

THE VIOLATION OF PRINCIPLE AND PERPETUATION OF GENDER BIAS IN THE WESTERN AUSTRALIAN ASSAULT CAUSING DEATH OFFENCE

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INTRODUCTION

In 2008 the Western Australian Parliament introduced an assault causing death (ACD) offence in to the Western Australian Criminal Code ('the Code').¹ At that time it was the only jurisdiction to feature such an offence: seven years later and four other Australian jurisdictions have introduced similar offences.² A number of recent articles have examined the general issues associated with this national trend.³ This article focuses on the Western Australian offence, critiquing it and examining the way in which it has been applied to date in this jurisdiction. Specifically, it explores the capacity of this law to violate a number of core principles in criminal law. It also notes the way in which this offence can potentially operate to distort the prosecution of homicide offences in a way which re-introduces gender bias into the system. The discussion is anchored in the Code's approach to criminal liability, in which criminal responsibility is addressed through the excuses or defences, rather than the common law doctrine of *mens rea*.

The paper commences with a discussion of the background to the introduction of the offence, followed by an examination of two fundamental doctrinal arguments which can be levied against the offence. The first is that the offence unjustifiably violates the principle against constructive liability. The second is that, while the offence might appear to provide an appropriate label for the conduct in question, in fact there is no 'social need' for the offence

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¹ *Criminal Law Amendment (Homicide) Bill 2008* (WA).

² In August 2014, the Queensland Parliament passed the Safe Night Out Legislation Amendment Bill 2014, which amends the Criminal Code (Qld) 1899 to include the offence of unlawful striking causing death (section 314A). It requires that the court sentence the offender to serve at least 15 years imprisonment. In February of 2014 the New South Wales Parliament passed a new offence of assault causing death. Those convicted of this face a mandatory eight year prison sentence where the accused is intoxicated. In Western Australia the offence of assault causing death was introduced in 2008, carrying with it a maximum penalty of ten years' imprisonment, whilst in the Northern Territory a similar offence was introduced in 2012, laying down a maximum penalty of sixteen years.

³ See, eg, Julia Quilter, 'The Thomas Kelly case: Why a 'one punch' law is not the answer', (2014) 28 *Criminal Law Journal* 16; Andrew Hemming, 'Please mind the gap: An assessment of fatal 'one punch' provisions in Australia', (2015) 39 *Criminal Law Journal* 130.

because the conduct which is sought to be targeted is already appropriately criminalised. These objections from principle are examined against the backdrop of how to appropriately 'mark' the fact of death in terms of structuring homicide offences. The third part of the article, building on the constructivist and 'social need' issues identified in the first part, analyses the application of the ACD offence to spouse homicides. Most concern about the effects of extreme constructive liability focusses on the potential for overstating the moral and criminal culpability of an accused. However, the fundamental problem with extreme constructive liability is its lack of subtlety. It casts a very wide net of liability; establishing the offence is made easier for the prosecution due to the reduced requirement to prove a mental element. Thus, even though the application of the assault causing death offence to spouse homicides may appear surprising, it was to be expected. It is an exemplary illustration of the flaws and dangers of an offence that rests on extreme constructive liability and which is not 'needed' in the sense discussed earlier in the paper.

PART 1 : BACKGROUND TO THE WESTERN AUSTRALIAN OFFENCE

The introduction of the assault causing death offence in Western Australia was part of a 'package' of proposed amendments which flowed from the recommendations of the Western Australian Law Reform Commission's ('LRC (WA)') 2007 Report, *Review of the Law of Homicide*.⁴ In that Report the LRC (WA) addressed the situation where the accused causes the death of another through a deliberate act, but in circumstances in which death was not reasonably foreseeable. Under s 23B of the Code, evidence that death is reasonably unforeseeable and unforeseen by the accused invokes the consideration of the accidental event defence. If the defence is successful, it will prevent a conviction for manslaughter. The LRC (WA) felt that the availability of the accident defence in such circumstances was appropriate; it: 'ensures that there is a degree of correspondence between the blameworthy conduct of the accused and the resulting harm.' Despite the views of the LRC (WA), the offence was introduced, allowing prosecution for this alternative homicide offence where: an assault had occurred; it had resulted in death; and, death was not intended and was neither subjectively foreseen nor objectively reasonably foreseeable. In other words, the defence of accident is specifically rendered redundant.

Key to the enactment of the offence was significant media coverage of situations in which young men had died as a result of being 'king hit' and the subsequent politicisation of the issue.⁵ The circumstances were characterised as

⁴ Law Reform Commission of Western Australia ('LRC (WA)'), *Review of the Law of Homicide*, Final Report No. 97 (2009).

⁵ In Western Australia the victims included Leon Robinson, Skye Barkwith, Neil Collette and Dwayne Favazzo. In the Northern Territory Brett Meredith died after a single punch assault

random, public acts of violence associated with intoxication, and the public reaction was very much linked to that context; the political campaigns mounted to support the introduction of the laws reflect this. For example, in Western Australia the Attorney-General, in the Second Reading of the bill introducing the proposed offence, noted that: 'This 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'.⁶ Such statements have proven to be typically associated with the introduction of similar offences across Australia.⁷

These statements indicate a focus on one-off, drunken, violent encounters which have occurred in public. Later in this article it will be argued that in fact the offence as introduced lends itself to a rather different, private, context. Evidence gathered from prosecutions in Western Australia demonstrates that the offence has been utilised in ways which bear little resemblance to the sort of conduct which the offence was intended to capture.

Significance of the Code Approach

In Western Australia, the criminal law was codified at the beginning of the twentieth century on the basis of the Griffith Code, which had already been enacted in Queensland in 1899.⁸ Unlike the common law, which frequently requires the existence of *mens rea* as a pre-requisite to prima facie liability,⁹

(although the accused Michael Martyn was in fact convicted of manslaughter); in New South Wales it was the deaths of Thomas Kelly in July 2012, and Daniel Christie in January 2014, which prompted the introduction of the new offence. In New South Wales this was accompanied by a raft of measures to deal with alcohol fuelled physical violence – see *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW). In recently enacted legislation Victoria has introduced a mandatory sentence of 10 years for 'coward punch manslaughter' prompted by similar coverage.

⁶ Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, p1209c-1212a, 2.

⁷ The New South Wales Attorney-General, in announcing the proposed one punch offence stated: 'The new offence and proposed penalty will send the strongest message to violent and drunken thugs that assaulting people is not a rite of passage on a boozy night out.' Greg Smith MP, 'Unlawful Assault Laws Proposed', (Media Release, MR13, 12 November 2013). In introducing the *Safe Night Out Legislation Amendment Bill 2014* (Qld), then Premier Campbell Newman stated that 'We want both locals and tourists to be able to go out on a Friday or Saturday night and have a great time without it being ruined by the bad behaviour of violent or aggressive drunks' See Campbell Newman, (Media Statement, 23 March 2014) <<http://statements.qld.gov.au/Statement/2014/3/23/safe-night-out-strategy-to-stop-the-violence>>.

⁸ See *Criminal Code 1913* (WA) and *Criminal Code 1899* (Qld).

⁹ Some offences do not require the existence of *mens rea*, but in relation to the more serious offences, it is generally the case that the existence of an offence element has both an *actus reus* (conduct) and a *mens rea* (fault) requirement. See *DPP v Morgan* [1975] 2 All ER 347.

both the Queensland and Western Australian Codes approach the construction of criminal liability through both the offence elements (in the offence-creating section) and the elements of other provisions which speak to the fault of the accused. Many offence-creating sections in the Code do not, in their terms, require proof of fault; manslaughter is one such offence (although murder is not).¹⁰ However, fault requirements addressed in other provisions of the Code are incorporated into the offences.¹¹ These other provisions correlate to what the common law calls *mens rea* or defences,¹² and most of them are found in Ch V of the *Criminal Codes*, titled “Criminal Responsibility”.¹³ One such provision associated with the homicide offences is that of accident in s 23B. That section has been interpreted to mean that an accused has no criminal responsibility where an ‘event’ (the consequence)¹⁴ was neither reasonably foreseeable nor subjectively foreseen by the accused.¹⁵ The accident defence is distinct from causation. Establishing a causal connection to the event is a conduct element; the accident defence should be understood as part of the mental element. In Western Australia there is now clear judicial authority that the test for causation in homicide cases is distinct from considerations of foreseeability; it requires the prosecution to establish a substantial or significant contribution to the event by the conduct of the accused.¹⁶ This is not to suggest that difficulties will not continue to arise in distinguishing which facts are relevant to causation

¹⁰ Murder (*Criminal Code* (WA) s 279(1)) requires either proof of intent to cause death or intent to cause life-endangering injury. A third form of murder, ‘dangerous act murder’, is based on constructive liability: an act ‘likely to endanger life’ must have been done ‘in the prosecution of an unlawful purpose’ (s 279(1)(c)). Under the Queensland Criminal Code s 302(1)(a), murder requires either an intention to kill or an intention to cause grievous bodily harm. Section 302(1)(b) contains the offence of dangerous act murder.

¹¹ This is usually effected by the requirement in the offence-creating provision that the conduct be “unlawful”. For example, an “unlawful killing” is manslaughter and a killing is unlawful unless authorised, justified or excused (s 268). The criminal responsibility provisions in Ch V (and in some other sections later in the Code, for example, self-defence in s 248) will determine whether the killing was authorised, justified or excused.

¹² There is debate regarding the correct use of the terms ‘excuse’ and ‘defence’. See Kelly Burton and Thomas Crofts, *The Criminal Codes: Commentary and Materials* (Lawbook Co, 6th ed, 2009) 18.

¹³ Although note that defences of self-defence, medical necessity and provocation are dealt with elsewhere. It is critical to appreciate that the Code jurisdictions construct criminal liability through the prosecution having the onus of proof in relation to both the ‘offence elements’ and any elements of relevant ‘excuses’.

¹⁴ See *Kapronovski v The Queen* (1973) 133 CLR 209 (‘*Kapronovski*’).

¹⁵ The Code s 23B. The defence was reformulated in the 2008 amendments. Although there is no explicit test for accident under sub-s 23B(3) excludes ‘thin skull’ cases from the ambit of the defence. Sub-section 23B(4) notes that this is so even where the event is unforeseen by the accused, and unforeseeable, thereby implying that the test for accident comprises both an objective and a subjective foreseeability test. This is consistent with the case law – see *Kapronovski* (1973) 133 CLR 209, 225-41 (Gibbs J).

¹⁶ *Krakouer v Western Australia* (2006) 161 A Crim R 347 (‘*Krakouer*’).

and which relate to the accident defence (and many will be relevant to both),¹⁷ but the approach of both the Western Australian and Queensland Codes is to largely separate questions of conduct from those of mental responsibility.

In Western Australia, the introduction of the s 281 offence was preceded by a number of cases in which the accused persons, charged with manslaughter after a strike to the victim which ultimately caused fatal brain injuries, were raising the defence of accident, and being acquitted of these charges.¹⁸ It seems that juries were not convinced that the death of the victim in such circumstances was not an accident, and therefore that the foreseeable result of such a blow would not be death but some sort of bodily harm.

The Western Australian offence of ACD specifically removes the applicability of the accident defence, and is punishable with a maximum of 10 years imprisonment. Other excuses or defences, including self-defence, remain open for the accused to raise. The Western Australian Supreme Court has referred to the offence as essentially one of accidental manslaughter, designed to deal with a death which is a 'tragic, unexpected and accidental consequence'¹⁹ of a violent blow. That the offence is 'accidental manslaughter' is not merely a lay description. As a matter of law the offence would be manslaughter (an unlawful killing) but for the fact that it occurred by accident. This raises important questions about the way to 'tier' homicide offences, and the enduring issue in criminal law as to how to approach the situation where the actor causes the death of another but lacks mental culpability with respect to the 'event of death'.²⁰

The following section deals with doctrinal issues raised by the ACD offence.

¹⁷ See eg, *Stevens v The Queen* (2005) 227 CLR 319.

¹⁸ The publicised deaths included those of Leon Robinson in 2002 (see Law Reform Commission of Western Australia, above n 4, 33-35), Skye Barkwith in 2005 (see 'Mother's outrage after murder acquittal', *ABC News* (online), 12 September 2007 < <http://www.abc.net.au/news/2007-09-12/mothers-outrage-after-murder-acquittal/667316>> and Denis Rice, 'Kalgoorlie man, 22, in coma after pub fight' *The Sunday Times* (online), 14 September 2007 < <http://www.perthnow.com.au/news/western-australia/man-in-coma-after-pub-fight/story-e6frg13u-1111114426883>>; Neil Collette in 2006 (see 'Prosecutors call for substantial jail term over one punch assault' *ABC News* (online), 27 March 2008 < <http://www.abc.net.au/news/2008-03-28/prosecutors-call-for-substantial-jail-term-over/2385150>>) and Dwayne Favazzo in 2006 (see 'Mine worker to stand trial for unlawful killing', *ABC News* (online), 26 June 2007 < <http://www.abc.net.au/news/2007-06-26/mine-worker-to-stand-trial-for-unlawful-killing/81224>>). See also commentary in *The State of Western Australia v JWRL* (2009) 213 A Crim R 50, 52 [3] (EM Heenan J), noting the accused had been acquitted of murder and manslaughter and that 'this must mean that the jury were not satisfied that the death of Steven Rowe was an event which had not occurred by accident.'

¹⁹ *The State of Western Australia v JWRL* [2010] WASCA 179 [143] (Martin CJ).

²⁰ Andrew Ashworth, 'Manslaughter: Generic or Nominate Offences?' in C.M.V. Clarkson and Sally Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Ashgate, 2008) 235; Andrew Cornford, 'The Architecture of Homicide' (2014) 34(4) *Oxford Journal of Legal Studies* 819.

Firstly, it assesses an identified potential problem of overly constructive liability. It then questions whether there is in fact a genuine need for such an offence based on societal expectations and the existing framework of offences, taking into account penalties and offence labels. It is argued that even if the ACD offence does not represent a form of over-constructive liability, that this is not enough; a demonstrable need for the offence must exist.

PART 2 : OBJECTIONS FROM DOCTRINE

A *Objections from Doctrine 1: The Offence of Assault Causing Death Unjustifiably Interferes with the Principle Against Constructive Liability*

The notable feature of a ‘typically applied’²¹ ‘one punch killing’ offence is the disparity between the conduct element – an assault of some kind, typically one strike, which causes death – and the fault requirement. In Western Australia, the unavailability of the defence of accident means that there is no requirement on the part of the prosecution to prove that the accused had any awareness of the possibility of death, or even of any harm.²²

Subjectivists contend that there is an entrenched principle in criminal law which argues against this form of liability, known as constructive liability. A similar, although distinct argument, is that it is a breach of the correspondence principle which requires that all of the conduct elements have a ‘corresponding’ mental element which needs to be proven by the prosecution.²³ Andrew Ashworth, in ‘Manslaughter: Generic or Nominate Offences?’, in the context of discussing homicide offences which turn on the commission of an originating wrong that can be connected to the death, asks ‘why should a minor but unlawful act, done in circumstances where there is no gross negligence as to death (that is, a reasonable person would not have taken precautions against death resulting), be converted into a serious crime when by mischance death results?’²⁴

The reference to ‘mischance’ is associated with the notion of ‘moral luck’ in criminal law.²⁵ It is a concept which has consistently been raised in connection

²¹ By ‘typically applied’ is meant an application of the offence to a situation in which one punch or blow has felled the victim, and the victim has died as a result of striking his head. It is not suggested here that this is actually how the offence is being applied. Part 3 of the article explores an unintended application of the offence.

²² This is the case in all Australian jurisdictions where the offence has been introduced.

²³ See Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th ed, 2009) 76-77.

²⁴ Andrew Ashworth, ‘Manslaughter: Generic or Nominate Offences?’ in C.M.V. Clarkson and Sally Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Ashgate, 2008) 235.

²⁵ See eg, Kenneth W. Simons, ‘Is Strict Criminal Liability in the Grading of Offences Consistent with Retributive Desert?’ (2012) 32(3) *Oxford Journal of Legal Studies* 445-66; Larry Alexander, ‘Crime and Culpability’ (1994) 5 *Contemporary Legal Issues* 1; Sanford Kadish, ‘Foreward: The

with the boundaries of the manslaughter offence, but has also featured in relation to driving and attempt offences.²⁶ Subjectivists argue that where harm caused to a victim may be fortuitous, the result of 'bad luck' rather than an acknowledged risk, this should be reflected in the actor's criminal responsibility. Others posit that it should not make a difference to culpability, and that the actor should be held accountable for the consequences, notwithstanding that it is not foreseen by the actor.²⁷ John Gardner, for example, argues "that by intentionally committing an assault or other unlawful act D changes his normative position vis-à-vis the victim and it is therefore fair to hold him responsible for the death that ensues, however foreseeable that was in the circumstances."²⁸

Ashworth criticises the 'change of normative position' theory: 'Good reasons need to be advanced to explain why the commission of an originating wrong (of a certain type) should lead to constructive liability, and a simple reference to 'change of normative position' is unhelpful and inadequate'. He notes that in the absence of good reasons 'the defendant's fault falls too far short of the unlucky result'. Ashworth concludes that the arguments for homicide liability in such a case are unconvincing:

...if we are not to be governed by the law of deodand or a raging constructivism, we should have the courage to refuse to label such cases as homicide offences. It is wrong to be so influenced by the fact that D was committing an offence by doing the act that caused death, so as to turn the offence into homicide even when the fatal result lay outside the scope of the foreseeable risk created by the offence D was committing (assault, driving while disqualified etc). The gap between D's fault and the ultimate result is too wide or, to borrow Jeremy Horder's phrase, the moral distance is too great.²⁹

The subjectivist/objectivist debate on approaches to criminal liability and punishment is deep and complex, and a full discussion of this is outside of the scope of this article. For present purposes it should be noted that the debate in

Criminal Law and the Luck of the Draw' (1994) 84 *The Journal of Criminal Law and Criminology* 679-702.

²⁶ See Simons, above n 25.

²⁷ See Simons (ibid) who notes that almost all 'real world legislators' and many retributivist theorists believe that the criminal law should punish one actor more than another 'even if the only difference between them is the fortuitous occurrence of the result Y is or circumstance Y'. That is, Simons points out that this is not telling us anything about how much punishment should be imposed on the person. His point is that 'no fault' extension of the criminal law needs to recognise that this is not only about liability per se, but must also address the extent of punishment.

²⁸ John Gardner, 'Rationality and the Rules of Law in Offences against the Person' (1984) 53 *Cambridge Law Journal* 502, 509.

²⁹ Ashworth, 'Manslaughter: Generic or Nominated Offences?' above n 24, 242.

academic commentary has most often featured in relation to the common law offence of unlawful and dangerous act manslaughter which has long been a target of criticism. That offence is committed where a person commits an act which is unlawful (in the sense of a crime, not, for example, a civil wrong³⁰) and dangerous and which causes the death of another. The offence requires the prosecution to prove fault only in relation to the unlawfulness of the act; the issue of dangerousness is assessed on an objective basis.³¹ That offence remains part of Australian common law. ‘Battery manslaughter’ was a different offence; it was committed where a person intentionally inflicted bodily harm on the victim.³² In a decision of the High Court abolishing battery manslaughter,³³ the majority³⁴ noted that the existing offence of unlawful and dangerous act manslaughter (‘UDM’) would cater for those cases in which death results from a serious assault, and that in those cases where death results from a ‘comparatively minor assault’ it was appropriate to look to the law of assault rather than manslaughter, commenting that: “A conviction for manslaughter in such a [minor assault] situation does not reflect the principle that there should be a close correlation between moral culpability and legal responsibility, and is therefore inappropriate.”³⁵ These comments appear to limit unlawful and dangerous act manslaughter in Australia to deaths that occur as a result of serious assaults.³⁶ Notwithstanding this, the High Court’s approach speaks of a hierarchy of blameworthiness in the homicide offences; as noted, the majority would not regard death that results from a ‘comparatively minor assault’ as an incident properly categorised as homicide at all.

The Western Australian Supreme Court has expressly acknowledged that the ACD offence sits below manslaughter in terms of seriousness. In *The State of Western Australia v JWRL*,³⁷ the Court heard an appeal from the sentencing of a young man convicted of the s 281 offence. The trial judge had commented

³⁰ *R v Franklin* (1883) 15 Cox CC 163 at 165, affirmed in *Bouhey v R* (1986) 161 CLR 10, 35.

³¹ *R v Church* [1966] 1 QB 59; *DPP v Newbury & Jones* [1977] AC 500. In *R v Holzer* [1968] VR 481, 482 (Smith J) states that to be ‘dangerous’, a ‘reasonable man...would have realised that he was exposing another or others to an appreciable risk of really serious injury’. This is a stricter test than that preferred by the English courts which refer to the risk of ‘some harm resulting, albeit not serious harm’ (*R v Church* [1966] 1 QB 59, 70). It remains unclear which is the prevailing test in Australia, although in *Wilson v R* (1992) 174 CLR 313, the *Holzer* view was preferred.

³² For example see *Mamote-Kulang v R* (1964) 111 CLR 62, although the main issue in that case was whether the defence of accident under the Papua New Guinea legislation.

³³ See *Wilson v The Queen* (1992) 174 CLR 313.

³⁴ Mason CJ, Toohey, Gaudron and McHugh JJ.

³⁵ *Wilson v The Queen* (1992) 174 CLR 313, 333-4.

³⁶ Note that the recently introduced Victorian legislation appears to create a special sentencing category for ‘Coward Punch Manslaughter’, highlighting that the ‘one punch’ killing scenario is already captured by unlawful and dangerous act manslaughter.

³⁷ *The State of Western Australia v JWRL* [2010] WASCA 179.

that the offence was of less severity than culpable driving causing death. In considering this, Martin CJ noted that s 281 is regarded as a less serious offence than that of manslaughter, but added that the commission of an assault cannot generally be said to be a less serious offence than dangerous driving. His comments confirm that the one punch killing offence introduces a lesser form of homicide, one which sits below manslaughter. In this respect it is a 'third rung' homicide offence.

The criticisms directed at unlawful and dangerous act manslaughter as an unacceptable form of constructive liability³⁸ can be equally levelled at the ACD offence. There is clearly no culpability requirement towards the facts of death, and it therefore is inconsistent with a subjectivist approach. Given that, in the common law manslaughter offence, there is a requirement that the accused's action be 'dangerous' and the ACD offence requires a mere assault, the degree of inconsistency is probably greater.

Notwithstanding this, it is arguable that this criticism can be defended, particularly by those who argue that the nature of the unlawful act which leads to the accidental outcome must be taken into account. Jeremy Horder, a moderate constructivist, for example, has argued that actors who deliberately interfere with a victim's personal integrity are violating that person. His thesis that a victim's life is a constituent part of their physical integrity has been properly challenged³⁹, but, still, there is substantial academic (and judicial) support for the idea that a physical attack on a victim which results in death, albeit in unforeseeable circumstances, is a justifiable instance of constructive liability. It has been argued, for example, that, like drink driving, the activity is per se dangerous and risky.⁴⁰ It has also been argued, albeit in the context of considering the degree of punishment which should be imposed, that the change in normative position argument postulated by Gardner (above) has relevance where the action and the end result are 'integrally connected'.⁴¹ Arguably all of these justifications apply to the ACD offence. So, while there may be a significant 'gap' between the seriousness of the attack and the end death event, there are ways to defend this gap, at least where the actor subjects

³⁸ The LRC (WA) had considered the offence of unlawful and dangerous act manslaughter in the common law and noted that this had been 'criticised as operating harshly', and that the Model Criminal Code Officers Committee in the UK had recommended its abolition for this reason (LRC (WA), above n 4, 90).

³⁹ See Andrew Cornford, 'The Architecture of Homicide' (2014) 34(4) *Oxford Journal of Legal Studies* 819, 832 reviewing Jeremy Horder's book *Homicide and the Politics of Law Reform*, where Cornford notes that homicide is distinguished legally from non-fatal offences because life is constructed as a 'significantly distinct value from physical integrity.' His point is that culpability in relation to the initial assault may not necessarily entail responsibility for the loss of life; deliberate interference with one value, bodily integrity, does not always entail responsibility for interference with another value, human life, which results.

⁴⁰ Hemming, 'Mind the gap', above n 3.

⁴¹ Jeremy Horder, *Homicide and the Politics of Law Reform* (Oxford University Press, 2012).

the victim to a serious assault.

But while the use of the term ‘assault’ does envisage some sort of personal encounter with the victim, and therefore may be defensible on the basis of some of the arguments referred to above, it does not speak to the seriousness of that encounter, or of the degree of violence involved. ‘Assault’ as a term is inherently wide; the Code definition includes threats or attempts to apply force within the term as well as actual applications of force.⁴² It also states that even where the victim consents there may still be an assault.⁴³ In this respect the ACD offence does not really escape the criticisms of ‘over-inclusiveness’ which have dogged the UDM offence. While the ACD offence is limited to interpersonal encounters, the requirement of ‘dangerousness’ in the UDM offence probably makes that offence more defensible to subjectivists. This is particularly so in Australia given the High Court’s view that a ‘dangerous act’ refers to an act which a reasonable person would believe carried with it ‘an appreciable risk of serious injury to the deceased’.⁴⁴ By extending homicide to potentially include death resulting from very minor assaults, the Western Australian ACD offence has probably overstepped the boundary of what can be regarded as justifiable constructive liability.

B *Objections from Doctrine 2: Necessity, Fair Labelling and Gap-Filling*

Notwithstanding problems of excessive constructive liability, is it possible nonetheless to justify the creation of the ACD offence on other grounds? It might be argued that this offence meets a ‘social need’. While this has not been specifically identified as a doctrinal consideration, we would argue that principles such as proportionality⁴⁵ and minimum criminalisation⁴⁶ recognise that there needs to be a societal demand for the introduction of a new offence. This argument speaks to two further considerations, also doctrinal in nature.

The first of these is the need for victims (and society as a whole) to ‘mark’ a person’s death in the name or category of the offence which the accused is convicted of. This reflects the principle of ‘fair labelling’, the importance of which has been addressed by several eminent scholars. Andrew Ashworth notes that fair labelling has the important functions of appropriately describing the

⁴² The definition of assault is s 222 of the Code ; the offence itself is found in s 313.

⁴³ Now defined to exclude simple assaults and some assaults occasioning bodily harm.

⁴⁴ *Wilson v The Queen* (1992) 174 CLR 313, 335. The term ‘appreciable’ has not been defined although it has been suggested that it refers to a risk that is significant. This is consistent with the way in which ‘likely’ has been interpreted in the context of dangerous act murder. See the interpretation of this in *R v Hind and Hardwood* (1995) 80 A Crim R 105 and *Stuart v The Queen* (1974) 134 CLR 426: a ‘real and not remote’ risk. Also see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 3rd ed, 2010) 537.

⁴⁵ Discussed Ashworth, *Principles of Criminal Law*, above n 23, 57.

⁴⁶ See Douglas Husak, *Overcriminalization: The Limits of Criminal Law* (Oxford University Press, 2008).

conduct for the benefit of the general public, and also adequately differentiating between different sorts of conduct to assist those working in criminal administration.⁴⁷ Barry Mitchell has similarly noted that making the law ‘more comprehensible and communicable to the general public’ is a ‘primary legal goal’ which is served by labelling crimes to reflect their wrongfulness and severity.⁴⁸ Horder has argued that ‘The law must try to fix on a definition of the crime that captures the moral essence of the wrong in question, by reference to the best moral conception of that essence in society as it is today.’⁴⁹

These comments suggest that fair labelling refers to both the way in which the offence is described, and the classification of the offence, and that both of these aspects should conform to moral conceptions. Does the ACD offence do this? The description certainly captures the one-off, drunken, public encounters which the offence was aimed at, in the sense that the reference to an ‘assault’ implies a single act of violence. Its classification as a distinct homicide offence means that it does not share the label ‘manslaughter’. The 10 year maximum for the offence reinforces this point; it is more commensurate with an aggravated assault offence.⁵⁰

In Ireland’s Law Reform Commission’s review 2008 *Report on Homicide: Murder and Involuntary Manslaughter*,⁵¹ the possibility of introducing a specific offence to deal with the one punch which kills was discussed. The Commission discussed the importance of the principle of fair labelling, noting that this is particularly significant in relation to the homicide offences:

It is arguably unfair to impose such a stigmatic label as manslaughter on an attacker who only intended a minor battery. Where death was unforeseen and unforeseeable, there is powerful force to the argument in favour of sentencing the accused only on the basis of what he intended, for example, for assault, and not on the basis of the unfortunate death which occurred. Attaching moral or legal blame for causing death to the attacker who did not foresee the fatal consequences of his or her unlawful act is perhaps overly severe.⁵²

The Commission acknowledged that marking the occurrence of death in the

⁴⁷ Ashworth, *Principles of Criminal Law*, above n 23, 78 citing James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 *Modern Law Review* 217, 246.

⁴⁸ Barry Mitchell, ‘Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling’ (2001) 64 *Modern Law Review* 393.

⁴⁹ Horder, above n 41. His comment is in response to the United Kingdom Law Commission’s report on Murder, Manslaughter and Infanticide, and defends that body’s recommendation to create a three tiered homicide offence structure: The Law Commission (UK), *Murder, Manslaughter and Infanticide*, Report No 304 (2006).

⁵⁰ It is described as an aggravated assault in JWRL by ...J [Martin CJ]

⁵¹ Law Reform Commission of Ireland, *Report on Homicide: Murder and Involuntary Manslaughter*, Report No 87 (2008).

⁵² *Ibid*, 4.18-4.19.

criminal system is of societal importance, so much so that it recommended introducing a new homicide offence:

The Commission does, however, appreciate that the occurrence of death is a very serious consequence of unlawful conduct and should, therefore, be marked accordingly. It might well be traumatic for the families of victims who died as a result of deliberate assaults, albeit those which were minor in nature, if the perpetrator of the assault were only charged with, convicted of and sentenced for assault, rather than the more serious-sounding manslaughter. Thus, the Commission believes that rather than prosecuting such defendants with assault, as was the provisional recommendation in the Consultation Paper, it would be more appropriate to enact a new offence such as 'assault causing death' which would be below involuntary manslaughter on the homicide ladder, but which would clearly mark the occurrence of death in the offence label.⁵³

The recommendation of the Irish LRC therefore resembles what in fact was introduced in Western Australia the following year. While the LRC 'openly acknowledged' that the fact that death has occurred does not necessarily increase the culpability of the accused, it resolved that the death event should appear in the offence label in order to reflect the seriousness of the consequence for the family of the victim.⁵⁴

But even if it is accepted that the ACD offence properly labels the relevant conduct, does this in and of itself justify its introduction? In our view this would be difficult to conclude given the problem of excessive constructive liability identified above. However, there is a second point which requires consideration, this being the idea that the ACD offence fills a 'gap' in the law and therefore in *this* sense fulfils a social 'need'. If the fair labelling considerations are coupled with a demonstrable societal desire to 'fill a gap' in the law it could be concluded that there existed a social 'need' to introduce a new homicide offence.

Quilter has distinguished the introduction of the ACD offence in the Code jurisdictions from those in common law jurisdictions, arguing that the availability of the defence of accident under the Codes means there is a 'gap' in the law of homicide and that therefore there exists a societal need to fill this gap.

This means that in the Code jurisdictions, where there is a one punch manslaughter charge and the accident defence is raised, the jury must be satisfied beyond reasonable doubt that the death (that is 'the event')

⁵³ Ibid, 5.40. The Irish Parliament has not as yet considered this recommendation – see <<http://www.oireachtas.ie/parliament/>>.

⁵⁴ Barry Mitchell has criticised this approach noting that the LRC, 'by its own admission, [it] does not seek to provide an appropriate rationale for the imposition of criminal liability' – see Barry Mitchell, 'Minding the Gap in Unlawful and Dangerous Act Manslaughter: A Moral Defence of One-Punch Killers', (2008) 72 *The Journal of Criminal Law* 537, 546.

from the one punch was reasonably foreseeable by the ordinary person. This is a very high threshold and often may not be satisfied in such situations. Hence, one punch laws may be viewed as necessary in jurisdictions such as Western Australia, not because manslaughter is viewed as too light, but because manslaughter may not be available in one punch situations.⁵⁵

This view is an endorsement of that taken by the Western Australian Director of Public Prosecutions.⁵⁶

While we agree that there is no need for such an offence in the non-Code jurisdictions⁵⁷, we would also argue that the presence of the accident defence does not create a need for the offence in Code jurisdictions. The ‘gap’ argument does not adequately address the issue of *why* the defence of accident was successfully raised in relation to manslaughter charges involving one punch killings. It seems important to explore the reasons why juries were accepting the accident defence in these circumstances, and to have given this due weight in any analysis of the need for a new homicide offence. If a jury is not convinced beyond a reasonable doubt that the death was either foreseen or objectively reasonably foreseeable then this would seem to be a legitimate conclusion on the accused’s culpability. With no regard to contextual factors, death would seem an unlikely consequence of even a very weighty single punch; it would be expected that persons would break their fall in such circumstances and therefore avoid their head directly hitting the hard surface with fatal force.⁵⁸ Although there has been criticism directed at the accident defence, and more generally the way in which both the Queensland and Western Australian Codes approach the construction of criminal liability⁵⁹, it should be noted that the West Australian s 23B does not operate randomly, but is a clearly articulated means of assessing criminal responsibility, one which is tied to the ‘event’ in question⁶⁰. Foreseeability of consequences represents a community ‘moral

⁵⁵ Quilter, above n 3, 21. In support of this the author refers to the acquittals of Jonathon Little in March 2007, and William Moody in April 2007.

⁵⁶ Women Lawyers of Western Australia, *2014 20th Anniversary Review of the 1994 Chief Justice’s Gender Bias Taskforce Report* (2014) 498.

⁵⁷ A point made by Hemming, ‘Mind the gap’, above n 3.

⁵⁸ Indeed the Law Reform Commission of Ireland speculated that ordinary, reasonable people would, as a matter of common sense, come to this conclusion: LRC of Ireland, above n 51, 5.10. Note that in eight of 15 cases prosecuted for assault causing death in Western Australia the victim was intoxicated with alcohol and may have been in another case. In one case the victim was affected by amphetamines and sedatives as well as alcohol. See, further discussion of the Western Australian cases below, Part 2. This may have affected the victim’s reaction to the blow, although this is speculative given that other victims were not intoxicated.

⁵⁹ See eg, Hemming, ‘Mind the gap’, above n 3.

⁶⁰ In Andrew Hemming, ‘Why the Queensland, Western Australian and Tasmanian Criminal Codes are Anachronisms’ (2012) 31(2) *University of Tasmania Law Review* 1, Hemming directs criticism at the way in which the Codes deal with the mental element. It should be noted that the article does not refer to the changed wording of the defence and the considerations of the LRC

measure' which has long been a feature of assessing culpability in both criminal and tort law.⁶¹

In this sense, the juries' acceptance of the accident defence in these circumstances raises an important point as to the ordinary person's moral assessment of what an accused person should be held accountable for. In the four West Australian cases which preceded the introduction of the ACD offence, the juries acquitted the accused men; they were not charged in the alternative with other, non-fatal, offences.⁶² Were the accused men charged with other, alternative, offences, it is entirely possible that they would have been convicted of those offences. Moreover, where the amount of force is particularly brutal, or where the victim is taken unawares, the jury may well conclude that very serious forms of harm are foreseeable, a point emphasised by the Western Australian Law Reform Commission. In recommending the retention of the foreseeability test for accident, noting the role which it plays in ensuring a degree of correspondence between the blameworthy conduct and the resulting harm, it concluded that the 'accused could still be held criminally liable for any harm caused that *was* reasonably foreseeable'.⁶³

PART 3 : ASSAULT CAUSING DEATH APPLIED TO SPOUSE HOMICIDES: AN ILLUSTRATION OF THE PROBLEMS ARISING FROM AN UNNECESSARY, EXTREME CONSTRUCTIVE LIABILITY OFFENCE

We have argued that: the 'moral distance' in this instance of constructive liability in ACD is very significant (a minor assault can be prosecuted as a homicide offence); and that therefore, unless there is a countervailing social need for its enactment, ACD is unjustified. We have recognised that there is force in a labelling argument; that there is a community need to mark the death of a victim of a 'one-off punch' offence. But the argument that there is a need for ACD in the Code to fill the 'gap' created by the accident defence is unsustainable because the accident defence is an important moral measure in the construction of liability. This part of the paper examines the application of ACD to spouse homicides with reference to these conclusions. It demonstrates: (1) that, although unexpected, this application of ACD is an exemplary illustration of the flaws of constructive liability; (2) in this context there is an

(WA) on the important function which the accident defence plays in homicide offences: LRC (WA), above n 4.

⁶¹ In criminal law foreseeability was associated with tests of causal responsibility. Western Australia, at least, has moved definitively away from this, allowing causation and accident to be considered by reference to distinct tests – see *Krakouer* (2006) 161 A Crim R 347.

⁶² There was no provision for convicting of an alternative offence under the Code at the time. This is now possible, following the recommendation of the LRC (WA).

⁶³ LRC (WA), above n 4, 90.

argument that contradicts the conclusion above, that the ACD offence fulfils a social need for correct labelling. In this context the offence wrongly labels the offending conduct; (3) By removing the moral measure constituted by the Code's accident defence ACD removes consideration of the social context of the death, making the exclusive focus the 'moment' of the assault. This removal flies in the face of more than 30 years of reform aimed at gender equality in the criminal law.

A *The Application of ACD to Spouse Homicides*

From its introduction in 2008 until June 2014 there were 16 convictions⁶⁴ under s 281. Four of those were spouse homicides.⁶⁵ Although most of the 16 cases did not fall within the profile of the 'one-punch killings' that were the political motivation for the offence, spouse killings were the furthest removed. All the victims of the spouse homicides were women, three died inside a home (two in their own home and one in the home of her estranged husband) and one died in the backyard of a house she was visiting. In three cases only the offender and the deceased, or the offender, deceased and their children, were present when the assault or assaults took place. In all four cases there was a history of domestic violence by the offender against the deceased⁶⁶ and in all but one case the specific violence that led to death involved a sustained attack, ranging from slaps, punches and kicks to the face and body, being struck on the body and head with a metal chair and being kicked in the face 'as you would a football'.⁶⁷ In the one case in which the specific assault was one punch, the offender punched the deceased in the ribs with a clenched fist because he was angry that she had already eaten a meal without arranging to make one for

⁶⁴ There were 23 prosecutions. One was discontinued, three resulted in acquittals after trial and three were not concluded in June 2014. The analysis of the remaining 16 convictions in this Part relies on sentencing remarks from the District and Supreme Courts of Western Australia supplemented by data supplied by the Office of the Director of Public Prosecutions for Western Australia (ODPP) and Sentencing Tables available on the ODPP's website (at www.dppwa.gov.au/S/sentencing.aspx?uid=2851-7898-0868-7784). The ODPP data were charts setting out s 281 prosecutions, including pleas, convictions and sentences. All of this information was available in the sentencing reports. The authors rely on the ODPP data for their understanding that the 23 prosecutions are the only prosecutions under s 281 during this time period, and for the observation made in n66 below.

⁶⁵ *The State of Western Australia v Zyrucha* (Unreported, Supreme Court of Western Australia, No 127 of 2009, Simmonds J, 4 December 2009); *The State of Western Australia v Indich* (Unreported, Supreme Court of Western Australia, No 211 of 2009, 13 January 2009) ('Indich'); *The State of Western Australia v Warra* [2011] WASCSR 17, [12] ('Warra'); *The State of Western Australia v Jones* [2011] WASCSR 136.

⁶⁶ It is clear from the sentencing reports of three of the cases that there was this prior violence; data supplied by the ODPP (see n 64 above) indicated prior domestic violence in all four spouse homicide cases.

⁶⁷ *Warra* [2011] WASCSR 17, [12].

him.⁶⁸ In two of the four cases there were prior convictions for assault on the deceased,⁶⁹ and in another, the sentencing court found that there had been a long history of severe violence against the deceased by the offender, though there was no reference to prior convictions relating to assaults against the deceased.⁷⁰

B *Constructive Liability: the Application to Spouse Homicides was Predictable*

The application of ACD to spouse homicides was not intended by those who enacted the offence but it could have been predicted. Most concern about the effects of extreme constructive liability focusses on the potential for overstating the moral and criminal culpability of an accused. The earlier discussion on constructive liability specifically noted this problem; an accused who perpetrates a minor assault on their victim can be convicted of homicide in circumstances where the accused's legal culpability bears no relation to his or her moral culpability. The fundamental problem with extreme constructive liability, however, is its lack of subtlety; it casts a very wide net of liability. This, in fact, is the political aim of the law makers: to catch conduct that was, or was perceived to be, escaping approbation. The net of liability is wide because the reduced requirement to prove a mental element makes it easier for the prosecution to establish the offence. However, this means that extreme constructive liability offences such as ACD also make it easier to secure convictions which understate the culpability of an accused.

Moreover, the ease of prosecution of an offence built on constructive liability will have an indirect influence on defendants, prosecutors and juries. It will affect the likelihood of an accused pleading guilty because there will be a higher chance of conviction at trial, and where the maximum penalty is lower than that for alternative charges, the accused has an incentive to plead guilty to the 'constructed' offence. Because there is a public interest in securing a conviction and avoiding the costs and risks of a trial, there is an incentive for prosecutors, exercising their public duties, to accept a guilty plea, even if it is for a lesser conviction. Further, where the matter proceeds to trial, if ACD is a statutory alternative to a more serious homicide offence, a jury is entitled to return a verdict of ACD, even where the accused is not charged with that lesser offence. In Western Australia, ACD is a statutory alternative to murder and manslaughter.⁷¹ Therefore, if there are difficult questions at trial about whether the accused has a defence and a jury is reluctant to grapple with those questions, ACD provides a fall-back verdict. Thus, independently of the factual circumstances of each case, the existence itself of an offence built on

⁶⁸ *Indich* No 211 of 2009.

⁶⁹ *Indich* No 211 of 2009, *Jones* [2011] WASC SR 136.

⁷⁰ *Warra* [2011] WASC SR 17.

⁷¹ Sections 279 and 280.

constructive liability will provide the opportunity for compromise pleas, verdicts and convictions by accused, prosecutors and juries. This means an offence built on constructive liability will have a tendency to be relied on. This is borne out in the use of ACD in Western Australia. All of the spouse homicide convictions resulted from guilty pleas and 10 of the remaining 12 convictions were the result of guilty pleas.

C *Unfair Labelling*

As discussed in Part 2, labelling an offence in such a way that accurately reflects the culpability of the offender is necessary to maintain confidence in the criminal justice system generally and is part of the provision of justice to individual offenders and victims. We have argued that, due to the constructive liability that underpins the offence, ACD carries a grave risk of burdening an offender with criminal responsibility they do not deserve. In the context of domestic killings, where serious violence has been on-going, an ACD can easily operate to minimise culpability. The application of s 281 in these circumstances labels a partner's death, as a matter of law, the *accidental* outcome of a (mere) assault; that is, the death is found at law to have been *not* reasonably foreseeable by an ordinary person. Martin CJ in *The State of Western Australia v Daniels* described a death within this provision as an 'assault gone wrong'.⁷² This is a correct legal description but it is very problematic as a characterisation of spousal violence.

The seriousness of violence in the home has been long-recognised, largely through a cultural and legal re-labelling of the practice. From descriptions such as 'discipline' and 'chastisement',⁷³ the practice has become recognised as real crime, and the focus of state attention.⁷⁴ The characterisation of lethal domestic violence has been challenged by the close scrutiny of legal and social concepts such as provocation, 'crimes of passion' and 'male honour'.⁷⁵ The argument

⁷² *The State of Western Australia v Daniels* [2013] WASCSR 109, [8]; see also *The State of Western Australia v JWRL* (2009) 213 A Crim R 50, 51 [1], 55 [15], 64-5 [51].

⁷³ William Blackstone, *Commentaries On the Law of England Vol 1* (London, Strahan, 15th ed, first published 1809, 1982 ed) 441; Western Australian Taskforce on Domestic Violence, *Break the Silence* (Perth, Government Printer, 1986), 40-43.

⁷⁴ See, for example, Heather Douglas and Tanja Stark, *Stories from Survivors: Domestic Violence and Criminal Justice Interventions* (T.C. Beirne School of Law, University of Queensland, 2010), 9-10; Australian Government Department of Social Services, *The National Plan to Reduce Violence against Women and their Children 2010-2022* (online) < <https://www.dss.gov.au/our-responsibilities/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022>>; Australian Law Reform Commission and the New South Wales Law Reform Commission, *Family Violence - A National Legal Response*, Report No 114 (2010).

⁷⁵ See, for example, Graeme Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006) 18(1) *Current Issues in Criminal Justice* 51, 52; Victorian Law Reform Commission, *Defences to Homicide*, Final Report No 94 (2004) [2.4]; Jenny Morgan,

with respect to labelling is that it is neither accurate nor fair to characterise the death of an intimate partner after serious prior violence, as the accidental result of an assault.

D *The Removal of the Moral Measure of the Accident Defence: the Reintroduction of Gender Bias in Criminal Law.*

We have argued that the accident defence in s 23B of the Code is a moral measure because it describes a limit of liability by reference to what was or was not considered to have been reasonably foreseeable to an ordinary person in the accused's circumstances. The removal of the defence removes the requirement to consider the context in which the death occurred; that is, to consider what, in the circumstances of the case, could, and should, have been foreseen as a possibility. In ACD the focus of legal attention is not on the context but on the isolated 'moment' of the offending conduct. This removal of the requirement to consider the relationship context, in particular, 're-shapes' some domestic killings in a way that flies in the face of more than 30 years of public discussion and reform relating to gender equality in homicide offences and defences. In essence, all of those reforms were concerned with ensuring that the context of domestic killings is appropriately taken into account when apportioning moral and criminal responsibility. ACD, which constructs liability through the assault and a death linked only by the *conduct* element of causation, focuses attention on the 'moment' of killing more than ever. An examination of the criticisms and reform of provocation as a defence to murder demonstrates how legal structures that construct liability by focussing only on the 'moment' of offending conduct rather than taking the relationship context into account are gender biased. Now that provocation as a defence to murder has been abolished in Western Australia, ACD may take its place in this regard.

Provocation was a partial defence to murder that reduced an intentional killing (murder) to manslaughter where the offender lost emotional control in circumstances in which an ordinary person would have been likely⁷⁶ to lose control. The defence was abolished in Western Australia in 2008 at the same time ACD was introduced.⁷⁷ The criticism of the provocation defence,

'Provocation Law and Facts: Dead women tell no tales, tales are told about them' (1997) 21 *Melbourne University Law Review* 237, 263.

⁷⁶ *The Criminal Code* (WA), s 245; at common law the requirement is that the ordinary person "might" have lost control. However, the standards have been interpreted to be equivalent. See *Stingel v The Queen* (1990) 171 CLR 312; *Masciantonio v The Queen* (1995) 183 ALR 58; *Hart v The Queen* (2003) WASCA 213.

⁷⁷ *Criminal Law Amendment (Homicide) Act 2008* (WA). Provocation has also been abolished in Tasmania (*Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas)) and Victoria (*Crimes (Homicide) Act 2005* (Vic)), and has been amended with the aim of addressing the criticisms discussed here, in Queensland (*Criminal Code and Other Legislation Amendment*

consistent with the discourse in all Australian and many overseas jurisdictions, was that it excused sudden, violent outbursts unjustifiably in ways that privileged typically male patterns of behaviour.⁷⁸ Two main gender critiques were contained in the criticism. First, male offenders *were too often excused* by the provocation defence for what were *over* reactions. The argument here was that a homicidal response should not be excused even partially for some of the kinds of provocation offenders relied on - for example, a woman ending, or expressing an intention to end, a relationship with the offender.⁷⁹ The second critique was that *more men than women* could rely on the defence because it required a decontextualised assessment of the provocation and response. That is, it required 'sudden provocation' and a specific triggering incident, identified as the provocation, in response to which the accused formed an intention to kill. The argument was that those who are habitually more powerful in a conflict situation can afford to react quickly, so their physical and emotional responses fit the construct of the (sudden) provocation defence. Those who are habitually weaker within a relationship know that sudden responses, even in anger, can be dangerous. Emotional reactions of those who are less powerful are more likely to occur at a time *other than* during a physical confrontation⁸⁰ and this pattern of human response to being goaded did not fit the construct of the provocation defence. The gender bias argument applies to intimate relationships as men are more likely to be in the former group and women in the latter.

Judicial interpretation responded to these criticisms in a way that expanded the focus of provocation, somewhat mitigating the gender bias,⁸¹ but the underlying assumptions, about how and when 'loss of control' occurs in human beings, persisted. Immediacy of response was still the underlying model. 'Delayed' response, necessary for someone smaller and physically weaker, was commonly interpreted as 'planned' or 'pre-meditated' and antithetical to the

Act 2011 (Qld)) and New South Wales (*Crimes Amendment (Provocation) Act 2014* (NSW)); and see Thomas Crofts and Danielle Tyson, 'Homicide Law Reform in Australia: Improving Access to Defences for Women who kill their Abusers' (2013) 39 *Monash University Law Review* 864.

⁷⁸ LRC (WA), above n 4, 211-16; Victorian Law Reform Commission, above n 75, 26-32.

⁷⁹ See reports from LRC (WA) and Victorian Law Reform Commission, above n 75. Where women relied on the defence, the provocation they pointed to was far more severe: typically prolonged and extreme violence against them by their male partners. Another group of provocation cases that raise gender issues in a different context was also the focus of criticism. They involved reliance of provocation by male accused who had killed in response to a non-violence homosexual advance by the deceased. See *Green v The Queen* (1997) 48 ALR 659; Stephen Tomsen and Thomas Crofts, 'Social and cultural meanings of legal responses to homicide among men: Masculine honour, sexual advances and accidents' (2012) 45 *Australian and New Zealand Journal of Criminology* 423, 424-429.

⁸⁰ Stella Tarrant, 'Something Is Pushing Them to the Side of Their Own Lives - A Feminist Critique of Law and Laws' (1990) 20(3) *University of Western Australia Law Review* 573.

⁸¹ *R v R* (1981) 28 SASR 321; Victorian Law Reform Commission, above n 75, 24.

loss of control model underpinning provocation.

Just as the provocation defence narrowed legal attention onto the question whether, at the moment of the death-inflicting blow the accused had 'lost control' of his emotions, ACD narrows legal attention onto the question whether the accused 'applied force'. The structures of neither provocation nor ACD encompasses the 'before' with respect to the ongoing relationship between the victim and the accused; ACD even less than provocation. Provocation permits consideration of the relationship context in order to assess whether the accused had lost control and to assess the reasonableness of that.⁸² ACD requires no consideration of the context. If force was 'applied' the element is satisfied. Thus, there is no legal relevance in the questions whether the death-inflicting blow was part of on-going and serious spousal violence; whether the blow itself or as a pattern of conduct could reasonably be expected to have led to serious harm or death; or *why* the blow was inflicted (for example, because the victim had left the relationship or did not cook dinner for the offender). Thus, the same kinds of outbursts of violence in intimate relationships that were formerly considered unjustifiable bases for a provocation defence, can provide the bases for ACD pleas and convictions. And, as discussed, the constructive liability underpinning the offence, along with the lower maximum penalty, places pressures on parties to accept guilty pleas. So long as an application of force can be characterised as an assault and a death follows, a homicide conviction can be secured, in this case without any consideration of the social context of the killing.

Thus, although provocation is designated a defence (meaning it need not be considered if there is no prima facie evidence of it) and ACD is an offence (meaning the prosecution must in all circumstances prove the application of force), both result in a reduced conviction: ACD can function as a de facto defence.

Finally, ACD, like provocation, will be more difficult for women to take advantage of as a 'partial defence' than men. As demonstrated in the Western Australian cases, men who kill their partners typically inflict injury with their fists and feet; this characterises a majority of ACD cases overall. Women who kill their spouses generally do not do so with fists and feet because they are generally smaller and less physically powerful. Evidence of 'delay' or 'planning' or the use of a weapon will provide the clear basis for proving the absence of accident leading to a manslaughter or murder conviction.

CONCLUSION

This paper criticises the introduction of ACD in Western Australia. It has been argued it offends against core principles of criminal responsibility that protect

⁸² *R v R* (1981) 28 SASR 321; *Mehemit Ali v R* (1957) 59 WALR 28.

individuals and the integrity of the justice system as a whole. Primarily, the law is faulty because it constructs liability out of *conduct* and *result*, leaving the mental state that would connect those two events out of the picture. Constructive liability is not unknown to the criminal law but the construction underpinning ACD is extreme and prevents the real culpability of the offender being assessed. Moreover, the offence is not necessary. While the 'label' of ACD appears to reflect the conduct it was aimed to capture, this is not sufficient in and of itself to justify the introduction of the offence; the conduct which is the focus of the new law is already caught by existing homicide laws that are not based on constructive liability. The accident defence is an appropriate moral measure, not a construct that produces a 'gap' in need of filling.

Most concern about the effects of extreme constructive liability focuses on the potential for overstating the moral and criminal culpability of an accused. That is, an accused who perpetrates a minor assault on their victim can be convicted of homicide in circumstances where this is unfair. However, an extreme constructive liability offence such as ACD can also secure convictions which *understate* the culpability of an accused. It has been argued that the application of an ACD offence to spouse killings illustrates this problem. This application, though unexpected, was predictable where an offence is based on extreme constructive liability. Moreover, application of ACD to spouse homicides is an instance of unfair labelling, contrary to the argument that the offence fairly labels 'one-punch' deaths. It is neither accurate nor fair to characterise the death of an intimate partner, after serious prior violence, as an assault that accidentally led to death. Finally, it has been demonstrated how the abolition of the accident defence and the constructive liability underpinning ACD offences reintroduces a gender bias in the criminal law by (re)creating a focus on the 'moment of the killing'. Advocates for gender equality in the criminal law have argued against this legal structure for many years.