

# POLICING PUBLIC HEALTH: THE JUSTIFIABLE LIMITS OF COVID-RELATED OFFENCES IN WESTERN AUSTRALIA

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*The COVID-19 pandemic reminded the world of the significant burden of infectious diseases on individuals, families, communities and health systems. Compliance with public health measures was regarded as central to a successful response to the pandemic and, like other jurisdictions, Western Australia utilised the criminal law as a way of achieving this compliance. While a common tactical response, the utilisation of the criminal law in response to a public health crisis raises significant theoretical, regulatory and practical questions about the role of criminal sanctions in this context. This article unpacks the legal frameworks imposing these restrictions and the associated criminal penalties on Western Australians during the height of the pandemic and subjects these to a normative analysis, focusing on the harm principle, and the systemic consequences of risk-based offences more generally. It then undertakes a review of the relevant case law associated with the sentencing of persons convicted of the offences in Western Australia to explore judicial attitudes and sentencing patterns. The article concludes that, in light of both the normative and the explanatory inquiry, there is a place for criminal law in the regulation of communicable diseases, but such a response must be tailored on the basis of need and proportionality given the significant human rights concerns with criminal responses to public health threats.*

Introduction .....	79
Part I: The Regulatory Framework.....	82
A <i>Emergency Declarations</i> .....	83
B <i>Implementation of PHSMs</i> .....	84
C <i>Offences</i> .....	86
Part II: A Normative Critique of the Regulatory Framework .....	88

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A	<i>Theoretical Justifications: The Harm Principle and the Criminalisation of Risk</i> .....	89
B	<i>Systemic Implications</i> .....	94
Part III: The Case Law and Approaches to Sentencing.....		105
A	<i>Compliance with Fundamental Sentencing Principles</i> .....	105
B	<i>The Pandemic Context</i> .....	107
C	<i>Range of Sentences</i> .....	111
D	<i>Prosecutorial Approaches</i> .....	113
Part IV: Evaluating the Use of Criminal Sanctions in the WA COVID-19 Response .....		114
Conclusion.....		119

## INTRODUCTION

Novel infectious diseases are emerging, and previously controlled endemic diseases are re-emerging, at an increasing rate.<sup>1</sup> With over 777 million cases and over seven million deaths reported globally, the COVID-19 pandemic reminded nations of the significant burden of infectious disease on individuals, families, communities and health systems.<sup>2</sup> Public Health and Social Measures ('PHSMs') including physical distancing, mask-wearing and quarantine reduced transmission, morbidity and mortality.<sup>3</sup> As successful pandemic responses

<sup>1</sup> Michael Madigan et al, *Brock Biology of Microorganisms* (Pearson, 14<sup>th</sup> ed, 2015) 864. Emerging infectious diseases include endemic diseases that 'were previously under control but suddenly ... re-emerge in epidemic or pandemic forms': at 839–41.

<sup>2</sup> 'Coronavirus Disease (COVID-19) Pandemic', *World Health Organisation* (Web Page, 11 May 2025) <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>>. COVID-19 or 'coronavirus disease' is caused by the SARS-CoV-2 virus: 'Coronavirus Disease (COVID-19)', *World Health Organisation* (Web Page) <<https://www.who.int/health-topics/coronavirus>>. We acknowledge that infectious diseases are a constant, rather than sporadic, concern in developing countries: see, eg, Gaëtan Gavazzi, Francois Herrmann and Karl-Heinz Krause, 'Aging and Infectious Diseases in the Developing World' (2004) 39(1) *Clinical Infectious Diseases* 83, 84–7.

<sup>3</sup> Kwadwo Agyapon-Ntra and Patrick E McSharry, 'A Global Analysis of the Effectiveness of Policy Responses to COVID-19' (2023) 13(1) *Scientific Reports* 5629; 'Overview of Public Health and Social Measures in the Context of COVID-19: Interim Guidance', *World Health Organisation* (Web Page, 18 May 2020) 1 <[https://apps.who.int/iris/bitstream/handle/10665/332115/WHO-2019-nCoV-PHSM\\_Overview-2020.1-eng.pdf?sequence=1&isAllowed=y](https://apps.who.int/iris/bitstream/handle/10665/332115/WHO-2019-nCoV-PHSM_Overview-2020.1-eng.pdf?sequence=1&isAllowed=y)>.

depend on substantial compliance with such measures,<sup>4</sup> a number of jurisdictions resorted to using the criminal law to sanction non-compliance.<sup>5</sup>

In Western Australia ('WA') COVID-related offences arose in relation to three pieces of legislation: the *Public Health Act 2016* (WA) ('PHA');<sup>6</sup> the *Emergency Management Act 2005* (WA) ('EMA');<sup>7</sup> and the *Criminal Code Act Compilation Act 1913* (WA) ('Criminal Code').<sup>8</sup> This article focuses on 'failure to comply'<sup>9</sup> offences under the EMA-PHA framework ('the offences') and is, therefore, concerned with the criminalisation of behaviours that create a risk of transmission of COVID-19 rather than with transmission itself. The EMA-PHA framework imposed a range of restrictions on the WA population. Many of the restrictions replicated those adopted elsewhere in Australia, although the adoption of WA's 'hard border' was a unique and controversial measure.<sup>10</sup> We focus on the offences to evaluate critically whether the criminal sanctions they imposed were a justifiable and appropriate means of enforcing PHSMs, and thereby effecting communicable<sup>11</sup> disease control, in the context of the COVID-19 pandemic and in WA specifically. The focus on risk-based criminalisation positions our analysis in the jurisprudential realm of preventive harm.

While there were clear social and health benefits which flowed from the WA government's approach, particularly for those at increased risk of severe disease and mortality, we remain conscious of the distinct harmful social consequences which can flow from the use of punitive measures. For these reasons the article is

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<sup>4</sup> See generally Kristina Murphy et al, 'Why People Comply With COVID-19 Social Distancing Restrictions: Self-Interest or Duty?' (2020) 53(4) *Australian & New Zealand Journal of Criminology* 477, 478.

<sup>5</sup> See, eg, *Public Health Act 2010* (NSW) s 10; *Public Health and Wellbeing Act 2008* (Vic) ss 209, 232; *Emergency Management Act 2004* (SA) s 28(1); *Public Health Act 2005* (Qld) ss 99–102, 362D; *Public Health Act 1997* (Tas) s 53; *Public Health Act 1997* (ACT) s 120(4); *Public and Environmental Health Act 2011* (NT) s 56; *COVID-19 Public Health Response Act 2020* (NZ) s 26. See generally Nina Sun et al, 'Human Rights in Pandemics: Criminal and Punitive Approaches to COVID-19' (2022) 7(2) *BMJ Global Health* e008232:1–7, 2–3.

<sup>6</sup> *Public Health Act 2016* (WA) ('PHA').

<sup>7</sup> *Emergency Management Act 2005* (WA) ('EMA').

<sup>8</sup> *Criminal Code Act Compilation Act 1913* (WA) ('Criminal Code').

<sup>9</sup> 'Failure to comply' offences involve the breach of public health directions made under either the EMA or PHA. Cf *ibid* ss 1(4)(a)–(d), 294, 297, 304, 317.

<sup>10</sup> 'WA's Hard Border Lifted', *Government of Western Australia* (Web Page, 3 March 2022) <<https://www.wa.gov.au/government/announcements/was-hard-border-lifted>>; 'Controlled Interstate Border', *Government of Western Australia* (Web Page, 30 October 2020) <<https://www.wa.gov.au/government/announcements/controlled-interstate-border>>.

<sup>11</sup> 'A communicable disease is an infectious disease that can be transmitted from person-to-person': Joanne M Willey, Linda M Sherwood and Christopher J Woolverton, *Prescott's Microbiology* (McGraw-Hill, 9<sup>th</sup> ed, 2014) 836.

underpinned by a contextual approach,<sup>12</sup> consistent with the Australian approach to criminalisation scholarship which argues that the criminal justice system and, specifically criminalisation, must be assessed in its socio-political context.<sup>13</sup> Our analysis proceeds in four parts.

First, we set out the offences and their role in the *EMA-PHA* framework, explain their substantive elements and associated penalties, and demonstrate that the process of law-making in the pandemic context was intrinsically executive-led.

Second, we engage in a normative critique of the offences. This part of the article interrogates the theoretical justifications for the offences by reference to the harm principle, noting that the elastic nature of this concept provides a useful framework to analyse risk-based offences and identify the competing interests at play. The normative critique of the offences continues with the identification of the systemic issues they raise, specifically those associated with executive law-making and the disproportionate enforcement of the offences against already marginalised societal groups.<sup>14</sup> In relation to the latter issue, we focus on the lessons learned from the human immunodeficiency virus ('HIV') experience which provides a historical foundation for issues that arise with respect to using the criminal law to manage a public health emergency.<sup>15</sup> This analysis concludes by referencing one aspect of the State's obligation to the community, particularly

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<sup>12</sup> See generally David Brown, 'Criminalisation and Normative Theory' (2013) 25(2) *Current Issues in Criminal Justice* 605, 607: the contextual approach adopted still recognises the value in identifying normative principles to guide criminalisation decisions.

<sup>13</sup> See generally Luke McNamara and Julia Quilter, 'Public Intoxication in NSW: The Contours of Criminalisation' (2015) 37 *Sydney Law Review* 1.

<sup>14</sup> See, eg, Julia Quilter and Luke McNamara, 'Guest Editors' Introduction Special Edition: Hidden Criminalisation — Punitiveness at the Edges' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 1, 1. Also see the detailed discussion in Chapter 7 of Belinda Bennett, Ian Freckleton and Gabrielle Wolf, *COVID-19, Law and Regulation: Rights, Freedoms and Obligations in a Pandemic* (Oxford University Press, 2023) in which the authors explore the 'risk, impact and disadvantage' of the COVID-19 pandemic on different sectors and analyse the role of the law in managing this.

<sup>15</sup> HIV refers to the positive-strand, enveloped RNA retrovirus that is a human immunodeficiency virus. Persistent replication of HIV results in the progressive decline of CD4 T cell numbers and the clinical disease, acquired immune deficiency syndrome ('AIDS'), which leaves individuals vulnerable to life-threatening complications: Madigan et al (n 1) 866. We choose to refer to HIV as a pandemic to indicate its global reach, whilst the virus may have become 'endemic' the disease remains a significant global health issue: 'Epidemic, Endemic, Pandemic: What are the Differences?', *Columbia University Mailman School of Public Health* (Web Page, 19 February 2021) <<https://www.publichealth.columbia.edu/news/epidemic-endemic-pandemic-what-are-differences>>; Peter Sands, 'Why Aren't Diseases like HIV and Malaria, Which Still Kill Millions of People a Year, Called Pandemics?', *STAT* (Web Page, 6 July 2021) <<https://www.statnews.com/2021/07/06/why-arent-diseases-like-hiv-and-malaria-which-still-kill-millions-of-people-a-year-called-pandemics/>>.

those most vulnerable to infection, and assessing the role of the offences in connection with this obligation.

Third, we provide a qualitative and textual analysis of available case law associated with the offences, including high-profile magistrate and appeal decisions.<sup>16</sup> Transcripts of sentencing decisions in the Magistrates Court were obtained by application.<sup>17</sup> The language of judgments is closely analysed to distil judicial approaches to and trends in sentencing.<sup>18</sup>

In the final part of the article, we analyse patterns of judicial interpretation and sentencing in the context of our normative critique in Part II. The qualitative data collected in Part III is supplemented with official sentencing statistics to contextualise our findings and assess the operation of the offences:<sup>19</sup> noting that empirical research is still needed to assess efficacy. Ultimately, our article suggests there is a time and place for criminalisation in communicable disease control and that in the WA context, the offences were an appropriate response to the threats COVID-19 posed to our community and health system. We conclude that if criminal sanctions are found to be an effective means of generating compliance with PHSMs, criminalisation of this kind is justified in the most critical stages of a legal response to a respiratory pathogen with pandemic potential, provided discriminatory impacts are actively mitigated.

## PART I: THE REGULATORY FRAMEWORK

The WA Government's 'executive-led response'<sup>20</sup> to COVID-19 relied on twin emergency declarations under the *EMA* and *PHA* to enliven emergency management powers.<sup>21</sup> Following WHO's pandemic declaration on 11 March

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<sup>16</sup> See generally Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 116.

<sup>17</sup> Google searches were conducted with the terms 'WA COVID-19 breaches' to obtain the names of defendants and date of hearings to file a Form 3A with a supporting affidavit.

<sup>18</sup> See Nicola Lacey, 'Legal Constructions of Crime' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (Oxford University Press, 3<sup>rd</sup> ed, 2002) 179, 190; Hutchinson and Duncan (n 16) 111, 118. See also Katerina Linos and Melissa Carlson, 'Qualitative Methods for Law Review Writing' (2017) 84(1) *The University of Chicago Law Review* 213, 214; John H Farrar, *Legal Reasoning* (Thomson Reuters, 2010) 91; Christopher Enright, *Legal Reasoning* (Maitland Press, 2011) ch 6.

<sup>19</sup> See generally Kylie Burns and Terry Hutchinson, 'The Impact of "Empirical Facts" on Legal Scholarship and Legal Research Training' (2009) 43(2) *Law Teacher* 153, 159, 167.

<sup>20</sup> Tamara Tulich and Sarah Murray, 'Executive Accountability and Oversight in Australia During The COVID-19 Pandemic' (2022) 30(2) *Michigan State International Law Review* 283, 285.

<sup>21</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 2020 (Mark McGowan, Premier).

2020,<sup>22</sup> the Minister for Emergency Services declared a ‘State of Emergency’ (‘SOE’) under s 56 of the *EMA* on 15 March 2020; and the Minister for Health subsequently declared a ‘Public Health State of Emergency’ (‘PHSOE’) under s 167 of the *PHA* on 16 March 2020.<sup>23</sup> Both were continuously extended under s 58 of the *EMA* and s 170 of the *PHA* respectively, until their revocation on 4 November 2022.<sup>24</sup> Penalties incurred under this *EMA*–*PHA* framework, while the emergency declarations were in force, were unaffected by those declarations being subsequently revoked.<sup>25</sup>

### A Emergency Declarations

These declarations, given the expansive powers conferred, were intended to be temporary. Under the then statutory regime, the powers remained in force for three and six days under the *EMA* and *PHA* respectively, unless sooner revoked.<sup>26</sup> Further, each extension was confined to 14 days,<sup>27</sup> suggesting that these provisions anticipated emergency responses of short duration. Although the requirement to review circumstances every 14 days to assess the necessity of the measures<sup>28</sup> spoke to the emergency response character, the long-term management of the pandemic exposed the shortcomings of this approach.

This is evidenced through the parliamentary consideration of the *EMA* — although it contemplates plagues and epidemics,<sup>29</sup> the second reading speech focussed on terrorism preparedness and ‘frequently occurring and predictable’ natural disasters.<sup>30</sup> In reality, pandemics typically continue for many months and are, comparatively, infrequent and variable.<sup>31</sup> Moreover, while pts 4, 11 and 12 of

<sup>22</sup> ‘WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19: 11 March 2020’, *World Health Organisation* (Web Page, 11 March 2020) <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>>.

<sup>23</sup> Discussed in Marco Rizzi and Tamara Tulich, ‘All Bets on the Executive(s)! The Australian Response to COVID-19’ in Joelle Grogan and Alice Donald (eds), *Routledge Handbook on Law and the COVID-19 Pandemic* (Routledge, 2022) 457, 458–9.

<sup>24</sup> ‘Revocation of Western Australia Declaration (No. 3) of Public Health State of Emergency: 3 November 2022’, *Government of Western Australia* (Web Page, 4 November 2022) <<https://www.wa.gov.au/government/publications/revocation-of-western-australia-declaration-no3-of-public-health-state-of-emergency-3-november-2022>>.

<sup>25</sup> See, eg, *EMA* (n 7) s 59(4).

<sup>26</sup> *EMA* (n 7) ss 57(b), 59; *PHA* (n 6) ss 168, 170.

<sup>27</sup> *EMA* (n 7) s 58(4); *PHA* (n 6) s 170(5).

<sup>28</sup> See the preconditions in s 56 of the *EMA* and s 167 of the *PHA*.

<sup>29</sup> *EMA* (n 7) s 3.

<sup>30</sup> See Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 August 2005, 4120b–4125a [1]–[2] (Michelle Roberts).

<sup>31</sup> See generally on the nature of pandemics Nita Madhav et al, ‘Pandemics: Risks, Impacts, and Mitigation’ in DY Jamison et al (eds), *Disease Control Priorities: Improving Health and Reducing*

the *PHA* were designed for ‘emerging risks’, including bioterrorism and ‘rapidly spreading epidemics’,<sup>32</sup> equivalent issues arise given the provisions that enable the PHSOE largely mirror the content and structure of s 56 of the *EMA*.<sup>33</sup>

### B Implementation of PHSMs

Both declarations facilitated the implementation of PHSMs through executive directions while the SOE and PHSOE were in force.<sup>34</sup> Over the course of the pandemic, the majority of directions were implemented under the *EMA*,<sup>35</sup> by the State Emergency Coordinator who had ‘overall responsibility’ for coordinating the emergency response.<sup>36</sup> The primacy of the *EMA* is consistent with the *PHA*’s second reading speech, which contemplated using the *EMA* when ‘a coordinated interagency response is required’.<sup>37</sup> In the relevant parliamentary debates, reliance on the *EMA* was attributed to the key role of the police in any emergency response;<sup>38</sup> and the benefits of the *EMA*’s ‘[establishment of] a comprehensive emergency management framework’<sup>39</sup> between the State Disaster Council, the State Emergency Coordinator and the Hazard Management Agency.<sup>40</sup> Inherent deficits of the *PHA* were proffered, including, implementation and enforcement

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*Poverty* (The International Bank for Reconstruction and Development, The World Bank, 3<sup>rd</sup> ed, 2017). Also note that the *EMA* did not feature in parliamentary debates during the influenza A (H1N1) pandemic of 2009. The following searches were conducted in Hansard: ‘Swine flu’ AND ‘Emergency Management Act’; ‘Swine flu’; ‘H1N1’; ‘SARS’ AND ‘Emergency Management Act’; ‘Severe Acute Respiratory Syndrome’ AND ‘Emergency Management Act’; ‘SARS’; ‘Severe Acute Respiratory Syndrome’.

<sup>32</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 August 2005, 4120b–4125a [1]–[2] (Michelle Roberts).

<sup>33</sup> Cf *PHA* (n 6) s 202D: the infectious disease extreme circumstances declaration introduced by pt 12A remains in force for 3 months unless extended or revoked.

<sup>34</sup> See *EMA* (n 7) pt 6 div 1; *PHA* (n 6) pt 12 div 5.

<sup>35</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 19 October 2022, 4658c–4695a [2] (Stephen Dawson).

<sup>36</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 18 November 2021, 5670c (Sue Ellery).

<sup>37</sup> See Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 November 2014, 8833b–8836a [3] (Kim Hames). See also, *PHA* (n 6) s 164(1)–(2): these provisions make clear that a SOE and PHSOE can run concurrently.

<sup>38</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 19 October 2022, 4658c–4695a [4] (Stephen Dawson).

<sup>39</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 18 May 2022, 2402b–2416a [7] (Martin Aldridge).

<sup>40</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 19 October 2022, 4658c–4695a [2] (Stephen Dawson).

difficulties,<sup>41</sup> and no 'legislative mechanism' to effect a whole-of-government response.<sup>42</sup> Further, the Hon Stephen Dawson commented:

Given that the [CHO] is the main operational authority for the [PHA], holistic COVID-19 coordination, management and enforcement by the WA Police Force under the [EMA] is preferable so that the [CHO] may focus on underlying public health considerations and individual COVID-19 cases.<sup>43</sup>

One particular limitation in the *PHA* for implementing COVID-related PHSMs that was discussed was the requirement for 24-hour quarantine review.<sup>44</sup> To overcome this limitation the *Public Health Amendment (COVID-19 Response) Act 2020* (WA) ('*PHA Amendment*')<sup>45</sup> introduced 'infectious disease extreme circumstances declarations' ('IDEC-declarations') to allow the CHO to issue quarantine directions without daily review when an IDEC-declaration is in force.<sup>46</sup> Notably, these provisions were not utilised after their enactment as the government continued to implement the quarantine regime under the *EMA*.<sup>47</sup> The continued reliance on the *EMA* appears to have been based on the practicality of police enforcement of PHSMs.

The directions that were issued by the CHO under the *PHA* appear to have been targeted at coordination of the pandemic response and vaccination mandates: for example the Rapid Antigen Test (Restrictions on Sale and Supply) Directions (No 2); the Wastewater COVID testing at WA Laboratories Reporting Directions (No 2); and the Health Worker (Restrictions on Access) Directions (No 4).<sup>48</sup> These PHSMs were not enforced by police.<sup>49</sup>

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<sup>41</sup> Ibid.

<sup>42</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 18 May 2022, 2402b–2416a [15] (Stephen Dawson).

<sup>43</sup> Ibid.

<sup>44</sup> See, eg, Western Australia, *Parliamentary Debates*, Legislative Council, 18 August 2020, 5056c–5073a.

<sup>45</sup> *Public Health Amendment (COVID-19 Response) Act 2020* (WA).

<sup>46</sup> *PHA* (n 6) ss 160(3), 187(3).

<sup>47</sup> See generally Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 August 2020, 4608b–4632a [2], [18]–[20] (Roger Cook).

<sup>48</sup> For a list of directions in force under the *PHA* in March 2022: see Western Australia, *Parliamentary Debates*, Legislative Council, 16 March 2022, 918a–919a (Sue Ellery).

<sup>49</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 18 May 2022, 2402b–2416a [16] (Stephen Dawson).



### C Offences

At the outset it should be noted that the range of offences associated with the *EMA-PHA* framework do not involve proof of fault on the part of the alleged offender — these are offences which do not require proof of intention, recklessness or negligence. Under the *Criminal Code*, however, s 36 of ch V applies all excuses within that Chapter to ‘all persons charged against the statute law of Western Australia’.<sup>50</sup>

Part 8 of the *EMA* concerns offences, all with an associated pecuniary penalty of \$50,000.<sup>51</sup> The *Emergency Management Amendment (COVID-19 Response) Act 2020* (WA) sought to ‘strengthen’ WA’s legislative response by amending s 86 and inserting s 70A(6)–(7), which introduced imprisonment as a sentencing option for breach of emergency management directions.<sup>52</sup> Section 86 now provides:

- (1) [a] person given a direction under section 47, 67, 70, 71, 72A or 75(1)(i) must comply with the direction.

Penalty:

- (a) Imprisonment for 12 months or a fine of \$50,000;
  - (b) For each separate and further offence committed by the person under the *Interpretation Act 1984* section 71, a fine of \$5,000.
- (2) a person must comply with a direction referred to in subsection (1) despite the provisions of any other written law, and the person does not commit an offence by reason of that compliance.
- (3) it is a defence to a charge of an offence under subsection (1) for the person to prove that the person had a reasonable excuse for failing to comply with the direction.<sup>53</sup>

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<sup>50</sup> *Criminal Code* (n 8) s 36.

<sup>51</sup> *EMA* (n 7) ss 85, 86(1)(a), 87–90.

<sup>52</sup> Explanatory Memorandum, *Emergency Management Amendment (COVID-19 Response) Bill 2020* (WA) 5.

<sup>53</sup> *EMA* (n 7) s 86 (emphasis added).

Significantly, imprisonment was not until this amendment a penalty under the *EMA*.<sup>54</sup> The stated purpose of the amendment was to ‘improve compliance with directions ... during an emergency’ and to expand sentencing options.<sup>55</sup> These amendments remain in force.

The *PHA* provides for an extensive penalty framework ranging from a fine of \$1,000,<sup>56</sup> to a fine of \$250,000 and imprisonment for 3 years.<sup>57</sup> The most severe penalties relate to serious and material public health risks.<sup>58</sup> These are aimed at deterrence and offer a ‘tiered approach’ to ‘[capture] known and emerging risks’.<sup>59</sup> Section 41 provides a list of factors that the court must consider in determining appropriate penalties for these offences, including the degree of risk created; ‘practical measures’ that could have reduced that risk; foreseeability; and control.<sup>60</sup>

Significantly, it was the penalty of 12 months imprisonment which already existed under s 122 of the *PHA* for breach of personal public health orders that was introduced into the *EMA* to mandate individual PHSMs. As such, it appears that it was intended for the threat of imprisonment to generate compliance. Failure to comply with a direction issued under the *PHA*, for example attending a restricted workplace when unvaccinated, was captured by the offence provisions in ss 202 and 162.

The temporary scheme introduced by the *Emergency Management Amendment (Temporary COVID-19 Provisions) Act 2022* (WA), which amended the *EMA* (with consequential amendments to the *PHA*), was designed to enable the State Emergency Coordinator to make a 3-month COVID-19 declaration. This declaration, once made, would then confer expansive powers on ‘authorised COVID-19 officers’ for the purposes of COVID-19 management.<sup>61</sup> Relevantly, the offence contained in s 86(1) of the *EMA* was expanded to capture directions

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<sup>54</sup> Excluding s 95 of the *EMA*, which involves breach of confidentiality by persons authorised by the act and has an associated penalty of a fine of \$12,000 and imprisonment for 12 months.

<sup>55</sup> Explanatory Memorandum, Emergency Management Amendment (COVID-19 Response) Bill 2020 (WA) 5.

<sup>56</sup> *PHA* (n 6) s 32(2).

<sup>57</sup> *Ibid* s 37(1).

<sup>58</sup> *Ibid* s 4: a ‘material public health risk’ involves ‘potential harm to public health that is neither trivial nor negligible’.

<sup>59</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 3 December 2015, 9401b–9404a [2] (Alyssa Hayden).

<sup>60</sup> *PHA* (n 6) s 41(1).

<sup>61</sup> See generally Explanatory Memorandum, Emergency Management Amendment (Temporary COVID-19 Provisions) Bill 2022 (WA).

issued under those new COVID-19 declaration powers.<sup>62</sup> While this scheme only remained in force for a two year period, it is arguably indicative of the approach to the regulation of future pandemics, one which is likely to be governed almost entirely by the *EMA* provisions and accordingly accompanied by a reliance on punitive measures to manage the associated public health threats.

## PART II: A NORMATIVE CRITIQUE OF THE REGULATORY FRAMEWORK

Questions involving the rationale for and philosophical foundations of criminalisation remain some of the most elusive and challenging aspects of criminal law theory. There is a growing recognition in critical scholarship of the theoretical incoherence and fragmented nature of criminal law,<sup>63</sup> its dependence on criminalisation as a social practice,<sup>64</sup> and the pressing need for 'shared conceptual tools and language'<sup>65</sup> to progress scholarship.<sup>66</sup> While we acknowledge the complexity and depth of criminalisation theory, we do not, understandably, attempt in this article to engage broadly with the jurisprudence nor to promote a theory of criminalisation. Rather, our normative inquiry focusses on the harm principle to situate the offences within their jurisprudential landscape for the purposes of subsequent analysis. In doing so, we explore theoretical justifications for the offences as well as the broader systemic issues they raise for the administration of criminal justice, including executive law-making and the possible exacerbation of existing social and economic inequities.

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<sup>62</sup> See especially *EMA* (n 7) ss 77L, 77M(4), 77N, 77O and 77Q.

<sup>63</sup> Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4<sup>th</sup> ed, 2017) 90.

<sup>64</sup> Nicola Lacey, 'Theorising Criminalisation Through the Modalities Approach: A Critical Appreciation' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 122, 122. See also Celia Wells and Oliver Quick, *Lacey, Wells and Quick: Reconstructing Criminal Law* (Cambridge University Press, 4<sup>th</sup> ed, 2010) 4.

<sup>65</sup> Luke McNamara et al, 'Theorising Criminalisation: The Value of a Modalities Approach' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 91, 92.

<sup>66</sup> Ngaire Naffine, 'Human Agents in Criminal Law and its Scholarship: A Review Essay' (2011) 35(1) *Criminal Law Journal* 51, 53; Nicola Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues' (2009) 72(6) *Modern Law Review* 936, 956, 960 ('Historicising Criminalisation'). See also Nicola Lacey, 'The Rule of Law and the Political Economy of Criminalisation: An Agenda for Research' (2013) 15(4) *Punishment & Society* 349, 361; McNamara et al (n 65) 92. See also Simon Bronitt, 'Towards a Universal Theory of Criminal Law: Rethinking the Comparative and International Project' (2008) 27(1) *Criminal Justice Ethics* 53, 53.

### A Theoretical Justifications: The Harm Principle and the Criminalisation of Risk

Arguably the most influential concept shaping philosophical debate on the appropriate contours of criminal law is the harm principle.<sup>67</sup> Derived from John Stuart Mill's *On Liberty*,<sup>68</sup> Mill's original formulation only permits restrictions on individual autonomy to prevent *harm to others*: thereby prohibiting criminalisation on the basis of moral or paternalistic grounds.<sup>69</sup> While harm to others has been supported, modified, and critiqued, the concept does, in its various forms, permeate the literature as central to whether conduct should be criminalised.<sup>70</sup>

Despite its influence, application of the harm principle encounters difficulties that limit its ability to adequately guide and explain criminalisation.<sup>71</sup> Most notably for present purposes, the concept of 'harm' is subjective, culturally dependent, and influenced by 'prevailing [societal] power structures'.<sup>72</sup> It is, therefore, context dependent and challenged by the difficulty of identifying societal values. To account for these limitations, the principle is best viewed 'neither as an ideal nor as an explanation but rather, as an ideological framework in terms of which policy debate about criminal law is expressed'.<sup>73</sup> That view of the principle is consistent with scholarship which has expressed concern with the increasing

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<sup>67</sup> R A Duff et al, *The Boundaries of the Criminal Law* (Oxford University Press, 2010) 23; Wells and Quick (n 64) 9; Hamish Stewart, 'The Limits of the Harm Principle' (2009) 4(1) *Criminal Law and Philosophy* 17, 18.

<sup>68</sup> 'The only purpose for which power can be rightfully exercised over any member of a civilised community, against [their] will, is to prevent harm to others': John Stuart Mill, *On Liberty* (Penguin, 1974) ch 1, par 9. But see Steven Debbaut, 'The Legitimacy of Criminalizing Drugs: Applying the "Harm Principle" of John Stuart Mill to Contemporary Decision-Making' (2022) 68 *International Journal of Law, Crime and Justice* 1, 1–2: other passages in *On Liberty* have sparked debate as to whether Mill supported criminalisation on the basis of 'offence'. As the offence principle primarily concerns affronts to public decency and is therefore not relevant to the offences, which concern risk of harm, it is beyond the scope of this article.

<sup>69</sup> John Stanton-Ife, 'What is the Harm Principle For?' (2014) 10(2) *Criminal Law and Philosophy* 329, 331.

<sup>70</sup> See especially HLA Hart, *Law, Liberty, and Morality* (Stanford University Press, 1963); Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965); Joel Feinberg, *Harm to Others* (Oxford University Press, 1984). For commentary see also Bernard E Harcourt, 'The Collapse of the Harm Principle' (1999) 90(1) *The Journal of Criminal Law & Criminology* 109.

<sup>71</sup> Wells and Quick (n 64) 10.

<sup>72</sup> Historicising Criminalisation (n 66) 940; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014) 104. See generally Bernard E Harcourt, 'The Collapse of the Harm Principle' (1999) 90(1) *Journal of Criminal Law & Criminology* 109; Ted Honderich, 'On Liberty and Morality-Dependent Harms' (1982) 30 *Political Studies* 504; Paddy Hillyard et al (eds), *Beyond Criminology: Taking Harm Seriously* (Pluto Press, 2004).

<sup>73</sup> Wells and Quick (n 64) 10.

reliance on criminalisation as a regulatory tool and reflex response to social problems.<sup>74</sup>

Standard application of the harm principle weighs ‘the extent and likelihood’ of harm to others against the countervailing consequences of criminalisation.<sup>75</sup> In doing so, an analysis focussed on harm reflects the tension between individual and collective interests that underlies the criminal law. The debate in relation to the role of harm as a justification for criminalisation is particularly relevant for an analysis of risk-based offences such as those created pursuant to the *EMA-PHA* framework. As already noted, by criminalising breaches of public health directions the offences operate to criminalise *risk of transmission* of a communicable disease not *transmission* itself. In doing so, they share the preventive rationale of both inchoate and regulatory offences, which pre-emptively criminalise behaviour that risks causing harm.<sup>76</sup> Offences of this kind have proliferated in the anti-terrorism, organised crime and public order spheres.<sup>77</sup> While the precautionary principle is well established in environmental and public health legislation,<sup>78</sup> it remains a contentious basis for criminalisation

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<sup>74</sup> See, eg, Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116(Apr) *Law Quarterly Review* 225; Douglas Husak, *Overcriminalisation* (Oxford University Press, 2007); Victor Tadros, ‘Justice and Terrorism’ (2007) 10 *New Criminal Law Review* 658; Lucia Zedner, *Security* (Routledge, 2009); Andrew Ashworth and Lucia Zedner, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions’ (2008) 2 *Criminal Law and Philosophy* 21; Lucia Zedner, ‘Security, the State and the Citizen: The Changing Architecture of Crime Control’ (2010) 13(2) *New Criminal Law Review* 379; Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009). But see Jeremy Horder, *Ashworth’s Principles of Criminal Law* (Oxford University Press, 9<sup>th</sup> ed, 2019) 33–4: ‘contrary to the impression often given by scholars, penal regulation has always existed in some form. It is not the regulatory aspect but the pre-emptive criminalisation of harmless conduct that is the main concern.’

<sup>75</sup> A P Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011) 45, 55 (‘*Crimes, Harms, and Wrongs*’).

<sup>76</sup> See Larry Alexander and Kimberly Kessler Ferzan, ‘Risk and Inchoate Crimes: Retribution or Prevention?’ in G R Sullivan and Ian Dennis (eds), *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (Hart Publishing, 2012) 103.

<sup>77</sup> Lucia Zedner, ‘Fixing the Future? The Pre-Emptive Turn in Criminal Justice’ in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 35, 37. In relation to anti-terrorism orders in an Australian context see especially Tim Matthews, ‘Under Control, but Out of Proportion: Proportionality in Sentencing for Control Order Violations’ (2017) 40(4) *University of New South Wales Law Journal* 1422; Susan Donkin, *Preventing Terrorism and Controlling Risk: A Comparative Analysis of Control Orders in the UK and Australia* (Springer, 2014). See also Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 5.

<sup>78</sup> Ashworth and Zedner (n 72) 120, discussing Principle 15 of the United Nations Rio Declaration on Environment and Development; Elizabeth Fisher, ‘Precaution, Precaution Everywhere: Developing a “Common Understanding” of the Precautionary Principle in the European

given *harm to others* need not eventuate for criminal sanctions to be imposed.<sup>79</sup> These preventive, risk-based regimes necessarily privilege collective interests over the autonomy of individuals.<sup>80</sup> Being concerned with risk, they are also challenged by the uncertainties in quantifying and predicting the harm they seek to prevent and because of this, need to accord with scientific or other expert advice.<sup>81</sup>

Ashworth and Zedner, in their taxonomy of criminal offences which are primarily preventive in nature, include crimes of ‘concrete’ and ‘abstract’ endangerment.<sup>82</sup> Endangerment offences expand the harm principle beyond realised harms to include the mitigation of risk.<sup>83</sup> To ensure such expansions are justified, scholars have proposed normative limits on the scale and likelihood of the targeted harm. Simester and von Hirsch argue that the harm principle is easily satisfied where the prohibited conduct creates a genuine risk of immediate harm, as with concrete endangerment.<sup>84</sup> Abstract endangerment is more controversial as the conduct prohibited ‘only generates risk if certain contingencies are present’.<sup>85</sup> The offences resemble offences of ‘concrete’ or ‘abstract’ endangerment.<sup>86</sup> If an individual receives an isolation direction due to a positive COVID-19 test and breaches that direction, their conduct is criminalised for the ‘concrete’, ‘actual or likely endangerment’ of transmission to others. The basis for criminalising breach of a travel-based quarantine order, by way of distinction, is ‘abstract endangerment’ because the individual’s travel history ‘creates an unacceptable risk of harm’.

The greater the extent and likelihood of predicted harm, the greater the case for criminalisation.<sup>87</sup> Ashworth and Zedner propose further normative limits to justify endangerment offences, including that such offences must target ‘a

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Community’ (2002) 9(1) *Maastricht Journal of European and Comparative Law* 7, 9. See also Zedner ‘Fixing the Future?’ (n 77) 57–8.

<sup>79</sup> Ashworth and Zedner, *Preventive Justice* (n 72) 120. See also Horder (n 74) 34, quoting AP Simester, ‘Prophylactic Crimes’ in G R Sullivan and Ian Dennis (eds), *Seeking Security: Pre-empting the Commission of Criminal Harms* (2012) 59.

<sup>80</sup> McSherry, Norrie and Bronitt (eds) (n 77) 3. See also R A Duff et al, *The Boundaries of Criminal Law* (Oxford University Press, 2010) 2–3.

<sup>81</sup> Catherine Bennett and Meru Steel, ‘Advancing Evidence to Enable Optimal Communicable Disease Control’ (2025) 35(2) *Public Health Research and Practice* 1.

<sup>82</sup> Ashworth and Zedner, *Preventive Justice* (n 72) 120.

<sup>83</sup> *Crimes, Harms, and Wrongs* (n 75) 75.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid* 76, cited in Horder (n 74) 34.

<sup>86</sup> See Ashworth and Zedner, *Preventive Justice* (n 72) 102; A P Simester and Andrew Von Hirsch, ‘Remote Harms and Non-Constitutive Crimes’ (2009) 28(1) *Criminal Justice Ethics* 89, 93.

<sup>87</sup> See Ashworth and Zedner, *Preventive Justice* (n 72) 122.

significant risk of serious harm'; and that the creation of risk must also be wrongful 'in the sense that [offenders have] failed to show appropriate concern for the interests of others'.<sup>88</sup>

Reliance on harm as the rationale for criminalisation also, inevitably, raises the concept of proportionality as an associated limit guiding the justifiable use of criminal law.<sup>89</sup> While it is recognised as a central concept in the criminal justice system, the challenges associated with achieving this in practice have long been recognised.<sup>90</sup> It is nonetheless contended that proportionality has particular relevance for the subject of this article in two respects. First, criminalisation must be a proportionate legislative response to an identified "harm";<sup>91</sup> and second, any punishment imposed must be proportionate to the seriousness of the offending conduct.<sup>92</sup> The latter aspect is enshrined in s 6(1) of the *Sentencing Act 1995* (WA) ('*Sentencing Act*')<sup>93</sup> as a key sentencing principle. Jurisprudence further suggests that sentencing must be proportionate to both culpability and gravity of harm caused.<sup>94</sup> This requires that sentences for abstract endangerment are lower than concrete endangerment,<sup>95</sup> and by extension, that risk-based offences receive lower sentences than harm-based offences.

In the height of the COVID-19 pandemic in WA, the State Government aligned itself with health advice that inadequate compliance with PHSMs at that time would have resulted in uncontrolled community transmission, with significant morbidity and mortality falling disproportionately on 'vulnerable'<sup>96</sup> members of

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<sup>88</sup> Ibid 116.

<sup>89</sup> See generally Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55, 55–56. See also Tim Matthews, 'Under Control, but Out of Proportion' (2017) 40(4) *University of New South Wales Law Journal* 1422, 1429, citing Carol Steiker, 'Proportionality as a Limit on Preventive Justice' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 194, 195.

<sup>90</sup> See, eg, Joel Goh, 'Proportionality: An Unattainable Ideal in the Criminal Justice System' (2013) 2 *Manchester Review of Law, Crime and Ethics* 41.

<sup>91</sup> See generally Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55, 55–6; Ashworth and Zedner, *Preventive Justice* (n 72) 86, citing Victor Tadros, 'Controlling Risk' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 110.

<sup>92</sup> On this distinction see also Sarah J Summers, *Sentencing and Human Rights: The Limits on Punishment* (Oxford University Press, 2023) 91.

<sup>93</sup> *Sentencing Act 1995* (WA) ('*Sentencing Act*').

<sup>94</sup> Bronitt and McSherry (n 63) 18–19, 21. See generally Richard G Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19(3) *Melbourne University Law Review* 489.

<sup>95</sup> Ashworth and Zedner, *Preventive Justice* (n 72) 102.

<sup>96</sup> This term is used to refer to all people at an increased risk of severe illness or complications following infection.

the community;<sup>97</sup> increased pressure on health systems leading to the rationing of resources;<sup>98</sup> disruption of health services and deferred treatment;<sup>99</sup> mental health harms associated with prolonged lockdowns and increased morbidity and mortality rates;<sup>100</sup> increased risk of new, more transmissible, and potentially more virulent, variants of concern;<sup>101</sup> and numerous other, negative, economic and social consequences.<sup>102</sup> In considering the precise harms that the offences sought to prevent or manage, then, those harms included the significant, and potentially catastrophic, direct and indirect harms to the health and welfare of individuals and to the continued functioning of our health system as a whole.

As the offences effectively operated to criminalise usually permissible human behaviour they extensively interfered with ordinary civil and social behaviours. Directions such as quarantine orders greatly restrict socialisation and freedom of movement, conduct at the very heart of the human experience. We note that the nature and extent of their impact on how we live also aligns the offences with scholarship tackling moral questions of when and why the criminal law should be used to regulate human behaviour, over other methods.<sup>103</sup> These observations underpin the analysis that follows of the systemic implications raised by the offences, which we suggest need to be considered to evaluate whether criminalisation in this instance was justified.

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<sup>97</sup> See generally 'Monitoring and Reporting on COVID-19', *Australian Government: Department of Health, Disability and Ageing* (Web Page, 2 November 2025) <<https://www.health.gov.au/topics/covid-19/monitoring-and-reporting>>.

<sup>98</sup> See, eg, Michelle A Gunn and Fiona J McDonald, 'COVID-19, Rationing and the Right to Health: Can Patients Bring Legal Actions if They Are Denied Access to Care?' (2021) 214(5) *Medical Journal of Australia* 207, 207.

<sup>99</sup> 'COVID-19 and the Social Determinants of Health and Health Equity: Evidence Brief', *World Health Organisation* (Web Page, October 2021) 9 <<https://www.who.int/publications/i/item/9789240038387>>.

<sup>100</sup> See, eg, Chip Le Grand, 'Melbourne Ground Zero for Lockdown Harms, Says Health Expert' *The Age* (online, 24 September 2022) <<https://www.theage.com.au/national/victoria/melbourne-ground-zero-for-lockdown-harms-says-health-expert-20220922-p5bkcc.html>>.

<sup>101</sup> World Health Organisation (n 99) v, 13. See also 'Why Does COVID Mutate and Will We See More Variants?', *University of Western Australia* (Web Page, 21 March 2022) <<https://www.uwa.edu.au/news/Article/2022/March/Why-does-COVID-mutate-and-will-we-see-more-variants>>.

<sup>102</sup> 'Overview of Public Health and Social Measures in the Context of COVID-19: Interim Guidance', *World Health Organisation* (Web Page, 18 May 2020) 1 <[https://apps.who.int/iris/bitstream/handle/10665/332115/WHO-2019-nCoV-PHSM\\_Overview-2020.1-eng.pdf?sequence=1&isAllowed=y](https://apps.who.int/iris/bitstream/handle/10665/332115/WHO-2019-nCoV-PHSM_Overview-2020.1-eng.pdf?sequence=1&isAllowed=y)>.

<sup>103</sup> See generally *Crimes, Harms, and Wrongs* (n 75) 3.



## B Systemic Implications

### 1 Executive Law-Making

Given it is the breach of a public health direction that incurs criminal sanction, the offences invoke a two-step criminalisation process that allows the criminal law to intervene and criminalise conduct that, without the pandemic context, would not be criminal. This method of criminalisation is characteristic of many civil preventive orders, often associated with criminalisation that circumvents standard criminal processes that safeguard the rights of the accused. This is because conviction and the imposition of a penalty occurs as an administrative process, absent the involvement of a court or tribunal.<sup>104</sup>

Although providing a flexible response to the fluctuating circumstances of the pandemic brought benefits,<sup>105</sup> one consequence of the two-step structure of the offences is that the question of whether criminalisation is justified depends on the specific nature of the directions themselves. PHSMs significantly curtail individual freedoms, including by restricting movement and positively requiring COVID-testing and mask-wearing, and as such they raise questions of the proportionality of the measures and their necessity in controlling the risk of transmission.<sup>106</sup> While evaluating the directions is beyond the scope of this article and requires interdisciplinary expertise, it is noted here that infringements on individual rights for public health purposes raise questions around the consistency of such instruments with democratic processes.<sup>107</sup>

This method of criminalisation is often associated with the exercise of wide and discretionary executive powers. As noted earlier, the declaration of successive states of emergency in WA (and indeed in other Australian jurisdictions) triggered these powers, enabling the introduction of the various Directions (and related offences).<sup>108</sup> The parliamentary scrutiny which ordinarily accompanies

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<sup>104</sup> Andrew Ashworth, 'Criminal Law, Human Rights and Preventative Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 87, 95, 97; Lucia Zedner, 'Penal Subversions: When is a Punishment Not Punishment, Who Decides and on What Grounds?' (2016) 20(1) *Theoretical Criminology* 3, 11 citing Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10(4) *International Journal of Evidence and Proof* 241.

<sup>105</sup> See also Transcript of Proceedings, *Western Australia Police v Burbank* (Magistrates Court of Western Australia, 40621–40623, Magistrate Holgate, 13 October 2021) 20 (Magistrate Holgate) ('*Burbank*').

<sup>106</sup> See Bernadette McSherry, "'Dangerousness" and Public Health' (1998) 23(6) *Alternative Law Journal* 276, 279.

<sup>107</sup> Michael Kirby, 'The Right to Health Fifty Years on: Still Sceptical?' (1999) 4(1) *Health and Human Rights* 6, 16–17.

<sup>108</sup> *EMA* (n 7) pts 5–6; *PHA* (n 6) pt 12.

the introduction of criminal offences was therefore absent,<sup>109</sup> raising distinct concerns around the transparency of decision-making and accountability of governmental action. As the Directions implemented under the *EMA-PHA* framework are examples of delegated legislation, they were made ‘without parliamentary enactment’.<sup>110</sup> Moreover, much delegated legislation made in response to the pandemic bypassed the usual avenues that provide proper parliamentary scrutiny.<sup>111</sup> Relatedly the *EMA-PHA* framework authorised the executive to create offences to manage emergencies;<sup>112</sup> the dependence of these offences on ‘fast-tracked’ delegated legislation accordingly raised related issues of government accountability and concerns that the process was fundamentally flawed.<sup>113</sup> While the Directions were the subject of external scrutiny in the courts,<sup>114</sup> judicial commentary demonstrates considerable deference to public health advice,<sup>115</sup> and supports the executive’s precautionary response to the pandemic emergency.<sup>116</sup> Although this deference is appropriate given the need for epidemiology and virology expertise in assessing the legitimacy of the directions, it dilutes the scrutiny provided by the judiciary. The sheer scope conferred by emergency powers contained in the *EMA* and *PHA* further questions the ability of the courts to temper the use of executive power.<sup>117</sup> As transparency

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<sup>109</sup> Tulich and Murray (n 20) 285.

<sup>110</sup> Ibid 309.

<sup>111</sup> Ibid discussing the *Interpretation Act 1984* (WA), pts III–V.

<sup>112</sup> *EMA* (n 7) pt 5; *PHA* (n 6) pts 11–12.

<sup>113</sup> Julie Falck, Jessica Kerr and Marco Rizzi, ‘I Sought the Law and the Law Is Gone: Revoked COVID-19 Directions in Western Australia’, *Australian Public Law* (Blog Post, 12 May 2023) <<https://www.auspublaw.org/blog/2023/5/i-sought-the-law-and-the-law-is-gone-revoked-covid-19-directions-in-western-australia>>.

<sup>114</sup> State challenges include: *Falconer v Chief Health Officer* [2022] WASC 3; *Falconer v Commissioner of Police [No 4]* [2022] WASC 271; *Falconer v Chief Health Officer [No 3]* [2022] WASC 270; *Falconer v Chief Health Officer [No 2]* [2022] WASC 29; *Falconer v Commissioner of Police [No 3]* [2022] WASC 30; *Falconer v Commissioner of Police (WA)* [2022] WASCA 157; *Falconer v Commissioner of Police (WA)* [2021] WASC 481. See also, eg, *Palmer v Western Australia* (2021) 95 ALJR 229; *Palmer v Western Australia (No 4)* [2020] FCA 1221; *Newman v Minister for Health and Aged Care* [2021] FCA 517; *Loiolo v Giles* [2020] VSC 722. Although not a court but an Ombudsman review, see also Victorian Ombudsman, *Investigation into the Detention and Treatment of Public Housing Residents Arising from a COVID-19 Hard Lockdown* (Report, 17 December 2020).

<sup>115</sup> See especially Transcript of Proceedings, *Western Australia Police v Babbage* (Magistrates Court of Western Australia, 40618–40620, Magistrate Holgate, 13 October 2021) 26 (Magistrate Holgate) (*‘Babbage’*). See also, eg, *Palmer v Western Australia* (2021) 95 ALJR 229 [77]–[79] (Kiefel CJ and Keane JJ).

<sup>116</sup> *Palmer v Western Australia (No 4)* [2020] FCA 1221 [315], [366] (Rangiah JJ); *Palmer v Western Australia* (2021) 95 ALJR 229 [77] (Kiefel CJ and Keane JJ), cited in Tulich and Murray (n 20) 314.

<sup>117</sup> See especially *PHA* (n 6) ss 158, 185: these provisions empower authorised officers to enforce directions with reasonable force if necessary, including to effect medical examination, treatment, or vaccination (see ss 158(2)(c), 185(2)(c)).

and accountability engender trust in government action,<sup>118</sup> mechanisms that promote these qualities may improve the overall effectiveness of the *EMA-PHA* framework in generating compliance. To this end it has been suggested that human rights compatibility statements should be explored to strengthen this legislative framework and justification of criminalisation.<sup>119</sup>

## 2 *Inequality Exacerbation and Stigmatisation: Lessons from HIV*

Infectious diseases generally exacerbate pre-existing inequalities within our society.<sup>120</sup> Given the law's pivotal role in protecting vulnerable people and marginalised groups,<sup>121</sup> any legal response to an infectious disease should mitigate, not aggravate, discriminatory outcomes.

A significant risk associated with criminalisation and the offences was the potential for the regulatory framework to disproportionately impact some members of our community.<sup>122</sup> The HIV experience is a cautionary tale of the risks associated with criminalisation. For 'those vulnerable to HIV, the law is neither abstract nor distant. It is police harassment or clean needles, prison cells or self-help groups — the law is the torturer's fist or the healer's hand.'<sup>123</sup> It is, therefore, important for us to engage with the extensive scholarship on

<sup>118</sup> See Maria Cucciniello and Greta Nasi, 'Transparency for Trust in Government: How Effective is Formal Transparency?' (2014) 37(13) *International Journal of Public Administration* 911.

<sup>119</sup> Tulich and Murray (n 20) 312–13, quoting Kylie Evans and Nicholas Petrie, 'COVID-19 and The Australian Human Rights Acts' (2020) 45 *Alternative Law Journal* 175.

<sup>120</sup> See, eg, Philip M Alberti, Paula M Lantz and Consuelo H Wilkins, 'Equitable Pandemic Preparedness and Rapid Response: Lessons from COVID-19 for Pandemic Health Equity' (2020) 45(6) *Journal of Health Politics, Policy and Law* 921, 923; Clare Bambra et al, 'The COVID-19 Pandemic and Health Inequalities' (2020) 74 *Journal Epidemiology Community Health* 964, 964. See also, Clare Bambra, Julia Lynch and Katherine E Smith, *The Unequal Pandemic: COVID-19 and Health Inequalities* (Policy Press, 2021) ch 2; Paul D Rutter et al, 'Socio-Economic Disparities in Mortality Due to Pandemic Influenza in England' (2012) 57(4) *International Journal of Public Health* 745.

<sup>121</sup> See, eg, *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').

<sup>122</sup> See Joseph Lelliott, Andreas Schloenhardt, and Ruby Ioannou, 'Pandemics, Punishment, and Public Health: COVID-19 and Criminal Law in Australia' (2021) 44(1) *University of New South Wales Law Journal* 167, 190, citing '5 Concerns with Australia's Policing During COVID-19', *Amnesty International* (Web Page, 27 April 2020) <<https://www.amnesty.org.au/policing-during-covid-19/>>; Jarni Blakkarly, 'Concerns Police Using Coronavirus Powers to Target Marginalised Communities in Australia', *SBS News* (online, 12 April 2020) <<https://www.sbs.com.au/news/concerns-police-using-coronavirus-powers-to-target-marginalised-communities-in-australia>>; Matt Dennien, 'Concerned Human Rights Groups Call for COVID-19 Fine Data', *Brisbane Times* (online, 14 June 2020) <<https://www.brisbanetimes.com.au/national/queensland/concerned-human-rights-groups-call-for-covid-19-fine-data-20200608-p550ih.html>>.

<sup>123</sup> Global Commission on HIV and the Law, *Risks, Rights & Health* (Final Report, July 2012) 12 <<https://hivlawcommission.org/wp-content/uploads/2017/06/FinalReport-RisksRightsHealth-EN.pdf>>.

HIV-specific criminalisation ('HIV-criminalisation'), which refers to laws that specifically and expressly target people living with or at risk of HIV and intend to regulate their behaviour.<sup>124</sup> This scholarship has developed in the context of communicable disease control and in this sense is particularly aligned with the concerns raised in relation to the offences under examination.

Because Australia has largely steered away from criminalisation in the HIV context and limited the criminal law to respond to assault-based crimes, much of the contemporary literature relied upon concerns other jurisdictions.<sup>125</sup> The scholarship is, unsurprisingly, focused on criminalisation theories associated with endangerment offences. Notably, the weight of the literature largely falls against criminalising risk behaviours.<sup>126</sup> It is accordingly one site of criminalisation where empirical and theoretical scholarship indicate that the counter-productive and discriminatory consequences of criminalisation significantly outweigh the benefits.<sup>127</sup> While there is a reasonable body of historical scholarship which has expressed support for the criminalisation of HIV in limited circumstances,<sup>128</sup> this article accepts more recent scholarship which points to evidence that the criminalisation of HIV disproportionately impacts already marginalised groups by effectively criminalising behaviour 'legal for others'.<sup>129</sup> In the United States and Canada, there is empirical evidence that

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<sup>124</sup> See generally 'Global HIV Criminalisation Database', *HIV Justice Network* (Web Page) <<https://www.hivjustice.net/global-hiv-criminalisation-database/>>. On the two ways these laws regulate behaviour see especially Joshua D Blecher-Cohen, 'Disability Law and HIV Criminalisation' (2021) 130 *Yale Law Journal* 1560, 1569.

<sup>125</sup> See generally Michael Kirby, 'The Never-Ending Paradoxes of HIV/AIDS and Human Rights' (2004) 4(2) *African Human Rights Law Journal* 163, 168, citing William Bowtell, 'HIV/AIDS: Present at the Creation' (Presentation to the HIV/AIDS, Hepatitis C and Related Diseases Social Research Conference, Sydney, 18 May 2004).

<sup>126</sup> Eric Mykhalovskiy, 'The Public Health Implications of HIV Criminalization: Past, Current, and Future Research Directions' (2015) 25(4) *Critical Public Health* 373, 374.

<sup>127</sup> See generally 'Save Lives: Decriminalise', *UNAIDS* (Web Page) <<https://www.unaids.org/en/topic/decriminalization>>. See generally Kirby (n 125) 164.

<sup>128</sup> See, eg, Simon H Bronitt, 'Criminal Liability for the Transmission of HIV/AIDS' (1992) 16(2) *Criminal Law Journal* 85; Simon Bronitt, 'Spreading Disease and the Criminal Law' (1994) *Jan Criminal Law Review* 21; Simon Bronitt, 'Controlling Disease and the Criminal Law: A New Regulatory Strategy' in R Smith (ed), *Health Care, Crime and Regulatory Control* (Hawkins Press, 1998) 167.

<sup>129</sup> See, eg, Amy R Baugher et al, 'Black Men Who Have Sex with Men Living in States with HIV Criminalisation Laws Report High Stigma, 23 U.S. Cities, 2017' (2021) 35(10) *AIDS (London)* 1637, 1638.

HIV-criminalisation disproportionately impacts people of colour and African immigrants, likely due to racial bias and increased policing.<sup>130</sup>

Public health and human rights-based concerns emerge from this complex 'medico-legal borderland'<sup>131</sup> including the misaligning of objectives and outcomes of public health and criminal law.<sup>132</sup> HIV-criminalisation, in targeting people living with or at risk of HIV, significantly undermines public health efforts aimed at reducing transmission of the virus.<sup>133</sup> The HIV literature particularly emphasises that the 'blunt'<sup>134</sup> and 'punitive'<sup>135</sup> nature of criminalisation is ill-equipped to regulate the complex issues that arise around disclosure of infection.<sup>136</sup> Relatedly, the stigmatising effects of criminalisation<sup>137</sup> construct a psychological barrier to HIV-testing and treatment initiatives.<sup>138</sup>

More generally, criminal regulation of risk behaviours and the lives of those living with HIV harmfully magnifies existing stigma of the virus itself and those people perceived to be at increased risk of infection.<sup>139</sup> These individuals most frequently

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<sup>130</sup> Trevor Hoppe, Alexander McClelland and Kenneth Pass, 'Beyond Criminalisation: Reconsidering HIV Criminalisation in an Era of Reform' (2022) 17(2) *Current Opinion in HIV & AIDS* 100, 100.

<sup>131</sup> Stefan Timmermans and Jonathan Gabe, 'Introduction: Connecting Criminology and Sociology of Health and Illness' (2002) 24(5) *Sociology of Health & Illness* 501, 506–9, cited in, 'The Public Health Implications of HIV Criminalization: Past, Current, and Future Research Directions' (n 128) 379.

<sup>132</sup> Leslie Pickering Francis and John G Francis, 'Criminalising Health-Related Behaviours Dangerous to Others? Disease Transmission, Transmission-Facilitation, and the Importance of Trust' (2012) 6 *Criminal Law and Philosophy* 47, 48–9.

<sup>133</sup> See, eg, Mykhalovskiy, 'The Public Health Implications of HIV Criminalisation: Past, Current, and Future Research' (n 126) 377.

<sup>134</sup> Ibid 375. See also Pickering Francis and Francis (n 132) 47: these authors also discuss the 'potential misalignment between static criminal law and the changing nature of infectious disease'.

<sup>135</sup> See also Pickering Francis and Francis (n 132) 54.

<sup>136</sup> Mykhalovskiy, 'The Public Health Implications of HIV Criminalization: Past, Current, and Future Research Directions' (n 126) 375.

<sup>137</sup> On the particular relationship between stigma and health see Daniel S Goldberg, 'On Stigma & Health' (2018) 45(4) *Journal of Law, Medicine and Ethics* 475.

<sup>138</sup> See, eg, Daniel Grace, 'Criminalising HIV Transmission Using Model Law: Troubling Best Practice Standardisations in the Global HIV/AIDS Response' (2015) 25(4) *Critical Public Health* 441, 442; Elena Jeffreys, Kane Matthews and Alina Thomas, 'HIV criminalisation and sex work in Australia' (2010) 18(35) *Reproductive Health Matters* 129, 134; Lydia Kipiriri et al, "...They Should Understand Why..." The Knowledge, Attitudes and Impact of the HIV Criminalisation Law on a Sample of HIV+ Women Living in Ontario' (2016) 11(10) *Global Public Health* 1231, 1231; Amy R Baugher et al (n 129) 1643; Mykhalovskiy, 'The Public Health Implications of HIV Criminalisation: Past, Current, and Future Research' (n 126) 377; Hoppe, McClelland and Pass (n 130) 101.

<sup>139</sup> See Mykhalovskiy, 'The Public Health Implications of HIV Criminalisation: Past, Current, and Future Research' (n 126) 378 and the scholarship cited therein.

include men who have sex with men, injecting drug users, sex workers, and some immigrants.<sup>140</sup> While COVID-19 did not emerge in quite the same way, epidemics and pandemics have a long history of generating xenophobic attitudes.<sup>141</sup> In relation to COVID-19, attempts were made to address this issue in the public health space, through a deliberate decision to take away the geographic origin of the SARS-CoV-2 virus,<sup>142</sup> and to focus on care-driven messaging and education.<sup>143</sup>

It is also worth noting that HIV-related stigma has been, and continues to be exacerbated by, often 'gendered and racialized' media reports that portray HIV-positive defendants as hypersexual, blameworthy predators.<sup>144</sup> Although

<sup>140</sup> Pierre Somse and Patrick M Eba, 'Lessons from HIV to Guide COVID-19 Responses in the Central African Republic' (2022) 22(1) *Health and Human Rights* 371, 371, citing G M Herek, 'Thinking About AIDS and Stigma: A Psychologist's Perspective' (2003) 30(4) *Journal of Law, Medicine & Ethics* 594.

<sup>141</sup> See, eg, Carmen H Logie and Janet M Turan, 'How Do We Balance Tensions Between COVID-19 Public Health Responses and Stigma Mitigation? Learning from HIV Research' (2020) 24(7) *AIDS and Behaviour* 2003, 2003.

<sup>142</sup> See especially *World Health Organisation*, 'WHO Director-General's Remarks at the Media Briefing on 2019-nCoV on 11 February 2020' (Web Page, 11 February 2020) <<https://www.who.int/director-general/speeches/detail/who-director-general-s-remarks-at-the-media-briefing-on-2019-ncov-on-11-february-2020>>. See also Marietta Vazquez 'Calling COVID-19 the "Wuhan Virus" or "China Virus" is Inaccurate and Xenophobic', *Yale School of Medicine* (Web Page, 12 March 2020) <<https://medicine.yale.edu/news-article/calling-covid-19-the-wuhan-virus-or-china-virus-is-inaccurate-and-xenophobic/>>; Mari Webel, 'Calling COVID-19 a 'Chinese Virus' is Wrong and Dangerous — The Pandemic is Global' *The Conversation* (online, 25 March 2020) <<https://theconversation.com/calling-covid-19-a-chinese-virus-is-wrong-and-dangerous-the-pandemic-is-global-134307>>.

<sup>143</sup> Australian Council of Human Rights Authorities, 'Australian Council of Human Rights Authorities Statement' (Media Release, Equal Opportunity Commission, 16 September 2020) <<https://www.wa.gov.au/government/announcements/australian-council-of-human-rights-authorities-statement>>; Logie and Turan (n 141) 2004. For COVID-related examples of "care-driven" messaging see, eg, World Health Organisation's 'Small acts save lives' comics: who, 'Keep your distance' (Instagram, 26 December 2022) <<https://www.instagram.com/p/CmoTJJuj39n/?igshid=YmMyMTA2M2Y=>>>; who, 'Wear a mask' (Instagram, 27 December 2022) <[https://www.instagram.com/p/Cmqrw4\\_D5n\\_/?igshid=YmMyMTA2M2Y=>](https://www.instagram.com/p/Cmqrw4_D5n_/?igshid=YmMyMTA2M2Y=>)>; who, 'Cover up a cough or sneeze' (Instagram, 29 December 2022) <<https://www.instagram.com/p/CmudpS4DAYU/?igshid=YmMyMTA2M2Y=>>>; who, 'Protect yourself today' (Instagram, 30 December 2022) <<https://www.instagram.com/p/Cmw6gOPDw7C/?igshid=YmMyMTA2M2Y=>>>; who, 'Open a window' (Instagram, 3 January 2023) <<https://www.instagram.com/p/Cm69gosDxjG/?igshid=YmMyMTA2M2Y=>>>; who, 'Wash your hands' (Instagram, 4 January 2023) <<https://www.instagram.com/p/Cm-EtFkDvod/?igshid=YmMyMTA2M2Y=>>>.

<sup>144</sup> Hoppe, McClelland and Pass (n 130) 102, citing Jennifer M Kilty and Katarina Bogosavljevic, 'Emotional Storytelling: Sensational Media and the Creation of the HIV Sexual Predator' (2019) 15(2) *Crime, Media, Culture* 279. See, eg, Colin Hastings et al, 'Prairie Fantasy and Constructing Racial Otherness: An Analysis of News Media Coverage of Trevis Smith's Criminal Non-Disclosure Case' (2020) 45(1) *Canadian Journal of Sociology* 22; Eric Mykhalovskiy et al, 'Explicitly Racialised and Extraordinarily Over-represented: Black Immigrant Men in 25 Years of News Reports on HIV Non-disclosure Criminal Cases in Canada' (2021) 23(6) *Culture, Health and Sexuality* 788; Jenny Roth and Chris Sanders, "Incorrigible Slag," the Case of Jennifer Murphy's HIV Non-Disclosure:

constructions of “otherness”<sup>145</sup> were not as obviously apparent in press coverage of the offences analysed,<sup>146</sup> there were instances of racial abuse following media reports of border breaches in other jurisdictions.<sup>147</sup> What remains clear is that the stigmatising effects of criminalisation cannot be overlooked, and must be proactively addressed by government, communities and individuals.<sup>148</sup> It is also important to recognise that communicable diseases can be associated with stigma in and of themselves;<sup>149</sup> HIV-related stigma is arguably entwined with the stigma already faced by marginalised groups.

While these difficulties associated with HIV-criminalisation reveal the need for flexibility in legislative pandemic responses, their connection to mode of transmission, length of incubation period, and nature of infection should also be acknowledged. In contrast to COVID-19, an acute respiratory virus, HIV is a chronic infection transmitted by direct contact with specific bodily fluids and also perinatally.<sup>150</sup> As such, HIV risk behaviours are limited, usually involving private,

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Gender Norm Policing and the Production of Gender-Class-Race Categories in Canadian News Coverage’ (2018) 68 *Women’s Studies International Forum* 113. For an Australian example see Elena Jeffreys, Kane Matthews and Alina Thomas (n 138) 130–1.

<sup>145</sup> Logie and Turan (n 141) 2003: ‘Blaming a foreign other for epidemics is commonplace throughout history’; to conceptualise illness in this way harmfully and unproductively, promulgates fear and xenophobia.

<sup>146</sup> See, eg, Heather McNeill, Lucy Manly and Gary Adshead, ‘Demons fans charged in WA after illegally entering state for AFL grant final’ *WAtoday* (online, 28 September 2021) <<https://www.watoday.com.au/national/western-australia/melbourne-demon-fans-arrested-in-regional-wa-after-sneaking-into-state-to-attend-grand-final-20210928-p58vhe.html>>. Also note that none of the offenders had COVID-19.

<sup>147</sup> See Lelliott, Schloenhardt, and Ioannou (n 122) 191, discussing Jessica Marszalek, ‘Enemies of the State’, *The Courier Mail* (Brisbane, 30 July 2020) 1; Queensland Human Rights Commission, ‘Commission Urges Focus on Safety, Not Scapegoating’ (Press Release, 30 July 2020) <[https://www.qhrc.qld.gov.au/\\_data/assets/pdf\\_file/0020/27434/2020.07.30-Media-statement-re-new-Queensland-COVID-cases.pdf](https://www.qhrc.qld.gov.au/_data/assets/pdf_file/0020/27434/2020.07.30-Media-statement-re-new-Queensland-COVID-cases.pdf)>; Ahmed Yussuf, ‘Media Reporting of Two Queensland Teens: “A Form of Doxxing”’, *SBS News* (online, 31 July 2020) <<https://www.sbs.com.au/news/the-feed/article/media-reporting-of-two-queensland-teens-a-form-of-doxxing/y9fq5mgtk>>.

<sup>148</sup> On the importance of community led action see generally Winnie Byanyima, Karl Lauterback and Matthew M Kavanagh, ‘Community Pandemic Response: The Importance of Action led by Communities and the Public Sector’ (2022) 401(10373) *The Lancet (British edition)* 253.

<sup>149</sup> See generally Joan L Williams, Diego J Gonzalez-Medina and Quan Vu Le, ‘Infectious Diseases and Social Stigma’ (2011) 7 *Medical and Health Science Journal* 2.

<sup>150</sup> ‘Coronavirus disease (COVID-19): How is it transmitted?’, *World Health Organisation* (Web Page, 23 December 2021) <<https://www.who.int/news-room/questions-and-answers/item/coronavirus-disease-covid-19-how-is-it-transmitted>>. ‘Global HIV Programme: Mother-to-child transmission of HIV’, *World Health Organisation* (Web Page) <<https://www.who.int/teams/global-hiv-hepatitis-and-stis-programmes/hiv/prevention/mother-to-child-transmission-of-hiv>>. Perinatal transmission is also known as ‘mother-to-child’ or ‘vertical’ transmission.

human-to-human interactions entwined with issues of consent and disclosure.<sup>151</sup> The offences, although targeting various social behaviours, were most concerned with an individual's interaction with the wider public for a limited period of time, either while infectious or when in quarantine.<sup>152</sup> These virological differences are significant because the reasons why criminalisation is ineffective in reducing HIV-transmission do not necessarily translate to the COVID-19 pandemic.

A study of 90 reports of people's experiences of COVID-related policing throughout Australia in 2020 confirmed that these disproportionate impacts manifested during the pandemic. In that study, the authors identified that people's experiences of this policing were influenced by their 'race, age, gender, disability or illness'.<sup>153</sup> We argue that the offences raised concerns in relation to three particular categories: people who were disproportionately impacted by PHSMs; people who were more likely to be exposed to COVID-19 and therefore, more frequently subject to isolation and quarantine requirements;<sup>154</sup> and people who were at increased risk of severe illness and complications from COVID-19. There are numerous vulnerable populations upon which PHSMs placed a disproportionate burden, including, but not limited, to people experiencing homelessness, family violence, disability, drug or alcohol dependencies, and mental illness.<sup>155</sup> People from low socio-economic and culturally and linguistically diverse ('CaLD') backgrounds may additionally have been at increased risk of infection due to overcrowded housing and employment in

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<sup>151</sup> See generally Kirby (n 125) 164. On the intersection of consent and disclosure see Wells and Quick (n 64) 256-257, citing Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 5<sup>th</sup> ed, 2006) 319. Also on the complexities of consent consider people living with HIV who may be vulnerable to circumstances of coercion and intimate partner violence: Pickering Francis and Francis (n 132) 49; Grace (n 138) 442; Scott Burris and Edwin Cameron, 'The Case Against Criminalization of HIV Transmission' (2008) 300(5) *Journal of the American Medical Association* 578, 580. Pragna Patel et al, 'Estimating Per-Act HIV Transmission Risk: A Systematic Review' (2014) 28(10) *AIDS* 1509, 1513-16.

<sup>152</sup> All cases except for Transcript of Proceedings, *Western Australia Police v Parihar* (Magistrates Court of Western Australia, 853-4, Chief Magistrate Heath, 27 April 2022) ('*Parihar*') involved interstate travel-based quarantine breaches.

<sup>153</sup> Vicki Sentas and Louise Boon-Kuo, 'People's Experiences of Pandemic Policing: Why Criminalisation is Bad for the Social Determinants of Health', (2023) 46(4) *University of New South Wales Law Journal* 1356, 1375.

<sup>154</sup> Isolation separates people with an infectious disease from the community, whereas quarantine 'separates and restricts the movement of people who were exposed to a contagious disease' in case they were infected: US Centres for Disease Control and Prevention, 'Port Health' *Centres for Disease Control and Prevention* (Web Page) <[https://www.cdc.gov/port-health/about/?CDC\\_AAref\\_Val=https://www.cdc.gov/quarantine/quarantineisolation.html](https://www.cdc.gov/port-health/about/?CDC_AAref_Val=https://www.cdc.gov/quarantine/quarantineisolation.html)>.

<sup>155</sup> For a more detailed list see National COVID-19 Health and Research Advisory Committee, *Mental Health Impacts of Quarantine and Self-Isolation* (Report, 19 May 2020) 9.



service professions.<sup>156</sup> It must be recognised that for some individuals, particularly those experiencing mental illness and abuse, the threat of criminal sanctions may well have harmfully intensified their distress more than other measures of social regulation.<sup>157</sup>

Although the abovementioned unequal impacts are not necessarily reflected in the cases analysed in the next part of this article, there is evidence of discriminatory enforcement in other jurisdictions. Both the “hard lockdown” of the Public Housing Towers in Melbourne and the highly visible police presence in Fairfield LGA in Sydney disproportionately impacted people from low socio-economic and CaLD backgrounds.<sup>158</sup> Data on fines issued during Melbourne’s first lockdown similarly suggested an over-policing of Aboriginal and Torres Strait Islander peoples and migrant Australians.<sup>159</sup> A Victorian Parliamentary inquiry in 2021 confirmed that people from lower socio-economic areas in Victoria were disproportionately fined by police for COVID-related breaches during this time.<sup>160</sup> A more recent study has found that the imposition of COVID fines was influenced by racial profiling.<sup>161</sup> While the issue of on-the-spot fines in WA by police has not been scrutinised, one observation of the WA approach is that PHSMs were primarily aimed at interstate travellers and it was, therefore, people voluntarily entering the state who were policed rather than the WA resident community.

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<sup>156</sup> See also George Williams and Sophie Rigney, ‘Human Rights in a Pandemic’ in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (The Federation Press, 2021) 134–149, 142, citing Aryati Yashadhana et al, ‘Indigenous Australians at Increased Risk of COVID-19 due to Existing Health and Socioeconomic Inequities’ (2020) 1 *The Lancet Regional Health — Western Pacific* 100007, 100007.

<sup>157</sup> See, eg, UNAIDS, *Rights in the Time of COVID-19: Lessons from HIV for an Effective, Community-Led Response* (Report, 20 March 2020) 9.

<sup>158</sup> See, eg, Osman Faruqui, ‘As Police Enforce COVID-19 Health Orders, a Disproportionate Number of Fines Have Been Issued in Areas Largely Populated by Indigenous or Migrant Australians’, *The Saturday Paper* (online, 18 April 2020) <<https://www.thesaturdaypaper.com.au/news/health/2020/04/18/compliance-fines-under-the-microscope/15871320009710#hrd>>: noting the drastically different approach to fines in the Northern Beaches and Waverley; Duc Dau and Katie Ellis, ‘From Bondi to Fairfield: NSW COVID-19 press conferences, health messaging, and social inequality’ (2022) 188(1) *Media International Australia* 12.

<sup>159</sup> Williams and Rigney (n 156) 145, citing J Taylor, ‘Sudanese and Aboriginal People Overrepresented in Fines from Victoria Police During First Lockdown’, *The Guardian* (online, 28 September 2020) <<https://www.theguardian.com/australia-news/2020/sep/28/sudanese-and-aboriginal-people-overrepresented-in-fines-from-victoria-police-during-first-lockdown>>.

<sup>160</sup> Public Accounts and Estimates Committee, Parliament of Victoria, *Inquiry into the Victorian Government’s Response to the COVID-19 Pandemic* (Parliamentary Paper No 203, February 2021) 266–7.

<sup>161</sup> Tamar Hopkins and Gordana Popovic, *Policing COVID-19 in Victoria: Exploring the Impact of Perceived Race in the Issuing of COVID-19 Fines during 2020* (Report, 2023).

Since pecuniary penalties are intrinsically more burdensome on people in low socio-economic circumstances,<sup>162</sup> the policing of these offences needs to be reviewed to ensure that, in future public health emergencies, police enforcement does not penalise disadvantage and desperation, but rather targets deliberate wrongdoing.<sup>163</sup>

As ‘trust and equity’<sup>164</sup> are evidenced to be factors which greatly contribute to the efficacy of public health responses, it is critical that, going forward, over-policing and discrimination are not just minimised but actively avoided.<sup>165</sup> Indeed, it has been argued that many of the police actions during the height of the pandemic ‘sabotaged public health by criminalising health-positive behaviour’<sup>166</sup> and that in this respect ‘pandemic policing has demonstrated it is incapable of preserving public health’.<sup>167</sup>

In addition to mitigating the discriminatory effects detailed above, the law has an integral role in supporting the welfare of those at increased risk of serious illness and complications from COVID-19. Australia has obligations under international law to respect ‘the dignity, autonomy and liberty’ of all persons.<sup>168</sup> Out of the 14 treaties of which Australia is a party, the *Convention on the Rights of Persons with Disabilities*<sup>169</sup> is especially emblematic of the role of the law in supporting those considered “vulnerable”.<sup>170</sup> While human rights protections in Australia are complex and difficult to enforce, particularly given the absence of national human rights guarantees, it is submitted that legal responses should fulfil human rights

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<sup>162</sup> Gaye Lansdell et al, ‘Infringement Systems in Australia: A Precarious Blurring of Civil and Criminal Sanctions?’ (2012) 37(1) *Alternative Law Journal* 41, 41. See generally Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5<sup>th</sup> ed, 2010) 240–59 for an overview and discussion of equality before the law issues that arise in sentencing.

<sup>163</sup> See, eg, the cases concerning breaches associated with attendance at Australian Rules Football (‘AFL’) games.

<sup>164</sup> Winnie Byanyima, Karl Lauterback and Matthew M Kavanagh, ‘Community Pandemic Response: The Importance of Action led by Communities and the Public Sector’ (2022) 401(10373) *The Lancet (British edition)* 253, 253.

<sup>165</sup> Pickering Francis and Francis (n 132) 48.

<sup>166</sup> Sentas and Boon-Kuo (n 153) 1356.

<sup>167</sup> Ibid 1384.

<sup>168</sup> See Belinda Bennett et al, ‘Australian Law During COVID-19: Meeting the Needs of Older Australians?’ (2022) 41(2) *University of Queensland Law Journal* 127, 137.

<sup>169</sup> *CRPD* (n 121).

<sup>170</sup> See also Bennett et al (n 168) 137. But see 133, citing Majse Lind, Susan Bluck, and Dan P McAdams, ‘More Vulnerable? The Life Story Approach Highlights Older People’s Potential for Strength during the Pandemic’ (2021) 76(2) *Journals of Gerontology: Psychological Sciences* 45: these commentators recognise the negative connotations associated with “vulnerability” that undermine the resilience and ‘psychosocial strength’ of older members of the community and generate ageist attitudes.

obligations and operate consistently with anti-discrimination legislation.<sup>171</sup> People at increased risk of serious illness and complications from COVID-19 include older persons, people with some disabilities, immune deficiencies, chronic illnesses and co-morbidities, those receiving immunosuppressive therapies, and Indigenous populations.<sup>172</sup>

It is important to emphasise that many of these individuals are also impacted by discrimination and stigmatisation as discussed above. For example, many older persons and people with disabilities experienced prolonged isolation; disruption to essential care services; and increased social stigma, ageism and ableism as a result of PHSMs.<sup>173</sup> They were and remain at increased risk of exposure to COVID-19 due to a reliance on care services and physical difficulties with implementing some PHSMs.<sup>174</sup> It has also been observed that:<sup>175</sup>

While the COVID-19 pandemic was associated with increased severe disease and mortality amongst older persons with COVID-19, the pandemic was also characterized by increased ageism, negative stereotypes of older persons, and a devaluing of the lives of older persons ...

The difficulties experienced by older people, particularly those in aged care facilities, also demonstrated the fragility of the health system, and speak to the risk which the pandemic posed to its fundamental integrity, one that has been identified and discussed in recent scholarship.<sup>176</sup> The evidence and scholarship presents a 'complex picture of risk for older persons [and other vulnerable groups], comprising the physical risk of severe disease, the risks of [and associated with] social isolation, and the risks of ageism [and other forms of discrimination]'.<sup>177</sup> Given this complexity, fashioning a supportive rather than

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<sup>171</sup> See especially the *Age Discrimination Act 2004* (Cth) s 10(7); *Disability Discrimination Act 2004* (Cth) s 12(8); *Equal Opportunity Act 1984* (WA) ss 66A, 66V.

<sup>172</sup> Williams and Rigney (n 156) 134–49.

<sup>173</sup> Ivanka Antova, 'Disability Rights During COVID-19: Emergency Law and Guidelines England' (2020) 28(4) *Medical Law Review* 804, 805, discussing A Ruddock and A Gkiouleka, 'I Feel Forgotten: The Impact of COVID-19 on People with Chronic Illness' (online, 2020) <<https://citizen-network.org/library/i-feel-forgotten.html>>. See also UN News, 'Preventing Discrimination Against People with Disabilities in COVID-19 Response' (online, 2020) <<https://news.un.org/en/story/2020/03/1059762>>.

<sup>174</sup> See also Ivanka Antova, 'Disability Rights During COVID-19: Emergency Law and Guidelines England' (2020) 28(4) *Medical Law Review* 804.

<sup>175</sup> Belinda Bennett, Ian Freckelton and Gabrielle Wolf, *COVID-19 Law & Regulation: Rights, Freedoms, and Obligations in a Pandemic* (Oxford University Press, 2023) 284.

<sup>176</sup> Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 5<sup>th</sup> ed, 2023) 356.

<sup>177</sup> Bennett et al (n 168) 133.

discriminatory role for the law involves a thorough balancing exercise of the interests that different individuals in society have in their health and freedoms.<sup>178</sup>

### PART III: THE CASE LAW AND APPROACHES TO SENTENCING

The next section of the article moves to examine the way in which the offences have been approached by the courts. It examines judicial commentary on the relevance of the pandemic context to the criminalisation of the conduct in question and the exercise of sentencing discretion as a further dimension of our critique of the offences. Several key themes identified in the canvassing of the relevant cases are now explored.

#### A Compliance with Fundamental Sentencing Principles

The language and outcomes of appeal decisions convey the importance of fundamental sentencing principles and warn that the circumstances of the pandemic must not override their consistent application. In *Johnson v Vander Sanden* ('*Johnson*'),<sup>179</sup> the Full Court of Appeal held:

[T]he sentencing of persons under the [EMA], in times of emergency such as the COVID-19 pandemic, does not involve some special category of case in which the law is to be applied differently than in other times. The rule of law remains unaffected and the fundamental principles of the criminal law continue unaltered.<sup>180</sup>

In upholding the decision of Hill J in *Vander Sanden v Johnson* ('*Vander Sanden*'),<sup>181</sup> the Court emphasised imprisonment as a penalty of last resort despite the public interest underlying the directions.<sup>182</sup> Similarly in *RDS v Luplau* ('*RDS*'),<sup>183</sup> McGrath J emphasised the universal application of both principles, having stated that they 'have application to all offences *including* offences under the [EMA]'.<sup>184</sup> Both Hill and McGrath JJ held that the sentences in question were 'manifestly

<sup>178</sup> See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 1; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 4(1), 4(2), 6.

<sup>179</sup> [2021] WASCA 27; (2021) 57 WAR 209 ('*Johnson*').

<sup>180</sup> Ibid [3] (Quinlan CJ, Buss P and Mazza JA), quoted in *Tonkin v Busby* [2021] WASC 61 [35] (Allanson J) ('*Tonkin*'); Transcript of Proceedings, *Western Australia Police v Cox* (Magistrates Court of Western Australia, 40528–40530, Magistrate Harries, 25 October 2021) 12 ('*Cox*'), discussed *Babbage* (n 115) 26.

<sup>181</sup> See *Vander Sanden v Johnson* [2020] WASC 331 ('*Vander Sanden*').

<sup>182</sup> *Johnson* (n 179) [4] (Quinlan CJ, Buss P and Mazza JA), discussing *Sentencing Act* (n 93) ss 6(4), 39(3). See also *Dinsdale v The Queen* (2000) 202 CLR 321, 328 [14] (Gleeson CJ and Hayne JJ) ('*Dinsdale*').

<sup>183</sup> [2021] WASC 280 ('*RDS*').

<sup>184</sup> Ibid [78] (McGrath JJ) (emphasis added).

excessive',<sup>185</sup> and resented the appellants to a 6-month community-based order and a \$1000 fine, respectively. Importantly, in *Vander Sanden*, it was the learned magistrate's failure to consider suspension that was found to be in error.<sup>186</sup> Hill J considered a partly or wholly suspended sentence would have been appropriate. A community-based order was only imposed due to time spent in custody and 'should not ... ordinarily be imposed for an offence ... where the offender has avoided the quarantine regime'.<sup>187</sup>

Arguably a "trend" of reduced sentences on appeal highlights the risk for the pandemic context and public interest underlying the offences to result in harsher penalties than ordinarily appropriate.<sup>188</sup> In *Tonkin v Busby* ('*Tonkin*'),<sup>189</sup> Allanson J overturned a sentence of 7 months imprisonment, 5 months suspended, again on grounds of excessiveness.<sup>190</sup> The magistrate's comments indicate an attitude that the need to communicate 'to the community that [PHSMs] must be adhered to'<sup>191</sup> warranted a custodial sentence.<sup>192</sup> While not necessarily representative of sentencing practices more broadly, it is an example of where the pursuit of general deterrence was found to have generated a disproportionate sentence.

More recently, in the Tasmanian case of *Gunn v Reardon and Rogers*,<sup>193</sup> the Court referenced the Western Australian decisions, noting that 'the facts on each of the cases decided in that jurisdiction all differ greatly from one another'. The magistrate in that case, in dealing with a breach of public health directions in entering Tasmania in circumstances where the applicant had provided false information in knowingly breaching the directions stated that '[t]he instant case lacks the mitigation and reasons for sympathy and leniency present in most of these cases, including those that, somewhat surprisingly, were dealt with quite

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<sup>185</sup> 'A sentence may be excessive 'because the wrong type of sentence has been imposed (for example, custodial rather than non-custodial) or because the sentence imposed is manifestly too long': *Tonkin* (n 180) [57], citing *Dinsdale* (n 182) [6].

<sup>186</sup> *Johnson* (n 179) [5] (Quinlan CJ, Buss P and Mazza JA).

<sup>187</sup> *Vander Sanden* (n 181) [65] (Hill J).

<sup>188</sup> For example, *AAN v Butterfield* [2021] WASC 228 ('*AAN*'); *Tonkin* (n 180); *RDS* (n 182). But see *AAN* (n 188) [28]–[31] (Tottle J): although the initial sentence of 7 months, 5 months suspended, was not expressly found to be manifestly excessive, Tottle J found that a more lenient sentence was appropriate.

<sup>189</sup> *Tonkin* (n 180).

<sup>190</sup> *Ibid* [76] (Allanson J).

<sup>191</sup> *Ibid* [28] (Allanson J), quoting ts 5.

<sup>192</sup> *Ibid* [76] (Allanson J): '[t]he sentencing magistrate expressly found that imprisonment was the only appropriate sentence'.

<sup>193</sup> [2022] TASSC 10.

harshly'.<sup>194</sup> The original sentence for the offences — a term of imprisonment of five months with two months suspended — was upheld by the Supreme Court, which found that sentence to be well within the magistrate's discretion and that '[c]ompletely irrespective of the applicant ultimately testing positive to COVID-19, the sentence was justified on grounds of general deterrence and denunciation'.<sup>195</sup>

This sentence has not been appealed, but, by way of contextualisation, the conduct of the applicant involved a level of determination to breach the directions, involving deceit, and which necessitated a significant effort in contact tracing and the imposition of a three-day lockdown in southern Tasmania.

### B The Pandemic Context

Notwithstanding the maintenance of the fundamental principles referenced above, the pandemic context informed the courts' approach to sentencing with respect to the prioritisation of sentencing aims, along with the view of the relative seriousness of the offending conduct. It is important to note at this juncture that the vast majority of prosecutions occurred at the summary level, with the superior courts only involved in the occasional appeal. The implications of hearings at the summary level have been the subject of critique, notably in connection with the 'ideology of triviality' associated with summary level proceedings.<sup>196</sup> Exploration of the specific ramifications in relation to the offences are beyond the scope of this article but this point is noted as a characteristic of the pattern of prosecution.

The case law indicates that judicial consideration of the purpose of the directions to limit transmission, the public interest in uniform compliance, and the role of these offences in generating compliance gave weight to a prioritisation of deterrence.<sup>197</sup> As Hall J stated in *Phillips v Wroe* ('*Phillips*'):<sup>198</sup>

Offences against the [EMA] of failing to comply with directions must be seen in light of the context in which they occur. Where directions are given, as here, in the context of a pandemic, public safety depends

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<sup>194</sup> Ibid [55].

<sup>195</sup> Ibid [87]. Note Bennett, Freckelton and Wolf (n 175) 458 where the authors note that in Germany the sentence imposed was harsher where a person's violation of quarantine resulted in someone else being infected.

<sup>196</sup> Doreen McBarnet, 'Magistrate's Courts and the Ideology of Justice' (1981) 8(2) *British Journal of Law and Society* 181, 189.

<sup>197</sup> *Burbank* (n 105) 19–20; *Vander Sanden* (n 181) [39] (Hill J).

<sup>198</sup> [2022] WASC 48 ('*Phillips*').

upon uniform compliance. Personal and general deterrence is a significant factor in sentencing for such offences.<sup>199</sup>

This prioritisation of deterrence is consistent with all cases citing personal and general deterrence as important sentencing considerations.<sup>200</sup> Personal circumstances, ‘although not irrelevant’, were accordingly given less weight.<sup>201</sup>

Secondly, the ever-evolving circumstances of the pandemic provided the context within which seriousness was assessed.<sup>202</sup> In *Western Australia Police v Burbank* (*‘Burbank’*),<sup>203</sup> circulation of the more virulent Delta Variant of Concern (*‘VOC’*) elevated the risk of the defendant’s conduct and aggravated the seriousness of the offence.<sup>204</sup> Magistrate Holgate also considered that the emergence and circulation of the Delta VOC distinguished the cases in which breaches had occurred in the context of attendance at Australian Rules Football (*‘AFL’*) games from earlier appeal decisions.<sup>205</sup> Similarly, in *Western Australia Police v Parihar* (*‘Parihar’*),<sup>206</sup> Chief Magistrate Heath discussed the circumstances that had led to the introduction of the breached directions, particularly the Mess Hall cluster and resulting concern that cases were circulating in the community.<sup>207</sup> These circumstances increased *both* risk of harm and culpability, as the defendant’s knowledge of the local outbreak, coupled with his failure to act, knowingly risked creating a “super-spreader” event.<sup>208</sup>

The court assesses seriousness in light of aggravating and mitigating factors.<sup>209</sup> The cases, therefore, provide insight into the influence of specific factual

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<sup>199</sup> *Phillips* (n 198) [43] (Hall J).

<sup>200</sup> *Vander Sanden* (n 181) [42] (Hill J); *RDS* (n 182) [66] (McGrath J); *Tonkin* (n 180) [74] (Allanson J); *Babbage* (n 115) 25 (Magistrate Holgate).

<sup>201</sup> *Tonkin* (n 180) [53] (Allanson J).

<sup>202</sup> *AAN* (n 188) [35] (Tottle J).

<sup>203</sup> *Burbank* (n 105).

<sup>204</sup> *Ibid* 19–20 (Magistrate Holgate). See also *Cox* (n 180) 9 (Magistrate Harries).

<sup>205</sup> *Burbank* (n 105) 20 (Magistrate Holgate). See also *Babbage* (n 115) 25, 27 (Magistrate Holgate).

<sup>206</sup> *Parihar* (n 152).

<sup>207</sup> *Ibid* 6 (Chief Magistrate Heath). See, eg, Charlotte Elton, ‘COVID-19 WA: Woman charged after allegedly travelling to South West after Perth Mess Hall rave’, *PerthNow* (online, 25 December 2021) <<https://www.perthnow.com.au/news/coronavirus/covid-19-wa-woman-charged-after-allegedly-travelling-to-south-west-after-perth-mess-hall-rave-c-5082968>>; Jessica Warriner, ‘Two new WA COVID-19 cases in Perth outbreak as Mark McGowan warns close contacts unlikely to be found’, *ABC News* (online, 29 December 2021) <<https://www.abc.net.au/news/2021-12-29/two-new-local-covid-19-cases-recorded-in-wa-outbreak/100729632>>; Department of Health (WA), ‘COVID-19 update 26 December 2021’ (Media Release, 26 December 2021).

<sup>208</sup> *Parihar* (n 152) 6 (Chief Magistrate Heath).

<sup>209</sup> *Phillips* (n 198) [37] (Hall J); *RDS* (n 182) [57] (McGrath J), discussing ss 6(1) and 6(2) of the *Sentencing Act* (n 93).

circumstances on sentencing outcomes. Hall J outlined factors considered in the proceeding appeal decisions as follows: ‘the degree of risk of the offender introducing this disease in [WA], whether deception was involved ... the extent to which the offender sought to avoid the quarantine regime and the extent to which the offender complied with the regime’.<sup>210</sup> While these factors are interconnected and wide-ranging, ultimately, the courts considered factual circumstances that increased *risk of transmission* and *culpability*.

Risk-relevant factual circumstances identified in the cases included vaccination;<sup>211</sup> mask-wearing;<sup>212</sup> state or territory travelled from;<sup>213</sup> timing and result of COVID-19 tests;<sup>214</sup> duration of offending conduct;<sup>215</sup> and degree of public exposure.<sup>216</sup> Judicial consideration of these factors provides insight into the court’s interpretation of the purpose and scope of the offences. For example, the fact that testing negative after committing the offence was not a mitigating factor indicates that these offences only targeted the creation of risk. As Hill J in *Vander Sanden* wrote:

[T]he Directions seek to address the *risk* of COVID-19 being reintroduced into [WA], and how this risk can best be managed. The Directions are not solely aimed at the management of people who have the virus.<sup>217</sup>

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<sup>210</sup> *Phillips* (n 198) [47] (Hall J).

<sup>211</sup> *Ibid* [45] (Hall J); *Cox* (n 180) 10 (Magistrate Harries); *Babbage* (n 115) 26 (Magistrate Holgate); *Burbank* (n 105) 19, 22 (Magistrate Holgate). Although vaccination is mentioned as a relevant consideration, it is unclear how much weight it is given, particularly as no cases involved wholly unvaccinated offenders. Further, in *Cox*, vaccination appears to be considered as a factor that mitigates risk, whilst one dose only reduces risk minimally: *Cox* (n 180) 6 (T M Andrews), 10 (Magistrate Harries).

<sup>212</sup> *Phillips* (n 198) [45] (Hall J).

<sup>213</sup> *Ibid*; *Vander Sanden* (n 181) [41] (Hill J); *Babbage* (n 115) 25 (Magistrate Holgate); *Burbank* (n 105) 22 (Magistrate Holgate); *Cox* (n 180) 9 (Magistrate Harries).

<sup>214</sup> *Vander Sanden* (n 181) [46] (Hill J); *Babbage* (n 115) 26 (Magistrate Holgate); *Burbank* (n 105) 19, 22 (Magistrate Holgate); *Cox* (n 180) 9, 14 (Magistrate Harries); *Tonkin* (n 180) [27]–[29], [71], [76] (Allanson J).

<sup>215</sup> *Phillips* (n 198) [38], [44] (Hall J); *Tonkin* (n 180) [72] (Allanson J).

<sup>216</sup> *Vander Sanden* (n 181) [45] (Hill J); *Babbage* (n 115) 26, 28 (Magistrate Holgate); *Burbank* (n 105) 21, 23–4 (Magistrate Holgate); *Cox* (n 180) 9 (Magistrate Harries); *Phillips* (n 198) [45] (Hall J).

<sup>217</sup> *Vander Sanden* (n 181) [46] (Hill J), quoted in *Tonkin* (n 180) [28] (Allanson J) (original emphasis). See also *Burbank* (n 105) [19] (Magistrate Holgate); *Babbage* (n 115); *Cox* (n 180) 6, 11 (Magistrate Harries): Burbank and Babbage were tested on 15 September 2021 and arrived in Perth a week later on 22 September, those tests were irrelevant as they did not indicate risk at the time of breach. Cox, by contrast, was tested on 11 September 2021 and arrived on 23 September 2021; the test appears to have been taken into account as a step towards mitigating risk.



In *Tonkin*, Allanson J distinguished from this the receipt of a negative test pre-breach on the basis that it reduced risk.<sup>218</sup> The appellant had tested negative for a second time on day 11 of his 14-day quarantine before breaching quarantine on day 12.<sup>219</sup> His Honour gave considerable weight to the timing of this second test result in determining that the initial custodial sentence was inappropriate.<sup>220</sup> Importantly, it was the receipt and knowledge of the negative test, after 11 days of compliance, that proved significant.<sup>221</sup> Allanson J's commentary implies that an offender's attitude, at least to the extent demonstrated by conduct, influenced how these factual circumstances were considered. Conduct indicating indifference or a deliberate, rather than spontaneous, attempt to circumvent requirements increased culpability.<sup>222</sup> Being a close contact, receiving a positive test result pre-breach, or being symptomatic might have therefore featured as significant aggravating factors.

Deception and public exposure emerged as the most serious aggravating factors. In the AFL cases, the deception demonstrated by the offenders in entering WA and the number of people they could have exposed elevated the seriousness of these offences to the worst category of case.<sup>223</sup> In *Babbage* and *Burbank*, Melbourne-based offenders obtained Northern Territory drivers' licences, changed their banking addresses, and produced fraudulent documents including a property lease to falsely represent they had been living in a "low-risk" jurisdiction prior to arrival.<sup>224</sup> Their method of entry was considered the most serious charge as it facilitated their avoidance of all PHSMs.<sup>225</sup> The degree of public exposure was extensive given the offenders attended cafes, the AFL grand final with 61,000 people, after-parties, and even travelled to other regions of the state while in WA.<sup>226</sup> Accordingly, only a partial 10% s 9AA discount was awarded for their early plea, which reduced their total custodial sentence from 11 to 10

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<sup>218</sup> *Tonkin* (n 180) [29] (Allanson J).

<sup>219</sup> Cf *AAN* (n 188) [9] (Tottle J) where the appellant had been tested but was unaware of the result at the time of the breach.

<sup>220</sup> *Tonkin* (n 180) [76] (Allanson J).

<sup>221</sup> *Ibid* [71] (Allanson J).

<sup>222</sup> For an example of disregard, the offender in *AAN* breached without knowing the results of his COVID-19 test: *AAN* (n 188) [9] (Tottle J).

<sup>223</sup> *Babbage* (n 115) 28 (Magistrate Holgate); *Burbank* (n 105) 21, 23 (Magistrate Holgate).

<sup>224</sup> *Babbage* (n 115) 25 (Magistrate Holgate) ('*Babbage*').

<sup>225</sup> *Burbank* (n 105) 23 (Magistrate Holgate).

<sup>226</sup> *Ibid* 19 (Magistrate Holgate).

months.<sup>227</sup> Their conduct was deemed too serious to wholly suspend their sentences.<sup>228</sup>

Another compelling factor in the cases analysed was the offender's state of mind at the time of, and motivation behind, the offending. In *AAN v Butterfield* ('AAN')<sup>229</sup> and *Tonkin*, there were express statements in each decision concerning motivation, which included that selfishness aggravated the seriousness of the offence;<sup>230</sup> and that the appellant had had 'no good reason' for breaching quarantine.<sup>231</sup> In *Babbage* and *Burbank*, Magistrate Harries similarly emphasised that the sole motivation of the offenders was to attend the AFL grand final.<sup>232</sup> Such conduct sits in stark contrast to RDS, whose visit to her critically ill father in breach of the restrictions occurred 'in the most extenuating of circumstances';<sup>233</sup> and to the offender's emotional distress in *Phillips*.<sup>234</sup> While there was no discussion of the statutory 'reasonable excuse' defence under s 86 of the *EMA* in the case law, its existence supports the relevance of the circumstances that contribute to or cause an offender's breach.<sup>235</sup>

### C Range of Sentences

Table 1: Range of sentences

<i>Defendant/conduct</i>	<i>First instance</i>	<i>Appeal</i>
<i>Vander Sanden</i> Deception	Imprisonment for 6 months and 1 day	6-month community-based order
<i>Tonkin</i> Quarantine breach High risk public exposure Negative test result	7 months imprisonment, 2 months to serve, 5 months suspended for 12 months	\$6000 fine

<sup>227</sup> *Babbage* (n 115) 29 (Magistrate Holgate).

<sup>228</sup> *Ibid* (Magistrate Holgate).

<sup>229</sup> *AAN* (n 188).

<sup>230</sup> *Ibid* [35]. But see *Tonkin* (n 180) [73] (Allanson J): although the appellant had 'no good reason' for breaching quarantine, substantial compliance suggests a sudden, spontaneous breach on day 12.

<sup>231</sup> *Tonkin* (n 180) [73] (Allanson J).

<sup>232</sup> Cf *Cox* (n 180).

<sup>233</sup> *RDS* (n 182) [20], [25], [99] (McGrath J).

<sup>234</sup> See especially *Phillips* (n 198) [38] (Hall J). See also [20] (Hall J).

<sup>235</sup> See *EMA* (n 7) s 86(3).

<i>AAN</i> Quarantine breach Potentially exposed two people	7 months imprisonment, 2 months to serve, balance suspended for 12 months	6-month community-based order and spent conviction order
<i>RDS</i> Quarantine breach in extenuating circumstances Low risk public exposure	Imprisonment for 6 months and 1 day, wholly suspended	\$1000 fine and spent conviction order
<i>Phillips</i> Quarantine breach	Imprisonment for 6 months and 1 day, partially suspended after 2 months	6 months and 1 day, wholly suspended for 6 months
<i>Babbage</i> Avoidance of quarantine Deception High risk public exposure	10 months imprisonment, 3 months to serve, 7 months suspended for 10 months	
<i>Burbank</i> Avoidance of quarantine Deception High risk public exposure	10 months imprisonment, 3 months to serve, 7 months suspended for 10 months	
<i>Cox</i> Avoidance of quarantine Deception Public exposure	7 months imprisonment, 1 month to serve, 6 months suspended for 12 months	
<i>Power*</i>	8 months imprisonment, wholly suspended	
<i>Parihar</i> Deception Public exposure	7 months imprisonment, wholly suspended	

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\* Sentencing decision not obtained due to adjournment.

Where a custodial sentence was imposed these were either partially or wholly suspended.<sup>236</sup> While this may seem at odds with judicial commentary as to the seriousness of these offences,<sup>237</sup> it is clear from the language and reasoning of the judgments that even wholly suspended sentences are regarded as severe penalties of last resort.<sup>238</sup> In *Johnson* the Court, by reference to Kirby J's discussion of s 76 of the *Sentencing Act* in *Dinsdale v The Queen*,<sup>239</sup> explained that suspension requires two steps such that the Court must consider imprisonment a necessary penalty as a precondition to considering whether that sentence can then be suspended. This approach demonstrates that suspension was not regarded as a 'soft option',<sup>240</sup> but used to mitigate the 'effect of imprisonment' on the offender.<sup>241</sup>

#### D Prosecutorial Approaches

The court's view of the seriousness of the offending conduct and relative seriousness of the offences did not always reflect the compilation and presentation of the prosecution's case. At times there was a lack of precision in the prosecution's case regarding which directions applied,<sup>242</sup> or the specific conduct constituting each charge.<sup>243</sup> Notably in *Phillips*, these issues included the grounds of appeal, with the appeal judge noting that '[i]t was not apparent, either from the charges themselves or the statement of facts read by the prosecutor, what conduct related to each of the charges'.<sup>244</sup> The confusion led the learned magistrate to make an express factual error that one charge concerned a police direction when in fact, it related to a failure to wear a mask whilst being transported by police.<sup>245</sup> Hall J held that this error was so fundamental it prevented the sentencing discretion from being properly exercised.<sup>246</sup>

Our examination of the offences both "in the books" and "in action"<sup>247</sup> reveals the WA Government's primary reliance on the *EMA* to implement and enforce PHSMs. Most cases concerned interstate travel and involved either an individual's failure

<sup>236</sup> *Phillips* (n 198); *Babbage* (n 115); *Burbank* (n 105); *Parihar* (n 152).

<sup>237</sup> See especially *RDS* (n 182) [93]–[94] (McGrath J).

<sup>238</sup> See, eg, *Babbage* (n 115) 29 (Magistrate Holgate).

<sup>239</sup> *Dinsdale* (n 182) [76] (Kirby J).

<sup>240</sup> *Johnson* (n 179) [76] (Quinlan CJ, Buss P and Mazza JA).

<sup>241</sup> *Tonkin* (n 180) [36] (Allanson J). See also *Cox* (n 180) 12 (Magistrate Harries).

<sup>242</sup> See *Tonkin* (n 180) [13]–[16] (Allanson J).

<sup>243</sup> See *Phillips* (n 198) [31] (Hall J).

<sup>244</sup> *Phillips* (n 198) [31] (Hall J).

<sup>245</sup> *Ibid* [31]–[34].

<sup>246</sup> *Ibid* [6], [36]–[37].

<sup>247</sup> See generally Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12.

to comply with quarantine directions or their avoidance of the quarantine regime entirely. The judiciary's approach to sentencing was consistent across the cases analysed. The pandemic context afforded more weight to deterrence as a sentencing aim and informed the courts' assessment of seriousness, while emphasising the need for the fundamental principles of criminal law to be maintained. While the broad range of conduct captured by these offences meant each case turned on its own facts,<sup>248</sup> there was consistency in the courts' identification and consideration of factors relating to *risk of transmission* and *culpability*, which revealed the deterrent purpose of these offences to generate compliance. While no express criticism nor endorsement of the criminalisation of these behaviours surfaced in the case law, there was commentary emphasising the seriousness of these offences in the pandemic context and perhaps an implicit deference to the public health interest protected. These observations are useful, although not a basis for inferring that they indicate judicial support for the criminalisation of PHSMs.

#### PART IV: EVALUATING THE USE OF CRIMINAL SANCTIONS IN THE WA COVID-19 RESPONSE

While the breadth of the offences may intuitively appear an overreach of the criminal law, patterns of judicial interpretation and sentencing arguably placed them within justifiable limits, in light of the theoretical justifications discussed in Part II. What emerges from the appeal decisions is that the consequentialist aim of general deterrence was fettered by the exercise of the sentencing discretion, which prioritised proportionate sentencing and reserved imprisonment as a penalty of last resort.<sup>249</sup> Proportionality in sentencing was addressed through the courts' consideration of factual circumstances that increased *risk of transmission* and *culpability*.<sup>250</sup>

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<sup>248</sup> See also *Vander Sanden* (n 181) [38] (Hill J); *Tonkin* (n 180) [30] (Allanson J).

<sup>249</sup> *Sentencing Act* (n 93) ss 3(1), 6(1)–(4); *Johnson* (n 179) [3] (Quinlan CJ, Buss P and Mazza JA); *RDS* (n 182) [78] (McGrath J). See generally Bronitt and McSherry (n 63) 18, citing Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offences* (Report, ALRC Report 103, 13 September 2006) 133, 149–51. See also Sarah J Summers, *Sentencing and Human Rights: The Limits on Punishment* (Oxford University Press, 2023) 91, 91, 93, citing Youngjae Lee, 'Why Proportionality Matters' (2012) 160(6) *University of Pennsylvania Law Review* 1835, 1836.

<sup>250</sup> See generally Bronitt and McSherry (n 63) 18–19, 21; Richard G Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19(6) *Melbourne University Law Review* 489. Consider also the retributivist language in *Phillips* (n 200) 3 (Hall J): '... whilst the offence was serious enough to deserve a sentence of imprisonment, that sentence should be wholly suspended' (emphasis added).

Though s 6(1)–(3) of the *Sentencing Act* facilitates proportionate sentencing, whether criminalisation itself is a ‘proportionate response’<sup>251</sup> depends upon the balancing of the interests at stake. Firstly, as discussed in Part II, the offences sought to prevent probable, significant, and irreparable harm. While expanding on the accepted core of harm-based crimes,<sup>252</sup> the gravity of the consequences anticipated was regarded as meriting the adoption of a precautionary approach which resulted in pre-emptive legal intervention.<sup>253</sup> Secondly, the courts’ consideration of culpability in sentencing indicated the consideration of wrongdoing, such that judicial interpretation of the offences appears to satisfy Ashworth and Zedner’s proposed limits for criminalising the creation of risk. We also suggest that the existence of the ‘reasonable excuse’ defence, though not discussed in the case law, should in theory also operate to minimise the discriminatory impacts on people for whom PHSMs placed a disproportionate burden.<sup>254</sup>

Despite the proposition that the *EMA-PHA* framework justifiably used the pragmatic and symbolic functions of criminalisation to manage a significant risk, it is submitted that the censure of criminal sanction could still only be regarded as appropriate if the offences fulfilled their deterrent purpose and generated substantial compliance with PHSMs.<sup>255</sup> Although there was no ‘controlled experiment’ to measure the efficacy of alternative pandemic responses in a WA context,<sup>256</sup> lessons from the HIV experience and statistical evidence on the application of the offences are instructive. In Part II some of the extensive literature on the HIV experience was explored. This article now turns to the available qualitative data concerning the offences in WA.<sup>257</sup>

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<sup>251</sup> See generally Andrew von Hirsch, ‘Proportionality in the Philosophy of Punishment’ (1992) 16 *Crime and Justice* 55, 55–6.

<sup>252</sup> *Crimes, Harms, and Wrongs* (n 75) 75.

<sup>253</sup> Ashworth and Zedner, *Preventive Justice* (n 72) 116.

<sup>254</sup> As discussed above in Part II.B above, this may include people experiencing homelessness, family violence, mental illness, disability and drug or alcohol dependencies.

<sup>255</sup> See generally Lelliott, Schloenhardt, and Ioannou (n 122) 167, citing Horder (n 74) 73–7; Douglas Husak, ‘The Criminal Law as Last Resort’ (2004) 24(2) *Oxford Journal of Legal Studies* 207, 208. See Phillips (n 198) [43] (Hall J): ‘public safety depends on uniform compliance’.

<sup>256</sup> Heather McNeill, ‘A Timeline of WA’s COVID-19 Response: Was Our Success Luck, Good Management, or a Bit of Both?’ *WAtoday* (online, 28 August 2020) <<https://www.watoday.com.au/national/western-australia/a-timeline-of-wa-s-covid-19-response-was-our-success-luck-good-management-or-a-bit-of-both-20200827-p55q03.html>>.

<sup>257</sup> Burns and Hutchinson (n 19) 159, 167.

In WA, 219, 746 and 1,171 people were 'proceeded against'<sup>258</sup> for the offences during 2019–2020, 2020–2021 and 2021–2022, respectively.<sup>259</sup> Over two-thirds of these were male,<sup>260</sup> and more than one-third nationally were aged between 20 and 29 years.<sup>261</sup> Given limited data and inconsistencies across jurisdictions, these statistics should be interpreted cautiously.<sup>262</sup> Nevertheless, it does appear that young males were sanctioned most commonly Australia-wide.<sup>263</sup> Empirical research on convicted persons' characteristics would assist in determining why: whether penalties were an ineffective deterrent; socio-economic circumstances presented barriers to compliance; or young males were simply more visible to police by virtue of their public behaviours. While not necessarily representative of this demographic, the offender in *AAN* failed to appreciate both the seriousness of his offence and that imprisonment was a sentencing option.<sup>264</sup>

Border restrictions and 'snap lockdowns'<sup>265</sup> enabled WA to live comparatively unaffected by the pandemic, until the arrival of the highly transmissible Omicron

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<sup>258</sup> Note that 'data relating to police proceedings for [WA]' is not included in publications by the Australian Bureau of Statistics: Australian Bureau of Statistics, 'Recorded Crime: Offenders methodology', *Australian Bureau of Statistics* (Web Page, 10 February 2022) '<<https://www.abs.gov.au/methodologies/recorded-crime-offenders-methodology/2020-21>>.

<sup>259</sup> Australian Bureau of Statistics, 'Recorded Crime: Offenders', *Australian Bureau of Statistics* (Web Page, 11 February 2021) '<<https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/2019-20#covid-19-related-offences>>; Australian Bureau of Statistics, 'Recorded Crime: Offenders', *Australian Bureau of Statistics* (Web Page, 10 February 2022) '<<https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release#cite-window2>>; Australian Bureau of Statistics, 'Recorded Crime: Offenders', *Australian Bureau of Statistics* (Web Page, 9 February 2023) '<<https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release#covid-19-related-offences>>.

<sup>260</sup> 65.8%, 62.3% and 67.7%, recorded in 2019–2020, 2020–2021 and 2021–2022, respectively.

<sup>261</sup> 42%, 36.4% and 34% offenders nationally were aged between 20 and 29 years in 2019–2020, 2020–2021, and 2021–2022 respectively.

<sup>262</sup> Australian Bureau of Statistics, 'Recorded Crime: Offenders', *Australian Bureau of Statistics* (Web Page, 9 February 2023) '<<https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release#covid-19-related-offences>>.

<sup>263</sup> *Ibid.*

<sup>264</sup> *AAN* (n 188) [29] (Tottle J).

<sup>265</sup> See, eg, Government of Western Australia, '4-day Lockdown Introduced for Perth and Peel' (Media Release, 28 June 2021) '<<https://www.wa.gov.au/government/announcements/4-day-lockdown-introduced-perth-and-peel>>; Government of Western Australia, 'Perth Metro and Peel to enter a 3-day Lockdown' (Media Release, 23 April 2021) '<<https://www.wa.gov.au/government/announcements/perth-metro-and-peel-enter-3-day-lockdown>>; Government of Western Australia, 'Perth Metro, Peel and South West to Enter Hard Lockdown' (Media Release, 31 January 2021) '<<https://www.wa.gov.au/government/announcements/perth-metro-peel-and-south-west-enter-hard-lockdown>>. On the efficacy of such measures compared with New South Wales and Victoria see Rizzi and Tulich (n 23) 6, discussing Aisha Dow and Melissa Cunningham, 'NSW Too Slow to Lock Down so Borders Should be Closed: Epidemiologists' (online, 28 June 2021) '<<https://www.theage.com.au/national/victoria/nsw-too-slow-to-lock-down-so-borders-should-be-closed-epidemiologists-20210628-p584y4.html>>.

VOC in 2022.<sup>266</sup> While these measures were effective in preventing widespread community transmission in WA,<sup>267</sup> there is a lack of qualitative data around the influence of criminal sanctions on compliance and, therefore, the efficacy of the offences. Similarly, quantitative data on the effect of relaxing mandates on vaccination rates and case numbers in WA,<sup>268</sup> and comparative analyses of government responses, could gather further evidence of the broader public health and social effects of criminalisation.<sup>269</sup> As it was geographic isolation that made the “controlled border” possible,<sup>270</sup> it is clear that geographic, socio-economic and cultural circumstances had an impact on the efficacy of PHSMs generally. Comparative research must, therefore, be sensitive to these differences in order to be valuable.<sup>271</sup>

Statistics also demonstrate that the efficacy of criminalisation in generating compliance was inseparable from the way in which PHSMs were utilised. The majority of the offences occurred in Victoria:<sup>272</sup> a state that faced extended restrictions, including an extended lockdown of 112 days.<sup>273</sup> By July 2022 the Victorian Government was rejecting health advice to mandate PHSMs on the basis

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<sup>266</sup> Government of Western Australia, ‘WA’s Updated Safe Transition Plan from 5 February, 2022’ (Media Release, 20 January 2022) <<https://www.wa.gov.au/government/announcements/was-updated-safe-transition-plan-5-february-2022>>; Government of Western Australia, ‘New Public Health and Social Measures from Monday, 21 February’ (Media Release, 18 February 2022) <<https://www.wa.gov.au/government/announcements/new-public-health-and-social-measures-monday-21-february>>; Department of Health, ‘COVID-19 Update 18 January 2022’ (Media Release, 18 January 2022) <<https://ww2.health.wa.gov.au/Media-releases/2022/COVID19-update-18-January-2022>>; Department of Health, ‘COVID-19 Viral Fragments Detected in WA Wastewater’ (Media Release, 28 January 2022) <<https://ww2.health.wa.gov.au/Media-releases/2022/COVID-19-viral-fragments-detected-in-WA-wastewater>>.

<sup>267</sup> *Palmer v Western Australia [No 4]* [2020] FCA 1221 (25 Aug 2020) [315], [366] (Rangiah J): ‘the border restrictions presently reduce the probability of COVID-19 being imported into WA to a very substantial extent, broadly by somewhere in the region of 85%–90%. Screening and PCR testing would not have the same effectiveness in preventing importation of the virus.’

<sup>268</sup> Including hospitalisations, intensive care, and mortality rates.

<sup>269</sup> See especially Lawrence O Gostin et al, ‘Human rights and the COVID-19 pandemic: a retrospective and prospective analysis’ (2023) 401(10371) *The Lancet: Health Policy* 154, 155.

<sup>270</sup> McNeill (n 256).

<sup>271</sup> See, eg, Frederik E Juul et al, ‘Mortality in Norway and Sweden During the COVID-19 Pandemic’ (2022) 50(1) *Scandinavian Journal of Public Health* 38.

<sup>272</sup> ‘Recorded Crime: Offenders’, *Australian Bureau of Statistics* (Web Page, 10 February 2022) <<https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release#cite-window2>>.

<sup>273</sup> See, eg, ‘Covid in Australia: Melbourne to Exit 112-Day Lockdown’, *BBC NEWS* (online, 26 October 2020) <<https://www.bbc.com/news/world-australia-54686812>>; Chip Le Grand, ‘Melbourne ground zero for lockdown harms, says health expert’ *The Age* (online, 24 September 2022) <<https://www.theage.com.au/national/victoria/melbourne-ground-zero-for-lockdown-harms-says-health-expert-20220922-p5bkcc.html>>.



that compliance with further restrictions was predicted to be low.<sup>274</sup> In contrast to the high levels of public support for the “controlled border” in WA, the Melbourne experience illustrates that as sentiments of lockdown fatigue grew, PHSMs and by extension criminalisation became less effective.<sup>275</sup>

A further question around the efficacy of compliance with the offences arises in connection with the imposition of suspended sentences for high-profile border breaches. Although judicial commentary reveals that these sentences are the penultimate penalty before imprisonment, public perception may have differed.<sup>276</sup> The 8 month wholly suspended sentence imposed on Neville Power generated headlines that he ‘avoid[ed]’, ‘dodge[d]’ and was ‘spared jail’.<sup>277</sup> Such reporting may have reflected and even encouraged a perception that suspended sentences are less serious than what actually is the case according to established approaches to sentencing. While this potential mismatch between judicial and public perception may have impacted the ability of suspended sentences to achieve general deterrence, we would also suggest that the influence on deterrence of the initial publicity surrounding criminalisation, and the consequences of successful prosecution, should not be discounted.<sup>278</sup>

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<sup>274</sup> Annika Smethurst, ‘Why the Victorian Government Won’t Go Harder on COVID Restrictions’, *The Age* (online, 12 July 2022) <<https://www.theage.com.au/national/victoria/why-the-victorian-government-won-t-go-harder-on-covid-restrictions-20220712-p5b0zz.html>>.

<sup>275</sup> See Dau and Ellis (n 158). See also Ian Freckelton, ‘Editorial: COVID-19 as a disruptor and a catalyst for change’ (2021) 28(3) *Journal of Law and Medicine* 597, 599.

<sup>276</sup> R A Duff, *Punishment, Communication, and Community* (Oxford University Press, 2001) 4.

<sup>277</sup> See, eg, Peter de Kruijff, ‘Neville Power Avoids Jail For COVID-19 Helicopter Border Breach’, *The Sydney Morning Herald* (online, 23 March 2022) <<https://www.smh.com.au/national/neville-power-avoids-jail-for-covid-19-helicopter-border-breach-20220323-p5a79n.html>>; Michael Bennet, ‘Nev Power And Son Dodge Jail For WA Border Breach’, *Financial Review* (online, 23 March 2022) <<https://www.afr.com/wealth/people/nev-power-and-son-dodge-jail-for-wa-border-breach-20220323-p5a76h>>; Michael Ramsey, ‘Nev Power Spared Jail Over ‘Disrespectful And Foolish’ COVID Breach’, *The West Australian* (online, 23 March 2022) <<https://www.perthnow.com.au/news/court-justice/nev-power-spared-jail-over-wa-virus-breach-c-6176855>>; ‘Millionaire Neville Power Avoids Jail For ‘Deliberate And Disrespectful’ Flouting Of WA Covid Restrictions’, *The Guardian* (23 March 2022) <<https://www.theguardian.com/australia-news/2022/mar/23/millionaire-neville-power-avoids-jail-for-deliberate-and-disrespectful-flouting-of-wa-covid-restrictions>>.

<sup>278</sup> See, eg, Peter de Kruijff, ‘Police Seek Prison Term for Former COVID-19 Recovery Boss After WA Border Breach’ (online, 11 February 2022) <<https://www.smh.com.au/national/former-national-covid-commission-boss-to-plead-guilty-over-wa-border-breach-20220211-p59vpk.html>>. See especially Government of Western Australia, ‘Urgent Legislation to Support State’s COVID-19 Response’ (Media Release, 31 March 2020) <<https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/03/Urgent-legislation-to-support-States-COVID-19-response.aspx>>; Government of Western Australia, ‘Police Squad to Enforce COVID-19 Restrictions’ (Media Release, 29 March 2020) <<https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/03/Police-squad-to-enforce-COVID-19-restrictions.aspx>>.

## CONCLUSION

Criminal offences reflect the values and priorities of the society from which they stem.<sup>279</sup> The COVID-19 pandemic, and indeed public health crises more broadly, require governments to tackle the complex balancing of individual and collective interests and to mitigate discriminatory outcomes. In WA, these demands appear to have prompted a communitarian shift in legislative responses that saw a recalibration of what constitutes ‘criminal harm’. The offences effected this shift by imposing criminal sanctions on those who, wrongfully, put their own interests above the welfare of the community. Whether criminalisation was justified requires serious consideration of whether the offences, both in word and action, reflect the central limiting concepts that underlie theories of criminalisation and the punitive regime associated with this.

As preventive offences, the offences intuitively raise concerns of overcriminalisation by expanding the traditional contours of criminal law beyond substantive harm-based crimes.<sup>280</sup> Further, and unusually, the offences lacked association with innately dangerous activities, instead targeting social human behaviours that we would ordinarily encourage. What emerges from our analysis is that patterns of judicial interpretation and sentencing aligned (at least at lower and appellate court levels) the operation of the offences with jurisprudence by upholding principles of proportionate sentencing and imprisonment as a penalty of last resort.

To assess efficacy and explore the social consequences of criminalisation in this instance, insights were drawn from the HIV experience and from available quantitative data on the offences. Our analysis concludes that the most significant risk with the *EMA-PHA* framework was that it may have generated disproportionate impacts, primarily through policing and the provision of on-the-spot fines. We also note that the effectiveness of criminal sanctions as a deterrent may well have waned with the prolonged exercise of immense executive power.

While scholarship concerning HIV-criminalisation provides wise counsel regarding the risks associated with using the criminal law to effect communicable disease control, it is not determinative of our assessment of the offences associated with the *EMA-PHA* framework. We conclude that while there is no place for criminalisation to facilitate PHSMs for HIV and other pathogens

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<sup>279</sup> See generally Bronitt and McSherry (n 63) 6, citing Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968) 364.

<sup>280</sup> *Crimes, Harms, and Wrongs* (n 75) 75–76; Ashworth, ‘Is the Criminal Law a Lost Cause?’ (n 74) 225–6.

transmitted by direct-contact routes,<sup>281</sup> there is scope for its use in relation to virulent respiratory pathogens with pandemic potential.<sup>282</sup> When faced with the prospect of catastrophic harm, most especially when that harm falls disproportionately on particular societal groups, the nuanced and proportionate use of criminalisation is not only justified but, we would argue, necessary to fulfill human rights obligations and mitigate the unequal impacts of infectious disease outbreaks. Looking forward, if criminal sanctions are able to establish an effective quarantine or containment regime that could avoid extended lockdowns and restrictions, criminalisation itself will minimise the adverse public health and social consequences resulting from PHSMs.

While the offences sought to pragmatically manage a risk, the symbolic aspects of criminalisation functioned to communicate to the community the seriousness of the pandemic and that the failure to comply was wrongful in a criminal sense. By doing so, the offences sent a message to vulnerable members of the community that their lives mattered. The complexity of the balancing of interests demonstrated the need for legislative responses to be proportionate, fair and nuanced. Unprecedented times saw a necessary expansion of executive power, but evidence- and theory-based recommendations will improve government accountability and the overall success of future pandemic responses.

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<sup>281</sup> Consider Mpox and viral haemorrhagic fevers: see generally Willey, Sherwood and Woolverton (n 11) 901.

<sup>282</sup> Such as influenza A H5N1 (avian influenza), which has appeared several times over the last decade with a mortality rate of almost 60%: Madigan et al (n 1) 874.