

PEOPLE'S EXPERIENCES OF PANDEMIC POLICING: WHY CRIMINALISATION IS BAD FOR THE SOCIAL DETERMINANTS OF HEALTH

VICKI SENTAS* AND LOUISE BOON-KUO**

'Baffled', 'embarrassed', 'quite intimidated', 'unsafe' – these are some of the words people used to describe their experience of COVID-19 laws and policing in Australia. While governments across Australia expanded police powers as a strategy to contain the virus, people's experiences provoke questions about whether police are inescapably bad for public health. Our study of 90 accounts of how COVID-19 laws were policed in Australia foregrounds the experience of policed peoples to better understand how policing impacts on public health. This article finds that people's experiences of criminalisation, exclusion and punishment, correlate with race, age, gender, disability and illness to undermine the social determinants of public health. Many police actions were unlawful and unnecessary, which sabotaged public health by criminalising health-positive behaviour and by increasing the debt burden of already policed populations. Police as first responders in the pandemic added further health risks to encounters already defined by the threat of force.

I INTRODUCTION

After the COVID-19 pandemic struck in 2019, most governments rapidly introduced an unprecedented expansion of law and street policing to contain the spread of the virus. New public health order frameworks increased police interventions and their powers to question, direct and move on people, and require quarantine. One of the critiques of COVID-policing has been that the police enforcement response has undermined public health imperatives. The stated objective of public health orders was to stop the spread of contagion in the interests of public health. However in practice, governments empowered police to contain the virus through the usual forms of coercive public order policing practices that identify, contain and disrupt populations pre-emptively in advance of, or

* Faculty of Law & Justice, University of New South Wales.

** Sydney Law School, University of Sydney. This article draws from Louise Boon-Kuo, Vicki Sentas and Leanne Weber, *COVID-19 Policing in the Pandemic: Analysis of Reports Submitted to the COVID-19 Policing in Australia Coalition* (Report, 2021).

without the presence of identifiable risks.¹ What we refer to as the 'criminalisation paradigm' of COVID-policing has involved high visibility punitive enforcement through move on directions, questioning and searches, and financial punishment through large fines and prosecution for minor offending.² The burden of COVID-policing, like street policing in general, is disproportionately applied to racialised and marginalised peoples perceived by police as 'suspect'.

A review of the multidisciplinary policy and academic literature points to how pandemic policing undermines public health goals and has further securitised public health.³ Emma Russell et al however give an important warning against 'juxtaposing crime control and public health', pointing to the long history of 'their continuous and over-lapping logics, techniques and effects'.⁴ In this article, we do not interrogate how public health techniques 'police' or operate as crime control. We seek to better understand lived experience of the harms of police criminalisation as a social determinant of health. Social determinants of health refer to 'the non-medical factors that influence health outcomes' and the 'conditions in which people are born, grow, work, live, and age, and the wider set of forces and systems shaping the conditions of daily life'.⁵ Policing and criminalisation are established social determinants that drive poor mental and physical health outcomes.⁶ For example, policing increases risk of further contact with the criminal justice system and imprisonment, and amplifies socio-economic stresses, stigma, and racialised marginalisation. Policing functions as a fundamental mechanism of social

-
- 1 Louise Boon-Kuo et al, 'Policing Biosecurity: Police Enforcement of Special Measures in New South Wales and Victoria during the COVID-19 Pandemic' (2021) 33(1) *Current Issues in Criminal Justice* 76 <<https://doi.org/10.1080/10345329.2020.1850144>>.
 - 2 Ibid. For discussion of the role of 'law and order' in constructing criminalisation in the pandemic, see UNSW Centre for Crime, Law & Justice, *COVID-19 Criminalisation in NSW: A 'Law and Order' Response to a Public Health Crisis?* (Report, November 2022) <<https://cclj.unsw.edu.au/sites/cclj.unsw.edu.au/files/CCLJ%20Covid%20Fines%20NSW%20Report%20Nov%202022.pdf>> ('COVID-19 Criminalisation in NSW').
 - 3 Clifford Stott, Owen West and Mark Harrison, 'A Turning Point, Securitization, and Policing in the Context of Covid-19: Building a New Social Contract between State and Nation?' (2020) 14(3) *Policing: A Journal of Policy and Practice* 574 <<https://doi.org/10.1093/police/paaa021>>; James Sheptycki, 'The Politics of Policing a Pandemic Panic' (2020) 53(2) *Australian & New Zealand Journal of Criminology* 157 <<https://doi.org/10.1177/0004865820925861>>; Michael D White and Henry F Fradella, 'Policing a Pandemic: Stay-at-Home Orders and What They Mean for the Police' (2020) 45(4) *American Journal of Criminal Justice* 702 <<https://doi.org/10.1007/s12103-020-09538-0>>; Lambros Fatsis and Melayna Lamb, *Policing the Pandemic: How Public Health Becomes Public Order* (Policy Press, 2022) <<https://doi.org/10.2307/j.ctv249sg07>>; Lawrence O Gostin et al, 'Human Rights and the COVID-19 Pandemic: A Retrospective and Prospective Analysis' (2023) 401(10371) *Lancet* 154 <[https://doi.org/10.1016/s0140-6736\(22\)01278-8](https://doi.org/10.1016/s0140-6736(22)01278-8)>.
 - 4 Emma K Russell et al, "'It Is Not about Punishment, It's about Protection": Policing "Vulnerabilities" and the Securitisation of Public Health in the COVID-19 Pandemic' [2022] *Criminology & Criminal Justice* 1 <<https://doi.org/10.1177/17488958221120480>>.
 - 5 'Social Determinants of Health', *World Health Organization* (Web Page) <https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1>.
 - 6 Merrill Rotter and Michael Compton, 'Criminal Legal Involvement: A Cause and Consequence of Social Determinants of Health' (2022) 73(1) *Psychiatric Services* 108 <<https://doi.org/10.1176/appi.ps.202000741>>.

stratification that produces and amplifies health disparities.⁷ The disproportionate prevalence and impact of COVID-19 for First Nations, people of colour and people from low socio-economic backgrounds globally, are caused by the social and economic determinants of health.⁸ These structural factors include access to health care, housing, socio-economic inequalities, diet and nutrition, structural racism and policing and carceral systems.⁹ In exploring the impacts of policing on health, we refer to ‘public health’ normatively as the social and economic conditions necessary for collective healthy life, rather than examining public health as a technique of government.

What do we know empirically about the impacts of COVID-policing on those who have been policed? We suggest that three broad strands of literature on COVID-policing offer competing narratives on its function and effect. The first strand, largely published in scholarly journals, is concerned with public perceptions of police officer enforcement¹⁰ and measuring public compliance with public health orders,¹¹ in order to assess police legitimacy. The second strand grows from an older debate on the limits and possibilities of police as public health workers, and considers opportunities for COVID-policy to recalibrate policing towards public health goals.¹² The third strand, largely published by non-government organisations as public reports (and a smaller sample found in scholarly publications), documents the experiences of policed peoples as empirical bases for understanding the effects of COVID-policing. Key themes evidenced in these studies include: poor use of police discretion, excessive force and violence, unlawful policing and discrimination. A particular focus of the grey literature has been on the disproportionate impact and

-
- 7 Asad L Asad and Matthew Clair, ‘Racialized Legal Status as a Social Determinant of Health’ (2018) 199 *Social Science & Medicine* 19 <<https://doi.org/10.1016/j.socscimed.2017.03.010>>.
- 8 Lakisha D Flagg and Lisa A Campbell, ‘COVID-19 in Communities of Color: Structural Racism and Social Determinants of Health’ (2021) 26(2) *Online Journal of Issues in Nursing* 6:1–12 <<https://doi.org/10.3912/ojin.vol26no02man06>>; Jocelyn Turner-Musa, Oluwatoyin Ajayi and Layschel Kemp, ‘Examining Social Determinants of Health, Stigma, and COVID-19 Disparities’ (2020) 8(2) *Healthcare* 168 <<https://doi.org/10.3390/healthcare8020168>>.
- 9 Flagg and Campbell (n 8); Turner-Musa, Ajayi and Kemp (n 8).
- 10 Aram Ghaemmghami et al, ‘Responding to the Public during a Pandemic: Perceptions of “Satisfactory” and “Unsatisfactory” Policing’ (2021) 15(4) *Policing: A Journal of Policy and Practice* 2310 <<https://doi.org/10.1093/police/paab058>>; Seyvan Nouri and Tammy Rinehart Kochel, ‘Residents’ Perceptions of Policing and Safety during the COVID-19 Pandemic’ (2022) 45(1) *Policing: An International Journal of Police Strategies and Management* 139 <<https://doi.org/10.1108/pijpsm-05-2021-0067>>; Bojan Janković and Vladimir Mirosljub Cvetković, ‘Public Perception of Police Behaviors in the Disaster COVID-19: The Case of Serbia’ (2020) 43(6) *Policing: An International Journal of Police Strategies & Management* 979 <<https://doi.org/10.1108/pijpsm-05-2020-0072>>; Gali Perry and Tal Jonathan-Zamir, ‘Expectations, Effectiveness, Trust, and Cooperation: Public Attitudes towards the Israel Police during the COVID-19 Pandemic’ (2020) 14(4) *Policing: A Journal of Policy and Practice* 1073 <<https://doi.org/10.1093/police/paaa060>>; Daniel J Jones, ‘The Potential Impacts of Pandemic Policing on Police Legitimacy: Planning Past the COVID-19 Crisis’ (2020) 14(3) *Policing: A Journal of Policy and Practice* 579 <<https://doi.org/10.1093/police/paaa026>>.
- 11 Karl A Roberts et al, *Why Rights-Based Policing Responses to Pandemics Are Good for the Police and Good for Policing* (Report, 2021); Kristina Murphy et al, ‘Why People Comply with COVID-19 Social Distancing Restrictions: Self-Interest or Duty?’ (2020) 53(4) *Australian & New Zealand Journal of Criminology* 477 <<https://doi.org/10.1177/0004865820954484>>.
- 12 See, eg, Roberts et al (n 11).

effect of fines on low socio-economic, racialised, and First Nations communities in Australia,¹³ Canada,¹⁴ the United States,¹⁵ and England.¹⁶ Studies which engaged with the lived experience of those policed, did so through the lens of human rights¹⁷ or institutional racism.¹⁸ We build on the themes in this third strand by turning to how police instigated criminalisation impacts on public health.

In Australia, criminal justice studies have found COVID-policing functions as an extension of diverse, pre-existing practices of criminalisation. Studies argue that COVID-policing is a continuation of the racialised public order policing of First Nations people, reflected in statistics in NSW¹⁹ and Victoria.²⁰ A recent quantitative study found that racial profiling by Victoria Police played a part in the racially disproportionate issue of COVID-19 fines in 2020.²¹ People of African/Middle Eastern appearance were over-represented by four times and First Nations people were two and half times as likely to be issued COVID fines than expected by their size in the population. Other research has documented 'the high-visibility policing of racialised and socio-economically disadvantaged communities in public housing'.²² We have argued elsewhere that COVID-policing operated as security policing, aimed at pre-emptive and punitive disruption of otherwise lawful activities, informed by race, class, and other proxies for health risk.²³ This was effected by extensive COVID-19 stops and searches, police applications for judicial orders to prohibit protest gatherings, as well as pre-emptive arrests of

-
- 13 Change the Record, *Critical Condition: The Impact of Covid-19 Policies, Policing and Prisons on First Nations Communities* (Report, 2020); 'Increased Police Powers Must Not Be a Free Kick for Discrimination', *Victorian Aboriginal Legal Service* (Web Page, 11 August 2020) <<https://www.vals.org.au/increased-police-powers-must-not-be-free-kick-for-discrimination/>>; Aboriginal Legal Service, 'Police Must Exercise Discretion to Avoid Further COVID Harm to Aboriginal Communities' (Media Release, 24 August 2021) <https://www.alsnswact.org.au/exercise_discretion_to_avoid_covid_harm>.
- 14 Canadian Civil Liberties Association, *COVID-19 and Law Enforcement in Canada: The Second Wave* (Report, May 2021) ('*COVID-19 and Law Enforcement in Canada*'); Canadian Civil Liberties Association, *Stay off the Grass: COVID-19 and Law Enforcement in Canada* (Report, June 2020) ('*Stay off the Grass*').
- 15 Pascal Emmer et al, *Unmasked: Impacts of Pandemic Policing* (Report, October 2020).
- 16 Scarlet Harris et al, Institute of Race Relations, *A Threat to Public Safety: Policing, Racism and the Covid-19 Pandemic* (Report, 2021).
- 17 See, eg, Amnesty International, *COVID-19 Crackdowns: Police Abuse and the Global Pandemic* (Report, 2020) ('*COVID-19 Crackdowns*'); Amnesty International, *Policing the Pandemic: Human Rights Violations in the Enforcement of COVID-19 Measures in Europe* (Report, 2020) ('*Policing the Pandemic*').
- 18 See, eg, Harris et al (n 16).
- 19 Boon-Kuo et al (n 1) 79–81.
- 20 Tamar Hopkins and Gordana Popovic, *Policing COVID-19 in Victoria: Exploring the Impact of Perceived Race in the Issuing of COVID-19 Fines during 2020* (Report, 2023).
- 21 Ibid 8, 11, 19.
- 22 Boon-Kuo et al (n 1) 85. See also Russell et al (n 4); Emma Ryan, Ian Warren and Bree Carlton, 'Biopolitics, Control and Pandemic Policing in Victoria, Australia' (2022) 5(1–2) *Justice, Power and Resistance* 127 <<https://doi.org/10.1332/ichl4154?>>.
- 23 Boon-Kuo et al (n 1).

protest organisers,²⁴ and detention of whole communities within public housing.²⁵ We found that COVID-policing ‘intensified existing policing practices directed towards the “usual suspects”, which disrupts the notion that COVID-policing is directed solely towards the legitimate public health objective of preventing contagion’.²⁶ Australian scholarship to date largely draws on either quantitative data and/or secondary reports of lived experience to conceptualise COVID-policing.

This article presents the findings from a survey of people’s experiences of COVID-policing in Australia in 2020, with most reports lodged in Victoria. Our aim in this article is to understand what people’s experience of COVID-policing tells us about the impacts of policing on public health. People’s lived experience of pandemic policing suggests policing is incapable of preserving the conditions for healthy life.

II OVERVIEW OF COVID-POLICING LEGISLATION

COVID-policing relies on three interrelated sites of law: new criminal offences created by public health orders; new powers afforded for police enforcement of COVID-19 orders; and existing police powers (like stop and search, move on directions and request for identification) which are part of the legal resources able to be deployed towards public health risks.²⁷ We treat new criminal offences created by public health orders as a policing function because these ‘new offences give police expansive discretion to decide what conduct ought to be considered an offence and reflect the practical indistinction between criminal offences and police powers’.²⁸ As our study will explain, people’s complaints were about how police used their procedural powers (to stop, search, fine and arrest), as well as the substantive assessments police made as to whether a person’s conduct constituted an offence under public health orders.

Every state and territory public health Act contains diversely worded provisions that empower the Minister of Health or Chief Health Officer to make public health orders and directions to the public.²⁹ Generally, the Minister is empowered to make public health orders if the Minister considers, on reasonable grounds, that a public health risk exists or is likely to arise. The key features of public health orders are broadly similar across jurisdictions. In making a public health order, the Minister

24 See also Greg Martin, ‘Protest, Policing and Law during COVID-19: On the Legality of Mass Gatherings in a Health Crisis’ (2021) 46(4) *Alternative Law Journal* 275 <<https://doi.org/10.1177/1037969X211029963>>.

25 Ryan, Warren and Carlton (n 22); Russell et al (n 4).

26 Boon-Kuo et al (n 1) 85.

27 *Ibid* 77–8.

28 *Ibid* 78, citing David Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Press, 1997).

29 David Carter, ‘The Use of Coercive Public Health and Human Biosecurity Law in Australia: An Empirical Analysis’ (2020) 43(1) *University of New South Wales Law Journal* 117, 129–32 <<https://doi.org/10.53637/KVCB1591>>.

may declare a specific area of the state a health risk and may contain directions considered by the Minister to be necessary to reduce or remove access to an area, to segregate or isolate individuals in an area, or to prevent or conditionally permit access to an area.³⁰

Public health orders generally expire within 90 days unless they were revoked beforehand.³¹ Across the nation a large number of frequently changing public health orders proliferated, characterised as 'high-volume and high-speed law-making'.³² For example, in New South Wales ('NSW') alone, 266 principal and amending public health orders had been made 'averaging to an order every 2.5 days for the almost 2 years between 15 March 2020 – 31 January 2022'.³³ The NSW Ombudsman, in their second report on the pandemic, set out a comprehensive analysis of how the speed and volume of orders challenged the rule of law. Whilst acknowledging the necessity of quickly responding to changing circumstances, the Ombudsman raised significant concerns, including: the dangers of executive government lawmaking without parliamentary oversight; ambiguities in the construction of public health orders, including complex drafting; and the absence of 'common sense' in the rules.³⁴ The Ombudsman concluded it was 'challenging to know what the law was, and what it required, at any given time'.³⁵ The rule of law principle that laws need to be 'knowable' in order to be legitimate was challenged by the significant sanctions introduced.³⁶

All Australian jurisdictions made it an offence to contravene public health orders or directions issued under public health legislation, punishable by a fine and/or imprisonment.

During the most stringent stages of lockdown, it was a criminal offence to not stay at home, unless a person met specified exceptions or had a 'reasonable excuse'. In most jurisdictions this offence would not be established, for example, if a person left home to shop for food or groceries, seek medical care, travel to work that cannot be done remotely, care for vulnerable people, attend education, care for or visit children as part of parenting arrangements, or escape harm including family violence. The stay-at-home orders did not apply to people who were experiencing homelessness.

30 See, eg, *Public Health Act 2010* (NSW) s 7.

31 See, eg, *ibid* s 7(5); *Public Health Act 2005* (Qld) s 142I(2).

32 *COVID-19 Criminalisation in NSW* (n 2) 5.

33 Ombudsman (NSW), *The COVID-19 Pandemic: Second Report* (Report, 2022) 62. See also Andrew Edgar, 'Law-Making in a Crisis: Commonwealth and NSW Coronavirus Regulations', *AUSPUBLAW* (Blog Post, 30 March 2020) <<https://auspublaw.org/blog/2020/03/law-making-in-a-crisis-commonwealth-and-nsw-coronavirus-regulations/>>.

34 Ombudsman (NSW) (n 33) 62–6.

35 *Ibid* 62.

36 See also Carter (n 29). Carter argues that the use of coercive public health and human biosecurity law in general is also characterised by insufficient transparency.

Table 1: Selected Public Health Offences in 2020 by State or Territory

State or Territory	Offence	Maximum penalty for individual	On-the-spot fine
Northern Territory	Conduct that contravenes the emergency declaration or any direction from the Chief Health Officer: <i>Public and Environmental Health Act 2011</i> (NT) s 56.	\$62,800	\$5,024
Western Australia	Failure to comply with a Direction of the Chief Health Officer or emergency officer: <i>Public Health Act 2016</i> (WA) s 122.	\$50,000 and/or 12 months imprisonment	\$1,000
South Australia	Fail or refuse to comply with a Direction without reasonable excuse during a declared major emergency, major incident or disaster: <i>Emergency Management Act 2004</i> (SA) s 28.	\$20,000	\$1,000
Tasmania	Breach a Direction of the Director of Public Health: <i>Public Health Act 1997</i> (Tas) s 16(3).	\$16,800 and/or imprisonment for 6 months	\$756
Victoria	Failing to comply with a Direction or exercise of an emergency power by an authorised officer without a reasonable excuse: <i>Public Health and Wellbeing Act 2008</i> (Vic) s 203.	\$19,826.40	\$1,652
Queensland	Not comply with a public health direction or direction by emergency officer without a reasonable excuse: <i>Public Health Act 2005</i> (Qld) ss 362D, 362J.	\$13,345	\$1,334.50
New South Wales	Breach Ministerial Direction or public health order: <i>Public Health Act 2010</i> (NSW) s 10.	\$11,000 and/or imprisonment for 6 months	\$1,000
Australian Capital Territory	Fail to comply with a direction without a reasonable excuse: <i>Public Health Act 1997</i> (ACT) s 120.	\$8,000	\$1,000

At various times, health orders or directions have also restricted public gatherings. The number of people permitted to gather in public, as well as indoors including at individual residences, was subject to frequent change. Rapidly changing directions used by governments to tailor restrictions against evolving COVID-19 risk assessments have resulted in difficulty in knowing what conduct may constitute a criminal offence at a specified time. Further, lawyers have argued that the legal interpretation of the health directions themselves is more complex than some might assume. For example, in NSW, health orders made on 30 March 2020 prohibited leaving home unless for one of the ‘reasonable excuses’ listed

by the order.³⁷ However, it has been argued that the courts would interpret the listed 'reasonable excuses' as non-exhaustive and may decide that other reasons for a person leaving home could also be reasonable.³⁸ We discuss this, as well as inconsistency and problems in police enforcement of public health orders, in more detail in this study.

III METHODS

This study sought to construct from the ground up, lived experience of how COVID-19 was policed, and the impacts and effects on those policed. We analyse 90 reports of people's experiences of COVID-policing gathered between 6 April 2020 and 1 August 2020.³⁹ These reports were made via an encrypted form on the COVID Policing in Australia website, which was developed by a coalition of community, legal and human rights organisations across Australia.⁴⁰ The form sought details including where and when the police interaction occurred, whether the policed person was under 18 years of age (12% of reports), whether the policed person was Aboriginal or Torres Strait Islander (7% of reports), and the enforcement outcomes (see Figure 1 below). The form also asked open questions about what happened and the complainant's view on why police decided to approach them. Of the 90 reports received, 77% (69) were made by persons who directly experienced the events, 11% (10) by witnesses, and 8% (7) by legal, community or health advocates who assisted the affected person. This data is necessarily selective, as a consequence of how it was collected.

People in all states and territories in Australia, except the Australian Capital Territory, made reports to the website. However, the vast majority (71%), concerned incidents in Victoria and most concentrated on events occurring in Melbourne (60% of the 90 reports), with the next greatest number of reports originating from NSW (14%). The geographical concentration likely reflects that people in Victoria were more aware of the website because this is where most of the Coalition member agencies were located.

Our research focuses on the reported experiences of COVID-policing as an essential strand in understanding how policing relates to public health objectives. We used both concept and data driven coding of the narratives contained in the reports to categorise people's experiences and identify themes in COVID-policing. The main categories in coding were drawn from the nature of the incident report data itself which sets out the context of the encounter, perceived health impacts, perceived discrimination or differential treatment, and the action taken by police.

37 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW).

38 Anthony Levin and Trish Kashyap, 'Law Enforcement and Police Powers in NSW during COVID-19' (2020) 32(4) *Judicial Officers' Bulletin* 29, 32–3.

39 UNSW Sydney, Human Ethics Approval Number: HC200599. See also Louise Boon-Kuo, Vicki Sentas and Leanne Weber, *COVID-19 Policing in the Pandemic: Analysis of Reports Submitted to the COVID-19 Policing in Australia Coalition* (Report, 2021).

40 *COVID Policing* (Web Page, 2020) <<https://covidpolicing.org.au/>>, archived at <<https://web.archive.org/web/20230327221536/https://covidpolicing.org.au/>>.

All reports were received in de-identified anonymised form. As reports were often relayed in first person, unless disclosed in the narrative, it has not been possible for us to identify gender, and thus where unknown, gender non-specific pronouns have been used. We identify the following key themes complainants commonly experienced:

- experiences of enforcement as unlawful or unreasonable;
- policing as a COVID-19 exposure and safety risk;
- punitive impacts of policing on the ‘usual suspects’; and beyond.

Drawing on key findings from each thematic analysis, we argue that people’s experiences of criminalisation, exclusion and punishment, evidences how policing undermines the social determinants of public health.

IV THEME 1: EXPERIENCES OF ENFORCEMENT AS UNLAWFUL OR UNREASONABLE

Before presenting complainants’ experiences of police enforcement, we set out in Figure 1 a snapshot of the police actions reported in this survey for context. Of the total 90 incidents reported, the most common police action was to move on complainants (61%), record the person’s details (almost 49%), followed by giving warnings (37%) and issuing fines (37%). Arrest and charge were the least reported actions. In many of the incidents, police took multiple measures; it was not uncommon for police to record a person’s details, warn them, and move them on.

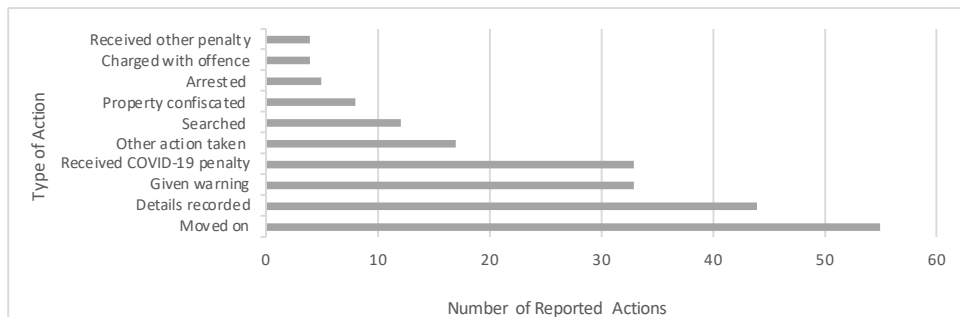


Figure 1: Police Action as a Percentage of 90 Incidents Reported in the Period 6 April 2020 – 1 August 2020.

The majority of complainants did not regard COVID-policing as fair nor lawful. In 54 out of the 88 reports where this information was available (61%), complainants reported that police had intervened in circumstances they regarded as unreasonable and where no breach of COVID-19 rules had occurred. At the time of this study, across Australia, exceptions to stay-at-home orders permitted people to leave home for various reasons including exercise, grocery shopping, work and education that was not reasonably practicable to be done from home, care and other compassionate reasons, and to obtain necessary goods or services for

health or medical services.⁴¹ Complainants questioned police action such as move on directions or fines for conduct they believed did not breach or else afforded a 'reasonable excuse' that allowed their conduct under public health orders.

As exercise formed a reasonable excuse (and thus exception) to stay-at-home orders,⁴² it is not surprising that 22% of people reported that police intervened when they were exercising. Complainants disputed the legality of police action during exercise outside the home. In one incident in Victoria, a police patrol car approached a person jogging alone at their local grass football oval, one kilometre from home, and an officer asked the jogger if they had driven there. The officer said 'driving is not permitted to exercise. She also said I can finish my lap, but then go home. She didn't even ask how far I had driven. Exercise is permitted and so is driving there! I was running alone'.⁴³ In Queensland, two people were fined for hiking, with one person arrested for this fine only offence, despite rules stating that exercise outdoors in groups of two was permitted.⁴⁴ Police issued a fine in Victoria for taking photos which police said was 'non-essential' during an otherwise permitted walk.⁴⁵

Others disputed the police's approach to rules which permitted people to be outside the home to access health services or for care reasons. In one report, a couple had left their usual residence for health-related reasons.⁴⁶ The complainant explained that COVID-19 restrictions made it harder to access their usual health support systems: '12 step meetings went online and a detox I had attended before [the provider] shut down because it was the source of a COVID cluster'. He and his pregnant partner, who was affected by his relapses, decided to head out of the city to begin a detox and stabilisation on a prescribed drug treatment for opioid dependency. During their stay, a police officer visited and questioned them, and an issue of dispute was whether the couple could reside together. The complainant believed from Victorian government health information online that overnight stays were permitted if one partner was pregnant or had mental health concerns,⁴⁷ both of which were relevant to their situation. The Victorian Police officer disagreed. The officer stated it 'was only relevant if I was visiting someone to GIVE care', implying that staying at a premise that was not the usual residence of either for care reasons was not permitted. The next day the officer returned and as the couple were still there, issued two fines of about \$1,652 each, which caused immediate distress.

41 For example, in Victoria, these provisions were included in the following directions applicable during the period covered by the reports: *Stay at Home Directions (No 2) 2020* (Vic) to *Stay at Home Directions (No 7) 2020* (Vic), iterations of the *Stay Safe Directions 2020* (Vic) up to *Stay Safe Directions (No 8) 2020* (Vic). In NSW, see the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW) and the versions that followed up to the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020* (NSW).

42 See n 41.

43 CASEID: 1040533. See, eg, *Stay at Home Directions (No 2) 2020* (Vic) cls 9, 11.

44 CASEID: 15041919. See also *Home Confinement, Movement and Gathering Direction 2020* (Qld) cls 6, 7.

45 CASEID: 30041548. See also *Stay at Home Directions (No 2) 2020* (Vic) cls 6, 9.

46 CASEID: 1061127.

47 See, eg, *Stay at Home Directions (No 6) 2020* (Vic) cl 7(1)(d)(ii), which permits leaving home to provide care and support because of matters relating to the health of a relative or other person 'including mental health or pregnancy'.

The complainant explained, ‘I haven’t been able to sleep since the fine and feel guilty to put my partner in that position. I feel like everything I try at the moment is pretty hopeless.’

The lawfulness of police intervention was especially contentious for complainants when policing was at odds with public government information. Over 20% of complainants reported that police had applied the law inconsistently. A person in Victoria commented that while they were paddle boarding, Water Police approached and advised that paddle boarding, kayaking, canoeing, and surfing were not permitted as exercise under the COVID-19 laws: ‘Yet 4 days later I observed at least 8 surfers in the water at Williamstown Beach with a Police Patrol Car driving by and no action taken. The inconsistency shown by Victoria Police is eroding community confidence with some Officers taking the opportunity to turn a health issue into crime issue.’⁴⁸

A parent in Victoria reported that although the Victorian state government published information and provided verbal confirmation that learner drivers were permitted to drive, accompanied, to the weekly grocery shop, police advised the opposite and explained that should the learner driver daughter be found driving ‘[they] could be booked as [they] were no longer going to the shops’.⁴⁹

Incident reports showed that people went to great lengths to determine what action was lawful and were often frustrated by police who could not advise what conduct was lawful, and by fruitless referrals to information lines and web sites.⁵⁰ As one report explained ‘I contacted my local police [anonymised], the Service NSW hotline and my local MP to inquire. I got three different answers’.⁵¹ These experiences undermined people’s confidence that police acted consistently in enforcing COVID-19 laws.

A Discussion

Our first finding is that complainants overwhelmingly reported that they believed they were complying with the law when police intercepted them, which raised an open question as to whether police acted lawfully. At the time of writing, almost two years after the reports were collected, it appears they were right. Evidence that has subsequently come to light supports complainants’ accounts and helps us understand the structural implications of their experiences. Police actions did not reflect nor focus on non-compliance with COVID-19 orders, and police commonly enforced the law incorrectly.

First, complainants’ beliefs that they were acting lawfully at the time police issued a fine or direction is supported by expert legal analysis. Over the course

48 CASEID: 14040822. Note that the *Stay at Home Directions (No 2) 2020* (Vic) cl 9 permitted leaving home for exercise and did not restrict the type of exercise permitted.

49 CASEID: 10041011. See also ‘Stay at Home Direction – Frequently Asked Questions’, *Victoria State Government Health and Human Services* (Web Page, 13 April 2020) <<https://www.dhhs.vic.gov.au/coronavirus-stay-home-directions-frequently-asked-questions>>, archived at <<https://web.archive.org/web/20200413032944/https://www.dhhs.vic.gov.au/coronavirus-stay-home-directions-frequently-asked-questions>>.

50 See, eg, CASEID: 14040959.

51 CASEID: 15040926.

of the pandemic, lawyers and scholars have expressed concern that the police have incorrectly issued fines in NSW and Victoria, the two most populous jurisdictions in Australia.⁵² Ben Mostyn and Niamh Kinchin found the NSW Police Force's interpretation of COVID-19 orders to be a 'picture of confusion' and 'inconsistency'.⁵³ The authors analysed NSW Police Force media releases reporting on 439 fines against legal interpretation of COVID-19 orders applicable from 31 March 2020 – 14 May 2020. Mostyn and Kinchin's analysis indicates that the NSW Police Force narrowly interpreted the NSW COVID-19 list of reasonable excuses as exhaustive. In contrast, the correct legal interpretation required 'reasonable excuse' to be interpreted in a way that 'is reasonably necessary to achieve its legislative object' to address risk to public health and its potential consequences,⁵⁴ and that 'least interferes with common law rights' such as rights to freedom of movement, privacy, and family life.⁵⁵ Evidence from NSW – that more than half of a sample of 570 police recorded narratives involved a person being outside their permitted area purportedly without a reasonable excuse⁵⁶ – identifies that the problem of invalidly issued fines is likely to be widespread. In practice, as the complainants in our study intuited, this means that their individual circumstances ought to have been considered by police, for a COVID-19 breach to be valid.⁵⁷

Second, our finding that complainants believed that they were not breaking the law is broadly supported statistically. The NSW crime statistics agency, the Bureau of Crime Statistics and Research ('BOCSAR'), analysed the almost 37,000 breaches of public health orders detected by NSW Police Force between 26 June 2021 and 31 August 2021.⁵⁸ It found that police detection of breaches largely reflected police enforcement practices rather than actual patterns of non-compliance with COVID-19 orders.⁵⁹ Most of the breaches recorded by police involved males aged 18 to 39 in Local Government Areas ('LGAs') of concern, areas that were subject to more stringent restrictions including curfews.⁶⁰ Yet the data from self-report compliance surveys showed a greater proportion of people in LGAs of concern adhered to COVID-19 orders than in other areas.⁶¹ BOCSAR suggested that the trends in alleged breaches evident in LGAs of concern and

52 See for example the open letter to the Premier of NSW: 'A Call to Address Unjust COVID-19 Fines' (Open Letter, 15 September 2021) <https://rlc.org.au/sites/default/files/2022-01/Open_let_150921_fn.pdf>.

53 Ben Mostyn and Niamh Kinchin, 'Can I Leave the House? A Coded Analysis of the Interpretation of the Reasonable Excuse Provision by NSW Police during the COVID-19 Lockdown' (2021) 49(3) *Federal Law Review* 465, 480 <<https://doi.org/10.1177/0067205x211016576>>. See also Ombudsman (NSW) (n 33) 70.

54 Mostyn and Kinchin (n 53) 475; *Public Health Act 2010* (NSW) s 10.

55 Mostyn and Kinchin (n 53) 475.

56 Sara Rahman, 'Breaches of COVID-19 Public Health Orders in NSW' (Bureau Brief No 157, NSW Bureau of Crime Statistics and Research, 2021) 5–6 <<https://www.bocsar.nsw.gov.au/Publications/BB/2021-Report-COVID-breaches-BB157.pdf>>.

57 Mostyn and Kinchin (n 53) 478–9.

58 Rahman (n 56).

59 *Ibid* 1, 14.

60 *Ibid* 14.

61 *Ibid* 13 fig 10.

areas of pedestrian activity might be explained by police use of a high visibility enforcement strategy.⁶² Recognising the longstanding critique that policing is not directed towards law enforcement but to enforcing public order,⁶³ we argue that the policing of COVID-19 is not neutrally directed to enforcing the law nor neutrally aligned with public health objectives.

It is the communities in already over-policed suburbs that have borne the burden of worsening public health enabled through a criminalisation paradigm during the pandemic. Financial debt is recognised as an adverse social determinant of health.⁶⁴ Substantial COVID-19 fines were issued to individuals; on-the-spot fines of \$1,000 in NSW and \$1,652 in Victoria, and up to \$11,000 and/or imprisonment for six months or \$19,826 respectively in these states.⁶⁵ Large fines are not only heavy financial burdens in the first instance, but pose added risks of losing a license or property if unpaid, and illustrate the disproportionate impact on disadvantaged communities. A Victorian Parliamentary inquiry found that people in lower socio-economic areas in Victoria were twice as likely to receive a fine from police for COVID-19 rule breaches in 2020 than in higher socio-economic areas.⁶⁶ Similarly, in NSW, police data shows that people living in the most advantaged postcodes were fined at a rate three times less than people living in the most disadvantaged postcodes, with the highest rates of fines in postcodes with higher proportions of Aboriginal and Torres Strait Islander residents.⁶⁷ The impacts of fines will be developed further in discussion of our third thematic finding, but it is clear that COVID-policing practices harm the social determinants of health of the most disadvantaged.

The effect of COVID-policing on the social determinants of health is heightened by the weak procedural infrastructure for the resolution of legal errors in fines. By July 2022, while about 45,000 COVID-19 fines in NSW were overdue,⁶⁸ none in NSW had yet been challenged in court, with the result that tens of thousands of potentially invalid COVID-19 fines continued to impact on individuals and communities subject to them. A test case brought by the Redfern Legal Centre in the Supreme Court of NSW sought judicial review of the penalty notices of

62 Ibid 14.

63 See, eg, Richard V Ericson, *Reproducing Order: A Study of Police Patrol Work* (University of Toronto Press, 1982).

64 Kristy Muir et al, *Exploring Financial Wellbeing in the Australian Context* (Final Report, 2017) <<https://www.unsw.edu.au/content/dam/pdfs/unsw-adobe-websites/arts-design-architecture/ada-faculty/sprc/2021-06-exploring-financial-wellbeing-australian-context.pdf>>.

65 *Public Health Regulation 2012* (NSW) sch 4, as at 26 March 2020; *Public Health and Wellbeing Regulations 2019* (Vic) sch 8 items 72–4, as at 28 March 2020; *Public Health Act 2010* (NSW) s 10; *Public Health and Wellbeing Act 2008* (Vic) ss 188(2), 193(1), 203(1).

66 Public Accounts and Estimates Committee, *Inquiry into the Victorian Government's Response to the COVID-19 Pandemic* (Final Report, February 2021) 266–7 tbl 10.1.

67 Mostafa Rachwani and Nick Evershed, “Incredible Imbalance”: NSW Covid Fines during Delta Higher in Disadvantaged Suburbs’, *The Guardian* (online, 10 February 2022) <<https://www.theguardian.com/australia-news/datablog/2022/feb/10/incredible-imbalance-nsw-covid-fines-during-delta-higher-in-disadvantaged-suburbs>>.

68 Christopher Knaus, ‘Sitting in a Park, Riding a Bike: Covid Fines in NSW Riddled with Problems, Legal Centres Say’, *The Guardian* (online, 24 July 2022) <<https://www.theguardian.com/australia-news/2022/jul/24/sitting-in-a-park-riding-a-bike-covid-fines-in-nsw-riddled-with-problems-legal-centres-say>>.

three plaintiffs. We consider key aspects of the judgment of Yehia J in *Beame v Commissioner of Police*.⁶⁹ The first and second plaintiffs, Brendan Beame and Teal Els sought declaratory relief that penalty notices issued by police against them for breach of public health orders were invalid.⁷⁰ On receipt of summons, State Revenue New South Wales withdrew the penalty notice issued against the third plaintiff, Rowan Pank.⁷¹ The Supreme Court agreed with the plaintiffs, finding the penalty notices invalid because the offence was not 'specified' in the notice, in accordance with section 20 of the *Fines Act 1996* (NSW) ('*Fines Act*').⁷²

Brendan Beame was issued with a penalty notice of \$1,000 on 6 August 2021. The notice stated: 'Fail to comply with noticed direction in relation to section 7/8/9 – COVID-19 – Individual.'⁷³ While sections 7, 8 and 9 of the *Public Health Act 2010* (NSW) ('*Public Health Act*') set out the power for the Minister to make and give directions, the notice did not mention section 10, the offence-creating provision. A statement at the bottom of the notice alleged Beame failed to comply with the direction 'by gathering for a picnic with 5 other persons from 4 separate households in a public place without lawful excuse'.⁷⁴ Beame asked Revenue New South Wales to withdraw the penalty notice through internal review: 'The penalty notice doesn't say what the offence is that I'm accused of, I don't know what makes up the offence and I don't know what noticed direction I'm meant not to have followed.'⁷⁵ Beame's application was rejected.⁷⁶

Teal Els was issued with a penalty notice of \$3,000 on 1 September 2021 by post, 'for participating in an outdoor public gathering of more than two persons in an "area of concern" in a reserve on Tonbridge Street, Ramsgate on 28 August 2021'.⁷⁷ The notice described the offence as: 'unlawfully participate in outdoor public gathering – area of concern – individual'.⁷⁸ In her unsuccessful application to Revenue New South Wales for internal review, Els outlined her reasons for being in the park, concluding: 'I am hoping that with this information you now have you could see that I wasn't unlawfully participating in an outdoor public gathering but instead trying to be safe while still supervising my son's exercise with some other kids so his father could be the 1 person in our household shopping.'⁷⁹

The Court did not consider whether the plaintiffs committed an offence, but rather whether the penalty notices were valid. The Court found that the offence-creating provision itself (section 10 of the *Public Health Act*) was not identified in either notice, and that the notices did not set out any elements of the offence.⁸⁰ Her

69 (2023) 297 A Crim R 131 ('*Beame*').

70 Ibid 134–5 [1]–[2].

71 Ibid 135 [4].

72 Ibid 153–5 [109]–[119].

73 Ibid 136 [13].

74 Ibid 137 [14].

75 Ibid 137 [15].

76 Ibid 137 [16].

77 Ibid 137 [18].

78 Ibid 137 [19].

79 Ibid 137–8 [22].

80 Ibid 154 [113]–[114].

Honour asked ‘how the plaintiffs would know what offence they had committed on the face of the subject notices’.⁸¹ Critically, knowing what offence one has committed underpins whether a range of subsequent informed decisions are possible, such as whether to pay or contest the fine.⁸²

Her Honour rejected the defendant’s argument that a ‘short description identifying the substance of the offence’ is sufficient to satisfy section 20 of the *Fines Act*.⁸³ The Court read section 20 of the *Fines Act*, particularly the words ‘committed the penalty notice offence specified in the notice’⁸⁴ as requiring ‘unambiguous clarity’ in accordance with superior courts on the meaning of ‘specified’.⁸⁵ Further, Her Honour concluded that the entire purpose of the legislative scheme of the *Fines Act* made it imperative that the offence be set out clearly in the notice, in order that the scheme be workable.⁸⁶ Her Honour noted the ‘punitive character’ of the penalty notice scheme could result in interference with property rights and personal liberty, including seizure of property and community service.⁸⁷ Her Honour continued: ‘The *Fines Act* uses the word “specified” in a careful and deliberate way to govern interactions between the recipients of a penalty notice and the police.’⁸⁸ Her Honour thus concluded that the penalty notice offence must be specified in the offence.

Initially, the defendants argued that section 20 of the *Fines Act* did not require that the offence-creating provision be specified.⁸⁹ The defendants later conceded that the fines were invalid and consented to the substantive declarations that the penalty notices be withdrawn and refunded to the plaintiffs.⁹⁰ The key point of contention between the parties however remained. The defendants proposed that it was neither ‘necessary nor appropriate’ for the Court to provide reasons for decision where there is consent to the relief.⁹¹ The defendants argued ‘difficult questions relating to the content of the specification requirement may arise in other factual circumstances where there are differently worded notices and potentially different circumstances’.⁹² In other words, the defendants were concerned that the judgment could serve as precedent for invalidating thousands of similarly issued penalty notices. At hearing, the defendants objected to the Court admitting the plaintiff’s evidence that 32,648 notices, in the same form as that received by the plaintiffs, had been issued, at approximately \$33 million total in fines.⁹³ Her Honour admitted

81 Ibid 154 [116].

82 Ibid 154 [118].

83 Ibid 151 [99].

84 Ibid 142 [56].

85 Ibid 146–7 [74]–[76], 148–50 [84]–[95].

86 Ibid 147–9 [77]–[87].

87 Ibid 148 [83].

88 Ibid 151 [101].

89 Ibid 139 [35].

90 Ibid 139 [37]–[39].

91 Ibid 141 [50].

92 Ibid 136 [9].

93 Ibid 138–9 [26]–[32].

the evidence as relevant to decide ‘whether there is a public interest in [the] Court providing full reasons as to why the subject penalty notices are invalid’.⁹⁴

In concluding that the Court should give reasons, her Honour reiterated the Court’s duty to justify the making of its judicial review power, elaborating the principles of open justice including judicial accountability and transparency.⁹⁵ Her Honour identified four critical factors in supporting her decision. First, the plaintiffs were entitled to understand the reasons why the penalty notices were invalid, particularly in the context of being forced to bring proceedings after failed internal review.⁹⁶ Second, in spite of the defendant’s concession that the notices were invalid, the defendants continued to argue that it was not necessary for a penalty notice to identify the offence-creating provision.⁹⁷ If the Court did not give express reasons, the parties and the public would remain uncertain as to precisely why the notices were invalid.⁹⁸ Third, the far-reaching impacts of COVID enforcement generated a ‘considerable public interest’ in understanding the Court’s reasoning: ‘The community experienced some of the most difficult and challenging times in living memory during the COVID-19 lockdowns. Peoples’ movement and interactions were restricted in substantial ways.’⁹⁹ Lastly, her Honour noted that whilst the matter concerned the discrete facts of particular notices rather than penalty notices generally, ‘these reasons may provide some clarity to the Commission of Fines Administration about the minimum content of the requirement, established by s 20 of the *Fines Act*’.¹⁰⁰ Shortly after the judgment, Revenue New South Wales rescinded the penalty notices of 33,121 people, around half of the 62,138 penalty notices issued in total in NSW.¹⁰¹

V THEME 2: POLICING AS A COVID-19 EXPOSURE AND SAFETY RISK

A second prominent theme in the reports was concern that police conduct directly increased the risk of COVID-19 transmission through police proximity or as a broader risk to personal safety as a consequence of the exercise of police powers and its threat of violence. At the time that individuals reported to the website, vaccines had yet to be released and public health campaigns broadcasted the need to maintain 1.5 metres distance from others and to wear a mask as crucial

94 Ibid 139 [33].

95 Ibid 143–4 [60]–[61], quoting *Soulezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279 (McHugh JA) and *Wainohu v New South Wales* (2011) 243 CLR 181, 216 [58] (French CJ and Kiefel J).

96 *Beame* (n 69) 144 [64].

97 Ibid.

98 Ibid 18 [57].

99 Ibid 144 [64].

100 Ibid 145 [64].

101 Aisling Brennan, ‘More than 33,000 Covid-19 Fines Thrown out after NSW Supreme Court Ruled them Invalid’, *The Daily Telegraph* (online, 29 November 2022) <<https://www.dailytelegraph.com.au/business/legitimacy-of-covid19-fines-challenged-in-new-south-wales-supreme-court/news-story/eb6685f9fe508a17b6461aa27adf1bf5>>.

protective measures. Almost 20% of complainants reported concerns that police themselves broke COVID-19 rules. Individuals reported incidents where police did not observe physical distancing or did not wear a mask or other personal protective equipment ('PPE') in encounters including vehicle stops, questioning on the street, protest, as well as planned activities such as execution of arrest warrants and entries to people's homes. Police were also repeatedly observed by complainants not following physical distancing rules amongst themselves while they were actively policing COVID-19 laws as well as during activities such as awaiting coffee orders.¹⁰²

People's most basic worry was that police contact itself carried risk. Typical concerns were that police contact meant 'there was more chance of spreading a virus ... over leaving us be to mind our own business',¹⁰³ and alarm in instances where police did not physically distance nor wear PPE. An example of the latter occurred in NSW when eight police and two repair people entered a complainant's home for reasons unrelated to COVID-19 enforcement.¹⁰⁴ The resident was chronically ill, at high risk for COVID-19, living with post-traumatic stress disorder and told police that she was self-isolating to avoid COVID-19. She explained the entrants did not maintain arm's length distance from her and did not wear PPE despite her offer to provide it. Rather, the resident reported that 'while being physically aggressive' an officer 'breathed into my mouth several times while shouting leaving his spit/saliva on my face and mouth'. The unease of many complainants was aggravated by their perception that the police interaction was unnecessary because they believed they were complying with COVID-19 rules.

It was clear from reports that close police proximity made people feel threatened and unsafe, powerless to request safe distance, and became a challenging factor to navigate in police encounters, such as in this Queensland vehicle stop: 'I didn't feel safe to ask him to step back as he was already condescending and not interested in anything I had to say. I didn't want to further agitate him by asking him to stand back. I felt unsafe and he should have observed social distancing.'¹⁰⁵

Like qualitative research on pandemic policing in the United Kingdom in which individuals describe being required to 'become a lawyer' or 'become a hostage negotiator',¹⁰⁶ complainants' reports show how the responsibility to de-escalate policing encounters fell on those subjected to policing rather than the police.¹⁰⁷

Reports also disclosed distress that police unnecessarily used powers to search people and issue directions in COVID-19 law enforcement. Although it was unclear whether police searched individuals for COVID-19 or non-COVID-19 reasons,¹⁰⁸ no special COVID-19 search powers were available to police and stopping virus transmission is not aided by searching people. Despite this, empirical research

102 See, eg, CASEIDs: 6042249, 6042012, 14042312, 23040822.

103 CASEID: 17040942.

104 CASEID: 1051329.

105 CASEID: 11040749. See also CASEID: 29052114.

106 Harris et al (n 16) 22.

107 Ibid.

108 CASEIDs: 1061354, 29052114.

confirms that COVID-policing has heavily consisted of stop and search. Analysis of NSW Police Force data during the 2020 restrictions revealed that 45% of all people stopped for a COVID-19 incident were searched, and almost 74% of all First Nations people were recorded as having been stopped and then searched by police.¹⁰⁹ Analysis of 570 NSW Police Force narratives of breaches in 2021 similarly found 48% involved searches of the person, location or vehicle, some of which followed solely a COVID-19 stop and many also involving police road patrol and suspected drug activity.¹¹⁰

Similarly, the main grievance about police directions to move on for COVID-19 reasons was that the police direction increased potential exposure to infection. Over 60% of the incidents reported to the website involved police directions to move on in situations regarded as inconsistent with COVID-19 prevention. For example, Victoria Police officers told a woman with an infant child waiting for her partner to do the shopping 'to go inside the shop as it was not allowed for her to wait outside the shop',¹¹¹ even though waiting outside 1.5m from others was safer for avoiding COVID exposure. Complainants also questioned police directions on longer-term solutions that individuals had adopted to shelter in place safely. For instance, police directed a couple to return from rental accommodation in NSW to their usual residence in Melbourne within 24 hours on the basis that they had breached 'the unnecessary travel rule'.¹¹² The couple believed the police direction lacked 'common sense' and would increase their exposure to infection:

Making us return now pointless from a quarantine/spread perspective because we'd been here so long and we'd be moving between, and exposing ourselves to, two distinct/separate populations ... We feel doing so would jeopardise our health and safety as we live in a dense high-rise apartment ... I also feel that this away time has not been as a holiday (both partner and I still working throughout the time) but as a safety precaution for our health. I think it's unfair to discriminate against those who do not have the luxury of living in a large house with private outdoor spaces.

Others were perturbed by police directions to move on from activities that carried little or no risk of COVID transmission, including where a person was sitting alone outside near a café having bought a takeaway coffee or eating lunch alone on a park bench.¹¹³

A Discussion

The second finding that emerges from our thematic analysis is that complainants were sceptical that police exercise of discretion promoted COVID-19 public health objectives. Complainants' expectations of police conduct would have been informed by the government's endorsement of health experts' advice that suppressing the

109 Boon-Kuo et al (n 1) 80–1.

110 Rahman (n 56) 9, 14.

111 CASEID: 14040935.

112 CASEID: 12042337. See, eg, *Stay at Home Directions (No 3) 2020* (Vic) cl 5.

113 See, eg, CASEIDs: 13050709, 14042312.

spread of COVID-19 requires physical distancing to reduce contact and the wearing of a face mask to reduce transmissibility in the context of contact.¹¹⁴

A large part of why complainants doubted that COVID-19 prevention required police to act as they did was because complainants were outside and physically distant from others. The most likely locations for reported incidents to occur were on the street (32.2%) or in the car (16.7%), with other outdoor locations such as the park also accounting for 13.3% of incidents. Combined, 71% of the reported incidents occurred outdoors. In fact, the key driver of increased police enforcement activity during the 2021 restrictions in NSW was statistically found to be its focus on outdoor public space and ‘areas of high pedestrian activity which is consistent with a high-visibility enforcement strategy’.¹¹⁵

Yet this policing focus is open to the same critiques made of hot spot policing more generally – that it reflects police priorities, not the prevalence or seriousness of a problem; and its focus on public space disproportionately impacts on people from marginalised communities and of low income.¹¹⁶ Areas of high pedestrian activity did not signify unlawfulness because stay-at-home directions permitted leaving the house for a range of activities, which suggests reliance on conventional public order practices.

These statistics underlay our qualitative findings that police enforcement practices are disconnected from the objectives of the public health orders. Police enforcement strategies that focus on outdoor spaces are at odds with research that uncrowded outdoor spaces that enable physical distancing are safer than indoor spaces.¹¹⁷ Such policing is also inconsistent with research showing the immune, anti-inflammatory, and psychological benefits of physical activity in the COVID-19 pandemic may outweigh the risks of infection.¹¹⁸ A proportionate response in accordance with the objects of the orders would require police to take into account the risk posed by a person’s behaviour on public health and whether this conduct contributed to potential spread of the virus. Considering the 90 narratives we analysed as a whole, it does not appear that police interactions clearly *advanced* public health objectives. The next thematic analysis shows that it does appear that police interactions conformed with a criminalisation paradigm.

114 Australian Health Protection Principal Committee, ‘AHPPC Statement on the Role of Face Masks to Protect Individuals and the Community from COVID-19’ (Media Release, 15 November 2021) <<https://www.health.gov.au/news/ahppc-statement-on-the-role-of-face-masks-to-protect-individuals-and-the-community-from-covid-19>>.

115 Rahman (n 56) 14.

116 Dennis P Rosenbaum, ‘Critic: The Limits of Hot Spots Policing’ in David Weisburd and Anthony A Braga (eds), *Police Innovation: Contrasting Perspectives* (Cambridge University Press, 2nd ed, 2019) 314 <<https://doi.org/10.1017/9781108278423.015>>.

117 Shirra Freeman and Angela Eykelbosh, ‘COVID 19 and Outdoor Safety: Considerations for Use of Outdoor Recreational Spaces’ (National Collaborating Centre for Environmental Health, 14 April 2020).

118 Fábio Hech Dominski and Ricardo Brandt, ‘Do the Benefits of Exercise in Indoor and Outdoor Environments during the COVID-19 Pandemic Outweigh the Risks of Infection?’ (2020) 16 *Sport Sciences for Health* 583 <<https://doi.org/10.1007/s11332-020-00673-z>>.

VI THEME 3: PUNITIVE POLICING OF RACE, AGE, DISABILITY AND MENTAL HEALTH

A third theme that emerged was that people's experiences of COVID-policing were shaped by their race, age, gender, disability or illness, and also impacted on their mental health. In 21 incidents (27.3%), participants reported experiences of discrimination, and 40 participants (51.9%) reported a serious outcome of fear or trauma. As in the discussion of the first theme, most of the complaints discussed below involve police enforcement in circumstances where people believed their conduct was lawful.

A Policing Race

Of 86 reports, 10 reports identify race as a factor in their COVID-policing, with many of the reports involving more than one person.¹¹⁹ In eight of these encounters, complainants perceived that police stopped them because of their ethnicity/race, for others, race factored into how they were treated. It is significant that four of these ten reports involved Aboriginal or Torres Strait Islander people, and three reports involved people of African heritage. The relatively low number of reports to the website where race was reported as a factor likely under-represents the significance of race in COVID-policing more generally, and may be a reflection of the fact that all information about the COVID Policing website was circulated in the English language.

Police used handcuffs and arrested people despite proceeding to issue only an on-the-spot COVID-19 fine in two incidents where race was reported as a factor. Police deprived these individuals of their liberty despite courts strongly emphasising that arrest is an additional punishment, which is inappropriate for minor offences where the individual's name and address are known.¹²⁰ An Indigenous man in Queensland was handcuffed after being questioned by police because, he explained, 'I didn't know my new address. I was taken to my new address by the officers to confirm where I had been sleeping'. Police intervened with the complainant and his partner in the car park of their local national park in Queensland, as they were about to go on a run in the park. Police then took the complainant to the police station where they issued a \$1,334.50 fine for being 2 km outside his permitted 10 km radius. His partner, also in attendance at the national park, was not fined.¹²¹ A community worker reported police stopped their clients while grocery shopping in a Melbourne suburb, and before police questioned the young people about why they were outdoors, 'the pair were handcuffed, searched and then questioned'.¹²² The worker explained that '[w]hilst there were other people in the street, police targeted the two youngsters of African origins, and it does not appear that other people were fined. The infringement notice states that my client

119 The perceived reason for police intervention was ascertained from the narrative in 86 of the 90 reports.

120 *DPP (NSW) v Carr* (2002) 127 A Crim R 151.

121 CASEID: 13051139.

122 CASEID: 1061354.

was “walking aimlessly”¹²³. While other incidents noted that police handcuffed individuals (including an incident involving a young woman of African heritage)¹²⁴ the accounts relayed here were the only incidents where a COVID-19 fine was known to be the sole outcome, which suggests that race factored into the extent of coercive force police perceived to be appropriate.

In two incidents in NSW, police stopped Aboriginal people, using coercive practices long recognised as part of the everyday criminalisation of Aboriginal presence in public space. An observer witnessed police stop and then search the clothing and bags of two young boys aged about 12 years.¹²⁵ Finding no illicit substances, police warned the boys that they were in breach of stay-at-home orders and that a written warning would follow by post.¹²⁶ Another bystander heard an Aboriginal man tell police that ‘he’d already been stopped twice in the preceding 10 minutes and that he was on his way to the [anonymised] police station to lodge a complaint about racial profiling. He had been stopped 37 times in the past month’.¹²⁷ In an incident in Victoria, an individual explained that police treated their alleged breach of COVID-19 rules more harshly and differently to that of the non-Indigenous members of a park gathering. Unusually, police notified their landlord that they had been arrested, despite this occurring off the landlord’s property and did not take such action with the non-Indigenous people in the group.¹²⁸ Unlike the others in the group, the Aboriginal complainant had cooperated with police, while the others had run upon being approached.

Two reports to the website (that did not specify cultural background) involved incidents where people believed police stopped them because of ‘racial profiling’.¹²⁹ In one of these reports an individual in Victoria said they ‘felt quite intimidated’ when a police car sighted earlier returned to drive into the open car park, where the complainant was running laps, alone in gym gear, and an officer asked, unnecessarily in their eyes, if the complainant was doing exercise.¹³⁰

B Policing Disabled and Ill People

Eight reports relayed instances where policing and its impact was shaped by disability or illness. A common thread running through experiences of people with a disability or illness was that police enforced COVID-19 laws with a neurotypical, able-bodied person in mind. Police intervened in public places and intruded in

123 CASEID: 1061354.

124 CASEID: 6041623.

125 CASEID: 6042147. Police presumably drew on their powers to stop and search under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 21.

126 CASEID: 6042147. See *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW) cl 5.

127 CASEID: 14050950.

128 CASEID: 26051220.

129 CASEIDs: 17041150, 15042131.

130 CASEID: 17041150.

residences; one complainant was assaulted,¹³¹ another was given a fine. For many people, police encounters felt intimidating and discriminatory.

One complainant lives with a severe acquired brain injury that affects every area of his day-to-day life, has limited mobility, and National Disability Insurance Scheme carers five days a week to assist in all activities of daily living.¹³² With his usual gym closed due to the pandemic, he and his carer were resting from exercise in a park in Victoria when police questioned him:

They asked us what we were we doing. She said she is my carer and that we were exercising. The cops said we have to move on and we can't 'just be lounging around'. It upset me to be questioned by the police, because they are a bit scary. The cops asked me a question, I can't remember what. I didn't answer because I have lots of trouble talking. I was a bit embarrassed that I couldn't talk, I thought I might get in trouble from the police. I was very relieved when they walked away.

His carer added that he can only walk short distances without a rest, and that: 'It is obvious from looking at him that he has mobility issues as he has a walking stick. It is highly discriminatory to expect all people who are exercising to be moving the whole time.'

For some, the intimidating experience of policing itself was experienced as punitive,¹³³ but for others, the punitive element was being issued with a fine. In an incident in Victoria, an individual had gone for a walk to the park with their mother, aged almost 70 and suffering from knee and back pain and asthma. They sat down for a rest before returning home, and at that point two police approached, told them to move on and issued a \$1,652 fine, adding to the complainant's financial stress over loss of work.¹³⁴

For people who are deaf or hard of hearing, COVID-19 health precautions have increased communication barriers and contributed to adverse experiences with police. A complainant described how police road patrol stopped her and her partner on a bike ride in order to wind down after a late-night work shift.¹³⁵ The complainant could not hear police, explained that she was hard of hearing and relies on lip reading, and informed police that where a person cannot hear or lip read due to mask wearing that Department of Health and Human Services Victoria guidelines state that it is reasonable to request that a person remove their mask to talk, provided all parties maintain 1.5 m distance.¹³⁶ The complainant explained:

Instead of [the officer] removing her mask, turning off the engine or having her non-masked male colleague talk, she yelled over louder 'name miss. Now'.

131 See discussion above of CASEID: 1051329 (n 104).

132 CASEID: 11042025.

133 See, eg, CASEID: 14040909.

134 CASEID: 27041922.

135 CASEID: 26071112.

136 See government information to this effect at the time: 'Face Coverings – 11.59pm Wednesday 22 July', *Victoria State Government Health and Human Services* (Web Page, 22 July 2020) <<https://www.dhhs.vic.gov.au/updates/coronavirus-covid-19/face-coverings-1159pm-wednesday-22-july>>, archived at <<https://web.archive.org/web/20200721053738/https://www.dhhs.vic.gov.au/updates/coronavirus-covid-19/face-coverings-1159pm-wednesday-22-july>>.

The more I thought about the event, the more upset I became and the more concerned I am about how often this might occur, what impact it has on emotional and psychological safety and how people with special or different needs/identities/experiences, are being treated by police.

I am most disappointed that the police themselves were not observing Covid-19 hygiene practices, did not explain their role or reason for intercepting and did not act to assist or care about a hearing impairment. I am left baffled about the experience, how our information was or will be used and what legal grounds any of this exists on. Mostly, it has made us feel that using our own common sense in stage 3 restrictions, is not all we need so, but now also, preempt police behaviour or assumptions.

Another complainant with a disability who uses a wide tricycle for stability, described a Queensland Police instruction to them to move on as ‘aggressive’, and that police were ‘hostile’ to their request for police to move so that they could comply.¹³⁷

C Policing Mental Health

The majority of accounts volunteered that the policing encounter affected their mental health. In 52% of the 77 reports in which this information was available, complainants reported being afraid or traumatised by the police encounter, and 64% reported mild to moderate reactions that ranged from feelings of upset or annoyance, disbelief, or confusion.¹³⁸ Some people highlighted the impact of COVID-19 laws and policing on their access to mental health services, such as in the closure or reduced access to drug detox and rehabilitation support described above. Similarly, people could not access health services when subject to the detention orders in the ‘hard lockdowns’ of public housing towers in Melbourne in July 2020.

One report conveyed the struggle faced by one resident who in the first three days of the lockdown had run out of their standard medication, had not received a food package, and had become suicidal:¹³⁹ ‘By Monday lunchtime, my client called 000 and advised that she was overdosing on medication. Victoria Police prevented paramedics or mental health workers from attending to her to check on her welfare for approximately three hours.’¹⁴⁰

After that time, health workers were permitted to use intercom communication to discuss packing for hospital attendance and leaving the flats, but police attendance at the Towers escalated the resident’s distress and made leaving difficult.

Another theme was that people came to police attention because of steps they took to maintain their mental health during the pandemic. Police stopped and warned a motorbike rider in NSW who explained to police, ‘I do suffer from mental illness and that I ride for stress relief’.¹⁴¹ Policed fined an international

137 CASEID: 9062306.

138 Note that up to three aspects of impact on the complainant were coded for each report and yielded 180 observations in total.

139 CASEID: 15071601.

140 CASEID: 15071601.

141 CASEID: 24041436.

student in Victoria experiencing self-described severe depression and anxiety while skating for mental relief.¹⁴² The student explained that although a sign indicated the skatepark was temporarily closed, they believed the skatepark could still be used because the adjacent basketball court was open and in use, and also because despite signage that beaches were closed they were still in use by hundreds of people. Police fined the student \$1,652, resulting in an immediate and consequent mental health impact:

I was very shocked after this event and feel very traumatised and have difficulty sleeping. I already suffer from mental illness and don't have family or government support here in Australia ... As an international student I'm scared of so many things ... they will find me and lock me up, not being able to pay the fine, my visa getting cancelled, and my mental health deteriorating since I am too scared to go out to exercise and many other things ... I was just skating for two minutes there without causing any hurt to anyone, how can I know that if I walk in the street, suddenly the police says I'm breaking a law I didn't know that exists.

Police may have held the power to issue a fine in this instance. However, this international student's experience illustrates how a criminalisation paradigm is ill-equipped in making decisions to support public health.

D Discussion

Our third finding is that a significant proportion of complainants experienced their race, class, disability or illness, age, gender, mental health or a combination of these factors, to be the reason why they were targeted for police interactions or why police treated them more harshly or differently than others. Several community driven studies internationally document similar discriminatory policing and other human rights violations.¹⁴³

COVID-19 law enforcement in Australia has almost completely taken place in public spaces,¹⁴⁴ which is an important factor in its discriminatory effect. Public order policing hands police the power to define what conduct amounts to an offence and shapes the production of police knowledge about who is suspect.¹⁴⁵ Public order policing has had devastating consequences for the criminalisation of First Nation communities¹⁴⁶ and has shaped the over-representation of people with cognitive and intellectual disabilities in Australian prisons.¹⁴⁷ COVID-policing as a practice of the policing of public order through stay-at-home orders resulted in

142 CASEID: 17040807.

143 Harris et al (n 16); Emmer et al (n 15); Amnesty International, *COVID-19 Crackdowns* (n 17); Amnesty International, *Policing the Pandemic* (n 17); Canadian Civil Liberties Association, *COVID-19 and Law Enforcement in Canada* (n 14); Canadian Civil Liberties Association, *Stay off the Grass* (n 14).

144 Rahman (n 56); Stasha Rmandic et al, 'Police-Recorded Crime Trends in Victoria during the COVID-19 Pandemic' (In Brief No 10, Crime Statistics Agency, September 2020).

145 Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Routledge, 2001) 29.

146 Ibid 80–105.

147 Simone Rowe et al, 'Policing Disability: Alliance Building, Police Divestment and Community Investment' (2022) 34(2) *Current Issues in Criminal Justice* 171, 177–8 <<https://doi.org/10.1080/10345329.2022.2029084>>.

the criminalisation, collective punishment, and social exclusion of disadvantaged people and communities across Australia. These terms and concepts overlap but are used in distinct ways here to refer to how police mark out people with certain attributes as suspect and draw them into criminal legal procedures (criminalise), treat these groups differently or more intensively (punish), with the result that these people are excluded from equal enjoyment of public space and civil rights.

People at the intersection of multiple structural forces have experienced COVID-policing as punitive; the discussion that follows concentrates on its effects on Aboriginal and Torres Strait Islander people and people with a disability or illness. The COVID-policing of these groups demonstrates how it has both intensified the policing of the 'usual suspects' for whom the net was already very wide, and widened the net of those cast as suspect to include older people living with an illness or condition.

COVID-policing was experienced by many First Nations complainants as a familiar and longstanding racialised punishment, which includes the use of arrest or detention instead or in addition to infringement notices; police avoidance of available diversionary approaches for young people; the unreasonable use of force, and disproportionate police deployment in areas with high Aboriginal and Torres Strait Islander populations.¹⁴⁸ Early in the pandemic in NSW, research showed that, where identified, Aboriginal and Torres Strait Islander peoples were disproportionately subject to coercive police powers and were increasingly over-represented as the level of the seriousness of police coercion increased. First Nations People constituted 9% of those stopped, 10% of those searched and 15% of those arrested despite comprising around 3% of the population.¹⁴⁹ As mentioned above in the second theme, the NSW Police Force searched almost three-quarters of First Nations people they stopped,¹⁵⁰ which is indicative of greater, discriminatory use of coercive powers.

Evidence also suggests that Aboriginal and Torres Strait Islander peoples have disproportionately shouldered the burden of COVID-policing and fines. Data obtained by Redfern Legal Centre from the NSW Police Force shows that the top three postcodes with the highest rate of fines were in areas that data from the Australian Bureau of Statistics shows have higher Indigenous populations than the 2.9% of NSW in general.

148 See, eg, *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 1991); Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, December 2017); Cunneen (n 145); Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan* (Report, 2017).

149 Boon-Kuo et al (n 1) 80.

150 Ibid 80–1.

Table 2: NSW Postcodes with the Highest Rate of Fines in the Period 1 July 2020 – 10 October 2021 against the Percentage of the Population

Postcode area	Number of fines per 1000 people ¹⁵¹	Percentage of the population who are Aboriginal and/or Torres Strait Islander ¹⁵²
Walgett	67	21.2%
Brewarrina	54.4	56.2%
Wilcannia	46	63.8%

Police enforcement of COVID-19 orders has further fuelled the expansion of on-the-spot fines and their consequences.¹⁵³ Fines have led to mandatory suspension of licence for fine default in states including NSW, which in turn can lead to further fines for driving offences.¹⁵⁴ The suspension of drivers' licences following COVID-19 fine defaults, reported by the Aboriginal Legal Service NSW/ACT, accord with prior documented trends of disproportionate impacts of fines on marginalised populations.¹⁵⁵

Qualitatively different policing was deployed in areas with high Aboriginal populations. First Nations led coalition Change the Record reported that police fined 'houses known to them as overcrowded' and that the military were stationed at bottle shops in Tennant Creek without prior notice nor explanation.¹⁵⁶ Nerita Waight et al argue that the Australian governments' policing and prison responses

151 Data obtained by Redfern Legal Centre from NSW Police Force and analysed by *The Guardian*: see Rachwani and Evershed (n 67).

152 'Walgett 2021 Census Aboriginal and/or Torres Strait Islander People QuickStats', *Australian Bureau of Statistics* (Web Page) <<https://abs.gov.au/census/find-census-data/quickstats/2021/IQSLGA17900>>; 'Brewarrina 2021 Census Aboriginal and/or Torres Strait Islander People QuickStats', *Australian Bureau of Statistics* (Web Page) <<https://abs.gov.au/census/find-census-data/quickstats/2021/ILOC10300205>>; 'Wilcannia 2021 Census Aboriginal and/or Torres Strait Islander People QuickStats', *Australian Bureau of Statistics* (Web Page) <<https://abs.gov.au/census/find-census-data/quickstats/2021/ILOC10300506>>.

153 For historical and theoretical analyses of fines and their consequences: see David Brown, Chris Cunneen and Sophie Russell, "It's All about the Benjamins": Infringement Notices and Young People in New South Wales' (2017) 42(4) *Alternative Law Journal* 253 <<https://doi.org/10.1177/1037969X17732703>>; Julia Quilter and Russell Hogg, 'The Hidden Punitiveness of Fines' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 10 <<https://doi.org/10.5204/ijcsd.v7i1.512>>.

154 Quilter and Hogg (n 153).

155 Christopher Knaus, 'Indigenous Australians Losing Driving Licences and Face Crushing Debts over NSW Covid Fines, Lawyers Say', *The Guardian* (online, 20 July 2022) <<https://www.theguardian.com/australia-news/2022/jul/20/indigenous-australians-losing-drivers-licenses-and-face-crushing-debts-over-nsw-covid-fines-lawyers-say>>; New South Wales Law Reform Commission, *Penalty Notices* (Report No 132, February 2012); Brown, Cunneen and Russell (n 153); Elyse Methven, 'Cheap and Efficient Justice? Neoliberal Discourse and Criminal Infringement Notices' (2019) 45(2) *University of Western Australia Law Review* 65; Amanda Porter, 'The Price of Law and Order Politics: Re-examining the Fines, Penalties and Infringement Notices Enforcement Amendment Act 2012 (WA)' (2015) 8(16) *Indigenous Law Bulletin* 28; Bernadette Saunders et al, 'The Impact of the Victorian Infringements System on Disadvantaged Groups: Findings from a Qualitative Study' (2014) 49(1) *Australian Journal of Social Issues* 45 <<https://doi.org/10.1002/j.1839-4655.2014.tb00299.x>>.

156 Change the Record (n 13) 23–5.

over the pandemic ‘have caused harm to, and breached the rights of, Aboriginal and Torres Strait Islander people’.¹⁵⁷ While this discussion has situated COVID-policing within existing trends of the over-policing of First Nations peoples, racially discriminatory policing during the pandemic must also be understood in the context of evidence of racial profiling of people of African background in stop and searches by police in Victoria.¹⁵⁸

In our findings, some complainants were brought to police notice because of the impact of their disability, which for example, necessitated rest during exercise. We argue that COVID-19 law and policing operated to deepen the criminalisation of some disabled people. The reported experience of COVID-policing is consistent with research that people with cognitive disability are more likely to be subject to police contact, particularly if they are also First Nations people, women experiencing violence, or people with mental health issues and other disabilities, for example, a hearing impairment.¹⁵⁹ Part of the reason why some people with a disability are more likely to come into contact with police is because their disability is read as ‘dangerous’ because it impacts on their ability to understand police and comply with directions.¹⁶⁰ Poor police understanding of disability has also informed assumptions that a person’s gait or cognition was the result of alcohol or other drugs, and often escalated the interaction.¹⁶¹

Disability scholars conceive of the time and effort required of people to explain their disability to police as a form of labour,¹⁶² aggravated by the ‘active resistance by police to accepting the presence of disability and/or accepting its impacts’.¹⁶³ This sense of labour was evident in reports made by people with a disability and their advocates to the COVID Policing website. The added burden on people with a disability whose difference has stood in for suspicion and shaped the encounter can also be understood as part of its punitive effect.

Many of the complainants to the website were not the ‘usual suspects’ of policing. They were older and chronically ill individuals, some with arthritis, cancer or diabetes, who, after police intervention, stopped activities that had kept them physically and mentally healthy during the pandemic. The policing of this cohort indicates that COVID-policing widened the net beyond those usually targeted by police. A person, who was 71 years of age, started avoiding activities they had pursued for a ‘sense of normality’ following a police officer’s warning that they could be fined for pausing to drink a takeaway coffee during their daily walk in a

157 Nerita Waight et al, ‘COVID-19: A Missed Opportunity to Reimagine the Justice System for Our People’ (2021) 33(1) *Current Issues in Criminal Justice* 19, 23 <<https://doi.org/10.1080/10345329.2021.1885899>>.

158 Tamar Hopkins, *Monitoring Racial Profiling: Introducing a Scheme to Prevent Unlawful Stops and Searches by Victoria Police* (Police Stop Data Working Group Report, 2017); Leanne Weber, ‘“You’re Going to Be in the System Forever”: Policing, Risk and Belonging in Greater Dandenong and Casey’ (Research Report, 2020).

159 Rowe et al (n 147) 172.

160 Ibid 177–8.

161 Ibid.

162 Ibid 178–9.

163 Ibid 178.

small Victorian town.¹⁶⁴ In this instance it seems that police narrowly interpreted the stay-at-home directions which permitted leaving home to 'obtain' food or drink and leaving home to 'exercise'.¹⁶⁵ Another individual in Victoria explained that police action in stopping and questioning them meant a walk taken on the beach at night to alleviate anxiety ended up leaving them 'more anxious than when I had left the house'.¹⁶⁶ The complainant described the officer as 'yelling', 'berating' and asking 'invasive questions' about their job and absence of identification. The complainant explained, 'I am now afraid of leaving the house for exercise and my condition as a type 1 diabetic may deteriorate because of this, ultimately making me more susceptible to COVID-19'.¹⁶⁷

The public order policing of older people has received little attention, except where it intersects with the policing of people sleeping rough or those experiencing mental illness.¹⁶⁸ We argue that the scholarship on the police construction of impairment or disability as non-compliant and thus 'dangerous'¹⁶⁹ helps us understand how, during the pandemic, police at times viewed older people or those with impaired mobility as a public order problem. While older people are not generally regarded as the target of police suspicion, their experience of COVID-policing, like those marked as suspect because of their race, shows how a 'criminalisation paradigm' results in social exclusion and is counter to public health.

VII CONCLUSION

Our research supports existing evidence that COVID-policing increases the inequity and disadvantage experienced by groups already at higher risk of serious illness from COVID-19 itself. We explain how police mobilisation of longstanding, coercive public order practices to enforce public health orders entrenches criminalisation and undermines the social determinants of health. In summary, our first key finding is that police actions were regarded by a majority of respondents as neither fair nor lawful. Our analysis of people's narrative accounts reveals it is highly likely that many of the police move on directions, fines, and searches our complainants experienced were unlawful. Unreasonable and unnecessary police action sabotages public health by criminalising non-harmful and even health-positive behaviours. Such police action increases the debt burdens of already over-policed populations, compounding the risk of adverse consequences with the non-payment of fines, whilst entrenching marginalisation and other psychosocial harms through stressful and sometimes violent, discriminatory encounters.

164 CASEID: 13050709.

165 *Stay at Home Directions (No 3) 2020* (Vic) cls 6, 9.

166 CASEID: 10041445.

167 CASEID: 10041445.

168 Luke McNamara et al, 'Homelessness and Contact with the Criminal Justice System: Insights from Specialist Lawyers and Allied Professionals in Australia' (2021) 10(1) *International Journal for Crime, Justice and Social Democracy* 111 <<https://doi.org/10.5204/ijcjsd.1742>>.

169 Liat Ben-Moshe, *Decarcerating Disability: Deinstitutionalization and Prison Abolition* (University of Minneapolis Press, 2020) <<https://doi.org/10.5749/j.ctv10vm2vw>>.

Our second finding is that public order imperatives to exercise police powers to apprehend and disrupt ‘suspects’ increases proximity and therefore the risk of COVID-19 transmission, multiplying the threatening presence of police especially for vulnerable people. Paradoxically, over 70% of the reported incidents occurred outdoors, with the majority of complainants believing their actions were not in breach. Third, we found that more than half of the complainants reported a serious outcome of fear or trauma from their encounter with police. Race, age, gender, disability or illness map onto social determinants of poor health, as well as the likelihood of over-policing and criminalisation. We document instances across these social dimensions of identity where policing resulted in oppressive and punitive effects. Community driven research and advocacy initiatives have called for abandoning or amnesty of COVID-19 fines, and a rethink of policing more broadly, including its reduction and abolition.¹⁷⁰ In this study, people experienced policing as a health hazard, and in this respect, pandemic policing has demonstrated it is incapable of preserving public health.

170 Fatsis and Lamb (n 3).