



UNSW
CCLJ
Centre for Crime,
Law & Justice

**COVID-19 CRIMINALISATION IN NSW: A 'LAW AND ORDER'
RESPONSE TO A PUBLIC HEALTH CRISIS?**

A report completed by researchers at the Centre for Crime, Law and Justice,
Faculty of Law and Justice, UNSW

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ABOUT THE CENTRE FOR CRIME, LAW AND JUSTICE

This report was prepared by members of the Centre for Crime, Law and Justice (CCLJ), a research centre at the University of New South Wales. CCLJ was established in 2018, building on a long tradition of criminal justice research and scholarship at UNSW. The Centre produces high quality scholarship on important topics in criminal law, criminal justice, criminology and crime prevention that are of pressing local, national and international significance. Core themes for the Centre's research are: the relationship between criminal justice administration and social justice and human rights; and the relevance of race, Aboriginality, gender, disability and socio-economic disadvantage to victimisation, criminalisation, the criminal process and punishment.

CCLJ also has a strong focus on effective knowledge transfer and advocacy for policy and law reform outcomes that enhance social justice. Engagement and partnerships with NGO and government organisations is an important feature of our work.

Report authorship

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EXECUTIVE SUMMARY

During a three-month period in 2021 (July-September) financial penalties totalling \$45,900,180 were imposed on NSW residents by NSW Police for alleged breaches of Ministerial orders made pursuant to the *Public Health Act 2010* (NSW). This represented more than 80% of the total value of fines issued from the beginning of the COVID-19 pandemic in March 2020 to 30 September 2022, when the lifting of the last remaining broad-scale infection control measure (ie mandatory isolation after a positive test) was announced.

The fine burden fell heavily on socio-economically disadvantaged individuals, families and communities, especially in south-western and western Sydney, and western NSW. Revenue NSW data shows that as at 1 October 2022, more than \$15,845,900 in fines was unpaid and categorised as 'outstanding'. This represents one of two significant negative legacies arising from the response of the NSW Government and the NSW Police Force to the 'Delta Wave': fine debt that continues to have punitive effects on people's lives. The other negative legacy is damaged police-community relations in those parts of the state that experienced the most intense forms of policing and penalty notice issuance. These are consequences of a decision to 'criminalise' non-compliance with special COVID-19 public health rules – particularly restrictions on social gathering, 'stay-at-home' orders and mandatory mask-wearing.

This report traces three dimensions of what we describe as a 'law and order' response to the public health threat posed by the COVID-19 pandemic. While present from the beginning of the pandemic, all three intensified during a period of high anxiety starting in June 2021, with the emergence of the Delta variant.

First, there was a period of high-volume and high-speed law-making, with more than 120 principal orders and amendments made in a period of 6 months. During July 2021 one Public Health Order was amended 13 times in 15 days. An almost constant state of flux seriously challenged the basic rule of law principle that the legitimacy of law and punitive sanctions relies on rules being 'knowable'.

Secondly, there was a massive increase in police penalty notice issuance, as a practice designed to promote compliance with the extraordinary restrictions imposed during the Delta Wave. In August 2021 alone, 25,710 penalty notices were issued – an average of 829 a day. Fines were not issued evenly across Sydney and NSW. Residents in some of the most disadvantaged communities in the state – including the Sydney suburbs of Blacktown, Mount Druitt and Liverpool, and the NSW towns of Brewarrina, Bourke and Walgett – were disproportionately affected.

Thirdly, frenetic law-making and aggressive policing via issuance of penalty notices was associated with a notable shift in the media-reported enforcement rhetoric used by political leaders. Residents of NSW were threatened with a 'zero tolerance' response in which police officers would *take action* (ie issue penalty notices) and 'ask questions later'. The data on penalty notice issuance shows that this was not hollow rhetoric – it was reflected in police enforcement practices.

In appraising the events summarised here, due regard must be had to the serious and largely unprecedented nature of the public health risks to which the NSW Government and the NSW Police Force were responding. However, this report concludes that a regulatory response that criminalised non-compliance with public health measures, centred the police as the responsible compliance and enforcement agency, and foregrounded punishment in the form of large 'on-the-spot' fines – was regrettable, and should be avoided in the future.

In addition, the NSW Government should take steps to ameliorate the resulting debt legacy (at a minimum, by waiving outstanding fines for all children and any persons experiencing financial hardship). The events of the Delta Wave suggest that the NSW Police Force should review its use of penalty notices for all offence categories, and prioritise less punitive methods of encouraging compliance, including engagement, education and negotiation.

1. INTRODUCTION

1.1 Background

Between 1 March 2020 and 30 September 2022, 62,131 penalty notices were issued in NSW for breaches of rules made under the *Public Health Act 2010* (NSW) to address the COVID-19 pandemic.¹ The total value of penalty notices issued over this 2.5 year period was \$56,578,740. As at 1 October 2022, 17,964 of the penalty notices (29%) were classified by Revenue NSW as outstanding, with a combined debt of \$15,845,900. The size of these figures draws attention to underappreciated features of the use of penalty notices as a law enforcement mechanism: ironically, for a method of punishment colloquially referred to as ‘on-the-spot’ fines, and commonly perceived as relatively benign, penalty notices can leave a long legacy of debt, and involve a significant level of punitiveness.² This is particularly so where the issuance of penalty notices falls disproportionately on disadvantaged members of the community. Debt is not the only legacy of the heavy use of penalty notices. Damage can also be done to police-community relations. These points were vividly illustrated by the experience of Walgett – a town in north-western NSW with a large Aboriginal population. When data became public in early 2022³ that showed that Walgett had experienced one of the highest rates of COVID-19 penalty notice issuance per capita in NSW, the Dharriwaa Elders Group released a statement that included the following:

This statement is about the harm caused by NSW Police during the COVID-19 pandemic in Walgett between July 2020 and October 2021. The NSW Government made a big mistake for our community in tasking police to lead the local emergency response to this public health crisis. Police have a long history as an intimidating presence in Walgett, without a track record of building trust or communicating well with the local Aboriginal community. ...

¹ Revenue NSW, ‘COVID-19 Offences (DSF 019)’, Data and statistics, Fines, Penalty notices <https://www.revenue.nsw.gov.au/help-centre/resources-library/statistics>

² J Quilter & R Hogg ‘The Hidden Punitiveness of Fines’ (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 9.

³ Mostafa Rachwani and Nick Evershed, “‘Incredible imbalance’: NSW Covid fines during Delta higher in disadvantaged communities”, *The Guardian*, 10 February 2022 <https://www.theguardian.com/australia-news/datablog/2022/feb/10/incredible-imbalance-nsw-covid-fines-during-delta-higher-in-disadvantaged-suburbs>

Throughout 2020 and 2021 Dharriwaa Elders Group had, in good faith, been relying upon representations ... that Walgett Police had the capability to use their discretion to appropriately enforce new powers afforded by Covid19-related Public Health Orders. We were also relying on information ... that the majority of the community was complying with the Public Health Orders so believed that police issuing use of fines under Public Health Orders was not widespread. However, the new evidence on fines data for Walgett contradicts this.

What we know is that there is no evidence that the heavy use of fines has benefited our community or achieved any public health outcome. Now we must take precious resources from our front-line services to address the harm caused by the heavy use of Public Health Order fines in Walgett by police officers.⁴

While shocking, Walgett's experience was not unique. Communities in many parts of NSW experienced intense policing and high-volume issuance of penalty notices. This was especially the case during the 'Delta wave' in mid 2021. 80% of the more than 60,000 penalty notices issued in NSW during the course of the pandemic were issued in the three-month period from July 2021 to September 2021.⁵ In the face of warnings about the risk associated with a policing-centred response to compliance with COVID-19 public health rules,⁶ and encouragements for a non-punitive approach,⁷ NSW residents found themselves on the receiving end of millions of dollars in police-issued fines for the 'crime' of non-compliance with major and frequently changing restrictions. Impacts were not evenly distributed across the state, but were greatest in designated

⁴ Dharriwaa Elders Group, 'Statement: High numbers of Covid19 Fines issued by NSW Police in Walgett' (5 May 2022) <https://www.dharriwaaeldersgroup.org.au/index.php/news/220-high-numbers-of-covid19-fines-issued-by-nsw-police-in-walgett>

⁵ Revenue NSW, above n 1.

⁶ 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>

⁷ Clifford Stott, Owen West, 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; Freya Mills, Charles Symons, Holly Carter, 'Exploring the Role of Enforcement in Promoting Adherence with Protective Behaviours during COVID-19' (2021) *Policing: A Journal of Policy and Practice*, paab079, <https://doi.org/10.1093/police/paab079>; 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.

‘Local Government Areas of concern’, which were concentrated in the south-western and western suburbs of Sydney.⁸

1.2 Origins and Aims of the Report

In late 2021 the individual, collective and cumulative consequences of the large number of COVID-19 penalty notices issued during the Delta Wave became increasingly apparent. In December 2021 a coalition of organisations led by the Aboriginal Legal Service NSW/ACT (ALS), the Public Interest Advocacy Centre (PIAC), Redfern Legal Centre (RLC) and Community Legal Centres NSW called on the NSW Government to pause enforcement action on all outstanding COVID-19 fine debts on grounds of unfairness and excessive harshness.⁹ In May 2022, the Law Society of NSW joined the call for Government action on Covid fines.¹⁰

In June 2022, PIAC, RLC and the ALS asked the UNSW Centre for Crime, Law and Justice to prepare a report on those aspects of the NSW Government’s response to the pandemic that contributed to the debt legacy and associated hardship which many of their clients are now facing, and for which they continue to seek redress, including via litigation in the Supreme Court of NSW.¹¹

It was not inevitable that the COVID-19 pandemic would result in the issuance of more than \$56 million in penalty notices for non-compliance with public health orders (‘PHOs’), and the twin legacies of a large debt burden for socio-economically disadvantaged individuals and families, and damaged community-police relations.

The aim of this report is to investigate the factors that contributed to these outcomes.

⁸ Although not considered ‘areas of concern’, there were specific restrictions that applied to varying LGAs in rural and regional NSW from 21 July 2021 until 11 October 2021. See amendments 2-26 of the *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021*.

⁹ Community Legal Centre NSW, ‘A call for an immediate pause on the enforcement of COVID-19 fines’ (6 December 2021) <https://www.clcnsw.org.au/call-immediate-pause-enforcement-covid-19-fines>

¹⁰ Christopher Knaus, ‘Lawyers call on NSW Premier to urgently review thousands of Covid fines’, *The Guardian*, 27 May 2022) <https://www.theguardian.com/australia-news/2022/may/27/lawyers-call-on-nsw-premier-to-urgently-review-thousands-of-covid-fines>

¹¹ Georgina Mitchell, ‘Supreme Court test case that could throw out thousands of NSW Covid fines’, *Sydney Morning Herald*, 16 July 2022 <https://www.smh.com.au/national/nsw/supreme-court-test-case-that-could-throw-out-thousands-of-nsw-covid-fines-20220708-p5b079.html>

1.3 A Criminalisation Approach

We have not adopted the terminology of criminalisation for hyperbolic effect, but rather because it is a recognised concept in the academic literature that has value as a tool for analysing the state's pursuit of a public policy objective – in this instance, COVID-19 infection control – via the use of certain regulatory techniques, including offence creation, police enforcement and punishment. We adopt a 'thick' and contextual conception of criminalisation that encompasses not only traditional criminal offences and their prosecution in the courts, but also the wide variety of other 'modalities' by which the state engages criminal justice institutions to influence behaviour and punish transgression.¹² Police-issued penalty notices are an under-appreciated modality of criminalisation, and alongside work done recently by others,¹³ we believe that examination of their use in the context of the COVID-19 pandemic can contribute to a better understanding of criminalisation 'in all its multidimensional complexity'.¹⁴

1.4 Report Scope and Structure

This report is organised around three important dimensions of the story behind the legacies of fine debt and damaged police-community relations described above.

First, we examine the making, amending and remaking of orders pursuant to the *Public Health Act 2010* (NSW), focusing on the volume and pace of law-making and the challenges this created for the 'knowability'¹⁵ of the rules. Second, we examine the available statistical data on COVID-19 PHO enforcement actions generally, and the issuance of penalty notices specifically. The data tell a powerful story of the intensity of enforcement, particularly, in terms of the volume of penalty notices issued, and the uneven distribution of police enforcement actions across NSW. Third, we analyse media-reported public comments by NSW Government and NSW Police Force leaders

¹² Luke McNamara, 'Criminalisation Research in Australia: Building a foundation for normative theorising and principled law reform' in Thomas Crofts & Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (OUP, 2015); David Brown, 'Criminalisation and normative theory' (2013) 25(2) *Current Issues in Criminal Justice* 605; Luke McNamara, Julia Quilter, Russell Hogg, Heather Douglas, Arlie Loughnan and David Brown, 'Theorising criminalisation: The Value of a Modalities Approach' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 91.

¹³ See Julia Quilter & Russell Hogg, "[I]f it's a public health and safety thing...why not just give the kids helmets?": Policing Mandatory Helmet Laws in NSW' 44(2) (2021) *UNSW Law Journal* 747; and Elyse Methven, 'Cheap and Efficient Justice? Neoliberal Discourse and Criminal Infringement Notices' (2019) 45(2) *UWALR* 65.

¹⁴ McNamara, above n 12, 34.

¹⁵ See James Spigelman, 'The Rule of Law and Enforcement' (2003) 26(1) *UNSW Law Journal* 200.

on the policing of PHOs to discern changes in official compliance and enforcement ‘mentality’ over the course of the pandemic.

Although we set our analysis in the longer timeframe from the start of the pandemic in March 2020 through to 30 September 2022,¹⁶ our primary focus is on the events of the Delta Wave: June 2021 to November 2021.¹⁷ The reason for this focus is that the legacies which were the catalyst for this report – fine debt for disadvantaged persons and damaged police-community relations – are largely attributable to how PHOs were enforced during this period (remembering, as noted above, that 4 out of 5 Covid notices penalty notices for the full 2.5 year period were issued in the three months from July-September 2021).

Our focus is on police-issued penalty notices (as opposed to court issued fines or other punishments) because penalty notices were overwhelmingly the dominant method of enforcement, accounting for 86% of enforcement actions for alleged PHO breaches.¹⁸ We recognise that although they are not within the scope of this report, there are other aspects of policing practices during the COVID-19 response in NSW that warrant attention (such as the use of search powers),¹⁹ as do other ways in which COVID-19 public health measures exacerbated *penalty* in the criminal justice system, including in prisons.²⁰

¹⁶ On this date, Australia’s National Cabinet announced that the last remaining broad-scale infection control measure (mandatory isolation after a positive test) would be lifted from 14 October 2022, including in NSW: Jake Evans, ‘Mandatory COVID-19 isolation periods scrapped from October 14, emergency response ‘finished’ says national cabinet’, ABC News (online) 30 September 2022 <https://www.abc.net.au/news/2022-09-30/covid-19-isolation-period-dropped-national-cabinet/101489566>

¹⁷ We have adopted the date parameters for defining the 4th (Delta) Wave of the COVID-19 pandemic that were employed by the NSW Ombudsman in *The COVID 19 Pandemic: Second Report*. A special report under section 31 of the Ombudsman Act 1974 (7 September 2022), 10.

¹⁸ NSW Bureau of Crime Statistics and Research (BOCSAR), ‘NSW Recorded Crime Statistics 17 Mar 2020 to 31 Dec 2021: Number of persons of interest (POIs) proceeded against by the NSW Police for a COVID-19 related breach of the Public Health Act 2010’ (2022) https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/COVID.aspx

¹⁹ Louise Boon-Kuo, Alec Brodie, Jennifer Keene-McCann, Vicki Sentas & Leanne Weber, ‘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.

²⁰ See, eg, Alison Whittaker, ‘No news is no news: COVID-19 and the opacity of Australian prisons’ (2021) 33(1) *Current Issues in Criminal Justice* 111; Andreea Lachs & Monique Hurley, ‘Why practices that could be torture or cruel, inhuman and degrading treatment should never have formed part of the public health response to the COVID-19 pandemic in prisons’ (2021) 33(1) *Current Issues in Criminal Justice* 54; Nerita Waight, Cheryl Axleby, Roxanne Moore & David Mejia-Canales, ‘COVID-19: a missed opportunity to reimagine the justice system for our people’ (2021) 33(1) *Current Issues in Criminal Justice* 19; Faith Gordon, Hannah Klose & Michelle Lyttle Storrod, ‘Youth (in)justice and the COVID-19 pandemic: rethinking incarceration through a public health lens’ (2021) 33(1) *Current Issues in Criminal Justice* 27.

Finally, it is important to note that this report does not endeavour to assess whether the substantive PHOs were legitimate or justified, these being matters beyond our field of expertise. Relatedly, we have not attempted to evaluate the effectiveness of COVID-19 PHOs with respect to impacts on rates of infection, hospitalisation, serious illness and death.²¹

²¹ See generally, Peter Shergold et al, *Fault Lines: An Independent Review into Australia's Response to COVID-19* (October 2022).

2. ANALYSIS OF PUBLIC HEALTH ORDER-MAKING

The making of new laws – especially the creation of new offences and/or the introduction of increased penalties – regularly attracts the attention of criminalisation scholars, attuned to questions about the justification for new laws, the process by which new offences come into existence, and their likely effects in practice. Laws that are made in haste, and in the absence of wider consultation, come in for particular scrutiny. It is from this perspective that we approached the flurry of law-making – in the form of PHOs made under the pre-existing legislative architecture of the *Public Health Act 2010* (NSW) – that was a feature of the NSW Government’s response to COVID-19.

When we embarked on the research for this report, our intention was to undertake a full review of PHO-making from the beginning of the pandemic in March 2020 to the end of our review period (30 September 2022). However, when the NSW Ombudsman released its second report on the COVID-19 pandemic on 7 September 2022²² we recalibrated our approach in light of the extensive analysis of public health law-making that the Ombudsman’s report contained.

After offering a summary of the findings and insights contained in the NSW Ombudsman’s report about law-making over the entire pandemic, this section of our report will focus on highlighting the distinctive features of PHO-making during the Delta Wave.

2.1 Findings of the NSW Ombudsman’s 2nd Report

The NSW Ombudsman calculated the number of PHOs and amendments made in the period from 15 March 2020 to 31 January 2022:

*By 31 January 2022, 266 principal and amending public health orders had been issued – averaging to an **order every 2.5 days** for the almost 2 years between 15 March 2020 – 31 January 2022. There were **53 days on which at least 2 public health orders were either made or amended.***²³

²² NSW Ombudsman, above n 17.

²³ NSW Ombudsman, above n 17, 62 (emphasis added).

In addition to the volume and pace of PHO-making, the NSW Ombudsman noted that COVID-19 law-making departed from several important law-making conventions and expectations:

During the pandemic, the way in which relevant legal rules were made, how they were communicated, the speed at which they were prepared and implemented, the frequency of changes, and the manner in which they were enforced, has differed in some important respects from what we would expect, or accept, during ordinary times.

At times, some of those differences have rubbed against what might ordinarily be considered essential elements for a system of democratic government based on 'the rule of law'. These elements include that:

- 1) Laws should be made by or with the authority of Parliament.*
- 2) Laws, and what they demand, should be clear and known by the public.*
- 3) Laws should be enforceable.*
- 4) Laws should be enforced consistently.*
- 5) Penalties should be proportionate.*
- 6) Enforcement action should be subject to appropriate review.²⁴*

The NSW Ombudsman documented a number of ways which NSW COVID-19 law-making and enforcement 'sat uncomfortably with these elements of the rule of law.'²⁵

The first notable feature was the extra-Parliamentary process by which new laws were made:

The standard model of law-making is that legislation is made by the people's duly elected Parliament (by passing an act of Parliament) and then administered by the Government. In modern times, much legislation is also made by the Government through powers delegated (under acts) to make regulations and other sub-ordinate legislative instruments.

²⁴ Ibid, 58.

²⁵ Ibid, 58.

In NSW, the primary tool used to 'legislate' the pandemic response was neither acts nor regulations, but public health orders made (usually) by the Minister for Health under the Public Health Act 2020 ...

... [T]hese public health orders allowed for rapid and flexible action to meet unforeseen and evolving circumstances. However, they also allowed for Executive action – which was extraordinary in its application and reach, and which imposed extraordinary and significant incursions on individual rights – to be taken without ordinary parliamentary consideration and oversight.²⁶

The NSW Ombudsman also drew attention to the serious challenges to the important rule of law principle of *knowability*:

Mere ignorance of the law is generally considered no excuse for a failure to comply. On the other hand, that laws are knowable (that is - known to exist, sufficiently clear and certain, and accessible) by those who are subject to them is a fundamental requirement of the rule of law.

When laws are introduced, it is important they are known and predictable so that people understand what they are permitted and not permitted to do and what services they are entitled to expect. It is also important there is clarity regarding the consequence of non-permissible actions, and options for redress if services are not delivered to expected standards.

However, people who contacted our office reported that the frequent changes to the rules left them feeling overwhelmed, confused and uncertain about what they could and could not do on any given day, and what services they could expect to receive. This is consistent with reports of other organisations. Community service providers and private businesses also struggled to keep abreast of the changes which meant they could not confidently and consistently provide advice and deliver services to their respective clients.

²⁶ Ibid, 58.

The ability of any individual or business to be able to know what was required of them under the public health orders in effect at any given time was increasingly challenged throughout the pandemic ...²⁷

The NSW Ombudsman identified a number of factors that contributed to uncertainty and confusion:

- *The sheer number of public health orders made ...*
- *The frequency with which public health orders were modified ...*
- *Limited or no specific prior consultation or debate about a particular order and limited or no notice period before an order came into effect ...*
- *The lack of pre-announced ‘triggers’ or criteria for the making of public health orders ...*
- *The manner in which the public health orders were drafted and published ...*
- *Ambiguities and vagueness in the terms of the public health orders ...*
- *Confusion between ‘rules’ (hard law) and ‘guidance’ (soft law) ...*
- *Lack of ‘common sense’ in the rules ...²⁸*

The features of NSW PHO-making to which the NSW Ombudsman has drawn attention were evident, to a lesser or greater extent, across the full period of the pandemic. However, after the ‘Delta’ variant was detected in Australia in mid-2021, and infection numbers began to rise, the challenges associated with this style of law-making described here became more acute. Further, as we will show in Part 3 of this report, when freshly created and frequently changing PHOs began to be zealously enforced by NSW Police, the practical consequences became apparent.

In the remainder of Part 2, we will highlight three features of law-making during the Delta Wave (June-November 2021²⁹): i) the accelerated volume and pace of PHO amendments; ii) the

²⁷ Ibid, 62.

²⁸ Ibid, 62-65.

²⁹ See NSW Ombudsman, above n 17, 10.

introduction of the toughest infection control measures of the pandemic; and iii) significant increases in the size of the penalty notice fines for several PHO breaches.

2.2 Background to the Delta Wave Period

In the months prior to the Delta Wave residents of NSW and most of Australia had experienced something of a return to ‘normalcy’, as the first doses of COVID-19 vaccines were administered in large numbers, and the National Cabinet eased border restrictions to welcome international travellers.³⁰ This easing was reflected in the status of PHOs, with a significant winding back of restrictions from February 2021 onwards. By May 2021, even mask mandates were eased with people only required to wear fitted facemasks inside NSW airports and on domestic commercial aircraft.³¹ At the beginning of June 2021, NSW was recording zero locally acquired cases.³² Up to 100 visitors were permitted at residential premises, with no more than 1 person per 2 square metres or 25 persons at non-residential premises.³³ Entertainment venues and major recreational facilities were operating with limited restrictions, and “covid-safe” outdoor gatherings were permitted.³⁴

However, on 16 June 2021, the first community cases of the highly transmissible Delta variant, which became known as the ‘Bondi Cluster’, were recorded in the eastern suburbs of Sydney.³⁵ As the Delta variant made its way across Sydney and NSW, the NSW government quickly began re-instating restrictions to stop the spread, mandating the wearing of masks in public indoor spaces, restricting movement in the suburbs of Metropolitan Sydney, and eventually, placing Greater Sydney into ‘lockdown’.³⁶ Despite these containment measures the Delta variant

³⁰ NSW Ombudsman, above n 17, 82.

³¹ *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021* as amended by the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) Amendment Order 2021*.

³² NSW Health, ‘COVID-19 (Coronavirus) statistics’, Media Release, 3 June 2021
https://www.health.nsw.gov.au/news/Pages/20210603_00.aspx

³³ *Public Health (COVID-19 Gathering Restrictions) Order (No 2) 2021*.

³⁴ Pursuant to the *Public Health (COVID-19 Gathering Restrictions) Order (No 2) 2021*, individuals were not to participate in an outdoor public gathering of more than 200 persons unless it is a COVID-19 safe outdoor gathering, that complied with the requirements of Section 19(2).

³⁵ NSW Health, ‘Public health alert – new case and additional venues’, Media Release, 16 June 2021
https://www.health.nsw.gov.au/news/Pages/20210616_04.aspx

³⁶ NSW Ombudsman, above n 17, 92-98.

continued to spread reaching regional and western NSW within one month.³⁷ In the 24 hours leading up to 14 August, NSW Health reported the deaths of four people attributed to COVID-19, bringing the total number of COVID-19 related deaths during the Delta Wave to a record 43 people.³⁸ With an additional 466 locally acquired cases in the same period, the total number of Delta cases recorded since 16 June rose to 12,903.³⁹ In a bid to ‘protect the people of NSW from the evolving COVID-19 outbreak’ NSW was plunged into a state-wide lockdown on 14 August, marking the beginning of the state’s strictest lockdown to date, and a period of rapid-law making and criminalisation through penalty notice issuance.⁴⁰

2.3 The Operation, Making and Amending of PHOs During the Delta Wave

Studies of over-criminalisation have identified *haste* as a law-making feature that may be indicative of illegitimacy.⁴¹ Specifically, hurried (‘knee-jerk’) law-making,⁴² with little opportunity for scrutiny,⁴³ has been associated with an excessively punitive ‘law and order’ approach to identified harms and risk.⁴⁴ If the speed with which a new law is enacted is indicative of the need for close attention to potential dangers, the pace and volume of public health order law-making in response to the COVID-19 pandemic certainly invites scrutiny. This was true in the first wave in 2020,⁴⁵ but was even more pronounced in the period with which this report is primarily concerned: the Delta Wave in 2021.

³⁷ NSW Ombudsman, above n 17, 84-85.

³⁸ NSW Health, ‘COVID-19 (Coronavirus) statistics’, Media Release, 14 August 2021 https://www.health.nsw.gov.au/news/Pages/20210814_00.aspx

³⁹ Ibid.

⁴⁰ Ibid; NSW Ombudsman, above n 17, 85.

⁴¹ Luke McNamara, Julia Quilter, Russell Hogg, Heather Douglas, Arlie Loughnan, David Brown and Lindsay Farmer, ‘Understanding *processes* of criminalisation: Insights from an Australian study of criminal law-making’ (2021) 21(3) *Criminology & Criminal Justice* 387.

⁴² Luke McNamara & Julia Quilter, ‘The “Bikie Effect” and other Forms of Demonisation: the Origins and Effects of Hyper-criminalisation’ (2016) 34(2) *Law in Context*.

⁴³ Luke McNamara & Julia Quilter, ‘Institutional Influences on the Parameters of Criminalisation: Parliamentary Scrutiny of Criminal Law Bills in New South Wales’ (2015) 27 *Current Issues in Criminal Justice* 21-40

⁴⁴ Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998).

⁴⁵ 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.

Table 1: COVID-19 PHOs operating, made and amended, June-November 2021 (Delta Wave)⁴⁶

Order	Operation	Amendments
Public Health (COVID-19 Air and Maritime Arrivals) Order, Public Health (COVID-19 Air Transportation Quarantine) Order and Public Health (COVID-19 Maritime Quarantine) Order (' Air and Maritime Orders ') ⁴⁷	17 March 2020 – 21 June 2022 ⁴⁸	14
Public Health (COVID-19 Care Services) Order (' Aged-care Orders ') ⁴⁹	24 March 2020 – present ⁵⁰	4
Public Health (COVID-19 Self-Isolation) Order (' Self-isolation Orders ') ⁵¹	26 March 2020 – 14 October 2022 ⁵²	7
Public Health (COVID-19 Interstate Travellers) Order (' Interstate Travellers Order ') ⁵³	5 February 2021 – ⁵⁴	2
Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (' Delta Restrictions Order ') ⁵⁵	26 June 2021 – 11 October 2021 ⁵⁶	64

⁴⁶ Data retrieved from NSW Legislation, 'Public Health Orders', COVID-19 Related Legislation, 21 September 2022, <https://legislation.nsw.gov.au/information/covid19-legislation>.

⁴⁷ Includes the *Public Health (COVID-19 Air and Maritime Arrivals) Order (No 2) 2022*, *Public Health (COVID-19 Air Transportation Quarantine) Order 2021*, *Public Health (COVID-19 Air Transportation Quarantine) Order (No 2) 2021*, *Public Health (COVID-19 Air Transportation Quarantine) Order (No 3) 2021*, *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021*, *Public Health (COVID-19 Maritime Quarantine) Order 2021*, *Public Health (COVID-19 Maritime Quarantine) Order (No 2) 2021*, *Public Health (COVID-19 Maritime Quarantine) Order (No 3) 2021*, *Public Health (COVID-19 Maritime Quarantine) Order (No 4) 2021* and corresponding amending orders. See 'Air and Maritime Arrivals', 'Air Transportation Quarantine' and 'Maritime Quarantine' in NSW Legislation, above n 46.

⁴⁸ The *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021* and *Public Health (COVID-19 Maritime Quarantine) Order (No 4) 2021* were repealed by the *Public Health (COVID-19 Air and Maritime Arrivals) Order (No 1) 2022*, which was repealed on the 21 June by the *Public Health (COVID-19 Air and Maritime Arrivals) Order (No 2) Repeal Order 2022*.

⁴⁹ Includes the *Public Health (COVID-19 Care Services) Order 2021*, *Public Health (COVID-19 Care Services) Order (No 2) 2021*, *Public Health (COVID-19 Care Services) Order (No 3) 2021* and corresponding amending orders. See 'Care services' in NSW Legislation, above n 46.

⁵⁰ The *Public Health (COVID-19 Care Services) Order (No 3) 2022* commenced on 5 September 2022 and is in force as of 14 September 2022.

⁵¹ Includes the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021*, *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021*, and corresponding amending orders. See 'Self-isolation', in NSW Legislation, above n 46.

⁵² Order repealed by the *Public Health Repeal Order 2022*.

⁵³ Includes the *Public Health (COVID-19 Interstate Travellers) Order (No 2) 2021*, *Public Health (COVID-19 Interstate Travellers) Order (No 3) 2021*, and the *Public Health (COVID-19 Interstate Travellers) Order (No 4) 2021*. See 'Interstate travellers', in NSW Legislation, above n 46.

⁵⁴ The *Public Health (COVID-19 Interstate Travellers) Order (No 4) 2021* commenced on 27 October 2021. It was not expressly repealed by the *Public Health Order Repeal Order 2022*, but all 'Interstate travellers' PHOs are recorded as no longer in force: see 'COVID-related legislation' in NSW Legislation, above n 46.

⁵⁵ Includes the *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021*, *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*, *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* and corresponding amending orders. See 'Delta outbreak restrictions', in NSW Legislation, above n 46.

⁵⁶ Order repealed by the *Public Health (COVID-19 General) Order 2021*.

Public Health (COVID-19 Gathering Restrictions) Order ('Gathering Restrictions') ⁵⁷	16 March 2020 – 29 August 2021 ⁵⁸	3
Public Health (COVID-19 Mandatory Face Coverings) Order ('Mandatory Face Coverings Order') ⁵⁹	3 January 2021 – 11 September 2021 ⁶⁰	4
Public Health (COVID-19 Spitting and Coughing) Order ('Spitting and Coughing Order') ⁶¹	9 April 2020 – 11 October 2021 ⁶²	1
Public Health (COVID-19 Greater Sydney) Order ('Greater Sydney Order') ⁶³	6 May 2021 – 26 June 2021 ⁶⁴	3
Public Health (COVID-19 Vaccination of Health Care Workers) Order, and Public Health (COVID-19 Vaccination of Education and Care Workers) Order ('Vaccination Orders') ⁶⁵	26 August 2021 – 19 June 2022 ⁶⁶	5
Public Health (COVID-19 Safety) Order ('Safety Order') ⁶⁷	29 August 2021 – 11 October 2021 ⁶⁸	3
Public Health (COVID-19) General Order ('General Orders') ⁶⁹	11 October 2021 – 14 October 2022 ⁷⁰	13

Table 1 records all PHOs that were operating during the Delta Wave, including when they were operational and how often they were amended. There were 123 amendments made to PHOs

⁵⁷ Includes the *Public Health (COVID-19 Gathering Restrictions) Order 2021*, *Public Health (COVID-19 Gathering Restrictions) Order (No 2) 2021* and corresponding amending orders. See 'Gathering and Movement' in NSW Legislation, above n 46.

⁵⁸ Order repealed by the *Public Health (COVID-19 Safety) Order 2021*.

⁵⁹ Includes the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021*, *Public Health (COVID-19 Mandatory Face Coverings) Order (No 3) 2021* and corresponding amending orders. See 'Mandatory Face Coverings' in NSW Legislation, above n 46.

⁶⁰ Order repealed by the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) Amendment (No 7) Order 2021*.

⁶¹ Includes the *Public Health (COVID-19 Spitting and Coughing) Order (No 2) 2021* and *Public Health (COVID-19 Spitting and Coughing) Order (No 3) 2021*. See 'Spitting and Coughing' in NSW Legislation, above n 46.

⁶² Order repealed by the *Public Health (COVID-19 General) Order 2021*.

⁶³ Includes the *Public Health (COVID-19 Greater Sydney) Order 2021*, and the *Public Health (COVID-19 Greater Sydney) Order (No 2) 2021*. See 'Greater Sydney' in NSW Legislation, above n 46.

⁶⁴ Order repealed by the *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021*.

⁶⁵ Includes the *Public Health (COVID-19 Vaccination of Health Care Workers) Order 2021*, *Public Health (COVID-19 Vaccination of Health Care Workers) Order (No 2) 2021*, *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021* and corresponding amending orders. See 'Vaccination of education and care workers' and 'Vaccination of health care workers' in NSW Legislation, in NSW Legislation, above n 46.

⁶⁶ The *Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2022* was repealed by clause 11(2) on 13 May 2022 and the *Public Health (COVID-19 Vaccination of Health Care Workers) Order 2022* expired on the 19 June 2022.

⁶⁷ Includes the *Public Health (COVID-19 Safety) Order 2021* and all amending orders. See 'Safety' in NSW Legislation, above n 46.

⁶⁸ Order repealed by the *Public Health (COVID-19 General) Order 2021*.

⁶⁹ Includes the *Public Health (COVID-19 General) Order 2021* and corresponding amending orders. See 'General' in NSW Legislation, above n 46.

⁷⁰ Order repealed by the *Public Health Repeal Order 2022*.

within a period of 6 months (see Table 1), averaging an order/amendment every 1.5 days between June-November 2021. These Delta amendments represent 38.5% of all PHOs made since the beginning of the pandemic in 2020. 64 of these amendments (52%) related to the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*. There were several instances in which PHOs were amended within a matter of days, or even hours. For example, in July 2021, there were 13 amendments made to the same PHO in 15 days.⁷¹ One of these PHOs was only in force for 3 hours and 50 minutes, before being amended the following morning.⁷² On 11 August 2021, there were three amendments made to the same PHO within 20 hours.⁷³ This pattern continued well into September, during which there were a record 33 amendments made in a single month.

The NSW Ombudsman has compiled a detailed summary of the contents of PHOs and amendments, with extensive coverage of law-making during the Delta Wave, and so we have not attempted to duplicate all of that information here.⁷⁴ Instead, we have produced a selective extract from the NSW Ombudsman’s compilation that highlights the most restrictive of the PHO measures, with a focus on those measures that did not apply state-wide or Sydney-wide, but targeted particular geographical locations, including Sydney ‘areas of concern’ (see Table 2).

*Table 2: Selected COVID-19 PHO restrictions imposed during the Delta Wave*⁷⁵

Date (2021)	Key PHO Amendment
26 June	<p>The <i>Public Health (COVID-19 Greater Sydney) Order (No 2) 2021</i> was amended to impose stay-at-home restrictions to all LGAs in the Greater Sydney area including the Blue Mountains, Central Coast, Wollongong and Shellharbour:</p> <ul style="list-style-type: none"> Residents (and those staying in temporary accommodation) of Greater Sydney were not permitted to leave their home/accommodation without reasonable excuse, e.g. to buy food, attend work, exercise or for medical and caring reasons.

⁷¹ Period spanning 8 July to 22 July 2021. See Amendment No 2-13 to *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021*.

⁷² The *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021* was amended at 6:10pm on 18 July 2021, by the *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Amendment (No 8) Order 2021*, only to be further amended the following morning by the *Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Amendment (No 9) Order 2021*.

⁷³ See Amendment No’s 22-25 to *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*.

⁷⁴ NSW Ombudsman, above n 17, 90f (covering the period 2 February 2021 to 30 April 2022). See also NSW Ombudsman, *2020 hindsight: the first 12 months of the COVID-19 pandemic*. A special report under section 31 of the Ombudsman Act 1974 (22 March 2021), 64f (covering the period 16 March 2020 to 10 January 2021).

⁷⁵ Selected entries reproduced or adapted from ‘Chronology of COVID-related public health orders from 1 February 2021’ in NSW Ombudsman, above n 17, 90-110.

	<ul style="list-style-type: none"> • People living outside Greater Sydney were not permitted to enter Greater Sydney without a reasonable excuse. • Taking a holiday was not a reasonable excuse for leaving a residence or for entering or leaving Greater Sydney. • Outdoor public gatherings of more than 10 people were not permitted unless a special exemption applied. • Certain premises were required to close altogether including hairdressers and beauty salons, auction houses and betting agencies, caravan parks and camping grounds, public pools and properties operated by the National Trust. • Other premises were closed except for certain purposes.
9 July	<p>The <i>Public Health (COVID-19 Temporary Movement and Gathering Restrictions) Order 2021</i> ('<i>Temporary Movement and Gathering Order</i>') was amended to impose further restrictions. In Greater Sydney:</p> <ul style="list-style-type: none"> • Outdoor public gatherings were limited to 2 persons. • Only one person per household could go out to buy food each day. • Person's exercising were restricted to the LGA in they lived, and no more than 10 km from their home. • Funeral services were limited to 10 attendees, including the person conducting the service. • Carpooling to a place for exercise was limited to passengers from the same household. • An exemption to mask requirements for construction sites was removed. • Reasons for entering Greater Sydney were limited to obtaining goods and services and attending funerals and memorial services. It did not include exercise or recreation. • Persons permitted to leave Greater Sydney were required to carry and show their address details on request by police. • Persons permitted to leave Greater Sydney to attend a funeral or memorial service were limited to close family members.
14 July	<p>The <i>Temporary Movement and Gathering Order</i> was amended:</p> <ul style="list-style-type: none"> • The City of Fairfield was designated an 'affected area.' Workers from affected areas were not permitted to attend work outside of their LGA of residence unless they could demonstrate a negative test result for COVID within the preceding 72 hours. • Comparatively, residents of Greater Sydney were not permitted to attend work if it was further than 50km outside of Greater Sydney unless they could demonstrate a negative test result for COVID within the preceding 7 days.
18 July	<p>The <i>Temporary Movement and Gathering Order</i> was amended to impose further requirements in Greater Sydney as well as across the State. State-wide, employers were required to have employees work from home. In Greater Sydney:</p> <ul style="list-style-type: none"> • People had to wear masks outdoors when near or next to food/drink or retail premises as well as when at indoor and outdoor food markets. They were required to carry a face mask on their person at all times when away from their place of residence. • Work was not permitted on construction sites in Greater Sydney, unless the work was urgently required or needed to maintain the integrity of plant, equipment or assets, or to prevent deterioration of partially completed works. • People could only travel together in a vehicle in Greater Sydney if all from the same household. <p>People in City of Fairfield, City of Liverpool and Canterbury LGAs or any other LGAs designated as affected areas were not permitted to work outside their LGA unless they were an authorised officer (as listed on the NSW government website).</p>

21 July	<p>The <i>Temporary Movement and Gathering Order</i> was amended:</p> <ul style="list-style-type: none"> • Stay-at-home requirements were imposed in affected regions, being the LGAs of Blayney, Cabonne and the City of Orange. • The Chief Health Officer was permitted to specify new affected regions by a notice published on the NSW Health website. • People outside affected regions could not enter those regions without reasonable excuse unless they were travelling through the region. • Outdoor gatherings in affected regions could not exceed 2 people.
24 July	<p>The <i>Temporary Movement and Gathering Order</i> was amended. The following LGAs were added to the list of affected areas:</p> <ul style="list-style-type: none"> • City of Blacktown; • Cumberland; and • The following day, Canterbury-Bankstown was specified as an affected area by the Chief Health Officer.
29 July	<p>The <i>Temporary Movement and Gathering Order</i> was amended. The definition of affected area was expanded to include these LGAs:</p> <ul style="list-style-type: none"> • City of Campbelltown; • Georges River; and • City of Parramatta. <p>At this time, other affected areas were the City of Blacktown, Canterbury-Bankstown, Cumberland, City of Fairfield and the City of Liverpool.</p>
30 July	<p>The <i>Temporary Movement and Gathering Order</i> was amended and renamed as the <i>Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021</i> ('<i>Additional Restrictions for Delta Outbreak Order</i>'): </p> <ul style="list-style-type: none"> • All Greater Sydney residents undertaking exercise or outdoor recreation away from their homes were required to carry and produce details of their address if requested by police. • Those living within affected areas were not permitted to travel further than 5km to obtain goods or services (if not reasonably obtainable within the area) or for exercise. • People in higher risk areas were required to wear a mask when outside. • Construction sites in Greater Sydney were able to operate if not in higher risk areas.
8 August	<p>The <i>Additional Restrictions for Delta Outbreak Order</i> was amended to provide that restrictions could be imposed on part of a LGA (a 'declared area') as well as the entire LGA. Parts of the City of Penrith were specified as 'declared areas' to which additional restrictions applied:</p> <ul style="list-style-type: none"> • Caddens, Claremont Meadows, Colyton, Erskine Park, Kemps Creek, Kingswood, Mount Vernon, North St Marys, Orchard Hills, Oxley Park, St Clair and St Marys.
14 August	<p>The <i>Additional Restrictions for Delta Outbreak Order</i> was amended to extend the restrictions applicable to Greater Sydney to the rest of the state, marking the beginning of the state-wide lockdown.</p>
16 August	<p>The <i>Additional Restrictions for Delta Outbreak Order</i> was amended:</p> <ul style="list-style-type: none"> • Work at residential premises was allowed in all areas of Greater Sydney if no more than 5 workers were at the residence at any time. • Persons in declared areas not permitted to leave home for outdoor recreation but were permitted to do so to supervise a child exercising or at play. • The distance that persons were permitted to travel outside their area for food or services or for exercise and recreation was reduced to 5 km. • A requirement to answer questions from contact tracers was introduced. • Persons leaving Greater Sydney to inspect a potential new residence were permitted to do so only if genuinely intending to move to and live in the new residence as soon as practicable.

23 August	<p>The <i>Additional Restrictions for Delta Outbreak Order</i> was amended:</p> <ul style="list-style-type: none"> • Police officers who suspected a person did not have a reasonable excuse for leaving their residence could direct the person to return to their residence. • Masks were required to be worn outdoors in stay-at-home areas. • The expiry date of the Order was removed. <p>The following restrictions applied in areas of concern:</p> <ul style="list-style-type: none"> • A curfew was imposed. This meant that between 9pm and 5am, the reasons for which a person could leave their residence were more limited. • Authorised workers allowed to leave an area of concern for work were required to have a permit and have had at least one dose of a COVID vaccine. • Persons allowed to enter an area of concern for work were also required to have a permit. • Certain care workers who resided or worked in an area of concern were required to have had at least one dose of a COVID vaccine. • Certain retail premises, including hardware stores and garden centres, were to be open only to trade or business customers. Home delivery and click and collect service for members of the public remained available. • An exception for shops predominantly selling office supplies or pet supplies to open in areas of concern was removed. • Educational institutions, other than schools were not permitted to conduct face to face teaching or assessment.
11 September	<p>The <i>Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021</i> repealed the <i>Mandatory Face Coverings Order</i> and incorporated its requirements. A number of businesses and gatherings were permitted to reopen as long as the number of people on the premises did not exceed the following distancing requirements:</p> <ul style="list-style-type: none"> • Hairdressers and beauty salons: the lesser of 1 person per 4 square metres of space or 5 people. • Significant events: the lesser of 1 person per 4 square metres of space or 50 people. • Certain outdoor events: 500 people for a controlled outdoor public gathering; 50 people for a COVID safe outdoor public gathering; 20 people for another outdoor public gathering. • Regional NSW was reclassified from a stay-at-home area to general areas with lower level requirements. • Stay-at-home requirements continued to apply to number of LGAs: Bathurst Regional, Bega Valley, Blayney, Bogan, Bourke, Brewarrina, City of Broken Hill, Cabonne, Central Coast, Central Darling, City of Cessnock, Dubbo Regional, Dungog, Eurobodalla, Forbes, Gilgandra, Goulburn Mulwaree, Kiama, City of Lake Macquarie, City of Lithgow, City of Maitland, Mid-Western Regional, Muswellbrook, Narrabri, Narromine, City of Newcastle, City of Orange, Parkes, Port Stephens, Queanbeyan-Palerang Regional, City of Shellharbour, City of Shoalhaven, Singleton, Snowy Monaro Regional, Upper Hunter Shire, Walgett and Wingecarribee.

As highlighted by the extracts in Table 2, the intensity of restrictions that applied to ‘affected areas’ (later referred to as ‘areas of concern’) were far greater than those imposed upon other LGAs. The curfew imposed in areas of concern on 23 August 2021 marked the height of the extreme measures taken by the NSW Government. The curfew was in place for 23 days, before being lifted

on 15 September.⁷⁶ Whilst restrictions were gradually eased in Greater Sydney LGAs and areas of concern, various rural and regional LGAs remained under stay-at-home orders. From the 11 September to 11 October, rural and regional cities and towns were regularly added to and removed from the list of stay-at-home areas in Schedule 1 of the *Additional Restrictions for Delta Outbreak Order*.

2.4 High Penalties and Mid-Pandemic Increases

From the beginning of the pandemic, penalty notices were set at relatively high levels: generally \$1000 for individuals and \$5000 for corporations.⁷⁷ These penalties could be imposed for conduct that had never previously been unlawful (such as failing to wear a face mask on a train, leaving home without a reasonable excuse, or exercising outdoors with more than two people). They were notably higher than penalty notices for existing criminal offences in NSW, such as: larceny⁷⁸ of goods up to \$300 in value (PN: \$300); offensive behaviour in a public place⁷⁹ (PN: \$500); having stolen goods in custody⁸⁰ (PN: \$350); possession of less than a small quantity of ecstasy⁸¹ (PN: \$400); and exceeding the speed limit by 20+ km/hr⁸² (PN: \$615).⁸³

The high value of COVID-19 penalty notices is an important part of the story behind the legacy of fine debt which was the catalyst for this report. During the Delta Wave the potential for disproportionate punishment was increased further when the value of penalty notices was raised for several PHO breaches.⁸⁴ Coinciding with the commencement of 'Operation Stay at Home' on

⁷⁶ See *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) Amendment (No 9) Order 2021*.

⁷⁷ Public Health Regulation 2012 (NSW), Schedule 4; see Lenny Roth, *NSW Public Health Restrictions to Deal With the COVID-19 Pandemic: A Chronology*. Issues Backgrounder No 5. NSW Parliamentary Research Service (November 2020) 3.

⁷⁸ *Crimes Act 1900* (NSW) s 117.

⁷⁹ *Summary Offences Act 1988* (NSW) s 4.

⁸⁰ *Crimes Act 1900* (NSW) s 527C.

⁸¹ *Drug Misuse and Trafficking Act 1985* (NSW) s 10.

⁸² Road Rules 2014 (NSW) Rule 20.

⁸³ See Criminal Procedure Regulation 2017 (NSW), Schedule 4 Penalty notice offences; and Road Transport (General) Regulation 2021, Sch 5 Penalty notice offences.

⁸⁴ NSW Government, 'Increased fines, test and isolate payments and new compliance measures as NSW battles Delta', Media Release, 14 August 2021, <https://www.nsw.gov.au/media-releases/increased-fines-test-and-isolate-payments-and-new-compliance-measures-as-nsw-battles>

16 August 2021, penalty notice fines were significantly increased to \$5000 for the following offences:⁸⁵

- Failure to comply with a direction prohibiting coughing or spitting on a public official or other worker;
- Failure to comply with a direction to answer questions, provide information about a person's movements or provide contact details to an authorised contact tracer upon request;
- Failure to comply with a direction to ensure all information provided to Service NSW or authorised contract tracers is true and accurate;
- Failure to comply with a direction that prohibits any provision, display or production of untrue or inaccurate evidence of a person's full vaccination status;
- Failure to comply with a direction to self-isolate if diagnosed with COVID-19; and
- Failure to comply with a direction to self-isolate if deemed a close contact.

The penalty notices for failure to register a positive rapid antigen test result and failure to comply with any other COVID-19 related direction were also increased to \$1000, whilst a breach of the 2-person limit on outdoor gatherings was increased to \$3000.⁸⁶

At the same time, penalty notices for a failure to comply with a direction to wear or carry a fitted face covering were reduced for three age categories:

1. Children aged 15 or younger incurred a \$40 PN;
2. Children aged 16 or 17 incurred a \$80 PN; and

Persons aged 18 and over incurred a \$500 PN.⁸⁷

These modest and belated age-based adjustments (applicable only to mask-related PHO rules) were the only time that 'capacity to pay' was taken into account in setting the value of the fines attached to penalty notices. For all other PHO 'offences', the same (high) financial penalty was

⁸⁵ See Public Health Regulation 2022 (NSW) Sch 6. All penalties notices issued pursuant to *Public Health Act 2010* (NSW), s 10.

⁸⁶ See Public Health Regulation 2022 (NSW) Sch 6; Public Health Amendment (Rapid Antigen Tests) Regulations 2022 (NSW).

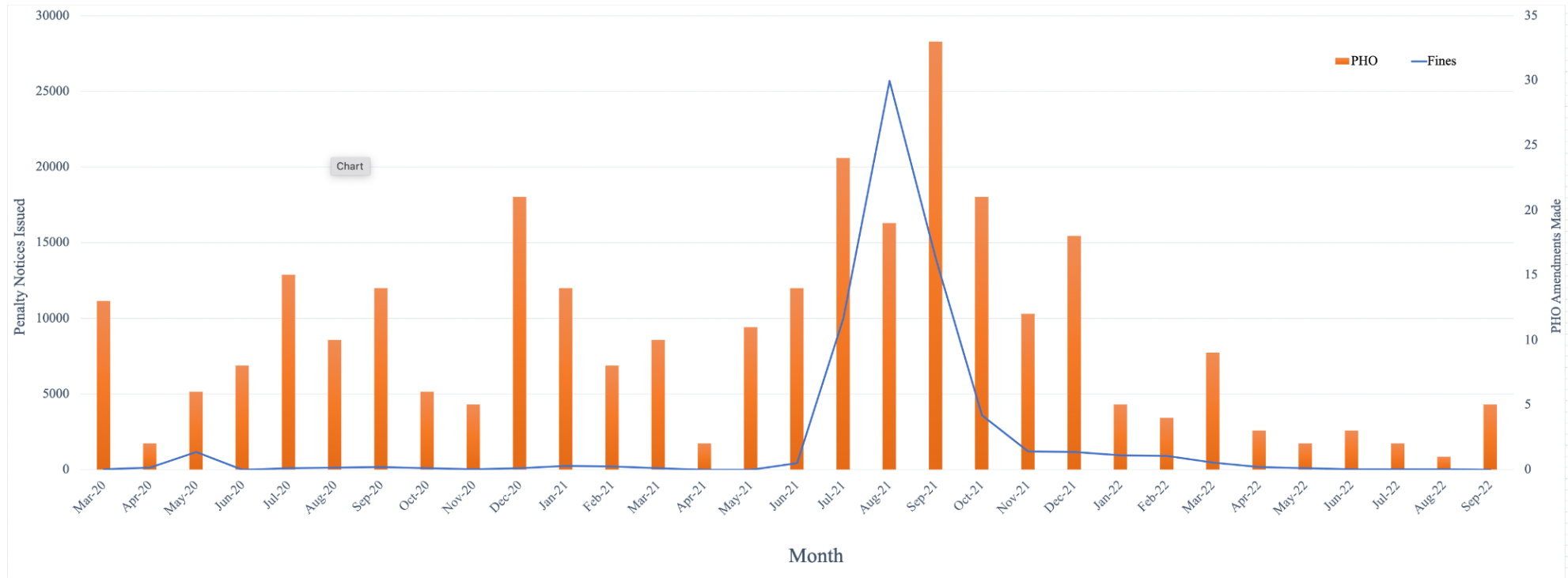
⁸⁷ This tiered system of penalty notices was only introduced into the Public Health Regulations 2012 (NSW) on 30 July 2021, by the Public Health Amendment (COVID-19 Mandatory Face Coverings) Regulation (No 4) 2021. Prior to this, the penalty for failing to comply with a direction to wears or carry a fitted face covering was \$200, and the Public Health Regulation 2012 (NSW) did not differentiate between adults and children (See Public Health Regulation 2012 (NSW) Sch 4 Pt 1, as at 21 July 2021).

imposed on persons alleged to have breached PHOs, irrespective of their socio-economic circumstances.

2.5 Public Health Orders and Police Enforcement

Before we turn, in Part 3 of this report, to a detailed discussion of PHO enforcement actions and rates of penalty notice issuance, we note the temporal relationship between the peak COVID-19 law-making period in NSW and the peak period for police fines issuance (see Figure 1).

Figure 1: Number of penalty notices issued, and number of COVID-19 PHO amendments made, per month, March 2020 – September 2022⁸⁸



⁸⁸ Source: Expanded version of graph that appeared in NSW Ombudsman, above n 17, 66, inclusive of up-to-date data from Revenue NSW, above n 1, and additional PHO amendments.

3. ANALYSIS OF PUBLIC HEALTH ORDER ENFORCEMENT

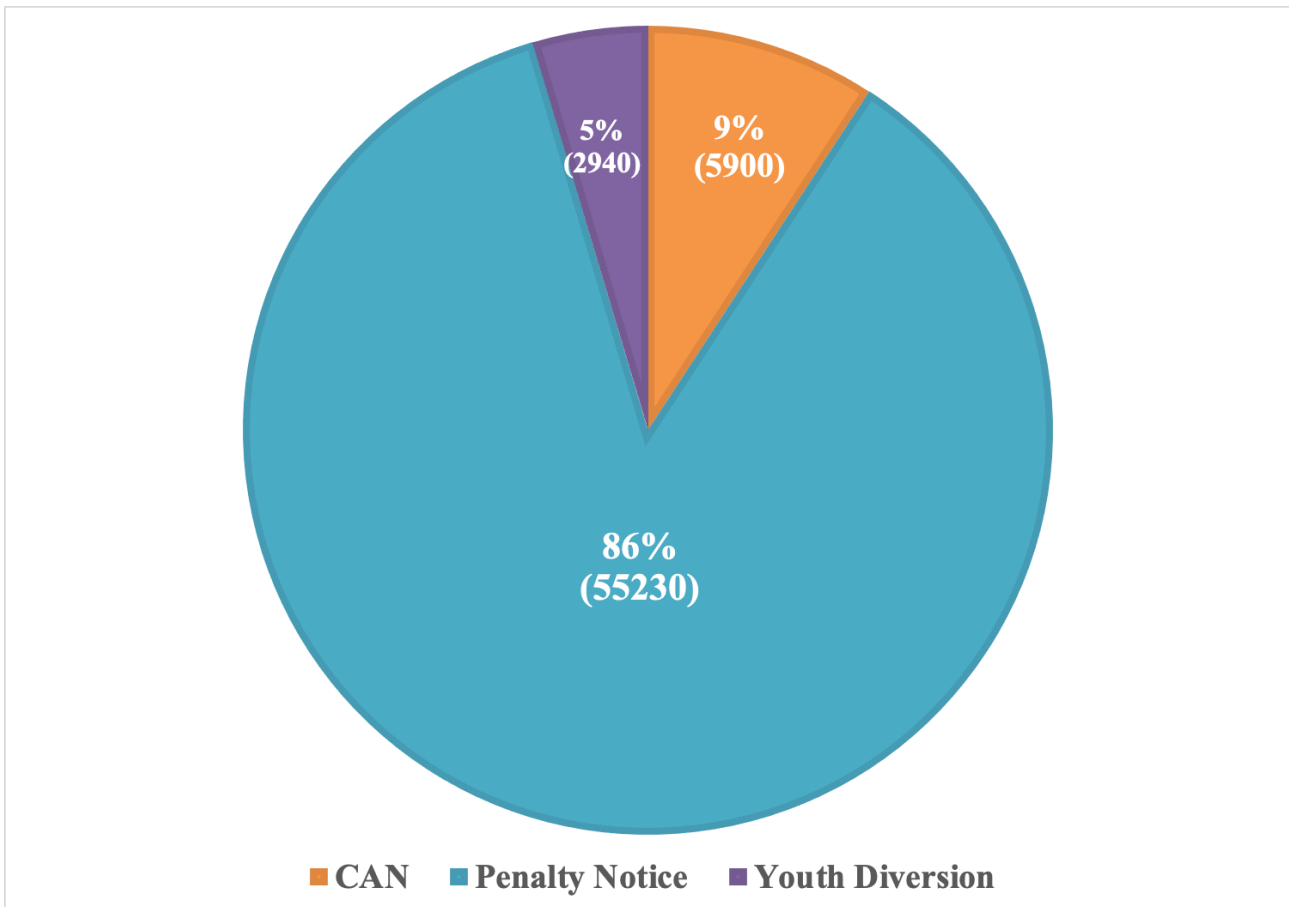
In this section we present a summary of quantitative data on the punishment of non-compliance with COVID-19 public health orders in NSW, with a focus on the most common enforcement action: police issuance of a penalty notice. We have drawn on public domain data published by Revenue NSW and the NSW Bureau of Crime Statistics and Research (BOCSAR), as well as data obtained by Redfern Legal Centre via applications under the *Government Information (Public Access) Act 2009* (NSW). Our priorities are to show the heavy reliance on *penalty notices* as the preferred enforcement action, the *volume* of fines issued, *when* they were issued, and *where* they were issued. *Why* fines were issued – that is, the nature of the public health order transgression alleged and punished – is also an important consideration, but the available data offers only limited granularity on this topic.⁸⁹

3.1 Type of Enforce Action

Breaches of COVID-19 PHOs constituted an offence under s 10 of the *Public Health Act 2010* (NSW). Police officers had the option of charging a person with an offence (via issuance of a Court Attendance Notice (CAN) or issuing a penalty notice (or, in the case of a child, issuing a warning, caution or conferencing referral under the *Young Offenders Act 1997* (NSW)). Figure 2 shows that of the 64,070 enforcement actions taken from the start of the pandemic in March 2020 to December 2021, police overwhelmingly preferred enforcement via issuing a penalty notice (86%).

⁸⁹ For example, Revenue NSW records most COVID-19 penalty notices in one of two generic ‘law parts’ (being classification units for offences managed by the Judicial Commission of NSW <https://lawcodes.judcom.nsw.gov.au/help>): ‘Failure to comply with noticed direction in relation to section 7/8/9 – COVID-19’ (law part 95638); and ‘Fail to comply requirement public health order - COVID-19’ (law part 95640).

Figure 2: Type of enforcement action for breach of COVID-19 PHO, March 2020-December 2021⁹⁰



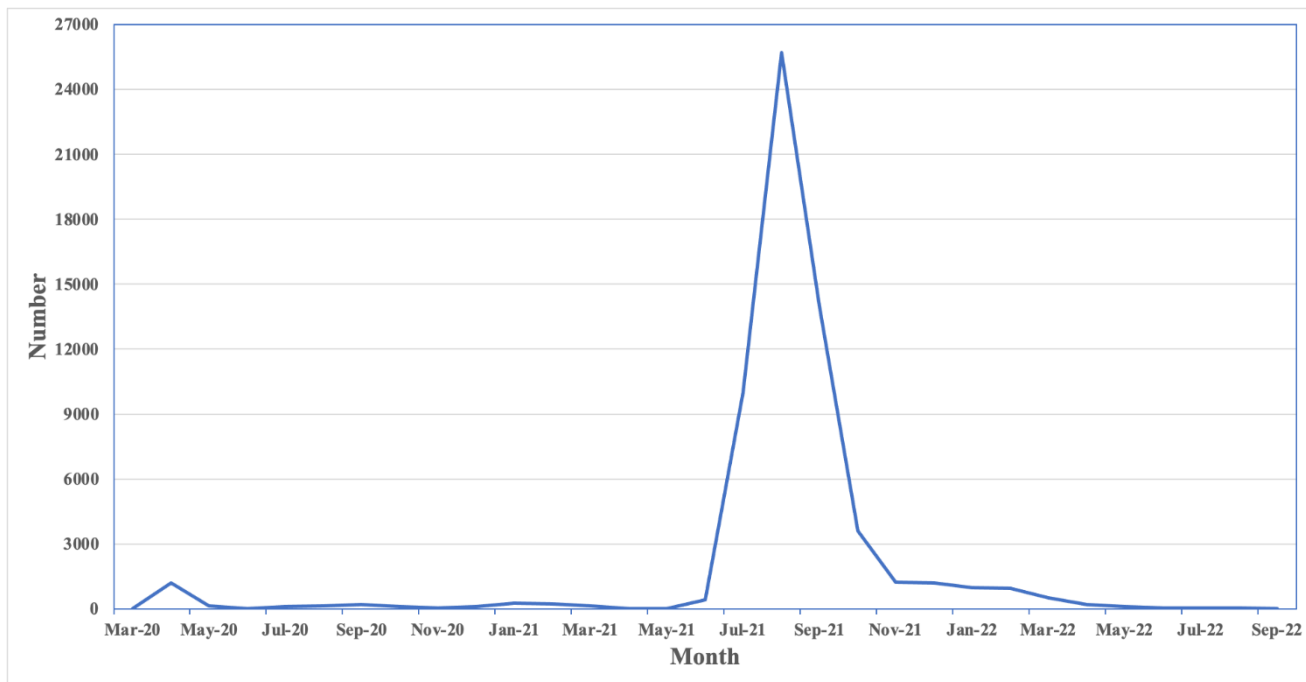
3.2 Volume and Distribution of Penalty Notices Over Time

Figure 3 shows that for most of the duration of the COVID-19 public health crisis in NSW, very few penalty notices for public health order breaches were issued. Most fines were issued during a small peak in the ‘1st Wave’ in the first half of 2020,⁹¹ and a very large peak during the Delta Wave in the second half of 2021.

⁹⁰ Source: BOCSAR, above n 18.

⁹¹ As noted above (n 17) we have adopted the NSW Ombudsman’s temporal parameters of Covid 19 ‘waves’, according to which the first wave extended from the start of the pandemic to 1 July 2020.

Figure 3: Number of COVID-19 PHO penalty notices Issued by month, March 2020 to September 2022⁹²



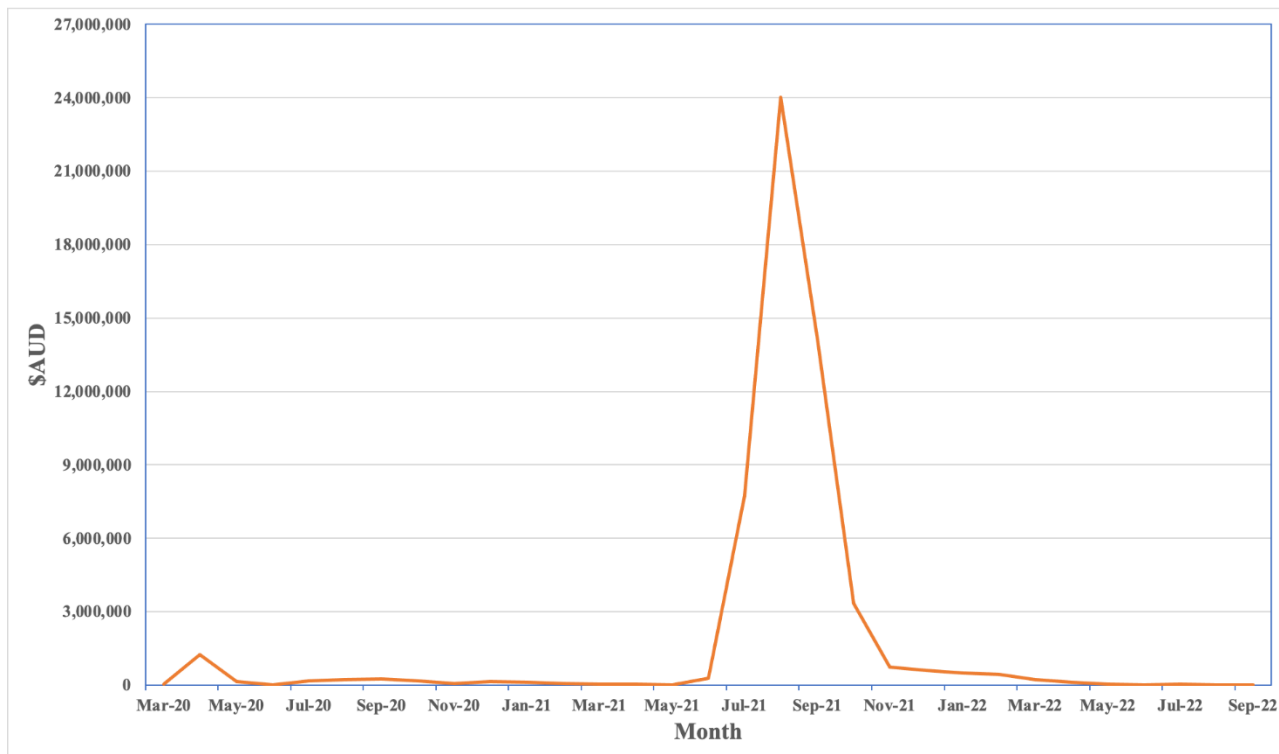
We note that even though the number of penalty notices used during the 2020 1st Wave was relatively low (especially when compared to the 2021 Delta Wave to come), concerns were already being expressed about the uneven distribution of fines, including disproportionate rates in socially-economically disadvantaged communities.⁹³ As we discuss below, such concerns were amplified during the rapid intensification of COVID-19 PHO enforcement during the Delta Wave.

Very few penalty notices were issued in the 12 months from June 2020 to May 2021: a total of 1767; an average of 147 per month. The arrival of the Delta Wave in mid 2021, the subsequent flurry of PHO-making (discussed in Part 2 of this report) and the hardening of the ‘enforcement mentality’ of the NSW Government and NSW Police Force (discussed in Part 4), were associated with a significant escalation in penalty notice issuance.

⁹² Source: Revenue NSW, above n 1.

⁹³ Osman Faruqi, ‘Compliance fines under the microscope’ *The Saturday Paper*, 18-24 April 2020 <https://www.thesaturdaypaper.com.au/news/health/2020/04/18/compliance-fines-under-the-microscope/15871320009710#hrd>; Pallavi Singhal and Laura Chung, ‘Police issued \$165,000 in COVID-19 fines, but only two in Sydney’s worst-affected area’, *Sydney Morning Herald*, 9 April 2020 <https://www.smh.com.au/national/police-issue-165-000-in-covid-19-fines-but-only-two-in-sydney-s-worst-affected-area-20200409-p54ik3.html>

Figure 4: Total value of COVID-19 PHO penalty notices issued by month, March 2020-September 2022⁹⁴



Almost 90% of the total number of COVID-19 penalty notices over the 2.5 years from March 2020 to September 2022 were issued during the Delta Wave (June-November 2021). In fact, the large majority of fines (80%) were issued during an even more concentrated period: the three months from July to September 2021. This includes the period from 16 August 2021 when the NSW Police Force launched ‘Operation Stay at Home’.⁹⁵ 25,710 penalty notices were issued in the month of August alone, with 13,990 issued in September and 9,992 in July.⁹⁶

Figure 4 shows that the dollar value of these fines was incredibly large. During these three months, the combined value of penalty notices issued was \$45,900,180, representing 81% of the \$56.5 million in penalty notices issued during the full 2.5 year period reviewed for this report (March 2020 to September 2022). The average value of fines during July-August and September 2021 was \$923. As noted in Part 1 of this report, as at 1 October 2022, the combined ‘outstanding’ debt

⁹⁴ Source: Revenue NSW, above n 1.

⁹⁵ NSW Government, ‘Increased fines, test and isolate payments and new compliance measures as NSW battles Delta’, Media Release, 14 August 2021 <https://www.nsw.gov.au/media-releases/increased-fines-test-and-isolate-payments-and-new-compliance-measures-as-nsw-battles>

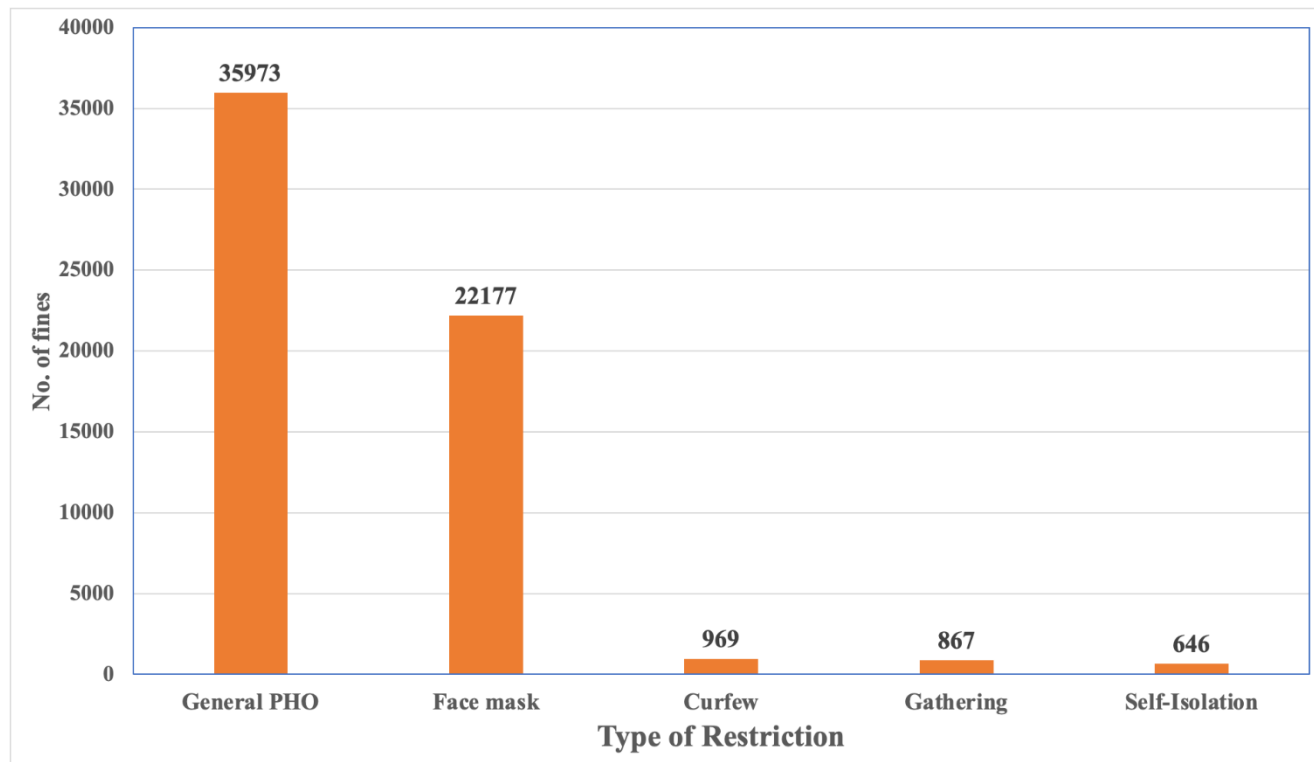
⁹⁶ Revenue NSW, above n 1.

attributable to COVID-19 penalty notices was almost \$16 million dollars (based on 17,964 unpaid penalty notices).

3.3 Non-complying Behaviours That Attracted Penalty Notices

As explained in Part 2 of this report, NSW PHOs prohibited a range of different behaviours that were regarded as carrying an unacceptable risk of COVID-19 transmission. We were interested in identifying which restrictions were punished most frequently by penalty notices. However, our attempts to do so were stymied by the limitations of public domain data. As reflected in Figure 5, most penalty notices were recorded against a generic PHO category – either ‘Failure to comply with noticed direction in relation to section 7/8/9 – COVID-19’; or ‘Fail to comply requirement public health order - COVID-19’ (which we have combined in the category ‘General PHO’) – or one of several ‘failure to wear mask’ categories (reflecting the fact that mask-wearing requirements were the subject of discrete PHOs).

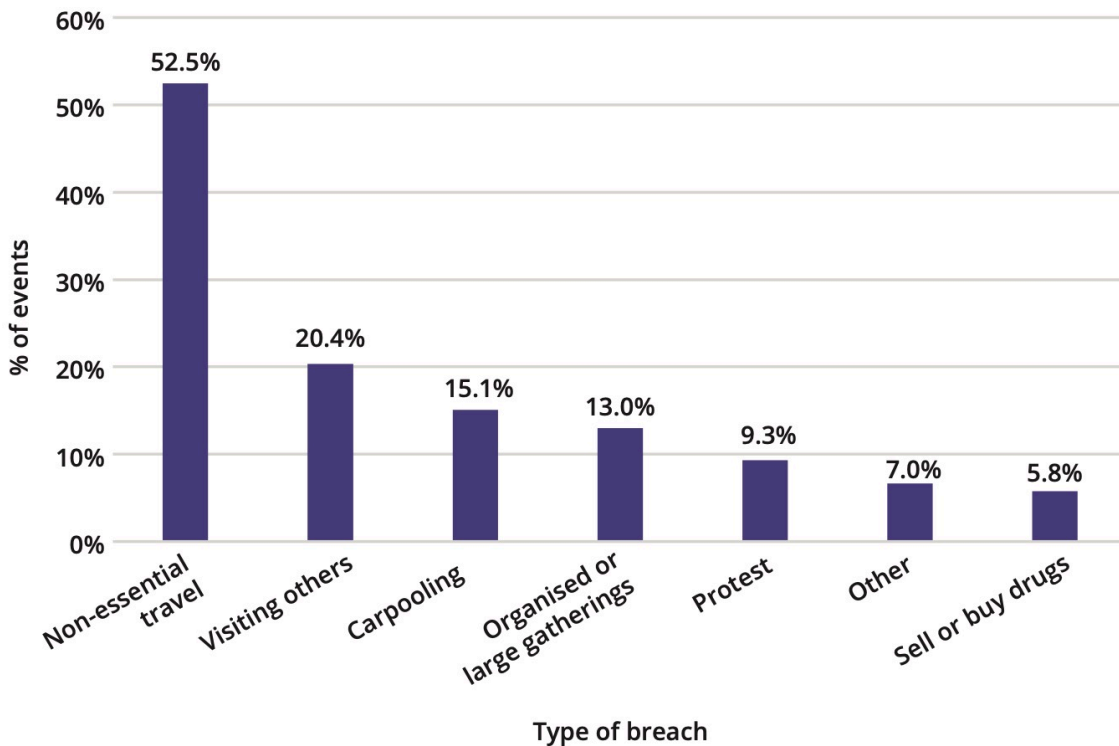
Figure 5: Type of COVID-19 PHO restriction breach for which penalty notice issued, March 2020-September 2022⁹⁷



⁹⁷ Source: Revenue NSW, above 1.

Greater granularity is contained in data presented in BOCSAR’s 2021 report on *Breaches of COVID-19 public health orders in NSW*.⁹⁸ Figure 6 reproduces a graph contained in this report which presents the findings of a review of police narratives for a small sample of ‘breach events’ in July 2021.

Figure 6: Type of COVID-19 PHO breach resulting in police enforcement action, July 2021⁹⁹



3.4 Locations Where Penalty Notices Issued

Figures 7-12 show various dimensions of an important feature of COVID-19 PHO enforcement in NSW: the uneven distribution of penalty notice issuance across Sydney and the state, and the over-representation of socio-economically disadvantaged suburbs and towns. In the period March 2020 to December 2021, the average number of persons proceeded against per 1000 population in Metropolitan Sydney was 8.2, and the state-wide average was 6.8.¹⁰⁰

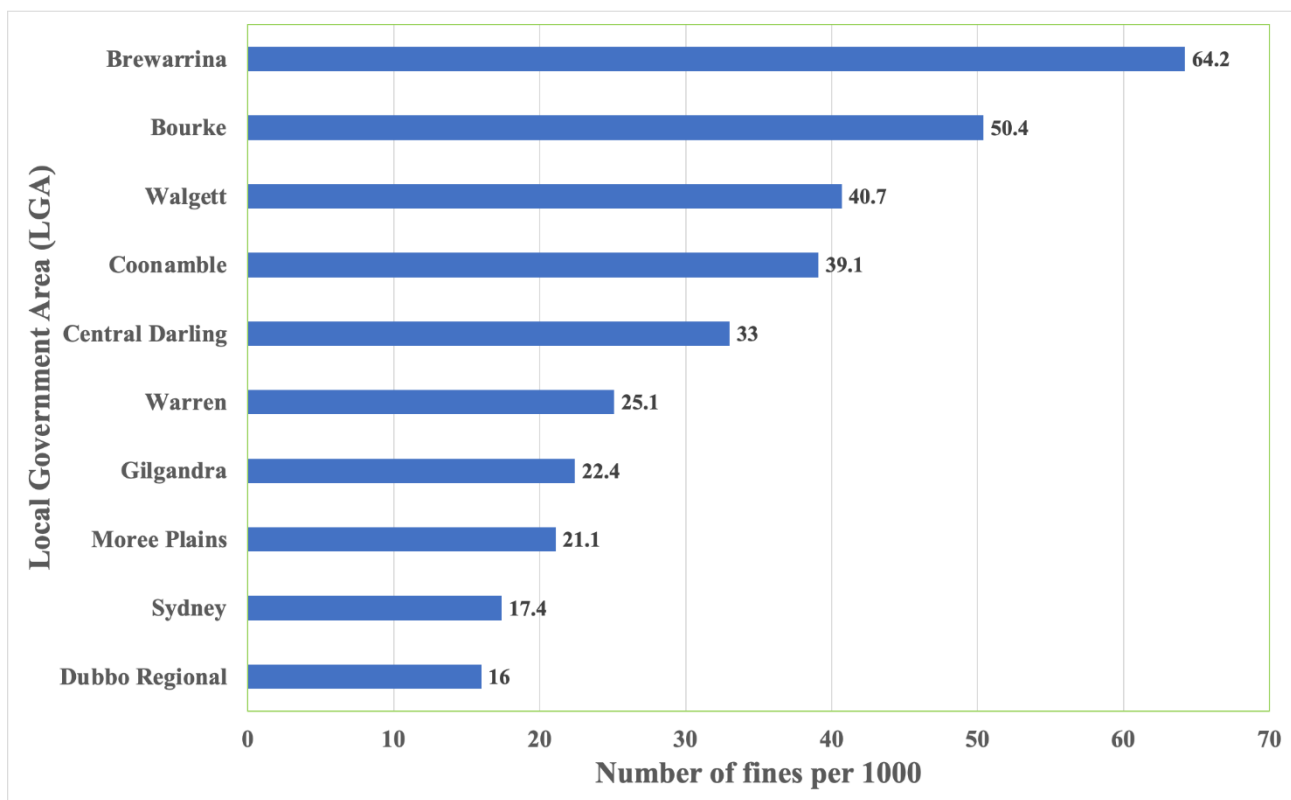
⁹⁸ Sarah Rahman, *Breaches of COVID-19 public health orders in NSW*. Bureau Brief No. 157 (NSW Bureau of Crime Statistics and Research, 2021).

⁹⁹ Reproduced from Rahman, above n 98, 6.

¹⁰⁰ Source: BOCSAR, above n 18.

Figure 7 shows that, relative to population, the number of persons against whom police took action for an alleged COVID-19 PHO breach by issuing a penalty notice was much higher in some locations. It is striking that 9 of the ‘top 10’ LGAs across the state were in rural or regional NSW. The rate in the Brewarrina LGA was more than nine times the state average. In the Bourke LGA the rate was seven times the state average, and in the Walgett LGA the rate was six times the state average.

Figure 7: COVID-19 PHO penalty notices per 1000 population – Top 10 NSW LGAs, March 2020-December 2021¹⁰¹



Although the focus of this report is COVID-19 PHO enforcement via penalty notice, it is noteworthy that in a number of the ‘top 10’ locations, police proceeded by way of a Court Attendance Notice (CAN) at a higher rate than the state-wide average of 9%. In the Bourke LGA, almost one-quarter of the persons against whom police proceeded were given a CAN (24.2%), and in the Central Darling LGA (which includes the town of Wilcannia) the figure was 20.2%.¹⁰²

¹⁰¹ Source: BOCSAR, above n 18.

¹⁰² Source: BOCSAR, above n 18.

Figure 8: Aboriginal and Torres Strait Islander person population in Top 10 NSW LGAs for COVID-19 PHO penalty notices¹⁰³

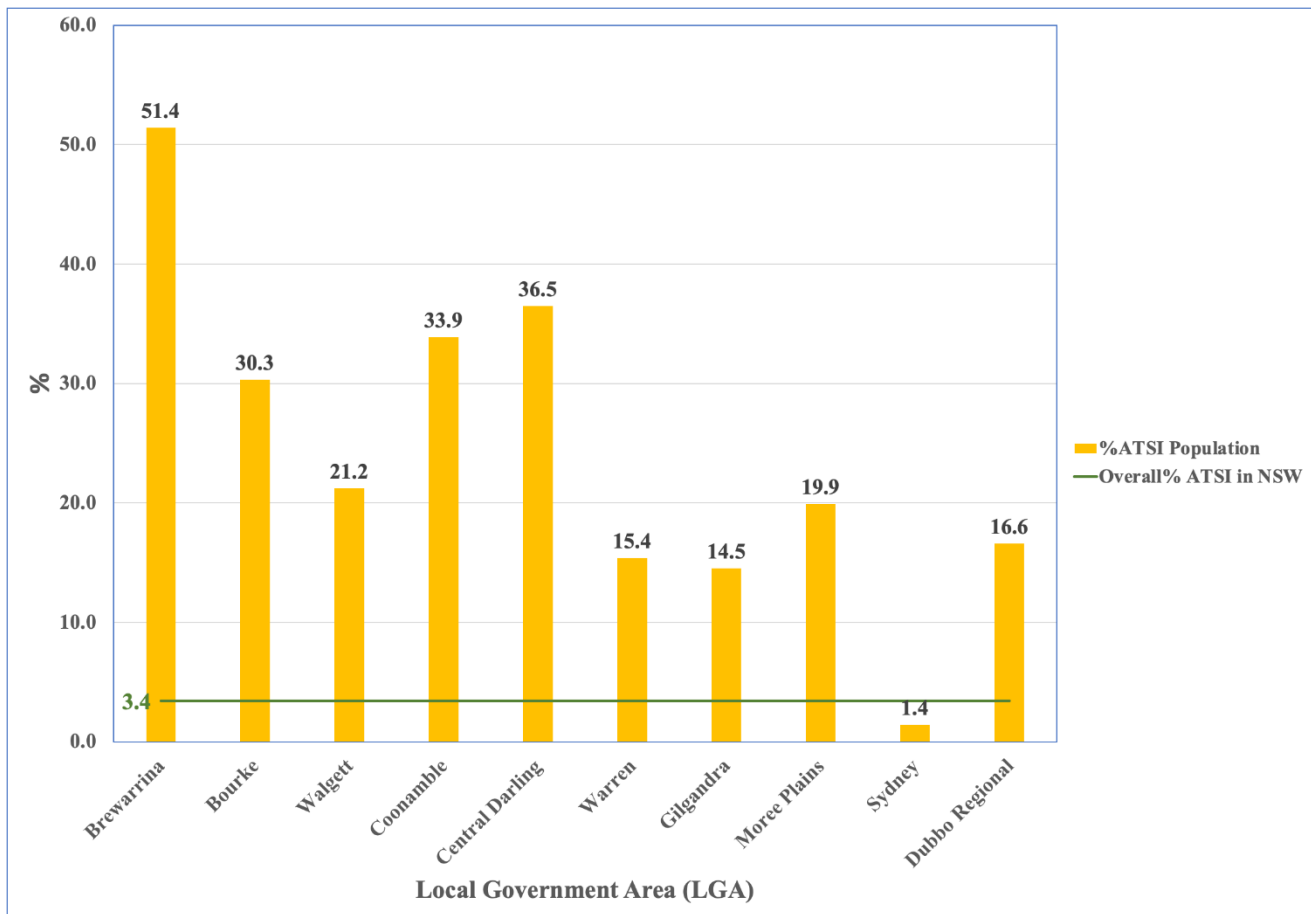


Figure 8 draws on Australian Bureau of Statistics Census data to show that each of the locations outside of Sydney that experienced high rates of COVID-19 PHO enforcement action are places with a significant proportion of Aboriginal and Torres Strait Islander residents. It was data like these that prompted the Dharriwaa Elders Group to release a public statement (discussed in Part

¹⁰³ Australian Bureau of Statistics (ABS), *Aboriginal and Torres Strait Islander people: Census* <<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/aboriginal-and-torres-strait-islander-people-census/latest-release#key-statistics>> (Catalogue No 2002.0, 28 June 2022). Note that the ABS recognises that the official ‘count’ of Aboriginal and Torres Strait Islander persons is likely to be an undercount, and this is likely to have been especially so in the 2021 Census: <https://www.abs.gov.au/census/about-census/census-statistical-independent-assurance-panel-report/5-conclusions-and-observations#aboriginal-and-torres-strait-islander-peoples-counts> Therefore, the percentages contained in Figure 8 may be underestimates. Undercounting in 2021 may also account for discrepancies between 2016 and 2021 Census data. For example, in the 2016 Census, the proportion of the population in the Walgett LGA that identified as Aboriginal or Torres Strait Islander was 29.4%, and the percentage for the town of Walgett was 49.2%: <https://www.abs.gov.au/census/find-census-data/quickstats/2016/UCL115144>

1 of this report) expressing concern about the disproportionate impact of COVID-19 police enforcement on the Walgett Aboriginal community.¹⁰⁴

During the height of the Delta Wave ‘law and order’ push by NSW Police in August 2021, the Aboriginal Legal Service (NSW/ACT) expressed concerns about how COVID-19 PHO enforcement practices were affecting Aboriginal communities in NSW:

*In one instance, a man with known mental health issues was stopped by police in a regional NSW town. Despite being known to wander and despite the local police command’s knowledge of the man’s mental illness, he was charged with breaching public health orders ... and will now have to attend court.*¹⁰⁵

The Deputy CEO of the ALS said:

*When you make people afraid, they’re less likely to come to you if they have a problem. Many police officers have worked hard in recent years to build trust in the community. All that work risks being undone by just a few weeks of hard-line, punitive policing.*¹⁰⁶

In September 2021, chief executives from Redfern Legal Centre, the Aboriginal Legal Service, the Public Interest Advocacy Centre and Community Legal Centres NSW released an open letter calling on the NSW Government and NSW Police Force to reduce the intensity of policing and PHO penalty notice issuance.¹⁰⁷ Signatories recommended that ‘greater investment in community education and engagement strategies and enhanced social and economic measures to support communities already in crisis’¹⁰⁸ would be more effective in garnering ‘trust in contact tracers and authorities enforcing public health advice’.¹⁰⁹ Importantly, the open letter also noted that:

¹⁰⁴ Dharriwaa Elders Group, above n 4.

¹⁰⁵ Aboriginal Legal Service NSW/ACT, ‘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>

¹⁰⁶ Anthony Carter, quoted in ALS, above n 105.

¹⁰⁷ Redfern Legal Centre, ‘“We cannot fine our way out of the pandemic: Legal profession calls on NSW Premier to revoke unlawful COVID-19 fines’, Media Release, 16 September 2021 <https://rlc.org.au/news-and-media/media-releases/we-cannot-fine-our-way-out-pandemic-legal-profession-calls-nsw-premier-revoke-unlawful-covid-19-fines>; Joanna Shulman, et al, ‘A call to address unjust COVID-10 fines’ Open Letter, 15 September 2021 https://rlc.org.au/sites/default/files/2022-02/150921Open_letter_COVID-19.pdf

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

*The excessive use of fines against Aboriginal and Torres Strait Islander people and communities in NSW also has the potential to further entrench disadvantage and exacerbate negative relationships between Aboriginal communities and the police.*¹¹⁰

In addition to CEOs from the organisations mentioned above, the letter was endorsed by more than 100 people including retired District Court judge Stephen Norrish QC, academics, Greens parliamentarians, and the chief executives of Homelessness NSW and Shelter NSW.

This open letter was an expression of concern about how COVID-19 PHOs were being enforced, not only in Aboriginal communities in rural and regional NSW towns, but in Sydney locations as well. Data from NSW's largest population centre – the Greater Sydney Metropolitan area – also show uneven rates of enforcement action and disproportionate impact in socio-economically disadvantaged suburbs. Figures 9 and 10 shows the 'top 10' and 'bottom 10' Sydney LGAs in terms of the number of persons proceeded against for alleged COVID-19 PHO breaches relative to population. Against a Sydney-wide average of 8.2, above average enforcement rates can be observed in a number of suburbs with higher rates of socio-economic disadvantage, notably the Blacktown LGA and the Cumberland LGA (which includes suburbs such as Auburn, Granville, Lidcombe and Guildford). Figure 10 shows that some of the most affluent parts of Sydney experienced low levels of COVID-19 penalty notices and enforcement actions generally.

Figure 11 provides further granularity on the disproportionate intensity of COVID-19 enforcement by presenting *postcode* data regarding penalty notices that relates primarily to the Delta Wave period.¹¹¹ The rate of 'on-the-spot' fine issuance was highest in the town of Walgett, followed by Brewarrina and Wilcannia. Nine of the 10 postcodes are in rural or regional NSW, with the western Sydney suburb of Mt Druitt number 10 on the list.

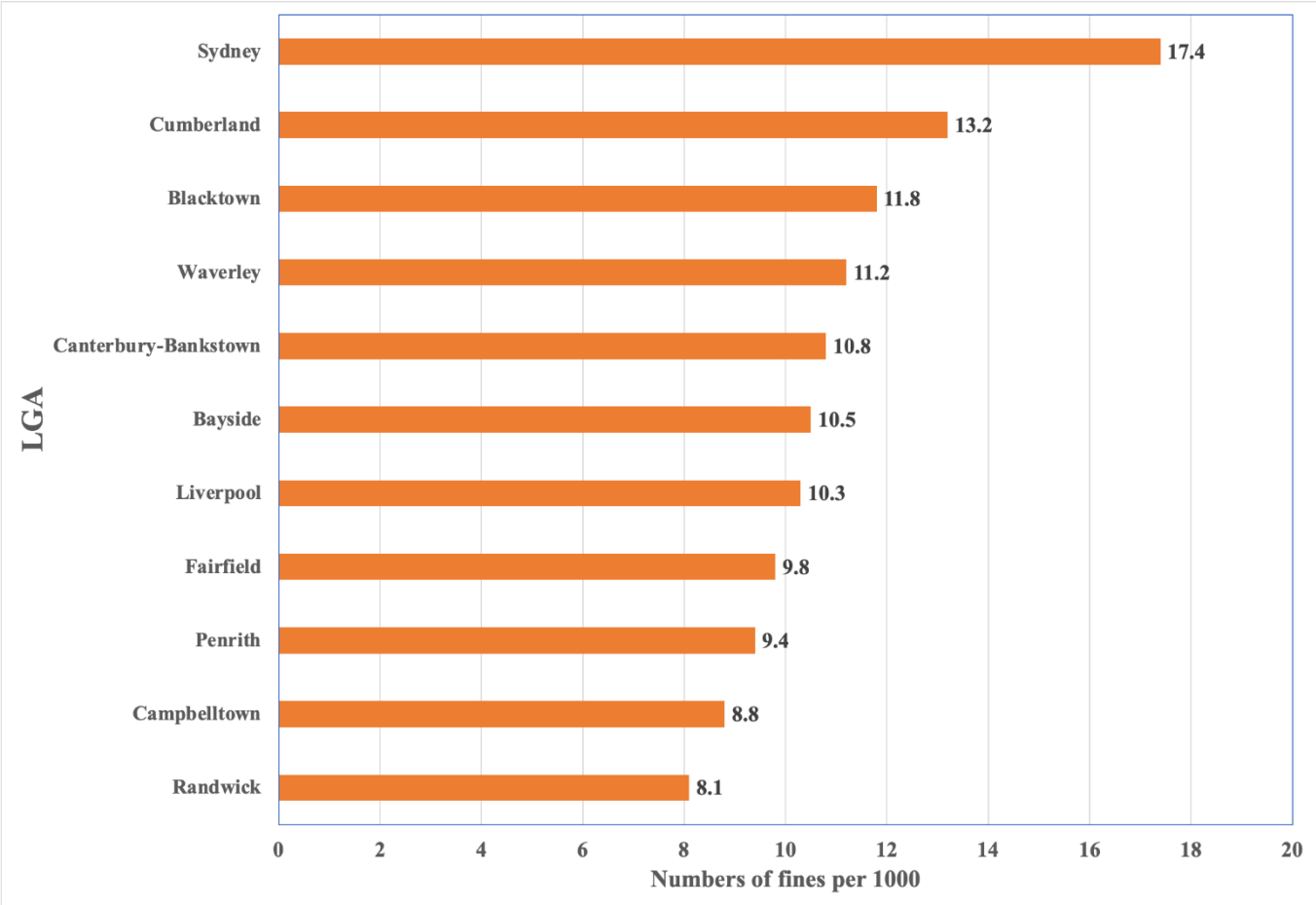
Figure 12 draws on the same data set to show the collective impact of the fine burden in socio-economically disadvantaged communities. 3,675 penalty notices were issued by police in the western Sydney suburbs of Mt Druitt, Blacktown and Liverpool, with a combined value of over \$3.275 million. Residents of Dubbo were fined over \$700,000. Residents of the remaining six postcodes in this particular 'top 10' – Merrylands, Westmead, Green Valley, Guildford,

¹¹⁰ Ibid.

¹¹¹ The penalty notice data in Figures 11 and Figure 12 was obtained by the Redfern Legal Centre via a GIPA application (see above n 113). Although it covers a 15+ month period (from July 2020 to October 2021), relatively few penalty notices were issued in the 12 months from 1 July 2020 to 30 June 2021 (2204 penalty notices in total: Revenue NSW, above n 1), and so almost all the enforcement activity represented by these data related to the Delta Wave (particularly the July-September 2021 'peak' period).

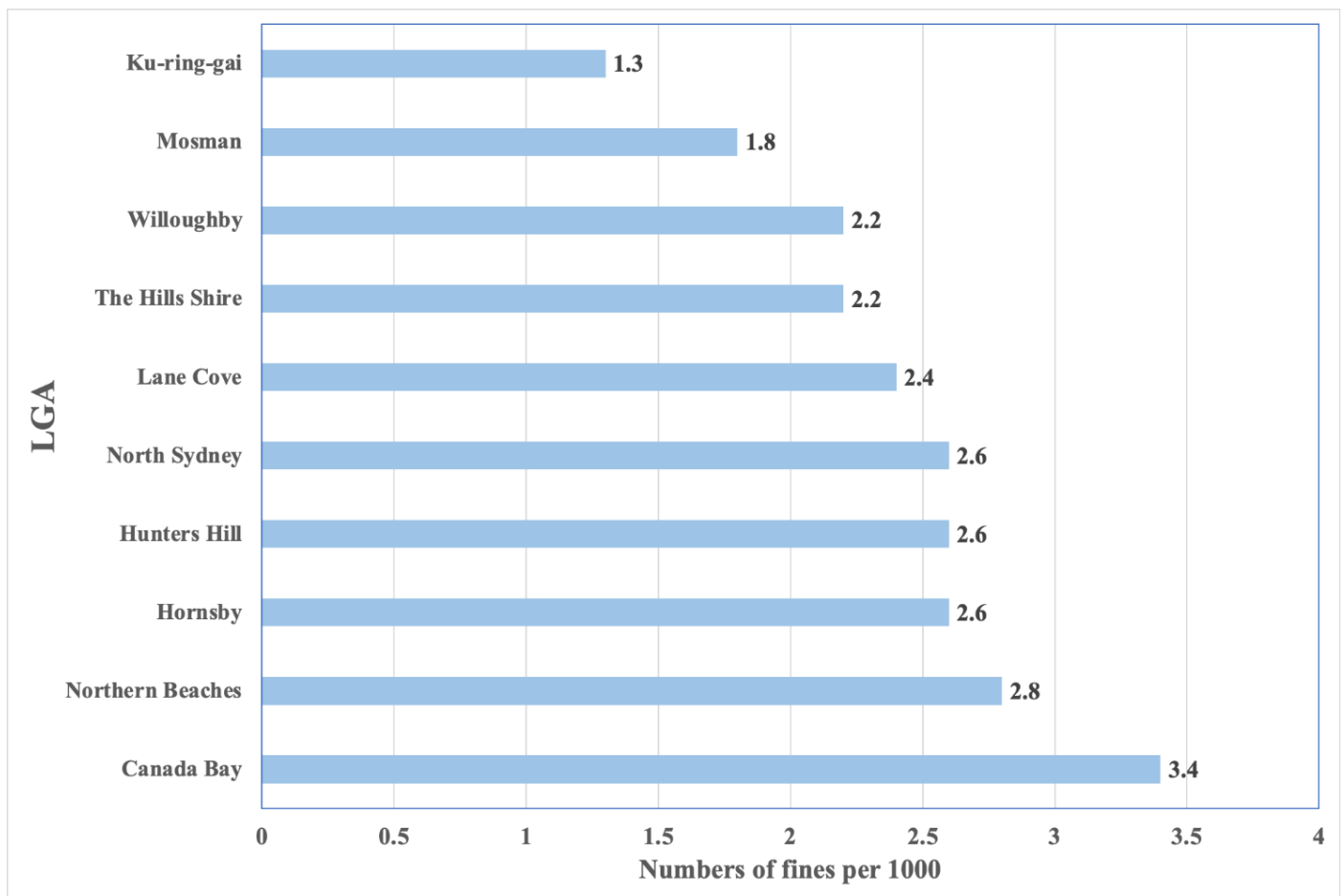
Campbelltown and Bankstown (all in Sydney’s south-western or western suburbs) – received a total of 3,905 penalty notices which imposed a combined fine burden of almost \$3.5 million.

Figure 9: COVID-19 PHO penalty notices per 1000 population – Top 10 Sydney LGAs, March 2020-December 2021¹¹²



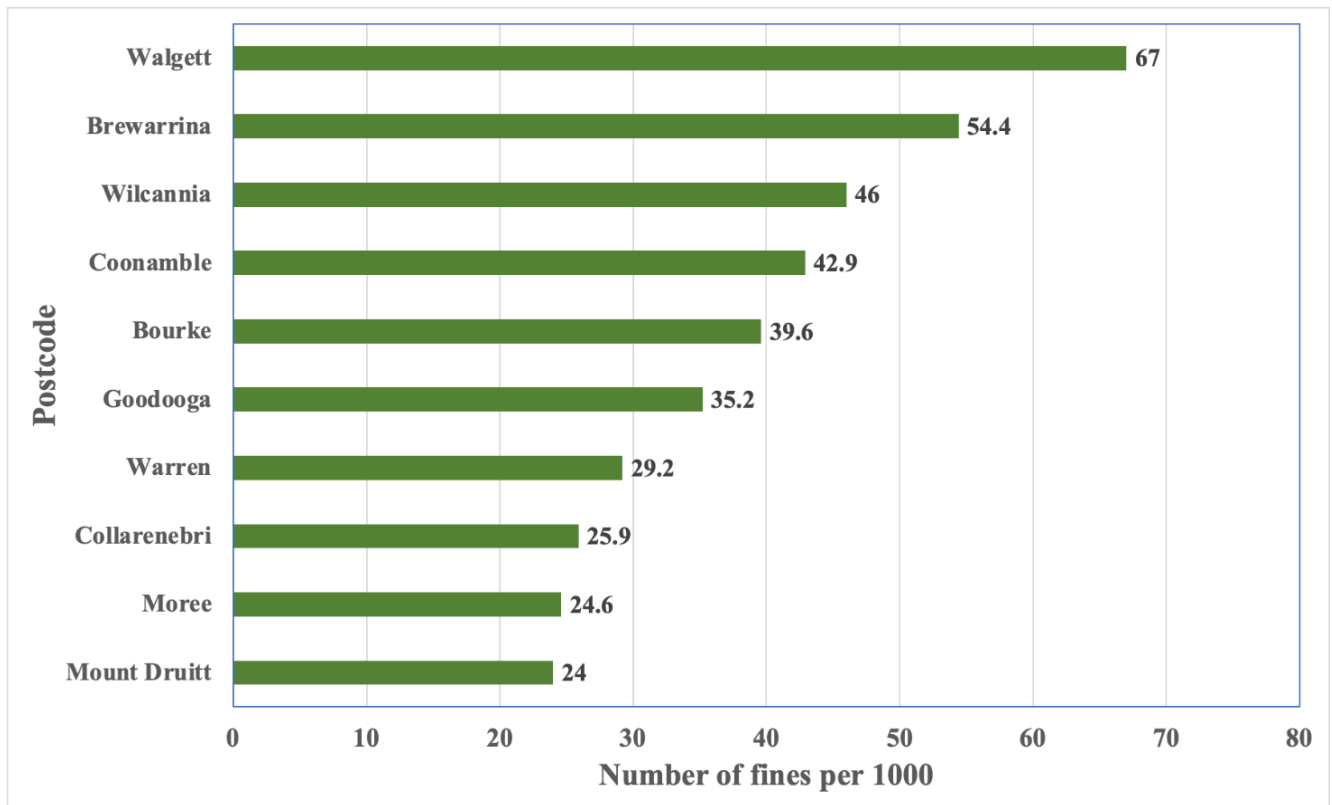
¹¹² Source: BOCSAR, above n 18.

Figure 10: COVID-19 PHO penalty notices per 1000 population – Bottom 10 Sydney LGAs, March 2020-December 2021¹¹³



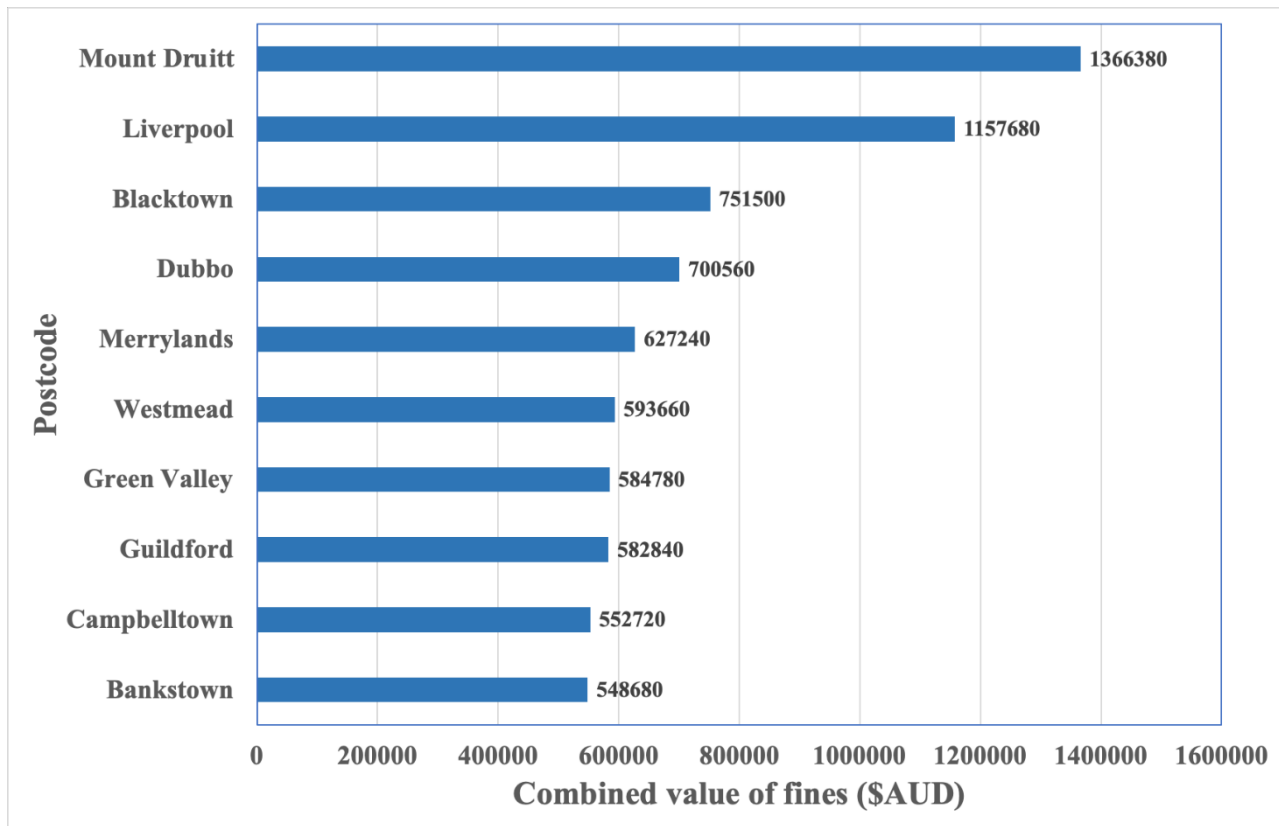
¹¹³ Source: BOCSAR, above n 18.

Figure 11: COVID-19 PHO penalty notices per 1000 population, Top 10 NSW postcodes, 1 July 2020-10 October 2021¹¹⁴



¹¹⁴ Source: Rachwani and Evershed, above n 3, based on data obtained by Redfern Legal Centre, 'COVID-19 Penalty Notices Issued to Individuals; 1 July 2020-10 October 2021', Information Released under the *Government Information (Public Access) Act 2009* (NSW). GIPR21/449.

Figure 12: Combined value of COVID-19 PHO penalty notices, Top 10 NSW postcodes, 1 July 2020-10 October 2021¹¹⁵



3.5 Disproportionate Impacts

The fact that many suburbs in south-western and western Sydney were in ‘LGAs of concern’ during the Delta Wave, and subject to additional restrictions, no doubt played a part in the high rates of penalty notice issuance. However, in light of the main focus of this report on the twin legacies of COVID-19 law-making and policing – fine debt and damaged police-community relations – it is noteworthy that PHO enforcement actions during the Delta Wave *exacerbated* existing problems in this respect.

During the period of the most onerous restrictions and intensive policing in south-western and western Sydney in July-August 2021, media reports provided insights into how this enforcement approach was experienced. For example, a story in *The Guardian* on 15 August 2021 was titled,

¹¹⁵ Source: Rachwani and Evershed, above n 3, based on data obtained by Redfern Legal Centre, ‘COVID-19 Penalty Notices Issued to Individuals; 1 July 2020-10 October 2021’, Information Released under the *Government Information (Public Access) Act 2009* (NSW). GIPR21/449.

“‘We feel intimidated’”: Residents in south-west Sydney Covid hotspots says police are making things worse’.¹¹⁶ It quoted ‘a Canterbury-Bankstown tradie’ telling journalist Mostafa Rachwani:

*I feel uncomfortable, it makes me feel like we are in a police state. And now, with the apparent increased presence from the military, it just doesn’t make you feel like you’re in Australia any more. Makes you feel like you’re in some sort of dictatorship.*¹¹⁷

An SBS News story on 8 July 2021 reported that Labor Party MLA, Jihad Dib (the state MP for Lakemba) questioned the wisdom of heavy reliance of fines issuance:

*I don’t think strong-arming is the way to go. What we need to do is to make sure people are being compliant, but people will be compliant when you give them reasons why they need to be and make it clear ... If everything is always the stick, I don’t necessarily know if that will always be the solution. What it could do is create a sense of angst and a sense of isolation. Remember, if we’re all in this together, we’re all in it together. Not one group separate to the other.*¹¹⁸

The same story reproduced a tweet from Greens Senator Mehreen Faruqi:

*Over-policing of multicultural communities is a recipe for disaster. The mounted police were never called into Avalon or Westfield Bondi. The double standard is there in plain sight.*¹¹⁹

A further troubling dimension of the police-led and penalty notice-centred public health compliance strategy pursued during the Delta Wave is evidence that enforcement practices followed pre-existing patterns of policing that contributed to disproportionate impacts on Aboriginal people and socio-economically disadvantaged residents of NSW.

BOCSAR’s study of COVID-19 PHO enforcement in NSW during the Delta Wave found that almost 50% of persons fined for non-compliance were ‘individuals who were previously proceeded

¹¹⁶ Mostafa Rachwani, “‘We feel intimidated’”: Residents in south-west Sydney Covid hotspots says police are making things worse’, *The Guardian*, 15 August 2021 <https://www.theguardian.com/australia-news/2021/aug/15/we-feel-intimidated-residents-in-south-west-sydney-covid-hotspots-say-police-are-making-things-worse>

¹¹⁷ Ibid.

¹¹⁸ AAP, SBS, “‘Double standard in plain sight’”: COVID 19 police operation in south west Sydney draws criticism’, SBS News, 8 July 2021 <https://www.sbs.com.au/news/article/double-standard-in-plain-sight-covid-19-police-operation-in-south-west-sydney-draws-criticism/2yws054zr>

¹¹⁹ Ibid.

against by police for another offence in the last 5 years.¹²⁰ An earlier study of 2020 police practices by Boon-Kuo and colleagues found that the pandemic provided police with:

*opportunities for the intensification of longstanding and selective criminalisation processes, evident in the disproportionate focus on First Nations peoples in street policing and the high-visibility policing of racialised and socio-economically disadvantaged communities ... 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.*¹²¹

¹²⁰ Rahman, above n 98, 10.

¹²¹ Boon-Kuo, above n 19, 85. See also Emma Russell, Tarryn Phillips, Averyl Gaylor and Marc Trabsky, "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* <https://doi.org/10.1177/17488958221120480>

4. ANALYSIS OF GOVERNMENT DISCOURSE ON COMPLIANCE AND ENFORCEMENT

4.1 Introduction

An important third dimension of the story of the use of penalty notices to promote compliance with COVID-19 PHOs was the nature of the messages communicated by leaders from the NSW Government and the NSW Police Force. Public discourse is an important component of regulatory practice, and discourse analysis can offer valuable insights about how political leaders attempt to promote compliance – in this instance with public health rules designed to reduce the transmission of COVID-19.¹²²

In order to gain insights into what we have termed the ‘enforcement mentality’ associated with PHO-making examined in Part 2 of this report, and the issuance of penalty notices considered in Part 3, we undertook a thematic analysis of media-reported public comments by NSW Government and NSW Police Force leaders. We were specifically interested in whether there was a discernible change in the rhetoric and messaging about fines enforcement during the Delta Wave.

4.2 Media Content Analysis Methodology

Utilising the Dow-Jones Factiva database, a sample (n = 367) of newspaper articles were collected from two time periods:

- 15 March 2020 to 15 June 2020 (‘1st Wave’, n = 213)
- 15 June 2021 to 15 October 2021 (‘Delta Wave’, n = 154)

Sources were limited to the two major NSW newspapers, the *Sydney Morning Herald* and the *Daily Telegraph*.

For each time period, an initial search was completed (‘search 1’), utilising the search terms “(covid) and (fines) and (enforcement or police or policing) and (minister or premier or commissioner or mayor)”. Three supplementary searches were then conducted, containing the

¹²² Elyse Methven, “‘There is no need for anyone to be concerned’”: The discursive legitimization of coercive police powers during the COVID-19 pandemic’ (2022) 77 *Revista de Llengua i Dret/Journal of Language and Law* 54 <https://doi.org/10.2436/rld.i77.2022.3773>

base search terms “covid” and “fines”, with a variety of accompanying terms.¹²³ Search terms were initially developed inductively, through structured discussions between researchers with reference to the aim of this project. Search terms were then refined deductively utilising Factiva’s keyword function to ascertain common and relevant keywords within the sample. Duplicate articles and articles that did not mention the enforcement of COVID-19 fines were removed from the sample through a process of manual comparison of the content of article’s headline and body texts.

We developed a simple binaries-based codebook¹²⁴ that could support thematic (sentiment) analysis of the articles in our sample, focused on the ‘enforcement mentality’ expressed by NSW political leaders. Each media article was manually coded by a member of the research team using a process of deductive content analysis.¹²⁵ Each article file was read in full, with a determination made as to whether a passage should be assigned one or more of the pre-determined codes.

¹²³ The terms used in the respective searches are summarised in the following table:

Search No.	Search terms
1	(covid) and (fines) and (enforcement or police or policing) and (minister or premier or commissioner or mayor).
2	(covid) and (fines) and (enforcement or police or policing) and (minister or premier or commissioner or mayor) and (punitive or powers or caution or warning)
3	(covid) AND (fines) AND (police commissioner)
4	(covid) and (fines) and (enforcement or police or policing) and (law) and (minister or premier or commissioner or mayor)

¹²⁴ Codebook for qualitative content analysis:

‘Enforcement Mentality’ Binaries		
1	Discretionary	Mandatory
2	Educational	Punitive
3	Due Process	Crime Control
4	Cautious	Cavalier
5	Individualised/Exceptional	Mass/Routine
6	Public health concern	Social Wrong
7	Considered	Rushed
8	Pleading	Threatening

¹²⁵ Andrea Bingham and Patricia Witkowsky, ‘Deductive and inductive approaches to qualitative data analysis in Charles Vanover, Paul Mihás and Johnny Saldaña (eds), *Analyzing and interpreting qualitative data: After the interview* (Sage, 2021) 133.

Coded passages were then subjected to thematic analysis¹²⁶ to identify prominent messages in the public statement of political leaders.

4.3 Findings: The First Wave

We identified three prominent enforcement mentality themes in the mainstream media-reported political leader discourse in the initial COVID-19 period in 2020:

- a characterisation of the COVID-19 challenge as primarily a public health concern;
- an emphasis on the need for discretion and a cautious approach to enforcing PHO restrictions, with only occasional usage of punitive rhetoric; and
- a degree of inconsistency in messaging as between different government and police leaders.

4.3.1 A Public Health Orientation

A strong recurring theme in the media-reported statements of political leaders on enforcement and fines during the 1st wave was public health concern. Enforcement of fines for PHO non-compliance was justified on the basis of minimising public health risks, and it was rare for non-compliance with public health orders to be characterised as a serious social wrong. This feature of leaders' public discourse is unsurprising. At the time, COVID-19 was a largely unknown phenomenon, and calls for the community to support public health measures were a natural reaction to the perceived risks associated with the virus. Reassuring public health-oriented messaging was consistent with the Government's objective of articulating a legitimate and reasonable basis for the extension of new powers to NSW Police, in the form of the option of issuing penalty notices.

For example, very early in the pandemic (March 2020) the then Prime Minister Scott Morrison suggested that all government actions were based on the advice of medical experts', and the main goal of PHO enforcement would be to reduce community transmission:

¹²⁶ Pranee Liamputtong, *Qualitative research methods* (Oxford University Press, 5th ed, 2019), 259; Virginia Braun et al, 'Thematic analysis' in Pranee Liamputtong (ed), *Handbook of Research Methods in Health Social Sciences* (Springer, 2019).

*Based on the advice of the Australian Health Protection Principal Committee (AHPCC), the National Cabinet agreed that our core objective now is to slow the outbreak of COVID-19 in Australia by taking additional steps to reduce community transmission.*¹²⁷

This sentiment was echoed by NSW Police Minister David Elliott: 'This is for your health and safety'.¹²⁸ Although we observed some later shifts in Mr Elliott's publicly expressed attitudes towards enforcement and non-compliance, at least at the very beginning of the pandemic (March 2020), the Police Minister's public position was that the main objective behind creating new public health offences was to ensure public health and safety.

Similar sentiments were observed in the 1st Wave public statements of then NSW Police Commissioner Mick Fuller:

*NSWPF officers are doing everything in their power to keep the community safe.*¹²⁹

When referring to individual incidents:

*Here we have another example of members of the community who have not listened to the advice of the government. This is why we need these restrictions in place.*¹³⁰

On 31 March 2020, the first day of the first lockdown, Commissioner Fuller spoke of the 'spirit' which should animate enforcement practice:

*I encourage my officers to use them in the spirit in which they were intended – to keep the people of NSW safe throughout this crisis.*¹³¹

Similarly, then Premier Gladys Berejiklian, who was a key 'primary definer'¹³² in shaping the content and messaging of the NSW Government's response to COVID-19, countered criticisms

¹²⁷ DTa3 (15/3/20). We have adopted an alpha-numeric labelling system for source articles. For example, DTa3 = article 3 in the '1st Wave' (ie 'a') sample of Daily Telegraph articles. By way of further illustration, SMHb7 would be the label used for article 7 in the 'Delta Wave' (ie b) sample of Sydney Morning Herald articles.

¹²⁸ DTa14 (22/3/20).

¹²⁹ DTa43 (28/3/20).

¹³⁰ Ibid.

¹³¹ DTa59 (31/3/20).

¹³² Hogg and Brown, above n 44, 18.

of new PHO restrictions by emphasising that considerations of public health and safety were the underlying justification for new police powers to impose ‘on-the-spot’ fines:

The police are only there to keep us safe. They don't mean to be overly zealous in their enforcement. ...

*I appreciate for some people this seems onerous, but this is to keep our community safe.*¹³³

In another illustration of this non-punitive enforcement mentality, NSW Police Association President Tony King was reported as stating that the police did not want to issue fines, but would prefer to be involved in engaging and reassuring the community.¹³⁴

Although expressions of public health concern recurred during the first period reviewed (ie the 1st Wave), there were periodically glimpses of a different characterisation – one that portrayed non-compliance with PHOs, as a *social wrong*, and which emphasised the role of fines in ensuring compliance and maintaining social order.¹³⁵

4.3.2 Discretion and Caution

A related theme observable in media-reported public statements by NSW leaders during the 1st Wave was promotion of the idea that police officers should take a discretionary and cautious approach to the enforcement of PHOs. A key message here was that penalty notice issuance should be an action of last resort and care should be taken to ensure that a fine was warranted.

For example, on 30 March 2020, the day before the state of NSW went into its first lockdown, the then Premier Gladys Berejiklian told the public that police would use discretion in exercising their new powers to impose fines for PHO non-compliance. The Premier reassured NSW residents that PHO restrictions were not meant to be punitive, and emphasised that education and encouragement were key compliance strategies:

¹³³ SMHa60 (1/4/20).

¹³⁴ SMHa80 (9/4/20).

¹³⁵ For example, Police Commissioner David Elliott in SMHa34 (26/3/20); Health Minister Brad Hazzard in DTa81 (10/4/20); Police Commissioner Mick Fuller in SMHa79 (9/4/20).

*We want to make sure people understand the arrangements. This isn't about fining people. This is just about encouraging people to do the right thing.*¹³⁶

NSW Police Commissioner Mick Fuller encouraged police officers to use their discretion reasonably, and to issue warnings, consistent with the objective of public health protection and education. Early in the first lockdown, the Commissioner noted that no penalty notices had yet been issued and stated:

*We are using our power of discretion reasonably.*¹³⁷

Even when referring to the prospect of fines being issued, the Commissioner made a point of positioning education and warnings as the preferred first policing response:

*People will be given one opportunity to pack up, go back to your home state and go back home. Otherwise, we will, unfortunately, have to issue tickets. ... We will continue to do our best to give people as many warnings as we can. But the reality is some people just don't get the seriousness of it, and tickets will continue to be issued.*¹³⁸

In response to suggestions that there had been instances of police officers being over-zealous, the Police Commissioner said:

*Could they have got out of the car and achieved the same thing in, I guess, a less aggressive way [than] that shown? Yes they could. ... Is that the sort of policing practices we want to see in NSW? No, it's not.*¹³⁹

In response to further reports that some penalty notices may have been issued inappropriately, the Police Commissioner indicated extraordinary oversight would be applied to COVID-19 PHO fines:

*I'm reviewing all of these tickets personally, which would never happen again for any other time.*¹⁴⁰

¹³⁶ SMHa48 (30/3/20).

¹³⁷ DTa56 (31/3/20).

¹³⁸ DTa73 (7/4/20).

¹³⁹ SMHa60 (1/4/20).

¹⁴⁰ DTa163 (2/4/20).

*All I can say is that I'm personally overseeing each of the infringements and if it's unreasonable I'm putting a line through them.*¹⁴¹

*We review each fresh infringement to make sure it was issued lawfully, I look at those personally and take that very seriously.*¹⁴²

While messages about discretion and caution in PHO enforcement were strong during the 1st Wave, there were some counter-currents, with leaders sometimes hitting more punitive and mandatory enforcement notes. However, this tended to be where leaders were asked to comment on extreme discrete instances of non-compliance. For example, in response to media coverage of large numbers of people on Bondi Beach in late March 2020 (during the first lockdown), the then Prime Minister Scott Morrison said:

*What happened at Bondi Beach yesterday was not OK and served as a message to federal and state leaders that too many Australians are not taking these issues seriously enough. ... State premiers and chief ministers may have to take far more draconian measures to enforce social distancing.*¹⁴³

Similarly, Police Minister David Elliott attempted to deter Sydney backpacker hostel residents from holding parties by warning that they will 'face the full force of the law' and police would have 'no hesitation' in issuing fines:¹⁴⁴

*If these people think they can gather for a barbecue at a backpackers in Bondi on a Friday night, they will face the full force of the law.*¹⁴⁵

Overall, most public statements in the 1st Wave that advocated an aggressive and punitive approach to PHO enforcement of fines were related to exceptional events rather than representing a general enforcement mentality or strategy. At the same time, Police Minister Elliott and Police Commissioner Fuller both sometimes veered into a more punitive and 'no tolerance' rhetoric. For example,

[The *Daily Telegraph* reported that:] *Mr Elliott ... promised a "no tolerance" approach to anyone caught breaking strict social distancing measures, pledging*

¹⁴¹ DTa70 (4/4/20).

¹⁴² SMHa104 (26/4/20).

¹⁴³ DTa14 (22/3/20).

¹⁴⁴ SMHa38 (27/3/20).

¹⁴⁵ *Ibid.*

*on-the-spot fines of \$1000 for individuals or \$5000 for businesses in breach of the new restrictions.*¹⁴⁶

*The \$1000 on the spot fine was something I asked the Premier for so we could deal with these matters quickly.*¹⁴⁷

*Police won't be giving advice and guidance now, we'll be taking strong action.*¹⁴⁸

As will be shown below, by the time of the Delta Wave, these occasional flourishes of punitive and threatening enforcement rhetoric became the *primary* message of NSW leaders.

4.3.3 Inconsistency in Messaging

The third theme observed in our analysis of media-reported public statements by NSW Government and NSW Police Force leaders was a degree of inconsistency in the enforcement mentalities expressed by different leaders – in two respects: some leaders expressed inconsistent positions at different times; and leaders were not always in sync with each other when it came to PHO enforcement messaging. In the first category, in his public statements on enforcement strategy during the 1st Wave, then Police Commissioner Mick Fuller fluctuated between talk of ‘strong action’¹⁴⁹ and being ‘done with cautions’,¹⁵⁰ to emphasising that police would use the ‘power of discretion reasonably’,¹⁵¹ with penalty notices used carefully ‘in the spirit in which they were intended’,¹⁵² and with a view to giv[ing] people as many warnings as we can’.¹⁵³

In the second category, we observed instances where there appeared to be inconsistency between the messaging of the NSW Government and the NSW Police Force. For example, at the beginning of the first lockdown, while the Police Commissioner was signalling tough enforcement (a position from which he later shifted), the then Premier Gladys Berejiklian was extolling a much more conciliatory and educative approach:

¹⁴⁶ DTa29 (26/3/20).

¹⁴⁷ SMHa48 (30/3/20) (Commissioner Fuller).

¹⁴⁸ DTa29 (26/3/20) (Commissioner Fuller).

¹⁴⁹ DTa29 (26/3/20).

¹⁵⁰ SMHa48 (30/3/20).

¹⁵¹ DTa56 (31/3/20).

¹⁵² DTa59 (31/3/20).

¹⁵³ DTa73 (7/4/20).

*We want to make sure people understand the arrangements. This isn't about fining people. This is just about encouraging people to do the right thing.*¹⁵⁴

In a context where NSW residents were faced with a completely novel and unfamiliar set of restrictions on their movements and behaviour, and frequent changes to PHOs, it is possible that public discourse inconsistencies of the sort illustrated here may have contributed to a degree of confusion and uncertainty about the nature of PHO restrictions and the consequences of non-compliance.

4.4 Findings: Delta Wave

We identified three prominent enforcement mentality themes in the mainstream media-reported political leader discourse in the Delta Wave period in 2021:

- continued inconsistency in the messages communicated publicly by government and police leaders;
- a decisive shift away from discretionary and cautious community policing, to mandatory punitive enforcement; and
- disregard for due process and licencing of 'cavalier' police enforcement.

4.4.1 Continued Inconsistency

As in the 1st Wave, inconsistencies in enforcement messaging were observable in the early stages of the Delta Wave, when the enforcement mentality expressed by key NSW Government leaders sometimes contradicted the media-reported public statements of NSW Police Force leaders. Members of the Government, such as then Premier Gladys Berejiklian and Health Minister Brad Hazzard, as well as NSW Chief Health Officer Dr Kerry Chant, expressed a discretionary, cautious and educative enforcement mentality. They appeared to distance themselves from the punitive realm of PHO enforcement and criminalisation by regular references to a concern for public health and safety, and the need for an informed, community-centred response to the pandemic. This is evidenced in the following statement from Premier Gladys Berejiklian:

¹⁵⁴ SMHa48 (30 March 2020).

*I'm urging everybody, stay home, don't leave home unless you absolutely have to... We know that there is the light at the end of the tunnel, we know we will get through this.*¹⁵⁵

Health Minister Hazzard framed his own Ministerial directions (that is, the basis for rapidly changing PHOs) as mere guidelines, emphasising that their main purpose was not punitive, but to educate the community on, and encourage compliance with, covid-safe behaviours:

*... [H]ealth orders are given as a guide to help the community get through what is a very difficult time.*¹⁵⁶

*The penalties are only there to send a clear message so my focus is not on the penalties but making sure people understand the most dangerous thing you can do [in a pandemic] is to be near another human being.*¹⁵⁷

Around the same time, key leaders from the NSW Police Force utilised strong language to express the conflicting view that PHOs were mandatory and punitive in nature. For example, NSW Police Commissioner Mick Fuller stated:

*NSW Police Force will have a zero-tolerance approach to members of the public and businesses breaching these [public health orders].*¹⁵⁸

*I can assure you, if you breach the health orders or the guidelines, you will be punished.*¹⁵⁹

Assistant Commissioner Gary Worboys stated:

*Police are willing and able right across the state and in particular the areas in and around Sydney to make sure people comply.*¹⁶⁰

In Part 2 of this report we observed, in line with the conclusions of the NSW Ombudsman,¹⁶¹ that the important rule of law principle of 'knowability' was jeopardised by the volume and speed of PHO-making during the Delta Wave. In a context where it was unrealistic to expect NSW residents

¹⁵⁵ DTb64, (18 August 2021).

¹⁵⁶ DTb26 (19 July 2021).

¹⁵⁷ SMHb35 (24 July 2021).

¹⁵⁸ DTb47 (31 July 2021).

¹⁵⁹ SMHb5 (28 June 2021).

¹⁶⁰ DTb2 (25 June 2021).

¹⁶¹ NSW Ombudsman, above n 17.

to read PHOs for themselves, inconsistencies in the messaging of NSW leaders can only have exacerbated this problem – including confusion and mistaken understandings by residents *and* police officers – with potential implications for the legitimacy of penalty notices issued in this volatile environment.

4.4.2 Mandatory and Punitive Enforcement

Against the backdrop of rising COVID-19 infection rates, and the tightening of PHO restrictions (described in Part 2), our analysis of media-reported public statements reveals a hardening of the enforcement mentality of NSW Government and NSW Police Force leaders. Where, during the 1st Wave, discretion, caution and education were emphasised, during the Delta Wave the rhetoric shifted decisively – towards a mandatory, mass and ‘crime control’¹⁶² approach to punishing PHO non-compliance through police issuance of penalty notices. However, this did not occur immediately. Initially, even when there was a significant intensification of COVID-19 PHO policing, NSW Police leaders employed relatively conciliatory language in their public statements.

In July 2021 there was a marketed increase in enforcement, with a series of compliance ‘blitzes’, characterised by the deployment of additional police officers across the state. On 8 July 2021, the NSW Police Force announced that a ‘major operation’ would commence the following morning, targeting the spread of the Delta variant in south-western Sydney.¹⁶³ The operation deployed more than 100 additional officers in the area (including in the suburbs of Fairfield, Liverpool and Bankstown) as well as additional traffic and highway patrol officers, canine and mounted units, and police helicopters. The aim of this deployment, according to NSW Police Deputy Commissioner Mal Lanyon, was to ‘to ensure compliance with public health orders.’¹⁶⁴

Initially, these police operations were framed as a visibility exercise, in which the mere presence of additional police officers in communities would serve the purpose of ensuring compliance with public health orders.¹⁶⁵ Deputy Commissioner Lanyon attempted to assure the public that:

¹⁶² Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1968).

¹⁶³ SMHb16 (8 July 2021).

¹⁶⁴ SMHb16 (8 July 2021).

¹⁶⁵ SMHb16 (8 July 2021).

*The addition of more police was not about trying to write more infringements but so people would see police and there is that compliance ... It is not about being heavy-handed.*¹⁶⁶

Deputy Commissioner Lanyon also emphasised the importance of police collaboration with the community during these operations, stating that the NSW Police force wanted to:

*... work very closely with the community to ensure compliance with the restrictions, and make sure that we restrict that movement across the community and slow down the spread of the virus.*¹⁶⁷

This sentiment was echoed by Police Commissioner Mick Fuller in the following statement:

*We have seen an improvement with the behaviour of people, particularly in terms of wearing masks and the other health orders, and we'd ask that the community continue to work with us over the coming weeks.*¹⁶⁸

However, there was a drastic shift in publicly declared enforcement mentality from 14 August 2021, following the announcement of 'Operation Stay At Home', the state-wide lockdown, we saw increased fines for breaches of PHOs, and the deployment of 500 Australian Defence Force personnel in targeted communities. Messaging from key NSW leaders during this period amounted to an express and public abandonment of due process and community policing models, and a hard shift to mandatory punitive enforcement.

On 14 August 2021, Premier Gladys Berejiklian announced that Police Commissioner Mick Fuller would be given additional powers to enforce PHO compliance:

*I just want to assure the community that not only will the Police Commissioner receive what he wants in terms of additional powers or additional resources, but more than what he needs and wants to make sure we are not leaving any stone unturned and to make sure that the community is kept safe at all times.*¹⁶⁹

¹⁶⁶ DTb19 (10 July 2021).

¹⁶⁷ DTb24 (18 July 2021).

¹⁶⁸ SMHb21 (12 July 2021).

¹⁶⁹ SMHb57 (15 August 2021).

Whilst Premier Berejiklian rationalised additional police powers as necessary for community safety, references to giving Commissioner Fuller ‘more than what he needs’ and ‘not leaving any stone unturned’ reveal a significant ratchetting up of enforcement rhetoric and strategy.

In a video message to NSW Police Force officers, Commissioner Fuller, armed with these additional powers, asked officers to ‘go high level enforcement’ and prioritise policing PHO compliance outside of their first response capabilities.¹⁷⁰ Whilst Commissioner Fuller acknowledged that there was ‘a lot to take in with the health orders’ he nonetheless instructed the NSW Police force as follows:

I am asking you to put community policing to the side for a short period of time, for 21 days I will head this operation, you need to take a strong approach to enforcement ... We need to stretch ourselves across the state, but we'll only get compliance if you start writing tickets, if you start future CANing [issuing a future court attendance notice] people for breaching the health orders.¹⁷¹

In the days following these statements from Commissioner Fuller, a curfew was introduced across 12 LGAs in south-western Sydney,¹⁷² under which people were unable to leave their residence from the hours of 9pm to 5am, subject to few exceptions. The Police Commissioner suggested that the curfew was introduced to crack down on non-compliant ‘young men’ in south-western Sydney:

From the health advice and police on the ground [indicating] that younger men in those areas of concern are being very difficult to manage and they're not complying.¹⁷³

This language (and the extreme PHO measure which it sought to justify) is revealing as to how far the prevailing enforcement mentality had shifted from the public health orientation of the 1st Wave to a ‘social wrong’ or ‘deviance’ characterisation of PHO non-compliance. Although there was no expressly racialised language in this public discourse, the singling out (‘demonisation’¹⁷⁴) of

¹⁷⁰ SMHb68 (20 August 2021).

¹⁷¹ SMHb68 (20 August 2021).

¹⁷² *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021* as amended on 23 August 2021 by the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) Amendment Order 2021*.

¹⁷³ DTb76 (21 August 2021).

¹⁷⁴ See generally, McNamara and Quilter, above n 42.

'young men' from south-western Sydney evokes the longer history of over-policing of racialised minorities in the south-western and western suburbs of Sydney.¹⁷⁵

It is important to recognise that this was not 'rogue' language (or a rogue operation) by NSW Police leadership, with the Police Commissioner making plain that:

*I was sought by the government to establish a police operation to improve compliance with the health orders.*¹⁷⁶

Commissioner Fuller declared that NSW Police would assist the NSW Government by:

*... treating the virus like a criminal, putting police in the areas of concern ... and taking strong action to try and reduce the spread.*¹⁷⁷

The rhetoric of 'putting aside' community policing, and 'treating the virus like a criminal' may have been uniquely Commissioner Fuller's, but the NSW Government enlisted the NSW Police Force to undertake an aggressive penalty-notice led 'law and order' response to a public health crisis, and so carries significant responsibility for the policing practices and punitive 'criminalising' effects that resulted.

4.4.3 Diminished Due Process and 'Cavalier' Policing

A discrete and troubling feature of NSW Police public discourse during the Delta Wave was an apparent disregard for due process and accuracy in the issuance of fines. Earlier we drew attention to the emphasis on fairness and accuracy in leaders' public statements on COVID-19 penalty notice issuance during the 1st Wave. This was perhaps best exemplified by Police Commissioner Fuller's public guarantee that he would personally review all penalty notices to ensure they were lawfully issued. By August 2021, the Police Commissioner's public statements on due process and the importance of review had changed dramatically. It was reported that Commissioner Fuller told police officers:

¹⁷⁵ For example, see Jock Collins, *Kebabs, kids, cops and crime: youth ethnicity and crime* (Pluto Press, 2000); Waqas Tufail and Scott Poynting, 'A common "outlawness": Criminalisation of Muslim minorities in the UK and Australia' (2013) 2(3) *International Journal for Crime, Justice and Social Democracy* 43.

¹⁷⁶ SMHb93 (2 September 2021).

¹⁷⁷ SMHb93 (2 September 2021).

*... if you write a ticket, and you get it wrong, I understand, and I won't hold you to account for that. We have to shape the behaviour of people to get out of lockdown.*¹⁷⁸

Commissioner Fuller went further, publicly stating that complaints regarding the issuance of penalty notices were not welcome:

*I'm not apologetic, please don't write and complain to me.*¹⁷⁹

Such statements suggest a cavalier approach to PHO enforcement and penalty notice issuance. This would be concerning at any time, in relation to any form of 'on-the-spot' fine or police enforcement action or exercise of powers. It is especially concerning where: restrictions were directed at public health objectives; the pace of PHO-making during the Delta Wave presented real knowability challenges – for both police officers and residents of NSW generally; and the value of penalty notices was so high. This powerfully evokes Packer's landmark account of criminal justice;¹⁸⁰ specifically, the countenancing of uncorrected errors (the antithesis of due process) in pursuit of the goal of 'crime control' and population-wide deterrence.

4.5 Synthesis: A Shift in Rhetoric and Enforcement Strategy

It would be easy to assume that the dramatic spike in COVID-19 PHO penalty notice issuance during the Delta Wave, as shown by the data presented in Part 3 of this report, was a 'natural' or unavoidable consequence of rates of non-compliance at this time. Our analysis suggests that it would be a mistake and overly simplistic to draw such a conclusion. Compared to the 'baseline' provided by our analysis of public statements by NSW Government and NSW Police leaders during the 1st Wave in the first half of 2020, we have shown that during the Delta Wave there was a discernible hardening in the publicly declared 'enforcement mentality' of leaders from the NSW Government and the NSW Police Force. Although we observed a degree of inconsistency in messaging in both of the periods reviewed, the dominant enforcement messaging of leaders during the Delta Wave, especially during July and August 2021, was that it was essential to pursue a punitive and uncompromising enforcement strategy of sanctioning all detected instances of non-compliance. This public discourse reflected a conscious decision to escalate from a public health-

¹⁷⁸ SMHb68 (20 August 2021).

¹⁷⁹ DTb56, (14 August 2021).

¹⁸⁰ Packer, above n 162.

oriented approach based on discretionary and cautious use of fines, to a 'law and order' approach that aggressively and unapologetically pursued police issuance of penalty notices on a mass scale.

5. CONCLUSION

In a wide-ranging review of the responses of Australian governments to the pandemic, which included both compliments and criticisms, the Shergold Report observed that '[t]o many Australians, it came to be perceived that governments were protecting their health by policing the pandemic.'¹⁸¹ Our analysis of the creation and enforcement of COVID-19 public health measures in NSW is consistent with this assessment, particularly during the Delta Wave in the second half of 2021, and most intensely during July, August and September. In this report we have shown how it was that NSW residents found themselves in the middle of a phenomenon that had many of the characteristics of a 'law and order' crisis, including frenetic and voluminous law-making, excessive financial penalties, hyperbolic rhetoric from political leaders and aggressive enforcement by police via issuance of penalty notices for alleged non-compliance with PHOs. Individuals were effectively 'criminalised' for behaviours that would never previously have brought them into contact with the police or state-sanctioned punishment.

While we have not attempted to analyse the proportionality of the regulatory response to the magnitude of the COVID-19 public health crisis, hindsight and the benefit of a wider perspective suggest that an 'extraordinary times' justification may be inadequate as an explanation for what occurred. We note that in the three months from July-September 2021 (the heart of the Delta Wave), there were 350 recorded COVID-19-related deaths in NSW. In the same three months of 2022, 1724 death were recorded,¹⁸² and yet, in the latter period, almost all public health restrictions had been lifted and only 83 penalty notices were issued.¹⁸³

The three dimensions of the NSW Delta Wave response described in this report are the back-story to the legacies left at the end of 2022: enduring fine debt (and consequential harms) for COVID-19 recipients unable to pay their fines; and damaged community-police relations, particularly in socio-economically disadvantaged suburbs and towns that disproportionately experienced the intensity of a punitive police-led and penalty notice-centred approach to seeking compliance with PHOs.

A key lesson to be learned from the legacies left by the NSW Government's response to the COVID-19 pandemic is that there are real risks associated with deploying conventional 'crime

¹⁸¹ Shergold et al, above n 21, 21.

¹⁸² Covid Live, 'NSW Deaths' <https://covidlive.com.au/report/daily-deaths/nsw>

¹⁸³ Revenue NSW, above n 1.

control’ tools – specifically, offences, police powers and financial penalties – to address a public health challenge. Punishment is usually an inappropriate public health strategy,¹⁸⁴ especially when used, as occurred during the Delta Wave, as a ‘first resort’. It is easy to assume that, without punishment, compliance rates will be low, but this is not necessarily so. Murphy and colleagues found that ‘perceived risk of legal sanctions played little role in predicting Australians’ compliance with lockdown restrictions’ and encouraged authorities focus on education and promoting that ‘everyone has a duty to protect those most vulnerable to the disease.’¹⁸⁵ BOCSAR’s study of compliance with COVID-19 public health restrictions during the Delta Wave found that rates of (self-reported) non-compliance were relatively low.¹⁸⁶

This report also adds to a growing body of Australian literature that draws attention to the fact that penalty notices are an insidious form of criminalisation – producing punitive effects that belie the perceived status of ‘on-the-spot-fines’ as relatively benign, and which are often disproportionate to the initial transgression that prompted the issuance of a penalty notice in the first place. Litigation pending in the Supreme Court of NSW has drawn attention to another way in which the legitimacy of penalty notices may be questioned. Routinely cited against criticisms that penalty notices favour efficiency and finality over fairness and due process is the availability of the ‘court election’ option. A recipient of a penalty who, in effect, wants to plead ‘not guilty’ to the alleged offence, can elect to have the matter considered in the NSW Local Court. In addition to the many recognised disincentives to this course of action (inconvenience, cost, risk of a criminal conviction, risk of a higher penalty),¹⁸⁷ a current test case is challenging the lawfulness of COVID-19 penalty notices on the basis that they provided insufficient detail about the alleged PHO breach to allow the recipient to make an informed decision about whether to attempt to pay the fine or elect to go to court.¹⁸⁸

¹⁸⁴ See generally, Joseph Lelliott, Andreas Schloenhardt and Ruby Ioannou, ‘Pandemics, punishment, and public health: COVID-19 and criminal law in Australia’ (2021) 44(1) *UNSW Law Journal* 167.

¹⁸⁵ Kristina Murphy, Harley Williamson, Elise Sargeant and Molly McCarthy, ‘Why people comply with COVID-19 social distancing restrictions: Self-interest or duty?’ (2020) 53(4) *Australian & New Zealand Journal of Criminology* 477, 490. See also Elise Sargeant, Molly McCarthy, Harley Williamson and Kristina Murphy, ‘Empowering the police during COVID-19: How do normative and instrumental factors impact public willingness to support expanded police powers?’ (2022) *Criminology & Criminal Justice* <https://doi.org/10.1177/17488958221094981>

¹⁸⁶ Rahman, above n 98, 11.

¹⁸⁷ NSW Law Reform Commission, *Penalty Notices Report* 132 (2012) 154-5; Quilter and Hogg, above n 2, 12. Methven, above n 13, 77.

¹⁸⁸ Georgina Mitchell, ‘Supreme Court test case that could throw out thousands of NSW COVID fines’, *Sydney Morning Herald*, 16 July 2022 <https://www.smh.com.au/national/nsw/supreme-court-test-case-that-could-throw-out->

The Dharriwaa Elders Group, whose 2022 public statement on COVID-19 policing in Walgett opened this report,¹⁸⁹ concluded:

*There must be a better way to keep our communities safe from future pandemics, than to elevate police powers. We ask the adults in NSW Parliament to apply themselves to planning better responses for the future.*¹⁹⁰

Amnesty International concurs:

*Public health responses should be led by community and health organisations, not by police. Under human rights standards, powers granted to authorities during a public health emergency should always be exercised in the pursuit of the protection of public health. When enforcing relevant restrictions, police must ensure their actions are proportionate to the threat posed to public health, and necessary to protect public health.*¹⁹¹

This report has focused on NSW, but its insights regarding the ‘unknowability’ associated with rapid law-making with little consultation,¹⁹² and the need to reconsider punitive ‘criminalisation’ approaches to achieving public health goals¹⁹³ (including the implications for confidence in police¹⁹⁴), are of national and international relevance.

So too are the wider lessons to be learned about penalty notices as a mechanism of law enforcement and punishment. The events of the NSW Delta Wave served to *magnify* what was

[thousands-of-nsw-covid-fines-20220708-p5b079.htm](https://www.smh.com.au/national/nsw/covid-19-fine-withdrawn-in-test-case-that-could-see-thousands-more-torn-up-20220716-p5b22w.html); Georgina Mitchell, ‘COVID-19 fines withdrawn in test case that could see thousands more torn up’, *Sydney Morning Herald*, 17 July 2022 <https://www.smh.com.au/national/nsw/covid-19-fine-withdrawn-in-test-case-that-could-see-thousands-more-torn-up-20220716-p5b22w.html>

¹⁸⁹ Above n 3.

¹⁹⁰ Dharriwaa Elders Group, above n 4.

¹⁹¹ Amnesty International, *The Policing of the 2021 NSW Lockdown* (11 October 2021) <https://www.amnesty.org.au/policing-2021-nsw-lockdown/>

¹⁹² Naomi Finch, Simon Halliday, Joe Tomlinson, Jed Meers and Mark Wilberforce, ‘Undermining loyalty to legality? An empirical analysis of perceptions of ‘lockdown’ law and guidance during COVID-19’ (2022) *The Modern Law Review* <https://doi.org/10.1111/1468-2230.12755> <https://www.smh.com.au/national/nsw/fines-commissioner-concedes-that-covid-fines-in-supreme-court-test-case-are-invalid-20221129-p5c23a.html>

¹⁹³ Nina Sun, Emily Christie, Luisa Cabal and Joseph Amon, ‘Human rights in pandemics: criminal and punitive approaches to COVID-19’ (2022) *BMJ Global Health*, 7:e008232 <https://gh.bmj.com/content/7/2/e008232>

¹⁹⁴ Gali Perry, Tal Jonathan-Zamir and Roni Factor, ‘The long-term effects of policing the COVID-19 pandemic: Public attitudes toward the police in the “new normal”’ (2022) 16(1) *Policing: A Journal of Policy and Practice* 167.

already a worrying longer-term trend in criminalisation practice: increasing reliance on ‘on-the-spot’ fines.¹⁹⁵ The evidence presented in this report supports a comprehensive re-think of the place of penalty notices in policing and punishment, now that the risks of excessive punitiveness and compounding disadvantage have been so vividly demonstrated.

Postscript

On 29 November 2022, Revenue NSW announced that 33,121 COVID-19 penalty notices, with a combined dollar value of more than \$30 million, would be withdrawn.¹⁹⁶ The announcement followed a concession made by counsel for the Commissioner of Fines Administration, during proceedings before the Supreme Court of NSW in a test case led by the Redfern Legal Centre, that penalty notices issued for ‘Fail to comply with noticed direction in relation section 7/8/9 - COVID-19’ were invalid because they contained insufficient detail about the alleged offence to meet the requirements of the *Fines Act 1996* (NSW).¹⁹⁷ In the wake of this decision, organisations that have been advocating for redress in relation to the adverse impacts of COVID-19 penalty notices, including the Aboriginal Legal Service (NSW/ACT) and the Law Society of NSW, have called for the cancellation or review of all remaining COVID-19 penalty notices.¹⁹⁸

¹⁹⁵ We thank Lauren Stefanou for this evocative and apt characterisation.

¹⁹⁶ NSW Government, ‘Statement by Revenue NSW’, Media Release, 29 November 2022 <https://www.nsw.gov.au/customer-service/media-releases/statement-by-revenue-nsw>; Georgina Mitchell, ‘More than 33,000 COVID fines withdrawn after government concedes they are invalid’, *Sydney Morning Herald*, 29 November 2022 <https://www.smh.com.au/national/nsw/more-than-33-000-covid-fines-withdrawn-after-government-concedes-they-are-invalid-20221129-p5c27a.html>

¹⁹⁷ Georgina Mitchell, ‘Fines Commissioner concedes that COVID fines in Supreme Court test case are invalid’, *Sydney Morning Herald*, 29 November 2022 <https://www.smh.com.au/national/nsw/fines-commissioner-concedes-that-covid-fines-in-supreme-court-test-case-are-invalid-20221129-p5c23a.html>; *Fines Act 1996* (NSW) s 20.

¹⁹⁸ Aboriginal Legal Service (NSW/ACT), ‘Huge victory for the people of NSW as millions worth of COVID fines withdrawn – now Government must cancel the rest’, Media Release, 29 November 2022 <https://www.alsnswact.org.au/huge-victory-covid-fines-withdrawn>; Law Society of NSW, ‘Common sense withdrawal of Covid 19 fines’, Media Release, 30 November 2022 <https://www.lawsociety.com.au/news-and-publications/news-media-releases/common-sense-withdrawal-covid-19-fines>; Christopher Knaus, ‘NSW government under pressure to scrap further 29,000 Covid fines after court ruling’, *The Guardian*, 30 November 2022 <https://www.theguardian.com/australia-news/2022/nov/29/nsw-government-under-pressure-to-scrap-further-29000-covid-fines-after-court-ruling>



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