



**LEGAL RESPONSES
TO ONE-PUNCH
HOMICIDE IN VICTORIA:
UNDERSTANDING
THE IMPACT
OF LAW REFORM**

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December 2018



“ I think there’s something special about that ‘one-punch’ in the sense that it seems to really hit a nerve as to that could be my child ... I think the normal people in the street think, well my children wouldn’t be anywhere where there was a knife, where there was a gun ... Whereas a one-punch in the street or a one punch in a pub that hits a nerve with more people because the crime itself and the result seems more – it seems closer to home. So I think that has a distorting effect on how people view that crime. (LegalA) ”

“ their [the family of the victim] lives have been destroyed all through this one incredibly stupid action that might have occurred a thousand times and not produced the same result, you know, that was the risk that someone took by throwing that punch. (LegalA) ”

Suggested citation:

Fitz-Gibbon, Kate. (2018) *Legal responses to one-punch homicide in Victoria: understanding the impact of law reform*. Faculty of Arts, Monash University, Victoria.

ISBN: 978-0-9953934-5-5

Acknowledgements

This study would not have been possible without the generous support from the Victorian Legal Services Board Grants Program. I am very thankful to the Board for the opportunity to undertake this study and for their vision in recognising the importance of, and need to create an evidence base in this area of the criminal law.

I am extremely grateful to the 11 Victorian stakeholders, including members of the Victorian legal community and policy advocates, who participated in a research interview as part of this study. I understand the constant demands on their time and appreciate the generosity that each participant showed in sharing their views and offering insight into their experiences. My understanding of legal responses to one-punch homicide in Victoria and the need for reform have been significantly enriched as a result of these valuable insights.

A special thanks to Madeleine Ulbrick who provided research assistance on this project. Maddy's time and attention to detail were a valuable support at all stages of this research. Thank you also to Jen Kloester for her patience and meticulous copyediting and to Graham Sunderland for design and production of this Final Report.

I am always extremely grateful to my colleagues in the Monash Gender and Family Violence Prevention Centre and to the criminology team and School of Social Sciences at Monash University. Their support and encouragement always enhance my work.

It is essential to recognise the human cost of a one-punch homicide. In a study of this scope debates surrounding criminal law and its reform can sometimes stray from acknowledging the individual tragedies of each case as it comes before the court. This research, however, provides a detailed analysis of 22 homicides resolved in the Supreme Court of Victoria, where the victim died from a single punch. While it is not within the scope of this research to provide detailed case studies on all Australian deaths from a one-punch homicide during the period under study, it is acknowledged that each of the cases examined as part of the sentencing analysis here represents a life lost and my thoughts are with the families, friends and communities that have suffered as a consequence.

Abbreviations

COAG	Council of Australian Governments
DPP	Director of Public Prosecutions
FARE	Foundation for Alcohol Research and Education
NAAA	National Alliance for Action on Alcohol
NSW	New South Wales
NT	Northern Territory
PHAA	Public Health Association of Australia
RCFV	Royal Commission into Family Violence
SVHA	St Vincent's Health Australia
VSC	Victorian Supreme Court
WA	Western Australia

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Executive Summary

Over the last decade the prevalence of one-punch homicides nationally has led scholars to note that 'Australia very likely holds the dubious honour of being the epicentre (in terms of fatality rates per 100,000 relevant population) of one-punch incidents' (Flynn, Halsey and Lee, 2016: 179). In their National Coronial Information System research on 'king hit' deaths in Australia in the period 2000 to 2012 Pligrim, Gerostomoulous and Drummer (2014) identified 90 fatalities. To date, the study is one of the key indicators of the depth of the problem of one-punch fatalities nationally.

The adequacy or otherwise of legal responses to 'one-punch' homicides has animated significant debate and law reform activity in Victoria and in other Australian state and territory jurisdictions. National debate first ignited in 2004 following the death of Australian cricketer David Hookes and was brought to the fore in the decade following with significant media coverage of several cases of drunken, unprovoked lethal violence between young males in and around licensed venues. In 2014 the Victorian Liberal government introduced new legislation, the purpose of which was twofold:

- to insert a new provision into law requiring that all cases of manslaughter by unlawful and dangerous act involving a single punch or a strike delivered to the victim's head or neck, which causes injury to the head or neck automatically constitutes a dangerous act; (*Section 4A, Crimes Act 1958 (Vic)*), and
- to insert three new sections into the Sentencing Act requiring that all manslaughter cases involving a single punch or strike, or manslaughter in circumstances of gross violence, attract a statutory minimum sentence of ten years imprisonment. (*Sentencing Amendment (Coward's Punch Manslaughter and other Matters) Act 2014*).

The reforms aimed to deter young people from engaging in alcohol-fuelled violence and to protect the community from the consequences of this type of manslaughter. In the period immediately following their introduction, the reforms received mixed responses from victim's advocacy groups and the Victorian legal community.

By combining in-depth interviews with case analysis, this research examines both the outcomes of the law (in terms of conviction and sentencing) as well as the process and practice of the law in reaching those outcomes (as garnered from the views of those within the system). This approach offers a detailed and unique assessment of the Victorian judiciary's response to one-punch homicides within the context of the law both before and after the 2014 reforms. In doing so, the research aims to:

1. Increase current knowledge of the context within which one-punch homicides are perpetrated;
2. Document case outcomes for 'one-punch' homicide finalised in Victoria prior to the 2014 reforms;
3. Generate insight into relevant stakeholders' views on the viability of the 2014 reforms and the strengths and weaknesses of current legal practice in this area in Victoria; and to
4. Develop an evidence base to support future law reform in this area of the law of homicide.

This project is the first to critically analyse whether Victorian homicide laws enabled a just response to one-punch homicides prior to the 2014 reforms and to examine relevant stakeholder views of current legal practices and future needs for reform in this area. In doing

so, it engages with questions of state-wide significance and generates an evidence base to benefit legal practice and future reform in Victoria as well as in other Australian state and territory jurisdictions and comparable international jurisdictions.

Key findings identified in this study include:

- Between 1 January 2000 and 31 December 2015 22 reported homicide cases involving a single punch causing death were finalised in the Supreme Court of Victoria, involving 20 male victims and two female victims,
 - In the majority of one-punch homicide cases sentenced between 2000 and 2015 in Victoria there was a preexisting relationship between the victim and the offender, with only 8 of the 22 cases occurring between strangers,
 - There was only one single-punch homicide case sentenced in this period where the judge noted that neither alcohol nor drugs were involved in the homicide incident nor did it occur at or near a premise where alcohol was sold or served,
 - Over the sixteen-year period examined, the majority of one-punch homicide offenders were convicted and sentenced for the offence of manslaughter,
 - Legal practitioners in Victoria recognise the dangers of mandatory minimum sentencing schemes and those participating in this research did not support the 2014 introduction of the mandatory minimum sentence for coward's-punch manslaughter, and
 - There is limited interest and/or support among key stakeholders in Victoria for the introduction of a specific one-punch homicide offence.
-

A note on terminology

The term ‘one-punch homicide’ is used throughout this report to refer to the act of a single hit by an individual resulting in the death of the victim either immediately or following a period of hospitalisation. Such behaviour has also been referred to in the media, by various advocacy groups and/or political representatives as a king hit, coward’s punch and social violence causing death. Research conducted by Pilgrim et al (2014) observed that between 2000 and 2012 Australia-wide the vast majority of one-punch deaths took place at night in public drinking venues, such as hotels and pubs, and involved young males (as both offender and victim) acting under the influence of alcohol and/or drugs. Reflecting this trend, to date, the majority of community disquiet and policy attention has focused on the perpetration of one-punch fatal assaults within this context.

There are other important terminology and definitional issues of relevance arising here.

In recent years the term ‘alcohol-fuelled violence’ has come to be associated with a wide range of alcohol-related violent behaviours committed across myriad settings, including random acts of violence, largely committed by men, in and around night-time venues. It is important, however, that violence occurring in other settings is not ignored in related discussions. In particular, the issue of intimate partner violence and other forms of family violence, which are generally perpetrated in private spaces, must not be overlooked. Alcohol has long been cited as a key factor in family violence incidents, where women and children are victimised at rates far greater than their male counterparts (RCFV, 2016). It is essential that advocacy work and research in the area of alcohol-related violence recognises the wide range of relevant, gendered abusive behaviours committed in both public and private spaces.

This research recognises the importance of language in terms of constructions of responsibility and understandings of culpability. The citing of violence as ‘alcohol-fuelled violence’ rather than, for example, using the term ‘alcohol-related violence’, partially shifts focus and responsibility for the act of violence from the individual to the alcohol involved. The term ‘alcohol-fuelled violence’ suggests a causal relationship between alcohol consumption and violence, which is not always the case. The term ‘alcohol-related violence’ is used throughout this report for this reason.

1. Introduction

Over the last decade the prevalence of one-punch homicides nationally has led scholars to note that ‘Australia very likely holds the dubious honour of being the epicentre (in terms of fatality rates per 100,000 relevant population) of one-punch incidents’ (Flynn, Halsey and Lee, 2016: 179). In their National Coronial Information System research on ‘king hit’ deaths in Australia in the period 2000 to 2012 Pligrim, Gerostomoulous and Drummer (2014) identified 90 fatalities. To date, the study is one of the key indicators of the depth of the problem of one-punch fatalities nationally.

The adequacy of legal responses to ‘one-punch’ homicides has animated significant debate and law reform activity in Victoria and in other Australian state and territory jurisdictions. This debate was first ignited in 2004 following the death of Australian cricketer David Hookes (Oliver, 2004), and was brought to the fore in the decade following with significant media coverage of several cases of drunken, unprovoked lethal violence between young males in and around licensed venues. The death of David Cassai on New Year’s Eve in 2012 (DPP v Closter [2014] VSC 484), in particular, sparked intense public outcry because of the perceived leniency of the perpetrator’s sentence which further propelled political debate as to how the law should best respond to this type of violence.

In September 2014, the Liberal state government introduced new legislation, the purpose of which was twofold:

- to insert a new provision into law requiring that all cases of manslaughter by unlawful and dangerous act involving a single punch or a strike delivered to the victim’s head or neck, which causes injury to the head or neck automatically constitutes a dangerous act; (*Section 4A, Crimes Act 1958 (Vic)*), and
- to insert three new sections into the Sentencing Act requiring that all manslaughter cases involving a single punch or strike, or manslaughter in circumstances of gross violence, attract a statutory minimum sentence of ten years imprisonment. (*Sentencing Amendment (Coward’s Punch Manslaughter and other Matters) Act 2014*).

The reforms aimed to deter young people from engaging in alcohol-fuelled violence and protect the community from the consequences of this type of manslaughter (AAP, 2014). In the period immediately following their introduction, the reforms received mixed responses. While victims’ advocacy groups praised the government’s ‘tough-on-crime’ approach to alcohol-related violence (Politi, 2014), the Victorian Criminal Bar Association, among others, criticised the reforms and, in particular, the move to further curtail judicial discretion (Victorian Bar, 2014; Anderson, 2014).

Victoria is not the first Australian jurisdiction to introduce reforms to increase legal sanctions imposed on one-punch homicide offenders. Over the last ten years the majority of Australian state and territory jurisdictions have grappled with questions of how the law should best respond to one-punch lethal violence. A range of reforms have been implemented. This includes the November 2012 and February 2014 introduction of a new one-punch homicide offence in the Northern Territory (NT) and New South Wales (NSW) respectively (*Criminal Code Amendment (Violent Act Causing Death) Act 2012 s161A; Assault causing death (Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014)*, and Queensland’s ‘Safe Night Out’ strategy (Queensland Government, 2014; see also description in McNamara and Quilter, 2016: 19). Diversity in the reforms introduced across Australia – the creation of a new offence in some state jurisdictions versus sentencing reform in others – illustrates that, despite national media attention on the issue of one-punch homicides, there is no nationally agreed upon approach to criminal law reform in this area.

Importantly, and despite intense media reporting of key cases and the introduction of substantive reform, little is known about how one-punch homicides were legally responded to in Victoria prior to the introduction of the 2014 reforms. This dearth of knowledge means there is limited in-depth understanding of how cases were resolved in terms of convictions recorded and sentences imposed. Without an informed understanding of how the law operated prior to the introduction of reform it is impossible to evaluate the changes that have occurred as a result of the 2014 legislation. This significantly limits opportunities to monitor the impact of the reforms, to determine whether a positive change has occurred in practice and to identify any unintended consequences. Compounding this issue further, at the time of their introduction, the Victorian government did not engage in a public consultation process (a trend previously seen in WA and NSW) nor was the issue referred to the Victorian Law Reform Commission for substantive consideration. This has meant that, to date, there is limited understanding of legal practitioners' experiences in one-punch homicide cases and of the views of relevant stakeholders regarding current practices, the 2014 reforms and the possible need for future reform in this area of law. This Report seeks to directly address this gap in current legal knowledge.

To achieve this, this study aims to:

1. Increase current knowledge of the context within which one-punch homicides are perpetrated;
2. Document case outcomes for 'one-punch' homicides finalised in Victoria prior to the 2014 reforms;
3. Generate insight into relevant stakeholders' views on the viability of the 2014 reforms and the strengths and weaknesses of current legal practice in this area in Victoria; and to
4. Develop an evidence base to support future law reform in this area of the law of homicide.

In examining legal responses to one-punch homicides in Victoria, this research engages with theoretical and conceptual questions relating to justice and culpability. The results of this research are intended to inform legal practice and law reform debate in Victoria and extend current understandings of the impact of the law in practice in this area.

2. Methodology

Over the last ten years legal responses to cases of one-punch homicide have attracted significant attention across Australia. However, with the exception of the substantial academic contribution made in this area by Quilter (see, inter alia, Quilter 2014, 2014b, 2017) there has been minimal research undertaken which critically analyses the adequacy of the law's response to this type of homicide. This study – while limited in scope to Victoria – seeks to build on and address this gap in current understanding. Specifically, the study presents a state-based analysis of legal responses to one-punch homicide cases (in terms of conviction and sentencing outcomes) over a sixteen-year period immediately prior to the implementation of the relevant 2014 law reforms. This project adopted a mixed-methods research design, including three key phases of data collection: homicide case analysis, thematic analysis of submissions to the 2016 Senate Inquiry, and semi-structured interviews with key stakeholders. This approach enabled the research to critically analyse the impact of the law in practice while also capturing the views and experiences of key stakeholders. The design and analysis of these three research phases were informed by a review of relevant grey and scholarly literature from Australia and comparative criminal law jurisdictions.

2.1 Case Analysis

A key component of the methodology for this research involved identifying and analysing all reported cases of one-punch homicide finalised in the Victorian Supreme Court (VSC) between 1 January 2000 and 31 December 2015. Case analysis has been used to examine the operation of homicide law in past criminological scholarship and by government bodies (see, inter alia, Burman, 2010; Fitz-Gibbon, 2014a; Ministry of Justice, 2008; Polk, 1994). In conducting a case analysis, the research utilised publicly available sentencing judgments gathered from legal databases (Austlii and Lexis Nexis) for all homicide cases finalised in the 16-year period between 31 January 2000 and 31 December 2015.

This approach resulted in the identification and subsequent analysis of 627 homicide cases. The breakdown of these cases by year and conviction recorded is set out in the table below.

Table 1: Reported homicide cases finalised in the Victorian Supreme Court (1 January 2000 and 31 December 2015)

Year Finalised	Total number of cases identified ¹	Number of murder cases	Number of manslaughter cases	Number of infanticide cases	Number of defensive homicide cases ²	Number of child homicide cases ³
2000	39	24	15			
2001	39*	19	22			
2002	43	21	22			
2003	28	20	8			
2004	40	26	13	1		
2005	38	24	14			
2006	38	23	15			
2007	39*	19	22			
2008	49	25	19		5	
2009	43	22	14		7	
2010	37	18	18		1	
2011	57*	34	17		7	
2012	35*	19	16		4	
2013	39	24	12		3	
2014	27*	13	9	1	5	
2015	36	20	13	1	1	1
Total	627	351	249	3	33	1

* For several years the total number of cases does not equal the number of cases listed under each of the homicide category. This is because some homicide cases involved multiple offenders who were convicted of differing offences and as such the case is captured multiple times in the one table.

¹ For several years the total number of cases does not equal the number of cases listed under each of the homicide category. This is because some homicide cases involved multiple offenders who were convicted of differing offences and as such the case is captured multiple times in the one table. See, for example, DPP v Younan, Younan & Talj [2001] VSC 402 (27 September 2001).

² The offence of defensive homicide was introduced in 2005 (Section 9AD, Crimes Act 1958 (Vic)), and abolished in November 2014 (Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic)). The offence applied to all homicide offences committed on or after 23rd November 2005 and before 1 November 2014. As such, the 16-year period under study captures time before, during and after the operation of this homicide offence. For analysis on the operation of the offence of defensive homicide and debates surrounding its reform, see further Fitz-Gibbon, 2015.

³ The offence of child homicide was introduced in Victoria in 2008 (Section 5A, Crimes Act 1958 (Vic); Crimes Amendment (Child Homicide) Act 2008 (Vic)). The offence can apply to any person who kills a child under the age of six years old in circumstances that constitute manslaughter. In the 16-year period under study, there was only one homicide resulting in a conviction for this offence (see *The Queen v Hughes* [2015] VSC 296).

Once all relevant cases were identified, case analysis of the relevant sentencing judgments was conducted in two stages:

1. A content analysis of all identified cases to determine the circumstances of the homicide, including the location of the offence, precipitating events, relationship between victim and offender, age and gender of victim and offender, presence of other people, relevant facts from the offender's background and contributing role of alcohol and drugs.
2. Documenting case outcomes, including conviction recorded, any secondary convictions, sentencing principles prioritised and sentence imposed.

A close reading of the circumstances in each of the cases, as presented in the sentencing judgment, led to the identification of a smaller subset of 22 homicide cases involving a single punch. These cases formed the basis of a subsequent phase of analysis to better understand the circumstances within which single-punch homicides have been perpetrated in Victoria, the circumstances of the offender and the victim as well as the law's response.

Table 2: Reported homicide cases finalised in the Victorian Supreme Court (1 January 2000 and 31 December 2015) involving a 'single punch'

Year Finalised	Total number of cases identified	Number of murder cases	Number of manslaughter cases	Number of recklessly causing injury cases	Number of recklessly causing serious injury cases
2000	0				
2001	3	1	1	1	
2002	1			1	
2003	2	1	1		
2004	1				1
2005	2		2		
2006	2		1	1	
2007	0				
2008	1		1		
2009	0				
2010	3		3		
2011	3		3		
2012	0				
2013	1		1		
2014	1		1		
2015	2		2		
Total	22	2	16	3	1

Beyond these 22 cases, there were an additional 12 homicide cases finalised during the period studied which, although not involving a death resulting from a single punch, did involve a death resulting from a small number of punches, a push and/or a throw. These cases highlight the ambiguity of deciding which homicides do and do not constitute 'coward's-punch' manslaughter.

While this process of identification and elimination was tedious using this method, it did result in a comprehensive understanding of the nature of homicide in Victoria in general and a specific accounting of cases involving a single punch. Documenting case details and outcomes was essential to understanding conviction and sentencing patterns in one-punch cases prior to the introduction of the 2014 Victorian reforms. Without such retrospective knowledge there is no way to determine the effectiveness or otherwise of those reforms, whether the intended aims have been achieved and whether there was indeed a need for the change in judicial practice imposed by the reforms.

2.2 Thematic analysis of submissions to the 2016 Senate Inquiry

In the second stage of this research the 65 submissions made to the 2016 Senate Inquiry into the need for a national strategy to reduce alcohol-fuelled violence were qualitatively analysed. The Senate Inquiry into the need for a national strategy to reduce alcohol-fuelled violence was established on 3 February 2016 and chaired by independent senator, Glenn Lazarus. The Senate referred the matter to the Legal and Constitutional Affairs References Committee for inquiry and report on:

The need for a nationally-consistent approach, negotiated, developed and delivered by the Federal Government together with all state and territory governments, to address and reduce alcohol-fuelled violence, including one-punch related deaths and injuries across Australia, with particular reference to:

- a) the current status of state and territory laws relating to:
 - i. bail requirements and penalties surrounding alcohol-related violence, and
 - ii. liquor licensing, including the effectiveness of lockout laws and alcohol service laws;
- b) the effectiveness of the current state and territory:
 - i. training requirements of persons working within the hospitality industry and other related industries, and
 - ii. educational and other information campaigns designed to reduce alcohol-related violence;
- c) the viability of a national strategy to ensure adoption and delivery of the more effective measures, including harmonisation of laws and delivery of education and awareness across the country, and funding model options for a national strategy;
- d) whether a judicial commission in each state and territory would ensure consistency in judgments relating to alcohol-related violence in line with community standards; and
- e) any other related matter.

The Inquiry was established chiefly to respond to the perceived frequency of public assaults involving alcohol intoxication across Australia, including several high-profile one-punch homicides, and to evaluate the efficacy of new laws and policies legislated and enacted in relation to those cases. Lazarus commented that everyone deserves to be able to safely participate in public and social life and he held that the Federal Government is obligated to investigate the need for a nationally consistent approach to combat the tragic and unnecessary harms associated with alcohol misuse. He remarked:

It is clear that Queenslanders are tired of seeing young lives like Cole Miller's ruined and extinguished by senseless coward punches. It seems as though every week we see a new sickening case of unprovoked and alcohol-fuelled assault killing or permanently injuring someone in the news.

It's time to say "enough". That's why I'm pushing for the Government to show some leadership and develop a national framework in partnership with the states and territories to address this important social issue. All options ought to be on the table in tackling the violence and the Inquiry will consider the effectiveness of existing approaches as well as new strategies in awareness, education, trading hours, transport, policing, sentencing, industry training and regulating the service of alcohol.

We need a more proactive approach to this issue, and with the support and advice of police, medical professionals, and community members around the country, I aim with this inquiry to

highlight the necessity of a rational, effective, and nationally consistent approach to making sure our country's nightlife is safe for every Australian to enjoy.

The Committee's interim report was tabled in parliament on 5 May 2016 (Legal and Constitutional Affairs References Committee, 2016). The interim report acknowledges the need for further work in this area, stating that the issues examined as part of the Inquiry's terms of reference warrant further and more detailed investigation than was possible in the timeframe of the Inquiry. The Committee noted the need to further explore the issues and possible solutions outlined in submissions provided, however, it was unable to continue its work due to the subsequent dissolution of the Senate and House of Representatives. While the Committee strongly recommended that the new parliament re-refer the matter of a nationally consistent approach to alcohol-related violence to the relevant committee for report in the years following, this has not occurred.

Despite not being a complete inquiry, the Committee's report does provide a qualitative analysis of the key themes and recommendations that emerged from the 65 submissions provided to the 2016 Senate Inquiry. These submissions proved an extremely valuable resource, giving insight into best practices nationally and identifying diverse stakeholder proposals on the future needs for law reform. These are drawn on throughout this Report to provide national insight, stakeholder perspective and recommendations for reform.

2.3 Interviews with key stakeholders

To supplement the case and documentary analysis, in the final phase of the research, semi-structured interviews were conducted with relevant Victorian stakeholders and legal practitioners. Semi-structured interviews were selected for use as they allowed for comparisons between responses from participants to a set of broad questions while still giving the researcher the flexibility to ask follow-on questions wherever necessary. The benefits of criminological and socio-legal research that directly engages legal practitioners through interviews and focus groups has been well documented (see, *inter alia*, Fitz-Gibbon, 2014a, 2016; Fleming, 2011; Richards, 2011). As Richards (2011: 68) describes:

Criminologists should pay more attention to the views of policy makers, legislators and other people in positions of power. Interviewing elites can be very useful given that it allows the researcher access to data that may be impossible to obtain by using any other method.

By drawing on the views and experiences of those operating within the justice system, as well as those of policy and advocacy stakeholders, this study builds on a body of Australian criminological research in related areas of criminal law reform (see, for example, Bartels, 2009; Fitz-Gibbon, 2014b).

By combining interviews with case analysis, this project seeks to move beyond statements of law and policy to critically analyse the operation of the law from the perspective of those directly engaged in its operation. The semi-structured interviews were used to enhance the quality of the project by providing insight into previously unexplored views on legal responses to one-punch homicides and the 2014 'cowards-punch' reforms. Given the limited public consultation undertaken prior to the Victorian reforms, the interview findings are invaluable for future state governments and law commissions that seek to evaluate, review and reform the law's response to one-punch homicide.

Specifically, eleven semi-structured interviews were conducted in the first half of 2018. One-on-one Interviews were completed with three advocates, one policy stakeholder and seven participants from the legal profession, including members of the Victorian Bar, Office of Public Prosecutions and Victorian Supreme Court judiciary. Advocates included three individuals who started and/or worked in foundations and not-for-profit organisations (NGOs) advocating for improved education, awareness and/or law reform in the area of one-punch homicide. Two of the advocate participants had personally experienced the tragedy of a one-

punch homicide, having lost a child in this way. The policy stakeholder interviewed had been involved in the 2014 law reform process.

Interviews were conducted face-to-face and over the phone, depending on the preference of the individual participant. All participants, with the exception of one, consented to the interview being audio recorded and transcribed verbatim. Following transcription all interview data was uploaded into the NVivo qualitative analysis software and thematically analysed into overarching themes as identified by the lead researcher. The key themes used for the qualitative interview data analysis included: views on current legal responses; the 2014 manslaughter reforms; motivations for reform; culpability for a one-punch homicide offence; sentencing practices; education and awareness; and an over-arching theme capturing all commentary on future needs for reform.

All participants were assured of anonymity prior to the interview and, as such, throughout this report participants are referred to by individually-assigned pseudonyms. Each pseudonym has been assigned to identify the role of the participant using a randomly assigned letter of the alphabet to allow for differentiation between participants, for example, PolicyA, AdvocateB, LegalC, LegalD.

¹ For this interview, hand-written notes were taken throughout the interview and have been analysed alongside the interview transcripts.

3. Legal responses to one-punch homicide: a review of national practices

Over the past ten years issues arising from the law's response – in terms of charging practices, convictions obtained by way of guilty plea or at trial, and sentencing practices – to one-punch assaults resulting in death have sparked significant debate across Australian jurisdictions and internationally (on the latter, see, inter alia, Mitchell, 2008; on legal responses to homicides among men more broadly see Tomsen and Crofts, 2012). Despite the similarity of questions surrounding the culpability of one-punch homicide offenders, Australian state and territory governments have proposed – and to varying degrees introduced – different reforms to homicide law and sentencing practices in an attempt to address this specific form of lethal violence.

Across Australia each state and territory jurisdiction has its own laws relating to homicide offences. While the specific homicide offences and partial defences to murder vary across jurisdictions, at a minimum each jurisdiction in Australia has:

- An offence of murder;
- An offence of manslaughter (divided into voluntary and involuntary manslaughter); and
- A complete defence of self-defence.

Beyond these 'traditional' homicide categories, some Australian jurisdictions legislate partial defences and/or alternative offences to murder including the partial defence of provocation, the partial defence of excessive self-defence and the partial defence of substantial impairment. In recent years, additional homicide offences have been introduced at a state level to combat specific types of homicide relevant to this research. These include:

- Northern Territory: Violent act causing death (*Criminal Code Amendment (Violent Act Causing Death) Act 2012 s161A*);
- New South Wales: Assault causing death (*Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014*);
- Western Australia: Unlawful assault causing death (*Criminal Code 1913 s281*).

While these offences may, at face value, appear similar it is worth acknowledging important differences in the motivations for reform across these jurisdictions. As they arguably form part of what McNamara and Quilter (2016: 5) have labelled a 'significant expansion' in Australian criminal laws whereby, 'in the name of crime prevention and risk management, legislatures around Australia have introduced various forms of "extreme" criminalisation which push the criminal law beyond its traditional boundaries'.

This section provides the national context for this research. In order to do so, it first examines the reforms introduced in Victoria and then provides an overview of related reforms introduced in recent years in WA, NT and NSW.

3.1 The 2014 Victorian coward's punch manslaughter reforms

On 18 September 2014, the Sentencing Amendment (*Coward's Punch Manslaughter and Other Matters*) Act 2014 (*Vic*) was passed by the Victorian parliament. The purpose of the 2014 Act is twofold:

² For an overview of the partial defences to murder in Australia, see Fitz-Gibbon (2014b).

- to insert a new provision into law requiring that all cases of manslaughter by unlawful and dangerous act involving a single punch or a strike delivered to the victim's head or neck, which causes injury to the head or neck automatically constitutes a dangerous act; (*Section 4A, Crimes Act 1958 (Vic)*), and
- to insert three new sections into the Sentencing Act requiring that all manslaughter cases involving a single punch or strike, or manslaughter in circumstances of gross violence, attract a statutory minimum sentence of ten years imprisonment.

The legislation was enacted by the State Government with the aim of sending a clear public message that 'coward punch' homicides would be taken more seriously by the criminal justice system and that those who chose to throw a single punch would incur significant legal penalties. Then Premier of Victoria, Denis Napthine (2014: 1), stated when announcing the new law that:

The legislation would ensure that cowards who engage in one-punch attacks on unsuspecting victims would be held to account ... A single punch is a dangerous act that can kill, and there is no excuse for such violence.

Specifically, the Victorian legislation states that:

Manslaughter—single punch or strike is taken to be dangerous act:

- (1) This section applies to a single punch or strike that—
 - (a) is delivered to any part of a person's head or neck; and
 - (b) by itself causes an injury to the head or neck.
- (2) A single punch or strike is to be taken to be a dangerous act for the purposes of the law relating to manslaughter by an unlawful and dangerous act.
- (3) For the purposes of subsection (2), it is irrelevant that the single punch or strike is one of a series of punches or strikes.
- (4) A single punch or strike may be the cause of a person's death even if the injury from which the person dies is not the injury that the punch or strike itself caused to the person's head or neck but another injury resulting from an impact to the person's head or neck, or to another part of the person's body, caused by the punch or strike.

(Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014, Part 2(3))

In order for an offender to have the mandatory minimum term of ten years applied, the legislation requires that:

- (c) the victim was not expecting to be punched or struck by the offender; and
- (d) the offender knew that the victim was not expecting, or was probably not expecting, to be punched or struck by the offender.

(Sentencing Act 1991 (Vic), s 9C)

The implications of this part of the new law is effectively expressed by McNamara and Quilter (2016: 18, emphasis in original) who note:

The culpability that justifies a ten-year MMS [mandatory minimum sentence] is not the fact of using fatal violence, but the element of taking your opponent by surprise. It might be countered that the focus on surprise reflects the fact that it carries greater risk – that such a victim is more likely to fall and suffer fatal injury. Nonetheless, it is hard to ignore the message conveyed by the legislative language: that there is a "right" way to engage in male violence and harsh punishment awaits only those who do not "follow the (unwritten) rules".

While at the time of their proposal the Victorian reforms were touted as giving ‘Victoria the strongest laws relating to one-punch deaths in Australia’ (Campbell, 2014), and as such were intended to accord with community expectations and desire for justice in such cases, the Victorian reforms were met with significant criticism from Victorian legal practitioners and media commentators in the aftermath of their introduction (see, for example, Anderson, 2014; Willingham, 2014).

3.2 The Western Australian experience of reform

In 2008, Western Australia (WA) became the first Australian jurisdiction to introduce a new charge to deal directly with ‘one-punch’ assaults. The offence deemed an ‘unlawful assault causing death’, attracts a maximum penalty of ten years imprisonment and carries the following three requirements:

1. That the conduct alleged was an assault;
2. That the assault was unlawful; and
3. That the victim died as a direct or indirect result of that assault.

(Criminal Code 1913 (WA) s281)

The requirements of the offence represent ‘a radical break from long-standing legal tradition’ in that the criteria includes neither mental nor foreseeability elements (Cullen, 2014: 54).

The offence was introduced following several high-profile cases of one-punch homicide in WA, including the deaths of Dwayne Favazzo, Skye Barkwith and Leon Robinson (Williams, 2008). In each of these cases the perpetrator was acquitted of manslaughter following a contested trial. The cases were heavily cited in debate surrounding the perceived inadequacy of the law’s response to one-punch homicides (for further details, see Williams, 2008; Cullen, 2014). In recognition of these acquittals, the WA reforms sought to specifically preclude defendants charged with a one-punch homicide offence from raising a defence of accident (Orr, 2014). In justifying this aspect of the reforms, the then WA Attorney-General, Michael Mischin, stated:

There was a massive sense of injustice which came about from people breaking the law, throwing a punch, killing someone and walking free, which just made the law look like an ass. You shouldn’t be able to go out there, break the law and then not be punished ... I just think it was a law that’s time was overdue. These are not accidents. (cited in Hayward, 2008)

In the period between the introduction of the new law in August 2008 and January 2014, 12 offenders were convicted of the new offence (Orr, 2014). Interestingly, and in contrast to the context of homicide for which it was implemented, convictions for the unlawful assault causing death offence were obtained in several cases of male-perpetrated intimate-partner homicide. The use of the offence in cases of fatal family violence attracted significant concern (Ball, 2012; Quilter, 2013a; Taylor 2014). This context of homicide is explored further in section 4.3.

3.3 The Northern Territory experience of reform

Following on from WA, in November 2012, the NT Parliament passed the Criminal Code Amendment (Violent Act Causing Death) Act 2012, within which Section 161A saw the introduction of a new homicide offence designed to address cases where ‘a person engages in conduct involving a violent act to another person ... and that conduct causes the death of that person or any other person’. The offence carries a maximum penalty of 16 years imprisonment and was introduced with the aim of capturing cases where ‘manslaughter is too difficult to prove’ (Erickson, 2013, p.58).

As is often the case with homicide law reform, the NT one-punch law reforms were introduced following a high-profile incident: the one-punch death of 39-year-old Brett Meredith. Meredith, a police officer at the time of his death, was fatally assaulted by Michael Martyn at a club in

the early hours of New Year's Day 2010 (Stratham, 2010). A jury found Martyn guilty and he was convicted of negligent manslaughter and sentenced to a non-parole period of one year and ten months, a term which was increased on appeal to five years maximum with a non-parole period of two years and six months (The Queen v Martyn [2011] NTCCA 13, hereinafter Martyn).

In explaining the circumstances of the case and its categorisation as negligent manslaughter in the initial sentencing, the judgment of the NT Court of Criminal Appeal stated:

The punch was 'opportunistic and calculated' and was deliberate and intended by the respondent to be a 'knockdown punch' that would send Mr Meredith to the ground ... The punch gave rise to a high risk of death resulting and there was, on the part of the respondent, a gross lack of reasonable care and a great falling short of the standard of care that a reasonable person would have exercised in the circumstances. (Martyn, at 8-9)

Following the case, Meredith's widow, Ameer, campaigned for the introduction of a specific offence for one-punch homicides, arguing that a targeted category would spare homicide victims' families the trauma of a contested trial for murder or manslaughter (Coutts, 2012).

3.4 The New South Wales experience of reform

The issue of one-punch homicide and legal responses in NSW came to the fore in July 2012 following the death of Thomas Kelly. Kelly was punched in Kings Cross by heavily intoxicated, 18-year-old Kieran Loveridge. Kelly died two days later from injuries caused by the single assault. The events leading up to and surrounding the death of Kelly were succinctly expressed by Justice Campbell:

Thomas Kelly was on his mobile phone talking to a friend who was already at the hotel. He had no reason to be on the lookout for trouble. He was entirely unsuspecting of any danger ... As Thomas Kelly and his friends passed by, the offender stepped out from the wall he was standing against and punched Thomas Kelly in the face with sufficient force to knock him down. (R v Loveridge [2013] NSWSC 1638, at 14-15, hereinafter Loveridge)

In addition to his fatal attack on Kelly, over the course of an hour, Loveridge committed multiple unprovoked assaults in the Kings Cross region. Prior to these assaults, which occurred from 9:30pm onwards on 7 July 2012, Loveridge had been drinking at home, in his car and in other licensed venues to the point where, at the time of the first assault, he was 'very drunk' (Loveridge, per Campbell J, at 9-10. Following the decision of the NSW Director of Public Prosecutions (DPP) to accept a guilty plea of manslaughter for an unlawful and dangerous act, in October 2013 Loveridge was sentenced for the manslaughter of Thomas Kelly and four other unrelated offences of assault committed on the same night.

In sentencing Loveridge, Justice Campbell described the offences as unprovoked incidents of 'drunken violence in a public place' (Loveridge, per Campbell J, at 2). Highlighting the relevance of several of the sentencing principles to such violence, Justice Campbell stated:

Other young people need to be able to walk our streets in safety. A breach of the peace of the type committed by the offender, notwithstanding his youth, calls for denunciation of his conduct, the exaction of retribution on behalf of the community and the deterrence of others who may put themselves in the same position. (Loveridge, per Campbell J, at 67)

Consequently, for manslaughter by an unlawful and dangerous act Loveridge received a maximum term of six years with a non-parole period of four years imprisonment. When combined with the sentences consecutively imposed for assault, Loveridge received a total sentence of seven years and two months with a non-parole period of five years and two months. In determining this sentence, on the advice provided by the prosecution and the defence, Justice Campbell (Loveridge, at 76) found that, prior to Loveridge, cases involving similar offending incurred a maximum sentence of between five and six years, with a minimum term of three years and six months.

The sentence led to intense media outrage and community concern (Bibby, 2013; Morton, 2013; Sheehan, 2013), following which, on 14 November 2013 the NSW DPP, Lloyd Babb, announced that he would appeal the sentence imposed on Loveridge on the grounds that it was manifestly inadequate. The decision of the NSW Court of Criminal Appeal was handed down on 4 July 2014. The initial sentence was quashed and Loveridge was sentenced to a maximum term of 13 years and eight months with a minimum term of ten years and two months imprisonment (R v Loveridge [2014] NSWCCA 120).

The perceived inadequacy of the law's response, at both conviction and sentencing, to the death of Thomas Kelly ignited a national debate as to the wider adequacy of current legal responses to one-punch homicides specifically, and to alcohol-fuelled violence more broadly. As Quilter (2013a: 440, emphasis in original) explained:

It is also a story of the absolute limitations of the criminal law; its complete inadequacy to prevent these types of incidents before they occur; and its inability to protect innocent individuals from random violence.

At the time, the NSW law of homicide (under section 18 of the Crimes Act 1990 (NSW)) legislated an offence of murder as well as manslaughter, which can be broadly categorised into voluntary and involuntary manslaughter. Within the latter category, the offence of manslaughter is further split into manslaughter by unlawful and dangerous act and manslaughter by criminal negligence; the former of which is the category of manslaughter under which Kieran Loveridge was sentenced. Importantly, and in recognition of the vast range of homicides that fall under the manslaughter banner, there is no standard non-parole period legislated for this offence.

On 21 January 2014, in response to ongoing community concern following the law's response to the Thomas Kelly case as well as the perpetration of several more alcohol related assaults, the O'Farrell Government announced a plan to target alcohol and drug violence in NSW. The announcement came shortly after the death of 18-year-old Daniel Christie, also in King's Cross, on New Year's Eve 2013, which reignited national media attention on the one-punch homicide issue (see, for example, McDougall and Bodkin, 2014; Needham and Smith, 2014). Christie, who was 18 years old at the time of his death, was attacked by Shaun McNeil just metres from where Thomas Kelly had been struck two years earlier. McNeil struck Christie once in the face using a closed fist, causing him to fall backwards, strike his head on the road, fracture his skull and lose consciousness. For this unprovoked assault McNeil was sentenced to an aggregate term of imprisonment of ten years with a non-parole period of 7 years 6 months (R v McNeil [2015] NSWSC 1198).

In what was described by then NSW Premier, Barry O'Farrell (2014: 1), as a 'tough and comprehensive package', the Government's plan included:

- Eight-year mandatory minimum sentence for offenders convicted of the new one-punch law, where the offender was intoxicated by drugs and/or alcohol;
- Mandatory minimum sentences for violent assaults where the offender was intoxicated by drugs and/or alcohol;
- Introduction of 1:30am lockouts and 3am last drinks;
- State-wide 10pm closing time for bottle shops and liquor stores;
- Increased maximum sentence for the illegal support and possession of steroids;
- Increased on-the-spot fines for continued intoxicated and disorderly behaviour disobeying a police move-on order;
- Community awareness and media campaign to address the culture of binge drinking and drug- and alcohol related violence;

³ Loveridge was originally charged with murder but this was downgraded by the prosecution to manslaughter by unlawful and dangerous act; a decision that attracted significant criticism in the media (see Wells, 2014).

- Free buses from Kings Cross to the CBD on Friday and Saturday nights;
- Remove voluntary intoxication by drugs or alcohol as a mitigating factor on sentence;
- Increased maximum penalties where drugs and/or alcohol are aggravating factors for violent crimes;
- Enable police to impose an immediate CBD precinct ban of up to 48 hours on individuals;
- A periodic risk-based licensing scheme with high fees imposed for venues and outlets that have later trading hours, poor compliance histories or are high risk locations; and
- A precinct-wide freeze on liquor licences for new pubs and clubs.
(O'Farrell, 2014: 1-2)

Framed largely around the need to increase penalties for those convicted of violent offences while under the influence of alcohol and/or drugs, the 'one-punch' homicide issue was ever-present in the government's plan. As O'Farrell (2014: 2) stated:

We're getting on with the job of making our streets safer ... A strong consistent message is required that alcohol and drug-fuelled violence will not be tolerated. The idea that it's OK to go out, get intoxicated, start a fight or throw a coward's punch is completely unacceptable – and, under these measures those who do so will face serious consequences.

A key element of the NSW reforms, and the 'serious consequences' described by O'Farrell (2014), was the introduction of a new offence: 'Assault Causing Death', carrying a mandatory minimum sentence of eight years. In introducing the new offence, O'Farrell explained:

The consequences couldn't be clearer for any thug heading out this weekend. If you are intoxicated with drugs or alcohol and fatally assault someone – you will now be captured by a new mandatory minimum sentence of eight years jail ... The NSW Government has today sent the strongest possible message on behalf of the community – drug and alcohol-fuelled violence won't be tolerated anywhere in NSW. (NSW Government, 2014a)

Based largely on the WA model, the NSW legislation establishes that a person is guilty of 'assault causing death' where:

- a) the person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and
- a) the assault is not authorised or excused by law, and
- b) the assault causes the death of the other person.

(Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014, Schedule 1: Amendment of Crimes Act 1990 No 40, s. 25A (1)(a)-(c))

Unlike sentencing practices for homicide offences in other Australian jurisdictions, the maximum sentence available for the offence varies according to the intoxication of the offender; an offender who commits an 'assault causing death' while sober is liable to 20 years imprisonment, while an intoxicated offender who is over 18 years old at the time of the offence is liable to a maximum sentence of 25 years (s. 25A (1)-(2)). The reform package also included the introduction of an eight-year mandatory minimum sentence for all offenders intoxicated by drugs and/or alcohol at the time of offending who are convicted under the new one-punch homicide law (NSW Government, 2014a).

In the period since the introduction of the NSW reforms, the legislation has drawn mixed responses in media commentary and recent research. On the one hand, the reform package

was praised as a 'shining example' and 'an important first step' in addressing alcohol-fuelled violence (Miller, 2014), while on the other, it has been heavily critiqued as 'devoid of principle' (Quilter, 2014, p.81). One of Quilter's (2014) key points of criticism has been levied at the apparent justification for the reforms on the basis that there was a gap in the law. Quilter (2014) argues that applying the justification used in WA and NT for a one-punch offence to the NSW context is flawed given that there was no 'gap' in the existing NSW legislation as such homicides were captured under the offences of manslaughter and murder. Consequently, Quilter (2014: 16) argues that the new legislation was 'neither necessary nor desirable'.

Undoubtedly missing from the reform process was a period of consultation with relevant stakeholders. Consequently, in the wake of the reforms, Quilter (2014b, p.101) noted that, due to a lack of public and stakeholder consultation, it was likely that any problems or unintended consequences resulting from the new legislation 'will fail to be resolved in the context of operational policing, prosecution discretion and the conduct of trials'.

In December 2017, Hugh Garth became the first person to be sentenced under the NSW 'one-punch' legislation. Garth was found guilty by a jury of unlawful assault causing death and sentenced to a maximum term of ten years imprisonment within the mandatory minimum term of eight years imprisonment (Whitbourn, 2017). Garth was 21 years old when he fatally punched 21-year-old Raynor Manalad in May 2014 outside the home where they had both been attending a birthday party (Whitbourn, 2017). Beyond the Garth sentencing specifically, Quilter (2017) has documented the punitive trend in NSW sentencing patterns for persons convicted of causing the death of any person in a public space while intoxicated. As Quilter (2017: 142) notes, in the future those convicted of such acts 'will be spending a substantially longer period in prison than those who perpetrated similar crimes in the past'.

4. Sentencing decisions for one-punch homicides in Victoria, 2000–2015

In the 16-year period from 1 January 2000 to 31 December 2015 there were 22 reported homicide cases which involved a single punch causing death finalised in the VSC. This number equates to just over one case finalised in each calendar year. This is not to dispute other prevalence figures in Victoria specifically, or Australia more broadly, which suggest that such events are more common but rather to focus in on those cases which were identified judicially as a ‘one-punch’ homicide and sentenced as such. This section focuses specifically on those homicides and provides a detailed analysis of the nature of the homicide, and the circumstances of the victim and the offender.

While it is a somewhat ambiguous exercise, if one were to apply the 2014 Victorian legislation retrospectively, the provisions establishing what constitutes a ‘coward’s-punch’ manslaughter would likely only apply to 22 of the cases cited here, including the four cases where additional injuries were inflicted either in the period leading up to or following the homicide offence. While in many respects this restriction may be the very intent of the legislature – in that it sought to provide a consistent legal response to homicide cases involving a coward’s punch that was not intended to apply widely – the highly restrictive wording of the legislation does lead to the exclusion of homicide cases which in the main involve circumstances resembling what has been colloquially referred to as a ‘one-punch’ homicide. As such, there are likely consequences of the disconnect between the higher number of cases for which the community have come to assume will now be categorised as a ‘coward’s-punch’ manslaughter and the very small number of cases that fit within the restrictive provisions of the new legislation.

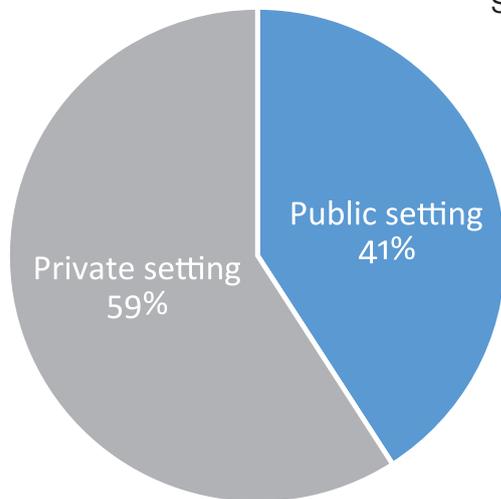
4.1 One-punch homicide in Victoria

Of the 22 homicides identified as a ‘one-punch homicide’ 20 of these were the result of a single punch, one was the result of a single kick and one the consequence of a single severe blow. While these homicides were all largely finalised in the VSC prior to the emergence of national debates and media coverage on the topic, the devastation of a single punch was not overlooked in the remarks made by members of the judiciary as the following judicial remark demonstrates:

I do not lose sight of the fact that your offence was constituted by one blow, and was not a protracted and vicious attack. Nor do I lose sight of the fact that you would not have foreseen that death was a probable consequence of your actions. But as I have said, that blow was struck a mere three weeks after you had been sentenced for assault. It robbed [the deceased] of his life. (The Queen v Sharp [2015] VSC 116, per Priest JA, at 18)

While a ‘single’ punch, kick or blow was cited in these homicides, the case analysis revealed several instances where there were additional acts of violence either precipitating or following the act of homicide which demonstrate the murkiness of a ‘one-punch homicide’ classification.

The location of the homicide incident was of key interest in this study given that popular discourses in the law-and-order debate surrounding one-punch homicide reforms in Victoria specifically and Australia more broadly have focused so heavily on depictions of the ‘night time economy’ and the need to ensure safety in and around licensed venues. However, and as shown in Diagram 1, the majority of one-punch homicides sentenced over this period did not, contrary to popular representations, occur in and around licensed venues. 13 of the 22 cases were perpetrated in a private setting. These included the residence of the victim, the offender and/or a mutual acquaintance. That the majority of homicides occur in private settings aligns with homicide patterns nationally. In the period 2010-2012 70 per cent of homicide incidents in Australia occurred in a residential location, in comparison to the 16 per cent of homicides that occurred in a street or open area (Bryant and Cussen, 2015).



Specifically, of the nine cases which occurred in a public setting and thus more closely align with media representations of one-punch homicides occurring in and around licensed venues, there were three homicides which occurred at or outside a hotel/pub, two homicides which occurred at or outside a restaurant, two homicides that occurred on the street, one homicide that occurred at a nightclub, and one homicide which occurred at a railway station. Of those that occurred in private settings, there were six homicides which occurred at a residence of a person known to both the victim and the offender, four homicides which occurred at the victim's residence and three homicides that occurred at the offender's residence.

Diagram 1: Location of the homicide in Victorian one-punch homicide cases sentenced 1 January 2000 and 31 December 2

The national debate surrounding one-punch homicides and the subsequent law-and-order campaign to improve legal responses have focused almost exclusively (with the exception of debate surrounding legal responses to intimate partner homicides in WA, see discussion in Section 4.5 below) on violence between young males. The sample of cases identified through this research offers a similar gendered picture of this form of homicide. Of the 22 cases examined, all involved a male perpetrator and 20 cases involved a male victim. Of the two cases which involved a female victim, the relationship between the offender and victim was an intimate relationship in one case, and a 'friendship' in the other. Both of the cases involving a female victim occurred in a residential setting. To some extent the dominance of male offenders (and male victims for that matter) within this sample is expected given that men commit significantly more lethal violence in Victoria, and in Australia, than their female counterparts (Bryant and Cussen, 2015). As recognised by Tomsen and Crofts (2012: 424) 'male on male attacks are so frequent as to form the bulk of all homicide cases'. In the period 2010-2012, 64 per cent of homicide victims in Australia were male and 85 per cent of homicide offenders were male (Bryant and Cussen, 2011).

With the notable exception of the reporting of the death of David Hookes, who was 49 years old when he died, media coverage of 'one-punch homicides' has focused largely on the actions and deaths of young males. This focus has been replicated in political campaigning surrounding related reforms, as was recognised during the interviews, where one legal practitioner commented:

I think Parliament wanted to send a clear message because there are a lot of young men, it's not confined to young men, but I think young men are more prone to reacting in an aggressive, violent, spontaneous way ... So that's the target audience ... It seems to be young men full of testosterone just wanting to get into a fight and punching someone. (LegalF)

Of the 22 cases of one punch homicide identified, the offender age ranged from 17 to 57 years old, with the majority of offenders aged between 19 and 24 years old ($n = 7$) and 25 and 30 years old ($n = 5$). Of the victims involved, the youngest victim was aged three months at the time of his death, and the oldest victim was 48 years old at the time of the homicide.

⁴ R v Harrison [2002] VSC 601.

⁵ R v Chang [2001] VSC 78.

Contrasting with offender age-range patterns, the majority of victims were under 18 years of age (n = 5) or between 31 and 40 years old (n = 5). There were five victims in total aged between 19 years and 30 years old at the time of their death. In six of the cases examined the sentencing judge did not report the age of the victim at the time of the homicide, so these cases have been excluded from this analysis of age and the diagram below.

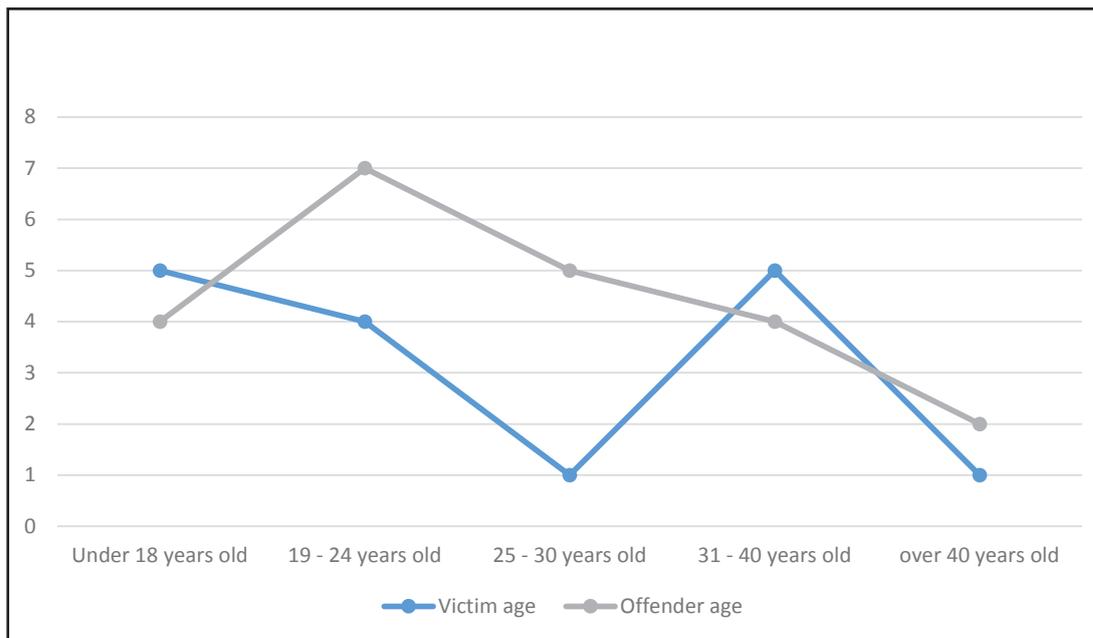
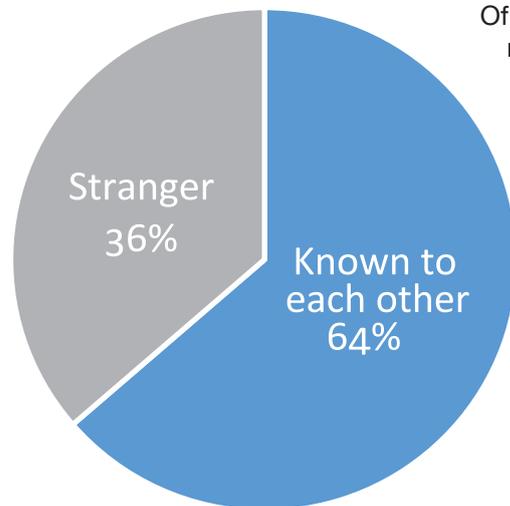


Diagram 2: Age of victim and offender at the time of the homicide in Victorian one-punch homicide cases sentenced between 1 January 2000 and 31 December 2015

When comparing this age distribution for victims and offenders involved in cases of one punch homicide with national homicide data there are some interesting similarities and differences. In the period 2010–2012, the average age of homicide offenders across Australia was 33.2 years, with the majority of offenders falling between the ages of 18 and 49 years (Bryant and Cussen, 2011). A similar pattern to that observed in this research. In terms of the age of the victim, in the period 2010–2012 the average age of homicide victims in Australia was 37.9 years (Bryant and Cussen, 2011). Interestingly, homicides involving a victim under the age of 18 years of age constituted 13 per cent of national homicides, while in the present study over 20 per cent of one-punch homicide cases analysed involved a victim who was under 18 years old at time of death, a slightly higher than the national average trend.

Of the one-punch homicides in Victoria and Australia that have generated national interest and been cited most heavily in political debates – the deaths of Thomas Kelly, Daniel Christie and David Cassai, for example – the victim was killed by a person unknown to them – a stranger. Given that the majority of homicides in Australia are perpetrated by an offender known to the victim (Bryant and Cussen, 2015), this research specifically examined whether acts of one-punch homicide occur more frequently between persons unknown to each other, or whether the media coverage of these cases and its subsequent impact on political debates and public perception, have skewed our understanding of risk and safety in relation to this form of homicide. As shown in Diagram 3 (above), this was indeed the case. In nearly two-thirds of one-punch homicides committed over the 16-year period under examination the victim and offender were known to varying degrees to each other at the time of the homicide. Table 3 sets out the specific relationship between the victim and the offender.



Of the three cases where there was a familial relationship between the victim and offender there was 1 case where the offender killed his father, one case where the offender killed his defacto partner's two-year-old son, and one case where the offender killed his three-month-old son.

Diagram 3: Relationship between victim and offender at the time of homicide in Victorian one-punch homicide cases sentenced between 1 January 2000 and 31 December 2015

Relationship between the victim and offender	Number of cases (N=)
Stranger	8
Friend	5
Acquaintance	4
Family member	3
Intimate partner	1
Neighbour	1

Table 3: Relationship between the victim and offender in Victorian one-punch homicide cases sentenced between 1 January 2000 and 31 December 2015

Acknowledging that in 14 of the 22 homicides there was a pre-existing relationship between the victim and offender is important given the proliferation of media reports and popular narratives that characterise fatal acts as 'random' (see further, Flynn et al, 2016: 183-4). This pervasive perception is both inaccurate for the majority of cases and also limiting in terms of furthering our understanding of the contexts within which these homicides occur. As Flynn, Halsey and Lee (2016: 183, emphasis in original) explain, 'constructing one-punch events as random is, of course, an immediately predictable and recognizable means for getting past the trauma of the event. But it is not a means for understanding it'.

4.2 The role of alcohol in one-punch homicides in Victoria

Tragically, your immature, alcohol-fuelled actions have damaged so many lives, including your own. (DPP v Closter [2014] VSC 484, per Hollingworth J, at 41)

As captured in the judicial remarks quoted here, the presence and influence of alcohol and intoxication in cases of one-punch homicide have been a central feature of recent debates, media coverage and regulatory responses across Australia (see, inter alia, Flynn et al 2016: 185-6; Pilgrim et al 2014; Tomsen and Payne, 2016). The Pilgrim study (2016) noted the presence and/or influence of alcohol intoxication and substance-related issues in over half of the king-hit fatalities identified, concluding that 'alcohol intoxication increases the risk of victimization, not just aggressive offending'. In order to examine the role of alcohol in the one-punch homicides under examination, this research drew on the classification of 'alcohol-related homicide' set out

⁸ R v Artis [2004] VSC 188, hereinafter Artis.

⁹ R v Gill [2003] VSC 466, hereinafter Gill.

¹⁰ R v Dempsey [2001] VSC 123, hereinafter Dempsey.

fatalities identified, concluding that ‘alcohol intoxication increases the risk of victimization, not just aggressive offending’. In order to examine the role of alcohol in the one-punch homicides under examination, this research drew on the classification of ‘alcohol-related homicide’ set out by Tomsen and Payne (2016: 4), who note that this term can be used to describe any homicide incident where alcohol is a contextual (i.e. The victim and/or offender was drinking alcohol in the period preceding the homicide) and/or proximal factor (i.e. the homicide occurred at or near a premises where alcohol was being sold or served).

There was only one homicide case in the sample where the judge noted that neither alcohol nor drugs were involved in the homicide nor did it occur at or near premises where alcohol was sold or served (*R v Chang* [2001] VSC 78). In the remaining 19 cases the judge noted at sentencing that, to varying degrees, either the victim and/or offender were intoxicated and/or under the influence of drugs at the time of the homicide. Specifically, in nine cases both the victim and offender were intoxicated, in five cases the offender was intoxicated, in two cases the victim was intoxicated, and in four cases the presence of drugs was noted at sentencing. These findings support previous research by Pilgrim et al (2014) who found that for all recorded one-punch deaths in Australia in the period 2000 to 2012, 79 per cent of cases involved an offender who was under the influence of alcohol and/or drugs at the time of the act.

Following the 2014 NSW reforms there has been debate as to whether intoxication should constitute an aggravating or mitigating factor in the sentencing of offenders convicted of an alcohol-related violent offence. To date, NSW remains the only Australian jurisdiction that specifies ‘intoxication’ as a specific aggravating feature of the one-punch offence (for further discussion see McNamara and Quilter, 2016: 19). While this debate has not emerged to the same degree in the Victorian context, in this case sample it is interesting to note that there were two cases where the offender’s intoxication was cited by the judge as an aggravating feature of the case. In these cases, the sentencing judge provided condemnatory remarks on the influence of alcohol on the homicide act committed, but did not suggest that the offender’s level of intoxication reduced his own personal responsibility, but rather affirmed that the offender was responsible for both his over-consumption of alcohol and subsequent violent actions. In these cases, the sentencing judges commented:

Fighting at the age of 17 when affected by alcohol is at least, if not more stupid and dangerous, as driving at the same age in that condition. It carries with it the same underlying potential for the infliction of the tragic loss of life and serious injury. (*R v E J C* [2008] VSC 474, per Osborn J, at 24)

it needs to be understood clearly, not just by you, but by all males and even more particularly those who overindulge in alcohol, drugs or other mind-altering substances, that a blow in the form of a punch to someone’s head is exceedingly dangerous. (*R v Heitanen* [2011] VSC 404, per King J, at 25)

In another case the judge noted that alcohol was an aggravating circumstance of the offence but stopped short of applying it as an aggravating factor in sentencing:

It might be said against you that your consumption of alcohol ... was an aggravating circumstance, having regard to the fact that you should have known ... that alcohol might make you aggressive and violent. However, in view of your youth and lack of maturity, I do not propose to take your consumption of alcohol into account as a matter of aggravation. (*R v RJP* [2011] VSC 363, per Beach J, at 13)

In two cases the offenders’ use of drugs and/or alcohol at the time of the homicide was cited by the judge as an explanation for their ‘loss of self-control’ (Gill, per Coldrey J, at 25) and ‘behaviour’ (Closter, per Hollingworth J, at 26).

¹¹There were also two one-punch homicide cases during the period studied where it was not open on the evidence to make any comments on the involvement and/or presence of alcohol and drugs at the time of the homicide.

The contested role of alcohol in male-perpetrated violence emerged as a recurring theme in submissions to the 2016 Senate Inquiry. The Committee heard evidence that alcohol can cause harm to the drinker and to others, including the obvious harm to a person's own health if they regularly drink to excess as well as the harm when intoxication can cause individuals to engage in activities which may be dangerous to their health and that of others. St Vincent's Health Australia (SVHA, 2016) stated that: '[a]lcohol is second only to tobacco as a leading preventable cause of death and hospitalisation'. The Foundation for Alcohol Research and Education (FARE, 2016) and the Public Health Association of Australia (PHAA, 2016) and the National Alliance for Action on Alcohol (NAAA) labelled alcohol a 'toxic substance' with the capacity to cause both long- and short-term harm, including harm to people other than the drinker. The Royal Australian College of Surgeons (RACS) likewise asserted:

Surgeons are dramatically confronted with the effects of alcohol misuse when treating patients with injuries resulting from road traffic trauma, interpersonal violence and personal accidents that are caused by excessive alcohol consumption.

There was, however, contention around the extent of the causal relationship, if any, between alcohol and violence. Such debate reflects that underway in social research, where Tomsen and Payne (2016: 2) have noted that 'intoxication does not determine behaviour' and that the link between alcohol and violence 'is far from inevitable' (see also Tomsen 1997). The relationship between alcohol and violence is important in this context given that policy responses to alcohol-related violence, including one-punch homicides, have often rested on assumptions about the underlying causes of the problem. As former Victorian Police Chief Commissioner Simon Overland has previously explained, our understandings of and responses to male violence can not be 'just about alcohol, or drugs, or young people. It is about a series of complex social issues that we have to understand in order to deal with them' (cited in Silvester 2009).

4.3 Intimate-Partner Homicide

In WA the introduction of the offence of unlawful assault causing death gave rise to a number of convictions in cases of male-perpetrated intimate-partner homicide. The use of the offence in this context has animated significant scholarly and media debate surrounding the ongoing proliferation of lenient responses to lethal domestic violence (see, inter alia, Banks 2015; Coutts 2012; Cullen, 2014; Egan 2011; Taylor, 2014). These concerns are clearly captured in the law's response to the 2010 killing of Saori Jones by her intoxicated husband, Bradley Wayne Jones (*The State of WA v Jones* [2011] WASC 136, hereinafter Jones). The Jones case demonstrates the unintended use of the WA offence of unlawful assault causing death in the domestic homicide context. Jones, who was trained in martial arts, punched his wife in the head while she was at his home visiting her four-year-old daughter who was staying with him for the weekend. There was a history of domestic violence in the relationship and, consequently, at the time of her death the victim and her two children were living in a women's refuge. Following the assault Jones failed to seek medical attention for 12 days during which time the victim remained dead in the home. While Jones was initially charged with manslaughter, his guilty plea to the lesser offence of assault causing death was accepted by the Crown due to the difficulties in establishing cause of death given the delay in locating the victim's body (Coutts 2012). Jones was sentenced to five years imprisonment on the basis that he had not intended to cause serious harm and that the victim's death was not foreseeable.

In response to the case, former WA Attorney-General, Jim McGinty, commented:

If it [the one-punch offence] is being used as a soft option in domestic homicide cases, then it is a misuse of the law. This was designed for gratuitous male violence, where people were walking free having taken the life of a human being, like the boy who died in Kings Cross. (cited in Coutts, 2012)

The case was the subject of heavy criticism from domestic violence advocacy groups and support services (McDermott, 2012), and initiated a proposal by the Opposition Party for a new

law. The proposed ‘Saori’s Law’, included a higher maximum term of 20 years imprisonment in circumstances where the offender is in a domestic relationship with the victim (Criminal Code Amendment (Domestic Violence) Bill 2012 (WA)). Despite gaining support from then Director of Public Prosecutions (DPP), Joe McGrath, the Bill was rejected by the WA Liberal Government (Cullen 2014).

The Jones case raises a clear concern surrounding the unintended impact that the use of the WA one-punch law may have had on legal responses to lethal domestic violence. The case also demonstrates the ease with which laws introduced for one purpose can be used in a different and often unforeseen context. It also raises questions surrounding the lack of consideration that to date has been given to the impact of one-punch homicide laws on legal responses to intimate-partner homicide. This is a particularly important line of inquiry given the breadth of work being done in other spaces across Australia to improve legal accountability of domestic violence perpetrators and improve legal responses in this area (see, *inter alia*, Victorian Royal Commission into Family Violence, 2016; Special Taskforce, 2015).

With this in mind, this study sought to identify the number of intimate-partner homicide cases prior to the introduction of the legislation which fit within the traditional definition of a ‘single-punch’ homicide. Over the period examined there was one case – *R v Harrison* [2002] VSC 601 – which involved a single punch inflicted by a male upon his female partner, the circumstances, however, were described as ‘tragic and unusual’ (per Coldrey J, at 1). In the Harrison case, following an argument between the two, the offender inflicted a single punch to the left side of the victim’s head, which caused a previously unknown aneurysm in the victim’s brain to rupture. That the victim had a pre-existing congenital defect of a berry aneurysm at the time of the argument was unknown. The prosecution accepted a guilty plea for recklessly causing serious injury on the basis that the offender had foreseen the probability of serious injury (being a loss of consciousness) but not death (Harrison, at 17).

Given the unique features of the Harrison case, it does not give rise to the same concerns as those arising from the law’s response to the Jones case. This is not to say that the new Victorian legislation could not, or will not, be used in unanticipated cases, including those where an intimate partner is held responsible for the death of a female partner, but given the sentencing implications are to impose a mandatory minimum term it is likely that different concerns would arise. For example, if the Harrison case had been resolved under those laws the punishment imposed upon the offender could have been increased from a 12-month intensive correction order in the community to a minimum term of 10 years imprisonment. The importance of judicial discretion and individualised justice is examined in more detail in Section 6, and the Harrison case provides an example of the disparate circumstances within which a ‘single punch’ can lead to a death.

¹² In some respects, the Harrison case raises similar questions surrounding culpability and causation as ‘thin skull’ or ‘eggshell skull’ cases in the UK, see further Mitchell 2009.

4.4 Legal responses to one-punch homicide in Victoria

“there appears to be a persisting view about, despite all the publicity and media campaigns by the police and government, that it’s “just a punch”. A punch kills. We have numerous examples, people just walking along the street ... One punch and one death that follows. This is not television, this is not a video game, this is real life, we have fragile bodies that break, and fragile heads that break with even more dire consequences. All of the men, particularly the young men of our society ought to come and sit here on this bench and look at the sad eyes that populate this court, the sad eyes of children, parents, partners, and friends who have lost someone they love and treasure because someone lost their temper, or got a bit angry or was showing off. One punch and hundreds of people’s lives are destroyed. Because nothing ever makes it better, time can dull the pain, but it never makes it better. That is what you have to live with - what you have inflicted upon these people for the rest of their lives. (R v Parker [2013] VSC 479, per King J, at 49-59) ”

As the above quotation by the Honourable Justice Betty King demonstrates, the severity and impact of an act of one-punch homicide was clearly acknowledged in Victorian legal responses to this form of homicide prior to 2014. In the main, the one-punch homicide cases under analysis here occurred in the period before any significant media coverage or political discussion had brought this form of violence to the forefront of national thinking.

As shown in Table 2 (see above Section 2 Methodology) of the 22 cases of one-punch homicide analysed here, two resulted in convictions for murder, 16 cases in convictions for manslaughter, 3 cases in convictions for recklessly causing injury and one case in a conviction for recklessly causing serious injury. Of these cases, 12 convictions resulted from a guilty plea and ten resulted from a jury verdict following a contested trial. The two murder convictions were obtained following contested trials. This simplistic viewing of the categorisation of one-punch homicide cases prior to the reforms is important as it reveals that the vast majority of cases involving a fatal single punch prior to 2014 resulted in a manslaughter conviction. That is, the same outcome that would now occur post the 2014 reforms, which sought to firmly locate fatal incidents of coward’s punch within the homicide category of manslaughter. To this end it is arguable that, in terms of legal categorisation, the reforms do not represent a significant change in practice. Rather, it is the government’s accompanying decision to introduce a mandatory minimum term of ten years imprisonment for anyone convicted of one-punch homicide that represents a problematic move towards obligatory judicial consistency at the cost of discretionary individualised sentencing. It is to sentencing practices that we now turn.

The maximum sentences imposed for the 22 cases of one-punch homicide examined here varied greatly from a 12-month intensive community-based order through to 19 years imprisonment. Likewise, there was significant variance in the minimum sentences imposed across the 22 cases, with one case attracting a wholly suspended sentence of two years, while in another case the minimum term of imprisonment was 14 years. For reference, the average minimum term of imprisonment imposed in cases of manslaughter in Victoria in the period 2011-2012 was 4.8 years (Sentencing Advisory Council 2013). Less than half of the mandatory term of ten years now prescribed for cases of ‘cowards punch’ manslaughter in Victoria. Indeed, in the ten-year period between 1998 and 2008 in Victoria, only four

¹³ R v Harrison [2002] VSC 601.

¹⁴ R v Gill [2003] VSC 466.

¹⁵ R v Sleeth [2001] VSC 133.

¹⁶ R v Gill [2003] VSC 466.

offenders convicted of manslaughter were sentenced to a minimum term (non-parole period) of ten years or greater (Parliamentary Library and Information Service 2014). As noted in a Parliament brief prepared at the time of the reforms, these statistics demonstrate that the ten years mandatory minimum now prescribed in law 'sits at the extreme end of current sentencing practices for manslaughter' in the state of Victoria (Parliamentary Library and Information Service 2014: 6).

It is interesting to note that of the 22 cases analysed in this study, there were two offenders who did not receive an immediate custodial term of imprisonment, an outcome that would not be available in comparable cases post the 2014 sentencing reforms. In the remaining cases (which, as noted above, involved convictions for both manslaughter and murder), the maximum term of imprisonment imposed ranged from a term of 18 months to 19 years. Of the 19 offenders who received a minimum term of imprisonment, the terms imposed ranged from 14 months to 14 years.

If one considers the justifications provided for the Victorian reforms for sentencing coward's-punch homicides then the argument could be made that the significant range of sentences imposed belie the need for greater consistency via mandatory sentencing. However, as the case analysis throughout this section shows, variance in the sentencing of one-punch homicide cases is arguably understandable and defensible given the myriad circumstances involved in these cases, the variation in the ages and circumstances of the offenders involved, as well as the differences in the nature of the offending (despite all cases involving a single punch). As such, the political justification for introducing the 2014 minimum sentencing reforms – that greater consistency in the sentencing of one-punch homicides was required – is revealed as not only flawed but also fails to allow for the complexity and range of circumstances within which an act of one-punch manslaughter can occur. This argument is further expanded in the following section examining stakeholder views on current legal responses (see below Section 5).

¹⁷ R v Harrison [2002] VSC 601; R v Leatham [2006] VSC 315.

5. Stakeholder views on the 2014 reforms and current legal responses to one-punch homicides in Victoria

Drawing heavily from the qualitative interview data obtained as part of this research, and an analysis of relevant views presented to the Senate Inquiry, the following section examines the responses of key stakeholders regarding the adequacy of current legal responses to one-punch homicide in Victoria, their reflections on the merits of the 2014 reforms, and perhaps most importantly, it offers insight into the need for reform to this area of homicide and sentencing law in the future.

At the outset of the interviews each of the participants was asked to comment on the need for reform and specifically whether they thought the operation of the law prior to the reforms was inadequate and whether the reforms had indeed addressed an unmet need or a perceived inadequacy in the law's operation. Overwhelmingly, legal practitioners interviewed noted that, while they were aware of the significant media attention and disquiet over the legal outcomes in high profile cases, they did not perceive that there was a need for the reforms. As one legal practitioner explained:

Ultimately the crime of manslaughter isn't quite as complicated for these situations as I heard a lot of the talkback radio people talk it out to be. There's certainly a lot of talk around the time that there were real issues with causation in these cases, whereas often the law on causation is pretty clear. Namely if you know what you do is a substantial operating connection with the result you achieve, then you've caused the death ... So in a case where someone's ... thrown what was objectively a very strong punch at someone and they didn't have justification for self-defence ... I don't think there was terribly much difficulty in working through those things ... I don't think it was needed. Yes, I do think the existing charges were adequate and as I said before, I think it's an odd thing to do to pick it out. (LegalA)

There were, however, a smaller number of participants who did view the reforms as important in facilitating required changes in law. In particular, one legal practitioner singled out the insertion of a new provision into law requiring that all cases of manslaughter by unlawful and dangerous act involving a single punch or a strike delivered to the victim's head or neck, which causes injury to the head or neck automatically constitutes a dangerous act (*Section 4A, Crimes Act 1958 (Vic)*), commenting:

So the introduction of section 4A of the Crimes Act, which deemed one punch manslaughter to be - or deemed dangerous in relation to one punch has, in my view, made a significant difference. In relation to the law, what that means is that it's no longer necessary for the jury to have to consider whether a reasonable person would foresee the probability of serious injury. Because what that does is it deems the act of punching someone in those circumstances to be dangerous, so that gets over a major hurdle. So in my view, that's something that's made a significant difference to date. (LegalE)

Supporting this favourable view of the 'dangerousness reforms', another legal practitioner remarked:

It removed the possibility of being able to argue that a single punch was not an unlawful and dangerous act and therefore you could not be convicted of manslaughter on that basis. So that's probably right. (LegalD)

In comparison to the academic discussion and media coverage regarding the introduction of the mandatory minimum sentence of ten years for cases deemed to be a 'coward's punch' manslaughter, the dangerous act aspect of the 2014 reforms has been the subject of significantly less media and scholarly commentary. These generally favourable appraisals of the new provision for those working within the Victorian legal community

have highlighted the need for this aspect of the reform to be monitored. As the quantity of post-reform case law builds, there will be a need to evaluate the degree to which the new provision does represent a 'significant difference' (as described above by LegalE) and to determine what that difference has meant in terms of legal outcomes in cases of one-punch homicide.

5.1 The mandatory minimum sentence for coward's-punch manslaughter

“The law was brought in to prevent people dying, to make people think twice before they punched a person because the consequences of that punch could be dire if they fell down and hit their head and had a fatal injury. So I understand the motivation behind it, I'm just querying whether non-discretion minimum sentences necessarily achieve justice because there are a lot of factors that come into play when a judge sentences or a magistrate sentences and a lot of those factors are taken away when there's a minimum, a mandatory minimum sentence. (LegalF) ”

“you don't need to apply your mind very hard to realise that identifying crimes in such a simplistic way could lead to very unjust results. (LegalD) ”

The introduction of three new sections into the Sentencing Act requiring that all manslaughter cases involving a single punch or strike, or manslaughter in circumstances of gross violence, attract a statutory minimum sentence of ten years imprisonment generated the most significant discussion and debate concerning legal responses to this form of homicide (*Sentencing Amendment (Coward's Punch Manslaughter and other Matters) Act 2014*). An analysis of these views builds on a significant bank of research which has critically analysed the operation and effects of mandatory sentencing policies in Australia and internationally (see, inter alia, Fitz-Gibbon, 2013; Morgan, 2009; Roberts, 2003). However, as the Victorian experience of reform demonstrates, in spite of mounting evidence against their effectiveness, mandatory minimum sentencing laws have been introduced in various Australian jurisdictions over the past two decades. In these instances, mandatory minimums have often been introduced with the stated political aim of increasing penalties, deterring future offenders and ensuring consistency in the sentencing of particularly heinous forms of violent and serious crime. In contrast to these expressed aims, however, evidence suggests that mandatory sentencing schemes not only lead to unjust outcomes – particularly for marginalised members of the community – but also fail to act as a deterrent or increase public confidence in the criminal justice system.

Legal practitioners who criticised the imposition of a mandatory minimum sentence described this aspect of the reforms as 'ridiculous quite frankly' (LegalC), 'knee jerk, unreasoned, unsupported' reform (LegalD) and 'slightly odd' (LegalA). Unpacking some of the reasons for opposing the reforms, one legal practitioner commented:

I find the singling out of single punch as against other forms of manslaughter slightly odd. Because in every case there are a lot of different aspects that go towards establishing the seriousness of a crime ... I think it's very difficult whenever you're coming up with the mandatory sentencing regime to sort of precisely target one thing ... one particular aspect of it makes it so much worse than every other crime going around. (LegalA)

By contrast, the support of stakeholders who supported the introduction of the mandatory minimum term of ten years imprisonment was strongly tied to the view that, prior to the 2014 reforms, sentencing outcomes in cases of one-punch homicide had been both inconsistent and too lenient. As captured in the following quotation, for these advocates lenient sentencing practices prior to the reform had created a problem where the only solution was to require (through the passing of a mandatory term) judges to increase the terms being imposed in these cases:

The thing is if sentencing was harsh enough we wouldn't need minimums. They're not harsh enough ... Well what's the solution? What's a way to give justice to victims without having mandatory minimums? How do you correct the precedent, the parity that's been set and those errors keep being repeated ... we're in a quagmire, we're not moving and so what do we do? (AdvocateA)

For critics of the mandatory minimum term, however, the legislation raised a real risk that cases would be unjustly sentenced. For example, one legal practitioner worried that by specifying cases where a punch is thrown from behind as attracting a mandatory minimum term, the legislation implies that a punch from behind is in all cases assumed to be more serious than one thrown face to face (LegalA).

Many legal practitioners also perceived the Act to be overly prescriptive in that it sets out in specific detail various elements required for conduct to amount to a 'coward's punch'. While specificity in law is often seen as desirable, in this case, several legal practitioners cited the overly prescriptive (and arguably restrictive) nature of the legislation as the reason why it is yet to be enacted in a homicide case. At the time of writing this report, while there have been numerous Victorian cases post-reform touted as 'coward punch' manslaughter cases by advocates and the media none are yet to be sentenced as such. Consequently, no offenders have yet been subjected to the mandatory minimum term of ten years imprisonment.

Noting the importance of initial interpretations of the new law (AdvocateA), interview participants were asked to reflect on why the mandatory minimum sentence is yet to be imposed. In answering this, several participants described the limits of the new legislation and in particular questioned how prescriptive the application of the new law is. The offence was described by legal participants as 'quite narrow' (LegalA), with other participants explaining that 'it's a pretty strict criteria [sic], so I'd imagine there won't be many cases that come within it' (LegalF) and 'the fact that it's never been applied demonstrates how difficult it is to find a case which meets all of those provisions' (LegalG). One legal practitioner described in more detail the impact of the prescriptive nature of the law, explaining:

there's a whole lot of hurdles. So the idea that you commit a one-punch manslaughter and that equals a ten year minimum is not – it's not as simple as that. It's a whole lot more complicated. There's a whole lot more hurdles that have to be jumped through. (LegalE)

Several legal practitioners interviewed commented that the fact that the minimum sentence is legislated for but not being applied runs the risk of creating unmet expectations among victim's families and members of the community. As one legal practitioner explained:

I know in my experience there's a much further and additional level of frustration and ultimately aggravation by people who need to be told and explained why it is that the mandatory minimums aren't being imposed in their particular cases. I think it just unnecessarily creates a further level of discomfort for those people who are involved in the process ... I think the real difficulty currently is that there's a message that this is the sentence that ought to be imposed in the usual course but it is quite difficult to find a case which actually fits through the hole – to find a square peg for the square hole that is the legislation. So the community expectation is that this is the sentence which ought to be imposed. But to find a case which properly engages with that sentence is difficult ... there's perhaps an expectation within the community that everyone sentenced with an unlawful dangerous act manslaughter which

involves the throwing of a punch and the eventual death of the victim, ought to be exposed to the expectation that that person would receive a ten-year minimum non-parole period. (LegalG)

Expanding on this, the participant noted the negative impact that the legislation can have on the families of one-punch homicide victims:

I think it also can serve to – particularly for those who find themselves, unfortunately, thrown into this area; families of deceased, friends of deceased who have died in these types of circumstances, they have a very strong expectation that the offenders will receive a sentence of this type and they find it very difficult to understand why that’s not the case. We sort of need to explain to them, “Well the circumstances that we’ve had put in front of us are just not met here” and they have an expectation that one-punch deaths equal ten years non-parole period, and that’s difficult. And those people feel likely aggrieved and that perhaps compounds what is already a difficult situation for them. (LegalG)

Ironically, this highlights a potential – and arguably very grave – unintended consequence of the legislation whereby a law introduced in part to provide clarity of legal outcomes for the families of victims of one-punch homicide may make families worse off than they would have been prior to the reforms. The potential for further negative impact on victim’s families was recognised by advocacy stakeholders interviewed. As two advocates interviewed explained:

There have been deaths. So why not use it and give those families some sort of justice? ... to see that these in the recent cases they weren’t used, and I can’t believe or even really understand how a law cannot be tight and not written correctly or it’s under interpretation. It’s totally inadequate ... So yes, definitely a lot of shortcomings and inadequacies around one-punch manslaughter. (AdvocateA)

it was meant to make it [the law] a lot more black and white, a lot more easy [sic] to understand, and it’s just made it worse, because now, not only are they [victim’s families] failing to understand all that’s going on, they’re not being explained why the mandatory minimums are not being used. So it’s just added another level of difficulty on there reality is it’s proven to be unworkable. (AdvocateB)

One legal practitioner also suggested that this loss in confidence may extend beyond the families involved to the wider community, whereby, in producing outcomes that are arguably unjust, the imposition of a mandatory minimum sentence may more broadly undermine confidence in the judicial system. As that practitioner explained:

My problem with mandatory sentencing is not about the outcomes it produces, it’s about the damage it does to the process because our system is one where generally speaking, in Australia and in Victoria, people have got confidence in the court system ... To me anything that has the potential to produce injustice, and injustice can come in either somebody being falsely convicted or somebody getting a penalty that doesn’t fit the crime they have produced, that’s going to undermine confidence in the system. And introducing a mandatory penalty effectively all it is ever doing is going to produce injustice ... by definition you are producing a false and incorrect outcome that can’t be good for the system as a whole. That’s got to undermine confidence in the system. (LegalA)

This criticism links to another frequently raised theme in the interviews, that of the importance of judicial discretion and an approach to sentencing that allows for individualised justice to be achieved.

5.2 The importance of judicial discretion and individualised justice

“ I thought it was wrong because it’s sort of treating it [as a] one-size fits all and it doesn’t. It’s insane to have the kind of fixed scale for these sorts of things ... the one size fits all is just absurd. (LegalC) ”

One of the key benefits often cited for mandatory minimum and maximum sentences is consistency in sentencing. And, while achieving consistency in sentencing is important, this should arguably not be achieved at the loss of proportionality and individualised justice. The failure of a mandatory sentencing scheme to allow a judge to take into account individual differences in the circumstances of the offence and the characteristics of the offender has been heavily criticised in Australian and international criminological research (see, for example, Hoel and Gelb, 2008; Tonry, 1992). The consequences of such an approach, as argued by former ACT Attorney-General, Simon Corbell, is that mandatory minimum sentences ‘undermine judicial independence ... and can lead to unjust, indiscriminate and potentially arbitrary outcomes for individuals’ (Inman, 2014). Mirroring Corbell’s sentiments, the importance of judicial discretion and the dangers of curtailing individualised justice were repeatedly emphasised by legal participants in this study. As one legal practitioner commented:

My preference would be to allow the sentencing judge to apply his or her discretion to the sentence in the conventional way without being hamstrung by minimum penalties. That’s not to say that the sentencing judge won’t sentence in a similar way to the penalty, it might even be above the minimum prescribed penalty, I just think that because there are so many factors that come in to play when sentencing any individual, that the best person to do that is the sentencing judge who has all the information. Whereas with a minimum mandatory penalty, then a lot of those sentencing considerations are rendered inutile, that is just no regard is had to them. (LegalF)

This view, on the importance of judicial discretion and as a result individualised justice, was similarly noted by other legal practitioners, one of whom described the ‘stripping of judicial discretion’ as ‘wrong’ (LegalC) and another two of whom stated:

I think it’s important that the courts have sufficient discretion to fit the right case to the right penalty. I understand that you have 20 different people in the room, a number of them might have very disparate views about what the penalty for something should be ... Judges are asked to consider a wide range of different factors on both sides of the equation and I think broadly speaking they have done an effective job in trying to balance all those competing options and when they haven’t the prosecutor’s got the right to take the matter for appeal in the court of appeal and they have taken that option whenever that’s come up. I feel that whenever there’s laws introduced to introduce some mandatory penalty for a particular event, what it’s effectively doing is saying to the judges we don’t trust you, you know, we don’t like the job you’re doing. But the reality of mandatory penalties is that it will result in injustice, namely the wrong penalty for the wrong offence ... So that to me is not a particularly effective reform. It doesn’t, to me, improve your prospects of general deterrence if it is imposing the incorrect penalty for the incorrect crime that is just going to undermine the justice system and end in poor results. (LegalA)

I think there’s some real inherent problems with mandatory sentencing and sentencing that departs from sort of classic judicial discretion common law sentencing. I’m always happy to see if it’s made to reflect community expectations in legislation and if that involves sentencing then I hope it is done in a way that provides a tool which achieves what it sets out to achieve. But I think those that we have currently are very difficult to apply in practice. (LegalG)

Restrictive sentencing practices are particularly limiting when imposed for crimes that encompass a wide range of behaviour. As the case analysis presented in the earlier sections of this report demonstrates, the range of circumstances within which a death can result from a single punch are disparate. By applying a mandatory minimum to cases that fall under the auspice of a ‘coward’s punch’ the legislation runs the real risk of treating ‘unlike’ homicides in a ‘like’ way. As such, there is a legitimate argument to make – above and behind acknowledging the well-established limitations of any mandatory sentencing scheme – that mandatory sentencing schemes do not provide adequate flexibility in sentencing laws and fail to recognise the range of culpabilities within which one-punch homicides can be committed.

A small number of legal practitioners also raised the concern that, by imposing a mandatory minimum term for a specific context of homicide, the new sentencing legislation would create inconsistencies in the treatment of manslaughter cases. As explained by one legal practitioner:

The other thing [that] really underlines the absurdity of it, is it takes that particular offence out of any system of consistency with other offences ... well what about home invasion, we’re all scared of home invasions. There’s something visceral about your home being invaded and then people being hit in their home and bashed up. But maybe the one-punch killer, somebody really who has no criminal intent and no prior convictions is going to end up being penalised so much more than gangs who invade homes and potentially even are engaged in untold, unspeakable acts. You just don’t get any harmony in the sentencing process by these one off [laws]. (LegalD)

Another legal practitioner agreed, commenting that the new legislation runs the risk of putting the sentences imposed in one-punch homicide cases ‘out of kilter with other manslaughters’ (LegalE). Explaining this in more detail, a third legal practitioner commented:

I’d have to say, there are other cases of manslaughter that I’ve done which would have to be regarded as more serious, because it wasn’t one infliction of the knife, it was multiple stabbings, or it was more than one stabbing, albeit manslaughter, not murder, and it wasn’t as spontaneous, that is the carrying of the knife or the use of the knife was not as spontaneous as just using your fists. So I think I’d have to say that there are other examples of manslaughter which are more serious, yet the sentence is less, so therein lies the problem, or a problem, I should say ... I do know of other examples of manslaughter where you wouldn’t get a minimum ten years and yet viewed objectively, they’re more serious because of the degree of planning involved and the weapon used. (LegalF)

Given that the mandatory minimum sentence is yet to be applied to any homicide cases in Victoria it remains to be seen whether this will occur, but the views of legal practitioners lend weight to the need for ongoing monitoring of the application of the sentencing legislation against sentencing practices for the offence of manslaughter more broadly.

5.3 Examining the motivations for the 2014 reforms

“ it’s another indication of a specific fix, political issue. Of a political issue with unintended consequences and unsatisfactory consequences. Fortunately, so far nobody’s been subjected to it which means ... we haven’t had a situation where really it could be a very unjust result. (LegalD) ”

“ it was a vote-winning exercise rather than a legal exercise, and that, for me, needs to be reviewed. (AdvocateB) ”

Given the strong opposition that members of the Victorian legal community, in particular, have expressed towards the 2014 coward’s-punch manslaughter reform, the question emerges as to why the reforms were introduced in the first place. In gauging a response to this, during the interviews participants were asked to comment on what they perceived to be the motivations for the 2014 reforms. This question produced unanimous views on the political motivations for the reform and specifically, the alignment between the punitive message heralded as part of the promotion of the reform package and the forthcoming state election in Victoria at the time of their introduction. As captured in the following interview comments:

It’s political. It makes for a good headline. (AdvocateC)

I think it was brought in as a political tool. (AdvocateA)

Law and Order is always a good seller. People want to be protected. If one political party would say we’ll be better at protecting you than the other political party, they will get a political benefit and we’re seeing it now. (LegalD)

Specifically, this perceived desire to use the reforms as a ‘political tool’ was linked to the stated effect that the reforms were intended to have in increasing minimum terms of imprisonment for this form of homicide. As two legal practitioners explained:

of course, governments like to impose minimum terms so they can say to the public that they’re doing something about increasing sentences. (LegalE)

I suspect that the legislators were taking a stand because one, a stand wasn’t being taken by the courts. I think, I don’t know if that’s definitely right, but that’s normally why these changes come in. (LegalF)

General acknowledgement of the political nature of the reforms is perhaps unsurprising given the recognised tendency in recent decades of Australian state governments to respond to community disquiet with increased maximum penalties and the creation of new criminal offences. As Loughnan (2010, p.18) notes in her NSW based research, ‘The willingness of parliaments to draft and pass new laws in relation to perceived social problems seems to represent a conviction that more law will produce more order’.

While commenting on the political motivations for the reforms, participants also noted the role individual high-profile cases had played in propelling the reform process. To this end there was also an acknowledgement of the understandable sympathy that politicians had towards the families of one-punch homicide victims and the consequent desire to act in response to their perceptions of injustice. As one legal practitioner explained:

People will feel for victims and they will adopt the position of the victims that there must be punishment for these sorts of things very readily. So that’s a difficult task, we’ve got to try to appease them and say well, just punishment may not be the best way to

do it. Because that's our natural reaction and it's an understandable one, certainly for victims. (LegalD)

The influence of individually felt injustices was pivotal in this debate, whereby legal practitioners perceived that the reforms had been motivated by the legal outcomes resulting from a small number of individual cases as opposed to a systematic analysis of the operation of the law more broadly. As one legal practitioner commented:

I can criticise mandatory sentencing as a global thing about penalty, but when people are talking about crime and punishment, generally they only talk about one case at a time. And when you're talking about one case, one case can have an emotional impact upon a community more than a whole bunch of statistics generally ... No one is coming up with saying, "Well I've gone through the median sentences for manslaughter for the last seven years and here's the trends in the area." That doesn't cut through, one individual case cuts through ... The challenge for lawmakers and for lawyers to some extent is to understand the impact that one case can have but not let the emotion attached to one case distort a system. I think that [is] what happens a lot at the moment and that is a challenge. (LegalA)

The prioritising of the government's need to be seen to be doing something in response to such high-profile cases over the need for more systematic analysis was cited as a key factor influencing the speed with which the reforms were introduced and the subsequent lack of consultation included in the reform process.

5.4 Recognising the limits of the deterrence justification

Among the political justifications put forward in support of the 2014 reforms was the claim that mandatory minimum sentences would act as a deterrent to potential offenders. Supporters of mandatory sentencing argue that a set term of imprisonment will deter would-be offenders from committing the relevant act. However, several participants have viewed this justification as flawed. As one legal participant explained:

The legislature of the day had a view that the mandatory sentencing provisions would be a good way to make very clear a message of denunciation by the community and hopefully a general deterrence by way of mandatory sentencing provisions ... I guess the mandatory sentencing provisions were an attempt to convey to the public at large that in the view of the legislature, a message needed to be sent by Parliament that those who would conduct themselves in this way ought be deterred by it, and the Courts were being asked to manifest Parliament's intention that that be the message sent. (LegalG)

The deterrence justification has been explained by Hoel and Gelb (2008, p.13) who describe mandatory sentencing policies as being based on the arguably false premise that they will:

provide an extra level of deterrence by ensuring that the cost of illegal conduct outweighs the benefits, in terms of both the severity of the sanction and the certainty that the sanction will be imposed consistently where there is a successful prosecution. [emphasis in original]

While participants acknowledged that this justification was influential politically, several participants identified and criticised this specific objective of the reforms, arguing that the deterrence justification is particularly undermined in this context given that one-punch homicides are often considered 'impulse' crimes. This viewpoint is clearly captured in the comments made by an advocate and a legal practitioner interviewed, who said:

I don't think that the mandatory minimums ramp up the deterrents, because I don't think the individuals, when it happens, are thinking about the, "Oh, I might go to jail if I hit him and he dies." They don't. (AdvocateB)

The law came in to act as a deterrent to people, that is, if the public become aware that there's a mandatory minimum of many years' jail, then it might act as a deterrent ... with one-punch crimes, they're invariably spontaneous. So it's not like planning an armed robbery where there's a degree of planning and time that the accused people have to consider their actions and

therefore you can well understand that deterrence would play a part in sentencing. But with one punch, they're spontaneous actions, invariably, and again, I just question whether or not deterrence is as important with that sort of crime as it is with others that require a degree of forethought. Because normally it happens in a situation where someone is momentarily aggrieved by the actions of the victim and lash out and then having lashed out, desist. Now I'm not saying that general deterrence doesn't have a part to play, of course it does with every crime, you want people to be deterred, that you want people to know that there'll be a consequence for their actions, but I'm just saying that I think one punch crimes are a special species of crime because by their very definition, they don't have much forethought to them. (LegalF)

Similar views were expressed by another two legal practitioners, who noted:

I have severe doubts that the ten-year minimum will have any beneficial effects in terms of deterrents such that you reduced the number of times a punch is thrown and thereby in the hope that that will reduce the number of times that, tiny as the percentage might be, that somebody dies from it. (LegalD)

The real issue is what you are trying to achieve with these laws. If your aim is simply increasing punishment because you just want the law to denounce this crime more to just treat it more harshly, that's one thing. If you want to deter people from doing these sort of offences I would really wonder whether a change in the law that meant that instead of a teenager throwing a punch getting a sentence that now would take away the entirety of his 20s, would take away the entirety of his 20s plus a little bit of his thirties is something that's going to feed into the calculation of a drunken angry person who's in a fight, I would take some convincing about that. (LegalA)

This view was not, however, unanimous. One advocate participant, in particular, noted the value of deterrents in educating members of the community on the severity of an action by demonstrating the seriousness with which it is dealt with in the courts. As this participant explained:

That's where we need to sort of put the deterrents out there, I think, is because [of] the random nature of these killings. That's what scares people because it happens to normal people, not people that are out there with an underworld connection, or a bikie gang, or drugs or whatever. These are just kids going out for a good time on a Saturday night ... How do you stop people throwing punches? That's the bigger challenge. But you know what? If someone realises, you know, when they throw that punch that, you know, I mean five years is still a long time in jail, don't get me wrong, but ten years is a lot more. So maybe, just maybe, someone might stop if they're in that position. (AdvocateC)

Mirroring this participant's view, the need for general deterrence in the sentencing of one-punch homicide offenders has been cited in several sentencing decisions in recent years. In NSW, for example, in the 2014 sentencing of Kieran Loveridge the Supreme Court of Appeal stated:

Other decisions of this Court have emphasised that violence on the streets, especially by young men in company and under the influence of alcohol and drugs, is all too common and needs to be addressed by sentences that carry a very significant degree of general deterrence ... The use of lethal force against a vulnerable, unsuspecting and innocent victim on a public street in the course of alcohol-fuelled aggression accompanied, as it was, by other non-fatal attacks by the Respondent upon vulnerable, unsuspecting and innocent citizens in the crowded streets of King Cross on a Saturday evening, called for the express and demonstrable application of the element of general deterrence as a powerful factor on sentence in this case. (R v Loveridge [2014] NSWCCA 120, at 103-5)

This demonstrates the traction that the deterrence justification has also managed to attain in homicide case law which, when considered alongside its often-assumed validity in supporting political decision making, highlights a highly problematic and significant disjunct between the evidence for its effectiveness and its use in practice.

6. Stakeholder views on future needs for reform of legal responses to one-punch homicides in Victoria

Given the range of reform activity introduced across Australian state and territory jurisdictions in a relatively short period of time – all of which are designed to improve legal responses to one-punch homicide but often adopting different approaches – this research also sought to understand key stakeholders' views on other models of reform. Drawing from the qualitative interview data, this section considers two other approaches to reform that differ from that ultimately implemented in Victoria but which have been introduced and/or considered in other Australian state jurisdictions. These are a specific homicide offence and a sentencing guideline for single-punch homicides.

6.1 *The merits of creating a specific homicide offence*

Given that several other Australian state jurisdictions have favoured reform which introduces a new category of homicide which is designed to better address cases of one-punch homicide, one of the questions included in the interviews was included to gauge whether this approach to reform was viewed favourably by Victorian stakeholders. Interestingly this question did not generate a lot of discussion among participants, with most dismissing the approach to reform as irrelevant given that Victorian had already implemented its own reforms. When asked whether they would support the creation of a specific homicide offence for this form of lethal violence, one participant did take the view a very that this would not be a good option, commenting:

No, only because we've got murder, we've got manslaughter, it's sufficient. I think the desire to keep making up new laws when some laws already cover it is just going to cause problems ... the desire to fix things is an admirable thing but it's a matter of being smart about what it is capable of fixing. (LegalA)

To this end, it is worth noting that, to date, no law reform body in Australia that has undertaken a review of homicide law has recommended the introduction of a specific offence for one-punch homicide. Without a review, a consultation process or a recommendation to the contrary from a law reform or inquiry body, it is questionable as to why any Australian state governments have favoured this approach to reform.

Debate surrounding the creation and introduction of a specific homicide offence for 'one-punch' homicide cases also raises broader questions surrounding liability and blame, culpability and causation, as well as proportionality (see, inter alia, Mitchell, 2009). Questions surrounding the perceived level of culpability of a person convicted of a one-punch homicide did raise some discussion in the context of a specific homicide offence in terms of where on the ladder of homicide seriousness that offence should sit – namely above, below, or equal with manslaughter. Legal practitioners commented:

I would have thought that, in a range of manslaughters, one-punch manslaughter probably, these days at any rate, falls around mid-level ... it's a deliberate action. There's manslaughter by negligence, gross negligence, which is different. There's also manslaughters where the level of dangerousness would be less than punching somebody. Then there's manslaughters where the level of dangerousness is up. So manslaughter by one punch strikes me, at any rate, as fitting with around the mid-level of manslaughter. (LegalE)

I think the difficulty with murder is – what the prosecution have to establish is that the person throwing the punch either intended to kill or cause really serious injury. Now if it is effectively one punch, I think the prosecution assessed that they wouldn't be able to establish that intent. You know a drunk person who's angry and throwing a punch probably doesn't turn their mind specifically to the precise consequences. Now if you had other information, and maybe in the current environment it's more likely a murder charge would be sustained because if everyone

was hyper aware of the potential impact of a punch the prosecution might be able to argue that, you know, if you're throwing that type of punch you must have intended at least really serious injury. But still it's a very high bar for murder, and justifiably so. (LegalA)

Advocates, on the other hand, were forthcoming in equating the actions of a one punch homicide offender with that of murder. As reflected in the following comment:

I think the moment you're conscious that's intent. At the moment, you take a step forward, that's intent. And then you throw a punch, that's intent. So, I don't know how you can throw an unintentional punch. (AdvocateB)

This view is to some extent to be expected given that the advocacy role in this space has often been taken on by persons directly affected by a one-punch fatality. In that respect, a more punitive view of culpability is perhaps unsurprising. It does bring to the fore the question of what is being punished – the action, the foreseeability of its harm or the consequence? Writing in the English context, Mitchell (2009) has raised this in his consideration of whether an offender should be judged by the outcome of their action or the perceived risk, and if the latter, then to whom should the risk be foreseeable –the offender specifically or an 'ordinary person'?

6.2 A sentencing guideline for single-punch homicide?

In NSW, following the sentencing of Kieran Loveridge, the DPP, Lloyd Babb, called for the introduction of a sentencing guideline for alcohol-related violence (Hall, 2014). If it had been pursued, the request for a sentencing guideline would have allowed the NSW Court of Criminal Appeal to provide guidance to the lower court on appropriate sentences for one-punch lethal violence. However, following the introduction of the new one-punch homicide offence in 2013 and the associated mandatory minimum sentence, in February 2014 Babb withdrew his application for the sentencing guideline (Hall, 2013). While this reform option appears to have been nullified in the NSW context, in Victoria there has been a recent move towards the use of sentencing guidelines for serious offences and, as such, the interviews have sought to gauge whether key stakeholders thought the introduction of a sentencing guideline for 'coward's-punch' manslaughter, in lieu of the mandatory minimum sentence, would represent a more effective approach to reform.

To provide some background on the merits of guideline judgments – guideline judgments aim to ensure consistency in sentencing while still allowing individualised justice to be achieved on a case-by-case basis. In this respect, guideline judgments are not intended to 'straitjacket' or 'control judicial discretion'. Rather, they are considered a form of judicial assistance and 'structuring' which, in an area of the law as controversial as one-punch homicides, should be viewed as welcome assistance (Anderson, 2006). As noted by the Honourable JJ Spigelman (1999: 877):

They [guideline judgments] are not precedents that must be followed. They represent a relevant indicator for the sentencing judge. They are not intended to be applied to every case as if they were binding rules. The sentencing judge retains his or her discretion both within the guidelines as expressed, but also the discretion to depart from them if the particular circumstances of the case justify such departure.

By ensuring consistency in sentencing, proponents of guideline judgments propose that they serve to maintain, and in some cases increase, public confidence in the justice system (Cowdrey, 2006; Spigelman, 1999). As argued by Warner (2003: 22), 'guideline judgments can reinforce public confidence by making the reasoning process in sentencing more transparent and they can provide a mechanism for the input of public opinion into sentencing'. These are two important outcomes in the context of legal responses to one-punch homicide given that the reform debate has, to date, been so heavily driven by community concerns and media campaigns over perceived inadequacies in sentencing and a lack of public confidence in the law's ability to respond to this type of lethal violence. In this respect, guideline judgments can

¹⁸ Guideline judgments in NSW are legislated for under Section s 36–41a of the Crimes (Sentencing Procedures) Act 1999 (NSW). For further information on guideline judgments in NSW see Cowdrey (1999, 2006).

also serve a political ‘law-and-order’ purpose, in that they respond to community concerns surrounding lenient sentencing. In doing so, however, they do not go as far as mandatory sentencing schemes (Warner, 2003).

In highlighting the potential benefits of guideline judgments from the perspective of the prosecution and the defence, Cowdrey (2006) argues:

There are significant benefits for the prosecution from effective guidelines – more consistent and appropriate sentences moulded by reference to known criteria, fewer Crown appeals and less pressure on the executive to respond to media hype. The defence also benefits, being able to predict more accurately just what the offender will receive and how best to take advantage of the guideline considerations.

Writing specifically on one-punch homicides, Quilter (2014:36) has described the guideline judgment approach as ‘a more appropriate and constructive path to responding to community concerns about alcohol-fuelled acts of fatal violence’ than the mandatory-sentencing response ultimately adopted by the NSW Government in the 2014 reforms.

However, while there are recognised benefits, it is also important to note criticisms made of guideline judgments – particularly by members of the Australian High Court judiciary and in the experiences of other Australian jurisdictions, such as WA (Cowdrey, 2006; Lovegrove, 2002). These concerns have focused on the prescriptive nature of guideline judgments and the practical risk they may present in unduly increasing the length of sentences imposed for targeted offences. In the Victorian context, however, the introduction of a mandatory minimum sentence for coward’s-punch manslaughter was justified specifically with reference to the need for more severe sentences, whereas a guideline judgment would arguably provide a more measured way for this to be achieved while still permitting a degree of discretion and flexibility to be retained in sentencing.

By creating a sentencing guideline detailing how one-punch homicides should be dealt with in sentencing offenders for manslaughter, including which factors (such as self-induced intoxication and the unprovoked nature of such attacks) should be considered in aggravation of sentence, arguably the adequacy of legal responses could have been improved without the need for a mandatory minimum term and the accompanying dangers of curtailing judicial discretion. This view was supported by several of the legal stakeholders interviewed, with one participant describing it as a ‘more effective way’ (LegalA) and another acknowledging that it is:

certainly better than mandatory minimums ... [guidelines] allow judges to explain why they’ve given more or less than the guideline. I think that would be possibly a good idea ... (LegalD)

Other legal participants agreed, commenting that guidelines ‘would be better’ (Legal E) and that they were ‘useful in so far as they lend some transparency to the process’ (LegalG).

Support for this approach, however, was not unanimous. In particular, one legal stakeholder noted the difficulty of formulating a sentencing guideline for one-punch homicide, a crime which, by its very nature (and as argued in this study), can involve such varied circumstances. As the participant explained:

I think it’s very difficult to categorise one punch. I think it’s very challenging ... To me the components that go into the gravity of an offence are a little bit more complex than just being one punch. I’m not quite sure why you would isolate that to the extent of others ... things [laws] specific on one punch seems to be unnecessarily narrow what the courts are really looking at. (LegalA)

Other participants similarly reflected on the practical difficulties of formulating a sentencing guideline for this type of homicide. One participant suggested such a difficulty could be overcome by introducing a sentencing guideline for manslaughter in general, rather than

confining it to the government's defined act of 'coward's-punch' manslaughter. As that legal practitioner explained:

What, in fact, you would do is have a sentencing guideline for manslaughter in general. So if you're going to have guidelines, then you would have a guideline that set out the aggravating features. One punch would fit somewhere in there and all the other forms of manslaughter would also rate a mention ... Which seems to me to be more sensible, because then you can deal with a whole range of offences from the lowest end to the highest end and they can be graded accordingly. Rather than have – take out a particular form of manslaughter and give it a minimum, which may or may not have any great relationship to what's happening in relation to all the other manslaughters. (LegalA)

While it is not within the scope of this study to examine and analyse the merits of sentencing guidelines more broadly for homicide offences and other serious violent offences, what this does provide is some early insight into whether the creation of a sentencing guideline for one-punch homicide or a broader sentencing guideline for the offence of manslaughter more generally would be viewed as a favourable alternative to the current mandatory minimum sentencing approach.

7. Conclusion: looking beyond the law and recommended future work

“ This whole issue of crime and all that isn’t going to be fixed just by the courts. We can’t expect them to fix it all ... The police can’t do it alone. But if we send a message of awareness, the police do their job to bring them to justice and show that they’re going to be punished, and then they take them to the courts and the courts do their bit, well every link in that chain is going to work and we’ll see a change. (AdvocateA) ”

“ I think just changing our culture to know that violence toward anyone at any time is unacceptable is a broad societal cultural thing with a lot of components. (LegalA) ”

This study arose out of the need to examine legal responses to one-punch homicides in Victoria and in turn to consider the merits and likely impact of the 2014 homicide law reforms which saw, among other changes, the introduction of a mandatory minimum sentence for coward’s-punch manslaughter. As such, and while the majority of this report is unapologetically focused on the framework of the law, sentencing practice and confidence in the justice system, it is essential to acknowledge that debates surrounding responses to this form of fatal violence has ignited a body of advocacy work beyond the realm of law. Looking outside the role of law, this final section of the report considers the role of education and awareness in this area as well as to the importance of ensuring any future work is informed by evidence and practice.

7.1 Education and awareness

“ I don’t think alcohol-related violence is something unique to this century or our generation, and I don’t necessarily think violence at licensed premises is unique to our generation. But there’s a lot of components to that and I would have thought [it] probably starts at a young age with children with the violence that they’re either exposed to or learn to accept – that’s a broader sort of societal issue I would think. (LegalA) ”

As suggested in the above participant quote, alcohol-fuelled violence is not a new issue. Violence and alcohol have been intertwined with problematic constructions of what it means to be an Australian man for far longer than the recent headlines of alcohol-related violence broadly, and one-punch homicide specifically, have tended to suggest. This is not to diminish the seriousness of recent assaults, but rather it serves to highlight the longevity of this issue and the need for a meaningful response that targets underlying problems in the culture of violence in Australia (Fitz-Gibbon, 2014c). Targeting cultural change must be achieved through education and improved public awareness.

Over the last decade there have been numerous media and advocacy campaigns in this area which have achieved significant reach in a relatively short period of time. These include the work of Victorian advocacy groups STOP, One Punch Can Kill and Step Back Think. As well

as campaigns in other Australian jurisdictions, including Danny Green's one-punch campaign, VOCAL (NSW-based), and One punch Can Kill (OPCK) in Queensland. These campaigns, alongside related media coverage more broadly, have been significant in documenting the dangers of a single punch and bringing to the fore the stories of loss and perceived injustice often associated with these cases. Advocates interviewed as part of this research believed these campaigns and advocacy through the media had played a key role over the last five years in spreading the message about the dangers of a single punch. As one advocate explained:

Now it's known that [if] you punch someone there's a very high possibility that person could die. So with all the awareness and all that over the last few years, well if anyone says, "You can't kill someone with a punch", well have they been hiding under a rock? We just want it to stop. We don't want any of this to happen, that's the thing. (AdvocateA)

Another legal practitioner similarly noted that an extensive awareness campaign had been undertaken but was somewhat more sceptical on its contribution to prevention, commenting:

I think the publicity surrounding one punch in the last five years has created a greater awareness, whether that is at the fore of a person's mind when they've been riled by someone and are angry and lash out, I'm not so sure. (LegalF)

Alongside awareness campaigns, the importance of primary, secondary and tertiary education in this area cannot be understated. Education programs about the danger of one-punch violence specifically and social violence more broadly should be consistently delivered in Australian primary and secondary schools. During the Senate Inquiry, many submissions emphasised the need for relevant education programs to be long-term and aimed at bringing about a change in the Australian culture of drinking and its associated aggression, rather than focusing on how to think when you drink. Drawing from the evidence presented during the Senate Inquiry, and noting that that body did not complete its review, it is recommended that education initiatives and strategies be continued and that the Federal Government dedicate resources to considering how best this can be achieved. Education is particularly important given the number of Australian children growing up in households where alcohol is misused and family violence is perpetrated. In these settings, the abuse of alcohol and the use of violence is normalised. If education is not used as an intervention tool the next generation of Australians are at high risk of continuing to perpetrate the same harmful alcohol-related violent behaviours that routinely confront us in today's society.

Through education, valuable lessons on the importance of respectful relationships, the dangers of binge drinking and recreational drugs, as well as the irresponsibility and profound consequences of violence and reckless behaviour can be instilled at an early age. This will have benefits in terms of challenging and changing the drinking culture among young Australians and raising awareness of the dangers of alcohol and violence. Cultural change is possible, while acknowledging it is a longer-term goal, as evidenced in the successful education and awareness campaigns targeting drink driving in Australia.

One of the purposes of education and awareness in this space was explained by stakeholders to involve upskilling youth to 'call out' bad behaviour before it escalates and to better understand the potential consequences of a recourse to violence. In this sense, some participants viewed education and awareness as providing young persons with the information needed to intervene and prevent acts of social violence. As one advocate explained:

So stopping it before it escalates, saying, "You've had enough to drink", and if you're being the idiot every single time, well your friends are going to hopefully have a voice and say, "We're not going to put up with this." It's giving the youth the confidence to speak up and not have to put up with bad behaviour from their friends who might go out and cause this. (AdvocateA)

Other participants, however, were less positive on the potential for education to drive change in this area, as captured in a comment made by one policy advocate:

we can educate kids until the cows come home that it's wrong to punch and you shouldn't hit people and violence solves nothing, but in the heat of the moment, they don't think about that. You know, it just needs to become enforced, like the drink driving, like the seatbelts before it. (AdvocateB)

This quote neatly marries together the role for prevention efforts alongside justice system responses.

7.2 *The need for evidence-based law reform*

“ To be honest with you, what I would have much preferred to see is some proper research and analysis as to how this might be better dealt with. (LegalD) ”

“ I don't think they're finished. I think they need to be looked at again. (AdvocateB) ”

A commonly-held view among those interviewed as part of this research was the overwhelming recognition of the need to ensure that there is a clearer understanding of 'what works' in legal responses to single-punch homicide. Recognising that the evidence base in Australia in this area has been limited, with the exception of the extensive work of Quilter (as cited throughout), legal practitioners and advocates alike reflected on both the difficulty of knowing whether the reforms were necessary given the paucity of evidence at the time, and the impossibility of knowing as yet what the consequences of those reforms have been given the limited time since their implementation and the consequently insufficient body of case law documenting their impact. Both of these points highlight the need for greater research in this area in Victoria specifically and across Australia more broadly. Without systematic research and legal analysis any future reforms or reviews of this area of the law will fail to be grounded in the evidence-base required to ensure effective and efficient legal reform.

Given the divergent law reform activity across Australia in recent years and the need to build the evidence base required there would be benefit in a national review of legal responses to alcohol-related lethal violence. This view is supported by the Magistrates' Court of WA (2006: 2) which, in its submission to the Senate Inquiry, commented:

It would seem that each State has developed its legislation in response to particular so called "one punch" deaths without any research as to the effectiveness of the legislation. There has been an emphasis on increasing penalties and creating new offences but historically there is nothing to suggest that increasing penalties alone is an effective way to reduce offending.

A national review would allow each state and territory to learn from the reform experiences of their counterparts. While there are sentencing and legislative differences in each state and territory jurisdiction, there are benefits in considering the range of reforms introduced and the emerging impacts in practice of each. Such a review would provide insight into pockets of best practice and allow for identification of opportunities for future reform.

Associated with the need for evidence-based law reform is recognition of the importance of consultation processes as an essential part of any law reform exercise. One of the common features of reforms introduced in this area over the last decade has been the minimal amount of consultation carried out. Several legal practitioners and advocates involved in this study specifically noted that the Victorian single-punch reforms were not put out to public consultation. This view is captured in the following two participant comments:

it was rushed through in a hurry so that the government could look like they were doing something ... The governments could look like they were doing something. (AdvocateB)

I would say with this particular reform they [the government] were determined to do it and I don't think there was much in the way of consultation that was going to impact on that, they wanted to make a point. (LegalA)

Recognising the lack of consultation on this specific reform package also led to broader observations from a smaller number of participants as to the value of consultation in any reform process. One legal practitioner described consultation, 'particularly with those who are dealing with this stuff on a practical level', as 'critical to a successful reform' (LegalG). Reflecting this view, it is argued that it is essential that any proposed national- or state-based law reforms are developed in consultation with the Australian legal community. To ensure a transfer of law into practice, those involved in the delivery and operation of the law – including police, legal counsel and judicial officers – must also be involved in informing its reform.

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