rather than the 10-year maximum attached to s 281. Of course, with the judicial discretion that exists in relation to manslaughter sentencing, a life sentence would have been unlikely for this particular crime.

The following year, in 2010, another perpetrator of chronic DV, Lincoln Warra, was charged by the DPP under s 281 for the death of his de-facto partner.⁵⁷ Warra pleaded guilty at the earliest possible opportunity. The offence, which took place in November 2009, occurred after Warra and his partner had a verbal argument about his belief that she was being unfaithful. Over the next three days that followed, the offender repeatedly assaulted the victim, punching and kicking her in the head numerous times, causing her to fall and strike her head on the floor, as well as hitting her in the back and the head with a metal chair. At the end of the second day, the victim went to a women's refuge and was taken to hospital where she had a number of assessments and X-rays. Instead of staying at the refuge that night, she returned home to Warra and they both consumed large quantities of alcohol. While the victim was sitting on a chair, Warra kicked her in the face in an unprovoked attack, causing her to fall off the chair and lose consciousness.

⁵² Office of the Director of Public Prosecutions for Western Australia, above n 40.

⁵³ *R v Steindl* [2002] 2 Qd R 542.

⁵⁴ *Ibid* 541 (Thomas JA).

⁵⁵ *Ibid* 549 (McMurdo P).

⁵⁶ *Criminal Code Act 1913* (WA) s 280.

⁵⁷ *The State of Western Australia v Warra* [2011] WASCSR 17.

They both went to sleep and when he awoke in the morning, Warra discovered his partner had died overnight. His prior criminal record, consisting of 17 pages of convictions including armed robbery, assaults occasioning bodily harm, and assaults on police officers, were considered during sentencing.⁵⁸ He was given a prison term of five years with no eligibility of parole.⁵⁹

Again, why the DPP did not pursue a charge such as murder or manslaughter is questionable. Murder under s 279(1)(b) of the Western Australian *Criminal Code* requires subjective 'intention to cause bodily injury such that it would endanger, or be likely to endanger, life'.⁶⁰ Arguably, this could have been a reasonable prospect on the facts. After all, it is not unreasonable to assume that any person who repeatedly uses a metal chair to strike the head of a victim they have already punched and kicked to the floor possesses the requisite *mens rea* to do bodily harm likely to cause death under s 279(1)(b).

As can be seen by the above discussion of the cases, the killings of these three female victims were in violent circumstances and perpetrated by violent criminals. However, it would appear the application of the one-punch law in these cases did not stir sufficient public outrage for Parliament to take notice. It was not until the details of the 2011 case *WA v Jones* came to light that the use of s 281 in DV-related killings became acutely problematic.⁶¹ In December 2010, the victim, 31-year-old Saori, visited the home of her ex-husband, Bradley, to see the estranged couple's four-year-old daughter who was staying with her father over the weekend. Saori, who was staying at a domestic violence refuge at the time, brought their 10-month-old baby with her to the house. Bradley was drunk and an argument ensued between the pair. This quickly escalated with Bradley, who was self-trained in martial arts, punching the victim in the head and knocking her to the ground. As Saori lay on the floor, Bradley continued to attack her. Both children were present and it was only until the young girl began to cry that he stopped. Instead of

⁵⁸ Ibid 6–10 (Murray J); Lincoln Warra was sentenced in February 2011 after being convicted in December 2010.

⁵⁹ The information described in this paragraph are established facts from the case of *The State of Western Australia v Warra* [2011] WASCSR 17 and have been retrieved from the Office of the Department of Public Prosecutions for Western Australia, above n 40; Western Australia, *Parliamentary Debates*, Legislative Council, 16 May 2012, 2575 (Sue Ellery); see also Angie Raphael, 'WA man gets five years for bashing death', *The Sydney Morning Herald* (online), 28 February 2011 <<http://news.smh.com.au/breaking-news-national/wa-man-gets-five-years-for-bashing-death-20110228-1bbbk.html>>; 'Man jailed for partner's death through bashings', *ABC News* (online), 28 February 2011 <<http://www.abc.net.au/news/2011-02-28/man-jailed-for-partners-death-through-bashings/1961186>>.

⁶⁰ *Criminal Code Act 1913* (WA) s 279(1)(b).

⁶¹ *The State of Western Australia v Jones* [2011] WASCSR 136 ('Jones').

calling an ambulance, Bradley carried his unconscious ex-wife to the bedroom and left her overnight, during which time she died. Over the next 12 days, police attended Bradley's house several times looking for Saori, who had been reported missing. Bradley refused to allow the officers to enter the house, telling them she had 'ran off with the best man from their wedding'.⁶² It was only after police returned and advised Bradley they intended to obtain a search warrant several days later that he admitted he had assaulted Saori and that she had died.⁶³

The fact that Bradley failed to alert authorities of his deceased ex-wife and left her body to decompose for 12 days, disturbingly, worked in his favour. At the time Saori's body was found, it was so badly decomposed that an autopsy could not determine her precise cause of death, although she was found to have a fractured skull.⁶⁴ According to the DPP,⁶⁵ the body's decomposition ruled out the possibility for a murder or manslaughter charge.⁶⁶ Subsequently, Bradley was charged with unlawful assault occasioning death under s 281. He was convicted after pleading guilty at the earliest opportunity.⁶⁷ Bradley, who had an extensive criminal record including armed robbery, drug offences, and assault, was sentenced to five years in prison in September 2011, backdated to the date of commission of the offence, making him eligible for parole in December 2013.⁶⁸

The public outrage in response to Bradley's conviction and sentence was widespread. In October 2011, Attorney-General Christian Porter received a letter from the Women's Council for Domestic and Family Violence Services about this case. The letter expressed the Council's outrage and disappointment at the DPP's decision to charge Bradley under

⁶² Mario Christodoulou, 'Report raises questions over wife's 'single blow' death', *ABC News* (online), 26 November 2012 <<http://www.abc.net.au/news/2012-11-24/police-report-raises-questions-over-wife-27s-violent-death/4389442>>; Kate Robertson, 'Wife-killer Bradley Jones may be released after three years', *Perth Now* (online), 20 September 2011 <<http://www.perthnow.com.au/news/western-australia/bradley-wayne-jones-may-be-released-after-serving-three-years/story-e6frg13u-1226141798151>>.

⁶³ The information described in this paragraph are established facts from the case of *Jones* and have been retrieved from the Office of the Director of Public Prosecutions for Western Australia, above n 40; Western Australia, *Parliamentary Debates*, Legislative Council, 16 May 2012, 2575 (Sue Ellery).

⁶⁴ Christodoulou, above n 62.

⁶⁵ *Ibid.*

⁶⁶ In defending prosecutors of the *Jones* case, Attorney-General Michael Mischin claimed 'there was no sufficient evidence that Bradley Jones intended to kill Ms Jones or intended to do her any life-threatening or health-endangering injury': Western Australia, *Parliamentary Debates*, Legislative Council, 26 September 2012, 2 (Michael Mischin) <[http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/046b5ca437aee5cf48257afc0018982a/\\$FILE/A38%20S1%2020121024%20p7596b-7604a.pdf](http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/046b5ca437aee5cf48257afc0018982a/$FILE/A38%20S1%2020121024%20p7596b-7604a.pdf)>.

⁶⁷ Robertson, above n 62.

⁶⁸ *Ibid.*

s 281, as well as their disdain for the lenient sentence he received for the killing.⁶⁹ On his review of the case and its available evidence, Porter formed the view that the DPP's decision to charge Bradley under s 281 was incorrect. Porter believed there was sufficient evidence to secure a manslaughter connection, and questioned the matter with the DPP.⁷⁰ The DPP maintained that due to the decomposed state of Saori's body, her exact cause of death could not be determined and thus there would be no reasonable prospect of a manslaughter conviction.⁷¹

The DPP's decision not to prosecute under a manslaughter charge is problematic. If the DPP had pursued a manslaughter charge, they would have had to prove Bradley's actions were the 'significant and substantial' cause of Saori's death,⁷² not the sole and main cause. Bradley voluntarily admitted to police he had punched his ex-wife 'very hard' in the temple, and that she had fallen to the ground.⁷³ If my analysis of fatal one-punch assaults under sections III and V indicates something, it is that this sequence of events (punch to victim's head, head hitting the ground) is likely to cause death. Section 270 of the *Criminal Code* defines the term 'kill' as 'any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person'.

This test applies to both manslaughter (s 280) and s 281, so why the DPP pursued the lesser charge is questionable. If the DPP's difficulty was with proving causation, then they would have had the same issues proving causation under s 281. If the issue was not one of legal causation, one might speculate about the reason the DPP chose to prosecute Bradley under s 281 and not s 280. Michael Mischin, who replaced Christian Porter as Attorney General in June 2012, denied that the decision related to DPP scepticism about

⁶⁹ Western Australia, *Parliamentary Debates*, Legislative Council, 18 October 2011 (Alison Xamon).

⁷⁰ Daniel Emerson, 'Former AG's question charge for wife killer', *The West Australian* (online), 6 August 2012 <<https://au.news.yahoo.com/a/14466753/former-ags-question-charge-for-wife-killer/>>; Western Australia, *Parliamentary Debates*, Legislative Council, 16 May 2012, 2575 (Sue Ellery); Standing Committee on Environment and Public Affairs, Parliament of Western Australia, *Petition Number 161: Review of the Laws Pertaining to Domestic Violence* (13 September 2012).

⁷¹ Christodoulou, above n 62; Western Australia, *Parliamentary Debates*, Legislative Council, 26 September 2012, 2 (Michael Mischin) <[http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/046b5ca437aee5cf48257afc0018982a/\\$FILE/A38%20S1%2020121024%20p7596b-7604a.pdf](http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/046b5ca437aee5cf48257afc0018982a/$FILE/A38%20S1%2020121024%20p7596b-7604a.pdf)>.

⁷² Also called the 'operating and substantial cause' test. See, eg, *Krakouer v Western Australia* (2006) 161 A Crim R 347.

⁷³ Christodoulou, above n 62.

being able to negate the accident excuse.⁷⁴ After all, Bradley had beaten Saori on many prior occasions and she had not died. Perhaps he might have argued this as a reason for lack of foresight and foreseeability. Whether a jury would have agreed with Bradley, a martial arts enthusiast 'trained in the use of physical violence',⁷⁵ is a question that forever will be left open.

VII 'SAORI'S LAW'

In westernised countries, such as the USA, Australia, and in particular Europe, the prevention of interpersonal violence among partners or ex-partners is a matter of growing urgency.⁷⁶ Internationally, there is an unequivocal tendency towards an increase of active state intervention for domestic violence.⁷⁷ In Australia, there has been increased attention on the role of the law for intervening and preventing family violence.⁷⁸

In September 2012, the Western Australian Opposition Leader Mark McGowan introduced a Bill referred to as 'Saori's Law'. The Bill was drafted by Labor MLA Tony Buti,⁷⁹ and proposed to amend s 281 to provide for a maximum imprisonment of 20 years in circumstances of aggravation. 'Circumstances of aggravation' includes cases where the offender is in a domestic relationship with the victim of the offence.⁸⁰

⁷⁴ Michael Mischin, *Statement from Western Australian Attorney General Michael Mischin in response to questions about the death of Saori Jones* (22 November 2012) ABC News, 2 <http://www.abc.net.au/4corners/documents/domestic2012/WA_AG_statement_Jones.pdf>; Western Australia, *Parliamentary Debates*, Legislative Council, 26 September 2012, 2 (Michael Mischin) <[http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/046b5ca437aee5cf48257afc0018982a/\\$FILE/A38%20S1%2020121024%20p7596b-7604a.pdf](http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/046b5ca437aee5cf48257afc0018982a/$FILE/A38%20S1%2020121024%20p7596b-7604a.pdf)>.

⁷⁵ Jones [2011] WASC SR 136 (Jenkins J).

⁷⁶ Römken and Lünemann, above n 41, 173.

⁷⁷ Ibid.

⁷⁸ Queensland Crime and Misconduct Commission, Queensland Parliament, *Policing Domestic Violence in Queensland: Meeting the Challenges* (2005) 11

<<http://www.cmc.qld.gov.au/data/portal/00000005/content/73653001131400781353.pdf>>.

⁷⁹ Dr Tony Buti is a Western Australian MLA representing the seat of Armadale. Prior to winning his seat in 2010, he had lectured at Murdoch University, published several books and worked as a lawyer. He spent over one year drafting the proposed law. Dr. Buti is also the author of the Labor Party's discussion paper on reducing domestic and family violence in Western Australia — one of Labor's election promises for the March 2013 election. Labor lost the election and thus the promises in relation to domestic violence could not be implemented.

⁸⁰ Criminal Code Amendment (Domestic Violence) Bill 2012 (WA); for definition of 'circumstances of aggravation' see *Criminal Code Act 1913* (WA) s 221.

Given the fact that DV laws are stricter in Western Australia than in any other State,⁸¹ it seems odd that the Western Australian Liberal Government rejected the Opposition's proposed 'Saori's Law'.⁸² One Minister stated that the legislation was 'premature', indicating the government would not support the law.⁸³ The 'guardian for the public interest',⁸⁴ Attorney-General Michael Mischin, stated the deterrent value of increasing the maximum sentence under s 281 to 20 years would detract from the broader problem of family violence, and therefore would not support the law.⁸⁵ He continued to maintain his opinion that direct causation of Saori's death could not be established due to the decomposed state of her body and thus a manslaughter conviction would be impossible. Mischin also asserted that the administration of criminal justice should not be influenced by politics and it would hence be inappropriate for the government to seek to exercise such influence. As a core component of western democracies, prosecution authorities (such as the Western Australian DPP) should enjoy independent decision-making and not be instructed on how to go about prosecuting cases.⁸⁶ This is interesting, considering one of the advocates of 'Saori's Law' is the current Director of Public Prosecutions Joe McGrath.⁸⁷

VIII CONCLUDING REMARKS

Far too often, heated debates for urgent law reform are a knee-jerk response to high-profile cases with outcomes that are viewed as unjust, inequitable, or contrary to public

⁸¹ Western Australia is the only state which makes it mandatory for police to take action (such as arrest or issue of a restraining order) upon having suspicion that DV is occurring: *Restraining Orders Act 1997* (WA) ss 62(A)-(C); and for courts to issue a protection order for certain 'violent personal offences': *Restraining Orders Act 1997* (WA) s 63A. 'Violent personal offence' is defined to mean certain offences against the *Criminal Code Act 1913* (WA) such as inflicting GBH, sexual coercion, etc. Under the WA Act the order lasts for life.

⁸² Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 October 2012, 7596b-7604a, 9. (Tony Buti)

<[http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/046b5ca437aee5cf48257afc0018982a/\\$FILE/A38%20S1%2020121024%20p7596b-7604a.pdf](http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/046b5ca437aee5cf48257afc0018982a/$FILE/A38%20S1%2020121024%20p7596b-7604a.pdf)>.

⁸³ *Ibid* 8 (John Day).

⁸⁴ Robin Banks, *The Role of the Attorney General is to Act as Guardian of the Public Interest and the Rule of Law* (3 September 2007) Human Rights Law Centre <<http://hrlc.org.au/if-i-were-attorney-general-september-2007/>>; Peter Hartley-Jones, 'The role of the Office of the Public Guardian in investigations of abuse' (2011) 13(3) *Journal of Adult Protection* 160.

⁸⁵ Mischin, above n 74.

⁸⁶ *Ibid*.

⁸⁷ Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 October 2012, 7596b-7604a, 4 (Tony Buti) <[http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/046b5ca437aee5cf48257afc0018982a/\\$FILE/A38%20S1%2020121024%20p7596b-7604a.pdf](http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/046b5ca437aee5cf48257afc0018982a/$FILE/A38%20S1%2020121024%20p7596b-7604a.pdf)>.

expectation.⁸⁸ Cases involving one-punch deaths highlight this issue. One cannot ignore the axiom “hard cases make bad law”. Law reform commissions — comprised of eminent and esteemed legal experts — are a non-statutory body of expert legal knowledge to advise the government of appropriate law reform measures. However, as shown by the one-punch law, expert recommendations often take a back seat to the demands of the public, and of course, the electoral cycle.⁸⁹ So although McGinty may have had the best intentions and motives for the utilisation of s 281 when he proposed the law in 2008, in hindsight it may not have been a particularly calculated decision. A similar opinion was expressed by Justice EM Heenan in the sentencing remarks for the case *Western Australia v JWRL (a child)*.⁹⁰

In relation to how the Western Australian Government may have better dealt with the problem of fatal one-punch assaults, Queensland's experience with the 'One Punch Can Kill' campaign is instructive. Instead of using legislative amendment, I conclude that the State of Queensland chose the more suitable approach of public education. After all, the results of the trials of *Dean* and *Hung* were two one-punch killings that resulted in manslaughter convictions due to the fact that both offenders were aware of the campaign.⁹¹ Since the *Moody* and *Little* acquittals, which were quickly followed by the introduction of the 'One Punch Can Kill' campaign, there have been no similar cases in Queensland where an accused has been acquitted of manslaughter on the grounds of accident. Queensland's approach illustrates that taking steps to reduce the antisocial behaviour and violence that leads to one-punch death does not necessarily require law reform.

In relation to DV, Attorney General Michael Minchin does make a strong point; it is indeed a broad social problem, and not simply a legal one. However, given that WA is stuck with the one-punch law for the time being, amending it to include an increased punishment for DV perpetrators might be worthwhile. In other words, renewed inquiries into the proposed 'Saori's Law' by the Attorney General should happen. Until then in Western Australia, it may only be a matter of time before another similar perpetrator is convicted under the law. With the sentencing precedents that currently

⁸⁸ Tomsen and Crofts, above n 4; Sue Erikson, 'One Punch' Legislation Commenced in the Northern Territory' (2013) 31(1) *Alternative Law Journal* 58.

⁸⁹ Simon Lenton, 'Pot, Policy and Politics — Reflection on Cannabis Law Reform in Western Australia' (2004) 23(2) *Drug and Alcohol Review* 223.

⁹⁰ *JWRL* [2009] WASC 392; *The State of Western Australia v JWRL (a child)* [2010] WASCA 179.

⁹¹ *Dean* [2009] QCA 309 (16 October 2009); *R v Hung* (Unreported, Supreme Court of Queensland, 5 May 2012); *Hung* [2012] QCA 341.

stand (e.g. the five-year sentence with a three-year non-parole period given to Bradley for the killing of his ex-wife Saori, among others),⁹² it is unlikely that a substantial punishment will be given in any similar case in future years.

⁹² For a discussion of other perpetrators convicted under the law, refer to pages 14–17 of this paper.

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