



A report on the monitoring of the infringement  
notices provisions of *The Criminal Code*  
Volume 1: Ombudsman's Foreword and  
Executive Summary

**Ombudsman Western Australia**

Serving Parliament – Serving Western Australians

Volume 1 of 5

## About this Report

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The office of the Ombudsman acknowledges Aboriginal and Torres Strait Islander people of Australia as the traditional custodians of Australia. We recognise and respect the exceptionally long history and ongoing cultural connection Aboriginal and Torres Strait Islander people have to Australia, recognise the strength, resilience and capacity of Aboriginal and Torres Strait Islander people and pay respect to Elders past, present and future.

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## Ombudsman's Foreword

In accordance with the relevant provisions of *The Criminal Code*, Parliament gave me an important function to keep under scrutiny the operation of the infringement notices provisions of *The Criminal Code*, relevant regulations made under *The Criminal Code* and the relevant provisions of the *Criminal Investigation (Identifying People) Act 2002* in relation to infringement notices (**Criminal Code infringement notices**). Importantly, this scrutiny included review of the impact of the operation of the provisions on Aboriginal and Torres Strait Islander communities. The infringement notices provisions of *The Criminal Code* and the relevant regulations allow authorised officers to issue Criminal Code infringement notices for two prescribed offences, with a modified penalty of \$500.

Overall, I have found that considerable positive work has been undertaken by Western Australia Police (**WAPOL**) to implement Criminal Code infringement notices effectively. At the same time, I have identified opportunities for further work to be undertaken by WAPOL.

I have also found that the key economic objectives arising from the introduction of Criminal Code infringement notices have been achieved, including anticipated outcomes relating to reducing administrative demands on police officers and avoided court appearances for alleged offenders.

I have identified a range of impacts of the introduction of Criminal Code infringement notices on Aboriginal and Torres Strait Islander communities (and in doing so I have also identified impacts for other people and communities experiencing vulnerability). Having done so, I have identified a range of measures to address these impacts (and concomitantly made recommendations about these measures). While certain of these recommended measures are specific to Criminal Code infringement notices, mostly these recommended measures are applicable to the impact of the broader criminal justice system on Aboriginal and Torres Strait Islander people (particularly the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system, including as recipients of Criminal Code infringement notices).

My report makes 34 recommendations relating to proposed amendments to the relevant regulations made under *The Criminal Code* as well as the proposed introduction of, or amendments to, other legislation, schemes, policies, procedures and other measures. I am very pleased that WAPOL has accepted each of the recommendations directed to them.

It is critical that no matter how beneficial these recommended measures may be (particularly as they are expected to have a positive impact on the interaction of Aboriginal and Torres Strait Islander people in the general criminal justice system), that I nevertheless carefully considered the costs of these measures. These costs are not simply in the form of one-off development and implementation costs but ongoing compliance costs (and, of course, the opportunity costs of the measures). I have also considered any unintended consequences that could arise from recommended measures.

Following this careful consideration of each recommended measure, I have formed the view that the benefits of the 34 measures recommended in this report outweigh their costs. This conclusion has been formed with two particular matters given additional consideration. First, the new measures are broadly of very low cost. Second, and most

importantly, in performing the function of monitoring the infringement notice provisions of *The Criminal Code*, the overall finding of the cost benefit analysis is that the total estimated gross benefit for the introduction of Criminal Code infringement notices equates to \$13.04 million (in present value terms) over the five year assessment period. This benefit, including allowing police to remain on front-line duties and reducing both court time and trial backlogs, will be far greater than the costs of any recommended measures.

More generally, there is an opportunity to consider the continuation (and indeed expansion) of Criminal Code infringement notices as a unique opportunity for justice reinvestment. A portion of the economic benefit created by the introduction of Criminal Code infringement notices, reinvested in our criminal justice system (and systems of social justice and equity) has the potential to make a very positive contribution to reducing the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system (including, of course, the issuance of Criminal Code infringement notices). In making this observation, it is nonetheless absolutely critical for me to note that it is entirely and exclusively a matter for a government of the day, and never an Ombudsman, to determine the allocation of economic benefit achieved by new laws and changes to public policy and/or public administration, such as the introduction of Criminal Code infringement notices.

Finally, I express my appreciation to WAPOL and the Department of Justice for their cooperation in the undertaking of my role as well as the provision of de-identified data by the Magistrates Court and the Children's Court. I also express my appreciation to the many police officers who participated in our police officer forums and the non-government organisations representing Aboriginal and Torres Strait Islander and other communities who participated in our other consultation processes. Both police officers and non-government organisations made very thoughtful contributions to the undertaking of my role.

# 1 Executive summary

## Scrutiny of the operation of the provisions

### 1.1 About this report

The *Criminal Code Amendment (Infringement Notices) Act 2011* amended the *Criminal Code Act Compilation Act 1913* (**The Criminal Code**) to include 'Chapter LXXIII – Infringement Notices' (**the infringement notices provisions of The Criminal Code**). Pursuant to section 721 of *The Criminal Code*, regulations may be made to allow infringement notices to be issued for Code offences, being the *Criminal Code (Infringement Notices) Regulations 2015* (**the Regulations**). In addition, *The Criminal Code* is taken to be a prescribed Act for the purposes of the *Criminal Procedure Act 2004* (**the CP Act**) Part 2.

Together, *The Criminal Code*, the CP Act and the Regulations allow authorised officers to issue Criminal Code infringement notices associated with a modified penalty for prescribed offences. Schedule 1 of the Regulations specifies the prescribed offences for which a Criminal Code infringement notice may be issued and modified penalties, as follows:

Offences under <i>The Criminal Code</i>	Modified Penalty \$
s. 74A (2) Behaving in a disorderly manner — (a) in a public place or in sight or hearing of any person in a public place; or (b) in a police station or lock-up .....	500
s. 378 Stealing anything capable of being stolen .....	500

In this report, the prescribed offences above are referred to as **the prescribed offence of disorderly behaviour** and **the prescribed offence of stealing**.

The infringement notices provisions of *The Criminal Code* and the Regulations came into operation on 4 March 2015.

Section 723 of *The Criminal Code* provides as follows:

#### **723. Monitoring of Chapter by Ombudsman**

- (1) For the period of 12 months after the commencement of this section, the Ombudsman is to keep under scrutiny the operation of the provisions of this Chapter and the regulations made under this Chapter and the *Criminal Investigation (Identifying People) Act 2002* Part 7 and section 67.

- (2) The scrutiny referred to in subsection (1) is to include review of the impact of the operation of the provisions referred to in that subsection on Aboriginal and Torres Strait Islander communities.
- (3) For that purpose, the Ombudsman may require the Commissioner of Police or any public authority to provide information about police or the public authority's participation in the operation of the provisions referred to in subsection (1).
- (4) The Ombudsman must, as soon as practicable after the expiration of that 12 month period, prepare a report on the Ombudsman's work and activities under this section and furnish a copy of the report to the Minister for Police and the Commissioner of Police.
- (5) The Ombudsman may identify, and include recommendations in the report to be considered by the Minister about, amendments that might appropriately be made to this Act with respect to the operation of the provisions referred to in subsection (1).
- (6) The Minister is to lay (or cause to be laid) a copy of the report furnished to the Minister under this section before both Houses of Parliament as soon as practicable after the Minister receives the report.

The period of 12 months referred to in Section 723(1) of *The Criminal Code* commenced on 5 March 2015 (**the monitoring period**).

## 1.2 Monitoring work and activities

In order to:

- keep under scrutiny the operation of the provisions of the Chapter, and the regulations made under the Chapter, and the *Criminal Investigation (Identifying People) Act 2002* Part 7 and section 67; and
- review of the impact of the operation of the provisions on Aboriginal and Torres Strait Islander communities,

the office of the Ombudsman (**the Office**) undertook the following:

- reviewed relevant international and national literature and any relevant reports of government, independent statutory officers, and non-government organisations;
- undertook scrutiny, engagement and conducted consultation with relevant state government departments and engagement and consultation with relevant state government authorities and non-government organisations, including those that provide services to Aboriginal and Torres Strait Islander communities and people requiring advocacy services;
- developed and distributed a consultation paper;
- collected and analysed information and data;
- undertook a cost-benefit analysis;

- developed a draft report and provided the draft report to the relevant state government departments and authorities for their consideration and response; and
- developed a final report including findings and recommendations.

### 1.2.1 Literature review

The Office conducted a review of relevant international and national literature regarding the provisions for, and the operation of, similar criminal law infringement systems, as well as literature on the impacts of similar systems on Aboriginal and Torres Strait Islander communities and other relevant communities. The Office also conducted a review of relevant reports of government, independent statutory officers, and non-government organisations. The information drawn from this review is referred to as **the research literature** throughout this report.

### 1.2.2 Engagement and consultation

#### *Police Officers*

In addition to scrutiny, engagement and consultation with relevant state government departments, including Western Australia Police (**WAPOL**), (the then) Department of the Attorney General (**DOTAG**), (the then) Department of Aboriginal Affairs and (the then) Department for Child Protection and Family Support, the Office engaged with police officers regarding the operation of Criminal Code infringement notices. The engagement with police officers included considering 16 forums with 149 police officers (**Police Officer Forums**).

The Office consulted the following state government authorities and non-government organisations:

- Commissioner for Children and Young People;
- Aboriginal Legal Service of Western Australia;
- Community legal services; and
- Men's Outreach Service Inc. (Broome).

#### *Consultation Paper*

To assist in obtaining views from members of the public and interested parties regarding their experiences of Criminal Code infringement notices, the Office developed a Consultation Paper, entitled *Monitoring of the infringement notices provisions of The Criminal Code: Consultation Paper (the Consultation Paper)*. To accompany the Consultation Paper, the Office developed a *Community Feedback Information Sheet* and a *Response Template*. Responses to the Consultation Paper could be provided to the Office using the *Response Template*, by letter or via email.

The Consultation Paper sought responses by 20 May 2016. Eleven responses were received from a wide range of state government departments and authorities and non-government organisations, including responses from organisations representing Aboriginal and Torres Strait Islander communities. Further details are set out at Volume 4.

### *Community Consultation Forum*

The Office held a Community Consultation Forum on 18 August 2016. The Forum was attended by the following five stakeholders:

- Aboriginal Legal Service of Western Australia;
- Outcare;
- Ruah Community Services;
- Women's Health and Family Service; and
- Youth Legal Service.

### **1.2.3 Information collection and analysis**

The Office collected information from WAPOL and other public authorities regarding the operation of Criminal Code infringement notices. In addition, the Office also requested and received information from relevant courts. The information collected and received included:

- data regarding all Criminal Code infringement notices issued by WAPOL during the monitoring period, and all recorded instances of WAPOL taking formal action<sup>1</sup> in response to the two prescribed offences, both during the monitoring period and for the 12 months prior to the monitoring period. Throughout this report:
  - the data for the monitoring period and for the 12 months prior to the monitoring period is collectively referred to as **the WAPOL state-wide data**; and
  - the 12 months prior to the monitoring period is referred to as **the benchmarking period**.
- data relating to court hearings for the two prescribed offences in the Magistrates Court and Children's Court (**the court data**); and
- data regarding all unpaid Criminal Code infringement notices referred to the Fines Enforcement Registry by WAPOL (**the DOTAG state-wide data**).

The Office analysed the information collected using qualitative and quantitative techniques. From this analysis, the Office developed draft findings and draft recommendations. The Office consulted with the stakeholders listed above regarding the results of this analysis.

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<sup>1</sup> In this report, the term 'formal action' is used to encompass all instances where police officers recorded that action was taken in response to an alleged offence. Formal action includes, for example, Criminal Code infringement notices, arrests, summons and referrals to a juvenile justice team. Actions that are not considered 'formal actions' included warnings and cautions.

#### 1.2.4 Cost-benefit analysis

A key element for the Ombudsman to include in his scrutiny of the infringement notices provisions of *The Criminal Code* was whether the provisions had met aims to reduce costs and divert resources to other uses.<sup>2</sup> In order to assist the Office to evaluate whether the infringement notices provisions of *The Criminal Code* had met these aims, the Office engaged Deloitte Touche Tohmatsu to consider the resource implications of the infringement notices provisions of *The Criminal Code*; more particularly to undertake a cost-benefit analysis study. This study was undertaken by Deloitte Access Economics. The full report of the cost-benefit analysis is provided as Volume 5.

#### 1.2.5 Draft report

The Office provided state government departments and authorities with the relevant parts of our draft findings and draft recommendations for their consideration and response.

#### 1.2.6 Final report

Having considered the responses of state government departments and authorities, the Office prepared this final report, including findings and recommendations, to furnish a copy to the Minister for Police and the Commissioner of Police.

### 1.3 Reviewing the impact of the infringement notices provisions of *The Criminal Code* on Aboriginal and Torres Strait Islander communities

As identified above, section 723(2) of *The Criminal Code* provides that the scrutiny referred to in section 723(1) is to include review of the impact of the infringement notices provisions of *The Criminal Code* on Aboriginal and Torres Strait Islander communities.

In keeping under scrutiny the operation of the infringement notices provisions of *The Criminal Code* at all stages, the Office considered how the infringement notices provisions of *The Criminal Code* and associated regulations impacted on Aboriginal and Torres Strait Islander communities.

To inform this consideration, the Office sought to consult Aboriginal and Torres Strait Islander communities regarding their experiences of Criminal Code infringement notices. In particular, the Office:

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<sup>2</sup> 'The key objectives of any such [Criminal Code infringement notices provisions] scheme are to reduce the administrative demands on police in relation to relatively minor offences by providing a quick alternative to arrest for police officers in dealing with minor matters; to reduce the time taken by police in preparation for and appearance at court; to allow police to remain on front-line duties rather than having to take the offender back to the police station...to save the court system the cost of having to deal with relatively minor offences and thereby reducing both court time and trial backlogs...' and '[t]he operation of the [Criminal Code infringement notices] scheme will be subject to ongoing monitoring and will be evaluated after the first 12 months to ensure that the proposed scheme has met its aims. The evaluation will examine, amongst other things, the impact of the use of infringement notices on resource implications, case length and case flow ...', the Hon. Robert Frank Johnson MLA, Minister for Police, Legislative Assembly, Parliamentary Debates (Hansard), 8 September 2010, pp. 6137d-6139a.

- placed advertisements in a national Aboriginal newspaper regarding the Ombudsman's role and the Consultation Paper (see Volume 4);
- ran advertisements on Aboriginal radio stations in Kriol, Wangatja and English languages, regarding the Ombudsman's role and the availability of the Consultation Paper (see Volume 4);
- developed a *Community Feedback Information Sheet* setting out culturally appropriate information on the Ombudsman's role, including (see Volume 4) a mechanism for providing feedback. The Office distributed this to non-government organisations working with Aboriginal people;
- consulted the (then) Department of Aboriginal Affairs, the Aboriginal Legal Service of Western Australia, and the Western Australian Aboriginal Advisory Council (**WAAAC**);
- engaged people with expertise in the area of the impact of criminal justice processes on Aboriginal and Torres Strait Islander communities, in relation to our analysis, draft findings and draft recommendations; and
- as noted above, in addition the Office contacted non-government organisations that provide services, including medical services, to Aboriginal and Torres Strait Islander communities.

In addition, following the release of the Consultation Paper, the Office invited stakeholders who worked with the Aboriginal community to a Community Consultation Forum to ensure information received in response to the Consultation Paper, particularly in relation to the impact of the infringement notices provisions of *The Criminal Code* on Aboriginal and Torres Strait Islander communities, had been understood and represented correctly. The Community Consultation Forum was held on 18 August 2016 and was facilitated by the Office's Principal Aboriginal Liaison Officer and an Aboriginal community facilitator (engaged by the Office).

#### 1.4 The operation of the infringement notices provisions of *The Criminal Code*

As part of the implementation of Criminal Code infringement notices, WAPOL developed a policy to provide police officers with guidance on how and when to issue Criminal Code infringement notices. This policy, *CR-01.00 Criminal Code Infringement Notice (CCIN)*<sup>3</sup> (**WAPOL's CCIN Policy**)<sup>4</sup>, provides police officers with information about key aspects of Criminal Code infringement notices, including:

- information regarding the legislative requirements:
  - who can, and who cannot, be issued with a Criminal Code infringement notice; and
  - when a Criminal Code infringement notice can, and cannot, be issued;
- information regarding policy considerations:
  - factors to consider when determining whether a Criminal Code infringement notice is the most appropriate course of action (having considered alternative legislative options); and
  - the process for issuing a Criminal Code infringement notice.

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<sup>3</sup> Western Australia Police, Police Manual, *CR-01.00 Criminal Code Infringement Notice (CCIN)*.

<sup>4</sup> WAPOL's CCIN Policy is provided as guidance for police officers when issuing Criminal Code infringement notices and is not publically available.

WAPOL also developed a new computer application for the management of non-traffic infringements, the Non-Traffic Infringement Management Solution (**NTIMS**). While NTIMS was developed to allow WAPOL to implement Criminal Code infringement notices, it is now also being used for other non-traffic infringements, for example infringements related to firearms.

In addition to the development of WAPOL's CCIN Policy, WAPOL reported that police officers were required to complete training specific to Criminal Code infringement notices prior to being able to issue a Criminal Code infringement notice. This training included two modules, one module which provided police officers with an overview of legislation and WAPOL policy relevant to Criminal Code infringement notices, and a second module which explained how to use NTIMS. Upon completion of the training, police officers were also required to complete an assessment and achieve 100 per cent accuracy.

During the monitoring period, the two training modules, for Criminal Code infringement notices and NTIMS, were delivered either face-to-face or online using WAPOL's training portal 'Blackboard'. Face-to-face training was delivered predominantly to police officers in metropolitan areas and the South West District as part of the pilot. At the end of the monitoring period, WAPOL reported that:

- 697 police officers had completed both Criminal Code infringement notice and NTIMS training on a face-to-face basis;
- 4,104 police officers had completed the Criminal Code infringement notice training using Blackboard; and
- 3,720 police officers had completed the NTIMS training using Blackboard.

#### **1.4.1 WAPOL commenced issuing Criminal Code infringement notices on 30 March 2015**

WAPOL commenced issuing Criminal Code infringement notices on 30 March 2015, initially as a pilot in the Perth metropolitan area and the South West. WAPOL reported that the following Local Policing Teams, Response Teams and specialised areas were selected as locations for inclusion in the pilot:

- Armadale
- Belmont
- Bunbury
- Busselton
- Canning Vale
- Cannington
- Ellenbrook
- Gosnells
- Kensington
- Kiara
- Mandurah
- Mundijong
- Perth
- Pinjarra
- Rottneest
- South East Metropolitan Response Team
- South West
- Perth
- Water Police
- Curtin House
- Mounted Police
- Regional Operations

From 30 March 2015 to 2 August 2015, Criminal Code infringement notices were operationalised across the State. Criminal Code infringement notices were issued

state-wide from 3 August 2015. As identified above, the monitoring period commenced on 5 March 2015. Importantly, and considered where relevant throughout this Report, this means that Criminal Code infringement notices were being operationalised during the monitoring period and almost five months of the monitoring period had elapsed prior to state-wide issuing of Criminal Code infringement notices being achieved.

## 1.5 Criminal Code infringement notices issued during the monitoring period

The Office found that, during the monitoring period, WAPOL issued a total of 2,978 Criminal Code infringement notices. The 2,978 Criminal Code infringement notices were issued to 2,817 individual alleged offenders.

Of the 2,978 Criminal Code infringement notices, 2,031 (68 per cent) were issued in metropolitan Police Districts and 947 (32 per cent) were issued in regional Police Districts.

The Office found that, overall, the 2,978 Criminal Code infringement notices were issued to more male recipients (1,935 or 65 per cent) than female recipients (1,024 or 34 per cent) at a rate of almost 2-1. However, the proportion of male and female recipients issued a Criminal Code infringement notice differed between the two prescribed offences:

- male recipients accounted for 76 per cent (1,367) of Criminal Code infringement notices issued for the prescribed offence of disorderly behaviour;
- male and female recipients accounted for approximately 50 per cent each (568 males, 599 females) of the prescribed offence of stealing; and
- the gender of recipients was unknown in one per cent (19) of all Criminal Code infringement notices issued.

The Office found that 23 per cent of Criminal Code infringement notices were issued to recipients aged between 20 and 24 years (683 recipients), with 18 per cent issued to recipients aged between 25 and 29 years (525 recipients).

Seventeen year olds accounted for three per cent of Criminal Code infringement notice recipients (89 recipients). Of these 89 recipients, 30 (34 per cent) were recorded by WAPOL as being Aboriginal. The impact of the infringement notices provisions of *The Criminal Code* on these young people is explored in detail in Volume 3.

### 1.5.1 Thirty-six per cent of Criminal Code infringement notices were issued to recipients recorded by WAPOL as being Aboriginal

For the 2,978 Criminal Code infringement notices issued, WAPOL provided further data regarding the characteristics of the recipients. This included the characteristic of 'Offender Appearance', which included categories of 'Caucasian', 'Aboriginal' and 'Unknown'. WAPOL data relating to 'Offender Appearance' refers to a variable which is determined and recorded by WAPOL. Where the Office has used the WAPOL state-wide data to review the impact of the infringement notices provisions on Aboriginal and Torres Strait Islander communities, the Office has included alleged offenders and Criminal Code infringement notice recipients recorded by WAPOL as 'Aboriginal'. The WAPOL state-wide

data does not identify alleged offenders and/or recipients who are of Torres Strait Islander 'appearance'.

The Office found that, of the 2,978 Criminal Code infringement notices issued during the monitoring period, WAPOL recorded that:

- 1,247 (42 per cent) Criminal Code infringement notices were issued to recipients who were recorded as being Caucasian;
- 1,080 (36 per cent) Criminal Code infringement notices were issued to recipients who were recorded as being Aboriginal;
- 'Offender Appearance' was not recorded in relation to 375 (13 per cent) Criminal Code infringement notices; and
- 276 (9 per cent) of recipients of Criminal Code infringement notices were recorded as being from other ethnicities.

For comparison, 3.1 per cent of Western Australia's population identified as Aboriginal and/or Torres Strait Islander in the 2016 Census of Population and Housing.<sup>5</sup> The impact of the infringement notices provisions of *The Criminal Code* on Aboriginal and Torres Strait Islander communities is discussed in detail in Volume 3.

## 1.6 Exercising discretion to issue a Criminal Code infringement notice

### 1.6.1 WAPOL complied with *The Criminal Code* and the Regulations and issued 100 per cent of Criminal Code infringement notices for the two prescribed offences

Regulation 4 and Schedule 1 of the Regulations prescribe two offences for which Criminal Code infringement notices may be issued. These are the prescribed offences of stealing and disorderly behaviour. The Office examined the WAPOL state-wide data regarding the 2,978 Criminal Code infringement notices issued by WAPOL and found that 100 per cent of the Criminal Code infringement notices issued by WAPOL were issued for the two prescribed offences. Of the 2,978 Criminal Code infringement notices issued:

- 1,178 (39.5 per cent) were issued for the prescribed offence of stealing; and
- 1,800 (60.5 per cent) were issued for the prescribed offence of disorderly behaviour.

### 1.6.2 Police officers identified four main factors which influenced whether they used their discretion to issue Criminal Code infringement notices

The infringement notices provisions of *The Criminal Code* and the Regulations set out the requirements in relation to the issuing of a Criminal Code infringement notice, including who can, and cannot, be issued a Criminal Code infringement notice, and when a Criminal Code infringement notice can be issued. WAPOL's CCIN Policy further provides for the factors to be considered by an authorised officer when determining whether a Criminal Code infringement notice is the most appropriate course of action (having considered alternative legislative options such as arrest, summons, caution, referral to a Juvenile

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<sup>5</sup> Australian Bureau of Statistics, 2016 Census: Aboriginal and/or Torres Strait Islander Peoples Quickstats, 2016, ABS, Canberra, June 2017.

Justice Team, or ordering the person to 'move on'). The decision regarding which legislative option to proceed with in each situation is at the discretion of the responding authorised officer.

At the Police Officer Forums, participants identified a number of factors that may influence a police officer's decision to issue a Criminal Code infringement notice instead of proceeding with other legislative options. These factors were:

- establishing an alleged offender's identity and postal address;
- investigative requirements, particularly for the prescribed offence of stealing;
- the need to put a stop to the offending behaviour; and
- consideration of an alleged offender's criminal history.

## 1.7 Serving Criminal Code infringement notices

### 1.7.1 WAPOL complied with legislative requirements and served 99.9 per cent of Criminal Code infringement notices within 21 days of being issued

Police officers are not able to serve Criminal Code infringement notices 'on the spot'. To serve Criminal Code infringement notices, police officers need to attend a police station and enter the details of the Criminal Code infringement notice into NTIMS. Once this has occurred, Criminal Code infringement notices are posted or served personally on the recipients.

The Office analysed the WAPOL state-wide data to determine whether the service of Criminal Code infringement notices was completed within 21 days of the date of the alleged offence, as required by section 8 of the CP Act (noting that Schedule 2 of the CP Act provides that a Criminal Code infringement notice served by post is deemed to have been served on the fourth working day after it was posted).

The Office found that, of the 2,978 Criminal Code infringement notices issued, 2,974 (99.9 per cent) were served on the recipient within 21 days.

## 1.8 Adjudicating and withdrawing Criminal Code infringement notices

The Office analysed the WAPOL state-wide data to determine whether recipients of Criminal Code infringement notices had sought to have the matter adjudicated by an approved officer, as provided by legislation. The Office found that 27 recipients of the 2,978 Criminal Code infringement notices issued (0.9 per cent) sought to do so. As a result of the 27 corresponding adjudications:

- eighteen (66 per cent) Criminal Code infringement notices were withdrawn;
- five Criminal Code infringement notices were not withdrawn, of these:
  - one Criminal Code infringement notice was paid in full;
  - one recipient was issued with a Final Demand notice; and
  - three Criminal Code infringement notices were referred to the Fines Enforcement Registry;

- two Criminal Code infringement notices were undergoing adjudication by an approved officer at the time that the data was provided to the Office by WAPOL; and
- for two recipients of Criminal Code infringement notices the matter was being determined by a court:
  - WAPOL had elected to prosecute one recipient; and
  - one recipient had elected to be prosecuted.

## 1.9 Electing to be prosecuted instead of paying Criminal Code infringement notices

The Office found that, of the 2,978 Criminal Code infringement notices issued, 41 (1.4 per cent)<sup>6</sup> recipients elected to be prosecuted instead. Of these 41 recipients:

- thirty-four recipients (83 per cent) were issued a Criminal Code infringement notice for the prescribed offence of disorderly behaviour;
- thirty recipients (73 per cent) were recorded as being non-Aboriginal, two (4.9 per cent) were recorded as being Aboriginal, and the 'Offender Appearance' of nine recipients (22 per cent) was recorded as being unknown; and
- thirty recipients (73 per cent) were issued with a Criminal Code infringement notice in a metropolitan Police District.

Of the 41 recipients who elected to be prosecuted, at the time of writing, 35 cases had been finalised by the court, with the following outcomes:

- nineteen recipients (54 per cent) were fined, of these:
  - ten recipients (53 per cent) received a fine greater than \$500;
  - four recipients (21 per cent) received a fine equal to \$500;
  - five recipients (26 per cent) received a fine less than \$500; and
  - the average fine imposed was \$547;
- seven recipients (20 per cent) had their case dismissed or were acquitted;
- four recipients (11 per cent) received a conditional release order; and
- the outcomes for five recipients (14 per cent) were not recorded by WAPOL.

That is, in 30 cases where the recipient elected to be prosecuted, the matter was finalised and the outcome was recorded. A sentence was imposed in 23 of these 30 cases (77 per cent). The sentence imposed included a fine in 19 of these 23 cases (83 per cent) and the average fine imposed was \$547.

The Office analysed the court data in relation to court outcomes for offenders who were arrested or summonsed for the two prescribed offences<sup>7</sup> to determine how often a fine was imposed on the alleged offender, and if so the average amount of the fine. For

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<sup>6</sup> WAPOL records indicate that one additional recipient initially elected to go to court but did not proceed as the Criminal Code infringement notice was withdrawn.

<sup>7</sup> The data provided by the Magistrates Court included all stealing offences in accordance with section 378 of *The Criminal Code*; the data does not include the value of the stolen item. In order to compare this data with offences which are likely to be eligible for a Criminal Code infringement notice the Office removed all stealing offences involving stealing a motor vehicle, and the offence of 'Stealing from Dwelling/House over \$10,000'. The Office also excluded data where an alleged offender appeared for multiple charges and/or the matter was transferred to a higher court.

comparison, the Office found that, where a charge was finalised in the monitoring period, a sentence was imposed on the offender in 91 per cent of cases. Where a sentence was imposed, the sentence included a fine in 93 per cent of cases, and the average fine imposed was \$522.

The Office findings that the average fine of \$547 for those who elected to be prosecuted, \$522 for those otherwise arrested and summonsed and \$500 for a Criminal Code infringement notices suggest that fine outcomes, regardless of methodology, are highly comparable. The Office's findings suggest that there was a comparatively lower rate of sentences imposed on the 30 recipients of Criminal Code infringement notices whose cases had been finalised by the court and the outcome recorded by WAPOL, than that imposed on alleged offenders who had been arrested or summonsed for the two prescribed offences. The low proportion of Criminal Code infringement notice recipients who elect to be prosecuted in court is particularly relevant to recipients from vulnerable communities, and Aboriginal and Torres Strait Islander communities, and this issue is explored in detail in Volume 3. Of particular note, Volume 3 recommends that WAPOL ensures that, when a Criminal Code infringement notice is served, written information is provided to assist vulnerable recipients to understand their rights and responsibilities, including their right to elect to go to court.

The Office notes that the findings above are based on the patterns in the use of Criminal Code infringement notices, and patterns in sentencing outcomes, over the initial 12 month monitoring period, including the pilot period, and that these patterns could change over time.

## 1.10 Paying Criminal Code infringement notices

### 1.10.1 Twenty one per cent of Criminal Code infringement notices issued during the monitoring period were paid

The Office found that, as at 22 April 2016,<sup>8</sup> 624 (21 per cent) of the 2,978 Criminal Code infringement notices issued had been paid, as follows:

- 515 (17 per cent) had been paid after the initial infringement notice had been issued; and
- 109 (4 per cent) had been paid after a final demand notice was issued.

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<sup>8</sup> The Ombudsman's monitoring period of 12 months referred to in Section 723(1) of *The Criminal Code* concluded on 4 March 2016. In order to examine the rates of payment of Criminal Code infringement notices, the Office took into account that a Criminal Code infringement notice may have been issued on 4 March 2016. As the modified penalty may be paid within 28 days after the date of the notice, payment for these Criminal Code infringement notices may not have occurred prior to 1<sup>st</sup> April 2016. WAPOL further informed the Office that Final Demand notices may be issued up to two weeks after the time for paying the modified penalty has elapsed (potentially on 15 April 2016). Accordingly, the Office considered the payment status of Criminal Code infringement notices issued in the monitoring period that were due to have been paid, and which would have escalated to a Final Demand in the event of non-payment. WAPOL provided this data from NTIMS as at 22 April 2016.

Of the remaining 2,354 Criminal Code infringement notices:

- 480 had progressed to a final demand but their Criminal Code infringement notice had not been registered with the Fines Enforcement Registry;
- 1,805 had been referred to the Fines Enforcement Registry; and
- 69 were either not due for payment, withdrawn, elected to be prosecuted, or subject to adjudication.

#### **1.10.2 Twenty-four per cent of Criminal Code infringement notices issued for the prescribed offence of disorderly behaviour were paid prior to referral to the Fines Enforcement Registry**

The Office found that, as at 22 April 2016, of the 2,978 Criminal Code infringement notices issued during the monitoring period, 624 (21 per cent) had been paid prior to referral to the Fines Enforcement Registry. Of these:

- 425 (68 per cent) were issued for the prescribed offence of disorderly behaviour. That is, 24 per cent of the 1,800 Criminal Code infringement notices issued for disorderly behaviour were paid prior to referral to the Fines Enforcement Registry; and
- 199 (32 per cent) were issued for the prescribed offence of stealing. That is, 17 per cent of the 1,178 Criminal Code infringement notices issued for stealing were paid prior to referral to the Fines Enforcement Registry.

Of the 425 paid Criminal Code infringement notices that were issued for disorderly behaviour:

- 258 (61 per cent) were paid by recipients who were recorded as non-Aboriginal;
- 155 (36 per cent) were paid by recipients whose 'Offender Appearance' was unknown; and
- 12 (3 per cent) were paid by recipients who were recorded as Aboriginal.

Of the 199 paid Criminal Code infringement notices that were issued for stealing:

- 149 (75 per cent) were paid by recipients who were recorded as non-Aboriginal;
- 47 (24 per cent) were paid by recipients whose 'Offender Appearance' was unknown; and
- three (1 per cent) were paid by recipients who were recorded as Aboriginal.

The Office also found that, for non-Aboriginal recipients and recipients of Criminal Code infringement notices whose 'Offender Appearance' was unknown, the payment rates prior to being referred to the Fines Enforcement Registry ranged from 20 per cent (for non-Aboriginal recipients for the prescribed offence of stealing) to 59 per cent (for recipients of unknown 'Offender Appearance' for the prescribed offence of disorderly behaviour).

### 1.10.3 Payment rates increased as socio-economic advantage increased

The records of WAPOL, DOTAG and the courts examined by the Office did not identify whether an alleged offender who received a Criminal Code infringement notice was financially or socially disadvantaged. In order to determine if there were any patterns or trends in the socio-economic status of recipients of Criminal Code infringement notices, the Office analysed the suburbs of addresses provided to WAPOL by the 2,978 recipients of Criminal Code infringement notices, using the Australian Bureau of Statistics' (ABS) Index of Relative Socio-economic Advantage and Disadvantage (IRSAD).<sup>9</sup>

After exclusion criteria were applied, the Office analysed the state based deciles of the addresses provided by the remaining 2,701 Criminal Code infringement notice recipients. The Office analysed the payment rates of these 2,701 Criminal Code infringement notices in order to determine if there were any patterns or trends considering the socio-economic status of recipients. Generally, payment rates increased as advantage increased; from nine per cent of Criminal Code infringement notices issued to recipients in decile 1 to 51 per cent of Criminal Code infringement notices issued to recipients in decile 10. Conversely, the percentage of Criminal Code infringement notices registered with the Fines Enforcement Registry decreased as advantage increased; from 69 per cent of Criminal Code infringement notices issued to recipients in decile 1 to 36 per cent of Criminal Code infringement notices issued to recipients in decile 10. The Office's analysis therefore suggests that recipients with greater levels of socio-economic disadvantage were the least likely to pay their Criminal Code infringement notices prior to registration with the Fines Enforcement Registry.

## 1.11 Registering Criminal Code infringement notices with the Fines Enforcement Registry

### 1.11.1 During the monitoring period, 1,202 unpaid Criminal Code infringement notices were registered with the Fines Enforcement Registry

As set out in the legislation, failure to pay a Criminal Code infringement notice after the Final Demand Notice period may result in the outstanding debt being registered with the Fines Enforcement Registry, which is administered by DOTAG.

It is important to note that a Criminal Code infringement notice is an 'infringement notice', as distinct from a 'fine'.<sup>10</sup> Infringement notices and fines, when not paid, result in different further penalties or consequences, which are explored in detail in Volume 3.

In order to examine Criminal Code infringement notices registered with the Fines Enforcement Registry, the Office analysed the DOTAG state-wide data regarding all Criminal Code infringement notices registered during the monitoring period. This does not include those Criminal Code infringement notices that were issued during the monitoring

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<sup>9</sup> Australian Bureau of Statistics, *Technical Paper: Socio-Economic Indexes for Areas (SEIFA 2011)*, ABS, Canberra, March 2013, p. 1.

<sup>10</sup> Section 28 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* provides that a 'fine means a monetary penalty imposed on an offender by a court in criminal proceedings for an offence'.

period and registered with the Fines Enforcement Registry after the monitoring period had concluded.<sup>11</sup>

The Office found that:

- during the monitoring period, 1,202 unpaid Criminal Code infringement notices were registered with the Fines Enforcement Registry;
- of the 1,202 registered Criminal Code infringement notices:
  - 673 (56 per cent) were issued for the prescribed offence of disorderly behaviour; and
  - 529 (44 per cent) were issued for the prescribed offence of stealing.

The Office's analysis also found that, of the 1,202 registered Criminal Code infringement notices:

- 480 (40 per cent) were recorded by DOTAG as relating to a non-Aboriginal recipient;
- 457 (38 per cent) were recorded by DOTAG as relating to an Aboriginal and/or Torres Strait Islander recipient; and
- 265 (22 per cent) were unknown.

The Office further examined the DOTAG state-wide data to assess the degree of payment after registration with the Fines Enforcement Registry. At the conclusion of the monitoring period, of the 1,202 registered Criminal Code infringement notices:

- 84 (7 per cent) had been paid in full, of these:
  - nine (11 per cent) were issued to Aboriginal recipients;
  - 37 (44 per cent) were issued to non-Aboriginal and/or Torres Strait Islander recipients; and
  - 38 (45 per cent) were unknown;
- Of the 1,118 unpaid registered Criminal Code infringement notices:
  - the average amount owing was \$560.48; and
  - the highest amount owing was \$797.95.

## 1.12 Destroying identifying information after payment of Criminal Code infringement notices

The Office attempted to determine how many requests for destruction of identifying information relating Criminal Code infringement notices were made to the Commissioner of Police during the monitoring period.

It was not possible to determine this by examining the WAPOL state-wide data or other WAPOL records. WAPOL advised the Office that, in 2015, identifying particulars were collected in 26,559 instances (including 21,201 instances involving charged suspects) and in 2015 there were 56 requests for the destruction of identifying particulars. This data

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<sup>11</sup> As at 22 April 2016, a total of 1,805 Criminal Code infringement notices had been referred to the Fines Enforcement Registry.

suggests that requests for destruction of identifying particulars are made in approximately 0.2 per cent of instances.

The Office further found that, during the monitoring period, WAPOL obtained one or more identifying particulars from 530 recipients of Criminal Code infringement notices. As at 22 April 2016, the recipient had paid the modified penalty for the prescribed offence in 93 instances. That is, 93 recipients of Criminal Code infringement notices were eligible to request the destruction of their identifying information pursuant to section 69 of the CIIP Act. Taking into account the Office's finding above, that requests for destruction of identifying particulars are made in approximately 0.2 per cent of instances, it is estimated that no requests for the destruction of identifying information were made during the monitoring period.

### 1.13 The economic effect of the infringement notices provisions of *The Criminal Code*<sup>12</sup>

A key element of the Ombudsman's scrutiny of the infringement notices provisions of *The Criminal Code* was whether the provisions had met their economic objectives. In order to determine whether the economic objectives of the infringement notices provisions of *The Criminal Code*, as set out in the Second Reading Speech of the Bill, were achieved, the Office undertook two key phases of analysis.

The Office analysed the WAPOL and DOTAG state-wide data and the court data to determine the extent to which the infringement notices provisions of *The Criminal Code* resulted in the diversion of alleged offenders away from the courts.

Informed by these findings, the Office engaged Deloitte Touche Tohmatsu to undertake a specialised, comprehensive cost-benefit analysis to test whether the stated intended economic objectives of the infringement notices provisions of *The Criminal Code*, in relation to police and the courts, had been achieved (**the cost-benefit analysis**).<sup>13</sup> In addition to obtaining a comprehensive understanding of the economic effect of the infringement notices provisions of *The Criminal Code* in the first 12 months of the operation of the provisions, the Office also sought to identify the net cost or benefit of the operation of the provisions extrapolated over a full five year period (including the first 12 months).

The cost-benefit analysis essentially involved the construction of two models, the 'base case' model and the 'change' model. For the purposes of the cost-benefit analysis, the 'base case' was defined as a continuation of the status quo, that is, the hypothetical (or 'counter-factual') situation where the infringement notices provisions of *The Criminal Code* had not been implemented and the option of a Criminal Code infringement notice was unavailable to WAPOL. The 'change' model was based on the introduction of the infringement notices provisions and forecast the trends in Criminal Code infringement

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<sup>12</sup> The information in this Chapter draws upon, and summarises, the findings of Deloitte Access Economics, *Ombudsman Western Australia Cost Benefit Analysis of the Infringement Notices Provisions of The Criminal Code*, Deloitte Access Economics, April 2017, which is provided in full as Volume 5 of this report.

<sup>13</sup> Deloitte Access Economics, *Ombudsman Western Australia Cost Benefit Analysis of the Infringement Notices Provisions of The Criminal Code*, Deloitte Access Economics, April 2017.

notices over a five year period, using analysis of the preceding periods. The net costs and benefits of the infringement notices provisions of *The Criminal Code* were estimated by comparison of the two models.

Through this analysis, it was possible to identify savings in terms of 'opportunity costs', that is, observed time savings attributable to the infringement notices provisions of *The Criminal Code*, to which standard cost rates can then be applied to calculate an overall economic benefit. For example, if an hour of police time is saved because of the infringement notices provisions of *The Criminal Code*, then the salary cost for an hour is assigned as a benefit.

In consultation, WAPOL indicated that the increased availability of police officers to attend to these incidents may result in the arrest or summons of additional alleged offenders across all offences, with subsequent court appearances. In other words, WAPOL has indicated that, insofar as the infringement notices provisions of *The Criminal Code* result in time savings to police officers, this enables police officers to identify and respond to other incidents (that those police officers otherwise would not have been available to attend).

The assumptions underlying the analysis are discussed in detail in Volume 5.

#### 1.14 Overall findings regarding the achievement of the economic objectives of the infringement notices provisions of *The Criminal Code*

The overall finding of the cost-benefit analysis was that the total estimated gross benefit from the introduction of the infringement notices provisions of *The Criminal Code* equates to almost \$13.04 million (in present value terms or \$14.25 million in unadjusted terms) over the five year assessment period.

Some 59 per cent (\$7.70 million in present value terms or \$8.41 million in unadjusted terms) of the total benefit estimated accrues to WAPOL officers in the form of opportunity costs (measured by time savings). Operational efficiencies realised by the Magistrates Court account for the remaining 41 per cent (\$5.34 million in present value terms or \$5.83 million in unadjusted terms) of the total benefits. This is as a result of cases that are avoided under the operation of the infringement notices provisions of *The Criminal Code*.

The introduction of the infringement notices provisions of *The Criminal Code* over the five year period gives rise to a net benefit of \$9,279,686, which is equivalent to an average annual net benefit of \$1.86 million. This result is derived from total estimated costs for the five years of \$3,759,295 and total estimated benefits of \$13,038,982.<sup>14</sup> It is equivalent to a benefit-cost ratio of 3.47. In other words, it is estimated that, for every \$1.00 spent over the first five years of the operation of the infringement notices provisions of *The Criminal Code* (that is, the monitoring period and a further four years), there will be a return of \$3.47.

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<sup>14</sup> It is important to note that the net result of the cost benefit analysis is strongly influenced by the forecast total Criminal Code infringement numbers. As there had been a progressive operationalising across police districts during the monitoring period, it was estimated that for a full year implementation there would have been 3,942 Criminal Code infringements issued. To estimate the 2016-17 total, that figure was then combined with historical growth estimates, as well as an estimate of take up rate, to obtain a total of 4,703.

The cost-benefit analysis indicates that this represents a very strong return to the community from implementation of the legislation and is reflective of the relatively low costs incurred in implementing and operating the infringement notices provisions of *The Criminal Code* relative to the benefits yielded by way of reducing the opportunity costs of police and court time.

The overall findings of the analysis are summarised in Table 1 below. Each monitoring year represented in the table corresponds to a monitoring period of 5 March of one year to 4 March of the following year (for example 2011-12 is 5 March 2011 to 4 March 2012).

**Table 1: Summary of findings of the cost-benefit analysis, by monitoring year, at present value<sup>15</sup>**

<b>Modelled benefits / costs</b>	<b>2015-16 \$</b>	<b>2016-17 \$</b>	<b>2017-18 \$</b>	<b>2018-19 \$</b>	<b>2019-20 \$</b>	<b>Total \$</b>
Benefit 1 – Saving in the cost of police time	1,069,098	1,722,702	1,678,728	1,635,876	1,594,118	7,700,522
Benefit 2 – Saving in the cost of court time	741,657	1,194,151	1,163,668	1,133,964	1,105,019	5,338,459
<b>Total benefit</b>	<b>1,810,755</b>	<b>2,916,853</b>	<b>2,842,396</b>	<b>2,769,841</b>	<b>2,699,137</b>	<b>13,038,982</b>
Cost 1 - Capital development costs of NTIMS	(4,983,825)	-	-	-	1,743,551	(3,240,274)
Cost 2 - Annual operating costs of NTIMS	(112,238)	(112,238)	(104,895)	(98,033)	(91,619)	(519,022)
<b>Total costs</b>	<b>(5,096,062)</b>	<b>(112,238)</b>	<b>(104,895)</b>	<b>(98,033)</b>	<b>1,651,932</b>	<b>(3,759,295)</b>
<b>Net benefit</b>	<b>(3,285,307)<sup>16</sup></b>	<b>2,804,615</b>	<b>2,737,501</b>	<b>2,671,808</b>	<b>4,351,069</b>	<b>9,279,686</b>
<b>Benefit-cost ratio</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>3.47</b>

Source: Deloitte Access Economics

<sup>15</sup> Totals in this and subsequent tables in the economic analysis may not add due to rounding.

<sup>16</sup> The estimated cost-benefit of the infringement notices provisions of *The Criminal Code* over the first 12 months of operation (that is, the monitoring period) was a net cost of \$3,285,307. This finding was largely due to the effect of the full development cost of NTIMS being attributed to the first year of operation. As a conservative assumption, the full cost of the system development has been attributed in the cost-benefit analysis to the implementation, although the Office notes that NTIMS is used for all non-traffic infringement notices and not solely for *Criminal Code* infringement notices. The apportionment of these costs in the model over time (with capital costs attributed to the first year of monitoring and the benefit of the residual value of the system attributed in the final year) is the main reason for the uneven pattern of costs and benefits appearing across the five year period in this table.

Key components of the table above are:

- all benefits and costs in the table are expressed in present value terms. To achieve this, a discount rate of seven per cent per annum was applied in a standard discounted cash flow framework;
- benefit 1 (\$7,700,522) refers to the savings in police officer time associated with the arrests, summonses, court preparation and court attendance that are avoided when Criminal Code infringement notices are issued instead; and
- benefit 2 (\$5,338,459) refers to the savings in court time associated with court hearings that are avoided when Criminal Code infringement notices are issued instead of arrests and summonses.

The full report of the cost-benefit analysis, setting out its findings in detail, together with the underlying calculations and assumptions is provided in Volume 5.

The net benefit identified in Table 1 accrues from the anticipated benefits identified in the Second Reading Speech. As part of the analysis of the robustness of the key assumptions of the model (referred to as 'sensitivity analysis' in Volume 5) analysis was also undertaken of what the net cost-benefit would be if various other scenarios had been modelled. Included in Volume 5 are the detailed findings for six alternative scenarios, for example if the change in revenue resulting from the introduction of the infringement notices provisions of *The Criminal Code* had been included in the calculation, or if there had been an assumption of consistent shared use of NTIMS with other types of infringements. All alternative scenarios result in a net economic benefit (that is a benefit above 1.00), with two of the six cases, an increase from 3.47, two a decline and two either up or down depending on test parameters.<sup>17</sup>

#### **1.14.1 Summary of assumptions to the overall findings**

The estimated benefits in the monitoring period are attributed to the savings in police time associated with the arrests, summonses, court preparation and court attendance that are avoided when Criminal Code infringement notices are issued instead. During the monitoring period, the 1,800 Criminal Code infringement notices issued for the prescribed offence of disorderly behaviour are taken to be a 'substitution' for 533 arrests and 1,267 summonses. However, the 1,178 Criminal Code infringement notices issued for the prescribed offence of stealing are taken to be a 'substitution' for processes other than arrests and summonses (including where no formal action may have been taken). In the cost-benefit analysis, if substitution for a summons or arrest is considered to occur, then the cost associated with the summons or arrest is attributed as a benefit towards the net result, otherwise there is no benefit. These estimates are shown in Table 2 below.

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<sup>17</sup> Deloitte Access Economics, *Ombudsman Western Australia Cost Benefit Analysis of the Infringement Notices Provisions of The Criminal Code*, Deloitte Access Economics, April 2017, pp. 22-27.

**Table 2: Forecast Criminal Code infringement notices,  
by monitoring year and prescribed offence**

Transition to CCIN	2015-16	2016-17	2017-18	2018-19	2019-20
<i>Prescribed offence of stealing</i>					
CCIN substituted for an arrest	0	0	0	0	0
CCIN substituted for a summons	0	0	0	0	0
CCIN substituted for other processes	1,178	1,806	1,883	1,964	2,048
Sub total	1,178	1,806	1,883	1,964	2,048
<i>Prescribed offence of disorderly behaviour</i>					
CCIN substituted for an arrest	533	858	894	932	972
CCIN substituted for a summons	1,267	2,039	2,126	2,217	2,311
CCIN substituted for other processes	0	0	0	0	0
Sub total	1,800	2,897	3,020	3,149	3,284
<b>Total CCINs substituted</b>	1,800	2,897	3,020	3,149	3,284
<b>Total CCINs</b>	2,978	4,703	4,903	5,113	5,332

Source: Deloitte Access Economics

As the above estimated benefits are attributed to the savings associated with the arrests, summonses, court preparation and court attendance that are avoided when Criminal Code infringement notices are issued instead, any future changes to the way in which Criminal Code infringement notices are operationalised will affect this result. For example, there were distinct differences in how Criminal Code infringement notices were used in response to each of the two prescribed offences; in the event that the number of offences for which Criminal Code infringement notices are prescribed is expanded, the nature of these offences will determine whether or not the intended economic benefits are achieved. The Office also notes that the estimated benefits are based on the patterns in the use of Criminal Code infringement notices over the initial 12 month monitoring period, including the pilot period, and that these patterns could change over time.

### 1.15 Findings relating to the use of Criminal Code infringement notices as a diversionary option

The first step in monitoring the achievement of the economic objectives of the infringement notices provisions of *The Criminal Code* was to analyse the use of Criminal Code infringement notices as ‘a diversionary option for the community as a means of avoiding court appearances for minor offences’.<sup>18</sup> To do this, the Office undertook a comparative analysis of the actions taken by WAPOL in response to the two prescribed offences, during the benchmarking and monitoring periods.

<sup>18</sup> The Hon. Robert Frank Johnson MLA, Minister for Police, Legislative Assembly, Parliamentary Debates (Hansard), 8 September 2010, pp. 6137d-6139a.

**1.15.1 WAPOL recorded a 12 per cent increase in the total number of recorded incidents of the two prescribed offences; this was driven by a 24 per cent increase in the number of stealing offences**

The Office's analysis of the benchmarking data found that there were 9,904 recorded incidents of the two prescribed offences across the state of Western Australia during the 12 months prior to the introduction of Criminal Code infringement notices, compared with 11,073 recorded incidents during the monitoring period, representing a 12 per cent increase. This increase was driven predominantly by a 24 per cent increase in the number of stealing offences, from 4,799 in the benchmarking period, to 5,953 in the monitoring period. It is important to note that recorded incidents only include offences reported to and recorded by WAPOL, where an alleged offender was identified and WAPOL took formal action. That is, the data does not include offences where an offender was not identified, or an informal action (such as a caution or informal warning) was taken.

**1.15.2 During the monitoring period, for the two prescribed offences, the number of arrests and summonses decreased by 1,804 and 2,978 Criminal Code infringement notices were issued**

The Office further found that, while the overall number of recorded incidents of the two prescribed offences increased from the benchmarking period to the monitoring period, the number of arrests and summonses for these offences fell 18 per cent over the same period, from 9,805 during the benchmarking period to 8,001 in the monitoring period. That is, arrests and summonses fell collectively by 1,804 for the two prescribed offences. This suggests that the introduction of Criminal Code infringement notices diverted alleged offenders away from the courts, through a reduction in the number of arrests and summonses.

However, while arrests and summonses decreased by 1,804, during the monitoring period, police officers issued 2,978 Criminal Code infringement notices. To further analyse and understand this difference, the Office analysed the actions taken for each of the two prescribed offences, as set out below.

**1.15.3 For the prescribed offence of disorderly behaviour, Criminal Code infringement notices were issued in instances where an alleged offender would otherwise have been arrested or summonsed**

For the prescribed offence of disorderly behaviour, the Office's analysis found that arrests and summonses decreased by a total of 1,782 (from 5,084 to 3,302):

- the number of arrests decreased from 1,506 to 1,077; and
- the number of summonses decreased from 3,578 to 2,225.

The number of Criminal Code infringement notices issued for the prescribed offence of disorderly behaviour was 1,800.

The Office's analysis suggests that, for the prescribed offence of disorderly behaviour, Criminal Code infringement notices were issued in instances where an alleged offender would otherwise have been arrested or summonsed. That is, Criminal Code infringement notices operated as a diversionary option for the prescribed offence of disorderly

behaviour. Accordingly, in the cost-benefit analysis, the 1,800 Criminal Code infringement notices issued for the prescribed offence of disorderly behaviour are taken to be a 'substitution' for 533 arrests and 1,267 summonses.

#### **1.15.4 For the prescribed offence of stealing, Criminal Code infringement notices were issued for alleged offences where previously an alleged offender may not have been arrested or summonsed**

For the prescribed offence of stealing, the Office's analysis found that arrests and summonses decreased by a total of 22 (from 4,721 to 4,699):

- the number of arrests decreased from 2,664 to 2,652; and
- the number of summonses decreased from 2,057 to 2,047.

The number of Criminal Code infringement notices issued for the prescribed offence of stealing was 1,178.

The Office's analysis suggests that, for the prescribed offence of stealing, Criminal Code infringement notices were issued for alleged offences where previously an alleged offender may not have been arrested or summonsed. Accordingly, in the cost-benefit analysis, the 1,178 Criminal Code infringement notices issued for the prescribed offence of stealing are taken to be a 'substitution' for processes other than arrests and summonses.

#### **1.15.5 There are two key factors affecting why Criminal Code infringement notices are not being used instead of arrests and summonses for the prescribed offence of stealing**

Considerations of prior criminal history can be a factor when issuing a Criminal Code infringement notice for the prescribed offence of stealing. A further factor contributing to the Office's finding that Criminal Code infringement notices are not being used instead of arrests and summonses was suggested at the Police Officer Forums. At the Police Officer Forums, participants expressed the view that there are benefits of Criminal Code infringement notices to alleged victims of stealing offences. Police officers reported that for the prescribed offence of stealing, the victims of the alleged offence (particularly retail store owners) were, in accordance with WAPOL's CCIN Policy, able to retain their property.<sup>19</sup> Prior to the introduction of Criminal Code infringement notices, if the victim of an alleged stealing offence requested police officers to take formal action (that is, arrest or summons the alleged offender), the property would need to be retained by WAPOL as evidence. In addition, should an alleged offender be arrested or summonsed, the victim (and/or their staff) may need to attend court to give evidence.<sup>20</sup> Police officers expressed the view that, based on their experience with victims, the loss of the stolen property and the time requirements to attend court were a barrier to victims requesting police officers to take formal action, and previously in these instances the alleged offender may have received a caution or informal warning.

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<sup>19</sup> WAPOL's CCIN Policy provides that '[p]olice do not seize the alleged stolen property for the CCIN related offence ... it is to be retained by the property owner'.

<sup>20</sup> The Office notes that victims and other witnesses are usually not required to attend court unless the person charged with the offence pleads not guilty and the matter proceeds to trial.

## 1.16 Findings relating to the use of Criminal Code infringement notices to provide an incentive for behaviour change

The Office found that the 2,978 Criminal Code infringement notices issued during the monitoring period were issued to 2,817 individual alleged offenders. Of the 2,817 individual alleged offenders, 2,686 (95 per cent) were issued one Criminal Code infringement notice during the monitoring period.

The Office's analysis also identified that 131 alleged offenders were issued more than one Criminal Code infringement notice during the monitoring period. Collectively, these 131 alleged offenders received 292 Criminal Code infringement notices. The Office found that, of these 292 Criminal Code infringement notices:

- 155 (53 per cent) were issued for the prescribed offence of disorderly behaviour; and
- 137 (47 per cent) were issued for the prescribed offence of stealing.

The Office's findings suggest that, for these 131 alleged offenders, a Criminal Code infringement notice did not prevent future alleged incidents of the two prescribed offences. It is important to note that, in relation to periods for studies of recidivism, the Australian Institute of Criminology expresses the view that:

Time is inherent in all recidivism models, as recidivist offending must be observed as a sequence of events separated by units of time. Recidivism studies often differ in the length of time over which events are observed. This has obvious implications for the interpretation of recidivism estimates. The longer an individual is followed, the more likely it is that any recidivist events will be indicated.<sup>21</sup>

At this stage it cannot be determined whether the introduction of Criminal Code infringement notices will achieve the objective of providing an incentive for behaviour change.

## 1.17 Extension of Criminal Code infringement notices to other offences

The Office's findings demonstrate that the key economic objectives of the infringement notices provisions of *The Criminal Code* have been achieved. Overall, the cost-benefit analysis found that the total estimated gross benefit from the introduction of the infringement notices provisions of *The Criminal Code* equates to \$13.04 million<sup>22</sup> over five years. The Office also made the following findings in relation to the economic effect of the infringement notices provisions of *The Criminal Code*:

- the anticipated outcome of reducing administrative demands on police officers will be achieved;
- the anticipated outcome of reducing time taken by police to prepare for and appear in court will be achieved;

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<sup>21</sup> Payne, J, *Recidivism in Australia: findings and future research*, Australian Institute of Criminology, ACT, 2007, p. 50.

<sup>22</sup> In present value terms, or \$14.25 million in unadjusted terms.

- there has been a reduction in court time as a result of the introduction of the infringement notices provisions;
- trial backlogs have been reduced for the prescribed offences; and
- there are changes in the patterns of sentencing outcomes for cases related to the prescribed offences.

The Office also identified that the 1,800 Criminal Code infringement notices issued for the prescribed offence of disorderly behaviour were issued in instances where an alleged offender would otherwise have been arrested or summonsed. That is, these 1,800 alleged offenders avoided a court appearance. In addition, at the Police Officer Forums, participants expressed the view that there are benefits of Criminal Code infringement notices to alleged victims of stealing offences. Police officers reported that for the prescribed offence of stealing, the victims of the alleged offence (particularly retail store owners) were, in accordance with WAPOL's CCIN Policy, able to retain their property.

At this stage, Criminal Code infringement notices can only be issued for the two prescribed offences of stealing and disorderly behaviour. Given the identified cost-savings, and benefits to victims of crime and alleged offenders, an expansion of the range of prescribed offences for which police officers may issue a Criminal Code infringement notice is expected to result in increased cost savings and the accrual of further benefits.

The Office notes, importantly, that the consideration of expanding the range of prescribed offences should include consideration of the Office's findings in Volume 3 of this report, namely the impact of the infringement notices provisions of *The Criminal Code* on Aboriginal and Torres Strait Islander and other vulnerable communities and measures recommended by this report to address those findings where relevant.

## *The impact on Aboriginal and Torres Strait Islander and other communities*

### 1.18 The Office's approach to reviewing the impact of the operation of the infringement notices provisions of *The Criminal Code* on Aboriginal and Torres Strait Islander communities

As noted above, section 723(2) of the *Criminal Code Amendment (Infringement Notices) Act 2011* provides that the Ombudsman review the impact of the infringement notices provisions of *The Criminal Code* on 'Aboriginal and Torres Strait Islander communities', and the Office uses this term throughout this report.

The Office recognises, in reviewing the impact of the infringement notices provisions on Aboriginal and Torres Strait Islander communities, that the views of Aboriginal and Torres Strait Islander communities are not necessarily homogenous or singular, nor are issues identified of uniform impact upon Aboriginal and Torres Strait Islander communities. In other words, there is identifiable 'diversity of cultures, traditional practices and differences across communities and the various clan, language and skin groups represented throughout Australia and the Torres Strait'.<sup>23</sup> It is particularly important to note that Aboriginal and Torres Strait Islander people are two distinct cultural groups that have their own unique identity, history and cultural traditions. Only 0.06 per cent of the Western Australian population identified as Torres Strait Islander people in the 2016 Census and a further 0.07 per cent identified as both Aboriginal and Torres Strait Islander.<sup>24</sup> During the consultation process, no information was received by the Office identifying specific issues or concerns for Torres Strait Islander people.

In order to review the impact of the infringement notices provisions of *The Criminal Code* on Aboriginal and Torres Strait Islander communities, the Office scrutinised, engaged and consulted state government departments and authorities, and also requested and received information from relevant courts. This information included the WAPOL and DOTAG state-wide data and the court data. Across all of these data sets, the Office collected, or requested and received, information about whether or not the alleged offender was recorded as Aboriginal or Torres Strait Islander. This enabled the Office to analyse the data relating to people from Aboriginal and Torres and Strait Islander communities separately, and to consider the impact of the infringement notices provisions of *The Criminal Code* on people from these communities specifically.

In addition, and as detailed in Volume 4, the Office particularly sought to consult with Aboriginal and Torres Strait Islander communities regarding their experiences of Criminal Code infringement notices. The Office also conducted a review of the relevant research literature, with a focus on the impact of the use of infringement notices systems on Aboriginal and Torres Strait Islander communities.

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<sup>23</sup> Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper No 84, Australian Law Reform Commission, Canberra, 2017, p. 29.

<sup>24</sup> Australian Bureau of Statistics, 2016 Census: Aboriginal and/or Torres Strait Islander Peoples Quickstats, 2016, ABS, Canberra, June 2017.

## 1.19 Issues examined by the Office

The Office identified a number of potential issues concerning the impact of the infringement notices provisions of *The Criminal Code* on Aboriginal and Torres Strait islander communities. Further, the Office identified that many of these potential issues arise particularly when Aboriginal and Torres Strait Islander alleged offenders are vulnerable for reasons including being financially and socially disadvantaged, being young, experiencing homelessness and/or having an intellectual disability or mental illness. The Office found that, in relation to the operation of the infringement notices provisions, these particular circumstances of vulnerability are also shared with members of the community who are not Aboriginal and Torres Strait Islander.

Accordingly, in reviewing the impact of the infringement notice provisions of *The Criminal Code* on Aboriginal and Torres Strait Islander communities, the Office also identified a range of potential issues for other people and communities. While the Office focused on the impact on Aboriginal and Torres Strait islander communities, the Office also considered these other people and communities experiencing vulnerability. For example, the Office identified that the infringement notices provisions of *The Criminal Code* can further disadvantage people who are homeless. While it is of critical importance to recognise that Aboriginal and Torres Strait Islander people are overrepresented in the homeless population, not every homeless person is Aboriginal or Torres Strait Islander. In this example, the Office has therefore considered the impact of the infringement notices provisions of *The Criminal Code* on homeless people generally, as well as reviewing the particular impact on Aboriginal and Torres Strait Islander people who are experiencing homelessness.

In this context, the Office considered, and made findings, in the following key areas:

- Aboriginal and Torres Strait Islander people and the criminal justice system;
- Exercising discretion to issue a Criminal Code infringement notice;
- The use of Criminal Code infringement notices as diversionary option, including the potential for a Criminal Code infringement notice to be issued as a substitute for a caution or warning, rather than as a diversion from court;
- Understanding and responding to Criminal Code infringement notices;
- The impact of not paying Criminal Code infringement notices; and
- Further mitigating the potentially negative impacts of the infringement notices provisions of *The Criminal Code*, including the provision of flexible repayment methods.

## 1.20 Aboriginal and Torres Strait Islander people and the criminal justice system

### 1.20.1 Aboriginal and Torres Strait Islander people are significantly overrepresented in the criminal justice system, and in particular in Western Australia

While ‘the majority of Aboriginal and Torres Strait Islander people never commit criminal offences’,<sup>25</sup> there is consensus in the research literature that Aboriginal and Torres Strait Islander people are overrepresented in the Australian criminal justice system, with the Australian Institute of Criminology finding, for example, that ‘Indigenous Australians ... experience contact with the criminal justice system – as both offenders and victims – at much higher rates than non-Indigenous Australians’.<sup>26</sup> Further, the Australian Institute of Health and Welfare has found that ‘Aboriginal and Torres Strait Islander young people are substantially over-represented in the juvenile justice system in Australia’.<sup>27</sup>

While Aboriginal and Torres Strait Islander people are overrepresented in rates of contact with the criminal justice system on a national level, the rate of overrepresentation of Aboriginal people in Western Australia is of particular note. The *Royal Commission into Aboriginal Deaths in Custody: National Report* remarked upon the ‘gross level of disproportion in Western Australia [where] ... Aboriginal people [were] in police custody at a rate forty-three times that of non-Aboriginal people ...’.<sup>28</sup> More recently in Western Australia, as observed by the Hon. Chief Justice Wayne Martin AC, ‘[i]t is of note that the rate of over-representation of Aboriginal people in Western Australian prisons has now reached the same level that applied prior to the Report of the Royal Commission into Aboriginal Deaths in Custody in 1991.’<sup>29</sup>

### 1.20.2 There are many complex factors contributing to the overrepresentation of Aboriginal people in the criminal justice system

The research literature suggests that ‘Aboriginal law-breaking is not exclusively an Aboriginal ‘problem’ but the product of circumstances created by history, social policies and structures, local conditions, and criminal justice practices’.<sup>30</sup> The research literature further identifies factors that contribute to the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system, including entrenched social

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<sup>25</sup> Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper No 84, 2017, Terms of Reference.

<sup>26</sup> Australian Institute of Criminology, *Indigenous justice in focus*, viewed 5 October 2016, <[http://www.aic.gov.au/crime\\_types/in\\_focus/indigenousjustice.html](http://www.aic.gov.au/crime_types/in_focus/indigenousjustice.html)>.

<sup>27</sup> Australian Institute of Health and Welfare, *Indigenous young people in the juvenile justice system, 2010-11*, Bulletin 109, November 2012, p. 3.

<sup>28</sup> Royal Commission into Aboriginal Deaths in Custody, *National Report Volume 1*, Royal Commission into Aboriginal Deaths in Custody, Canberra, April 1991, p.122.

<sup>29</sup> The Honourable Wayne Martin AC, Chief Justice of Western Australia, Foreword of the *Aboriginal Benchbook for Western Australia Courts Second Edition*, Australasian Institute for Judicial Administration, Melbourne, 2008.

<sup>30</sup> Homel, R, Lincoln, R, and Herd, B, ‘Risk and Resilience: Crime and Violence Prevention in Aboriginal Communities’, *The Australian and New Zealand Journal of Criminology*, vol. 32, no. 2, 1999, p. 184.

disadvantage in the areas of health, housing,<sup>31</sup> employment and education,<sup>32</sup> and the experience of high levels of psychological distress and intergenerational trauma associated with 'historical dispossession, racism, and forcible removal from family combined with grief, early death of family members and violence.'<sup>33</sup>

One critical factor contributing to the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system is the trauma experienced by Aboriginal and Torres Strait Islander people, both as individuals and as communities. That is, Aboriginal people's conceptualisation of trauma is not limited to psychological perspectives, but also encompasses the trauma caused by their 'displacement from Country, institutionalisation and abuse. The Stolen Generations also represent a significant cause of trauma.'<sup>34</sup>

The research literature suggests that experiencing trauma can cause a person to lose the ability to differentiate between a safe situation and a dangerous one, potentially resulting in an inappropriate response. This has particular implications for police officers; not only because people who have experienced trauma are they more likely to come into contact with police,<sup>35</sup> but also, this contact may be perceived as a dangerous situation, particularly for Aboriginal and Torres Strait Islander people.<sup>36</sup> In this context, 'certain interventions may escalate rather than control difficulties.'<sup>37</sup>

## 1.21 Exercising discretion to issue Criminal Code infringement notices

As noted above, the Office identified that one potential issue concerning the impact of the infringement notices provisions of *The Criminal Code* on Aboriginal and Torres Strait Islander communities was the potential for Aboriginal and Torres Strait Islander people to be more likely to receive a Criminal Code infringement notice than non-Aboriginal people. Further, the Office has found that there is a potential for any person experiencing disadvantage and vulnerability to be disproportionately likely to receive a Criminal Code infringement notice, including those who are not Aboriginal or Torres Strait Islander.<sup>38</sup>

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<sup>31</sup> Smart Justice Project, *Ending over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system*, Federation of Community Legal Centres, Reichstein Foundation and Victoria Law Foundation, Melbourne, 2015, viewed 10 May 2017, <[http://www.smartjustice.org.au/resources/SMART\\_OverRepresentation\\_Feb11.pdf](http://www.smartjustice.org.au/resources/SMART_OverRepresentation_Feb11.pdf)>; Select Committee on Regional and Remote Indigenous Communities, *Indigenous Australians, Incarceration and the Criminal Justice System*, Parliament of Australia, Canberra, March 2010, pp. 31-32.

<sup>32</sup> Select Committee on Regional and Remote Indigenous Communities, *Indigenous Australians, Incarceration and the Criminal Justice System*, Parliament of Australia, Canberra, March 2010, p. 30.

<sup>33</sup> Select Committee on Regional and Remote Indigenous Communities, *Indigenous Australians, Incarceration and the Criminal Justice System*, Parliament of Australia, Canberra, March 2010, p. 29.

<sup>34</sup> Atkinson, J, *Trauma-informed services and trauma-specific care for Indigenous Australian children*, Resource sheet no. 21 produced for the Closing the Gap Clearinghouse, Australian Institute of Health and Welfare and Australian Institute of Family Studies, July 2013, pp. 2-3.

<sup>35</sup> Randall, M and Haskell, L, 'Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping', *Dalhousie Law Journal*, vol. 36, no. 2, 2013, p. 516, citing Ardino, V, *Offending Behaviour: The Role of Trauma and PTSD*, 2012.

<sup>36</sup> Moore, E, *Not Just Court: Indigenous Families, Violence And Apprehended Violence Orders In Rural New South Wales*, University of Sydney, New South Wales, February 2002, p. 8.

<sup>37</sup> Dudley, R.G, *Childhood Trauma and Its Effects: Implications for Police*, National Institute of Justice, July 2015, p. 12.

<sup>38</sup> For example: S Clarke, S Forell & E McCarron, 'Fine but not fair: Fines and disadvantage,' Law and Justice Foundation of New South Wales, Justice Issues, paper 3, 2008, p. 3; NSW Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, NSW Ombudsman, Sydney, 2005, p. 84; D. Zanella, RUAH Community Services, submission dated 20 May 2016; D. Childs, CEO Helping Minds, submission dated 20 May 2016; C. Pettit, Commissioner for Children and Young People WA, submission dated 3 May 2016.

As observed by the Hon. Margaret Quirk MLA, ‘for the new scheme to work properly, police officers will need to use their discretion responsibly, consistently and in a non-discriminatory way. That is a key to the system.’<sup>39</sup> The Office analysed the WAPOL state-wide data and the court data to consider whether this was an issue in relation to Criminal Code infringement notices in Western Australia.

### **1.21.1 Thirty-six per cent of Criminal Code infringement notices were issued to recipients whose ‘Offender Appearance’ was recorded by WAPOL as Aboriginal**

The Office found that, of the 2,978 Criminal Code infringement notices issued, 1,080 (36 per cent) were issued to recipients whose ‘Offender Appearance’<sup>40</sup> was recorded by WAPOL as Aboriginal. For comparison, 3.1 per cent of Western Australia’s population identified as Aboriginal and/or Torres Strait Islander in the 2016 Census of Population and Housing.<sup>41</sup> That is, Aboriginal and Torres Strait Islander people were overrepresented as recipients of Criminal Code infringement notices by a factor of 11.6. However, this overrepresentation is consistent with the overrepresentation of Aboriginal and Torres Strait Islander people in the Western Australian criminal justice system generally; as at 30 June 2016, ‘Aboriginal and Torres Strait Islanders comprised 38% (2,403 prisoners) of the adult prisoner population’ in Western Australia.<sup>42</sup>

Although the overrepresentation of Aboriginal people as recipients of Criminal Code infringement notices is similar in magnitude to the overrepresentation of Aboriginal people in the overall criminal justice system in Western Australia, this overrepresentation is greater than that identified in New South Wales. A 2009 New South Wales Ombudsman’s Report found that New South Wales police issued 8,681 Criminal Infringement Notices in the first year, including 645 (7.4 per cent) to Aboriginal alleged offenders,<sup>43</sup> and that Aboriginal people ‘make up 2.1 [per cent] of the population of NSW’.<sup>44</sup> That is, in New South Wales, Aboriginal and Torres Strait Islander people were overrepresented as recipients of Criminal Infringement Notices by a factor of 3.5. For comparison, at 30 June 2016, ‘Aboriginal and Torres Strait Islanders comprised 24% (3,037 prisoners) of the adult prisoner population’ in New South Wales.<sup>45</sup>

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<sup>39</sup> The Hon. Margaret Quirk MLA, Legislative Assembly, Parliamentary Debates (Hansard), 21 October 2010, pp. 8194b-8204a.

<sup>40</sup> WAPOL data relating to ‘Offender Appearance’ refers to a variable which is determined and recorded by WAPOL. ‘Offender Appearance’ includes the categories of ‘Caucasian’, ‘Aboriginal’ and ‘Unknown’.

<sup>41</sup> Australian Bureau of Statistics, 2016 Census: Aboriginal and/or Torres Strait Islander Peoples Quickstats, 2016, ABS, Canberra, June 2017.

<sup>42</sup> Australian Bureau of Statistics, 4517.0 Prisoners in Australia, 2016, Australian Bureau of Statistics, Canberra, 2017, viewed 19 May 2017, <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Western%20Australia~22>>.

<sup>43</sup> New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009, p. 38.

<sup>44</sup> New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009, p. 38.

<sup>45</sup> Australian Bureau of Statistics, 4517.0 Prisoners in Australia, 2016, Canberra, 2017, viewed 19 May 2017, <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~New%20South%20Wales~18>>.

### **1.21.2 Seventy per cent of Criminal Code infringement notices issued to Aboriginal recipients were for the prescribed offence of disorderly behaviour**

The Office found that, of the 1,080 Criminal Code infringement notices issued to Aboriginal recipients:

- 752 (70 per cent) were issued for the prescribed offence of disorderly behaviour; and
- 328 (30 per cent) were issued for the prescribed offence of stealing.

In contrast, where WAPOL recorded that the 'Offender Appearance' of recipients was non-Aboriginal (1,523 Criminal Code infringement notices, excluding unknowns), 52 per cent (787) of Criminal Code infringement notices were issued for the prescribed offence of disorderly behaviour, and 48 per cent (736) for the prescribed offence of stealing.

The Office's findings are consistent with the research literature which suggests that, while Aboriginal people are 'overrepresented generally in the criminal justice system ... [t]his over-representation is pronounced for public order offences.'<sup>46</sup> This was further identified by the Royal Commission into Aboriginal Deaths in Custody, which identified that 'public order offences, especially those of vagrancy... and obscene or offensive language charges are used frequently against Aboriginal people.'<sup>47</sup> The research literature further suggests that these types of offences, including disorderly behaviour, arise from 'the contested nature of public space',<sup>48</sup> and that '[t]his rationale helps explain why public order offences impact most heavily on those who spend large amounts of time in public spaces and whose presence there is said to be highly visible.'<sup>49</sup>

In addition, Aboriginal and Torres Strait Islander people may be more visible in public spaces as '[t]he Indigenous population is much younger than the non-Indigenous population. In 2011, half of the Indigenous population was aged 22 or under compared with 38 or under for the non-Indigenous population.'<sup>50</sup>

### **1.21.3 A range of tailored strategies are required to ensure that Aboriginal and Torres Strait Islander people are not unfairly disadvantaged when exercising discretion to issue a Criminal Code infringement notice**

The Office found that Aboriginal and Torres Strait Islander people were overrepresented as recipients of Criminal Code infringement notices. Collectively, the Office's findings suggest that Aboriginal people are at increased risk of receiving a Criminal Code infringement notice, particularly for the prescribed offence of disorderly behaviour, for a number of reasons including but not limited to:

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<sup>46</sup> Crime and Misconduct Commission (Queensland), *Policing Public Order: A Review Of The Public Nuisance Offence*, Crime and Misconduct Commission, May 2008, p. 18.

<sup>47</sup> Commissioner Elliott Johnston, *National Report, Volume 3*, Royal Commission into Aboriginal Deaths in Custody, Canberra, 1991, RCN.0002.0001.0530.

<sup>48</sup> Crime and Misconduct Commission (Queensland), *Policing Public Order: A Review Of The Public Nuisance Offence*, Crime and Misconduct Commission, May 2008, p. 20.

<sup>49</sup> Crime and Misconduct Commission (Queensland), *Policing Public Order: A Review Of The Public Nuisance Offence*, Crime and Misconduct Commission, May 2008, p. 20.

<sup>50</sup> Australian Institute of Health and Welfare, *Australia's Health 2014*, Canberra, 2014, p. 297.

- Aboriginal people's spiritual and cultural connection to the land, leading to increased use of public space;
- the overrepresentation of Aboriginal people who experience homelessness; and
- potentially higher rates of mental illness and intellectual disability in Aboriginal communities.

Currently in Western Australia there is no framework for considering if an offence is a suitable offence to be dealt with by way of infringement. Bearing in mind the above findings, the establishment of such a framework could promote fairness and equality in the continued administration of the infringement notice provisions of *The Criminal Code*; in particular ensuring that the impact of any future prescribed offences is comprehensively considered.

Given the Office's finding that Aboriginal people are overrepresented as recipients of Criminal Code infringement notices, to promote effective interactions with Aboriginal people and communities it is important that police officers who are authorised to issue Criminal Code infringement notices are culturally competent.

## 1.22 Exercising discretion to issue Criminal Code infringement notices to 17 year olds

The Office identified that one potential issue concerning the impact of the infringement notices provisions of *The Criminal Code* is the potential for people aged 17 years to be more likely to receive a Criminal Code infringement notice and to be disproportionately negatively impacted as a result. In addition, Aboriginal and Torres Strait Islander people may be more exposed to the impact of this potential issue as '[t]he Indigenous population is much younger than the non-Indigenous population. In 2011, half of the Indigenous population was aged 22 or under compared with 38 or under for the non-Indigenous population.'<sup>51</sup> The Office analysed the WAPOL state-wide data and the court data to examine the impact of the infringement notices provisions of *The Criminal Code*, with a focus on 17 year old Aboriginal and Torres Strait Islander young people.

### 1.22.1 Young people may be subjected to increased policing within the public space

As noted above, 17 year olds accounted for 3 per cent of Criminal Code infringement notices (89 recipients). For comparison, in 2016, 17 year olds accounted for 1.6 per cent of all Western Australians aged 17 and over.<sup>52</sup>

The research literature suggests that young people (people aged less than 18 years) are vulnerable to the impact of infringement systems, with the research literature identifying that they 'are highly visible on the streets',<sup>53</sup> and that 'their use of public space is

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<sup>51</sup> Australian Institute of Health and Welfare, *Australia's Health 2014*, viewed 12 August 2016, <<http://www.aihw.gov.au/australias-health/2014/indigenous-health/>>.

<sup>52</sup> To determine Western Australia's population by age, the Office generated a customised table using the Australian Bureau of Statistics data '2016 Census – Persons, Place of Usual Residence', *Census of Population and Housing 2016*.

<sup>53</sup> Australian Law Reform Commission, '*Children's involvement in criminal justice processes*,' Australian Law Reform Commission, Canberra, November 1997, viewed 20 June 2016, <<http://www.alrc.gov.au/publications/18-childrens-involvement-criminal-justice-processes/public-spaces/>>.

increasingly regulated'.<sup>54</sup> Public space is important to young people, serving as a 'free and democratic space'<sup>55</sup> that allows them to 'assert their autonomy and to congregate ... in places outside of close adult or state control.'<sup>56</sup> Young people's frequent use of public space is also driven by necessity, 'because they do not own or have access to more private spaces in which to congregate.'<sup>57</sup>

The Office found that 34 per cent of 17 year old recipients of Criminal Code infringement notices were recorded by WAPOL as being Aboriginal. This finding was consistent with the Office's overall finding that 36 per cent of all Criminal Code infringement notices were issued to recipients recorded by WAPOL as being Aboriginal.

### **1.22.2 Where a prescribed offence was heard in court and the alleged offender was 17 years old the average fine was less than half of the \$500 modified penalty associated with a Criminal Code infringement notice**

The *Young Offenders Act 1994* provides a different legislative framework for dealing with young alleged offenders, including 17 year olds. Respondents to the Consultation Paper identified potential issues arising from the infringement notices provisions of *The Criminal Code* and its impact on actions taken pursuant to *Young Offenders Act 1994*.

Respondents to the Consultation Paper also expressed the view that the \$500 penalty for offences may be disproportionate with the offence committed (for example, for stealing an item worth \$5), and beyond the means or capacity of a young person to pay. This issue is also raised in the research literature, which suggests that 'while there are young people who earn income, there are many who earn little or no money.'<sup>58</sup>

It is also important to recognise that the *Young Offenders Act 1994* was drafted and commenced prior to the introduction of Criminal Code infringement notices. That is, at the time the legislation was passed, an infringement notice could not be issued in response to offences under the *Criminal Code*. For the two prescribed offences to result in a financial penalty, this could only occur through a court issued fine.

The Office's analysis found that, during the benchmarking period, 52 alleged offenders who were aged 17 years attended court for a prescribed offence.<sup>59</sup> All 52 matters were finalised by the court, with a sentence imposed in 22 instances (42 per cent). Of these 22 instances where a sentence was imposed, the sentencing outcome was a fine in 11 instances (50 per cent). The average fine imposed by the court was \$204.55.

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<sup>54</sup> Youth Affairs Council of Victoria, *Space Invaders? Young people and public space forum report*, (June 2005), Youth Affairs Council of Victoria, Melbourne, 2005, p 7.

<sup>55</sup> K. Delaney, M. Prodigalidad & J. Sanders, *Young People and Public Space*, 24 July 2002, workshop paper presented at New South Wales Council of Social Service 'Scales of Justice' conference, Woolloomooloo, p. 1.

<sup>56</sup> R. White, *Young People, Community Space and Social Control*, January 1992, paper presented at the National Conference on Juvenile Justice, Adelaide, p. 199.

<sup>57</sup> A. Copeland, 'Participation and the role of public space, our space, their space and MySpace,' *Public Space: The Journal of Law and Social Justice*, (2008) Vol 2, Art 4, p. 17.

<sup>58</sup> New South Wales Law Reform Commission, *Consultation Paper 10: Penalty notices*, NSWLRC, Sydney, September 2010, p. 105.

<sup>59</sup> The Office only included cases where the alleged offender had only appeared before the court once in the four year period, for one of the two prescribed offences.

The Office's analysis of the monitoring period found that, 38 alleged offenders who were aged 17 years attended court for a prescribed offence.<sup>60</sup> All 38 matters were finalised by the court, with a sentence imposed in 16 instances (42 per cent). Of these 16 instances where a sentence was imposed, the sentencing outcome was a fine in eight instances (50 per cent). The average fine imposed by the court was \$178.13.

The Office's analysis suggests that, where a prescribed offence is heard in court and the alleged offender is 17 years old, less than a quarter of 17 year old alleged offenders are fined by the court. Where the alleged offender was fined, the average fine was less than half of the \$500 modified penalty associated with a Criminal Code infringement notice.

## 1.23 The use of Criminal Code infringement notices as a diversionary option

### 1.23.1 Arrests and summonses of Aboriginal alleged offenders decreased by 14 per cent, a lower reduction than for all offenders

The Office found that arrests and summonses for the two prescribed offences reduced by 18 per cent between the two periods.

For recipients who were recorded by WAPOL as Aboriginal, the Office found that this reduction in arrests and summonses was 633 or 14 per cent (4,572 to 3,939); a lower reduction.

Taking into account that arrests and summonses reduced by 633 for Aboriginal alleged offenders between the two periods, and 1,080 Criminal Code infringement notices were issued to Aboriginal alleged offenders, this suggests that the introduction of Criminal Code infringement notices diverted some Aboriginal alleged offenders away from the court system.

### 1.23.2 The number of actions taken by police in response to the prescribed offence of stealing increased by 34 per cent for female Aboriginal alleged offenders

The Office undertook further analysis to determine the underlying factors in the nine per cent increase in arrests and summonses for the prescribed offence of stealing, where the alleged offender was Aboriginal. This analysis included consideration of the gender of Aboriginal alleged offenders for the two prescribed offences. To gain a complete picture of the actions taken by police<sup>61</sup> across the two prescribed offences and both genders, the Office analysed data relating to arrests, summonses and Criminal Code infringement notices across both the benchmarking and monitoring periods.

Comparing the benchmarking period to the monitoring period, the number of actions taken by police in response to the prescribed offence of stealing increased by 34 per cent for

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<sup>60</sup> The Office only included cases where the alleged offender had only appeared before the court once in the four year period, for one of the two prescribed offences.

<sup>61</sup> Actions recorded only relate to offences reported to and recorded by WAPOL, where an alleged offender was identified and WAPOL took formal action. That is, the data does not include offences where an offender was not identified, or an informal action (such as a caution or informal warning) was taken.

female Aboriginal alleged offenders, and 18 per cent for male Aboriginal alleged offenders. If Criminal Code infringement notices were being used to divert these alleged offenders, and with all other things being equal, the Office would expect that the number of actions taken across the two periods would be stable (that is, Criminal Code infringement notices would replace some arrests and summonses).

The Office's finding confirms that Criminal Code infringement notices were not used to divert Aboriginal alleged offenders for the prescribed offence of stealing, and that there has been an increase in the number of actions taken in response to the prescribed offence of stealing. This was particularly evident for female Aboriginal alleged offenders.

For the prescribed offence of disorderly behaviour, the number of actions taken across the two periods was relatively stable, indicating that Criminal Code infringement notices were used as a diversionary strategy for Aboriginal alleged offenders, as a replacement for arrests and summonses, for both genders.

### **1.23.3 A disproportionate number of Aboriginal females were issued a Criminal Code infringement notice for the prescribed offence of stealing when they otherwise may have received a caution**

The Office's findings suggest that, for the prescribed offence of stealing, the recipient may not have been arrested or summonsed, and may have been dealt with, for example, through a caution. It is arguable that, for recipients who were issued a Criminal Code infringement notice for the prescribed offence of stealing, there was no benefit to the recipient.

However, as noted above, police officers have identified that there is a benefit of Criminal Code infringement notices for the prescribed offence of stealing to the alleged victims of these offences. Police officers expressed the view that, based on their experience with victims, the loss of the stolen property and the time requirements to attend court were a barrier to victims requesting police officers to take formal action, and, prior to the introduction of Criminal Code infringement notices, in these instances the alleged offender may have received a caution or informal warning.

Again, the Office also notes that these findings are based on the Office's analysis of data relating to the monitoring period and therefore the use of Criminal Code infringement notices as a diversionary option for the community may change over time.

In order to determine which alleged offenders in the community were issued a Criminal Code infringement notice where they otherwise may not have been arrested or summonsed, the Office analysed the WAPOL state-wide data regarding Criminal Code infringement notices issued for the prescribed offence of stealing.

The Office found that, of the 1,178 Criminal Code infringement notices issued for the prescribed offence of stealing:

- the largest number were issued to non-Aboriginal male recipients (415 or 35 per cent) followed by non-Aboriginal female recipients (314 or 27 per cent);
- there were more than twice the number of female Aboriginal recipients (227 or 19 per cent) than male Aboriginal recipients (101 or 9 per cent); and

- that 599 (51 per cent) were issued to female recipients.

For comparison, the ABS estimates<sup>62</sup> that, in Western Australia in 2011, Aboriginal females made up 1.9 per cent of Western Australia's population.<sup>63</sup> That is, Aboriginal females were overrepresented by a factor of 10 as recipients of Criminal Code infringement notices for the prescribed offence of stealing.

The largest number of Criminal Code infringement notices issued to female recipients for the prescribed offence of stealing were issued to Aboriginal female recipients aged between 20 and 24 (57 or 9.5 per cent). Of particular note, 67 per cent (153 of 227) of Aboriginal female recipients who were issued a Criminal Code infringement notice for the prescribed offence of stealing were aged between 17 and 34.

The Office notes that, in many instances, issuing a Criminal Code infringement notice will be the most appropriate action available to police officers when responding to the prescribed offence of stealing. The Office also notes that there are identified benefits of Criminal Code infringement notices to alleged victims, particularly retail store owners who are, in accordance with the WAPOL CCIN Policy, able to retain their property. It is also noted that, taking into account the Office's finding that, for the prescribed offence of stealing, the recipient may not have been arrested or summonsed, and may have been dealt with, for example, through a caution, the data suggests that a disproportionate number of Aboriginal females (particularly those aged between 17 and 34) may have been disadvantaged through receipt of a Criminal Code infringement notice (where they otherwise may have been diverted away from the criminal justice system).

#### **1.23.4 Men aged between 17 and 34 avoided the most court appearances; accounting for 56 per cent of all Criminal Code infringement notices issued for the prescribed offence of disorderly behaviour**

The Office's findings suggest that, where a Criminal Code infringement notice was issued for the prescribed offence of disorderly behaviour, the recipient avoided a court appearance and potentially avoided receiving a criminal record. The Office recognises, however, that the overall benefit to the recipient is also affected by their capacity to pay the Criminal Code infringement notice. The Office also notes that these findings are based on the Office's analysis of data relating to the monitoring period and therefore the use of Criminal Code infringement notices as a diversionary option for the community may change over time.

In order to determine which alleged offenders in the community potentially avoided a court appearance, the Office analysed the WAPOL state-wide data regarding Criminal Code infringement notices issued for the prescribed offence of disorderly behaviour. The Office

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<sup>62</sup> The Australian Bureau of Statistics states that the 'estimates of the Aboriginal and Torres Strait Islander and non-Indigenous populations presented in this publication are based on 2011 Census of Population and Housing counts adjusted for net undercount as measured by the Post Enumeration Survey. The extent of undercoverage of Aboriginal and Torres Strait Islander Australians in the 2011 Census and the relatively small sample size of the Post Enumeration Survey to adjust for that undercoverage means the estimates should be interpreted with a degree of caution.' (Australian Bureau of Statistics, 3238.0.55.001 – *Estimates of Aboriginal and Torres Strait Islander Australians*, 2011, cat. no. 3238.0.55.001, ABS, Canberra, August 2013).

<sup>63</sup> Australian Bureau of Statistics, 3238.0.55.001 – *Estimates of Aboriginal and Torres Strait Islander Australians*, 2011, cat. no. 3238.0.55.001, ABS, Canberra, August 2013.

found that, of the 1,800 Criminal Code infringement notices issued for the prescribed offence of disorderly behaviour:

- the largest number were issued to non-Aboriginal male recipients (692 or 38 per cent) followed by Aboriginal male recipients (448 or 25 per cent); and
- where gender and alleged 'Offender Appearance' were both recorded, the lowest number were issued to non-Aboriginal female recipients (94 or 5 per cent).

As male recipients accounted for 76 per cent (1,367 of 1,800) of Criminal Code infringement notices issued for the prescribed offence of disorderly behaviour, the Office undertook further analysis of the ages of these 1,367 recipients. The largest number of Criminal Code infringement notices issued to male recipients for the prescribed offence of disorderly behaviour were issued to non-Aboriginal men aged between 20 and 24 (202 or 15 per cent). Across all 'Offender Appearance' types, male recipients aged between 17 and 34 years accounted for 73 per cent (1,001 of 1,367) of Criminal Code infringement notices issued to males for the prescribed offence of disorderly behaviour.

Overall, male recipients aged between 17 and 34 accounted for 56 per cent (1,001 of 1,800) of all Criminal Code infringement notices issued for the prescribed offence of disorderly behaviour, and therefore avoided the most court appearances.

#### **1.23.5 Diversion away from court may be of limited benefit to some alleged offenders as a court can take their personal circumstances into account**

As discussed above, the Office has found that, for the prescribed offence of disorderly behaviour, a Criminal Code infringement notice was issued as a substitute for an arrest or summons, and the recipient therefore avoided a court appearance. While this is arguably a benefit to an alleged offender, for alleged offenders in special circumstances, there is a potential that Criminal Code infringement notices may result in a higher penalty than that which would be imposed by a court.<sup>64</sup>

This situation may arise as a court is able to consider the personal circumstances of an alleged offender, as the Australian Law Reform Commission observes:

When an offender is being sentenced, a court may have regard to submissions that provide a subjective account of the person's history, background and experience, including matters of disadvantage. Each Australian jurisdiction has a legislative framework that guides the sentencing process. These frameworks allow for consideration of a range of subjective factors arising from the offender's history to be taken into account. This may include, for example, where the offender experienced deprivation, poverty, trauma or abuse where those factors may affect a person's moral culpability. These frameworks apply irrespective of an offender's cultural or racial background.<sup>65</sup>

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<sup>64</sup> The Hon. Giz Watson MLC, Legislative Council, Parliamentary Debates (Hansard), 22 February 2011, pp. 781b-787a; Aboriginal Legal Service, submission dated 28 April 2016.

<sup>65</sup> Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper No 84*, Australian Law Reform Commission, Canberra, 2017, pp. 52-53.

The Office notes that this could include consideration of an alleged offender's circumstances in the determination of the penalty amount, which, in the case of Criminal Code infringement notices, is legislated to be \$500. This could also include consideration of the underlying causes of the alleged offending behaviour, which is of particular importance for vulnerable people, including those who are homeless, have a mental illness and/or an intellectual disability.

The Office's review of the research literature suggests that vulnerable defendants may receive lower penalties in court, for example, as the Victorian Homeless Law in Practice observes:

Homeless clients will sometimes receive a more favourable outcome in court than under the infringements system. This is because the Magistrates Court is often better equipped to consider and respond to the individual circumstances of a person than the 'automated' infringements system with its fixed penalties. This is particularly so if the client appears before a Magistrate or judicial registrar in the Special Circumstances List because those decision makers have specialist experience dealing with homeless people and an understanding of the range of issues that people experiencing homelessness might be faced with.<sup>66</sup>

In order to further explore this issue, the Office analysed data provided by the Magistrates Court in relation to court outcomes for the two prescribed offences<sup>67</sup> to determine how often a fine was imposed on the alleged offender, and if so the average amount of the fine. The Office's analysis found that, where a charge was finalised:

- a sentence was imposed on the offender in 90 per cent of cases in the benchmarking period, and 91 per cent of cases in the monitoring period;
- the sentence imposed included a fine in 96 per cent of cases in the benchmarking period, and 93 per cent of cases in the monitoring period; and
- the average fine imposed was \$520 in the benchmarking period, and \$522 in the monitoring period.

The Magistrates Court also provided data for the three years prior to the benchmarking period, that is, a total of five years' data was provided. The Office analysed the data over the five year period and identified that, where the sentencing outcome included a fine, the average fine imposed was \$480. The fine amounts ranged from \$20 to \$10,000. The most frequently imposed fine amount was \$500 (24 per cent of all fines imposed).

While this analysis suggests that the modified penalty associated with a Criminal Code infringement notice is consistent with fine amounts imposed by the court for the two prescribed offences, it should be noted that it is not possible from the available data to determine whether any of these defendants were vulnerable.

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<sup>66</sup> Homeless Law in Practice, *Going to court*, viewed 20 June 2016, <<http://www.hlp.org.au/page/2170/going-to-court>>.

<sup>67</sup> The data provided by the Magistrates Court included all stealing offences in accordance with section 378 of *The Criminal Code*; the data does not include the value of the stolen item. In order to compare this data with offences which are likely to be eligible for a Criminal Code infringement notice the Office removed all stealing offences involving stealing a motor vehicle, and the offence of 'Stealing from Dwelling/House over \$10000'. The Office also excluded data where an alleged offender appeared for multiple charges and/or the matter was transferred to a higher court.

## 1.24 Understanding and responding to Criminal Code infringement notices

As noted above, the Office identified that one potential issue concerning the impact of the infringement notices provisions of *The Criminal Code* was the potential for vulnerable people, including vulnerable Aboriginal and Torres Strait Islander people, to find it more difficult to understand and respond to Criminal Code infringement notices. This includes understanding their options for seeking an internal review, electing to have the matter determined by a court, and payment options.

The Office's review of responses to the Consultation Paper found that recipients of Criminal Code infringement notices who may be vulnerable due to their personal circumstances (particularly homeless people and people with intellectual or cognitive disabilities) do not always understand the nature of the infringement, why they have been issued an infringement and what options are available to them for dealing with the notice.<sup>68</sup> Submissions from respondents further identified that people in these circumstances are not always literate and commonly rely on verbal information provided by police to support their understanding.

### 1.24.1 When a Criminal Code infringement notice is served an opportunity exists to provide information to recipients

While Criminal Code infringement notices are often described as 'on the spot' infringements, in practice recipients are served with a Criminal Code infringement notice, on average, five days after allegedly committing a prescribed offence. As noted above, the Office found that 80.5 per cent of Criminal Code infringement notices were served to recipients by post. As identified above, WAPOL's CCIN Policy currently does not specify whether postal or in person service of Criminal Code infringement notices is preferred. At the time of this report, police officers did not issue a Criminal Code infringement notice in person unless the recipient is taken to a police station. In most instances, the recipient's details would be entered into NTIMS, with the Criminal Code infringement notice being automatically generated and sent.

The Office's review of responses to the Consultation Paper found that recipients of Criminal Code infringement notices do not always understand the nature of the infringement, why they have been issued an infringement and what options are available to them for dealing with the notice.<sup>69</sup> Submissions from respondents further identified that people in vulnerable groups, particularly homeless people and people with intellectual or cognitive disabilities, are not always literate and commonly rely on verbal information provided by police to support their understanding. However, these respondents also expressed the view that, if an alleged offender is intoxicated or in a state where they cannot comprehend information, a verbal explanation at the time of the alleged offence would not further assist their understanding and a verbal explanation at a later date would be more effective.<sup>70</sup>

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<sup>68</sup> D. Zanella, RUAH Community Services, submission dated 20 May 2016.

<sup>69</sup> D. Zanella, RUAH Community Services, submission dated 20 May 2016.

<sup>70</sup> Jacaranda Community Centre, submission dated 19 May 2016; D. Zanella, RUAH Community Services, submission dated 20 May 2016.

At the Police Officer Forums, participants expressed the view that, to assist recipients in their understanding of Criminal Code infringement notices, it would be useful to give an information sheet or flyer about Criminal Code infringement notices to recipients at the time of the offence.

#### **1.24.2 People in vulnerable circumstances often do not elect to be prosecuted in court**

Of the 2,978 Criminal Code infringement notices issued, 41 recipients (1.4 per cent) elected to go to court. The New South Wales Law Reform Commission, in a report examining penalty notices, similarly observes the low number of alleged offenders who elect to have the matter heard in court:

The penalty notice system does not have the transparency normally associated with justice systems in democratic societies ... Most people simply pay the penalty. Only 1% elect to go to court, so that the guilt or innocence of the recipient is rarely scrutinised.<sup>71</sup>

A potential reason for this low percentage is that recipients may not always understand the process for dealing with a Criminal Code infringement notice.

Respondents to the Consultation Paper also expressed the view that there was a lack of accessible and understandable information provided regarding the option to elect to court, for example observing that:

None of those involved in the consultation had elected to have a charge for the alleged offence and go to court ... about half were not aware that this was an option. They did not have it explained by the police, were confused or unable to read the paper work, or did not seek help from service providers. There were at least 3 people who if they had known would have chosen this option.<sup>72</sup>

Respondents to the Consultation Paper further expressed the view that this could mean that these people are more likely to accept a Criminal Code infringement notice and not elect to go to court, despite 'circumstances where the offence cannot otherwise be proved by admissible evidence to the criminal standard or where there may be a defence at law available'.<sup>73</sup>

#### **1.24.3 Of the 1,080 Aboriginal recipients of Criminal Code infringement notices, only two recipients elected to be prosecuted**

In response to the Consultation Paper, the Aboriginal Legal Service of Western Australia also expressed the view that it is unlikely that Aboriginal people will seek legal advice, and that there is a 'potential for Aboriginal people to accept the [Criminal Code infringement notice] in circumstances where the offence cannot otherwise be proved by admissible

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<sup>71</sup> New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, pp. xv-xvi.

<sup>72</sup> D. Zanella, RUAH Community Services, submission dated 20 May 2016.

<sup>73</sup> Aboriginal Legal Service, submission dated 28 April 2016.

evidence to the criminal standard or where there may a defence at law available.<sup>74</sup> Accordingly, the Office examined this issue in further detail.

As discussed above, the Office found that, of the 2,978 Criminal Code infringement notices issued, 41 (1.4 per cent) recipients elected to be prosecuted. Of these 41 recipients, two recipients (4.9 per cent) were Aboriginal. Taking into account that 1,080 Criminal Code infringement notices were issued to Aboriginal recipients, this means that only 0.2 per cent of Aboriginal recipients elected to be prosecuted, and contest their infringement in court.

#### **1.24.4 The Office's findings regarding sentencing outcomes for Aboriginal alleged offenders, for the two prescribed offences**

The Aboriginal Legal Service of Western Australia also expressed the view that 'for some people, the penalty imposed by a court may well be significantly less than the infringement penalty of \$500.00'.<sup>75</sup> To consider this issue fully, the Office analysed the court data in relation to court outcomes for the two prescribed offences,<sup>76</sup> where the alleged offender was Aboriginal, to determine how often a fine was imposed, and if so the average amount of the fine. The Office's analysis found that, where a charge was finalised:

- a sentence was imposed on the offender in 92 per cent of cases in the benchmarking period, and 94 per cent of cases in the monitoring period;
- the sentence imposed included a fine in 96 per cent of cases in the benchmarking period, and 93 per cent of cases in the monitoring period; and
- the average fine imposed was \$530 in the benchmarking period, and \$523 in the monitoring period.

The court data also included data for the three years prior to the benchmarking period, that is, a total of five years' data was provided. The Office analysed the data over the five year period and identified that, where the sentencing outcome included a fine, the average fine imposed on Aboriginal and Torres Strait Islander offenders was \$487. The fine amounts ranged from \$20 to \$10,000. The most frequently imposed fine amount was \$500 (22 per cent of all fines imposed). Of particular note, 49 per cent of fine amounts were less than \$500.

### **1.25 The impact of not paying Criminal Code infringement notices**

#### **1.25.1 As relative socio-economic disadvantage decreased so did the rate of issue of Criminal Code infringement notices**

The records of WAPOL, DOTAG and the courts examined by the Office did not identify whether an alleged offender who received a Criminal Code infringement notice was financially or socially disadvantaged. In order to determine if there were any patterns or

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<sup>74</sup> Aboriginal Legal Service, submission dated 28 April 2016.

<sup>75</sup> Aboriginal Legal Service, submission dated 28 April 2016.

<sup>76</sup> The data provided by the Magistrates Court included all stealing offences in accordance with section 378 of *The Criminal Code*; the data does not include the value of the stolen item. In order to compare this data with offences which are likely to be eligible for a Criminal Code infringement notice the Office removed all stealing offences involving stealing a motor vehicle, and the offence of 'Stealing from Dwelling/House over \$10000'. The Office also excluded data where an alleged offender appeared for multiple charges and/or the matter was transferred to a higher court.

trends in the socio-economic status of recipients of Criminal Code infringement notices, the Office analysed the suburbs of addresses provided to WAPOL by the 2,978 recipients of Criminal Code infringement notices, using the ABS's Index of Relative Socio-economic Advantage and Disadvantage (**IRSAD**).

After exclusion criteria were applied, the Office analysed the state based deciles of the addresses provided by the remaining 2,701 Criminal Code infringement notice recipients. For comparison, the Office also considered the percentage of Western Australia's population usually resident in each state based decile. As a general trend, as relative socio-economic disadvantage decreased so did the rate of issue of Criminal Code infringement notices. When comparing the socio-economic status of Aboriginal recipients of Criminal Code infringement notices to that of non-Aboriginal recipients, larger numbers of Aboriginal recipients resided in suburbs classified as those of greater disadvantage.

It is also important to note that the Office's analysis is based on the data collected in the monitoring period, including the pilot period, during which time Criminal Code infringement notices were not being issued across the whole of Western Australia.

### **1.25.2 People who are experiencing financial and social disadvantage are less likely to pay their Criminal Code infringement notice**

As noted above, the Office found that people who are experiencing financial and social disadvantage are less likely to pay their Criminal Code infringement notice. This finding is also supported by the research literature which observes that there are a number of factors impacting vulnerable recipients' ability to pay infringements and fines, including not having a fixed address, being unable to pay due to unemployment or insufficient income, and having 'more pressing concerns than the payment of fines, including mental illness, inadequate housing, and social isolation.'<sup>77</sup> The disproportionate impact of infringement notices on financially and socially disadvantaged people can 'entrench and perpetuate a state of poverty and disadvantage.'<sup>78</sup>

### **1.25.3 Fifteen of the 1,080 Criminal Code infringement notices issued to Aboriginal recipients during the monitoring period were paid**

The Office found that, at the time of writing, 624 (21 per cent) of the 2,978 Criminal Code infringement notices issued had been paid. However, for Aboriginal recipients of Criminal Code infringement notices, this payment rate decreased to 1.4 per cent (15 out of 1,080 Criminal Code infringement notices). Of the 15 paid Criminal Code infringement notices issued to Aboriginal recipients:

- ten recipients paid the initial infringement notice when it was issued; and
- five recipients paid after a final demand notice was issued.

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<sup>77</sup> P. Lynch, S. Nicholson, S. Ellis & G. Sullivan, *Disadvantage and Fines: Submission to the Victorian Government regarding the enforcement of unpaid fines against financially and socially disadvantaged people*, Public Interest Law Clearinghouse, Melbourne, August 2003, p. 18.

<sup>78</sup> G Hazmi, 'Submission to the Department of Justice & Regulation: Review of Infringement Regulations,' Law Institute of Victoria, Melbourne, April 2016, p. 3.

Respondents to the Consultation Paper expressed the view that it is unlikely that their clients who are Aboriginal would be able to pay the \$500 penalty associated with a Criminal Code infringement notice.<sup>79</sup> One respondent identified that 'approximately 90 per cent of [their Aboriginal clients] are either on Centrelink payments, in a period of non-payment due to a default with Centrelink or because they have not applied for a payment'.<sup>80</sup> Another respondent identified that \$500 could be equal to one week's total income.<sup>81</sup>

#### **1.25.4 A time to pay order is the only legislative measure available to the Fines Enforcement Registry where the recipient of a Criminal Code infringement notice is experiencing hardship**

Failure to pay a Criminal Code infringement notice to WAPOL after the Final Demand Notice period may result in the outstanding debt being registered with the Fines Enforcement Registry. The infringement is then made an order of the court (a fee applies and an extra 28 days is allocated to payment). The Office's analysis of Criminal Code infringement notices registered with the Fines Enforcement Registry found that the average additional fee imposed after registration was \$116. Respondents to the Consultation Paper expressed the view that, for those who are unable to pay the Criminal Code infringement notice within the first 28 day timeframe, these people 'build up more debt as each step in the process incurs more cost'<sup>82</sup> due to the addition of enforcement fees.

In certain cases of hardship, vulnerable recipients can also apply to the Registrar of the Fines Enforcement Registry for a time to pay order. This allows recipients to pay off their Criminal Code infringement notice in instalments. DOTAG's website states that, '[b]y making time to pay arrangements early, you will avoid additional enforcement fees.'<sup>83</sup> In addition, entering into a time to pay arrangement suspends enforcement, including suspension of a person's driver's license in response to non-payment of debt.

A time to pay order therefore allows a Criminal Code infringement notice recipient to enter into an arrangement where the outstanding amount is paid by a particular date, or by a series of instalments on set dates. The Office notes that section 48 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* provides that recipients of a fine may discharge their liability to pay a fine and associated enforcement fees by satisfactorily performing the requirements of a Work and Development Order, by undertaking community work. A Work and Development Order can be issued by the Fines Enforcement Registry if the Registrar is satisfied with a series of conditions identified in section 57A(3) of the *Sentencing Act 1995*, whereby an offender does not have the means to pay a fine. However, in accordance with the *Fines, Penalties and Infringement Notices Enforcement Act 1994*, Work and Development Orders are only available to the recipients of fines, not infringement notices.

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<sup>79</sup> Jacaranda Community Centre, submission dated 20 May 2016; Western Australian Aboriginal Advisory Council (WAAAC), submission dated 16 June 2016; Aboriginal Legal Service, submission dated 28 April 2016.

<sup>80</sup> Jacaranda Community Centre, submission dated 20 May 2016.

<sup>81</sup> Western Australian Aboriginal Advisory Council (WAAAC), submission dated 16 June 2016.

<sup>82</sup> D. Zanella, RUAH Community Services, submission dated 20 May 2016, p. 9.

<sup>83</sup> The Department of the Attorney General, 'Frequently Asked Questions', viewed 1 July 2016, <[http://www.courts.dotag.wa.gov.au/F/fines\\_frequently\\_asked\\_questions.aspx?uid=1192-1055-7947-1752](http://www.courts.dotag.wa.gov.au/F/fines_frequently_asked_questions.aspx?uid=1192-1055-7947-1752)>

Section 27A of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* is, therefore, the only legislative measure available to the Fines Enforcement Registry where the recipient of a Criminal Code infringement notice is experiencing hardship, and is only available after registration with the Fines Enforcement Registry and the imposition of additional fees.

## 1.26 The impact of suspension of driver's licences

### 1.26.1 Suspension of driver's licences can lead to further disadvantage

As discussed above, a time to pay order can prevent further enforcement action being taken, including licence suspension. Where such an order is not in place, licence suspension is provided for by Section 19 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994*.

Respondents to the Consultation Paper expressed the view that the suspension of an individual's driver's licence can have a negative impact on people from vulnerable groups:

Over half of those involved in the consultation highlighted the impact on their capacity to get a driver's license. For some homeless people a car can provide a safe place to sleep and store their belongings. Most of those in the consultation talked about their driver's license in connection to getting work. Their inability to have a driver's license excluded them from many positions or made it very difficult for them to both seek and attend work. **As such, this restriction acts to continue the poverty trap.**<sup>84</sup> [Emphasis added]

Loss of a driver's licence also exposes alleged offenders to the risk of offending by driving without a licence. As identified in the *Road Traffic Act 1979*, the consequences for driving while unlicensed may include a fine, imprisonment or disqualification from holding or obtaining a driver's licence for a period of not more than three years.

Suspension of a driver's licence can have a number of impacts, including affecting a person's ability to gain employment, transport to support services, and, in the case of homeless people, denying them a safe place to sleep.

During the Community Consultation Forum, Aboriginal stakeholders expressed the view that there are significant negative impacts associated with alleged offenders having their driver's licence suspended for continued non-payment of Criminal Code infringement notices. These negative impacts included:

- recipients may be unaware that their driver's licence has been suspended (due to transiency and not always receiving notices in the post);
- an inability to meet family obligations, including to transport family members to important events and activities, for example children's attendance at school may be reduced, medical appointments missed and sporting events not attended;

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<sup>84</sup> D. Zanella, RUAH Community Services, submission dated 20 May 2016, pp. 10-11.

- the inability of the alleged offender to meet their cultural obligations, for example to attend funerals and transport Elders; and
- recipients electing to fulfil their family and cultural obligations and continuing to drive may be imprisoned for driving while their license is suspended.

Collectively, the research literature suggests that suspension of a driver's licence arising from non-payment of a Criminal Code infringement notice can have a significant impact on Aboriginal alleged offenders, including exposing them to the risk of engaging in criminal behaviour. This risk is exacerbated by the fact that the majority of Aboriginal people live outside the Perth metropolitan area,<sup>85</sup> and further, that Aboriginal people may have cultural obligations which require them to travel by car.

### 1.27 Further options for mitigating potential negative impacts of the infringement notices provisions of *The Criminal Code*

In summary, the Office found that a Criminal Code infringement notice may have a disproportionately negative impact on an alleged offender (compared with actions which may otherwise have been taken by police) if:

- the alleged offender would otherwise have been cautioned;
- the personal circumstances of the alleged offender may have influenced the court outcome, potentially resulting in a lesser or no penalty; and/or
- the alleged offender does not have the capacity to pay the modified penalty associated with a Criminal Code infringement notice, resulting in action being taken to recover to the debt and putting the alleged offender at risk of further offending (for example through driving with a suspended driver's licence).<sup>86</sup>

The Office's analysis and findings also indicate that Aboriginal people were overrepresented as alleged offenders who were issued a Criminal Code infringement notice during the monitoring period in all of the above categories, and accordingly were more likely to have experienced a disproportionately negative impact as a result.

The Office has also identified that other jurisdictions, in particular New South Wales and Victoria, have implemented measures aimed at mitigating these potentially negative impacts. Collectively, these measures seek to protect vulnerable people from the potentially negative impacts of infringements, to provide greater flexibility in responding to the needs of individual alleged offenders, and also to provide opportunities to repay infringement notice debts through non-financial methods while concurrently addressing the underlying causes of alleged offending behaviour.

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<sup>85</sup> Australian Bureau of Statistics, *2076.0 - Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians*, 2011, cat. no. 2075.0, ABS, Canberra, June 2012

<sup>86</sup> The Office recognises that it is not the role of individual police officers to consider the underlying personal circumstances of an alleged offender and/or an alleged offender's capacity to pay; this is rightfully a role for the courts.

### 1.27.1 Establishing principles to protect vulnerable people from the potentially negative impacts of infringements

The potential negative impacts on vulnerable people identified by the Office are not limited to Criminal Code infringement notices. There are also ‘problems’<sup>87</sup> with infringement systems generally, particularly the limited scope for responding to vulnerable people in a flexible manner, taking their circumstances into account. The New South Wales Law Reform Commission observes that ‘responding to these problems by reintroducing all of the protections of the criminal justice system would remove many advantages of the penalty notice system. It is important to get the balance right.’<sup>88</sup>

In order to assist with the achievement of this balance, several jurisdictions, both in Australia and internationally, have identified key principles or guidelines which should apply to infringement systems.<sup>89</sup> In particular, the Victorian Attorney-General has developed a set of guidelines and a policy framework in relation to the *Infringements Act 2006* that sets out, among other things, ‘the policy outlining what is appropriate to be dealt with by way of infringement and how that policy should be applied by agencies seeking to make new offences infringeable’.<sup>90</sup>

Critically, the Victorian *Attorney-General’s Guidelines to the Infringements Act 2006* seek to achieve:

- improved protection for all individuals, as well as for people in special circumstances (ie mental or intellectual disability, homelessness, serious addictions, those in genuine financial difficulty);
- improved administration by enforcement agencies of the infringements environments they manage; and
- firmer enforcement measures to improve deterrence in the system, and reduce ‘civil disobedience’ and the undermining of the rule of law.<sup>91</sup>

Currently in Western Australia there are no principles or guidelines to assist state government departments and authorities to administer their responsibilities in relation to the issuing of infringements, and no framework for considering if an offence is a suitable offence to be dealt with by way of infringement. Bearing in mind the Office’s finding that the visibility of vulnerable people increases the likelihood that they will be issued a Criminal Code infringement notice, particularly for the prescribed offence of disorderly behaviour, the establishment of such principles and guidelines could promote fairness and

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<sup>87</sup> New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. xvi.

<sup>88</sup> New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. xvi.

<sup>89</sup> For example, New Zealand Ministry of Justice, ‘Guidelines for New Infringement Schemes’, viewed 20 June 2016, <<http://www.justice.govt.nz/publications/publications-archived/2008/infringement-guidelines/guidelines-for-new-infringement-schemes>>; Attorney-General (Victoria), *Attorney-General’s Guidelines to the Infringements Act 2006*, Department of Justice, Victoria, 2006; Sentencing Advisory Council (Victoria), *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria Report*, Sentencing Advisory Council, Melbourne, Victoria, May 2014; New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012.

<sup>90</sup> Attorney-General (Victoria), *Attorney-General’s Guidelines to the Infringements Act 2006*, Department of Justice, Victoria, 2006, p. 1.

<sup>91</sup> Attorney-General (Victoria), *Attorney-General’s Guidelines to the Infringements Act 2006*, Department of Justice, Victoria, 2006, pp. 2-3.

equality in the continued administration of the infringement notice provisions of *The Criminal Code*. In particular, such principles could assist in ensuring that the impact of any future prescribed offences on vulnerable people is considered in a comprehensive manner.

In developing such principles, it would also be imperative that the impact of the infringement notices provisions of *The Criminal Code* on Aboriginal and Torres Strait Islander communities is given particular consideration.

### 1.27.2 Revoking an infringement notice in ‘special circumstances’

While the infringement notices provisions and the Regulations in Western Australia do not specify the circumstances in which a Criminal Code infringement notice is eligible to be withdrawn, Victoria has implemented a ‘special circumstances’ provision into its *Infringements Act 2006*. As a result, a person with ‘special circumstances’ who is issued with an infringement notice is eligible to apply for revocation of an Enforcement Order under Section 65 of the *Infringement Act 2006*.

While this provision enables ‘special circumstances’ to be considered **following** the issuing of an infringement, the research literature ‘highlights gaps and flaws in the infringements system that undermine optimal outcomes for people whose disadvantage should motivate a ‘special’ and effective response’<sup>92</sup> as follows:

... the complexity of the system which results in delays and poses a significant impost on the time and resources of CLCs [Community Legal Centres]; the nature and amount of evidence required to prove ‘special circumstances’; the requirement to appear in court and enter a guilty plea which results in a criminal record; the lack of regional access to the SC List [Special Circumstances List]; insufficient follow-up support for those who appear in the SC List; the absence of a system to flag repeat offenders with incurable conditions; and, finally, the narrow definition of ‘special circumstances’, which does not include ... those experiencing extreme long-term financial hardship.<sup>93</sup>

The Office therefore notes that, while such legislative amendments could mitigate the overrepresentation of vulnerable people as recipients of Criminal Code infringement notices, they must be supported by appropriate measures to minimise the number of Criminal Code infringement notices issued to alleged offenders who would meet the proposed legislative requirements for revocation.

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<sup>92</sup> Brown, M., et al, “I’m sorry but you’re just not that special ...’ Reflecting on the ‘Special Circumstances’ Provisions of the Infringements Act 2006 (Vic)”, *Current Issues In Criminal Justice*, Victoria, vol. 24, no. 3, 2013, p. 389.

<sup>93</sup> Brown, M., et al, “I’m sorry but you’re just not that special ...’ Reflecting on the ‘Special Circumstances’ Provisions of the Infringements Act 2006 (Vic)”, *Current Issues In Criminal Justice*, Victoria, vol. 24, no. 3, 2013, p. 389.

### 1.27.3 Providing flexible methods for recipients to repay their debt, including non-financial methods

In Western Australia the only option available for vulnerable people experiencing hardship to flexibly repay their debt is through seeking a time to pay order. Submissions from respondents to the Consultation Paper, members of the WAAAC, and attendees at the Community Consultation Forum, suggested that alternatives should be provided for vulnerable people with no capacity to pay a Criminal Code infringement notice. For example, this could include the option to set up a payment plan prior to registration with the Fines Enforcement Registry<sup>94</sup> and/or the option to complete community work.<sup>95</sup>

The findings of the Office, regarding the impact of the infringement notices provisions of *The Criminal Code* on people from vulnerable groups, and in particular their impact on Aboriginal and Torres Strait Islander communities, support consideration of alternative approaches to recovering Criminal Code infringement notice debt. This includes consideration of approaches such as that in operation in New South Wales and proposed in Victoria, which expiate debt while addressing the underlying causes of offending behaviour, through approved activities and treatment. The Office notes that, in order to be effective, such schemes also rely heavily on the support of non-government organisations to provide programs and services.

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<sup>94</sup> Jacaranda Community Centre, submission dated 19 May 2016; D. Zanella, RUAH Community Services, submission dated 20 May 2016.

<sup>95</sup> Department for Child Protection and Family Support, submission dated 19 May 2016.

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## Table of recommendations

### **Recommendation 1**

WAPOL considers ways to improve data collection relating to the ethnicity of recipients of Criminal Code infringement notices, in particular the collection of accurate and comprehensive data relating to recipients who are Aboriginal and/or Torres Strait Islander. In doing so, WAPOL should ensure that this is done in a way that:

- (i) collaborates and consults with Aboriginal communities;
- (ii) recognises that Aboriginal people may not wish to identify as Aboriginal to police officers and that choice not to identify is recognised and respected; and
- (iii) includes consideration of collaborating with other agencies to obtain more reliable data.

### **Recommendation 2**

So long as it is cost-beneficial to do so, WAPOL continues to pursue opportunities to facilitate the processing of Criminal Code infringement notices 'on the spot'.

### **Recommendation 3**

So long as it is cost-beneficial to do so, WAPOL considers any future opportunities to facilitate the issuing of Criminal Code infringement notices 'on the spot' (by mobile capability or other new technology developments as they become available and economically feasible).

### **Recommendation 4**

The *Criminal Procedure Act 2004* be amended to allow Criminal Code infringement notices to be served more than 21 days after the day on which the alleged offence is believed to have been committed, to provide sufficient time for police officers to conduct a primary investigation to establish whether a prescribed offence has been committed.

### **Recommendation 5**

WAPOL ensures that WAPOL's CCIN Policy regarding the issuing of a Criminal Code infringement notice in situations of the continuation of an alleged offence is consistent with the *Criminal Procedure Act 2004*.

### **Recommendation 6**

WAPOL ensures compliance with WAPOL's CCIN Policy and training regarding repeat offenders.

### **Recommendation 7**

WAPOL ensures that WAPOL's CCIN Policy regarding obtaining identifying particulars from alleged offenders who are to be issued with a Criminal Code infringement notice is consistent with section 47 in Part 7 of the *Criminal Investigation (Identifying People) Act 2002*, and the intent that 'police officers would only bring a person back to a police station to establish that person's identity in situations in which it is absolutely necessary to do so'.

**Recommendation 8**

In accordance with the *Criminal Investigation (Identifying People) Act 2002*, WAPOL ensures that police officers do not obtain DNA without legal authority.

**Recommendation 9**

WAPOL identifies that if there are instances in which DNA has been taken without legal authority, WAPOL ensures that the DNA is destroyed.

**Recommendation 10**

WAPOL considers further ways of providing information to recipients of Criminal Code infringement notices regarding their right to request that their identifying information be destroyed if their identifying information was collected under Part 7 of the *Criminal Investigation (Identifying People) Act 2002*, and they have paid the modified penalty for the prescribed offence.

**Recommendation 11**

That Schedule 1 of the *Criminal Code (Infringement Notices) Regulations 2015* be amended to enable the use of Criminal Code infringement notices for a range of other appropriate offences subject to consideration of the findings and recommendations in this report regarding the impact on Aboriginal and Torres Strait Islanders and vulnerable communities.

**Recommendation 12**

In further developing its Criminal Code infringement notice policy guidance and training for police officers, WAPOL actively invites and encourages the involvement of Aboriginal people at each stage and level of the process of that development.

**Recommendation 13**

Taking into account the findings of this report, WAPOL ensures that its Criminal Code infringement notice policy guidance and training for police officers include specific, culturally appropriate training to ensure police officers:

- (i) understand the potential impact of trauma and how trauma can influence responses to police; and
- (ii) are informed of how to respond in an appropriate and effective way to people who may be impacted by trauma.

**Recommendation 14**

In implementing Recommendation 13, WAPOL ensures that the revised Criminal Code infringement notice policy guidance and training takes into account the findings of this report and is informed by the relevant research literature regarding the neurological impact of trauma.

**Recommendation 15**

WAPOL amends WAPOL's CCIN Policy to include guidance for police officers about their options for dealing with people who may be homeless and, subsequently, ensures that its Criminal Code infringement notice training is updated, and that police officers who have already received the training are informed of the revised policy.

**Recommendation 16**

Following implementation of Recommendation 15, WAPOL considers the implementation of an electronic 'flag' to identify addresses related to homelessness or community support organisations and, where identified, considers whether it is appropriate for recipients of Criminal Code infringement notices who have provided one of these addresses to have their notice withdrawn.

**Recommendation 17**

Considering the New South Wales model, the Minister considers the necessary measures to establish a Western Australian protocol to provide a framework for interactions between relevant state government departments and authorities and homeless people in public places, to assist in protecting homeless people from discrimination and to enhance the likelihood that homeless people will be treated with dignity and respect.

**Recommendation 18**

WAPOL amends WAPOL's CCIN Policy to include guidance for police officers about their options for dealing with people with a mental illness and/or intellectual disability and, subsequently, ensures that its Criminal Code infringement notice training is updated, and that police officers who have already received the training are informed of the revised policy.

**Recommendation 19**

In implementing Recommendation 18, WAPOL considers offers of assistance made by organisations with expertise in mental health and disability, during the course of the Ombudsman's monitoring function of the infringement notices provisions of *The Criminal Code*.

**Recommendation 20**

WAPOL provides ongoing cultural competence training to police officers who are authorised to issue Criminal Code infringement notices.

**Recommendation 21**

Regulation 5 of the *Criminal Code (Infringement Notices) Regulations 2015* is amended so that a Criminal Code infringement notice cannot be issued if, on the day on which the alleged offence is believed to have been committed, the alleged offender is under 18 years of age.

**Recommendation 22**

Following consideration of Recommendation 21, if young people aged 17 years are still eligible to be issued a Criminal Code infringement notice, the Minister considers an amendment to lower the modified penalty associated with their Criminal Code infringement notices.

**Recommendation 23**

Following consideration of Recommendation 21, if young people aged 17 years are still eligible to be issued a Criminal Code infringement notice, the Minister considers the necessary measures to establish that a referral to a juvenile justice team is preferred to the issuing of a Criminal Code infringement notice.

**Recommendation 24**

WAPOL ensures that when a Criminal Code infringement notice is served, written information is provided to assist vulnerable recipients to understand their rights and responsibilities, including:

- (i) how to obtain further advice;
- (ii) their right to seek to have the notice withdrawn;
- (iii) their right to elect to go to court; and
- (iv) potential consequences of non-payment.

**Recommendation 25**

WAPOL ensures that information provided to recipients of a Criminal Code infringement notice:

- (i) is culturally appropriate and tailored to the specific needs of vulnerable Aboriginal and Torres Strait Islander people; and
- (ii) considers the needs of recipients who may otherwise be vulnerable.

**Recommendation 26**

Following consideration of Recommendation 3, if Criminal Code infringement notices are issued 'on the spot' (served in person), WAPOL ensures that police officers provide appropriate and understandable information to recipients of Criminal Code infringement notices, particularly considering the needs of recipients who may be vulnerable, and ensures that the information provided is culturally appropriate and tailored to the specific needs of vulnerable Aboriginal and Torres Strait Islander people.

**Recommendation 27**

WAPOL considers the implementation of an electronic 'flag' to identify recipients of Criminal Code infringement notices who have previously been found to be eligible to have the notice withdrawn, and who may qualify to have subsequent Criminal Code infringement notices withdrawn.

**Recommendation 28**

WAPOL, in collaboration with key government and non-government stakeholders, takes steps to raise community and stakeholder awareness of the consequences of non-payment of a Criminal Code infringement notice, in particular to raise awareness of the option to elect to go to court, and the different options for paying an infringement and a fine (taking into account the lack of community understanding that an infringement cannot be paid through imprisonment).

**Recommendation 29**

WAPOL provides information to Criminal Code infringement notice recipients regarding their ability to seek an extension to pay a Criminal Code infringement notice before the unpaid notice is registered with the Fines Enforcement Registry.

**Recommendation 30**

In the context of the Office's findings regarding the impact of the infringement notices provisions on vulnerable people, the Minister considers the necessary measures to establish principles and/or guidelines to support the administration of the infringement notices provisions of *The Criminal Code*.

**Recommendation 31**

If Recommendation 30 is accepted and implemented by the Minister, in developing the principles and/or guidelines to support the administration of the infringement notices provisions of *The Criminal Code*, Aboriginal and Torres Strait Islander people should be encouraged to be involved at each stage and level of the process of that development, and the principles and/or guidelines should be informed comprehensively by Aboriginal culture.

**Recommendation 32**

The Minister considers the necessary measures to establish that recipients of Criminal Code infringement notices in 'special circumstances' are eligible to apply for revocation of the notice.

**Recommendation 33**

The *Fines, Penalties and Infringements Notices Enforcement Act 1994* is amended to provide for consideration of a person's personal circumstances, including but not limited to financial hardship, and to provide for more flexible options for expiating Criminal Code infringement notice debt, including but not limited to the extension of the option of work and development orders.

**Recommendation 34**

The Minister considers the necessary measures to establish a scheme for expiating Criminal Code infringement notice debt, while addressing the underlying causes of alleged offending behaviour, through approved activities and treatment.

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