PANDEMICS, PUNISHMENT, AND PUBLIC HEALTH: COVID-19 AND CRIMINAL LAW IN AUSTRALIA

JOSEPH LELLIOTT,* ANDREAS SCHLOENHARDT,** AND RUBY IOANNOU***

This article examines the scope, application, and implications of criminal offences relating to the containment of COVID-19 in Australia. Drawing in part on existing research concerning criminalisation of HIV transmission, the article highlights actual and potential discriminatory consequences of the criminal justice approach to COVID-19, as well as consequences for persons' right to health. The article concludes that criminal offences relating to the spread of the virus must be precisely and narrowly circumscribed to be both fair and meaningful. Criminal prosecution and punishment can only be justified in a very small number of situations. Broad use of coercive and punitive powers, together with stigmatising rhetoric, may well be counterproductive to public health goals.

I INTRODUCTION

The spread of COVID-19 (in full, the Coronavirus disease 2019), which can cause fever, breathing difficulties and, in severe cases, pneumonia (leading to the death of some patients), raises questions about the criminal liability of persons who transmit the virus or risk its spread to others.[1] In April 2020, the Federal Minister for Health warned that persons spreading the virus in Australia could face jail time and that deliberate transmission may lead to sentences up to life imprisonment.[2] The criminal laws of all States and Territories contain offences criminalising the transmission of disease in certain circumstances. Most of these offences date back to the 1990s and were introduced or amended in response to the rise and spread of HIV/AIDS at that time. In 2020, some Australian jurisdictions introduced additional provisions or extended existing ones specifically to criminalise the

* LLB/BA, PhD (Qld), Lecturer, The University of Queensland, School of Law, Brisbane, Australia.
** PhD (SA), Professor of Criminal Law, The University of Queensland, School of Law, Brisbane, Australia; Honorary Professor for Foreign and International Criminal Law, University of Vienna, Faculty of Law, Vienna, Austria.
*** LLB/BA candidate, The University of Queensland, School of Law, Brisbane, Australia.

1 The terms 'virus' and 'disease' are used interchangeably in this article. The virus that causes COVID-19 is SARS-CoV-2.

2 Tom Stayner, 'People Who Deliberately Spread Coronavirus to Health Workers Face Life in Prison, Government Warns', *SBS News* (online, 8 April 2020) <https://www.sbs.com.au/news/people-who-deliberately-spread-coronavirus-to-health-workers-face-life-in-prison-government-warns>.

transmission of COVID-19 and related conduct.[3] The purpose, design, and application of these offences raise questions about the role of criminal law in preventing the spread of diseases and in combatting the COVID-19 pandemic, about the scope and spectrum of criminal liability, and, importantly, about the implications for human rights and civil liberties.

State authorities have an obligation to respond to public health emergencies and protect the lives and wellbeing of those within their jurisdiction.[4] In setting up effective responses to the rapid spread of novel and highly contagious diseases such as COVID-19, governments need to consider, combine, and balance a great number of sometimes conflicting priorities relating to public health, the safety of vulnerable groups and individuals, education, economy and industry, community life, and civil liberties, to name but a few. This may, in some cases, also include coercive measures to prevent the spread of diseases.

As a last resort, authorities may turn to criminal offences to sanction persons spreading or likely to spread disease, thus endangering other individuals or the public at large. Because of the severe implications for human rights and civil liberties, criminal law measures are the *ultima ratio* that can only be utilised in the most severe circumstances and only if other, less intrusive means are proven to be non-effective.[5] 'Using criminal law to regulate behaviour and prevent transmission of a virus is a severe and drastic approach in attempting to slow the spread of the virus', notes UNAIDS, the Joint United Nations Programme on HIV/AIDS, in a 2020 statement about the rights implications of COVID-19 responses:[6]

> As has been seen in the HIV epidemic, the overuse of criminal law can often have significant negative outcomes both for the individual and for the response as a whole and often fails to recognize the reality of people's lives. It can further stigmatize people who have the virus, dissuade people from getting tested and destroy trust between the government and communities. Use of criminal laws in a public health emergency is often broad-sweeping and vague and they run the risk of being deployed in an arbitrary or discriminatory manner. People caught up in a criminal or punitive approach are also often the more vulnerable members of society.[7]

Early experience with COVID-19 has further shown that some parts of the community are at greater risk of contracting the virus, of experiencing more severe courses of the illness, and of being affected by measures adopted to stop the spread of the disease. In this context, there is a significant risk of discrimination against

---

3 See, eg, *Public Health (COVID-19 Spitting and Coughing) Order (No 4) 2020* (NSW) s 5; *Criminal Code Amendment (COVID-19 Response) Act 2020* (WA) ss 4–5.

4 This includes under international law: see *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12(2)(c).

5 Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press, 8th ed, 2016) 73–7; Douglas Husak, 'The Criminal Law as Last Resort' (2004) 24(2) *Oxford Journal of Legal Studies* 207, 208.

6 UNAIDS, *Rights in the Time of COVID-19: Lessons from HIV for an Effective, Community-Led Response* (Report, 20 March 2020) 9 <https://www.unaids.org/sites/default/files/media_asset/human-rights-and-covid-19_en.pdf>.

7 Ibid. See also, on discrimination, Heather Worth, Cindy Patton and Diane Goldstein, 'Reckless Vectors: The Infecting "Other" in HIV/AIDS Law' (2005) 2(2) *Sexuality Research and Social Policy: Journal of NSRC* 3.

selected groups and individuals. This risk is all the more serious if criminal law and criminal justice measures are employed.

Moreover, criminalisation and the threat of sanctions may have secondary rights implications by potentially reducing the willingness of persons to get tested and of infected persons to seek medical support and access appropriate healthcare.[8] There is already evidence of stigmatisation around COVID-19 and numerous instances of 'shaming' and 'blaming' by officials and the media.[9] For these reasons, even if transmission of COVID-19 is construed as morally culpable, it must be emphasised that '[t]here are principled reasons not to criminalize all wrongful and blameworthy conduct'.[10]

Regrettably, human rights considerations have hardly surfaced in the political and public discourse about the usefulness and utility of employing criminal offences to combat COVID-19 in Australia. As in earlier public health crises, many public statements by politicians and measures adopted by legislators and regulators are made in 'the face of the latest of panic',[11] driven by 'a desire to attribute blame for the spread of the disease',[12] rather than based on reflection, research, and with due regard for the wider implications.

This article examines the scope and rights implications of criminal offences relating to COVID-19 in Australia. Parts II to IV analyse the origins and application of criminal laws concerning disease in the Australian States and Territories, identify the spate of new offences for COVID-19, and demonstrate the exceptionally wide ambit of potential liability. It explores how they might apply to deliberate, reckless, and negligent transmission of diseases and highlights the stringent penalties. In Part V, the article turns to the consequences of criminalisation and rights-based concerns. This part draws on the extensive and latest research on the criminalisation of HIV transmission and points to actual and potential discriminatory effects of a criminal justice approach to COVID-19, as well as implications for persons' right to health. The article concludes in Part VI that criminal offences relating to diseases must be precisely and narrowly circumscribed to be both fair and meaningful. The analysis in this article demonstrates that criminal prosecution and punishment can only be justified in a very small number of situations. In cases of alleged transmission, the practical difficulties of proving causation provide a further argument against prosecution.

---

8 Carol L Galletly and Steven D Pinkerton, 'Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV' (2006) 10(5) *AIDS and Behaviour* 451.

9 See, eg, Henrietta Cook and Aisha Dow, 'How COVID-19 Stigma Is Turning Victorians Away from Testing', *The Age* (online, 19 August 2020) <https://www.theage.com.au/politics/victoria/how-covid-19-stigma-is-turning-victorians-away-from-testing-20200819-p55n84.html>;
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/media-reporting-of-two-queensland-teens-a-form-of-doxxing>.

10 Douglas N Husak, 'The Nature and Justifiability of Nonconsummate Offenses' (1995) 37(1) *Arizona Law Review* 151, 155.

11 Hannah Quirk and Catherine Stanton, 'Disease Transmission and the Criminal Law: A Growing Concern?' in Catherine Stanton and Hannah Quirk (eds), *Criminalising Contagion: Legal and Ethical Challenges of Disease Transmission and the Criminal Law* (Cambridge University Press, 2016) 1, 16.

12 Simon Bronitt, 'Spreading Disease and the Criminal Law' [1994] (January) *Criminal Law Review* 21, 21.

II DISEASES IN AUSTRALIAN CRIMINAL LAWS

A Background

Starting in the early 1990s, specific provisions concerning the transmission of diseases were added to the criminal laws in the Australian States and Territories. Relevant offences can be found among the non-fatal offences against the person and generally serve to protect a person's right to physical integrity and health. The impetus for these amendments was the spread of HIV – the first case being recorded in Sydney in 1982 – together with a small number of cases in which individuals intentionally transmitted, or threatened to transmit, the disease.[13] It was also considered that precedent in the old English case of *R v Clarence*, which precluded disease transmission from the scope of infliction of harm,[14] needed to be overcome.[15] Notably, in that case, Stephen J warned of 'wide and uncertain extensions of the criminal law',[16] satisfied that a public health approach was preferable.[17]

At the national level, a Legal Working Party of the Intergovernmental Committee on AIDS, set up in 1987, released the *Legislative Approaches to Public Health Control of HIV Infection* report in 1991, which emphasised the duty of individuals to prevent the spread of the virus as part of a broader regulative strategy.[18] Shifting responsibility for the prevention of the disease, as noted by Simon Bronitt, was 'not inconsistent with … criminal liability for the transmission of the HIV/AIDS virus'.[19] The Working Party, however, refrained from proposing the creation of specific offences for HIV transmission because of concerns that such a move would stigmatise those carrying, transmitting, and contracting the virus.[20]

---

13 William Bowtell, *Australia's Response to HIV/AIDS 1982–2005* (Report, May 2005) 5 <https://archive.lowyinstitute.org/sites/default/files/pubfiles/Bowtell%2C_Australia%27s_Response_to_HIV_AIDS_logo_1.pdf>. See, eg, *R v Lynch* [1995] QCA 205, where an accused person with HIV bit a former partner.

14 (1888) 22 QBD 23, 39, 41 (Stephen J).

15 See New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 November 1990, 10396 (John Fahey). It may be noted that there was consensus in *R v Clarence* that gonorrhoea could constitute grievous bodily harm: (1888) 22 QBD 23, 38–9 (Stephen J, Wills J agreeing at 35, Smith J agreeing at 37, Matthew J agreeing at 38, Huddleston B agreeing at 56, Field J agreeing at 57, Pollock B agreeing at 62, Lord Coleridge CJ agreeing at 66).

16 *R v Clarence* (1888) 22 QBD 23, 39.

17 See Karl Laird, 'Criminalising Contagion: Questioning the Paradigm' in Catherine Stanton and Hannah Quirk (eds), *Criminalising Contagion Legal and Ethical Challenges of Disease Transmission and the Criminal Law* (Cambridge University Press, 2016) 201, 206.

18 Helen Watchirs et al, 'Legislative Approaches to Public Health Control of HIV-Infection' (Discussion Paper, Legal Working Party of the Intergovernmental Committee on AIDS, February 1991) 33.

19 Simon H Bronitt, 'Criminal Liability for the Transmission of HIV/AIDS' (1992) 16(2) *Criminal Law Journal* 85, 86.

20 Helen Watchirs et al, 'Legislative Approaches to Public Health Control of HIV Infection' (Discussion Paper, Legal Working Party of the Intergovernmental Committee on AIDS, February 1991) 47.

B Beginnings

The States and Territories nevertheless proceeded with criminal law reform, starting with New South Wales in 1990. The *Crimes (Injuries) Amendment Act 1990* (NSW) inserted section 36, entitled '[c]ausing a grievous bodily disease', into the *Crimes Act 1900* (NSW).[21] The offence was limited to intentional (malicious) transmission and extended beyond HIV/AIDS to capture other serious diseases such as hepatitis, as well as injury stemming from exposure to harmful radiation.[22] When introducing the Crimes (Injuries) Amendment Bill 1990 (NSW) to Parliament, the Minister cited 'community concern' arising from a series of robberies where criminals claimed to be armed with syringes of HIV-contaminated blood as the main motivator for the insertion of the new offence.[23]

Other jurisdictions soon followed. Western Australia amended its *Criminal Code* in 1992,[24] inserting 'provisions against deliberate attempts to transmit AIDS and other diseases'.[25] Notably, the Second Reading speech to this amendment observed community concern over the new offences' coverage of 'a variety of diseases'.[26] An opposition frontbencher, though expressing her support for the new provisions, also remarked that 'it would be ridiculous if people who coughed or sneezed on others could be prosecuted because they knew they went to work with an annual virus'.[27] The amendment altered the definition of grievous bodily harm in section 1(4)(c) of the *Criminal Code* to encompass 'causing a person to have a serious disease', together with a new definition of serious disease. Section 294(8) was inserted to criminalise 'doing an act likely to result in another person having a serious disease'.

In 1993, Victoria introduced an offence specifically targeting HIV transmission under section 19A of its *Crimes Act 1958*,[28] in response to 'concern about the use of hypodermic syringes filled with blood'.[29] This offence covered intentional transmission of a 'very serious disease', where 'very serious disease' was defined as HIV.[30] During parliamentary debate of the Bill, the offence was criticised in various terms as harmful to education and public health strategies, stigmatising, discriminatory, and as preying on sufferers of diseases.[31]

---

21 *Crimes (Injuries) Amendment Act 1990* (NSW) sch 2.

22 New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 November 1990, 10,397 (John Fahey).

23 Ibid 10,395.

24 *Criminal Law Amendment Act (No 2) 1992* (WA) pt 2, amending *Criminal Code Compilation Act 1913* (WA) sch 1 ('*Criminal Code* (WA)').

25 Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 December 1992, 7,659 (Cheryl Edwardes).

26 Ibid.

27 Ibid.

28 *Crimes (HIV) Act 1993* (Vic) s 3.

29 Victoria, *Parliamentary Debates*, Legislative Council, 27 April 1993, 417 (BT Pullen).

30 *Crimes Act 1958* (Vic) s 19A(2), later repealed by *Crimes Amendment (Repeal of Section 19A) Act 2015* (Vic) s 3.

31 Victoria, *Parliamentary Debates*, Legislative Council, 27 April 1993, 417–20 (BT Pullen); 420–2 (GP Connard); 422–4 (Jean McLean); 424–5 (RJH Wells); 425–6 (DA Nardella); 426–7 (CJ Hogg); 426–9 (DR White).

In Queensland, following a report in 1992 by the Criminal Code Review Committee,[32] schedule 5 (the dictionary) of the new *Criminal Code* of 1995 included a definition of 'serious disease' to mean 'a disease of a nature (a) endangering, or likely to endanger, life; or (b) causing, or likely to cause, permanent injury to health; or (c) causing serious disfigurement'.[33] The transmission of serious disease was an element of two offences in the 1995 Code.[34] The progressive 1995 Code was, however, repealed by the newly elected Liberal-National Government before proclamation. It was substituted in part with the less ambitious *Criminal Code Amendment Act 1997* (Qld), which merely amended the existing *Criminal Code* of 1899. The 1997 Amendment Act added a definition of 'serious disease' to section 1 and made it an offence under section 317 to intentionally transmit a serious disease.[35] As in the other jurisdictions, these amendments followed attacks against police and prison officers with HIV-contaminated blood,[36] as well as recommendations of the 1996 report of the Criminal Code Advisory Working Group.[37]

The Northern Territory and South Australia both later amended their *Criminal Code* and *Criminal Law Consolidation Act 1935*, respectively, to explicitly cover disease transmission.[38]

Since their introduction, the offences and definitions legislated in response to the HIV/AIDS epidemic have undergone various amendments. Of particular note for the purpose of this article was the abolition of the specific HIV offence in section 19A of the *Crimes Act 1958* (Vic) in 2015 on the grounds, as foreseen on its creation, that it was discriminatory and stigmatising to persons with the virus.[39] The offence was used very infrequently before its repeal.[40]

III CURRENT CRIMINAL OFFENCES

Today, all Australian States and Territories have criminal offences covering the transmission of diseases and related conduct. While their design and elements

32 The report noted that its recommendations were specifically designed to proscribe certain conduct in relation to intentional transmission of HIV/AIDS. It made reference to section 36 of the *Crimes Act 1900* (NSW): see Criminal Code Review Committee, *Final Report of the Criminal Code Review Committee* (Report, June 1992) 197.

33 *Criminal Code 1995* (Qld) sch 1 s 1 (definition of 'serious disease').

34 Ibid ss 94, 139(1)(a).

35 *Criminal Law Amendment Act 1997* (Qld) ss 6, 48(3) amending *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)'). The offence under section 313 was also amended to include transmission of a serious disease to a pregnant female: *Criminal Law Amendment Act 1997* (Qld) s 47(2).

36 Queensland, *Parliamentary Debates*, Legislative Assembly, 14 June 1995, 12550 (Santo Santoro); Queensland, *Parliamentary Debates*, Legislative Assembly, 18 March 1997, 546 (Robert Harper); Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, 628 (Graham Healy).

37 Criminal Code Advisory Working Group, *Report of the Criminal Code Advisory Working Group to the Attorney-General* (Report, 1996).

38 *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT) ss 5, 12; *Criminal Law Consolidation Act 1935* (SA) s 21.

39 *Crimes Amendment (Repeal of Section 19A) Act 2015* (Vic).

40 Victoria, *Parliamentary Debates*, Legislative Assembly, 5 May 2015, 1220 (John Pesutto).

vary, they can broadly be differentiated by the seriousness of the harm caused. At the top of the scale, where transmission of the disease results in death, manslaughter or even murder may be charged depending on the mens rea of the accused. The next category includes non-fatal offences that combine serious harm or the transmission of a serious disease with a mental element requiring intention to cause this result. Less serious offences either involve lower levels of harm or less serious mental elements (such as recklessness or negligence), or both, as well as offences concerning endangerment. At the bottom of this spectrum are offences and transgressions relating to breaches of public health regulations and directives. These attract low penalties, usually fines. Some of the new offences introduced in 2020 in response to the COVID-19 pandemic seem to be at odds with this scale in that they provide comparatively high penalties for situations in which no serious harm occurs or is intended. The law discussed here is current as at 30 September 2020.

A New South Wales

In New South Wales, the most serious offence expressly covering the transmission of disease is section 33(1) of the *Crimes Act 1900* (NSW). This offence, punishable by up to 25 years' imprisonment, criminalises persons who cause grievous bodily harm and intend to do so. Section 4(1)(c) of the Act defines grievous bodily harm to include 'any grievous bodily disease' and further stipulates that 'a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease'. The term 'disease' is not further defined.

Where a person transmits a 'grievous bodily disease' to another and does so 'reckless as to causing actual bodily harm', liability under section 35(2) ('Reckless grievous bodily harm') may arise. The maximum penalty for this offence is imprisonment for 10 years, or 14 years if the accused acts in the company of others (section 35(1)). If a grievous bodily disease is transmitted 'by any unlawful or negligent act', the person may be liable under section 54 ('Causing grievous bodily harm'), which is punishable by up to two years' imprisonment. The *Crimes Act 1900* (NSW) has no specific offences for the transmission of diseases not constituting a 'grievous bodily disease', though these might be captured by assault-based offences such as assault occasioning actual bodily harm (section 59).

Beyond the *Crimes Act 1900* (NSW), section 10 of the *Public Health Act 2010* (NSW) makes it an offence not to comply with a Ministerial direction. A direction may be made under section 7 of the Act 'to deal with public health risks generally'. The *Public Health (COVID-19 Spitting and Coughing) Order (No 3) 2020* (NSW) (superseded by the *Public Health (COVID-19 Spitting and Coughing) Order (No 4) 2020* (NSW) and the *Public Health (COVID-19 Spitting and Coughing) Order 2021* (NSW)) was issued pursuant to the *Public Health Act 2010* (NSW) and made it an offence, under section 5(1), to intentionally spit at or cough on public officials 'in a way that would reasonably be likely to cause fear about the spread of COVID-19'. It had a maximum penalty of six months' imprisonment or a fine up to AUD11,000

(or both), or an on-the-spot fine of AUD5,000.[41] The penalty of six months' imprisonment or a fine up to AUD11,000 (or both) also applies to breaches of other orders concerning, inter alia, public and private gatherings, self-isolation, and leaving a person's residence for unpermitted reasons.[42]

B Victoria

In Victoria, the transmission of diseases is classified as causing physical injury and can thus fall under several different offences. The *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) amended the definition of 'physical injury' under section 15 of the *Crimes Act 1958* (Vic) to encompass 'infection with a disease'.[43] The term 'disease' is not further defined. Under section 15, 'serious injury' means an injury (including physical injury, harm to mental health, and 'the cumulative effect of more than one injury') that either 'endangers life' or is 'substantial and protracted'.

Intentional transmission of a disease constituting serious injury falls under section 16 of the *Crimes Act 1958* (Vic) and is punishable by imprisonment for up to 20 years. Section 17 makes it an offence, punishable by imprisonment for up to 15 years, to 'recklessly cause serious injury'. A person negligently causing serious injury may be liable under section 24 and subject to imprisonment for up to 10 years. If the transmission of a disease results in injury not amounting to serious injury, liability under section 18 may arise if such injury was caused intentionally or recklessly. This offence is punishable by imprisonment for up to 10 years. Victoria also has general endangerment offences, which cover conduct that recklessly 'places or may place' persons in danger of death or serious injury, attracting imprisonment of 10 or five years respectively.[44]

Regulations made under the *Public Health and Wellbeing Act 2008* (Vic) include additional offences for which infringements may be issued.[45] Contraventions of public health directions in Victoria may lead to large fines of up to AUD20,000 for breaching isolation orders after testing positive for COVID-19.[46]

C South Australia

The definition of 'physical harm' under section 21 of the *Criminal Law Consolidation Act 1935* (SA) covers 'infection with a disease'. The term 'disease' is not further defined. Under section 21, harm is serious, inter alia, where it 'endangers a person's life' or leads to 'serious and protracted impairment of a physical or mental function'.

---

41 *Public Health (COVID-19 Spitting and Coughing) Order (No 3) 2020* (NSW) s 5; *Public Health Regulation 2012* (NSW) sch 4. Schedule 4 of the *Public Health Regulation 2012* (NSW) provides for the on-the-spot fine.

42 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 5) 2020* (NSW); *Public Health (COVID-19 Self-Isolation) Order (No 3) 2020* (NSW).

43 *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) s 3.

44 *Crimes Act 1958* (Vic) ss 22–3.

45 See, eg, *Public Health and Wellbeing Amendment (Further Infringement Offences) Regulations 2020* (Vic). See generally *Public Health and Wellbeing Act 2008* (Vic) ss 209, 232 ('*PHWA Act*').

46 *PHWA Act 2008* (Vic) s 120.

In cases in which the transmission of a disease amounts to serious harm, liability for intentionally or recklessly causing such harm may arise under section 23(1) or (3) of the Act, and may result in imprisonment for up to 20 or 15 years respectively (25 or 19 years in aggravated cases). If the harm caused is less than serious, liability for intentionally causing such harm may arise under section 24(1), punishable by 10 years' imprisonment (13 in aggravated cases). Recklessly causing harm is an offence under section 24(2) punishable by up to five years' imprisonment, or seven years in aggravated cases. Section 29 may further be relevant in this context if the transmission of a disease, or the threat or attempt to do so, amounts to an act endangering life or creating a risk of serious harm or harm.[47] Penalties for this offence, ranging from five to 18 years' imprisonment, vary depending on the specific circumstances.

Further offences outside the *Criminal Law Consolidation Act 1935* (SA) were added in 2020. The *COVID-19 Emergency Response Act 2020* (SA) penalises a range of conduct and allows for fines up to AUD10,000 to be imposed for offences against regulations made under the Act.[48] In addition, failure to comply with directions made under the *Emergency Management Act 2004* (SA) can result in fines up to AUD20,000 or imprisonment for two years.[49]

D Queensland

Queensland has two specific offences relating to the transmission of serious diseases, which are quite narrow in their application. The term 'serious diseases', which is modelled after the definition of 'grievous bodily harm', is defined in section 1 of the *Criminal Code* (Qld) to mean:

> a disease that would, if left untreated, be of such a nature as to –
>
> (a) cause or be likely to cause any loss of a distinct part or organ of the body; or
>
> (b) cause or be likely to cause serious disfigurement; or
>
> (c) endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health;
>
> whether or not treatment is or could have been available.

Serious disease is an element of section 317, which criminalises a range of acts intended to cause grievous bodily harm and other malicious acts. The intentional transmission of a serious disease is an offence under sections 317(1)(b) and (e), and is punishable by imprisonment for life. The term is also used as an element in section 313(2) to criminalise assaulting a pregnant female and transmitting a serious disease to an unborn child.

The term 'disease' is not used or defined separately in other non-fatal offences against the person and there has been some debate as to where and how the transmission of other diseases and the non-intentional transmission of serious diseases are criminalised. It is now settled that transmission of serious diseases without intention amounts to 'doing grievous bodily harm' under section 320 of

47 For application to disease, see *R v Parenzee* [2006] SASC 127 ('*Parenzee*').

48 *COVID-19 Emergency Response Act 2020* (SA) ss 19(2)(j)–(k).

49 *Emergency Management Act 2004* (SA) s 28(1).

the Act,[50] an offence that is punishable by imprisonment for up to 14 years. This offence has no mental element and thus covers cases of reckless or negligent transmission. Where the disease does not meet the threshold of a 'serious disease', liability for assault-based offences such as assault occasioning bodily harm (section 339), or negligent acts causing harm (section 328), may arise.

Section 36 of the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (Qld), an Act introduced in response to the COVID-19 pandemic, inserted part 7A ('Particular powers for COVID-19 emergency') into chapter 8 of the *Public Health Act 2005* (Qld). Section 362D of this Act now penalises persons who fail to comply with public health directions with imprisonment for up to six months.[51] Penalties also apply to persons refusing to supply information to contact tracers.[52]

E Western Australia

Relevant criminal offences in Western Australia and the definition of 'serious disease' in section 1 of the *Criminal Code* (WA) are quite similar to those in Queensland. Sections 1(4)(c) and (d) expressly state that any reference to 'grievous bodily harm' includes 'serious disease'. 'Bodily harm', meanwhile, encompasses 'a disease which interferes with health or comfort'.[53] These clarifications are missing from the Queensland *Criminal Code*.

Section 294(1)(h) of the *Criminal Code* (WA) criminalises the doing of any act 'that is likely to result in a person having a serious disease' where the accused intends to cause grievous bodily harm (or has one of the other intentions listed in the chapeau of section 294(1)). This offence is punishable by imprisonment for up to 20 years. If a serious diseases is transmitted without any of these intentions, liability for doing grievous bodily harm under section 297(1), punishable by imprisonment for up to 10 years, may arise. The transmission of a non-serious disease can result in liability for offences involving bodily harm, such as section 304 (causing bodily harm) or section 317 (assault causing bodily harm). Where a person infected with a disease endangers the 'life, health or safety of any person', they may also be penalised under section 304(1)(b) and liable for up to seven years' imprisonment.

In 2020, Western Australia amended its *Criminal Code* to add specific provisions in relation to COVID-19.[54] This includes serious assaults committed by a person knowing that he or she has COVID-19, or creating a belief, suspicion, or fear that he or she has COVID-19 (section 318(1A)). This offence, which stays in force for a period of 15 months, is punishable by imprisonment for up to 10 years. In addition, the offence of making threats under section 338B has been amended by inserting a new section 338B(2)(aa) for cases 'where the threat is to injure, endanger or harm a person referred to in section 318(1)(d) to (k) by exposing the

50 See *Zaburoni v The Queen* (2016) 256 CLR 482, 487 [2] (Kiefel, Bell and Keane JJ) ('*Zaburoni*').
51 As amended by *Corrective Services and Other Legislation Amendment Act 2020* (Qld) s 55X.
52 *Public Health Act 2005* (Qld) ss 99–102.
53 *Criminal Code* (WA) ss 1(4)(a)–(b).
54 *Criminal Code Amendment (COVID-19 Response) Act 2020* (WA) ss 4–5.

person to COVID-19'. This offence, which, too, remains in force for 15 months, is punishable by imprisonment for seven years. In addition, failure to comply with public health orders or directions attracts a penalty of one year's imprisonment or an AUD50,000 fine.[55]

F Tasmania

The Tasmanian *Criminal Code* contains no specific offences for the transmission of diseases and relevant definitions in it do not encompass diseases. 'Grievous bodily harm' is defined to mean 'any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause serious injury to health'.[56] Precedent from other jurisdictions with similar definitions, such as Queensland and Western Australia, suggests that 'bodily injury' also includes disease.

Causing bodily harm with an intention to do grievous bodily harm is an offence under section 170 of the *Criminal Code* (Tas). Causing grievous bodily harm with no mental element is criminalised in section 172. If the transmission of a disease results in lesser forms of harm, liability for assault may arise (section 184).

In 2020, section 51 of the *Public Health Act 1997* (Tas) was amended to criminalise persons who, being aware that they have COVID-19, do not take all 'reasonable measures and precautions to prevent the transmission of the disease' and 'knowingly or recklessly place another person at risk of contracting the disease'. The maximum penalty is one year's imprisonment, a fine of AUD17,200, or both. There are also penalties of up to six months' imprisonment for offences against emergency management workers (such as assault and/or using 'insulting language')[57] and fines up to AUD17,200 for breaching any order to 'stop, limit or prevent the spread' of COVID-19.[58]

G Australian Capital Territory

The *Crimes Act 1900* (ACT) does not contain specific offences or definitions relating to the transmission of diseases. Offences that would apply in such cases include intentionally, recklessly, or negligently inflicting grievous bodily harm under sections 19, 20, and 25, respectively, with penalties ranging up to 25 years' imprisonment. Transmission of a less serious disease could fall under offences attracting up to seven years' imprisonment, such as inflicting actual bodily harm, assault occasioning actual bodily harm, or common assault, under sections 23, 24, and 26 respectively. Breach of public health orders related to COVID-19 may incur fines up to AUD8,000.[59]

55 *Emergency Management Act 2005* (WA) s 86; *Public Health Act 2016* (WA) s 122.
56 *Criminal Code Act 1924* (Tas) sch 1 s 1 ('*Criminal Code* (Tas)').
57 *Emergency Management Act 2006* (Tas) s 60.
58 *Public Health Act 1997* (Tas) ss 42, 53.
59 *Public Health Act 1997* (ACT) s 120(4).

H Northern Territory

The definition of 'harm' in section 1A of the *Criminal Code* (NT) expressly includes 'infection with a disease'. 'Serious harm' is defined in section 1 as 'any harm (including the cumulative effect of more than one harm): (a) that endangers, or is likely to endanger, a person's life; or (b) that is or is likely to be significant and longstanding'.

Intent to cause serious harm is criminalised under section 177, while reckless and negligent infliction of serious harm is captured by sections 174E and 181. These offences have penalties ranging from 10 years' up to life imprisonment. Further offences of recklessly endangering life or giving rise to a danger of serious harm may cover conduct creating a risk of transmission and attract prison sentences up to 14 years.[60] Section 174B(1) explicitly states that for these offences 'a danger of death or serious harm includes exposing a person to the risk of catching a disease that may give rise to a danger of death or serious harm'. Lesser offences concerning non-serious harm include section 186 (unlawfully causing harm) and various assault-based offences.[61]

The *Public and Environmental Health Act 2011* (NT) now also criminalises persons who 'intentionally cough, spit or expectorate on or at' police officers and other workers in a way 'likely to cause a reasonable person to fear that COVID-19 will be transmitted'.[62] Contravention of other health declarations or directions may be penalised with fines up to AUD62,800.[63]

IV LIABILITY FOR COVID-19

Ever since the first cases of COVID-19 transmission were reported in Australia, politicians and the media have used the criminal law prominently in their rhetoric to threaten those failing to comply with the many laws and regulations both existing and recently introduced to prevent and combat the spread of the virus. The menace of fines and imprisonment were used as a deliberate scare tactic, as the statement by the Federal Minister for Health in Part I of this article shows.

These words have been followed by action, with thousands of people fined for failing to comply with health directions since these laws first came into force in March 2020. On 3 August 2020, the Australian Broadcasting Corporation reported that fines totalling AUD5.2 million had been issued and that prosecutors had asked for imprisonment in some cases.[64] In late August 2020, one woman was sentenced to six months' imprisonment for failing to self-quarantine after returning to Perth

60 *Criminal Code Act 1983* (NT) sch 1 ss 174C–174D ('*Criminal Code* (Tas)').
61 Ibid ss 187–189A.
62 *Public and Environmental Health Act 2011* (NT) s 113A(1).
63 Ibid s 56.
64 Sophie Meixner, Alicia Nally and Jason Dasey, 'Australian States Raise Millions from Coronavirus Fines', *ABC News* (online, 3 August 2020) <https://www.abc.net.au/news/2020-08-03/coronavirus-covid19-public-health-breach-fines-money-revenue/12498310>.

from Victoria.[65] In April 2020, three women were charged with the new offences under the *Criminal Code* (WA) after threatening the staff of a shopping centre by pretending to be infected with COVID-19.[66] Others have been charged with offences including assault, resisting arrest, failing to comply with police directions, and for spitting and coughing at another person.[67] Further, endangerment offences have been applied to disease in at least one case where transmission did not occur.[68] In sum, it appears that Australian authorities have proved willing to use the criminal law liberally to enforce COVID-19 restrictions and sanction noncompliant conduct.

Nonetheless and thus far, there appear to be few, if any, reported instances in which offences specifically designed to protect persons' physical integrity and public health from serious diseases have been charged in relation to COVID-19. The lack of reported cases, together with the rhetoric used by senior government representatives, begs the question of when serious criminal liability for the transmission of COVID-19 may arise and, just as importantly, when it does not.

A COVID-19, a 'Serious' Disease?

All Australian jurisdictions reserve higher penalties for offences involving serious injury, or 'grievous bodily harm' as it is commonly referred to in criminal law statutes. The criteria used to determine whether a disease such as COVID-19 is a 'serious' or 'grievous bodily' disease, and whether it amounts to 'serious harm' or 'serious injury', are not clearly articulated in the legislation. Some jurisdictions offer marginal guidance by requiring endangerment of life or 'permanent injury to health',[69] which may not be helpful in deciding whether a particular disease is sufficiently serious or not, especially if the impact of the disease depends on the (type and circumstances of the) person contracting it, a person's previous illnesses and health condition, or the availability of treatment and medication. The available case law is, for the most part, similarly unhelpful as nearly all reported cases of offences relating to serious diseases involve instances in which HIV was transmitted, or was attempted or threatened to be transmitted. The characteristics,

65 'Covid: Woman in Australia Jailed for Six Months over Quarantine Breach', *BBC News* (online, 25 August 2020) <https://www.bbc.com/news/world-australia-53903498>.

66 'WA Police Charge Three Women with Allegedly Threatening Shopping Centre Staff by Pretending to Have COVID-19', *The West Australian* (online, 24 April 2020) <https://thewest.com.au/news/coronavirus/wa-police-charge-three-women-with-allegeldy-threatening-shopping-centre-staff-by-pretending-to-have-covid-19-ng-b881529398z>.

67 See, eg, Kate Aubusson and Matt Bungard, 'Police Rule Out Charging Tangara School over COVID Outbreak', *Sydney Morning Herald* (online, 14 August 2020) <https://www.smh.com.au/national/nsw/clusters-linked-to-sydney-school-liverpool-hospital-and-lidcombe-clubs-grow-20200814-p55lqb.html>; Freya Noble, 'Woman Charged with Deliberately Coughing on Police in Wagga Wagga, Mullumbimby House Party Host Tells Police Coronavirus Is "Just a Flu"', *Nine News* (online, 3 August 2020) <https://www.9news.com.au/national/coronavirus-nsw-fines-wagga-wagga-woman-charged-with-coughing-on-police-mullumbimby-man-says-virus-is-just-a-flu/54b5e763-182e-4045-8ab1-6539378c8503>.

68 *Parenzee* [2006] SASC 127 .

69 See, eg, *Criminal Code* (Qld) s 1; *Criminal Law Consolidation Act 1935* (SA) s 21; *Crimes Act 1958* (Vic) s 15.

consequences, and transmission of HIV are, however, substantially different to those of COVID-19.

There is general consensus among judicial decisions in Australia that infection with a disease such as COVID-19 constitutes physical injury or harm. This position has been legislated in the Northern Territory, South Australia, and Victoria. Furthermore, proof of the transmission of (or infection with) the disease does not require manifestations of symptoms: *Peters v The Queen [No 2]* (a case involving hepatitis C).[70] On this point, the High Court in *Aubrey v The Queen*,[71] a case involving HIV transmission, also made reference to *Alcan Gove Pty Ltd v Zabic* (where the symptoms of mesothelioma did not need to have manifested to constitute damage).[72] In *Houghton v The Queen*, the Western Australian Court of Appeal held that it was open to a jury to find that infection by a virus, without proof of long-term ramifications, could constitute bodily injury.[73] It further crystallises from these cases that proof of the offence does not depend on the inevitable progression to symptoms constituting injury. In *Peters v The Queen [No 2]*, the Court stated that '[a] jury may reasonably find that an infection constitutes an injury without needing to be convinced of the inevitability, or even the likelihood, of its consequences'.[74]

What is less certain is whether infection with SARS-CoV-2 or progression to COVID-19 can be classified as 'serious disease' (or harm or injury, depending on the jurisdiction). One primary consideration here is whether the infection, if left untreated and regardless of whether treatment is available or not, can lead to death and, if it does, what the fatality rate for the virus is. Since COVID-19 is a very new illness, the fatality rate of SARS-CoV-2 is difficult to determine accurately for a range of reasons, including undetected cases due to asymptomatic infection, limited testing capacity, and misdiagnosis. In this context, it is also important to note that different countries determine and count COVID-19 fatalities differently.[75]

A medical analysis of the infection-fatality rate published in 2020, while noting the difficulty of making such an estimate, showed a rate of 0.68% for COVID-19.[76] That article further noted that, 'because of age and perhaps underlying comorbidities in the population, different places will experience different [infection-fatality rates] due to the disease'.[77] As of 3 September 2020, the case to fatality rate in Australia was 2.56% (with 25,923 cases and 663

70 (2019) 60 VR 231, 247 [59] (the Court).
71 (2017) 260 CLR 305, 321 [27] (Kiefel CJ, Keane, Nettle and Edelman JJ).
72 (2015) 257 CLR 1.
73 (2004) 28 WAR 399, 403 [16] (Murray J). The New Zealand Court of Appeal adopted the same position in *R v Mwai* [1995] 3 NZLR 149.
74 (2019) 60 VR 231, 248 [62].
75 See World Health Organization, 'Scientific Brief', *Estimating Mortality from COVID-19* (Web Page, 4 August 2020) <https://www.who.int/news-room/commentaries/detail/estimating-mortality-from-covid-19>.
76 Gideon Meyerowitz-Katz and Lea Merone, 'A Systematic Review and Meta-Analysis of Published Research Data on COVID-19 Infection Fatality Rates' (2020) 101 *International Journal of Infectious Diseases* 138, 143.
77 Ibid 147.

deaths).[78] The comparatively higher rate may be due to significant numbers of infections in Australian aged-care facilities, given that the fatality rate for elderly people and other vulnerable groups rises to up to 20%, while it is much lower for younger people.[79]

Aside from mortality, COVID-19 may cause a range of consequences, ranging from mild to severe flu-like symptoms. In critical cases, infected persons will require provision of oxygen through ventilation. In some patients, COVID-19 may lead to other complications such as multiple-organ failure, inflammation of the heart and brain, sepsis, and blood clots in the lungs, heart, legs and brain,[80] though these cases appear to be statistically quite rare. The extent to which the disease can cause various long-term and potentially debilitating health conditions, even in those who only experience initially mild symptoms, such as cognitive effects, chronic fatigue, cardiac complications, and pulmonary damage, were, at the time of writing, still under investigation.[81]

The available case law from Australia indicates that in the context of criminal offences, the seriousness of a disease must be determined at the time the disease is transmitted to (or, in other words, contracted by) another person. Proof of any actual or potential serious consequences of the disease is not required.[82] The Court in *Peters v The Queen [No 2]* held that the question of severity 'is to be asked without reference to the prospect of medical treatment ameliorating the disease … reflect[ing] the fact that an injury can be serious even though it can be (and has been) remedied by medical intervention'.[83] This approach was also taken by the New South Wales Court of Criminal Appeal in *Wick v The Queen*.[84] The definition of 'serious disease' in Queensland's *Criminal Code* similarly states that the availability of treatment is irrelevant to the serious nature of a disease.[85] Thus, it does not matter if the victim has recovered or can be cured from the disease, nor if more successful treatments have been developed. In *Peters v The Queen [No 2]*, the Court held:

> Even if it could be shown that the adverse effects of hepatitis C can be wholly avoided without significant side effects, that would not alter the fact that those

78 Department of Health, 'Coronavirus (COVID-19) Current Situation and Case Numbers', *Coronavirus (COVID-19) Health Alert* (Infographic, 2 September 2020) <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-current-situation-and-case-numbers>.

79 Nicolette R Holt et al, 'Implications of COVID-19 for an Ageing Population' (2020) 213(8) *Medical Journal of Australia* 342; John P A Ioannidis, Cathrine Axfors and Despina G Contopoulos-Ioannidis, 'Population-Level COVID-19 Mortality Risk for Non-Elderly Individuals Overall and for Non-Elderly Individuals Without Underlying Diseases in Pandemic Epicenters' (2020) 188 *Environmental Research* 1.

80 See, eg, Evelyn Lewin, 'What Are the Long-Term Health Risks Following COVID-19?', *newsGP* (Web Page, 24 June 2020) <https://www1.racgp.org.au/newsgp/clinical/what-are-the-long-term-health-risks-post-covid-19>.

81 See, eg, Xiaoneng Mo et al, 'Abnormal Pulmonary Function in COVID-19 Patients at Time of Hospital Discharge' (2020) 55(6) *European Respiratory Journal* 2001217.

82 *Peters v The Queen [No 2]* (2019) 60 VR 231, 249 [67]–[68] (the Court) ('*Peters*'). See also *R v Lobston* (1983) 2 Qd R 720.

83 *Peters* (2019) 60 VR 231, 250 [69].

84 [2017] NSWCCA 244, [22] (Fagan J, Basten JA agreeing at [1], Beech-Jones J agreeing at [2]).

85 *Criminal Code* (Qld) s 1.

> adverse effects were the prospective consequences of the infection, and the gravity of their nature would have sufficed to justify finding the injuries to be serious.[86]

According to *Swan v The Queen*, only the injury (or transmission) itself and its 'direct physical effects' can be taken into account to assess the seriousness of a disease, not its 'personal, social and economic consequences'.[87] Similarly, emotional harm is also not taken into consideration.[88]

In New South Wales and the ACT, no definition of 'serious' is provided. It is thus a question of fact for the jury as to whether a disease is serious enough to meet the threshold.[89] Other Australian jurisdictions provide some statutory guidance, though the respective definitions and criteria vary somewhat; they include that the disease:

- endangers life (Victoria, South Australia, Queensland, Western Australia, Tasmania, Northern Territory);[90]
- is likely to endanger life (Queensland, Western Australia, Tasmania, Northern Territory);[91]
- causes or is likely to cause permanent injury to health (Queensland, Western Australia);[92]
- causes or is likely to cause serious injury to health (Tasmania);[93]
- leads to serious and protracted impairment of a physical or mental function (South Australia);[94]
- causes an injury that is substantial and protracted (Victoria);[95]
- causes harm that is or is likely to be significant and longstanding (Northern Territory);[96] or
- results in disfigurement or loss of a part of the body or organ (Queensland).[97]

A key difficulty with applying these criteria to COVID-19 is the highly variable effects of the disease. Aside from the last criterion, COVID-19 could potentially be held to satisfy any or all of them. Complicating matters further is the fact that the disease is asymptomatic in a high proportion of infected persons and mild in up to 80%. Against this background and in light of the relatively low fatality rate, it becomes doubtful, for instance, that COVID-19 qualifies as a disease that

86 *Peters* (2019) 60 VR 231, 251 [72].
87 [2016] NSWCCA 79, [71] (Garling J).
88 *R v Chan-Fook* [1994] 2 All ER 552, 559 (Hobhouse LJ). It may, however, be an aggravating factor at sentencing.
89 *Welsh v The Queen* (Victorian Court of Criminal Appeal, Crockett, King and Tadgell JJ, 16 October 1987) ('*Welsh*') cited in *Peters* (2019) 60 VR 231, 233–4 [46].
90 *Criminal Code* (NT) s 1A; *Criminal Code* (Qld) s 1; *Criminal Law Consolidation Act 1935* (SA) s 21; *Criminal Code* (Tas) s 1; *Crimes Act 1958* (Vic) s 15; *Criminal Code* (WA) s 1.
91 *Criminal Code* (NT) s 1A; *Criminal Code* (Qld) s 1; *Criminal Code* (Tas) s 1; *Criminal Code* (WA) s 1.
92 *Criminal Code* (Qld) s 1; *Criminal Code* (WA) s 1.
93 *Criminal Code* (Tas) s 1.
94 *Criminal Law Consolidation Act 1935* (SA) s 21.
95 *Crimes Act 1958* (Vic) s 15.
96 *Criminal Code* (NT) s 1.
97 *Criminal Code* (Qld) s 1.

endangers or is likely to endanger life or causes serious or permanent injury to health. Based on the available knowledge today, COVID-19, on the surface, is possibly not a 'serious disease', though further experience and evidence of long-term consequences may change this assessment.

The answer is clearer still in Queensland, Western Australia, Tasmania, and the Northern Territory, which require that the disease 'is likely' to cause some of the stated consequences. In the context of a case involving reckless murder, the High Court held that 'likely' means a 'substantial – a "real and not remote" – chance regardless of whether it is less or more than 50 per cent'.[98] The Court did not encourage resort to mathematical percentages[99] and in a later decision held that 'likely' means more than 'possible' though somewhat less than 'probable'.[100]

All of the relevant case law concerning transmission of diseases involves transmission of HIV or hepatitis C, which is only marginally helpful to determining the seriousness of COVID-19.[101] By comparison, the fatality rate for HIV/AIDS, if left untreated, is extremely high while hepatitis C leads to chronic infection in approximately 70% of infected persons.[102] On this account, these diseases are far more serious than COVID-19, though some recent literature does question whether the view that HIV/AIDS is a serious disease (or grievous bodily harm) is still tenable given the current state of knowledge about the virus, its transmission, and possible treatment.[103]

A different position could be adopted if the seriousness of a disease like COVID-19 is determined not in reference to the general population but with a view to particular groups, especially their age, prior conditions, and other vulnerabilities. In the unreported Victorian case of *Welsh v The Queen*, it was noted that an injury inflicted on one person may be more serious than the same injury inflicted on another.[104] On this background, it might be possible that the type and gravity of offences available in a prosecution of COVID-19 transmission will depend on the characteristics of the particular victim.[105]

B Intentional, Reckless, and Negligent Transmission

In addition to proving the transmission of the (serious) disease, most of the relevant offences require proof of a mental element, such as intention, recklessness, or negligence, that reflect the fault or blameworthiness of the accused

98 *Boughey v The Queen* (1986) 161 CLR 10, 21 (Mason, Wilson and Deane JJ) ('*Boughey*').

99 Ibid 22.

100 *Darkan v The Queen* (2006) 227 CLR 373, 390–2 (Gleeson CJ, Gummow, Hayne and Crennan JJ). However, note that Gibbs CJ and Brennan J treated 'likely' as synonymous with 'probable' in *Boughey* (1986) 161 CLR 10, 14, 43.

101 Regarding HIV/AIDS, see *Aubrey v The Queen* (2017) 260 CLR 305; *Zaburoni* (2016) 256 CLR 482; *R v Reid* (2007) 1 Qd R 64; *Houghton v The Queen* (2004) 28 WAR 399 ('*Houghton*'). On Hepatitis C, see *Peters* (2019) 60 VR 231.

102 World Health Organization, 'Hepatitis C' (Web Page, 27 July 2020) <https://www.who.int/news-room/fact-sheets/detail/hepatitis-c>.

103 Thomas Poberezny-Lynch, 'Criminalising Infection: Questioning the Assumption that Transmitting HIV Constitutes Grievous Bodily Harm' (2019) 44(2) *Alternative Law Journal* 138.

104 *Welsh* (Victorian Court of Criminal Appeal, Crockett, King and Tadgell JJ, 16 October 1987).

105 See, on this point, Laird (n 17) 213.

at the time he or she transmits the disease to another. Liability for intentional transmission sits at the top of this fault spectrum and thus attracts the highest penalty. Section 317 of the *Criminal Code* (Qld), for instance, has a maximum penalty of life imprisonment. Statutory penalties for reckless or negligent transmission, where this is criminalised, are lower.[106]

Proving intentional transmission of a disease presents a high bar for prosecution. In practice, few cases fall into this category. Across all Australian jurisdictions intention is now commonly construed as the purpose of the accused (*dolus directus*), which requires proof that the accused had a subjective desire to transmit the disease.[107] In *Zaburoni v The Queen*, a case involving HIV transmission, the High Court emphasised that the accused must have, through his actions, sought to achieve infection of the victim.[108] It is not enough that the accused knows they have the disease and engages in conduct aware there is a substantial, or even virtually certain, likelihood of transmission. Foresight of potential consequences does not suffice to prove intention.[109] Thus, only persons who positively know they are infected with COVID-19 (after receiving their test results for instance) and then go to a place or interact with another with the specific purpose to spread the disease can be liable for offences such as section 33(1) of the *Crimes Act 1900* (NSW) and section 23(1) of the *Criminal Law Consolidation Act 1935* (SA). Such cases are, however, rather exceptional, as are cases in which a person intends to infect another but ultimately fails to transmit the disease (because they are stopped in some way or the other person is never infected). Depending on the circumstances, liability for attempting to transmit a disease might arise in such cases.

Offences criminalising reckless transmission cast the net considerably wider. In some jurisdictions, such as section 35(2) of the *Crimes Act 1900* (NSW), section 17 of the *Crimes Act 1958* (Vic), section 23(3) of the *Criminal Law Consolidation Act 1935* (SA), and section 20 of the *Crimes Act 1900* (ACT), these offences expressly require recklessness as the mental element. In others, such as section 320 of the *Criminal Code* (Qld), section 297 of the *Criminal Code* (WA), section 172 of the *Criminal Code* (Tas), and section 181 of the *Criminal Code* (NT), liability for recklessness may arise because no other mental element, such as intention, is specified. Recklessness generally refers to a wrongful disregard of a foreseen risk; that is, that the accused was aware of the possibility or probability that their actions could produce a particular result and acted regardless of the risk of the occurrence of the unintended result. Maximum statutory penalties for these offences range between imprisonment for 10 years in Western Australia and 15 years in Victoria and South Australia.[110] In practice, many scenarios in which

106 See, eg, *Crimes Act 1958* (Vic) ss 17, 24 (attracting 15 and 10 years' imprisonment respectively).

107 *Zaburoni* (2016) 256 CLR 482, 490 [14]–[15] (Kiefel, Bell and Keane JJ). Generally, see also *La Fontaine v The Queen* (1976) 136 CLR 62; *R v Crabbe* (1985) 156 CLR 464 ('*Crabbe*'); *Boughey* (1986) 161 CLR 10; *R v Demirian* [1989] VR 97.

108 *Zaburoni* (2016) 256 CLR 482, 491 [19] (Kiefel, Bell and Keane JJ).

109 Ibid 490 [14] (Kiefel, Bell and Keane JJ).

110 *Criminal Law Consolidation Act 1935* (SA) s 23(3); *Crimes Act 1958* (Vic) s 17; *Criminal Code* (WA) s 297(1).

COVID-19 might be transmitted recklessly are possible. This includes, for instance, cases where a person, knowing that he or she is infected, nevertheless leaves their house during the quarantine period and without any intention whatsoever transmits the disease to another. It suffices to show that they were aware that transmission might occur in these circumstances. Liability for recklessness might even arise where the person has symptoms that lead them to believe that they might have contracted COVID-19 (but have no confirmation that this is the case) and continue to mingle with other persons, thus transmitting the disease.

A particularly troubling consequence of the reckless transmission of COVID-19 can arise in those jurisdictions that recognise recklessness as a mental element of murder.[111] Here, it is possible that a person transmitting the disease to another who subsequently dies, merely foreseeing death as a probable risk,[112] faces the highest possible punishment. This would be the case, for instance, where a cleaner or other person working in an aged care facility or a geriatric hospital ward goes to work knowing they are infected with COVID-19 or being aware they have some of the symptoms and unintentionally transmits the disease to a patient thus causing their death. In Queensland, the accused could even face mandatory life imprisonment.[113] While such cases are tragic and blameworthy, the label 'murderer' and the extremely high penalties are utterly disproportionate in the circumstances.

Concerns about over-criminalisation and over-punishment also arise in cases where the transmission is objectively negligent. Negligence may be made out, for instance, if a person fails to get tested or fails to notice symptoms of COVID-19 when others would have and subsequently transmits the disease to another. In such cases, there is no need to prove a person has positive knowledge or subjective awareness that they have or might have the disease; the person is assessed by the objective standard of other people. Nonetheless, the person may face severe penalties under offences such as section 320 of the *Criminal Code* (Qld), section 297(1) of the *Criminal Code* (WA), or section 181 of the *Criminal Code* (NT). Statutory penalties are somewhat lower in those jurisdictions that expressly criminalise negligent transmission of a serious disease or negligently causing harm or injury.[114] Particularly concerning is the potential liability for manslaughter, where COVID-19 is transmitted negligently and another person dies as a result. In relation to negligent transmission of HIV, liability for manslaughter was found to be conceivable in *Houghton v The Queen*.[115]

A discussion of possible defences to any of the offences mentioned here goes beyond the scope of this article, but is worthy of future research.

111 *Crimes Act 1900* (ACT) s 12(1)(b); *Crimes Act 1900* (NSW) s 18(1)(a); *Criminal Code* (Qld) s 302(1)(aa). At common law, see *Pemble v The Queen* (1971) 124 CLR 107, 119–20 (Barwick CJ).

112 See, eg, *Crabbe* (1985) 156 CLR 464.

113 *Criminal Code* (Qld) s 305.

114 *Crimes Act 1900* (ACT) s 25; *Crimes Act 1900* (NSW) s 54; *Crimes Act 1958* (Vic) s 24.

115 *Houghton* (2004) 28 WAR 399.

V CONCERNS AND CONSEQUENCES

A Scope

The discussion thus far shows that a broad range of criminal offences may be applied to conduct concerning the transmission of COVID-19 in Australia. These range from minor offences aimed at breaches of public health orders, through to offences for coughing and spitting, threats to transmit the virus, and for endangerment and transmission. Some of these offences have been in operation for some time; others have been newly added, amended, or expanded. The scope of criminal law and criminal liability for diseases has grown noticeably since COVID-19 first surfaced in this country, raising concerns over human rights implications and restrictions on civil liberties.

These concerns are further fuelled by the fact that many offences, especially the less serious ones, have been used widely and liberally. In the first few months of the pandemic, police have meted out thousands of fines.[116] At the time of writing, prosecutions were underway for making threats, for coughing and spitting, for assaults, and for failing to comply with police directions.[117] Whether investigations and prosecutions for any of the more serious offences have been instigated is unclear at this time but, as explained above, their scope is potentially far-reaching. It is also possible, perhaps, that police and prosecutors have thus far rightly withstood the pressure and temptation to use serious offences against persons who have spread or risked transmitting COVID-19 to others, despite the media and politicians publicly blaming and shaming those persons, sometimes even by naming them or displaying their photos online and in newspapers.

Consistent with the criticism of criminal law responses to COVID-19 by organisations such as UNAIDS, the suite of offences found in Australian criminal law are 'broad-sweeping and vague', and capture conduct and situations of such breadth that there is a real risk that they may be deployed arbitrarily.[118] In particular, certain parts of the population may be targeted by these offences disproportionately. The low-bar for criminal liability may erode the presumption of innocence and concomitant restraints on the exercise of coercive and punitive police powers. In Australia, the due process implications of the growing number of pre-emptive and discretionary police powers have been widely noted.[119]

B Criminalising Disease Transmission

In the specific context of disease transmission, it has been argued that '[c]riminal laws that set unrealistic standards of behaviour or fail to distinguish levels of risk may undermine the development of risk reduction strategies and

116 Meixner, Nally and Dasey (n 64).

117 See, eg, Aubusson and Bungard (n 67); Noble (n 67).

118 UNAIDS (n 6) 9.

119 See, eg, Clare Farmer, Ashlee Curtis and Peter Miller, 'The Steady Proliferation of Australia's Discretionary Police-Imposed Patron Banning Powers: An Unsubstantiated Cycle of Assertion and Presumption' (2018) 18(4) *Criminology and Criminal Justice* 431, 441.

result in poor public health consequences'.[120] Although some authors have called for more extensive criminalisation of disease transmission[121] – with some even saying that 'the law is being under-enforced with respect to both lesser and more serious communicable illnesses'[122] – there are important reasons to question the broader utility of the criminal law in addressing public health matters.

In the current debate about criminalising transmission of COVID-19, some commentators seem to lose sight of the serious impact of the criminal law on the lives, well-being, safety, dignity, and liberty of alleged offenders, not to mention the stigma and the consequences of fines and incarceration. The rule of law, the presumption of innocence, and basic principles of criminal justice – that the coercive and punitive power of the state should only be used when justifiable and where the scope of liability is clearly demarcated[123] – appear to be ignored or forgotten by many who call for punishment of those transmitting COVID-19.

Even when conduct can be construed as wrongful or blameworthy, there may nevertheless be principled reasons not to criminalise and punish it.[124] This includes, inter alia, the risk that the law would, or would be seen to, operate in a manner discriminatory to a certain group, have significant undesirable consequences, or lack efficacy in deterring the criminalised conduct.[125] The availability of other, more effective, means to address a problem should also militate against criminalisation.[126]

More tempered experts argue that criminal law must play a limited, strictly circumscribed role in responding to diseases. James Chalmers, for instance, states that '[f]or obvious reasons, criminal law is not an attractive tool when it comes to the control of contagious disease. Coercive measures may be required in order to deal with an individual who presents a risk to the public health, but the process of criminal prosecution is unlikely to be helpful'.[127] Matthew Weait argues that 'there is scant evidence that criminalisation is effective on public health grounds', that overly broad criminalisation reinforces negative stereotypes, and that criminal law has been used all too frequently against defendants who took reasonable

120 Alana Klein, 'Criminal Law, Public Health, and Governance of HIV Exposure and Transmission' (2010) 13(2–3) *The International Journal of Human Rights* 251, 260. During a review of its laws in the '90s, the United Kingdom Home Office also stated that '[t]he government … is not persuaded that it would be right or appropriate to make the range of normal everyday activities during which illness could be transmitted, potentially criminal': Home Office, 'Violence: Reforming the Offences Against the Person Act 1861' (Consultation Paper, 1998) ch 3, [3.15] < https://webarchive.nationalarchives.gov.uk/20100303153427/http://www.homeoffice.gov.uk/documents/cons-1998-violence-reforming-law/cons-1998-violence-reform-scopea8cf.html?view=Html>.

121 See, eg, JR Spencer, 'Liability for Reckless Infection: Part 1' (2004) 154(7119) *New Law Journal* 384.

122 George R Mawhinney, 'To Be Ill or to Kill: The Criminality of Contagion' (2013) 77(3) *Journal of Criminal Law* 202, 213.

123 Horder (n 5) 77.

124 Husak (n 10) 155.

125 Horder (n 5) 74.

126 Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford University Press, 1984) 26.

127 James Chalmers, 'Disease Transmission, Liability and Criminal Law' in A M Viens, John Coggon and Anthony S Kessel (eds), *Criminal Law, Philosophy and Public Health Practice* (Cambridge University Press, 2013) 124, 125.

precautions and where no transmission of HIV occurred or where there was no risk of infection.[128] These sentiments are broadly echoed by United Nations agencies,[129] in an open letter signed by over 800 public health, human rights, and legal experts and organisations in the United States,[130] and feature prominently in a 2018 expert consensus statement on HIV and criminal law, which strongly recommends that 'caution be exercised when considering criminal prosecution' in the interests of reducing stigma and discrimination.[131]

On this background, arguments made by proponents of tough new criminal laws to fight COVID-19 and safeguard public health must be balanced against the negative and counterintuitive consequences of using such measures to prevent the spread of a very contagious virus. These consequences are threefold.

First, by design, offences criminalising transmission of the virus mostly target persons who are already infected, who cannot help having the disease, and who (save for extremely onerous limits on individual activity and freedoms) may find it difficult (even when hospitalised) to eliminate each and every risk of transmission. The risk of over-criminalisation is manifest as the potential scope of the current offences, illustrated above, clearly demonstrates.

Second, evidence from around Australia shows that the persons most at risk of contracting COVID-19 are disproportionately from disadvantaged backgrounds; ie, persons who are otherwise already more likely to be subject to law enforcement and other criminal justice measures. This includes ethnic minority and indigenous populations, low-skilled migrants (often with limited knowledge of the English language), and lower-socioeconomic groups, particularly homeless persons.[132] The broad scope of COVID-19 offences give significant deference to police and prosecution discretion, leading to potentially selective application to such groups.

Third, criminalisation and the rhetoric surrounding criminal justice approaches assign blame to individuals, create stigma around the disease, erode trust between communities and government, may reduce willingness to access testing and comply with other health directions, and, more broadly, thus reduce the efficacy of the broader public health response.

These latter two issues, and the human rights implications that crystallise from them, are explored in further detail in the following sections.

---

128 Matthew J Weait, 'Limit Cases: How and Why We Can and Should Decriminalise HIV Transmission, Exposure, and Non-Disclosure' (2019) 27(4) *Medical Law Review* 576, 578–80.

129 UNAIDS (n 6) 9; Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, UN Doc A/HRC/14/20 (27 April 2010) 15–21 <https://undocs.org/en/A/HRC/14/20> ('*Report of the Special Rapporteur*').

130 Yale Law School, 'Public Health and Law Experts Issue Guidelines for US Response to Coronavirus Transmission' (Web Page, 2 March 2020) <https://law.yale.edu/yls-today/news/public-health-and-law-experts-issue-guidelines-us-response-coronavirus-transmission>.

131 Françoise Barré-Sinoussi et al, 'Expert Consensus Statement on the Science of HIV in the Context of Criminal Law' (2018) 21(7) *Journal of the International AIDS Society* 1, 8.

132 See, eg, some of the observations in Stephanie Dalzell, 'Government Warned of Coronavirus "Missed Opportunity" to Protect Migrant Communities before Victorian Spike', *ABC News* (online, 24 June 2020) <https://www.abc.net.au/news/2020-06-24/government-warned-failing-engage-migrant-communities-coronavirus/12384800>.

C Discrimination

Like many other diseases, COVID-19 disproportionately affects population groups along socio-economic, ethnic, and geographical lines. Despite widely held beliefs that epidemics are 'equalisers', that COVID-19 'does not discriminate', and that 'we're all in this together'[133] – a position expressed repeatedly in government statements – evidence shows that the impact of COVID-19 reflects and perpetuates 'existing unequal experiences of chronic diseases and the social determinants of health'.[134] Studies of the 2009 H1N1 influenza pandemic similarly demonstrate much higher mortality rates in poorer neighbourhoods, and correlations between hospitalisation rates and lower educational attainment and poverty.[135]

Clare Bambra et al argue that COVID-19 is a 'co-occurring, synergistic pandemic that interacts with and exacerbates their existing [non-communicable diseases] and social conditions'.[136] In an address on 30 June 2020, the UN Secretary-General António Guterres further warned 'that the impacts of COVID-19 are falling "disproportionately on the most vulnerable: people living in poverty, the working poor, women and children, persons with disabilities, and other marginalised groups"'. [137]

Growing evidence from around the world, especially from Western industrialised nations, supports these observations. In the United States, people of colour die of COVID-19 at much higher rates than white persons, despite making up a smaller percentage of the population.[138] This is attributed, inter alia, to higher likelihoods that they are employed in service jobs where they interact closely with others, cannot afford to miss work, live in more crowded conditions, and take public transport, thus running a greater risk of both contracting and transmitting the diseases. Furthermore, pre-existing health conditions are more common among African-Americans and they have less access to health care.[139] A preliminary study found 'dramatically increased risk of death observed among residents of the most

133 'Victoria's Coronavirus Deaths Set Grim New Record as State Launches Ad Campaign and In-Home Testing Program', *ABC News* (online, 10 August 2020) <https://www.abc.net.au/news/2020-08-10/victoria-covid19-deaths-rise-by-19-state-detects-322-new-cases/12540452>.

134 Clare Bambra et al, 'The COVID-19 Pandemic and Health Inequalities' (2020) 74(11) *Journal of Epidemiology and Community Health* 964, 964.

135 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; Elizabeth C Lowcock et al, 'The Social Determinants of Health and Pandemic H1N1 2009 Influenza Severity' (2012) 102(8) *American Journal of Public Health* 51.

136 Bambra et al (n 134) 965.

137 United Nations, 'Impacts of COVID-19 Disproportionately Affect Poor and Vulnerable: UN Chief', *UN News* (Web Page, 30 June 2020) <https://news.un.org/en/story/2020/06/1067502>.

138 Centers for Disease Control and Prevention, 'Risk for COVID-19 Infection, Hospitalization, and Death By Race/Ethnicity', (Infographic, 10 March 2021) <https://web.archive.org/web/20210322074656/https://www.cdc.gov/coronavirus/2019-ncov/downloads/covid-data/hospitalization-death-by-race-ethnicity.pdf>.

139 Harvard TH Chan School of Public Health, 'COVID-19 Pandemic Highlights Longstanding Health Inequities in US', *News* (Web Page, 14 April 2020) <https://www.hsph.harvard.edu/news/hsph-in-the-news/covid-19-pandemic-highlights-longstanding-health-inequities-in-u-s/>.

disadvantaged counties' in the United States.[140] In England and Wales, black, Asian, and minority ethnic persons have become critically ill with COVID-19 at much higher rates than other parts of the population.[141] In Australia, many members of ethnic and religious minorities and low-skilled migrants are employed in industries with greater exposure to the pandemic. They are less likely to be able to self-isolate effectively, work from home, or support themselves for significant periods without work.[142] Indigenous Australians are at increased risk for a multitude of factors, including the prevalence of chronic health conditions and mental illness, poor housing, and limited access to health care and other support services.[143] As a consequence, 'COVID-19 policy responses [tend to] disproportionately [affect] people of colour and migrants – people who are over-represented in lower socioeconomic groups, have limited health-care access, or work in precarious jobs'.[144]

The potential for discriminatory use of criminal law in the COVID-19 context has been highlighted by official organisations and commentators. The United Nations High Commissioner for Human Rights stresses that 'discrimination is manifested in who is penalised for "violating" restrictions during the pandemic, with marginalised communities facing heightened risks'.[145] Amnesty International has noted that, in Australia, 'culturally diverse and low socio-economic groups are bearing the brunt of COVID-19 policing'.[146] Data from the New South Wales Police Force released in April 2020 shows that the number of fines issued for breaching COVID-19 restrictions was higher in more marginalised communities, creating the impression that police were 'targeting specific groups such as Aboriginal and Torres Strait Islanders as well as Muslim and African migrants – and giving warnings only to other groups'.[147] Concerns that Aboriginal and Torres Strait Islanders and other vulnerable groups have been targeted have also been raised in Queensland.[148]

Discrimination in the enforcement of criminal laws relating to transmission of diseases is nothing new and the experiences with other infectious diseases,

140 Jarvis T Chen and Nancy Krieger, 'Revealing the Unequal Burden of COVID-19 by Income, Race/Ethnicity, and Household Crowding: US County vs ZIP Code Analyses' (Working Paper No 19(1), Harvard Center for Population and Development Studies, 21 April 2020) 1.

141 Intensive Care National Audit and Research Centre, *ICNARC Report on COVID-19 in Critical Care 17 April 2020* (Report, 17 April 2020).

142 See, eg, Dalzell (n 132).

143 Aryati Yashadhana et al, 'Indigenous Australians at Increased Risk of COVID-19 Due to Existing Health and Socioeconomic Inequities' (2020) 1 *Lancet Regional Health – Western Pacific* 1.

144 Delan Devakumar et al, 'Racism and Discrimination in COVID-19 Responses' (2020) 395 *Lancet* 1194.

145 United Nations Human Rights Office of the High Commissioner, 'Racial Discrimination in the Context of the COVID-19 Crisis' (Report, 22 June 2020) 3 <https://www.ohchr.org/Documents/Issues/Racism/COVID-19_and_Racial_Discrimination.pdf>.

146 Amnesty International, '5 Concerns With Australia's Policing During Covid-19' (Web Page, 27 April 2020) <https://www.amnesty.org.au/policing-during-covid-19/>.

147 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>.

148 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>.

especially HIV/AIDS, are instructive here. In a 1988 article, Kathleen Sullivan and Martha Field stress the potential for 'discrimination, abuse and harassment in the enforcement of criminal law regulating AIDS', particularly given that persons contracting HIV disproportionately involved people who were already marginalised at that time: drug users and gay men.[149] In 1998, the UK Home Office expressed concern over offences criminalising reckless transmission of diseases saying 'that the law should not seem to discriminate against those who are HIV positive, have AIDS or viral hepatitis or who carry any kind of disease'.[150] 'Lessons learned from the HIV response… highlight the importance of … not further marginalising … populations in disease prevention responses', as noted by Dainius Pūras (the current United Nations Special Rapporteur on the Right to Health) and others in relation to COVID-19.[151]

Furthermore, where breaches of public health directives and criminal offending by certain groups and individuals in the COVID-19 context are reported in the media or used for political point-scoring, stigma in the community may soon follow.[152] This is well demonstrated in news stories concerning two young women who entered Queensland from Victoria in July 2020 in violation of border restrictions and were charged with fraud offences. Media reports called the two women, who were of African background, 'enemies of the state' and widely disseminated their names and photos of them.[153] Members of the African community in Brisbane subsequently contacted the Queensland Human Rights Commission to report widespread instances of racist abuse resulting from these reports.[154]

The fear of stigmatisation is also seen as a reason why some individuals and communities are reluctant to undergo COVID-19 testing.[155] This creates a serious risk that cases remain uncovered and transmission remains undetected 'especially when the costs of social exposure outweigh the benefits of early testing and treatment'.[156] The creation of stigma around the current pandemic deters people from seeking healthcare and amplifies distrust of health officials and government

149 Kathleen M Sullivan and Martha A Field, 'AIDS and the Coercive Power of the State' (1988) 23(1) *Harvard Civil Rights-Civil Liberties Law Review* 139, 161–2.

150 Spencer (n 121).

151 Dainius Pūras et al, 'The Right to Health Must Guide Responses to COVID-19' (2020) 395 *Lancet* 1888, 1888.

152 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.

153 See Jessica Marszalek, 'Enemies of the State', *The Courier Mail* (Brisbane, 30 July 2020) 1. For commentary, see Yussuf (n 9).

154 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>.

155 Cook and Dow (n 9).

156 Ron Barrett and Peter J Brown, 'Stigma in the Time of Influenza: Social and Institutional Responses to Pandemic Emergencies' (2008) 197(1) *Journal of Infectious Diseases* 34, 34.

information. It can distort the public's perception of the risks around the disease[157] and discourage compliance with health directives and other legal requirements.[158]

In sum, offences criminalising transmission of COVID-19 can create a cycle of discrimination: certain marginalised groups are more vulnerable to contract and transmit the disease, thus making them more likely to be the target of these laws. Their vulnerability makes it more likely that they will become the target of suspicions, investigations, and prosecution, and that transmitters and 'offenders' from other backgrounds will remain unnoticed. Reports of these suspicions and of criminal justice action taken against members of already marginalised groups reinforces the perception that they are more 'dangerous', thus creating stigma and deterring people from getting tested and seeking healthcare, thus further increasing the risk of infection and transmission. The difficulty in using criminal law to maximise persons' incentives to take precautions, notes Jonathan Montgomery, is that criminal offences 'necessarily impose the burden of criminal liability on specific groups' that are most exposed to the virus.[159]

D Deterrence and Public Health

There is a view that the available offences, including minor offences to enforce health orders and more serious ones to punish instances of actual or threatened transmission, deter people from engaging in risky behaviour, thus preventing the spread of diseases.[160] This belief drove the introduction of relevant offences in the 1990s,[161] as well as some of the recent amendments in response to COVID-19.[162] Seen this way, criminal offences are part and parcel of a broader suite of measures to protect rights relating to public and personal health and physical integrity. It could be argued further that such measures reflect obligations under article 12(2)(c) of the *International Covenant on Economic, Social and Cultural Rights*, which requires state parties to take steps for the 'prevention, treatment and control of epidemic, endemic, occupational and other diseases'.[163]

While the 'right to health' does not equate to a guarantee of health (a 'right to be healthy'), it does afford persons a right to 'the highest attainable standard' of health[164] and obliges States to take appropriate action to realise the right. In the

157 Ibid 35.

158 See, eg, Lisanna Brown, Kate Macintyre and Lea Trujillo, 'Interventions to Reduce HIV/AIDS Stigma: What Have We Learned?' (2003) 15(1) *AIDS Education and Prevention* 49.

159 Jonathan Montgomery, 'Medicalizing Crime: Criminalizing Health? The Role of Law' in Charles A Erin and Suzanne Ost (eds), *The Criminal Justice System and Health Care* (Oxford University Press, 2007) 257, 270.

160 See Aslak Syse, 'Criminal Law and Contagious Diseases: A Nordic Perspective' in Catherine Stanton and Hannah Quirk (eds), *Criminalising Contagion Legal and Ethical Challenges of Disease Transmission and the Criminal Law* (Cambridge University Press, 2016) 98, 101.

161 See Part II above.

162 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>.

163 *International Covenant on Economic, Social and Cultural Rights* (n 4) art 12(2)(c).

164 Ibid art 12(1); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 24(1); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 25.

context of a pandemic, this may involve measures ranging from quarantine regulations through to increased spending on personal protective equipment. It may also justify the use of criminal justice measures so long as they are proportionate, necessary, and reasonable and, in particular, if no less intrusive measure is available and effective. This threshold is – and must be – particularly high, given the severe consequences and rights implications of criminalisation, enforcement, and punishment. In this context, John Tobin articulates two guiding considerations: '[D]id the interference respond to a pressing social need, pursue a legitimate aim, or promote the general welfare of a state (such as a public health objective) and were the measures used to achieve that aim proportionate or justified?'[165]

Further guidance may be drawn from the work of the Special Rapporteur on the Right to Health. With reference to HIV, the Special Rapporteur states that criminal laws concerning transmission and exposure may be permissible in cases of intentional and malicious transmission; beyond that, they are likely to undermine realisation of the right to health.[166] The Special Rapporteur further stresses the potential for criminal offences to prove counterproductive to public health, noting the limited evidence that criminalisation actually reduces rates of transmission but instead lowers testing rates and raises barriers to access healthcare, especially among marginalised communities.[167]

On this background, the use of criminal law and punishment to combat the transmission of diseases can indeed be construed as a violation of the State's obligation to realise the right to health. This right is not merely focused on being free from illness but embraces a much wider range of factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health.[168] It is now widely recognised that health is linked to other contextual factors, including 'social prejudice and stereotypes'.[169] To this end, protecting the right to health also necessitates measures to protect all vulnerable or marginalised groups within society.[170] In the specific context of COVID-19, UNAIDS notes that overly restrictive and punitive measures increase barriers to health and the vulnerabilities of already disadvantaged communities, while also eroding trust between government and the people and harming public health messaging.[171]

Recent research on the impact of criminalisation on the spread of diseases, while somewhat limited, offers some support to the proposition that criminal justice approaches lack efficacy.[172] For example, in finding no positive effect from criminalisation on reducing transmission, in a large-scale study of the efficacy of

165 John Tobin, *The Right to Health in International Law* (Oxford University Press, 2012) 182.
166 *Report of the Special Rapporteur* (n 129) 17 [58], 18–20 [62]–[71].
167 Ibid 15–21.
168 Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, UN Doc E/C/12/2000/4 (11 August 2000) [8] ('*General Comment No 14*').
169 Tobin (n 165) 128–9.
170 *General Comment No 14* (n 168) [35].
171 UNAIDS (n 6) 4.
172 Klein (n 120) 253.

criminal laws on HIV risk behaviour, Scott Burris et al argue that '[t]hreats of punishment evidently are not effective' and that prosecutors, judges, and juries are not always good 'at distinguishing truly dangerous behaviour from behaviour that carries little risk of disease transmission'.[173] A 2006 study of the views held by HIV-positive persons towards criminal prosecutions for HIV transmission found that the vast majority of respondents thought that prosecutions would have negative impacts on prevention, treatment, and care. In particular, concerns were expressed that prosecutions would create further stigma and disincentivise persons from coming forward for testing.[174] A 2017 review of 25 empirical studies on criminalisation of HIV exposure found that such offences did not lead to safer behaviour (though it did suggest that they do not deter testing for HIV).[175]

There is broad consensus that criminalisation of disease transmission is counterproductive to prevention efforts and broader public health approaches. Ralf Jürgens et al, for instance, argue that the threat of punishment for transmitting HIV and for creating a risk of transmission, together with the stigma of criminalisation, may discourage persons from engaging with healthcare systems (and, in turn, risk greater spread).[176] Leslie and John Francis conclude that 'criminalisation is unlikely to deter risky behaviours … any more than other incentives would deter'.[177] Montgomery states that, while 'normal expectations of justice' may support punishment of persons inflicting injury on others or breaching legally mandated restrictions, they should give way to the broader public health imperatives of 'maximising … health and well-being'.[178] He adds that 'normal criminal sanctions should not be applied to disease transmission because the issues at stake are different from other circumstances in which harm is caused by one person to another'.[179]

If the goals of a public health response to diseases such as COVID-19 include ameliorating the impact of the virus on those affected and mitigating as much as possible its economic consequences, stigmatising and prosecuting those who are ill appears problematic. Criminalising those transmitting COVID-19 and media reporting about their prosecution shape the perception and responses to the current pandemic, singling out those affected as doing 'the wrong thing' and portraying them as threats to 'normal' people in the community.[180] When those singled out

173 Scott Burris et al, 'Do Criminal Laws Influence HIV Risk Behaviour? An Empirical Trial' (2007) 39(2) *Arizona State Law Journal* 467, 471–2.

174 C Dodds and P Keogh, 'Criminal Prosecutions for HIV Transmission: People Living with HIV Respond' (2006) 17(5) *International Journal of STD and AIDS* 315.

175 Dini Harsono et al, 'Criminalization of HIV Exposure: A Review of Empirical Studies in the United States' (2017) 21(1) *AIDS and Behavior* 27.

176 Ralf Jürgens et al, 'Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission' (2009) 17(34) *Reproductive Health Matters* 163, 166.

177 Leslie Pickering Francis and John G Francis, 'Criminalizing Health-Related Behaviors Dangerous to Others? Disease Transmission, Transmission-Facilitation, and the Importance of Trust' (2012) 6(1) *Criminal Law and Philosophy* 47, 49.

178 Montgomery (n 159) 259.

179 Ibid 264, citing Rebecca Bennett, 'Should we Criminalize HIV Transmission' in Charles A Erin and Suzanne Ost (eds), *The Criminal Justice System and Health Care* (Oxford University Press, 2007) 225.

180 Montgomery (n 159) 266–7, citing Susan Sontag, *Illness as Metaphor and AIDS and Its Metaphors* (Penguin, 2002).

come from minority or marginalised groups, the stigmatising dynamics in Australia can quickly take on racialised overtones. Labelling those transmitting COVID-19 as 'criminals' at fault for the pandemic undermines public health messaging that the virus spreads indiscriminately and that everyone can do their part to 'flatten the curve' and limit the transmission of this disease.[181]

VI CONCLUSION

The criminal measures adopted in Australia to prevent the spread of COVID-19 have been harsh by any measure. This is not only reflected in the many sanctions aimed at controlling COVID-19 but also in the political rhetoric, including threats to apply more serious offences criminalising the transmission of this disease. Those who put others at risk of contracting COVID-19 must 'face the full force of the law and harsh penalties', said Western Australia's Premier when he presented the new offences, adding that 'extraordinary times' necessitate 'extraordinary measures'.[182] Many other politicians around Australia have made similar statements.

Offences covering transmission of diseases are incredibly broad in scope. COVID-19 has given new meaning to these offences and has raised concerns over their design, scope, and application. Many offences have the capacity to criminalise innocuous conduct and punish people for trivial, every day activities. There is a real danger that these laws could be used against very many people who contract and transmit the disease, including some who may be unaware they are infected. This situation is all the more alarming in cases where a person dies as a result of being infected. When it comes to disease, notes Karl Laird, the criminal law 'is broad enough to encompass all sorts of everyday behaviour' and the 'only bulwark against this is prosecutorial discretion'.[183] General endangerment offences are equally controversial, penalising 'irresponsible behaviour, where no harm is caused' and thus subjecting 'too many people to liability'.[184] These offences have also been criticised for overcriminalisation and infringing the *ultima ratio* principle.[185]

The dangers associated with overcriminalisation are matched by concerns about stigmatisation and discrimination that follow from the enforcement of these offences. Resort to the criminal law in this context risks disproportionate use against marginalised groups and individuals who are already more likely to suffer the negative effects of the virus and of the criminal law. Even if unintended and well formulated, criminal offences can have differential impacts with serious human rights implications due to the action taken by law enforcement agencies,

181 Montgomery (n 159) 267–8.
182 See above n 162.
183 Laird (n 17) 228.
184 United Kingdom Law Commission, *Reform of Offences Against the Person: A Scoping Consultation Paper* (Consultation Paper No 217, 2014) 77 [3.64].
185 C M V Clarkson, 'General Endangerment Offences: The Way Forward?' (2005) 32(2) *University of Western Australia Law Review* 131, 141.

the language used by those in power, and media portrayal. The experiences with other diseases, particularly HIV/AIDS, clearly demonstrate these risks.

The use of the criminal law to combat COVID-19 may well prove ineffective or, worse, counterproductive:

> When criminalisation singles out some but is ineffectual in reducing spread, it may paradoxically undermine the very trust needed to achieve its goals. The situation may be worsened by the apparent hypocrisy of states that turn diseases into crimes but at the same time devote half-hearted resources to public health …[186]

There is already emerging evidence in Australia that punitive and coercive approaches to COVID-19 are having negative effects, including over-policing of certain communities and distrust of official messaging among these groups.[187] Furthermore, heavy-handed approaches by law enforcement have drawn criticism.[188]

Legislators and other authorities around Australia must exercise restraint and caution when creating and employing criminal offences, not only in the context of COVID-19. While infringement notices and the use of some police powers may be adequate and necessary to enforce some public health orders, the use of criminal law and punishment must be the very last – not first – resort. Prosecution for intentional transmission of COVID-19 'on purpose' may well be justified in some circumstances, though such cases will likely be few and far between. Criminalisation of reckless and negligent transmission, on the other hand, is unfair and, in most cases, unnecessary. Just as importantly, no pandemic can justify the use of punitive measures against groups and individuals who are at particular risk from the virus. Law enforcement and prosecutorial guidelines should be clearly articulated to reflect this position, and media reporting and political rhetoric should exercise appropriate restraint.

Lessons from the HIV/AIDS crisis in the 1990s show that '[r]espect for universal rights is most needed when they are most at risk of being forgotten, as in the middle of an epidemic'.[189] While the focus of this article has been on the circumstances and consequences of the COVID-19 pandemic – which may well be history by the time this article goes to print – it is hoped that the analysis and observations made here will be useful at a time when Australia looks back at its response to COVID-19 and prepares, in a more sober and reflective manner, for future public health crises.

186 Francis and Francis (n 177) 60–1.

187 Blakkarly (n 147); Dennien (n 148).

188 See, eg, Amnesty International (n 146); Osman Faruqi, 'Compliance Fines under the Microscope', *The Saturday Paper* (online, 18 April 2020) <https://www.thesaturdaypaper.com.au/news/health/2020/04/18/compliance-fines-under-the-microscope/15871320009710>.

189 Michael Kirby, 'The Ten Commandments for AIDS Law' [1991] (2) *AIDSED Newsletter* 27.