WHEN TRUST FAILS PURPOSE: LEGISLATIVE LESSONS FROM POLICE ACCESS TO THE SAFEWA COVID-19 CONTACT TRACING DATA

NARRELLE MORRIS AND ANNA BUNN*

In response to the ongoing COVID-19 pandemic, Western Australia (WA) introduced in November 2020 a mandatory contact tracing registration system and rolled out an online mobile application (the SafeWA app) which allowed users to easily check-in to venues at which they were required to register their attendance. The WA public was assured that their check-in data, including data logged through the SafeWA app, would only be used for contact tracing purposes. Despite this, it later came to light that WA Police had sought and gained access to data collected by the SafeWA app in connection with criminal investigations. Following that revelation, and to address its potential to undermine public confidence in the SafeWA app (and the contact tracing system in general), the WA Government introduced the Protection of Information (Entry Registration Information Relating to COVID-19 and Other Infectious Diseases) Act 2021 (WA). That Act, which came into force in June 2021, provides that entry registration information can be used only for contact tracing and some other specified purposes and cannot be used for general criminal investigations or law enforcement. This article examines the legislative basis of WA's mandatory contact tracing registration system and highlights some of the implications for law-making, parliamentary oversight and the rule of law which result from the use of subsidiary legislation to effect significant controls over the public.

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I INTRODUCTION

In late November 2020, due to the ongoing spread and impact of the COVID-19 pandemic, Western Australia (WA) swiftly introduced a mandatory contact tracing registration system which included the roll-out of an online mobile application

(app) known as SafeWA (hereafter referred to as the 'SafeWA System'). The mandated provision of personal information to the government—which in Western Australia included location data that confirmed attendance at specific locations or that could be used to infer association with other individuals at those locations as well as other potentially sensitive matters—has obvious trust and privacy implications. The 'bargain' to encourage Western Australians to provide their contact details and registration information was the reassurance that their information would be used *only* for contact-tracing purposes to prevent the spread of the COVID-19 virus.[1] Notwithstanding these assurances, six months later the WA Government admitted that the WA Police had sought and gained access to data collected by the SafeWA app in connection with criminal investigations. Moreover, this access by WA Police had occurred *within days* of the contact registration system becoming mandatory, in December 2020.

It is widely acknowledged that trust in government influences the extent to which people accept surveillance by government generally,[2] and plays a role in the uptake and use of specific surveillance technology, including apps used for contact tracing or other public health purposes.[3] As the Auditor-General of Western Australia has observed, trust in public institutions is 'necessary not only when responding to a viral pandemic, but also for the ongoing peace and prosperity of our democratic society.'[4] Revelations that SafeWA data had been used for a purpose other than that for which it was expressly stated to be limited could therefore have undermined public confidence in the SafeWA System in general, or use of the SafeWA app in particular. In fact, the risk of this happening was specifically drawn to the attention of the WA Police by the Director General of the Department of Health.[5] Not only would a loss of trust have undermined the public health objective of the SafeWA System, but it could also have made practical

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* Associate Professor and Senior Lecturer, Curtin Law School, Curtin University. The authors would like to acknowledge the valuable contributions of and insights from Jennifer Negus, Senior Lecturer, Curtin Law School.

[1] WA Government, 'Maintaining Contact Registers, a Requirement to Keep WA Safe', Media Statement, 25 November 2020 <https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/11/Maintaining-contact-registers-a-requirement-to-keep-WA-safe.aspx>.

[2] Nik Thompson et al, 'Cultural Factors and the Role of Privacy Concerns in Acceptance of Government Surveillance' (2020) 71(9) *Journal of the Association for Information Science and Technology* 1129.

[3] Andreas Oldeweme et al, 'The Role of Transparency, Trust, and Social Influence on Uncertainty Reduction in Times of Pandemics: Empirical Study on the Adoption of COVID-19 Tracing Apps' (2021) 23(2) *Journal of Medical Internet Research* e25893 <doi: 10.2196/25893>; Kobi Lins, Christopher Culnane and Benjamin IP Rubinstein, 'Tracking, Tracing, Trust: Contemplating Mitigating the Impact of COVID-19 through Technological Interventions' (2020) 213(1) *The Medical Journal of Australia* 6; Caroline Compton, 'Trust, COVIDSafe, and the Role of Government', Australian Public Law Blog (11 May, 2020) <https://auspublaw.org/2020/05/trust-covidsafe-and-the-role-of-government/>.

[4] Western Australia Auditor General, *SafeWA – Application Audit* (Report 2: 2021-22, August 2021) 2 <https://audit.wa.gov.au/reports-and-publications/reports/safewa/>.

[5] Letter from the Director General to the Commissioner of Police, 12 March 2021, included in Western Australia Auditor General (n 4) Appendix 2.

enforcement of the laws requiring compliance with the system untenable, given that wholesale non-compliance as a result of diminished public confidence is beyond the resourcing capacity of police to enforce or the courts to deal with.

The revelations of police access to SafeWA data led the WA Government to introduce a legislative fix to the problem. However, as we argue in this paper, beyond the immediate threat to public health objectives posed by those revelations, there are broader lessons to be learned regarding transparency, accountability, and the rule of law. During the COVID-19 pandemic, the powers to issue directions under the *Emergency Management Act 2005* (WA) and the *Public Health Act 2016* (WA) were enlivened for an extended period and were then used extensively in ways that impacted on many aspects of daily life, with hefty penalties attached for non-compliance. The SafeWA System is a significant example of one of those controls. Yet, the directions underpinning that system were *not* tabled in Parliament, *not* scrutinised, *not* published in the *Government Gazette* and are *not* available on the official WA Legislation website. With the end of the Public Health State of Emergency in WA on 4 November 2022,[6] the directions (and other key documents relating to SafeWA, such as its Privacy Policy) are difficult to formally locate.

Had those directions been subject to parliamentary oversight, the potential for alternative uses to be made of the data may have come to light much sooner. This is a particular risk in WA, where the lack of comprehensive privacy laws applicable to WA state agencies arguably contributes to the failure to design privacy protections into systems such as the mandatory entry registration system and the SafeWA app. Moreover, WA still lacks human rights legislation that might otherwise serve to additionally protect a right to privacy.[7] However, the SafeWA experience raises issues of relevance beyond Western Australia and should be viewed in the context of the broader issues of parliamentary oversight and executive accountability that have played out at national and sub-national level across Australia as a result of responses to the pandemic. While the broader issues of accountability for executive decisions taken in Australia during COVID-19 have

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[6] By means of WA Government, 'Revocation of Declaration (No. 3) of Public Health State of Emergency', 3 November 2022, published in Western Australia, *Gazette*, No 159 (8 November 2022) 5266.
[7] Cf *Human Rights Act 2004* (ACT) s 12; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13; *Human Rights Act 2019* (Qld) s 25.

been subject to recent scholarly works[8] and Parliamentary reports,[9] it was not until November 2020 that the SafeWA System featured in a key parliamentary report in WA that covered pandemic responses,[10] a scrutiny exercise that was not repeated. Moreover, the provision of SafeWA data to WA police has yet to be subject to much scrutiny in academic literature (as opposed to media).[11]

In Part Two of this paper, we provide an overview of the contact tracing system in WA, including development of the SafeWA app.[12] In Part Three we detail access and use by the WA Police of SafeWA data and explain the legislative fix that eventually 'closed the loophole' in relation to access to data for non-contact tracing purposes. In Part Four we analyse issues of transparency, accountability and the rule of law related to the SafeWA experience, before offering an overall conclusion, in Part Five.

II AN OVERVIEW OF SAFEWA

With no apparent end in sight to the COVID-19 pandemic by late 2020, WA Health contracted with WA software company GenVis[13] to create the SafeWA QR app,

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[8] See, eg, Tamara Tulich and Sarah Murray, 'Executive Accountability and Oversight in Australia during the COVID-29 Pandemic' (2022) 30 *Michigan State International Law Review* 283; Paula O'Brien and Eliza Waters, 'COVID-19: Public Health Emergency Powers and Accountability Mechanisms in Australia' (2021) 28 *Journal of Law and Medicine* 347; Belinda Bennett and Ian Freckelton, *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021); Yee-Fui Ng and Stephen Gray, 'Wars, Pandemics and Emergencies: What Can History Tell Us about Executive Power and Surveillance in Times of Crisis?' (2021) 44(1) *UNSW Law Journal* 227; Janina Boughey, 'Executive Power in Emergencies: Where is the Accountability?' (2020) 45(3) *Alternative Law Journal* 168.

[9] Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (Final Report, 16 March 2021); Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (Interim Report, 2 December 2020).

[10] Parliament of Western Australia, Legislative Assembly, Procedures and Privileges Committee, *The Legislative Assembly's Response to the COVID-19 Pandemic*, Report 8, 17 November 2020 <https://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/D5B49310 A5E6E8844825862400176FB0/$file/PPC+-+Report+8.pdf>.

[11] Josh Zimmerman, 'COVID in WA: Major "Weaknesses" in Contact Tracing Could Have Exposed Private Info of West Aussies', *The West Australian* (online, 18 May 2022); Eliza Laschon, 'Check-ins to SafeWA app Unaffected after WA Police Accessed Data as Part of Criminal Investigations', *ABC News* (online, 29 June 2021) <https://www.abc.net.au/news/2021-06-19/wa-safewa-government-oversight-analysis/100227928>; Kenith Png, 'Police Would Not Agree to Stop Accessing COVID SafeWA App Data, Premier Mark McGowan Says', *ABC News* (online, 16 June 2021) <https://www.abc.net.au/news/2021-06-16/police-refused-to-stop-accessing-safewa-app-data-premier-says/100218764>.

[12] As already explained, SafeWA is an app that supports WA's mandatory registration entry system introduced for COVID-19 contact tracing purposes, although contact information can also be captured directly by venues. However, for ease of reference, the mandatory entry registration system, including the SafeWA app, will be referred to throughout the rest of this paper as the 'SafeWA System', while the information collected by that system will be referred to as 'SafeWA data'.

[13] GenVis: <https://genvis.co/>. GenVis also created WA's online G2G Pass travel system: <https://genvis.co/g2gpass>. The latter URL is now defunct.

which was rolled out to the public under significant time pressure in about three weeks.[14] The SafeWA app, launched on 25 November 2020, is an attendance app, not a proximity app (in contrast with the Australian Government's COVIDSafe app). It enables users to register their personal information by scanning a unique Quick Response barcode (QR code) that records the date and time of entry to public and business venues. The app works by capturing personal information, including the name, email address and phone number of a person using the app (and, after an update was rolled out, similar information about other individuals accompanying the user), along with the place visited, and the time and date the QR code was scanned. Initially, the contact registration system was a 'soft' launch: providing one's contact information when entering a venue was voluntary. Contact information could be provided by using the SafeWA app, a venue's own QR code app, or the venue's paper-based registry. Almost immediately on 5 December 2020, however, it became mandatory for certain venues to request entry registration information from certain entrants, and for those individuals to provide the information upon request in order to enter the venue in question. The mandatory provision of entry registration information was provided for in the Closure and Restriction (Limit the Spread) Directions (No 9) ('the No 9 Directions'), which were issued on 2 December 2020 by Christopher Dawson, then Commissioner of Police and State Emergency Coordinator, pursuant to his powers as State Emergency Coordinator in the *Emergency Management Act 2005* (WA) ('*EM Act*').[15] The penalty for failing to comply with the request was imprisonment for up to 12 months or an individual fine of up to $50,000.[16]

By June 2021, more than 1.93 million people, as well as 77,000 businesses and 100,000 venues, had registered on the app;[17] and more than 217 million 'check-ins' were completed between December 2020 and May 2021.[18] Given the size of the WA population,[19] the uptake of the app was extremely high. This is despite the fact that by mid-2021 police had issued 'zero fines' and were 'not actively enforcing mandatory COVID check-ins'.[20] Within months of its launch, therefore,

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[14] Western Australia Auditor General (n 4) 3.
[15] *Emergency Management Act 2005* (WA) ss 10, 71, 72A ('*EM Act*').
[16] Ibid, Penalties. These penalties are the same as the penalties set out in the *EM Act* for the offence of failure to comply with a direction: *EM Act* s 86(1). It is also an offence under the *EM Act* s 89 to provide false and misleading information, which attracts a fine of $50,000.
[17] Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 June 2021, 1441b (J.R. Quigley, Attorney General).
[18] Western Australia Auditor General (n 4) 4.
[19] As reported in September 2021 this was just over 2.67 million people, (including over half million children aged under 16 who were exempt from registering): Australian Bureau of Statistics, National, State and Territory Population, 16 September 2021, <https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/mar-2021>.
[20] Heather McNeil, 'Zero Fines in Six Months: WA Police Are Not Actively Enforcing Mandatory COVID Check-Ins', *WAToday* (online, 17 June 2021) <https://www.watoday.com.au/national/western-

public use of the SafeWA app had created an enormous electronic database of (admittedly limited) personal information about a person, but also a significant rolling dataset of that person's attendance at locations over the previous 28 days.[21] In some instances, mere attendance at a location could allow the inference of further sensitive personal information, such as those that might be drawn from checking-in to a facility for particular types of medical treatment or a venue of significance for a particular social activity or religious practice.[22] Moreover, the location data could also allow for the building of patterns of information about people's broader movements, as well as assumptions about with whom they had been in contact or associated.

When it was launched, the WA Government assured the public that even though they would be offering up their personal information in the app, including information about their attendance at various places, their trust would not be abused and their information would be protected. A public Facebook post on 25 November 2020 by then Premier Mark McGowan, showing him checking-in to a Dome café using the app on his phone, included the statement: 'Data will be encrypted at the point of capture, stored securely and only be accessible by authorised Department of Health contact tracing personnel, should COVID-19 contact tracing be necessary.'[23]

The media release announcing the app similarly stated that '[r]ecords would only be used for the purpose of COVID-19 contact tracing, should it be required, and will only be kept for 28 days, and not used for any other purpose' and 'records … will only be used for necessary COVID-19 contact tracing, should the Department of Health require it'.[24] By early February 2021, information about SafeWA had been reproduced in more than 30 languages,[25] including 'Plain

australia/zero-fines-in-six-months-wa-police-are-not-actively-enforcing-mandatory-covid-check-ins-20210616-p581ly.html>.

[21] The SafeWA Privacy Policy, online in 2021-22, provided that check-in information would be stored for 28 days, although it could be retained for longer in some circumstances: Department of Health (WA), 'SafeWA Privacy Policy' (Webpage) <https://safewa.health.wa.gov.au/privacy>. At the time of publication in 2023, the SafeWA Privacy Policy is no longer available on the Department of Health website.

[22] Graham Greenleaf, 'Australia: A Poor Model for QR Data "Attendance Tracking"' (12 December 2020) Digital Asia Hub series 'When The Music's Over', 6 January 2021, UNSW Law Research, pp. 2-3, Available at SSRN: <https://ssrn.com/abstract=3779082>.

[23] Mark McGowan (Facebook, 25 November 2020) <https://www.facebook.com/photo/?fbid=4972772709407230&set=a.432761316741748>.

[24] WA Government, 'Maintaining Contact Registers' (n 1).

[25] 'COVID-19 Coronavirus: Translated Contact Registers Information <https://www.wa.gov.au/government/document-collections/covid-19-coronavirus-translated-contact-registers-information>. As with many pages on the WA Government's COVID-19 Coronavirus website, this URL is now defunct.

English', although not every translation explicitly mentions 'contact tracing' as the 'only' purpose of the system.[26]

The SafeWA app data is encrypted and hosted by Amazon Web Services on cloud servers in Sydney, although under the terms of its arrangement with Amazon, WA Health cannot enforce that the data is not transferred, stored or processed outside Australia or provided by Amazon to foreign authorities.[27]

III POLICE USE OF SAFEWA AND THE BELATED LEGISLATIVE 'FIX'

It is now known that WA Police sought and obtained access to SafeWA data for criminal investigation purposes as early as December 2020, almost immediately upon the app being rolled out. On 12 December 2020, former Rebels bikie leader Nick Martin was murdered at the Perth Motorplex in Kwinana. Likely given serious concerns about reprisal attacks and a spiral of violence in the bikie and bikie-adjacent communities, which could give rise to broader safety consequences for the public, WA Police sought, and were granted, access to certain data captured through the SafeWA app on 14 December 2020, by way of an order to produce a business record under Part 6 of the *Criminal Investigation Act 2006* (WA).[28] Reportedly, the application for access was made on the ground that the SafeWA data could assist WA Police to identify 'mainly potential witnesses' to the Martin killing,[29] although the data was likely also sought to assist in the identification of persons of interest.

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[26] The French translation advised, for example, that '*Les entrées ont uniquement pour but de faciliter le traçage des cas contacts de COVID-19 par le Ministère de la santé, le cas échéant.*' (Entries [on the contact register] are only intended to facilitate the tracing of contact cases of COVID-19 by the Ministry [sic] of Health, if applicable.): WA Government, 'Maintaining Contact Registers' (a Requirement to Keep WA Safe – French', 2 February 2021 <https://www.wa.gov.au/sites/default/files/2020-12/011220-Announcement-Maintaining-contact-registers-a-requirement-to-keep-WA-safe-French.pdf>. This URL is now defunct.

[27] Western Australia Auditor General (n 4) 4, 9. Yee-Fui Ng and Stephen Gray make a similar point in relation to the Commonwealth's COVIDSafe App which is also hosted by Amazon Web Services ('AWS'), namely that it is 'possible that AWS, under US legislation, could be required to provide access to the US government upon request': Ng and Gray (n 8) 255.

[28] Western Australia Auditor General (n 4) 7. The order to produce was granted pursuant to the *Criminal Investigation Act 2006* (WA) ('*CIA*') s 53(1). A 'business record' in this case means 'a record prepared or used in the ordinary course of a business for the purpose of recording any matter relating to the business': *CIA* s 50. There is an open issue as to whether SafeWA data even falls within the meaning of 'business record', since it is not a 'record prepared or used in the ordinary course of business', at least by the venues collecting it. In terms of whether data obtained by the Department of Health can be considered a business record of the Department itself, there is an argument that it cannot, because the Department itself cannot properly be regarded as a 'business', within the meaning of s 50 of the *CIA*. Nevertheless, the fact that the SafeWA data could be obtained via police orders to produce a business record was supported in advice from the State Solicitor of Western Australia: Letter from the Commissioner of Police to the Director General, 19 March 2021, included in Western Australia Auditor General (n 4) Appendix 2.

[29] Laschon (n 11).

On 23 December 2020, police were provided with data relating to 1,639 check-ins at the Motorplex.[30]

By late May 2021, WA Police had applied for access to personal information collected by the SafeWA app on seven occasions, including six times by means of orders and once by a request.[31] In addition to the Martin case, the other matters under investigation for which the police sought SafeWA data were an assault resulting in a laceration to the lip, a stabbing and a potential pandemic quarantine breach.[32] Access to SafeWA data was granted on three occasions, the practical effect of which was to provide to WA Police SafeWA data of more than 2,400 people.[33] In addition to the SafeWA data, during this period police also used personal information provided to WA's COVID-19 state travel pass system, the G2G Pass, which was directly managed by the police, in relation to more than a dozen criminal investigations, including murder, drug offences, property laundering and breach of a violence restraining order.[34]

Until 21 June 2021, even though WA Police access to and use of SafeWA data for criminal investigations was not in accordance with government policy, it was not contrary to the No 9 Directions, or subsequent replacement directions, nor to the terms and conditions and privacy policy then applicable to the SafeWA app.[35] In fact, the Department of Health was obliged to comply with the order to produce a business record, as it is an offence not to do so without reasonable excuse.[36] Despite being lawful, there is a question as to whether the use of SafeWA data for the investigation of criminal offences was *warranted*. This is less clear. When a person recorded their contact information in a paper register or by using the SafeWA app to check-in to a place, what they were doing is complying with a direction made under the *EM Act*. However, the Act provides that:

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[30] See SafeWA Timeline in Peter de Kruiff, 'Senior Health Officials Raised Concerns about SafeWA Data Breach Long Before Election', *WAToday (*online, 6 August 2021) <https://www.watoday.com.au/politics/western-australia/senior-health-officials-raised-concerns-about-safewa-data-breach-long-before-election-20210805-p58g5n.html>.

[31] Western Australia Auditor General (n **4**) 4, 7.

[32] Ibid 7.

[33] Figure given in de Kruiff (n 30).

[34] Laschon (n 11).

[35] The original version of the SafeWA Privacy Policy when the app launched in 2020 stated that information might be disclosed to those 'whom WA Health must (by law) disclose your information (e.g. a court or tribunal, or another government body)'. The original version is now not locatable, as the website was subsequently updated with a revised Privacy Policy, which is also now unavailable. However, the original version was quoted in Legislative Council Question without Notice 284 – SafeWA app, included in Western Australia Auditor General (n 4) Appendix 2. Moreover, the disclosure of personal information obtained from the SafeWA System by WA Health to the police is not contrary to any privacy laws, given that the WA public sector agencies are not subject to a comprehensive regime protecting personal information.

[36] *CIA* s 55(2). This was the position apparently adopted by the State Solicitor of WA in its advice to the Department of Health, but see the discussion at footnote 28 as to whether SafeWA data held by the Department of Health is correctly regarded as a business record.

> any information or answer given by a person in compliance with a direction … is not admissible in evidence in any criminal proceedings against the person other than proceedings for an offence under section 89 [for providing false and misleading information].[37]

This would appear to preclude SafeWA data (or other contact tracing information) of the accused person being adduced as evidence against them, although may not preclude the SafeWA data of persons other than the accused being adduced as evidence in those criminal proceedings. It is beyond the scope of this article to consider the laws of evidence which govern the admissibility of contact tracing data as evidence in the trial of an alleged criminal offence. However, as there was no criminal trial of the accused killer of Martin, who pleaded guilty to murder on 29 September 2021 with his identity still suppressed,[38] it will remain unknown to the public what SafeWA data, if any, was used in the investigation or whether it was useful in resolving his identity for an arrest. Unless one of the other investigation matters for which access to SafeWA data was gained eventually comes to trial, how a court might deal with such data is likely to remain unknown.

The fact that police were granted access to SafeWA data appears to show that, at the time when SafeWA was announced and launched, little consideration had been given to how the No 9 Directions might interact with existing statutory laws relating to the use and disclosure of data. If consideration was in fact given to this interaction, the assurances given to the public about who could access their data may have been provided in the expectation that government agencies would only exercise their powers within the ambit of the stated government policy.

It was not until June 2021 that it was revealed publicly that police had been accessing SafeWA data. At that time, however, the WA Government's legislative response to block police and other non-contact tracing related access to SafeWA data was swift. The Protection of Information (Entry Registration Information Relating to COVID-19 and Other Infectious Diseases) Bill 2021 (WA) was introduced 'without notice' and moved 'to proceed through all stages without delay' on 15 June 2021.[39] Introducing the Bill, Attorney General John Quigley spoke about the 'critical role' that contact tracing plays in containing potential outbreaks and observed that '[a]ny issue that compromises our contact tracing effort is of concern'.[40] He asserted that the Government was keeping its 'commitment that entry registration information would be used only for contact tracing purposes' and was 'shor[ing] up' the system to 'apply a higher standard of restriction on the use

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[37] Italics added for emphasis: *EM Act* s 72A(5).

[38] Joanna Menagh, 'Nick Martin Killer Pleads Guilty to Sniper-Style Murder of Former Rebels Bikie Boss at Kwinana Motorplex', *ABC News* (online, 29 September 2001) <https://www.abc.net.au/news/2021-09-29/rebels-bikie-boss-nick-martin-shooter-pleads-guilty/100499782>.

[39] Western Australia, *Parliamentary Debates* (n 17) 1441b (D.A. Templeman).

[40] Ibid 1441b-1444b (Quigley, Attorney General).

of this information'.[41] During the course of his address introducing the Bill, the Attorney General also noted by way of 'example' that the police had in fact been accessing the information to 'assist with criminal investigations and prosecutions'.[42]

The *Protection of Information (Entry Registration Information Relating to COVID-19 and Other Infectious Diseases) Act 2021* (WA) ('*Protection of Information Act*') passed on 17 June and received royal assent on 21 June 2021. The bulk of the Act came into force on the day after assent.[43] The brevity and specificity of the Act, and the speed of its passage,[44] demonstrates not only that the relevant privacy protections could have been achieved at the outset, but also that their absence at the outset was a significant oversight of the WA Government. While it is reasonable to assume that public opinion will grant some latitude to governments in circumstances of emergency, the fact is that the WA Government failed to appreciate the privacy implications of the SafeWA System that had initially been put in place and made incorrect representations to the public about the safety of their data.

The *Protection of Information Act* now provides that SafeWA data can only be used for contact tracing or purposes adjacent to contact tracing;[45] it cannot be used for general criminal investigations or law enforcement.[46] The legislation is not retrospective, but it has retroactive operation: it applies to personal information obtained at any time on or after 5 December 2020 (when the provision of contact tracing information became mandatory).[47] The *Protection of Information Act* thus puts SafeWA data beyond the reach of the police, including in response to any pending but incomplete requests or orders provided to WA Health at the time that the Act came into force.[48] The *Protection of Information Act* also puts SafeWA data beyond the control of other legislative schemes that are incompatible with the policy aims of the Act, including the *Freedom of Information Act 1992* (WA) and the *State Records Act 2000* (WA), both of which otherwise govern access to and retention of information.[49] To avoid doubt, the *Protection of Information Act*

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[41] Ibid.
[42] Ibid.
[43] *Protection of Information (Entry Registration Information Relating to COVID-19 and Other Infectious Diseases) Act 2021* (WA) s 2 ('Protection of Information Act').
[44] The controversial *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) was introduced on 11 August 2020 and passed two days later, on 13 August, before receiving Royal Assent on the same day.
[45] *Protection of Information Act* s 6(1).
[46] Ibid s 5(2).
[47] Ibid s 11.
[48] Other than in so far as SafeWA data is necessary to investigate or prosecute an offence pursuant to s 6(4) of the *Protection of Information Act.*
[49] Ibid ss 5(1), 6(6).

includes an express provision that it binds the State.[50] The penalties for breaching the *Protection of Information Act* are significantly higher than penalties for non-compliance with a direction under the *EM Act*: imprisonment for 3 years for an individual and a $250,000 fine for a body corporate, although lesser penalties are available for summary conviction.[51]

The WA Government's initial legislative inaction on the security and privacy of SafeWA stands out when compared to the Australian Government's actions in relation to the national app, COVIDSafe, which was launched in late April 2020. The COVIDSafe app is a proximity app that uses Bluetooth functionality in order to automatically detect a person coming into proximity with another person using the app, rather than requiring users to register their presence at a place. It thus collects personal information but not location data. The Australian Government's press release for COVIDSafe on 27 April 2020 stated explicitly that the data collected would only be used by health officials:

> A new determination issued by the Minister for Health under the Biosecurity Act [2015 (Cth)] will ensure information provided voluntarily through the App will only be accessible for use by authorised state and territory health officials. Any other access or use will be a criminal offence.[52]

As alluded to in the press release, the COVIDSafe app was initially supported by delegated legislation: the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020 (Cth) ('the Contact Information Determination').[53] While the Contact Information Determination was reasonably short, it explicitly addressed the purposes for which COVIDSafe data could be used or disclosed; generally, undertaking or enabling contact tracing or otherwise supporting the operations, security and integrity of contact tracing.[54] The only permissible use of COVIDSafe data for law enforcement purposes was for investigating whether a requirement of the Contact Information Determination had been breached or for prosecuting a person for failing to comply with an emergency requirement determined under the *Biosecurity Act 2015* (Cth).[55]

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[50] Ibid s 4.
[51] Ibid s 6(3).
[52] The Hon. Greg Hunt MP, 'COVIDSafe: New App to Slow the Spread of the Coronavirus', press release, 27 April 2020 <https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/covidsafe-new-app-to-slow-the-spread-of-the-coronavirus>.
[53] Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—Public Health Contact Information) Determination 2020 (Cth). This Determination was made on 25 April 2020 by Greg Hunt, the Minister for Health, under a power in the *Biosecurity Act 2015* (Cth) s 477(1) to make determinations regarding emergency requirements during a 'human biosecurity emergency period'.
[54] Ibid cl 6(1) and (2).
[55] Ibid cl 6(2)(d).

Although from a regulatory perspective this does not appear dissimilar to what was done in WA, a key difference is that determinations made under this specific power in the *Biosecurity Act 2015* (Cth) are boosted by the presence of a Henry VIII clause in the Act that elevates the determination to the status of primary legislation. In short, the Contact Information Determination 'applie[d] despite any provision of any other Australian law',[56] including law enforcement powers in other legislation.

Even though the Contact Information Determination was already powerful due to the Henry VIII clause, it was quickly replaced by legislation. Parliament debated the Privacy Amendment (Public Health Contact Information) Bill 2020 to amend the *Privacy Act 1988* (Cth) for two days and it was scrutinised by both the Parliamentary Joint Committee on Human Rights[57] and the Senate Standing Committee for the Scrutiny of Bills.[58] The *Privacy Amendment (Public Health Contact Information) Act 2020* (Cth) was passed on 14 May 2020 and came into force on 16 May 2020, at which point the Contact Information Determination was repealed. The amendments included generally limiting the use of COVIDSafe data to contact tracing[59] and, to avoid any doubt about the extent of the privacy protections being granted to COVIDSafe data, a statement that the Act overrides any inconsistent Australian laws.[60] The amendments also acknowledged that COVIDSafe data required stronger privacy protections and that this was, in part, to 'encourage public acceptance and uptake' of the app.[61] The Australian Government also entered into bilateral agreements with every state and territory on the collection, use and disclosure of COVIDSafe data. The Commonwealth-WA agreement was signed by the Director General of Health on 7 August 2020.[62]

Curiously, WA was not alone in rolling out contact tracing systems without privacy protection for the resulting data. Data privacy law scholar Graham Greenleaf pointed out in a paper written in December 2020, for example, that all states and territories were now mandating the provision of contact tracing

[56] *Biosecurity Act 2015* (Cth) s 477(5).
[57] Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report* (Report 6 of 2020, 20 May 2020, 5-15; and Report 8 of 2020, 1 July 2020, 17-25).
[58] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest* (Digest 8 of 2020, 17 June 2020, 10-19; and Digest 9 of 2020, 6 August 2020, 55-64).
[59] *Privacy Act* s 94D(2). There are some extra permissible uses of the data around the operation of the app and for investigation contraventions of the privacy protections.
[60] Ibid s 94ZD.
[61] Ibid s 94B(a). For further analysis of the privacy implications of the COVIDSafe app, see Normann Witzleb and Moira Paterson, 'The Australian COVIDSafe App and Privacy: Lessons for the Future of Privacy Regulation', Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 165-80.
[62] Commonwealth of Australia-Western Australia, *Agreement on Collection, Use and Disclosure of COVIDSafe Application (COVIDSafe) Data*, signed on 31 July 2020 and 7 August 2020, <https://www.health.gov.au/sites/default/files/documents/2020/09/bilateral-agreements-on-collection-use-and-disclosure-of-covidsafe-data-bilateral-agreement-with-wa-on-collection-use-and-disclosure-of-covidsafe-data.pdf>. This URL is now defunct.

information, including by QR apps, but that their governments had 'not taken responsibility for the privacy consequences of doing so'.[63] Moreover, he warned that the location data being built up through use of QR apps, particularly centralised government apps like SafeWA, is a 'honey pot' of information that 'may be very attractive to Police, ASIO [Australian Secret Intelligence Organisation], or other investigators'.[64] He concluded that under the state and territory privacy laws then in place, app data 'is susceptible to compulsory disclosure, and even discretionary voluntary disclosure, to a very wide range of entities, for purposes that have nothing to do with contact tracing'.[65] The 'necessary response', in his view, was legislation that provided protection equivalent to that granted to the Commonwealth's COVIDSafe app with the goal that the information collected is prohibited from being used for anything other than contact tracing.[66]

The potential risks in collecting personal information by the SafeWA System, at least in respect of privacy, were quickly recognised in at least some quarters in WA. On 28 January 2021 the WA Auditor General sought information from WA Health, under its audit power of information systems,[67] about the 'integrity, availability and confidentiality' of data collected by SafeWA.[68] This inquiry was, at least at the start, part of the routine business of the Auditor General, which annually audits a selection of government applications that deliver services to stakeholders, including the public.[69] WA Health asked for the audit to be deferred in order to allow for updates to the SafeWA System to account for the recent expansion of the registration requirements, and the rollout of vaccinations, to take place.[70] When the audit commenced in March 2021, WA Health told the Auditor General that the police had accessed SafeWA data.

IV TRANSPARENCY, ACCOUNTABILITY AND THE RULE OF LAW

Delegation of power from parliament to the executive in times of emergency or crisis —a worldwide pandemic almost certainly being properly described as both— is understandable and will often be necessary in order to enable an agile and flexible response.[71] As Stephenson, Freckelton and Bennett have observed, delegation ensures that 'timely and decisive action can be taken to respond to unpredictable

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[63] Greenleaf (n 22) 2.
[64] Ibid 3-4.
[65] Ibid 3.
[66] Ibid 4.
[67] *Auditor General Act 2006* (WA) s 25.
[68] Western Australia Auditor General (n 4) 2-3.
[69] Ibid 2.
[70] Ibid 3, 7.
[71] See, eg, Senate Standing Committee (Exemption of Delegated Legislation, Final Report) (n 9) (discussing why the power to make legislation is delegated).

and rapidly evolving situations'.[72] However, there is a need to strike the right balance between protection of the public, and protection of civil rights, including (but not limited to) the right of privacy.[73] It is, however, the case that, as Boughey has observed, the usual and 'fairly comprehensive' mechanisms by which Australian governments are held to account are, in times of emergency, often 'significantly eroded'.[74]

Common mechanisms by which governments are held to account vis-à-vis powers exercised by the executive include the scrutiny of delegated legislation by parliament, or through one of its committees, and scrutiny by courts by way of judicial review of the validity of delegated legislation or of powers exercised pursuant to a statute. In WA, the requirements for the making and interpretation of subsidiary legislation are contained in Part IV of the *Interpretation Act 1984* (WA) ('*Interpretation Act*'). The *Interpretation Act* sets out who has power to make subsidiary legislation.[75] It provides that all subsidiary legislation must be published in the *Gazette*;[76] that certain types of subsidiary legislation must be laid before Parliament;[77] and that certain 'regulations, rules, local laws or by-laws' may provide that contravention will constitute an offence, penalised by way of fine (not exceeding $1,000).[78] The *Interpretation Act* therefore plays an important role in providing certain checks and balances on executive power exercised by way of subsidiary legislation. However, an Act that empowers the making of subsidiary legislation can exempt that subsidiary legislation from some of the checks and balances set out in the *Interpretation Act* (for example, by exempting it from publication in the *Gazette*). Moreover, the checks and balances in the *Interpretation Act* simply do not apply at all where executive power is exercised other than by way of subsidiary legislation.

The following section discusses whether in fact that No 9 Directions and subsequent directions underpinning the SafeWA System[79] (the 'SafeWA Directions') can properly be classified as subsidiary legislation at all. We then proceed to discuss why, even if the directions *are* a form of subsidiary legislation, there was no prospect of either parliamentary or judicial scrutiny of them. Finally, we consider rule of law issues pertaining to the SafeWA directions: these issues

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[72] Peta Stephenson, Ian Freckelton and Belinda Bennett, 'Public Health Emergencies in Australia', in Belinda Bennett and Ian Freckelton (eds), *Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian Law* (Federation Press, 2021) 82.
[73] See, eg, Belinda Bennett, Terry Carney and Richard Bailey, 'Emergency Powers and Pandemics: Federalism and the Management of Public Health Emergencies in Australia' (2012) 31(1) *The University of Tasmania Law Review* 37, 39 referring to Centre for Public Health Law Report 2006 [reference omitted].
[74] Boughey (n 8) 168.
[75] *Interpretation Act 1984* (WA) s 40 ('Interpretation Act').
[76] Ibid s 41(1)(a).
[77] Ibid s 42(1).
[78] Ibid s 43(6).
[79] That is, the Closure and Restriction (Limit the Spread) Directions Nos 10-12.

arise primarily from failure to publish the directions in the *Gazette* as well as in any easily accessible and permanent form, as well as the duration of directions.

A Status of Directions

The initial No 9 Directions, as already noted, were issued pursuant to powers granted to the Police Commissioner, in his capacity as State Emergency Coordinator, in the *EM Act*.[80] The *EM Act* does not explicitly consider the status of any such directions. The *Interpretation Act*, however, defines subsidiary legislation by listing an array of instruments, which list does not specifically include 'directions.' However, that definition includes a catch all provision such that 'subsidiary legislation' also includes any 'other instrument, made under written law and having 'legislative effect'.[81]

In *Sea Shepherd Australia Ltd v State of WA*,[82] Edelman J was required to consider whether an exemption instrument made pursuant to a statute and exempting various persons from the operation of that statute was 'subsidiary legislation' within section 5 of the *Interpretation Act*. The decision proceeded on the basis that that question depended on establishing whether the exemption had legislative effect (in which case, according to his Honour, it would be 'subsidiary legislation'[83]) or administrative effect (in which case it would not be subsidiary legislation within the meaning of the Act[84]). Edelman J considered the meaning of 'legislative effect' as that expression is used in the *Interpretation Act*. His Honour noted that there is 'no clear guidance' within the *Interpretation Act*, so it is necessary to turn to 'other contexts and legislative approaches' relevant to the expression.[85] He explained that the starting point is to determine whether an instrument 'creates … a rule of conduct or a declaration as to power, right or duty (in which case it has legislative effect)'.[86] However, while this is the proper starting point, his Honour found there were a number of other factors that needed to be taken into account in order to determine whether or not a particular instrument has 'legislative effect'.[87] He concluded:

> At the end of the day, the question of whether an instrument has legislative effect is to be answered by considering whether the instrument bears sufficient resemblance to legislation, having regard to those qualities usually present in legislation. The more

[80] *EM Act* ss 71 and 72A.
[81] *Interpretation Act* s 5.
[82] (2014) 313 ALR 208 ('*Sea Shepherd*').
[83] Ibid [8].
[84] Ibid [7].
[85] Ibid [51].
[86] Ibid [77].
[87] Ibid [78].

legislative qualities that are present in the instrument the more it is likely to have a legislative effect.

At first blush it appears uncontroversial to suggest that the SafeWA Directions must have legislative effect and therefore likely constitute a form of subsidiary legislation within the meaning of the *Interpretation Act*.[88] After all, the SafeWA Directions do not merely apply an existing law, but rather seek to impose new obligations on members of the public. Moreover, the SafeWA Directions prescribe enforceable penalties, including imprisonment, for non-compliance. In this regard, they appear to be 'an instrument of legislative effect'.[89] However, as per *Sea Shepherd* this is just the starting point and various other factors, as enumerated in that judgment, must be taken into account. It is not necessary to apply those factors to the SafeWA Directions in order to reach a definitive conclusion about whether or not they have 'legislative effect'. This is because, legislative effect aside, there is one overriding reason that the SafeWA Directions are not subsidiary legislation within the meaning of the *Interpretation Act*. That is that directions issued under Part 8 of the *EM Act* (which includes the sections pursuant to which the Directions underpinning the SafeWA System were issued) may, as provided for in the enabling legislation, be given 'orally or in writing.'[90] The fact that such directions can be issued orally suggests that they cannot properly to be regarded as 'subsidiary legislation', principally because the *Interpretation Act* itself only applies to written laws.[91] Moreover, an oral direction would likely not be considered an 'instrument' within the meaning of the definition of 'subsidiary legislation' because it is not written, and because, until reduced to writing, it is not capable of being published (and the *Interpretation Act* requires *all* subsidiary legislation to be published in the Gazette.[92] While the same cannot of course be said of directions issued in writing (as the SafeWA Directions were), it seems unlikely that Parliament would have intended to create a situation where oral directions are not subsidiary legislation but written directions are, where the effect of the directions on the public is the same.

It is also noteworthy that the wording of the *EM Act* itself provides that directions issued under Part 8 (which includes the sections pursuant to which the SafeWA Directions were issued) need not be published in the *Gazette* 'despite the Interpretation Act 1984 section 41 (*to the extent to which it applies*)…'.[93] The

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[88] *Interpretation Act* s 5.
[89] *Sea Shepherd* (n 82) [77].
[90] *EM Act* s 77(1). However, if given orally the directions must be confirmed in writing 'within 2 working days' unless 'within that period it is complied with or cancelled': s 77(2).
[91] *Interpretation Act* s 3.
[92] Ibid s 41. Although in fact, and as discussed further below, No 9 Directions were subject to an exemption from the requirement to be published in the Gazette pursuant to *EM Act* s 77(2A)(b).
[93] *EM Act* s 41.

emphasised words foreshadow that section 41 will not necessarily apply: the only reason that would be the case is that the directions are not subsidiary legislation.[94] Further supporting a conclusion that the SafeWA Directions are not a form of subsidiary legislation is the fact that they are not to be found on the official WA Legislation website under 'Subsidiary Legislation'.[95]

If the SafeWA Directions are not a form of subsidiary legislation—despite the fact that contravention of them constitutes a criminal offence that may attract imprisonment—they are not subject to any of the checks and balances set out in the *Interpretation Act*. This position, it should be said, is not unique to Western Australia. O'Brien and Waters observed that even though public health orders 'have all the features of law and are being applied as legal requirements', yet 'it seems that governments around Australia have been resistant to the argument that public health emergency declarations or public health emergency orders are legislative instruments.'[96] In respect of orders, specifically, they note that it is an 'open question' in all jurisdictions other than the Commonwealth as to whether these are 'subordinate legislation' (or 'delegated legislation').[97] The position at national level is clear: directions ordered by the Federal Health Minister under the *Biosecurity Act 2015* (Cth) ('*Biosecurity Act*') (the substantive legislation pursuant to which a human biosecurity emergency was declared by the then Federal Health Minister in response to COVID[98]) are *not* legislative instruments. This is expressly provided for in the *Biosecurity Act* itself,[99] and, as such, those directions are neither subject to disallowance, nor tabled in Parliament. In terms of the position in other jurisdictions, Stephenson and Crowe have analysed the status of COVID-related directions issued by the Chief Health Officer in Queensland, pursuant to powers conferred by the State's public health legislation, and concluded that these seem not to constitute 'subordinate legislation' within the meaning of the *Statutory Instruments Act 1992* (Qld) ('*Statutory Instruments Act*'). Thus, they 'occupy a liminal status: they have the force of law but are exempt from the usual scrutiny

[94] As noted, *EM Act* s 41 requires all subsidiary legislation to be published in the *Gazette*.

[95] Western Australian Legislation <https://www.legislation.wa.gov.au/legislation/statutes.nsf/home.html>. In fact, only 7 sets of directions are currently listed in the table of subsidiary legislation in force (Table 4, Western Australian Legislation <https://www.legislation.wa.gov.au/legislation/statutes.nsf/tablessubs.html>) and none are listed in the table of subsidiary legislation no longer in force (Table 10, Western Australian Legislation <https://www.legislation.wa.gov.au/legislation/statutes.nsf/tablessubs.html>).

[96] O'Brien and Waters (n 8) 357.

[97] Ibid.

[98] See Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020, made pursuant to *Biosecurity Act 2015* (*Cth*) s 475.

[99] *Biosecurity Act 2015* (*Cth*) s 572.

applying to such measures.'[100] For the reasons set out above, the same can be said of the SafeWA Directions.

In the following section, however, we consider why even *if* the SafeWA Directions can properly be regarded as a type of subsidiary legislation, there was nevertheless no prospect of scrutiny of these directions by the WA Parliament. We then consider why, regardless of the status of the SafeWA Directions, there was also no prospect of challenge by the courts.

B No Prospect of Scrutiny by Parliament

The *Interpretation Act* provides that all 'regulations' must be laid before Parliament within six sitting days after being published in the WA *Gazette*.[101] Gazettal is therefore a precondition of any regulations being laid before parliament. Quite apart from the fact that the SafeWA directions are not 'regulations',[102] (and assuming for the sake of argument that the SafeWA Directions *were* subsidiary legislation) the *EM Act* exempts directions made under Part 6 (pursuant to which the SafeWA Directions were made) from publication in the Gazette.[103]

The exemption from publication in the *Gazette* has another implication. Upon publication in the *Gazette* or publication pursuant to another written law, an instrument (being 'subsidiary legislation' or 'another form of instrument that is subject to disallowance'[104]) is referred to the Joint Standing Committee on Delegated Legislation (JSCDL) for consideration.[105] The JSCDL's terms of reference enable it to enquire into whether the instrument:

(a) is within power;
(b) has no unintended effect on any person's existing rights or interests;

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[100] Peta Stephenson and Jonathan Crowe, 'Queensland Public Health Laws and COVID-19: A Challenge to the Rule of Law?', *Australian Public Law* (21 August 2020) <https://auspublaw.org/2020/08/queensland-public-health-laws-and-covid-19-a-challenge-to-the-rule-oflaw/>. It is also instructive to note the much clearer position that applies to directions issued by the Health Minister under the *Biosecurity Act 2015* (Cth) s 478(1): these are, by virtue of s 572, expressly stated not to be legislative instruments. Cf the position in Victoria: discussed by O'Brien and Waters (n 8) 357.

[101] *Interpretation Act* s 42(1), (8).

[102] Regulations are defined as 'including any rules, local laws or by-laws': *Interpretation Act* s 42(8). Each of these expressions (regulations, rules, local laws or by-laws) are defined in the *Interpretation Act* s5 and each definition requires that the regulation, rule, local law or by-law (as the case may be) is made 'under an Act in which the term is used.' The SafeWA Directions were made pursuant to powers under the *EM Act* but neither those the powers, nor the directions themselves, are described as 'regulations', 'rules', 'local laws' or 'by-laws'.

[103] *EM Act* s 77(2A)(b).

[104] Legislative Council Standing Orders (WA) sch 1 cl 10.9.

[105] Ibid cl 10.5.

(c) provides an effective mechanism for the review of administrative decisions; and
(d) contains only matter that is appropriate for subsidiary [delegated] legislation.[106]

The power of JSCDL to scrutinise subsidiary legislation (or another instrument subject to disallowance) is only enlivened, pursuant to the Standing Orders, once the relevant instrument is published in the *Gazette* or 'otherwise published pursuant to another written law'.[107] Given that the SafeWA Directions were not required to be (and were not otherwise) published in the *Gazette*, the JSCDL could only consider the SafeWA Directions if they were 'published pursuant to another written law'.[108] The *EM Act* does require that directions 'must be published in the manner that the Minister considers suitable in the circumstances of the emergency.'[109] The question, then, is whether publication in the manner the Minister considers suitable constitutes publication 'pursuant to another written law' within the meaning of the Standing Orders.[110] This is not clear cut, but there is a strong argument that any publication of directions that does occur would *not* be considered made pursuant to a written law (i.e. the *EM Act*) but rather pursuant to whatever requirements are imposed by the Minister,[111] taking into account the circumstances of the emergency. The wording used in the *EM Act* admits of wide discretion, which would presumably include not requiring publication at all (for example, where directions are intended to be short-lived). If that interpretation is correct, then JSCDL had no power to scrutinise the SafeWA directions at all.[112]

In fact, even if JSCDL *did* have power to scrutinise the SafeWA directions, it is unlikely it would have done so. This is because JSCDL can only recommend to Parliament that it disallow subsidiary legislation if it is subject to disallowance under section 42 of the *Interpretation Act* or if the relevant enabling legislation prescribes disallowance. As directions are not within the definition of 'regulations',

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[106] Ibid cl 10.6.
[107] Ibid cl 10.5.
[108] Ibid cl 10.5.
[109] *EM Act* s 77(2A)(c).
[110] As per Legislative Council Standing Orders (WA) sch 1 cl 10.5.
[111] Which Minister is not actually defined in the *EM Act*, but would likely be understood as the Minister for Emergency Services. Indeed, it was WA's Minister for Emergency Services who declared a State of Emergency in relation to the COVID-19 pandemic, on 15 March 2020.
[112] Even if the directions had been published and thus within the power of JSCDL to scrutinise, in practice it is unlikely that the Committee would have been so scrutinised given that there is, in any event, no power to 'disallow' directions pursuant to s 42 of the *Interpretation Act* (as only 'regulations' can be disallowed, and this does not include directions) or otherwise pursuant to the relevant enabling legislation. As such, directions tend to escape scrutiny by JSCDL because there is little point in JSCDL considering subsidiary legislation in respect of which it has no power to recommend disallowance. The JSCDL announced in its annual report for 2011, for example, that due to deadlines and limited resources, it 'resolved … to consider only those instruments that are [explicitly] subject to disallowance': Report of the Joint Standing Committee on Delegated Legislation, *Annual Report* (2011) 1.

and because the *EM Act* does not prescribe disallowance, they cannot be disallowed. As such, directions tend to escape scrutiny by JSCDL because there is little point in JSCDL considering subsidiary legislation in respect of which it has no power to recommend disallowance.[113]

The SafeWA Directions therefore fell squarely into an 'oversight gap'. While the JSCDL scrutinised 35 COVID-19-related pieces of subsidiary legislation in 2020, the SafeWA Directions were not among them.[114] Even if the SafeWA Directions are a form of subsidiary legislation, the fact that they were exempt from publication in the *Gazette* (and because they were arguably not 'otherwise published pursuant to another written law' within the meaning of the Standing Orders[115]) meant they were not referable to JSCDL. And even *if* the directions had been referable to JSCDL, it would likely not have scrutinised them anyway given their stated policy of not scrutinising instruments that are not disallowable.[116]

Academics and politicians have raised other concerns about failures of parliamentary scrutiny of executive decision making at both national and sub-national level, both prior to and during the COVID-19 pandemic. At Commonwealth level, the Senate Standing Committee for the Scrutiny of Delegated Legislation ('Standing Committee') has remarked upon the trend of using delegated legislation to deal with 'significant policy matters' and the prevalence of delegated legislation that is then exempt from disallowance.[117] The Standing Committee is concerned that this trend has 'significant consequences for the democratic foundations of our system of government'.[118] Referring to the delegation of decision-making at Commonwealth level, Tulich and Murray have pointed out that even legislative instruments that are exempt from disallowance must still be tabled in parliament, but they refer to the Standing Committee's final report acknowledging that '[d]isallowance is widely acknowledged as the principal measure of control the Houses of Parliament can exercise over delegated legislation'.[119] In fact, the Standing Committee observed that the disallowance mechanism was the '*only* substantive way scrutiny of delegated legislation can

[113] The JSCDL announced in its annual report for 2011, for example, that due to deadlines and limited resources, it 'resolved … to consider only those instruments that are [explicitly] subject to disallowance': JSCDL Report (n 112).

[114] Report of the Joint Standing Committee on Delegated Legislation, *Annual Report* (2020) 6 and appendix 2. Neither the 2021 nor 2022 Annual Reports mentioned the scrutiny of any COVID-19-related subsidiary legislation: Report of the Joint Standing Committee on Delegated Legislation, *Annual Report* (2021) and Annual Report (2022).

[115] Ibid cl 10.5.

[116] This was confirmed to co-author Narrelle Morris by a Legal Advisory Officer to the Legislative Council Committee Office of Western Australia on 8 September 2021.

[117] The Committee noted that, in 2020, 17.4 per cent of delegated legislation was exempt from disallowance: Senate Standing Committee (Exemption of Delegated Legislation, Final Report) (n 9) xvi.

[118] Ibid.

[119] Tulich and Murray (n 8) 310 citing Senate Standing Committee Final report [reference omitted].

occur'.[120] In relation to delegated legislation made at Commonwealth level in response to COVID-19, Tulich and Murray note that parliamentary scrutiny has been 'severely curtailed',[121] and point to findings of the Standing Committee noting that in the first half of 2020, '20 percent of all COVID-19 related legislative instruments made were exempt from disallowance.'[122]

Ng and Gray have similarly observed the 'limited level of parliamentary scrutiny' that exists at State level, but reflect that this tends to be 'after the fact rather than a consultative process prior to decisions being made.'[123] Boughey observes that many COVID-related orders or directions made in New South Wales and South Australia are also not disallowable: 'So while a parliamentary committee might read them, investigate them and report on them to parliament, there is nothing parliament can do if it thinks that the determinations go beyond the scope of what the Minister is authorised to do or that rules are disproportionate or unsuitable.'[124] While Boughey recognises the importance of governments being able to respond swiftly and effectively in a pandemic, she also queries whether the exclusion of disallowance is actually necessary,[125] and argues it 'should not be assumed that parliamentary processes will be divisive and/or delay effective implementation of necessary rules.'[126] Indeed, looking to the position at Commonwealth level, it appears that instances of disallowance are uncommon. Only 17 pieces of delegated legislation were disallowed between 2010 and 2019 out of the thousands of pieces of tabled legislation.[127] A further five pieces of delegated legislation have been disallowed, or taken to be disallowed, in 2020-22.[128]

C No Prospect of Scrutiny by The Courts

Not only were the SafeWA Directions not subject to parliamentary scrutiny, but there was little prospect of scrutiny by tribunals or courts. Merits review of emergency directions made under the *Public Health Act 2016* (WA) is available to the State Administrative Tribunal,[129] but not of directions made under the *EM Act*. Judicial review is, of course, available to challenge the validity of a power exercised pursuant to a statute. As Edelman J explained in *Palmer v State of Western*

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[120] Senate Standing Committee (Exemption of Delegated Legislation, Final Report) (n 9) xv-xvi [emphasis added].
[121] Tulich and Murray (n 8) 309.
[122] Ibid.
[123] Ng and Gray (n 8) 259.
[124] Boughey (n 8) 170.
[125] Ibid 174.
[126] Ibid 170.
[127] Senate Standing Committee (Exemption of Delegated Legislation, Final Report) (n 9) 7 [1.23].
[128] Parliament of Australia, Senate, Disallowance Alert, 2020-22 <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Disallowance_alert/>.
[129] *Public Health Act 2016* (WA) s 194.

Australia: 'If [an] … administrative or legislative act has a valid source of authority then the question is generally whether the act falls within that source or is ultra vires.'[130] In WA judicial review of administrative decisions is a power vested in the Supreme Court.[131] However, there are inherent limitations in obtaining judicial review. As Boughey has noted, these include cost, standing and the limitation on remedies.[132] Moreover, as Stephenson, Freckelton and Bennett observe, courts tend to take a 'more cautious' approach to reviewing government decisions during times of crisis, particularly when they involve the exercise of a discretionary power.[133]

In terms of the SafeWA directions, there is no reason to suspect that they were not authorised by the *EM Act* or otherwise invalid. Certainly, there seems to be no question that the initial declaration and subsequent declarations of a State of Emergency in 2020, which enlivened the power to issue the SafeWA directions, were invalid.[134] Further, as the High Court confirmed in *Palmer*, a challenge to the constitutional (as opposed to statutory) validity of the exercise of statutory powers is misplaced: any issue of constitutional validity goes to the primary legislation which provides for the exercise of those powers.[135]

D Rule of Law Issues

Even if the SafeWA Directions are not properly regarded to be a form of 'legislative instrument', they clearly impose obligations which are supported by court enforceable penalties. As O'Brien has noted, 'With orders directed to the population at large, these are, in effect, laws.'[136] Yet the SafeWA directions themselves were not published in the *Gazette*, having been exempted from that

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[130] (2021) 246 CLR 182 [225] ('*Palmer*').

[131] See, eg, *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) describing the prerogative jurisdiction of the Supreme Courts of Australia. See, also, Law Reform Commission of Western Australia, *Report on Judicial Review of Administrative Decisions* (Project No 95, December 2002) 3 noting that, in Western Australia, 'parties seeking judicial review generally invoke one or other of two separate areas of jurisdiction of the [Supreme] Court', those being the jurisdiction to grant prerogative remedies, and the jurisdiction to grant remedies of injunction and declaration.

[132] Boughey (n 8) 173.

[133] Stephenson, Freckelton and Bennett (n 72) 87.

[134] See, eg, *Palmer* (n 130) (Kiefel CJ and Keane J) noting that, in response to the question before the Full Court as to whether the *Quarantine (Closing the Border) Directions* (WA) and/or the authorising *Emergency Management Act 2005* (WA) were invalid on the basis that they infringed s 92 of the Constitution: 'No issue is taken as to whether the *Quarantine (Closing the Border) Directions* (WA) were validly authorised by the statutory provisions so that no other question remains for determination by a court'. While the judgment does not concern the SafeWA Directions, it does indicate that there was no ground to challenge the validity of the declaration of a State of Emergency, which declaration enlivened the powers pursuant to which the both the directions in question in *Palmer* and the SafeWA Directions were made.

[135] *Palmer* (n 130) [63] (Kiefel CJ & Keane J); [127] (Gageler J); [201]-[202] (Gordon J); [219] (Edelman J).

[136] O'Brien and Waters (n 8) 354.

requirement by the *EM Act*.[137] Neither are the SafeWA Directions to be found on the official WA Legislation website under 'Subsidiary Legislation'.[138] This means that there is no guaranteed permanent record of the directions themselves.

The WA Government's COVID-19 Coronavirus website had a SafeWA page that declared that it was 'mandatory for particular businesses and venues to maintain a contact register',[139] but the information and the links provided contained mostly general advice about the SafeWA app and its use; the SafeWA Directions were not provided. No webpage explained to the public, then or now, that the directions mandating the use of the SafeWA System were at one time embedded in a series of Closure and Restriction (Limit the Spread) Directions but were then transferred to standalone Contact Register Directions, before the Contact Register Directions No 4 were finally revoked on 14 April 2022.[140] More to the point, none of the titles of these directions contained the term 'SafeWA', which is the name that the public associated with state's contact tracing registration system. The SafeWA directions were instead provided on a 'State of Emergency Declarations' page of the COVID-19 website.[141] But the page itself sorted the COVID-19-related directions into one of four themes: travel and border: state-wide; regional travel; business and community activity; and health. It took a fair amount of searching to find the then current version of SafeWA Directions in the 'business and community activity' section, where the final version, Contact Register Directions No 4, was for some time sandwiched alphabetically, but unassumingly, between the Close Contact Modification (Schools and Approved Education Facilities) Directions and the COVID-19 Electricity Disconnection Moratorium. Moreover, the fleeting duration of some of the directions—mere days on occasion— means that it was difficult at the time, and is still difficult now, to obtain revoked directions, including the original No 9 Directions and Contact Register Directions Nos 1-4. While direct links on the 'State of Emergency Declarations' page to some revoked *EM Act* directions remained available in some cases,[142] the series of SafeWA directions

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[137] *EM Act* s 77(2A)(b).

[138] Western Australian Legislation <https://www.legislation.wa.gov.au/legislation/statutes.nsf/home.html>. This is mostly likely because, as discussed above, they do not constitute 'subsidiary legislation'.

[139] WA Government, 'COVID-19 coronavirus: SafeWA', <https://www.wa.gov.au/organisation/covid-communications/covid-19-coronavirus-safewa>.

[140] Contact Register (Revocation) Directions No 4 (WA).

[141] WA Government, 'COVID-19 coronavirus' <https://www.wa.gov.au/government/document-collections/covid-19-coronavirus-state-of-emergency-declarations>.

[142] For most of 2020-21, for example, the series of 62 separate Controlled Border for Western Australia Directions (WA) issued from November 2020 onwards were individually available. On 21 January 2022, however, this series was 'unofficially consolidated'. The unofficial consolidation advised the reader that the consolidation is not itself a direction made under the EM Act; that it 'does not replace, supersede or otherwise affect the validity' of any such direction; and that 'Persons wishing to ascertain their legal rights and obligations', it advised, should consult the individual 'legal instruments' that are available on the 'State

over time were never maintained in the 'business and community activity' section of the page, even though the PDFs themselves often remained online. By late 2022, only the Contact Register (Revocation) Directions were then available on the 'business and community activity' section.[143] By January 2023, however, all direct links to COVID-19 directions had been removed, apart from the one revoking the State of Emergency Declaration in November 2022. In other words, the revoked SafeWA directions can be found via Google, *if* one knows what they were titled, but the links to find them on the government website by browsing are gone.

Once again, this state of affairs is not unique to Western Australia. O'Brien has noted that many Australian jurisdictions, with the exception of New South Wales, Queensland and the Northern Territory, do not keep all iterations of directions and other public health orders made during COVID-19 on a publicly accessible website.[144] Apart from the obvious implications for transparency and scrutiny, the instability of many of these directions in itself can, as Stephenson and Crowe point out (albeit in relation to COVID-19 public health directions made in Queensland), 'make it difficult for members of the public (and lawyers) to know what the law is'.[145] This is, they note, a particular concern when penalties for non-compliance are substantial and where the orders are issued by a member of the public service who is 'not elected and accountable in the same way as Members of Parliament'.[146] These concerns apply equally to the SafeWA Directions given that they were enforceable by significant financial penalties and even imprisonment and were issued by a member of the public service, the State Emergency Coordinator.

It is understandable that, in an emergency, the exercise of the executive's powers to issue orders could be permitted without parliamentary scrutiny and may even be in the public interest. However, the continued exercise of unscrutinised executive power is not in the public interest, especially not when the power is being exercised with direct impact upon rights and freedoms, and even more so when the mechanism of that impact is government surveillance of private citizens. Safeguards to protect against endemic intrusion of executive power into the lives of private citizens are available. For example, subsidiary legislation made in

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of Emergency Declarations' page: : Unofficial Consolidation of the Controlled Border for Western Australia Directions (as at 21 January 2022) (WA) 1 <https://www.wa.gov.au/government/publications/unofficial-consolidation-of-the-controlled-border-western-australia-directions-21-january-2022>. However, the 62 separate directions were, by then, no longer listed on the 'Travel and border: State-wide' section, only the unofficial consolidation which should not – by its own recommendation – be legally relied upon. The direct links to all the directions, including the unofficial consolidation, have now been removed, as stated above.

[143] WA Government, COVID-19 coronavirus: Business and community activity' <https://www.wa.gov.au/government/document-collections/covid-19-coronavirus-business-and-community-activity>. This URL is now defunct.

[144] O'Brien and Waters (n 8) 355.

[145] Stephenson and Crowe (n 100).

[146] Ibid.

circumstances of a public emergency, whether under the *EM Act* or otherwise, could be subject to a sunset clause that requires legislation be enacted to retain the subsidiary legislation past 'sunsetting'. While this would be of limited utility in one sense—even a non-renewable sunset clause could not prevent a new direction in the same or similar terms being issued—the inclusion of such a clause precludes the continuance of outdated directions and might at least direct greater attention towards the content of continually 're-issued' directions. Moreover, as Ng and Gray have suggested, 'all delegated legislation and executive orders … should have an automatic expiry date that are [sic] of a short duration.'[147]

While there will always be practical limits to the volume and detail that parliaments, or their committees, are able to consider, entirely ring-fencing some subsidiary legislation from parliamentary scrutiny—such as through enabling Acts that make subsidiary legislation exempt from publication in the *Gazette*—is of particular concern. The justification for this is not clear, particularly where enabling Acts afford broad and sweeping power to the executive. For example, section 72A of the *Emergency Management Act* allows a hazard management officer or authorised officer to 'take, or direct, a person or a class of person to take, any action that the officer 'considers is reasonably necessary to prevent, control or abate risks associated with the emergency.' There are also consequential rule of law issues when orders are not even required to be published in the *Gazette*, even though contravention of those orders—as is the case with the SafeWA Directions—constitutes an offence and can attract potentially severe penalties, including imprisonment. Arguably, an even more fundamental concern is the status of orders and directions issued pursuant to the delegation of power to the executive. If such orders and directions are not even classed as subsidiary legislation (as is arguably the case with the SafeWA Directions), then the range of checks and balances stemming from the *Interpretation Act* simply do not apply. It is difficult to see why orders or directions which for all intents and purpose have the effect of legislation should not be subject to the same checks and balances set out in the *Interpretation Act* as apply to subsidiary legislation.

V CONCLUSION

Despite revelations that WA Police had accessed SafeWA data for the purpose of criminal investigations, public use of the SafeWA app continued through the critical stages in the COVID-19 pandemic and throughout 2022.[148] However, the fact that the SafeWA data had been used for purposes other than those which had been publicly stated, could have been seen by the public of Western Australia as a

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[147] O'Brien and Waters (n 8) 265.
[148] Laschon (n 11).

betrayal, with the actions taken by the WA Police having the potential to undermine confidence in and compliance with government action at a time when that confidence and compliance was most needed. As Graham Greenleaf had forecast in December 2020, the creation of new databases would prove alluring to police.

Police access to and use of contact tracing data was not an exclusively WA problem. Queensland Police gained access to Queensland's Check In Qld app in June 2021 via a search warrant in relation to the theft of a police-issued Taser and gun.[149] Victoria Police tried but failed to gain access to Service Victoria app data on at least three occasions in December 2020.[150] Moreover, outside Australia, police have similarly gained access to citizens' information meant to be provided only for COVID-19 contact tracing. In Singapore, for example, the Government said in March 2020 that the data collected by its TraceTogether app would 'only be used solely for the purpose of contact tracing of persons possibly exposed to covid-19' but Singapore police have lawful access to the data.[151] Police access to contact tracing information also allegedly happened in Germany.[152] Prohibiting police access to contact tracing data through robust legislative action is, however, a goal that has been sought and realised elsewhere: for example, New York State passed a law in December 2020 prohibiting police access to contact tracing information.[153]

One of the clearest lessons to be learned from this saga is that without statutory protections prohibiting the use of contact tracing data, the temptation (or duty) to utilise such data for other purposes in the public interest will outweigh the force of a simple policy statement about the purpose of its collection by a government. Indeed, then Premier McGowan admitted in June 2021 that failing to protect SafeWA data from police access from the start was an 'oversight', but one that had occurred during a 'once-in-a-century pandemic' that had resulted in many government initiatives being 'rushed'.[154] Certainly, the deluge of legislation, legislative amendments and delegated legislation drafted in haste in every jurisdiction to adapt to COVID-19 has meant that some gaps or flaws are not spotted

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[149] Matt Dennien, 'Queensland Police Use of Check-in Data Sparks Reform Calls', *Brisbane Times* (online, 28 June 2021) <https://www.brisbanetimes.com.au/national/queensland/queensland-police-use-of-check-in-data-sparks-reform-calls-20210628-p584x8.html>.

[150] Michael Fowler, 'Police Sought Access to QR Check-In Data Intended for Contact Tracing', *Age* (Melbourne, 21 June 2021) < https://www.theage.com.au/politics/victoria/police-sought-access-to-qr-check-in-data-intended-for-contact-tracing-20210621-p582x4.html>.

[151] Mia Sato, 'Singapore's Police Now have Access to Contact Tracing Data', *MIT Technology Review* (5 January 2021) <https://www.technologyreview.com/2021/01/05/1015734/singapore-contact-tracing-police-data-covid/>.

[152] 'German Restaurants Object after Police Use COVID Data for Crime-fighting', *Reuters* (1 August 2020) <https://www.reuters.com/article/us-health-coronavirus-germany-privacy/german-restaurants-object-after-police-use-covid-data-for-crime-fighting-idUSKCN24W2K6>.

[153] 'Governor Cuomo Signs Into Law Protections from Contact Tracing Data Sharing with Police, Immigration Enforcement', New York Civil Liberties Union Press Release, 24 December 2020 <https://www.nyclu.org/en/press-releases/new-york-installs-privacy-safeguards-contact-tracing>.

[154] Quoted in Laschon (n 11).

until some distance down the track. Yet, the WA Government could hardly be said to have been unprepared or uninformed about the issues: the nationwide debate over the privacy implications of the Federal Government's COVIDSafe app had been aired at length in mid-2020. Why, then, were privacy implications for the SafeWA System apparently not fully considered? It was the Director General of Health who had signed the Cth-WA COVIDSafe bilateral agreement relating to the Commonwealth app in mid-2020, a good six months before SafeWA was launched. Thus, there is a reasonable expectation that the Department of Health could have insisted on stronger protections. That said, WA lacks a comprehensive public sector privacy framework and stands alone in lacking comprehensive privacy legislation, or at least a set of privacy principles, applicable to the public sector.[155] This, by the WA Government's own admission, has resulted in a situation where 'personal information is protected by a patchwork of rules, and public sector agencies must operate within a complex, inefficient system in order to lawfully and responsibly manage and share the information they hold.[156] Had a privacy framework applicable to the public sector been in place in WA it may arguably have prompted stronger action to have been taken in relation to protecting SafeWA data.

The WA Government eventually legislated to cease access by WA Police to SafeWA data for the purposes of criminal investigation. While WA's protections around SafeWA data now more closely emulate the protections put in place by the Commonwealth Government in relation to the COVIDSafe app, there are still inconsistencies of approach across Australian jurisdictions. The Australian Capital Territory has now passed legislation to restrict the use of its information to the 'permitted purpose' of contact tracing or a purpose relating to contact tracing,[157] and Victoria has now passed amendments to the *Public Health and Wellbeing Act 2008* (Vic) that seek to 'safeguard' contact tracing information[158] (although the amendments have been criticised for ambiguity, potential abuse and possible future

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[155] All other states but South Australia have principles-based information privacy legislation that applies to the public sector: *Information Privacy Act 2014* (ACT); *Privacy and Personal Information Protection Act 1998* (NSW); *Information Act 2002* (NT); *Information Privacy Act 2009* (Qld); *Personal Information and Protection Act 2004* (Tas); *Privacy and Data Protection Act 2014* (Vic). In South Australia, information privacy principles applying to the state's public sector are set out in a Cabinet Administrative Instruction: Premier and Cabinet Circular, *Information Privacy Principles (IPPS) Instruction* (PC 012, May 2020). The situation in WA is, however, likely to change in the not too distant future with the WA government set to introduce new privacy and responsible information sharing laws: WA Government, 'Privacy and Responsible Information Sharing Fact Sheet' 14 December 2022 <https://www.wa.gov.au/government/publications/privacy-and-responsible-information-sharing-fact-sheet>.

[156] WA Government, *Privacy and Responsible Information Sharing for the Western Australian Public Sector* (Discussion Paper, 2019) 9.

[157] See the *COVID-19 Emergency Response (Check-in Information) Amendment Act 2021* (ACT) which amended the *COVID-19 Emergency Response Act 2020* (ACT).

[158] The amendments were made by the *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Vic) to insert provisions relating to 'Safeguards for contact tracing information' as pt8A div8 of the *Public Health and Wellbeing Act 2008* (Vic).

expansion of situations in which others are permitted to obtain such information[159]). That each Australian jurisdiction has its own governance structures and regulation around its own contact tracing systems is, perhaps, inevitable given Australia's constitutional arrangements. But the inconsistency of systems and of the laws relating to those systems is likely to be problematic, not only in terms of the efficiency of work done by contact tracers, but also for the protection of security and privacy interests of Australian citizens and residents.

More can still be done legally to maintain trust in the governance and regulation of public surveillance tools like contact tracing apps and to protect the privacy of individuals who use them. The Office of the Australian Information Commissioner (OAIC), and its state and territory counterparts, produced National COVID-19 Privacy Principles and some draft guidelines in September 2021. These are meant to prompt a nationally consistent best-practice approach to the privacy risks around technological solutions to the COVID-19 pandemic. Yet, on access to contact tracing for general police or law enforcement purposes, the relevant 'Purpose limitation' principle only says:

> Information that is required to be collected for a specific purpose related to mitigating the risks of COVID-19 should generally not be used for other purposes. This is particularly important to ensure that Australians can have trust and confidence that their personal information is protected so they can continue to support the public health response to COVID-19.[160]

The qualification 'should generally' hardly resounds with force, and it took less than a week from the public release of the Privacy Principles for data privacy scholars Graham Greenleaf and Katharine Kemp to declare that they are 'vague' and 'completely inadequate'.[161] Moreover, the OAIC's relevant guideline suggests that community trust and confidence in using QR Codes for contact tracing purposes is increased when health orders 'expressly prohibit access to contact tracing data for law enforcement purposes'.[162]

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[159] Law Institute of Victoria, *Position Paper in Response to the Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021*, 10 November 2021, 20 <https://www.liv.asn.au/download.aspx?DocumentVersionKey=b72eeeac-cfaf-4e06-94bb-4e4abc507a63 >.

[160] Office of the Australian Information Commissioner, 'National COVID-19 Privacy Principles', 2 September 2021 <https://www.oaic.gov.au/privacy/guidance-and-advice/national-covid-19-privacy-principles/>.

[161] Graham Greenleaf and Katharine Kemp, 'Police access to COVID check-in data is an affront to our privacy. We need stronger and more consistent rules in place', *The Conversation*, 7 September 2021 <https://theconversation.com/police-access-to-covid-check-in-data-is-an-affront-to-our-privacy-we-need-stronger-and-more-consistent-rules-in-place-167360>.

[162] Office of the Australian Information Commissioner, 'Guidelines for State and Territory Governments – Creating Nationally Consistent Requirements to Collect Personal Information for Contact Tracing Purposes', 3 September 2021 <https://www.oaic.gov.au/privacy/guidance-and-advice/guidelines-for-state-and-territory-governments-creating-nationally-consistent-requirements-to-collect-personal-information-for-contact-tracing-purposes/>.

It may well be true that an express prohibition written within the health order itself helps to build community trust and confidence, although it seems that for six months, Western Australians relied only on then Premier McGowan's word that their personal information would be used only for COVID-19 contact tracing purposes. Still, the fact remains that an executive order, particularly if it is not even in the form of a legislative instrument (as discussed above), cannot override express powers granted in other legislation (such as police powers of criminal investigation), unless the enabling legislation is drafted with an appropriate Henry VIII clause. It is *precisely* those legislative powers that the WA Police exercised from December 2020-June 2021 to access SafeWA data. However, the deployment of Henry VIII clauses to allow the executive greater power to affect legislation made by Parliament in such circumstances potentially solves one problem while raising other, more serious implications for the separation of powers and the role of parliamentary oversight of subsidiary legislation.

Ultimately, police use of SafeWA data for purposes other than contact tracing not only exposed a loophole in the purpose for which that data could be used but exposed a tension between Government policy on data access, on one hand, and data access laws, on the other. Although the Government may have trusted WA Police to respect its publicly-stated policy on the use of SafeWA data, in the absence of clear, legislatively-embedded purposes limiting the use of that data, there was always going to be a risk that that trust would simply fail to deliver the protections that had been promised. That public trust in the SafeWA System was not (apparently) undermined is perhaps unsurprising given that, in general, it has been shown that (at least during 2020) trust in Australian governments, including state governments, and particularly the WA Government, rose dramatically as a result of the pandemic.[163] However, it is also the case that the majority of Australians, while comfortable to share their personal information in order to 'combat COVID-19' also expect that information to be protected.[164]

By April 2022, Western Australia had started to wind down the use of use of mandatory contact tracing registration, as the state was already in the grip of exponential community spread of COVID-19.[165] Calls to discontinue contact

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[163] Shaun Goldfinch, Robin Gauld and Ross Taplin, 'Trust in Government Soars in Australia and New Zealand during Pandemic', *The Conversation*, 12 February 2021 <https://theconversation.com/trust-in-government-soars-in-australia-and-new-zealand-during-pandemic-154948>.

[164] Office of the Australian Information Commissioner, *Australian Community Attitudes to Privacy Survey 2020*, September 2020, 5 <https://www.oaic.gov.au/__data/assets/pdf_file/0015/2373/australian-community-attitudes-to-privacy-survey-2020.pdf>.

[165] Jessica Warriner, 'WA Records Over 1,000 New COVID-19 Cases as CHO Warns Asymptomatic Infections 'Out There', *ABC News* (Online, 25 February 2022) <https://www.abc.net.au/news/2022-02-25/wa-records-more-than-1000-new-covid-19-cases/100860014>.

tracing entirely were heard.[166] The State of Emergency in Western Australia finally ended on 4 November 2022.[167] However, the expanded use of the ServiceWA app (which was introduced in early 2022 and incorporated the SafeWA check-in functionality) is designed to have more functionality and usage for government services over time.[168] Even if public trust in these important public health measures has not been significantly undermined by the SafeWA data breach saga, it is nevertheless hoped that the broader issues around data privacy and security will continue to be addressed.

As the impact of the COVID-19 pandemic lessens, many jurisdictions are now reviewing their legislative and other responses to ponder the lessons that can be learned. The WA Government, for example, has now amended the *EM Act* by means of the *Emergency Management Amendment (Temporary COVID-19 Provisions) Act* 2022 ('*EM Amendment Act'*), which was assented to on 21 October 2022. The *EM Amendment Act* made significant changes to the *EM Act* by introducing into it a new Part 6A entitled 'Temporary Provisions for management of COVID-19.[169] Part 6A came into operation on 3 November 2022.[170] The temporary nature of the provisions is borne out, at least at this stage, by the inclusion of a provision in the *EM Amendment Act* that will delete Part 6A from the *EM Act* automatically, two years and a day after Part 6A commenced.[171] However, the amendments to the *EM Act* included no changes to the existing section 77(2A) which exempts directions from being published in the *Gazette*. Moreover, Part 6A introduced broad-ranging powers in section 77Q that can be used while a COVID-19 declaration is in force, including a power for authorised officers to: 'take or direct a person or a class of person to take, any action that the officer considers is reasonably necessary to prevent, control or abate risks associated with COVID-19 [and] to direct a person to provide certain types of information.'[172] Section 77T also

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[166] Alicia Bridges, 'SafeWA COVID Check-In System Should be Discontinued, says Security Expert', *ABC News* (Online 18 March 2022) <https://www.abc.net.au/news/2022-03-18/experts-safewa-check-in-wa-logic-privacy-high-caseload/100919552>.

[167] WA Government ('Revocation of Declaration (No. 3) of Public Health State of Emergency') (n 6).

[168] It appears that the intention is to eventually replace the standalone SafeWA app with the ServicesWA app, as the WA Government has advised that the SafeWA app will eventually become out of date: WA Government, 'ServiceWA App Launches to Help Keep WA Safe', press release, 11 January 2022 <mediastatements.wa.gov.au/Pages/McGowan/2022/01/ServiceWA-app-launches-to-help-keep-WA-safe.aspx>.

[169] *EM Amendment Act* s 7. Section 7 (which is contained in Part 2 of the Act) was set to come into force on a day fixed by proclamation (*EM Amendment Act,* s 2*)*.

[170] Proclamation occurred on 2 November 2022, fixing the operation of Part 2 to the day after publication: Western Australia, *Gazette*, No 156 Special, 2 November 2022, 5069.

[171] *EM Amendment Act*, s 30. The section of the *EM Amendment Act* that will repeal Part 6A is contained in Part 3 of the EM Act. Part 3 comes into force on the day after a period of 2 years has elapsed, that period commencing on the day that Part 2 came into force, i.e. 3 November 2022.

[172] Ibid s 7 cl 77Q.

sets out that such a direction may be given orally or in writing and need not be published in the *Gazette*.

In January 2023, the WA Government announced an independent review into the state's 'management and response' to the pandemic. While the terms of reference include '[i]ntragovernmental communication and cooperation, specifically: … data collection, sharing and use',[173] there is no explicit reference to legislative management and responses. It seems that the other issues that the COVID-19 pandemic and the SafeWA saga exposed —transparency, accountability and the rule of law— are unlikely to be addressed anytime soon.

[173] WA Government, 'Review of WA's COVID-19 management and response: Terms of reference' (19 January 2023) <https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/review-of-was-covid-19-management-and-response-terms-of-reference>.