History of correspondence – R v Daniels, & R v Daniels pg 55 DPP Annual Report

Attachment 1 – Letter to VAB dated 6/7/21

Attachment 2 – email from Chair of VAB dated 12/7/21

Attachment 3 – email from VAB Secretariate dated 15/11/21 containing 2 x attachments

- 3a) Copy of original letter
- 3b) VAB out of session questionnaire

Attachment 4 – VAB out of session questionnaire answered by Deputy Director Anthony Williamson

As at 23 February 2022, the VAB have not further progressed the issue, and we are not aware of a date having been set for the Board to next meet.

Att 1

ACTDPP

ACT Office of the Director of Public Prosecutions

6 July 2021

Mr Richard Glenn
Chairperson
Victims Advisory Board
GPO Box 158
CANBERRA ACT 2601

Dear Mr Glenn,

RE: THE ACT SUPREME COURT DECISIONS IN *R V DANIEL* [2020] ACTSC 64 AND *R V DANIEL (NO 2)* [2021] ACTSC 117 AND THE SENTENCING REGIEME FOR ASSAULTS CAUSING GRIEVOUS BODILY HARM IN THE ACT

I write to draw to the attention of the Victims Advisory Board the decisions of the ACT Supreme Court in ***R v Daniel*** [2020] ACTSC 64 and ***R v Daniel (No 2)*** [2021] ACTSC 117, and the state of the sentencing regime in the ACT for assaults involving grievous bodily harm more generally.

Further, I hope to enlist the support of the Board in advocating for legislative amendments in relation to the sentencing outcomes for violent offences to ensure that they align more closely with community attitudes and expectations.

***R v Daniel* [2020] ACTSC 64**

The victim in this matter was playing pool at the Civic Pub with his partner and friends. The offender was also at the Civic Pub playing pool with his partner and friends. The two groups were not known to each other but there was some disagreement. The victim approached the offender's pool table and tried to calm the situation the down displaying both his palms in a peaceful gesture. The offender approached from the side, grabbed the victim's shirt to square him up, and forcefully punched him in the head. The victim suffered life threatening injuries and was hospitalised for 75 days.

The entire incident was caught on CCTV. The footage is graphic and confronting. The force of the punch is evident as is the fact the victim was unconscious well before he hit the ground.

The offender was charged with recklessly inflicting grievous bodily harm, contrary to section 20 of the *Crimes Act 1900*, which is punishable by 13 years imprisonment.

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The defendant accepted his conduct was unlawful and that the victim had suffered grievous bodily harm, however, argued that he was not reckless about the victim suffering serious injuries. A judge-alone trial was conducted. During this trial the defendant admitted the following matters:

- He was angry;
- He had done boxing training. He knew he hit the complainant in "the right spot";
- At no stage did the victim present a threat to him;
- He watches a lot of combat sports and knows people suffer serious injuries from being struck to the head; and
- He punched the victim with significant force. He knows punching someone in the head with significant force can cause serious harm

Despite all these admissions, the offender said he didn't turn his mind in the few seconds leading up the punch to the possibility he might inflict really serious injury. On this basis he was found not guilty of the more serious charge of recklessly inflicting grievous harm (punishable by 13 years imprisonment), and guilty of the less serious offence causing grievous bodily harm (only punishable by 5 years imprisonment).[1]

The test our Courts apply in determining recklessness comes from the NSW decision of ***Blackwell v The Queen*** (2011) 81 NSWLR 119. The test requires the offender to have foreseen the possibility of not just *some* harm, but *grievous* bodily harm. From a practical perspective, this can be very difficult to prove when you're dealing with one punch matters where the offender is often intoxicated.

Due to the difficulties in proving recklessness, the Prosecution is frequently forced to accept guilty pleas to the less serious offence of causing grievous harm. It is not acceptable that conduct so serious be subject to a maximum penalty of only 5 years imprisonment. In this jurisdiction it is a uncommon that someone will go to jail for a 5 year offence unless they have a significant criminal history.

The NSW legislature recognised this problem and amended their offence provision so that the Prosecution only has to prove foresight of causing *actual* bodily harm, not *grievous* bodily harm. This amendment was in line with the community's increasing understanding about the serious consequences of being struck to the head. Curioulsy, the ACT chose not to adopt the same changes. This was despite our office in 2016 informing the then Attorney-General of the problem.

Returning to the matter of ***Daniel***, counsel for the offender made the following submissions about recklessness:

---

[1] See section 25 of the *Ctrimes Act 1900*

> **And that's the issue in *Blackwell*. And indeed, to be blunt, that's the reason the New South Wales legislature ... immediately changed the law in New South Wales following *Blackwell*. The ACT have not chosen to change the law. So that leaves recklessness with this higher standard in the ACT that what prevails currently in New South Wales.**

Loukas-Karlsson J also expressly noted in her judgment that NSW has amended their laws to fix the issue with ***Blackwell.***

Change sought to 'recklessness'

In ***Pattalis v R* [2013] NSWCCA 171,** the NSW Court of Criminal Appeal stated at [23]:

> Over recent years, the incidence of such offences, particularly when associated with the excessive consumption of alcohol, have been all too frequent. Such offences are a cause for grave disquiet and the community is understandably angry and frustrated at their occurrence. **Regrettably, it is now notorious (as his Honour recognised) that a single punch can not only cause catastrophic injuries but also death.** For offences of this kind, the community has the rightful expectation that judicial officers will impose meaningful penalties.

The Director would suggest that this notoriety needs to be reflected in legislative change. The Director would urge the Board to consider the following possible law reform avenues and advocate to Government accordingly:

a) Amend our legislation so that it aligns with NSW. Proof of recklessness is established by the foresight of *actual* bodily harm, not *grievous* bodily harm; or

b) Create a presumption whereby it is presumed that if an offender deliberately strikes someone to the head they are reckless as to grievous bodily harm

***R v Daniel (No 2)* [2021] ACTSC 117 and sentences for assaults causing grievous bodily harm more generally**

The community's concern about the consequences of these offences cannot be understated. As has been tragically observed across the country, one punch - typically delivered by drunk young males - can kill.

In ***The Queen v Loveridge*** (2014) 243 A Crim R 31 the NSW Court of Criminal Appeal considered the sentencing principles that should apply to alcohol or drug affected offenders who commit wanton acts of violence in public, even where the offender is a young offender. The Court observed at [103] that:

> 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: *R v Mitchell; R v Gallagher* [2007] NSWCCA 296; 177 A Crim R 94 at 101 [29]. Even in the case of juvenile offenders (which the Respondent is not), this Court has emphasised that, in relation to crimes of violence committed in the streets by groups of young persons, general deterrence should be given substantial weight notwithstanding the youth of the offenders: *Al v R* [2011] NSWCCA 95 at [69]; *MB v R* [2013] NSWCCA 254 at [27].

> This Court has emphasised that the principles of general deterrence and denunciation of crimes serve as a means of protection of the public: *R v AEM* [2002] NSWCCA 58 at [92].

In ***R v Freeman Quay (No 3)*** [2015] ACTSC 284, Murrell CJ stated at [36]:

> The sentencing purposes of general deterrence and denunciation loom large in this case. Unfortunately, "one punch" attacks in public places by young men who are grossly intoxicated are common. They arouse the abhorrence of the community. They place vulnerable people (including other intoxicated people) in danger. They cry out for a strong message of general deterrence. The sentencing purposes of accountability and protection of the public are important for similar reasons.

In ***R v Sharma* (2016) ACTSC 180**, Elkaim J stated at [33]-[34]:

> There is of course, in addition to the interests of the offender, the very significant considerations which must reflect society's abhorrence for attacks of this kind. These attacks are often called "coward punches". This is an emotive term but one which is a natural product of events as seen on the CCTV footage.
>
> The courts must emphasise to young people that the consumption of large amounts of alcohol, or drugs, that places them in situations where they act with reckless indifference towards other persons and cause very severe injuries is entirely inappropriate. As has tragically been seen around Australia, the tragedy can include the death of the victim.

In ***R v Deng* (2017) ACTSC 338**, Mossop J stated at [22]:

> ...There is clearly a significant need for general deterrence of violent conduct by young men that occurs in or near licensed drinking establishments.

In ***Daniel (No 2)***, Loukas-Karlsson J stated at [103]:

> I underline the importance of recognising that our society abhors attacks of this nature; the extremely serious nature of the punch is evidenced in the CCTV footage. Our society abhors this behaviour whether the relevant offence is one of recklessly inflicting grievous bodily harm or the offence of causing grievous bodily harm.

The impact on victims of this offences is profound and life changing. The victims are in many instances, as in *Daniel*, entirely unsuspecting and innocent. The victim in *Daniel* suffered the following catastrophic injuries:

- A severe traumatic brain injury;
- Permanent cognitive impairment and difficulties performing complex tasks;
- Impaired memory;
- Facial factures; and
- 3 days in an induced coma. 7 days in the intensive care unit. 29 days in the brain injury rehabilitation unit. 75 days in hospital

At sentence the prosecution submitted the only way to deter this conduct and recognise these injuries was to impose a period of full-time imprisonment. The Court did not agree and imposed an Intensive Corrections Order (ICO) for 3 years and 6 months with 500 hours of community service to be performed. The offender will not spend a single day in custody in relation to the incident.[2] The victim's life will never be the same.

There was considerable media coverage in relation to the sentence. This coverage included the CCTV footage of the incident. Our office understands the community to be outraged at the sentence imposed. Our office has been contacted by media outlets indicating they have received numerous letters from the public concerned with the sentence imposed.

What is of most concern is that this sentence is far from an aberration. It is commonplace in this jurisdiction that assaults resulting in grievous bodily harm do not result in an offender spending any time in custody. This is despite the Court, at least ostensibly, acknowledging the seriousness of the problem. This is illustrated by the matters below:

- ***R v Lacey*** [2020] ACTSC 241 - The offender forcefully punched the unsuspecting victim in the jaw and the victim lost consciousness and fell to the ground. The offence took place in the early hours of a Sunday morning near Mooseheads Nightclub & Pub in the Civic area of Canberra. The victim suffered a moderate to severe traumatic brain injury, a left epidural haematoma, a left temporal subarachnoid haemorrhage with a maximum depth of 9mm, a hairline base skull fracture and a right-sided temporo-occipital scalp haematoma. The victim remained in hospital for 25 days. The offender had other convictions for common assault. The offender was charged with an offence of causing grievous bodily harm which also breached an existing good behaviour order. Upon sentence, no further action was taken with respect of the breach of the good behaviour order. Elkaim J sentenced the offender to 27 months' imprisonment (reduced from 36 months on account of the guilty plea) to be served by way of an ICO. As an additional condition of the ICO, the offender had to undertake 240 hours of community service work within 12 months.

- ***R v Uluikadavu*** [2020] ACTSC 237 - The offender punched the victim in the head as part of an aggressive course of conduct, causing the victim to fall onto hard tiles near a rear exit of a bar and lose consciousness. The offence also took place in the early hours of a Sunday morning near Shorty's bar in the Civic area of Canberra. Prior to the strike to the head, the victim had put his hand up in a "stop" gesture and said *"hey, look, I don't want to fight"* to placate the situation. The victim suffered a fractured shoulder and jaw, as well as a traumatic dental injury that caused him to lose a tooth. The offender had no prior criminal record. Murrell CJ sentenced the offender to 13 months imprisonment (reduced from 16 months on account of the guilty plea) to be served by way of an ICO. The ICO included an additional condition that the offender had to undertake 100 hours of community service work within 12 months.

[2] Assuming he complies with the obligations of his ICO

- ***R v Rheinberger (No 2)*** [2016] ACTSC 307 - The offender was sentenced for recklessly inflicting grievous bodily harm after he was found guilty at trial by a judge alone: *R v Rheinberger* [2016] ACTSC 14. The victim had approached the offender in the smoking area of the Belconnen Soccer Club to complain of the offender's harassment of the victim's wife. As the victim turned intending to leave, the offender punched the victim, causing him to fall to the ground. The offender continued to punch the victim to the head several times with considerable force while the victim was on the ground. The victim suffered multiple facial fractures and soft tissue facial injuries. It is unclear whether the offender had a criminal history as there is no reference made in the sentence. Burns J sentenced the offender to 18 months imprisonment which was wholly suspended upon the offender entering into a good behaviour order for a period of 18 months.

- ***R v Kepaoa*** [2017] ACTSC 414 - The offender pleaded guilty to one count of recklessly inflicting grievous bodily harm, having punched the primary victim in the face three times. The victim did not retaliate and was admitted to hospital where he required extensive treatment for a broken jaw and related fractures and complications. The offender had on the same occasion committed an offence of common assault against a woman associated with the primary victim, by pushing her aggressively from behind. In *R v Kepaoa (No 2)* [2018] ACTSC 24, the offender was sentenced to 22 months imprisonment, served by way of Intensive Corrections Order, as well as 249 hours of community service, in addition to a Good Behaviour Order for a period of 12 months for the common assault offence.

- ***R v McNeill*** [2018] ACTSC 125 - The offender pleaded guilty to a charge of common assault, and a charge of recklessly inflicting grievous bodily harm. The offender punched the first victim in the face, then threw a punch at the victim which knocked the second victim unconscious, before immediately leaving the scene. The second victim required emergency surgery for a broken jaw. The offender was sentenced to 30 months imprisonment for the offence of recklessly inflict grievous bodily harm, to be served concurrently with 6 months for the offence of common assault, with the whole sentence to be served by way Intensive Corrections Order.

- ***R v Chapman*** [2018] ACTSC 57 - The offender pleaded guilty to a charge of recklessly inflicting grievous bodily harm in relation to an unprovoked strike to a victim which fractured the victim's jaw, at a nightclub. The offender did have previous convictions for violent offences. The offender was sentenced to 15 months imprisonment, fully suspended upon entering into a 30 month good behaviour order, with a requirement to perform 300 hours of community service within 30 months.

- ***R v Myles*** [2017] ACTSC 19 - The offender had committed another one-punch attack whilst drunk which led to a broken jaw. He was given a sentence of 22 months which was to be served by Intensive Corrections Order as well as a requirement that he perform 249 hours of community service within 12 months.

- ***R v Deng*** [2017] ACTSC 338 - The offender pleaded guilty to the offence of recklessly inflicting grievous bodily harm. The offender struck the victim with a closed fist. The victim fell to the ground striking the right side of his face on a solid metal table, suffering serious injuries as a result of the application of blunt force to his lower jaw which required surgical procedures. The offender had a history of alcohol and drug abuse. The offender was sentenced to 12 months imprisonment, to be served by way of an Intensive Corrections Order.

- ***R v Bandy*** [2018] ACTSC 261 - The offender was asked to leave the Hellenic club. In the foyer the offender was swearing, yelling, making threats towards security and arguing with his girlfriend, his fists were clenched and his shoulders were back. A male friend of the offender forcefully moved the offender out of the Club. At the same time, the victim was crossing Matilda Street walking towards the Club. The offender and the victim did not know each other. There was no exchange of words between the men as they approached each other from the opposite direction whilst crossing the street; the victim did not say anything to the offender nor did he make contact with, or attempt to reach out to, the offender. As the offender and the victim passed each other on the street, the offender suddenly, and without any warning or provocation, used his right fist to punch the victim in the face with considerable force. The victim fell backwards onto the road surface. The victim suffered permanent nerve damage to his mouth and lost several teeth. The offender was sentenced to 30 months imprisonment to be served by way an Intensive Corrections Order.

- ***R v Bailey*** [2019] ACTSC 102 - The offender had been drinking with friends in Canberra City. Suddenly, and without warning, the offender stood up from the bench and approached Mr Beitz and proceeded to punch him with an uppercut of his right fist connecting with Mr Beitz's chin. Someone intervened and the offender punched them in the left eye. The victim intervened and put his hands in the air in a non-threatening manner. The offender punched him in the jaw. The victim went to Calvary Hospital and had a metal plate inserted into his jawline secured by three screws, which are permanent. The offender was sentenced to 2 years imprisonment to be served by way an Intensive Corrections Order.

All of these attacks were committed by young males in or near licensed establishments. All of them had serious consequences for the victim, some suffering brain damage. Some of the offenders had previous convictions for violent offences. Not one of these offenders was sentenced to full-time custody.

It is important to recognise that whilst Intensive Corrections Orders and suspended sentences are taken or 'deemed' to be sentences of imprisonment, they are a completely artificial construct and in reality they are nothing of the type. A person sentenced to one of these orders will most likely never lose so much as a moment of their liberty. Inherent in community based sentences of imprisonment is a "significant degree of leniency": ***R v Ngerengere (No 3)*** [2016] ACTSC 299 at [21]; ***Whelan v The Queen*** [2012] NSWCCA 147 at [120].

In ***R v Zamagias*** [2002] NSWCCA 17, the NSW Court of Criminal Appeal observed at [32] that:

> Of course it must also be recognised that the fact that the execution of the sentence is to be immediately suspended will deprive the punishment of much of its effectiveness in this regard because it is a significantly more lenient penalty than any other sentence of imprisonment.

In other jurisdictions those who commit these serious offences of recklessly inflicting grievous bodily harm not only receive longer sentences of imprisonment, they are very rarely community based imprisonment orders. Consistent with community expectations, those who commit these offences in other jurisdictions will typically spend a period in full-time custody.

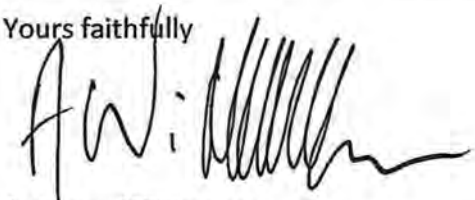
Unsurprisingly yet regrettably, the victims of these attacks, and the community more generally, often feel that that justice is not done in the ACT in relation to the sentences imposed for such serious offending. Victim's of these offences routinely complain to this Office of feeling aggrevied about these sentencing outcomes.

ICO'sand suspended sentences do not achieve the purposes of sentencing for alcohol fulled violence causing grievous bodily harm. ICO's are a rehabilitative tool designed to address criminogenic risk factors such as mental health, drug and alcohol addiction, unemployment, and disadvantaged upbringings. They do not have any punitive effect for offenders who may be otherwise law-abiding citizens but decide it is ok to strike someone in the face. They completely fail to recognise the permanent harm inflicted on innocent members of the community, and to properly denounce the offending.

The Director would urge the Board to consider possible law reform options to address the inadequate sentencing regieme in the ACT for this kind of offending and to advocate to Government accordingly.

Please do not hesitate to contact me should you have any questions.

Yours faithfully



Anthony Williamson
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

Att 2

Drumgold, Shane

From: Glenn, Richard
Sent: Monday, 12 July 2021 10:43 AM
To: Williamson, Anthony
Cc: Dent, Christian
Subject: RE: VICTIM'S ADVISROY BOARD - 'COWARD PUNCH' LAW REFORM IN THE ACT FOR THE OFFENCE OF RECKLESSLY INFLICTING GREVIOUS BODILY HARM

OFFICIAL

Hi Anthony,

Thank you for your letter from 6 July 2021.

As requested, we'll circulate the paper to the Victims Advisory Board and include it on the agenda for the Board's next meeting on 4 August 2021.

Separately I'd like to have a chat to you and Shane about the most efficient way to raise law reform proposals like this.

Best regards

Richard

From: Williamson, Anthony <Anthony.Williamson@act.gov.au>
Sent: Tuesday, 6 July 2021 2:16 PM
To: Glenn, Richard <Richard.Glenn@act.gov.au>
Cc: Dent, Christian <Christian.Dent@act.gov.au>
Subject: VICTIM'S ADVISROY BOARD - 'COWARD PUNCH' LAW REFORM IN THE ACT FOR THE OFFENCE OF RECKLESSLY INFLICTING GREVIOUS BODILY HARM

OFFICIAL

Dear Richard,

I write to you in your capacity as the Chairperson of the Victim's Advisory Board.

Please find ***attached*** a letter under my hand in relation to the difficulties with ACT law in relation to the prosecution of 'coward punch' assaults causing grievous bodily harm, and the related sentencing regime in the Territory for such offending.

Could I please kindly ask that the letter be circulated to the Board and included for discussion in the agenda of the Board's next meeting.

Kind regards

Anthony Williamson
Deputy Director – Head of Crown Chambers
Office of the Director of Public Prosecutions (ACT)
GPO Box 595, Canberra ACT 2601 (DX 5725)
T: (02) 6207 5399
E: anthony.williamson@act.gov.au
W: www.dpp.act.gov.au

For a full range of victims rights, please go to www.dpp.act.gov.au and follow the Witnesses and Victims link.

Att 3

Drumgold, Shane

From:	Victims Advisory Board,
Sent:	Monday, 15 November 2021 12:59 PM
To:	Yates, Heidi; Windeyer, Kirsty; Glenn, Richard; Williamson, Anthony; Champion, LInda; Beacroft, Laura; Johnson, Ray; Pappas, Helen; Nuttall, Amanda; Dening, Richard; fdrose@gmail.com; jonocornforth@gmail.com; chelsea.holton00 @gmail.com; lauren@adacas.org.au; margie.rowe@legalaidact.org.au; sel_walker@outlook.com
Cc:	Munro, Allison; CSD, OCGFS Work Allocation; Cowan, Nicola; Cantwell, Katie; ruth.hinchy@afp.gov.au; Nicholls, Tina; Ekert, Beverley; Courts, EA to CEO; Williams, Kimberley; Johnson, KathrynL; Osman, Nadia; Axell, Anita
Subject:	FLYING MINUTE No. 1 - Victims Advisory Board - Sentencing Options for One-Punch Assaults in the ACT
Attachments:	Att A - VAB - Out-of-Session Minute 01 - One-Punch Assaults.pdf; Att B - Letter to VAB - GBH assaults.pdf

UNOFFICIAL

Dear Members

RE: FLYING MINUTE No. 1 - Victims Advisory Board - Sentencing Options for One-Punch Assaults in the ACT

Please find at Attachment A: FLYING MINUTE No: 1 - Victims Advisory Board - Sentencing Options for One-Punch Assaults in the ACT – for your consideration and response out-of-session.

Please respond in writing to the VAB Secretariat (VictimsAdvisoryBoard@act.gov.au) highlighting your responses to the four (4) questions posed within the Flying Minute, by no later than **cob, 1 December 2021**.

At the last meeting of the VAB on 4 August 2021, Members discussed the issue of sentencing options for one-punch assaults in the ACT, which had been raised by the Deputy Director of Public Prosecutions (DPP), Mr Anthony Williamson, in a letter to the VAB dated 6 July 2021 (Attachment B). Members agreed that a formal position of the VAB could be canvased out-of-session.

In order for VAB Members to consider a formal position on sentencing options for one-punch assaults in the ACT out-of-session, this 'Flying-Minute' has been developed to canvas your views.

While the Flying Minute does not lend itself to discussion or debate, some discussion has already occurred between Members at the last VAB meeting held on 4 August 2021 and it is hoped that there is sufficient background information in the Flying Minute to allow Members to make an informed decision about the issues raised.

The Flying-Minute seeks to determine whether Members are of the view that:

a. the current ACT laws are adequate for this type of crime;
b. sentences handed down for these offences in the ACT have been appropriate;

What action should the VAB take:

c. this matter should be monitored by the VAB; or
d. a letter should be sent to the Attorney-General raising this matter.

Members are provided with two weeks to consider and deliver their response: **1 December 2021**.

The VAB Secretariat will compile Member's responses and the VAB will be advised of the final majority position of the VAB (also out-of-session), and the response then actioned.

Thank you

Regards

Anthony Butler
VAB Secretariat

Anthony Butler | Policy Officer | **Justice Policy Futures Taskforce** |Justice Reform Branch
Phone: 02 6205 3091 | Fax 02 6205 0937
Legislation, Policy and Programs | Justice and Community Safety Directorate | **ACT Government**
Level 4, 12 Moore Street Canberra ACT 2601 | GPO Box 158 Canberra ACT 2601 | www.act.gov.au

Att 3a

ACT Office of the Director of Public Prosecutions

6 July 2021

Mr Richard Glenn
Chairperson
Victims Advisory Board
GPO Box 158
CANBERRA ACT 2601

Dear Mr Glenn,

RE: THE ACT SUPREME COURT DECISIONS IN *R V DANIEL* [2020] ACTSC 64 AND *R V DANIEL (NO 2)* [2021] ACTSC 117 AND THE SENTENCING REGIEME FOR ASSAULTS CAUSING GRIEVOUS BODILY HARM IN THE ACT

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Further, I hope to enlist the support of the Board in advocating for legislative amendments in relation to the sentencing outcomes for violent offences to ensure that they align more closely with community attitudes and expectations.

***R v Daniel* [2020] ACTSC 64**

The victim in this matter was playing pool at the Civic Pub with his partner and friends. The offender was also at the Civic Pub playing pool with his partner and friends. The two groups were not known to each other but there was some disagreement. The victim approached the offender's pool table and tried to calm the situation the down displaying both his palms in a peaceful gesture. The offender approached from the side, grabbed the victim's shirt to square him up, and forcefully punched him in the head. The victim suffered life threatening injuries and was hospitalised for 75 days.

The entire incident was caught on CCTV. The footage is graphic and confronting. The force of the punch is evident as is the fact the victim was unconscious well before he hit the ground.

The offender was charged with recklessly inflicting grievous bodily harm, contrary to section 20 of the *Crimes Act 1900*, which is punishable by 13 years imprisonment.

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- He was angry;
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Despite all these admissions, the offender said he didn't turn his mind in the few seconds leading up the punch to the possibility he might inflict really serious injury. On this basis he was found not guilty of the more serious charge of recklessly inflicting grievous harm (punishable by 13 years imprisonment), and guilty of the less serious offence causing grievous bodily harm (only punishable by 5 years imprisonment).[1]

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Due to the difficulties in proving recklessness, the Prosecution is frequently forced to accept guilty pleas to the less serious offence of causing grievous harm. It is not acceptable that conduct so serious be subject to a maximum penalty of only 5 years imprisonment. In this jurisdiction it is a uncommon that someone will go to jail for a 5 year offence unless they have a significant criminal history.

The NSW legislature recognised this problem and amended their offence provision so that the Prosecution only has to prove foresight of causing *actual* bodily harm, not *grievous* bodily harm. This amendment was in line with the community's increasing understanding about the serious consequences of being struck to the head. Curioulsy, the ACT chose not to adopt the same changes. This was despite our office in 2016 informing the then Attorney-General of the problem.

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In ***The Queen v Loveridge*** (2014) 243 A Crim R 31 the NSW Court of Criminal Appeal considered the sentencing principles that should apply to alcohol or drug affected offenders who commit wanton acts of violence in public, even where the offender is a young offender. The Court observed at [103] that:

> 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: *R v Mitchell; R v Gallagher* [2007] NSWCCA 296; 177 A Crim R 94 at 101 [29]. Even in the case of juvenile offenders (which the Respondent is not), this Court has emphasised that, in relation to crimes of violence committed in the streets by groups of young persons, general deterrence should be given substantial weight notwithstanding the youth of the offenders: *Al v R* [2011] NSWCCA 95 at [69]; *MB v R* [2013] NSWCCA 254 at [27].

> This Court has emphasised that the principles of general deterrence and denunciation of crimes serve as a means of protection of the public: *R v AEM* [2002] NSWCCA 58 at [92].

In ***R v Freeman Quay (No 3)*** [2015] ACTSC 284, Murrell CJ stated at [36]:

> The sentencing purposes of general deterrence and denunciation loom large in this case. Unfortunately, "one punch" attacks in public places by young men who are grossly intoxicated are common. They arouse the abhorrence of the community. They place vulnerable people (including other intoxicated people) in danger. They cry out for a strong message of general deterrence. The sentencing purposes of accountability and protection of the public are important for similar reasons.

In ***R v Sharma* (2016) ACTSC 180**, Elkaim J stated at [33]-[34]:

> There is of course, in addition to the interests of the offender, the very significant considerations which must reflect society's abhorrence for attacks of this kind. These attacks are often called "coward punches". This is an emotive term but one which is a natural product of events as seen on the CCTV footage.
>
> The courts must emphasise to young people that the consumption of large amounts of alcohol, or drugs, that places them in situations where they act with reckless indifference towards other persons and cause very severe injuries is entirely inappropriate. As has tragically been seen around Australia, the tragedy can include the death of the victim.

In ***R v Deng* (2017) ACTSC 338**, Mossop J stated at [22]:

> ...There is clearly a significant need for general deterrence of violent conduct by young men that occurs in or near licensed drinking establishments.

In ***Daniel (No 2)***, Loukas-Karlsson J stated at [103]:

> I underline the importance of recognising that our society abhors attacks of this nature; the extremely serious nature of the punch is evidenced in the CCTV footage. Our society abhors this behaviour whether the relevant offence is one of recklessly inflicting grievous bodily harm or the offence of causing grievous bodily harm.

The impact on victims of this offences is profound and life changing. The victims are in many instances, as in *Daniel*, entirely unsuspecting and innocent. The victim in *Daniel* suffered the following catastrophic injuries:

- A severe traumatic brain injury;
- Permanent cognitive impairment and difficulties performing complex tasks;
- Impaired memory;
- Facial factures; and
- 3 days in an induced coma. 7 days in the intensive care unit. 29 days in the brain injury rehabilitation unit. 75 days in hospital

At sentence the prosecution submitted the only way to deter this conduct and recognise these injuries was to impose a period of full-time imprisonment. The Court did not agree and imposed an Intensive Corrections Order (ICO) for 3 years and 6 months with 500 hours of community service to be performed. The offender will not spend a single day in custody in relation to the incident.[2] The victim's life will never be the same.

There was considerable media coverage in relation to the sentence. This coverage included the CCTV footage of the incident. Our office understands the community to be outraged at the sentence imposed. Our office has been contacted by media outlets indicating they have received numerous letters from the public concerned with the sentence imposed.

What is of most concern is that this sentence is far from an aberration. It is commonplace in this jurisdiction that assaults resulting in grievous bodily harm do not result in an offender spending any time in custody. This is despite the Court, at least ostensibly, acknowledging the seriousness of the problem. This is illustrated by the matters below:

- ***R v Lacey*** [2020] ACTSC 241 - The offender forcefully punched the unsuspecting victim in the jaw and the victim lost consciousness and fell to the ground. The offence took place in the early hours of a Sunday morning near Mooseheads Nightclub & Pub in the Civic area of Canberra. The victim suffered a moderate to severe traumatic brain injury, a left epidural haematoma, a left temporal subarachnoid haemorrhage with a maximum depth of 9mm, a hairline base skull fracture and a right-sided temporo-occipital scalp haematoma. The victim remained in hospital for 25 days. The offender had other convictions for common assault. The offender was charged with an offence of causing grievous bodily harm which also breached an existing good behaviour order. Upon sentence, no further action was taken with respect of the breach of the good behaviour order. Elkaim J sentenced the offender to 27 months' imprisonment (reduced from 36 months on account of the guilty plea) to be served by way of an ICO. As an additional condition of the ICO, the offender had to undertake 240 hours of community service work within 12 months.

- ***R v Uluikadavu*** [2020] ACTSC 237 - The offender punched the victim in the head as part of an aggressive course of conduct, causing the victim to fall onto hard tiles near a rear exit of a bar and lose consciousness. The offence also took place in the early hours of a Sunday morning near Shorty's bar in the Civic area of Canberra. Prior to the strike to the head, the victim had put his hand up in a "stop" gesture and said *"hey, look, I don't want to fight"* to placate the situation. The victim suffered a fractured shoulder and jaw, as well as a traumatic dental injury that caused him to lose a tooth. The offender had no prior criminal record. Murrell CJ sentenced the offender to 13 months imprisonment (reduced from 16 months on account of the guilty plea) to be served by way of an ICO. The ICO included an additional condition that the offender had to undertake 100 hours of community service work within 12 months.

[2] Assuming he complies with the obligations of his ICO

- ***R v Rheinberger (No 2)*** [2016] ACTSC 307 - The offender was sentenced for recklessly inflicting grievous bodily harm after he was found guilty at trial by a judge alone: *R v Rheinberger* [2016] ACTSC 14. The victim had approached the offender in the smoking area of the Belconnen Soccer Club to complain of the offender's harassment of the victim's wife. As the victim turned intending to leave, the offender punched the victim, causing him to fall to the ground. The offender continued to punch the victim to the head several times with considerable force while the victim was on the ground. The victim suffered multiple facial fractures and soft tissue facial injuries. It is unclear whether the offender had a criminal history as there is no reference made in the sentence. Burns J sentenced the offender to 18 months imprisonment which was wholly suspended upon the offender entering into a good behaviour order for a period of 18 months.

- ***R v Kepaoa*** [2017] ACTSC 414 - The offender pleaded guilty to one count of recklessly inflicting grievous bodily harm, having punched the primary victim in the face three times. The victim did not retaliate and was admitted to hospital where he required extensive treatment for a broken jaw and related fractures and complications. The offender had on the same occasion committed an offence of common assault against a woman associated with the primary victim, by pushing her aggressively from behind. In *R v Kepaoa (No 2)* [2018] ACTSC 24, the offender was sentenced to 22 months imprisonment, served by way of Intensive Corrections Order, as well as 249 hours of community service, in addition to a Good Behaviour Order for a period of 12 months for the common assault offence.

- ***R v McNeill*** [2018] ACTSC 125 - The offender pleaded guilty to a charge of common assault, and a charge of recklessly inflicting grievous bodily harm. The offender punched the first victim in the face, then threw a punch at the victim which knocked the second victim unconscious, before immediately leaving the scene. The second victim required emergency surgery for a broken jaw. The offender was sentenced to 30 months imprisonment for the offence of recklessly inflict grievous bodily harm, to be served concurrently with 6 months for the offence of common assault, with the whole sentence to be served by way Intensive Corrections Order.

- ***R v Chapman*** [2018] ACTSC 57 - The offender pleaded guilty to a charge of recklessly inflicting grievous bodily harm in relation to an unprovoked strike to a victim which fractured the victim's jaw, at a nightclub. The offender did have previous convictions for violent offences. The offender was sentenced to 15 months imprisonment, fully suspended upon entering into a 30 month good behaviour order, with a requirement to perform 300 hours of community service within 30 months.

- ***R v Myles*** [2017] ACTSC 19 - The offender had committed another one-punch attack whilst drunk which led to a broken jaw. He was given a sentence of 22 months which was to be served by Intensive Corrections Order as well as a requirement that he perform 249 hours of community service within 12 months.

- ***R v Deng*** [2017] ACTSC 338 - The offender pleaded guilty to the offence of recklessly inflicting grievous bodily harm. The offender struck the victim with a closed fist. The victim fell to the ground striking the right side of his face on a solid metal table, suffering serious injuries as a result of the application of blunt force to his lower jaw which required surgical procedures. The offender had a history of alcohol and drug abuse. The offender was sentenced to 12 months imprisonment, to be served by way of an Intensive Corrections Order.

- ***R v Bandy*** [2018] ACTSC 261 - The offender was asked to leave the Hellenic club. In the foyer the offender was swearing, yelling, making threats towards security and arguing with his girlfriend, his fists were clenched and his shoulders were back. A male friend of the offender forcefully moved the offender out of the Club. At the same time, the victim was crossing Matilda Street walking towards the Club. The offender and the victim did not know each other. There was no exchange of words between the men as they approached each other from the opposite direction whilst crossing the street; the victim did not say anything to the offender nor did he make contact with, or attempt to reach out to, the offender. As the offender and the victim passed each other on the street, the offender suddenly, and without any warning or provocation, used his right fist to punch the victim in the face with considerable force. The victim fell backwards onto the road surface. The victim suffered permanent nerve damage to his mouth and lost several teeth. The offender was sentenced to 30 months imprisonment to be served by way an Intensive Corrections Order.

- ***R v Bailey*** [2019] ACTSC 102 - The offender had been drinking with friends in Canberra City. Suddenly, and without warning, the offender stood up from the bench and approached Mr Beitz and proceeded to punch him with an uppercut of his right fist connecting with Mr Beitz's chin. Someone intervened and the offender punched them in the left eye. The victim intervened and put his hands in the air in a non-threatening manner. The offender punched him in the jaw. The victim went to Calvary Hospital and had a metal plate inserted into his jawline secured by three screws, which are permanent. The offender was sentenced to 2 years imprisonment to be served by way an Intensive Corrections Order.

All of these attacks were committed by young males in or near licensed establishments. All of them had serious consequences for the victim, some suffering brain damage. Some of the offenders had previous convictions for violent offences. Not one of these offenders was sentenced to full-time custody.

It is important to recognise that whilst Intensive Corrections Orders and suspended sentences are taken or 'deemed' to be sentences of imprisonment, they are a completely artificial construct and in reality they are nothing of the type. A person sentenced to one of these orders will most likely never lose so much as a moment of their liberty. Inherent in community based sentences of imprisonment is a "significant degree of leniency": ***R v Ngerengere (No 3)*** [2016] ACTSC 299 at [21]; ***Whelan v The Queen*** [2012] NSWCCA 147 at [120].

In ***R v Zamagias*** [2002] NSWCCA 17, the NSW Court of Criminal Appeal observed at [32] that:

> Of course it must also be recognised that the fact that the execution of the sentence is to be immediately suspended will deprive the punishment of much of its effectiveness in this regard because it is a significantly more lenient penalty than any other sentence of imprisonment.

In other jurisdictions those who commit these serious offences of recklessly inflicting grievous bodily harm not only receive longer sentences of imprisonment, they are very rarely community based imprisonment orders. Consistent with community expectations, those who commit these offences in other jurisdictions will typically spend a period in full-time custody.

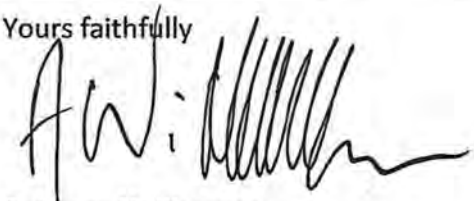
Unsurprisingly yet regrettably, the victims of these attacks, and the community more generally, often feel that that justice is not done in the ACT in relation to the sentences imposed for such serious offending. Victim's of these offences routinely complain to this Office of feeling aggrevied about these sentencing outcomes.

ICO'sand suspended sentences do not achieve the purposes of sentencing for alcohol fulled violence causing grievous bodily harm. ICO's are a rehabilitative tool designed to address criminogenic risk factors such as mental health, drug and alcohol addiction, unemployment, and disadvantaged upbringings. They do not have any punitive effect for offenders who may be otherwise law-abiding citizens but decide it is ok to strike someone in the face. They completely fail to recognise the permanent harm inflicted on innocent members of the community, and to properly denounce the offending.

The Director would urge the Board to consider possible law reform options to address the inadequate sentencing regieme in the ACT for this kind of offending and to advocate to Government accordingly.

Please do not hesitate to contact me should you have any questions.

Yours faithfully



Anthony Williamson
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

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OUT OF SESSION PAPER – VICTIMS ADVISORY BOARD (VAB)

Sentencing Options for One-Punch Assaults

Members agree that:

1. **Current ACT laws are adequate for this type of crime:**
   YES NO NOT SURE

2. **Sentences handed down for these offences in the ACT have been appropriate:** **YES NO NOT SURE**

3. **This matter should be monitored by the VAB:**
   YES NO NOT SURE

4. **A letter should be sent to the Attorney-General raising this matter:** **YES NO NOT SURE**

.....

BACKGROUND:

VAB Meeting 4 August 2021
Agenda Item 9.1 Sentencing Options for one punch assaults

Under Agenda Item 9.1 of the 4 August 2021 VAB meeting, the Deputy DPP, Mr Anthony Williamson raised the issue of sentencing options for one punch assaults, in support of his letter to the VAB dated 6 July 2021 and appearing as an Attachment to this email. The issue has been referred for consideration out-of-session by VAB Members.

Mr Williamson explained that he had written to the VAB in relation to sentencing outcomes arising from charges of grievous bodily harm (GBH) and his concerns over the difficulty in prosecutors achieving the level of proof required to sustain the charge in ACT courtrooms:

- The prosecution must prove that the accused 'recklessly caused GBH', by demonstrating that they were aware of the risk to the victim at the time of the incident.
- In circumstances, such as the intoxication of the perpetrator, this burden of proof was almost always too high for the prosecution to prove.
- This resulted in the courts finding the accused guilty of the lesser crime 'causing GBH'; which rarely attracted a penalty of imprisonment in the ACT, but rather the imposition of an Intensive Corrections Order and an amount of community service.
- It was the view of the DPP that these sentences were too lenient, given the impact of these crimes upon victims. The DPP has found it difficult to explain the ACT Courts' decisions on these matters to victims and their families.

- Furthermore, these outcomes are out of step with other jurisdictions, who have strengthened their stance against these types of offences by lowering the burden of proof required for a conviction of 'recklessly causing GBH'. In 2016 the NSW Government passed the Blackwell Amendments reducing the burden of proof required by the prosecution to demonstrate 'recklessly causing GBH' to the extent that perpetrators of one punch crimes causing serious harm were now routinely sentenced to periods of custody. The ACT has not aligned with NSW in relation to these sentencing protocols.
- Mr Williamson presented one of the case studies cited in his letter.
- Ms Yates queried whether rumours were correct that increased media attention surrounding one punch assaults had increased sentences passed down by ACT courts in recent times, however, sentencing records did not support this view according to DPP data.
- The Chair queried whether harsher penalties in other jurisdictions had resulted in a form of deterrence for these types of crimes.

FURTHER BACKGROUND

Alcohol-related violence has gained attention in recent years and a number of high-profile and sometimes controversial reforms have been introduced across Australian States and Territories. Some of the most prominent reforms include:

- lockout laws, which restrict access to late night venues after a certain time;
- restrictions on access to alcohol, such as early cessation of alcohol sales or the state-wide ban on takeaway alcohol after 10:00pm implemented in NSW;
- the introduction of new offences for alcohol-related one punch assaults; and
- increased punishments for alcohol-related violence, including mandatory minimum sentences.

These reforms have usually been introduced as a suite of measures that may include, but are not limited to, an increase in penalties for one-punch assaults. This makes it difficult to assess which measure (if any) has had a causal effect in reducing these types of crimes from occurring, especially in a COVID-19 environment.

Offences for one punch assaults - NSW

The *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW) (Act) amended the *Crimes Act 1900* (NSW) to include a new offence, ie Assault Causing Death.

The new provision states at section 25A(1):
A person is guilty of an offence under this subsection if:

- *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*
- *the assault is not authorised or excused by law, and*
- *the assault causes the death of the other person.*

A person who is convicted of this offence is subject to a maximum term of imprisonment for 20 years.

The Act also introduced an aggravated form of the offence in circumstances where the offender is intoxicated at the time the offence is committed. A person found guilty of the offence of Assault Causing Death When Intoxicated is liable to a maximum sentence of 25 years imprisonment.

Section 25B introduced a mandatory minimum sentence of 8 years for this offence. Any non-parole period is required to be set after the offender has served not less than 8 years.

Testing for intoxication

The Act made several other important amendments to the previous laws. Firstly the Law *Enforcement (Powers and Responsibilities) Act 2002* (NSW) was amended to allow for the testing of certain offenders for intoxication.

Section 138D states:

This Division applies to a person who has been arrested by a police officer:

- *for an alleged offence under section 25A(2) of the Crimes Act 1900, or*
- *for any other offence that involves the assault of another person if the police officer believes that the person would be liable to be charged with an offence under section 25A(2) of the Crimes Act 1900 if the other person dies.*

A police officer may exercise the powers conferred by this Division for the purpose of confirming whether the person had consumed or taken alcohol, a drug or other intoxicating substance before the alleged offence and the likely amount consumed or taken.

Section 138F of the Act allows police officers to conduct breath tests of offenders charged with a relevant offence and section 138G allows for blood and urine testing if the offender refuses a breath test or a police officer believes they are under the influence of a substance other than alcohol.

An offender who refuses to provide a blood or urine sample as required under section 138G, unless on proven medical grounds, is guilty of an offence and may be fined up to $5,500 and/or sentenced to a term of imprisonment of up to 2 years.

Intoxication not to be taken as mitigating factor

The Act also amended the *Crimes (Sentencing Procedure) Act 1999* (NSW) to deal with the issue of self-induced intoxication.

The Act inserted a new provision setting out a special rule for self-induced intoxication.

In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor (sections 21A (5A) and (5AA)).

This means that where the offender has freely chosen to ingest alcohol or another drug, their intoxication does not reduce the seriousness of their offending or the level of punishment they receive.

OUT OF SESSION PAPER – VICTIMS ADVISORY BOARD (VAB)

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Members agree that:

1. **Current ACT laws are adequate for this type of crime:**
   YES NO NOT SURE
2. **Sentences handed down for these offences in the ACT have been appropriate:**
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Anthony Williamson
ACT DPP

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