



A report on the monitoring of the infringement
notices provisions of *The Criminal Code*

Volume 3: The impact on Aboriginal and Torres
Strait Islander and other communities

Ombudsman Western Australia

Serving Parliament – Serving Western Australians

Volume 3 of 5

About this Report

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Contact Details

Street Address

Level 2, 469 Wellington Street
PERTH WA 6000

Postal Address

PO Box Z5386
St Georges Terrace
PERTH WA 6831

Telephone: (08) 9220 7555 or 1800 117 000 (free call)

Facsimile: (08) 9220 7500

Email: mail@ombudsman.wa.gov.au

Web: www.ombudsman.wa.gov.au

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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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1 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

1.1 Legislative requirements

The *Criminal Code Amendment (Infringement Notices) Act 2011* amended *The Criminal Code* to include the infringement notices provisions of *The Criminal Code* and the monitoring by the Ombudsman. Section 723(2) of the *Criminal Code Amendment (Infringement Notices) Act 2011* requires the Ombudsman to review the impact of the infringement notices provisions of *The Criminal Code* on Aboriginal and Torres Strait Islander communities, as follows:

723. Monitoring of Chapter by Ombudsman

...

- (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.

...

Section 723, providing for the Ombudsman's monitoring, was inserted as an amendment moved by the Hon. Giz Watson.¹ Referring to the proposed amendments, the (then) Minister representing the Minister for Police, the Hon. Peter Collier MLC stated:

There has been a considerable amount of thought and consultation put into this legislation. In New South Wales, some reviews of the legislation have been done by the Ombudsman on two separate occasions, including one in particular regarding Aboriginal people and the impacts on them of the legislation. I notice that Hon. Giz Watson has an amendment to the legislation to that effect on the supplementary notice paper. Although the government will not support the motion to refer the bill to the standing committee, it will support the amendment to the bill ...²

The (then) Minister for Police, the Hon. Robert Frank Johnson MLA, moved that the amendment to include the monitoring by the Ombudsman be agreed to, as follows:

This amendment was moved by Hon. Giz Watson and requires the Ombudsman to scrutinise the [Criminal Code infringement notices provisions], including the regulations made as part of the [provisions], for a period of 12 months after the commencement of the [provisions]. In particular, the amendment provides that the Ombudsman will scrutinise the impact of the

¹ The Hon. Giz Watson MLC, Legislative Council, Parliamentary Debates (Hansard), 23 February 2011, pp. 909c-916a.

² The Hon. Peter Collier MLC, Minister representing the Minister for Police, Legislative Council, Parliamentary Debates (Hansard), 23 February 2011, pp. 909c-916a.

[provisions] on Aboriginal and Torres Strait Islander communities ... The government is comfortable with that particular amendment.³

1.2 Methodology

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. In particular, the Office:

- placed advertisements in a national Aboriginal newspaper regarding the Ombudsman's role and inviting responses to the Consultation Paper;
- placed advertisements on Aboriginal radio stations in Kriol, Wangatja and English languages, regarding the Ombudsman's role and inviting responses to the Consultation Paper;
- developed the *Community Feedback Information Sheet* setting out easily accessible information on the Ombudsman's role and including a mechanism for respondents to provide feedback. The Office distributed this to non-government organisations working with Aboriginal people; and
- consulted the Department of Aboriginal Affairs, the Aboriginal Legal Service of Western Australia and the Western Australian Aboriginal Advisory Council.

Following the release of the Consultation Paper, the Office also invited stakeholders working with the Perth Aboriginal community to a Community Consultation Forum. The objective of the Community Consultation Forum was to ensure information received in response to the Consultation Paper and *Community Feedback Information Sheet*, particularly in relation to the impact of Criminal Code infringement notices 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 facilitator (engaged by the Office).

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

³ The Hon. Robert Frank Johnson MLA, Legislative Assembly, Parliamentary Debates (Hansard), 14 April 2011, pp. 3122b-3123a.

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’.⁴ 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.⁵ During the consultation process, no information was received by the Office identifying specific issues or concerns for Torres Strait Islander people.

In addition to this extensive consultation process, 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. The Office paid particular attention to two reviews undertaken by the New South Wales Ombudsman in relation to a strategy similar to Criminal Code infringement notices in operation in New South Wales (called ‘Criminal Infringement Notices’ or ‘CINs’). Arising from these reviews, the New South Wales Ombudsman produced two reports regarding Criminal Infringement Notices:

- a 2005 report entitled *On the Spot Justice? The Trial of Criminal Infringement Notices* by NSW Police⁶ (**the 2005 NSW Ombudsman’s Report**); and
- a 2009 report entitled *Review of the impact of Criminal Infringement Notices on Aboriginal communities*⁷ (**the 2009 NSW Ombudsman’s Report**).

The 2009 NSW Ombudsman’s Report,⁸ which focused on the impact of Criminal Infringement Notices on Aboriginal communities, was cited extensively during debate in the Western Australian Parliament of the Second Reading of the Bill.⁹ It is of particular note that the amendment providing for the Western Australian Ombudsman’s monitoring was taken ‘from the New South Wales legislation on which [the] bill [was] modelled.’¹⁰

⁴ 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.

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

⁶ New South Wales Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices* by NSW Police, New South Wales Ombudsman, April 2005.

⁷ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009.

⁸ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009.

⁹ The Hon. Margaret Quirk MLA, Legislative Assembly, Parliamentary Debates (Hansard), 21 October 2010, pp. 8194b-8204a; The Hon. Paul Papalia MLA, Legislative Assembly, Parliamentary Debates (Hansard), 21 October 2010, pp. 8194b-8204a; The Hon. Kate Doust MLC, Legislative Council, Parliamentary Debates (Hansard), 22 February 2011, pp. 781b-787a; The Hon. Giz Watson MLC, Legislative Council, Parliamentary Debates (Hansard), 22 February 2011, pp. 781b-787a; The Hon. Peter Collier MLC, Minister representing the Minister for Police, Legislative Council, Parliamentary Debates (Hansard), 23 February 2011, pp. 909c-916a.

¹⁰ The Hon. Giz Watson MLC, Legislative Council, Parliamentary Debates (Hansard), 23 February 2011, pp. 909c-916a.

1.3 Issues examined by the Office

1.3.1 Objectives of the infringement notices provisions of *The Criminal Code*

In the Second Reading Speech, the (then) Minister for Police, the Hon. Robert Frank Johnson MLA described the key objectives of the *Criminal Code Amendment (Infringement Notices) Act 2011* in relation to the Western Australian community as follows:

The key objectives of any such scheme [include] to ... provide a diversionary option for the community as a means of avoiding court appearances for minor offences, yet still providing an incentive for behaviour change ...¹¹

During subsequent debate in the Western Australian Parliament during the Second Reading of the Bill, the (then) Minister for Police went on to state the intended benefits for alleged offenders as follows:

This legislation is better for police and it is better for the offender. I think the offenders would prefer to simply cop it sweet, pay a fine, not spend all that time in court and not attract a criminal record in that instance. Is it better for police? Is it better for the offender? I think it is. I think everybody is a winner here.¹²

Further, the research literature suggests that infringement notices provide alleged offenders with a way to deal with criminal matters in a more convenient and less costly way, outside of the court system, and to avoid the concomitant possibility of a recorded conviction. That is, there are intended positive impacts for alleged offenders. The research literature describes the infringements system generally, and its intended benefits as follows:

The infringement system is an administrative method for dealing with minor criminal offences, where a person alleged to have committed an offence has the option of paying a fixed penalty rather than going to court. The infringements process benefits offenders by being a more convenient and less costly process, and also avoids a recorded conviction.¹³

1.3.2 The research literature identifies that there are potential unintended negative impacts

The research literature also recognises that, while there may be significant advantages to infringement notices, particularly in relation to avoided costs, there are also potentially disadvantages, including unintended negative impacts on particular groups of alleged offenders. For example, in relation to Penalty Notices in New South Wales (the equivalent of infringements), the New South Wales Law Reform Commission has found:

¹¹ The Hon. Robert Frank Johnson MLA, Minister for Police, Legislative Assembly, Parliamentary Debates (Hansard), 8 September 2010, pp. 6137d-6139a.

¹² The Hon. Robert Frank Johnson MLA, Minister for Police, Legislative Assembly, Parliamentary Debates (Hansard), 9 November 2010, pp. 8351b-8363a.

¹³ Department of Justice (Victoria), *Enforcement Operations Koori Strategy 2008-2010*, Department of Justice, Victoria, June 2008, p. 5.

0.3 Penalty notices were introduced, and have expanded in scope, because of their significant advantages, especially their cost benefits. They save time and money for the agencies that issue them, for courts that avoid lengthy lists of minor offences, and for recipients who do not have to take time off work to attend court or pay court or legal costs. The penalty is immediate and certain and is usually significantly lower than the maximum penalty available for the offence, were it to be dealt with by a court. Penalty notice recipients also avoid having a conviction recorded.

0.4 However penalty notices also have disadvantages. One of these is their tendency to proliferate in ways that are not always consistent and fair. The inconsistencies in the present system ... are severe enough to threaten the reputation of the penalty notice system.

...

0.8 A further problem with penalty notices is that the penalty is fixed and cannot be tailored to the circumstances of the recipient. Members of some vulnerable groups may be particularly susceptible to receiving penalty notices and also be ill-equipped to pay a monetary penalty. For example, people with intellectual disabilities may not understand what is required to avoid offending, what a penalty notice is, or where to go for help. They may accrue significant penalty notice debts that they cannot pay. People who live in regional areas may have their driver licence withdrawn for failing to pay a penalty, with significant flow-on effects. If they continue to drive to access essential services they commit more offences, and may accrue more penalties. More seriously they may ultimately be imprisoned, not for penalty notice debt, but for offences such as driving while disqualified, that flow on from penalty notice debt. Consultations and submissions demonstrated that the extent of this problem is significant.¹⁴

The 2009 NSW Ombudsman's report also recognised that there are potential benefits of Criminal Infringement Notices (**CIN**), but identified that these benefits:

[appear] to be premised on critical assumptions that:

1. most CIN recipients would otherwise be arrested and charged rather than cautioned, and
2. recipients are not re-entering the criminal justice system at a later stage due to secondary offences associated with [Road Traffic Authority] sanctions imposed for failing to pay their CIN and enforcement penalties, such as continuing to drive while driver's licence suspension is in place.¹⁵

Of particular note, the 2009 NSW Ombudsman's Report found that the New South Wales Criminal Infringement Notices scheme is increasing the number of Aboriginal people who 'become entrenched in the fines enforcement system',¹⁶ 'including many who are already

¹⁴ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, pp. xv - xvi.

¹⁵ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009, p. 48.

¹⁶ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009, Foreword by Bruce Barbour.

laden with high levels of debts'.¹⁷ In addition, the imposition of Roads and Traffic Authority sanctions in response to unpaid Criminal Infringement Notices penalties 'had led, or at least had the potential to lead, to increased secondary offending – that is, offences relating to driving while suspended or, in the case of repeat offenders, driving while disqualified.'¹⁸

Reporting on the findings of consultation with Aboriginal people and their community representatives regarding potential benefits and disadvantages for Aboriginal alleged offenders, the 2009 NSW Ombudsman's report further found that:

The many Aboriginal staff from local courts, police, justice groups, legal services, and training and employment agencies who contributed to this review all readily understood the principles of CINs and could immediately identify potential benefits and likely disadvantages for their communities. On the one hand there was widespread support for any initiative, including CINs, that purports to divert minor offenders from police custody. Yet on the other, we could find no Aboriginal organisations or people who felt that overall the scheme would provide a net benefit to the Aboriginal communities that they worked with.¹⁹

1.3.3 The Second Reading of the Bill identified further issues for consideration

Taking into account the findings of the New South Wales Ombudsman, debate of the Bill in the Western Australian Parliament focused on the potential impacts of Criminal Code infringement notices on Aboriginal and Torres Strait Islander communities, and the potential impacts on communities who may have particular vulnerabilities.²⁰ For example, the Hon. Margaret Quirk MLA raised the following issues arising in New South Wales for consideration in Western Australia:

By and large the opposition supports this legislation, but I want to spend some time looking at what has happened with a similar system that has operated relatively successfully in New South Wales for some years, and I want to spend some time reflecting on how similar laws have operated in that state.

...

The scheme that operates in New South Wales was first reviewed by the New South Wales Ombudsman in 2005, and he recommended a number of changes. Before I go on to that, I will mention why the changes were recently made to the New South Wales legislation. In 2008, under the Fines Further Amendment Act 2008, amendments were made to the New South Wales system that included the option for officers to provide an official caution in the

¹⁷ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009, p. 49.

¹⁸ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009, p. 51.

¹⁹ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009, p. 49.

²⁰ The Hon. Margaret Quirk MLA, Legislative Assembly, Parliamentary Debates (Hansard), 21 October 2010, pp. 8194b-8204a; The Hon. Kate Doust MLC, Legislative Council, Parliamentary Debates (Hansard), 22 February 2011, pp. 781b-787a; The Hon. Giz Watson MLC, Legislative Council, Parliamentary Debates (Hansard), 22 February 2011, pp. 781b-787a; The Hon. Peter Collier MLC, Minister representing the Minister for Police, Legislative Council, Parliamentary Debates (Hansard), 23 February 2011, pp. 909c-916a.

place of a penalty notice in certain circumstances, more flexible payment options for fines, and a two-year trial of the option for fines to be partially written off. That was the finetuning of the legislation that occurred in New South Wales two years ago, but we have not seen fit to include those changes in this bill.

Following the New South Wales Ombudsman's review in 2009, he thought some overriding principles should apply to this infringement notice regime. The overriding principles were that the offence is relatively minor; there is a sufficiently high volume of contraventions so as to justify the cost of establishing systems for the offence to be dealt with by way of criminal infringement notice; other diversionary options are not available to police to effectively and appropriately deal with the conduct in question; that a fine for the offence is a sufficiently effective means of addressing the conduct, as opposed to an alternative penalty or sentence; specific and general deterrents can be adequately conveyed by police rather than by a court; the physical elements of the offence are relatively clear cut; and the issuing of a criminal infringement notice for the offence would be generally considered a reasonable sanction by the community having due regard to the seriousness of the offence.

The same report found that approximately one-third of those given an infringement notice did not pay it; and, in the case of Aboriginal offenders, the figure was nearer two-thirds. Non-payment of the fines resulted in a referral to fines enforcement, with the attendant imposition of additional fees and charges, and, often, licence suspension. Under the system there was no assessment of an offender's capacity to pay, as there would be in a court, and, similarly, no ability to pay by way of instalment.

The Ombudsman also found evidence of net widening; for example, in the case of offensive language. A number of people were issued with an infringement notice for language that would ordinarily not have attracted a fine or a conviction had the case gone to court. Conversely, he also found that in other instances a less serious offence was charged when a more serious charge was warranted to bring it within the scheme. He noted cases in which charges of common assault had been laid and the Ombudsman had formed the view that assault occasioning actual bodily harm or higher should have been charged and that may well have warranted a jail term. The Ombudsman also found that identifying data such as fingerprints was not destroyed when it was supposed to be when the CPIN was expiated. As I said, following the 2005 recommendations of the Ombudsman, the NSW scheme was changed and the amendments that I referred to were passed in the New South Wales Parliament in December 2008.

...

As I mentioned earlier, the New South Wales government passed some amendments to the legislation following the reviews. The amending bill was second read in the New South Wales Legislative Council, where the Attorney General resides, in November 2008. The Attorney General, John Hatzistergos, noted in his second reading speech that —

Over the past few years several reports and inquiries have examined the fines and penalty notice system. These reports include the report of the Sentencing Council on the effectiveness of fines as a sentencing option, released in October 2006; the report by the Homeless Persons Legal

Service and the Public Interest Advocacy Centre entitled “Not Such a Fine Thing”, released in April 2006 and the report of the Standing Committee on Law and Justice entitled “Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations”, released in March 2006. These reports indicate that for the most part court fines and penalty notices are a cost-effective, prompt and appropriate means of punishing offenders. However, they also highlighted the disproportionately heavy impact that the fine and penalty notice system is having on the most vulnerable people in our community.

Some of the amendments initiated at that time were in response to issues that had been raised to make the system more equitable. For example, the amendments gave police officers the option of issuing cautions in appropriate circumstances, introduced a scheme for the internal review of penalty notices, implemented a system whereby a person could apply for withdrawal of a penalty notice on certain grounds, enabled eligible people who were experiencing hardship in paying fines to undertake a work and development order instead, and enabled more consideration to be given to a person's ability to pay a monetary penalty. Again, I think those considerations may have been absent in the rush to introduce the Western Australian bill. That is regrettable. The New South Wales experience has been that police and court time has been saved by this regime. We are not sure how much time the regime will save here as that has not been quantified. The Law Society of Western Australia has given general support to the scheme in the media. In a media statement issued in September this year president Hylton Quail said that the Law Society supported the on-the-spot fine regime to ease pressure on the courts, but he made a very important qualification: that 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.²¹

The Hon. Paul Papalia MLA further observed that the potential impacts of the infringement notices provisions of *The Criminal Code* also need to be considered in the broader context of Western Australia's justice system:

I rise to address the Criminal Code Amendment (Infringement Notices) Bill 2010. I endorse the shadow police minister's comments in their entirety, particularly the points she made about the necessity to question the potential outcomes of this legislation.

Although the legislation is introduced on reasonable grounds, with good intentions and, as outlined in the minister's second reading speech, with good reason, we have to consider the point very well made by the member for Girrawheen that this legislation does not stand alone. This legislation is a single thread in the tapestry that is Western Australia's judicial and law and order systems. We must understand that at the moment a group of people in Western Australia are disproportionately impacted upon by the system; be it intentional or not. It is a fact that a group of disadvantaged people are negatively impacted in a disproportionate fashion by our system. That has been widely

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

acknowledged by any number of respected authorities, but I cite the Chief Justice, Hon Wayne Martin, whenever I can. He gave a speech to the Australian and New Zealand Society of Criminology conference last year, titled “Popular Punitivism – The Role of the Courts in the Development of Criminal Justice Policies” in which he warned —

... while there is, of course, no ‘average’ prisoner, if there are any general characteristics of the recent prison intake in Western Australia, they include psychiatric disability, economic disadvantage (evidenced through an inability to pay fines), Aboriginality and offending at the lower end of the spectrum.

That is a reference to those who end up in the prison system.

As the shadow Minister for Police confirmed in her assessment of the outcomes in New South Wales, the potential consequence of this legislation is that those same people, identified by the Chief Justice as disproportionately making up the recent intake of the prison muster or prison population, could have yet another disproportionate burden placed on them by this legislation. The outcome may be that we inadvertently impose yet another burden and put yet another hurdle in their path, and possibly add to the social stresses that they already suffer, resulting in an even more negative outcome whereby they ultimately end up in the prison system.²²

²² The Hon. Paul Papalia MLA, Legislative Assembly, Parliamentary Debates (Hansard), 21 October 2010, pp. 8194b-8204a.

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

The Office has identified a number of potential issues concerning the impact of the infringement notices provisions on Aboriginal and Torres Strait Islander communities. Further, the Office has 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 have an intellectual disability or mental illness. The Office has 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 on Aboriginal and Torres Strait Islander communities, the Office has also identified a range of potential issues for other people and communities. While the Office has focused on the impact on Aboriginal and Torres Strait Islander communities, the Office has also considered these other people and communities experiencing vulnerability. For example, the Office has identified that the infringement notices provisions 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 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 has 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, including:
 - the potential for Aboriginal and Torres Strait Islander alleged offenders, and vulnerable alleged offenders, to be more likely to receive a Criminal Code infringement notice; and
 - 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;
- The use of Criminal Code infringement notices as a 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, including options for:
 - seeking internal review (adjudication and withdrawal),
 - electing to have the matter determined by a court; and
 - paying 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.

2 Aboriginal and Torres Strait Islander people and the criminal justice system

2.1 The overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system

2.1.1 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’,²³ 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’.²⁴ 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’.²⁵

The incarceration rate of Aboriginal and Torres Strait Islander men and women has also increased over time, by 57 per cent between the years 2000 and 2013, to a rate of 13 times the imprisonment rate for non-Aboriginal adults.²⁶ Former Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda called these rates ‘a catastrophe in anyone’s language.’²⁷

In 2010, a discussion paper prepared by the Parliament of Australia’s Senate Select Committee on Regional and Remote Indigenous Communities entitled *Indigenous Australians, Incarceration and the Criminal Justice System [the Senate Discussion Paper]*, also found that:

Data on police proceedings against alleged offenders suggests an offending rate by Indigenous people of approximately 1 in 10, compared to 1 in 79 for the non-Indigenous population, though this figure does not include data from all states.

What is certain is that Indigenous adults in Australia are almost 14 times more likely to be imprisoned than non-Indigenous people, and the gap continues to grow. Indigenous adults are imprisoned at a rate of 2308 per 100 000. Put

²³ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper No 84, 2017, Terms of Reference.

²⁴ Australian Institute of Criminology, *Indigenous justice in focus*, viewed 5 October 2016, <http://www.aic.gov.au/crime_types/in_focus/indigenousjustice.html>.

²⁵ Australian Institute of Health and Welfare, *Indigenous young people in the juvenile justice system, 2010-11*, Bulletin 109, November 2012, p. 3.

²⁶ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2014*, Australian Government, Melbourne, 2014, pp. 25.

²⁷ Mick Gooda, quoted by Jessica Kid, ‘Overrepresentation of Indigenous Australians in prison a catastrophe, says Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner,’ *ABC News*, 5 December 2014, viewed 10 May 2017, <<http://www.abc.net.au/news/2014-12-04/number-of-indigenous-australians-in-prison-a-catastrophe/5945504>>.

another way, 1 in 43 Indigenous adults is currently in prison. 25 per cent of prisoners in Australia are Indigenous.²⁸

The overrepresentation of Aboriginal and Torres Strait Islander people in custody is also acute for Aboriginal and Torres Strait Islander children. Despite making up only 6.4 per cent of all 10 to 17 year olds in Western Australia in 2014-15, Aboriginal and Torres Strait Islander children made up an average of 74 per cent of the youth detention population; making them on average 41 times more likely than non-Aboriginal children to be in detention.²⁹ This figure is also almost twice the 'extremely high' average rate at which Aboriginal children are detained nationally.³⁰

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 Senate Discussion Paper found that 'Western Australia has the highest Indigenous imprisonment rate'.³¹ The *Royal Commission into Aboriginal Deaths in Custody: National Report* also 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 ...'.³² 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.'³³

2.1.2 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'.³⁴ 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

²⁸ The Senate Select Committee on Regional and Remote Indigenous Communities, *Indigenous Australians, Incarceration and the Criminal Justice System*, Select Committee on Regional and Remote Indigenous Communities, p. i.

²⁹ Amnesty International, *Community is Everything: Issues by State*, Amnesty International Australia, Broadway, December 2016, viewed 10 May 2017, <https://static.amnesty.org.au/wp-content/uploads/2016/09/Pages-from-CIE_Issues-state-by-state_Dec16-3.pdf?x85233>.

³⁰ Amnesty International, *Community is Everything: Issues by State*, Amnesty International Australia, Broadway, December 2016, viewed 10 May 2017, <https://static.amnesty.org.au/wp-content/uploads/2016/09/Pages-from-CIE_Issues-state-by-state_Dec16-3.pdf?x85233>.

³¹ The Senate Select Committee on Regional and Remote Indigenous Communities, *Indigenous Australians, Incarceration and the Criminal Justice System*, Select Committee on Regional and Remote Indigenous Communities, p. 4.

³² Royal Commission into Aboriginal Deaths in Custody, *National Report Volume 1*, Royal Commission into Aboriginal Deaths in Custody, Canberra, April 1991, p.122.

³³ 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.

³⁴ 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,³⁵ employment and education,³⁶ 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.'³⁷

Speaking with regard to the high incarceration rates of Aboriginal children, the Hon. Wayne Martin AC, Chief Justice of Western Australia has stated:

[The statistics are] absolutely appalling ... It's very hard to put one's finger on exactly why the rates in WA for adults and children are so much worse. I suspect it's probably to do with levels of family dysfunction, levels of disadvantage ... The Aboriginal people living in parts of regional Western Australia are probably among the most disadvantaged in the country.³⁸

The research literature also identifies that, in addition to the disadvantage experienced by Aboriginal and Torres Strait Islander people, there are also problems with 'the way the traditional justice system responds to the offending'³⁹ with the Hon. Wayne Martin AC, Chief Justice of Western Australia further stating:

The justice system applies rules that work very well for conventional or mainstream Australians ... They don't work terribly well for people who are marginalised or disadvantaged. Take bail for example - under the Bail Act we're required to take into account the extent to which a person has stable accommodation, the extent to which they've previously offended and the extent to which they're in employment. Now those are criteria by which Aboriginal people fare very poorly, so they're more likely to be refused bail ... So at almost every step in the system there are structural disadvantages for Aboriginal people which means they tend to fare worse in the system.⁴⁰

The research literature further explores factors contributing to the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system. Despite being made over two decades ago, the research literature continues to cite the relevance of comments by Yawuru Elder Patrick Dodson, Commissioner of the Royal Commission into

³⁵ 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>; 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.

³⁶ Select Committee on Regional and Remote Indigenous Communities, *Indigenous Australians, Incarceration and the Criminal Justice System*, Parliament of Australia, Canberra, March 2010, p. 30.

³⁷ Select Committee on Regional and Remote Indigenous Communities, *Indigenous Australians, Incarceration and the Criminal Justice System*, Parliament of Australia, Canberra, March 2010, p. 29.

³⁸ The Honourable Wayne Martin AC, Chief Justice of Western Australia, quoted by Lucy Martin, 'WA Aboriginal children 53 times more likely to be jailed than peers, Amnesty report reveals,' *ABC News*, 11 June 2015, viewed 10 May 2017, <<http://www.abc.net.au/news/2015-06-11/wa-chief-justice-slams-high-rate-of-aboriginal-incarceration/6538006>>.

³⁹ 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>.

⁴⁰ The Honourable Wayne Martin AC, Chief Justice of Western Australia, quoted by Lucy Martin, 'WA Aboriginal children 53 times more likely to be jailed than peers, Amnesty report reveals,' *ABC News*, 11 June 2015, viewed 10 May 2017, <<http://www.abc.net.au/news/2015-06-11/wa-chief-justice-slams-high-rate-of-aboriginal-incarceration/6538006>>.

Aboriginal Deaths in Custody, in relation to statistics concerning Aboriginal people in custody:

Interpretations as to what these figures and percentages mean have been variously provided to me. They range from perceptions that Aboriginal people in this State are just more criminally inclined, to the way junior police officers, without a lot of adult maturity, go about their task of targeting Aboriginal people, and asserting their new authority and zeal for law enforcement over their peers in the Aboriginal population.

Other views have related to the broader issues of alcohol use, unemployment, lack of educational achievement and matters integral to the disadvantaged social and economic circumstances of Aboriginal people. There were yet other views that concern continuing Aboriginal resistance to non-Aboriginal social, cultural and legal imperatives, and that of not being able to understand that there is only one legal system. Police have to enforce the law so they are generally hated by younger Aboriginal people. In my view these explanations, while extremely broad, are not to be dismissed. They are not exclusive but nor are they exhaustive. They most certainly contribute to an understanding of the situation.⁴¹

2.2 Aboriginal and Torres Strait Islander people's experience of trauma

2.2.1 Aboriginal and Torres Strait Islander people experience traumatic events at significantly higher rates than non-Aboriginal Australians

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.'⁴²

The Office's consultation with stakeholders and review of the research literature suggests that the impact of trauma is emerging as an area of concern, particularly in relation to the mental health of vulnerable alleged offenders, who are more likely than other alleged offenders to have experienced trauma:

Trauma affects people from all socioeconomic backgrounds, levels of educational attainment, areas of geographical residence, ages, and racial or ethnic affiliation. Research suggests, however, that the more marginalized and most vulnerable members of society are at greater risk for trauma responses. It is more common for youth, the impoverished, and minority groups to

⁴¹ Commissioner of the Royal Commission into Aboriginal Deaths in Custody, Yawuru Elder Patrick Dodson, quoted by Amnesty International, *"There is always a brighter future": Keeping Indigenous kids in the community and out of detention in Western Australia*, Amnesty International Australia, Broadway, 2015, p. 14.

⁴² 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.

experience trauma, demonstrating the importance of social context in understanding trauma.⁴³

The research literature further suggests that Aboriginal and Torres Strait Islander people experience traumatic events at significantly higher rates than non-Aboriginal Australians. In particular:

- in 2014-15, Aboriginal and Torres Strait Islander children were almost seven times more likely to be the subject of substantiated child protection reports of abuse, neglect, or risk of harm than non-Aboriginal children;⁴⁴
- Aboriginal and Torres Strait Islander people are two to five times more likely than non-Aboriginal people to experience violence as victims or offenders;⁴⁵
- over one in five Aboriginal and Torres Strait Islander people aged 15 years and over have experienced physical or threatened physical violence in the last 12 months;⁴⁶ and
- around one in eight (13.3 per cent) of Aboriginal and Torres Strait Islander people aged 15 years and over have experienced physical violence in the last 12 months. Half of these people said that a family member was the perpetrator of the most recent incident.⁴⁷

Aboriginal and Torres Strait Islander people and their communities are also affected by transgenerational trauma, the transmission of 'trauma, grief and loss issues'⁴⁸ which are passed down through generations of families as a result of traumatic experiences, including 'historical events associated with the colonisation of indigenous land.'⁴⁹ Some of this trauma arises from experiences Aboriginal and Torres Strait Islander people have had as a result of contact with institutions, including the forcible removal of children from their families,⁵⁰ and the significant number of Aboriginal and Torres Strait Islander people who have died in the custody of the State.⁵¹ In the case of Aboriginal and Torres Strait Islander children, the Australian Institute of Health and Welfare and the Australian Institute of Family Studies identifies:

⁴³ 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. 508.

⁴⁴ Australian Institute of Family Studies, 'Child protection and Aboriginal and Torres Strait Islander Children,' Australian Government, Melbourne, 2016, viewed 20 March 2017, < <https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children>>.

⁴⁵ Willis, M, "Non-disclosure of violence in Australian Indigenous Communities," Australian Institute of Criminology, *Trends & Issues in Crime and Criminal Justice*, No, 405, Canberra, 2011, viewed 17 March 2017, <<http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi405.html>>.

⁴⁶ Australian Bureau of Statistics, *4714.0 National Aboriginal and Torres Strait Islander Social Survey 2014-15: Key Findings*, Australian Bureau of Statistics, Canberra, 2017, viewed 20 March 2017, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4714.0>>.

⁴⁷ Australian Bureau of Statistics, *4714.0 National Aboriginal and Torres Strait Islander Social Survey 2014-15: Key Findings*, Australian Bureau of Statistics, Canberra, 2017, viewed 20 March 2017, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4714.0>>.

⁴⁸ Merritt, S, 'Transgenerational trauma of indigenous people,' Australian Child & Adolescent Trauma, Loss & Grief Network, Wooden, 2009, viewed 20 March 2014, <http://www.earlytraumagrief.anu.edu.au/files/ACATLGN_Transcript_Merritt_TransgenerationalTrauma.pdf>.

⁴⁹ 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, p. 1.

⁵⁰ Australian Bureau of Statistics, *4704.0 – The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, Oct 2010*, Australian Bureau of Statistics, 2011, Canberra, viewed 20 March 2017, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter470Oct+2010>>.

⁵¹ Grabosky, P, Scandia, A, Hazlehurst, K, and Wilson, P, *No. 12 Aboriginal Deaths In Custody*, Australian Institute of Criminology, Melbourne, 1988, p. 1.

... some families and communities are unable to, or are still working to, heal the trauma of past events, including displacement from Country, institutionalisation and abuse. The Stolen Generations also represent a significant cause of trauma. In 2008, an estimated 8% of Indigenous people aged 15 and over reported being removed from their natural family and 38% had relatives who had been removed from their natural family (ABS 2009). This trauma can pass to children (inter-generational trauma) (Atkinson 2002; Atkinson et al. 2010).

Indigenous children may also experience a range of distressing life events including illness and accidents, hospitalisation or death of close family members, exposure to violence, family disintegration (with kin networks fragmented due to forced removals, relationship breakdown and possibly incarceration) and financial stress (ABS 2006, 2009; ABS & AIHW 2008; FaHCSIA 2011; Haebich 2000; Silburn et al. 2006).⁵²

2.2.2 Aboriginal and Torres Strait Islander peoples' experiences of trauma contributes to their overrepresentation in the criminal justice system

Experiencing trauma can affect a person's mental health in both the short and long term, and has been linked with increased rates of criminal behaviour.⁵³ The Australian Institute of Health and Welfare and the Australian Institute of Family Studies describe trauma as follows:

Trauma, in this context, refers to an event that is psychologically overwhelming for an individual. The event involves a threat (real or perceived) to the individual's physical or emotional wellbeing. The person's response to the event involves intense fear, helplessness or horror, or for children, the response might involve disorganised or agitated behaviour (Briere & Scott 2006; Courtois 1999; Guarino et al. 2009).

Complex trauma results from the problem of an individual's exposure to multiple or prolonged traumatic events that do not categorically fit psychiatric criteria for post-traumatic stress disorder. These events are typically of an interpersonal nature, such as psychological maltreatment, neglect, physical and sexual abuse (van der Kolk 2005). The events often begin in childhood (that is, early life-onset) (van der Kolk 2005) and can extend over an individual's life span (Giller 1999; Terr 1991).⁵⁴

The impact of trauma is important in the context of Criminal Code infringement notices as the research literature further suggests that '[v]ictims/survivors of childhood trauma are

⁵² 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.

⁵³ For example, 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; Australian Institute of Family Studies, July 2013, 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; Ardino, V, *Offending Behaviour: The Role of Trauma and PTSD*, 2012.

⁵⁴ 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, p. 4.

also more likely to adopt behaviours destructive to themselves and others'.⁵⁵ As a result, people who have experienced trauma 'participate in high numbers in the child welfare and juvenile justice systems (and later in life in the adult criminal justice system)'.⁵⁶ That is, experiencing trauma is a risk factor for engaging in criminal behaviour:

Research has demonstrated the interconnection between histories of violence and abuse, traumatic experiences, and criminal behaviour. This does not mean that violence and abuse in life creates or causes criminality in a simplistic or linear way, or that those who commit crime can merely "blame it on" their previous experiences of violence, abuse, or neglect. Still, it does mean that there are complex interconnections between people's life experiences, opportunities, choices and chances, and their personal histories, including trauma histories. As one researcher observes: "child abuse and neglect, poverty, sexual molestation, and witnessing violence are, among others, the most common risk factors for posttraumatic reactions, aggression, and antisocial behaviour."⁵⁷

Aboriginal people's engagement with institutions, including police, occurs in a context of individual and collective, transgenerational trauma. Throughout Australia, Aboriginal people remain the subject of significant contact with state government departments and authorities. In particular:

- 'Aboriginal children are over-represented in child protection and out-of-home care services' compared with non-Aboriginal children;⁵⁸
- approximately one in seven (14.5 per cent) Aboriginal people have been arrested in the last five years; and
- almost one in ten (8.8 per cent) Aboriginal people aged 15 years and over have been incarcerated in their lifetime, with males almost four times as likely as females to have been incarcerated.⁵⁹

The research literature identifies that the colonisation experiences of Aboriginal people have influenced the way in which Aboriginal people experience contact with institutions:

Under assimilation policies governments have used the justice system, police and courts, to remove children from families. The operation of the criminal justice system has resulted in the substantial overrepresentation of Aboriginal people in law and justice processes, prisons and deaths in custody (Australian Bureau of Statistics, 1997) ...

⁵⁵ 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, p. 6.

⁵⁶ 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, p. 6.

⁵⁷ 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.

⁵⁸ Australian Bureau of Statistics, *4714.0 National Aboriginal and Torres Strait Islander Social Survey 2014-15: Key Findings*, Australian Bureau of Statistics, Canberra, 2017, viewed 20 March 2017, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4714.0>>.

⁵⁹ Australian Bureau of Statistics, *4714.0 National Aboriginal and Torres Strait Islander Social Survey 2014-15: Key Findings*, Australian Bureau of Statistics, Canberra, 2017, viewed 20 March 2017, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4714.0>>.

Contact with police and courts is often experienced as victimising... Court experiences are marked by high levels of public scrutiny and shame, lack of access to information, lack of opportunity to participate fully in processes and decision making, and risk of being subjected to blame, discrimination and reprisal.⁶⁰

2.2.3 Experiencing trauma impairs a person's ability to recognise danger and respond appropriately

The research literature suggests that experiencing trauma can result in the development of neurological and psychological symptoms,⁶¹ and '[i]n the absence of treatment, [these] trauma-related difficulties and their effects tend to persist into adolescence and adulthood and become difficult to reverse'.⁶²

With regard to trauma-related neurological symptoms, the research literature suggests:

In the past two decades, a greater understanding of the effects of stress on the human brain has bolstered our understanding of the dynamics of childhood exposure to traumatic stress. Research has demonstrated that repeated violent traumatization of children in the absence of parental protection can permanently rewire their brains, which do not become fully developed until early adulthood. This influences the structure and the functioning of the brain so as to create symptoms that were previously thought to be purely psychological (Van der Kolk, 1994).⁶³

Of particular relevance to individual's interactions with police officers, the research literature describes the impact of trauma on a person's ability to control their responses in situations they perceive to be dangerous, even if no danger is present:

The human body's physiological response to stress is well-documented. When one encounters a stressor and becomes frightened, the body produces stress hormones; this has been called the "fight or flight response" (Kearney et al., 2010; Van der Kolk, 2005). This is a transient hormonal response, which healthy individuals experience and manage with little long-term effect on their functional capacities (Gunnar and Quevedo, 2008; Tarullo and Gunnar, 2006). However, in children, excessive stimulation of this hormonal response for prolonged periods of time ... eventually impairs regulation of the response (Handwerker, 2009; Van Voorhees and Scarpa, 2004). That is when the "fight or flight response" ceases to become a useful transient response to danger that the individual can regulate; instead, it becomes a constant, uncontrollable physiological warning of danger that persists even when no danger is present.

...

⁶⁰ 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.

⁶¹ For example, see: van der Kolk, B, *The Body Keeps Score: Brain, mind and body in the healing of trauma*, New York, 2014; Schore, A, 'Dysregulation of the Right Brain: A Fundamental Mechanism of Traumatic Attachment and the Psychopathogenesis of Posttraumatic Stress Disorder', *Australian and New Zealand Journal of Psychiatry*, 2002, vol. 36, pp. 9-30; Dudley, R.G, *Childhood Trauma and Its Effects: Implications for Police*, National Institute of Justice, July 2015.

⁶² Dudley, R.G, *Childhood Trauma and Its Effects: Implications for Police*, National Institute of Justice, July 2015, p. 1.

⁶³ Dudley, R.G, *Childhood Trauma and Its Effects: Implications for Police*, National Institute of Justice, July 2015, p. 5.

Studies have shown that, when children are repeatedly exposed to trauma, the amygdala — the area of the brain known to activate the physiological stress response — overdevelops. This overdevelopment increases the fear and anxiety these children experience and causes them to be hyperresponsive to frightening situations in both their physiology and their observable behavior (Pollak, 2008; Shin, Rauch and Pitman, 2006). At the same time, the development of the hippocampus — the area of the brain known to turn off the stress response — is inhibited, decreasing its capacity to control the response (Bremner et al., 2003). Impairment of the hippocampus also results in difficulties in memory, mood regulation and contextual learning, which includes learning to differentiate dangerous situations from safe ones (Pugh et al., 1997; Rudy, Kuwagama and Pugh, 1999). In addition, high levels of stress hormones impair the development of the connections to and within the prefrontal cortex of the brain (Elzinga and Bremner, 2002; Richert et al., 2006). The prefrontal cortex plays a role in modulating the physiological stress response and is responsible for decision-making, which includes assessing a perceived threat and responding appropriately (Lee and Seo, 2007; Morgan and LeDoux, 1995; Morgan, Romanski and LeDoux, 1993; Robbins, 2000).⁶⁴

In summary, 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 more likely to come into contact with police,⁶⁵ but also, this contact may be perceived as a dangerous situation, particularly for Aboriginal and Torres Strait Islander people.⁶⁶ In this context, ‘certain interventions may escalate rather than control difficulties.’⁶⁷

2.2.4 Trauma-informed approaches are essential to effective policy and practice

The research literature suggests that, while our understanding of the long-term impacts of trauma are emerging, and people who have experienced trauma are not always diagnosed as having a mental illness, trauma-informed approaches are essential to effective policy implementation, including approaches to legal interventions:

Complex trauma, or developmental trauma, are relatively new conceptualizations which capture the multiple and interconnected effects of experiences of ongoing exposure to traumatic events, most typically abuse, violence, and neglect, among others, in interpersonal and family relationships. Although not recognized in the recently released DSM-V – whose definitions, inclusions and exclusions are the subject of fierce controversy among mental health professionals- the concept of developmental trauma is becoming very widely used by leading mental health experts, and is a recognized global public health concern.

⁶⁴ Dudley, R.G, *Childhood Trauma and Its Effects: Implications for Police*, National Institute of Justice, July 2015, pp. 5-6.

⁶⁵ 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.

⁶⁶ 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.

⁶⁷ Dudley, R.G, *Childhood Trauma and Its Effects: Implications for Police*, National Institute of Justice, July 2015, p. 12.

Given the massive shifts and new knowledge generated in the fields of trauma, the brain, and neuroscience, there is an expanding recognition in a variety of contexts that a trauma-informed approach to working with people is an essential part of effective policy, practice, and institutional organization. A trauma-informed approach to programs and services begins from an acknowledgment of the extent of traumatic experiences in the human population and an understanding of the ways in which trauma responses affect people's lives, capacities, and abilities to cope with life's challenges. It recognizes that effective interventions with people require both the avoidance of re-traumatization and the presence of respectful and supportive interventions that help people rebuild their lives. While this recognition is most strongly taking hold in the mental health and social service contexts, why would it not also apply to interventions which are legal?⁶⁸ [Emphasis added]

In relation to the importance of trauma-informed approaches in policing, the research literature suggests that:

Without training focused on issues related to childhood trauma, it is unlikely that police officers will recognize that individuals may be acting out due to difficulties stemming from past traumatic experiences. Although anxiety, fear and impaired regulation of the brain's stress response drive the behavior of traumatized individuals, their visible symptoms are more obvious. Attention to these visible symptoms at the expense of their underlying causes results in police misperceiving these children, adolescents and young adults. Traumatized individuals tend to be hypervigilant and hypersensitive to perceived threats, and they tend to overreact to such threats, often violently. This extreme reaction becomes the focus of police attention. For example, a traumatized person may mask anxiety with an extreme bravado, which police view as arrogance or a lack of caring instead of the psychological defense mechanism that it is (Arroyo, 2001). Also, the brain's impaired regulation of the stress response makes it difficult, if not impossible, for traumatized individuals to calm themselves down, even when it would be in their best interest to do so, which makes them seem more aggressive (Van der Kolk et al., 2009). In addition, associated difficulties such as substance abuse can also become a focus of police attention, with no thought about whether underlying psychiatric difficulties might have contributed to such substance abuse.⁶⁹

Informed by the recognition of trauma as a factor, alongside of other critical factors, in the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system, opportunities for consideration of positive new initiatives to address this overrepresentation arise. Criminal Code infringement notices are, of course, simply a system in a much broader criminal justice system. These positive new initiatives are applicable not just to Criminal Code infringement notices, but to the broader criminal justice system, and the Office's recommendations reflect this fact.

⁶⁸ 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, pp. 504-505.

⁶⁹ Dudley, R.G, *Childhood Trauma and Its Effects: Implications for Police*, National Institute of Justice, July 2015, pp. 10-11.

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.

The overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system

Overall Findings

It is important to observe that while the Office has identified very significant financial (and indeed non-financial) benefits arising from the infringement notices provisions of *The Criminal Code*, the Office has identified certain impacts that are particular to Criminal Code infringement notices (that is, not necessarily an impact that would otherwise be observed in the broad criminal justice system). Throughout the remainder of this Volume the Office makes recommendations where appropriate to eliminate or mitigate these impacts for Aboriginal and Torres Strait Islander and other communities.

Ultimately, however, the fact that there is overrepresentation of Aboriginal and Torres Strait Islander people as recipients of Criminal Code infringement notices, and the widely shared view that this overrepresentation is both deeply distressing and unacceptable, is not, in and of itself, an argument against the continuation and expansion of Criminal Code infringement notices, given that this overrepresentation broadly mirrors overrepresentation that presently exists for Aboriginal and Torres Strait Islander people in the criminal justice system generally, including for the two prescribed offences.

Indeed, given the very considerable benefits that have already flowed, and will continue to flow, from the introduction of Criminal Code infringement notices (both financial and non-financial), including the escalation of these benefits for the expansion of Criminal Code infringement notices to other offences (as set out in Volume 2 and Volume 5 and summarised in Volume 1), the overrepresentation does not act as a countervailing argument against the continuation (and indeed expansion) of Criminal Code infringement notices (as the counter-factual position is that if Criminal Code infringement notices were discontinued, overrepresentation would continue for those offences in the criminal justice system, yet the significant cost-benefits that flow from the introduction of Criminal Code infringement notices would be lost).

It is in that context that the continuation (and indeed expansion) of Criminal Code infringement notices represents a unique opportunity for justice reinvestment. As Criminal Code infringement notices create significant new economic benefit, it is an opportunity to reinvest a portion of the economic benefit in our criminal justice system (and systems of social justice and equity) in the form of mitigating laws, regulations, policies and processes that will make a 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 and any impacts that arise that are particular to Criminal Code infringement notices).

3 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,⁷⁰ including those who are not Aboriginal or Torres Strait Islander.⁷¹ 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.’⁷² In this Chapter, the Office has 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.

3.1 Criminal Code infringement notices issued to Aboriginal recipients

3.1.1 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’⁷³ 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.⁷⁴ 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

⁷⁰ 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; New South Wales 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. Pettitt, Commissioner for Children and Young People WA, submission dated 3 May 2016.

⁷¹ 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; New South Wales 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. Pettitt, Commissioner for Children and Young People WA, submission dated 3 May 2016.

⁷² The Hon. Margaret Quirk MLA, Legislative Assembly, Parliamentary Debates (Hansard), 21 October 2010, pp. 8194b-8204a.

⁷³ 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’.

⁷⁴ Australian Bureau of Statistics, 2016 Census: Aboriginal and/or Torres Strait Islander Peoples Quickstats, 2016, ABS, Canberra, June 2017.

30 June 2016, 'Aboriginal and Torres Strait Islanders comprised 38% (2,403 prisoners) of the adult prisoner population' in Western Australia.⁷⁵

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. The 2009 NSW 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,⁷⁶ and that Aboriginal people 'make up 2.1 [per cent] of the population of NSW'.⁷⁷ 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.⁷⁸

3.1.2 Criminal Code infringement notices were issued to Aboriginal male recipients and female recipients at a similar rate

The Office found that, overall, Criminal Code infringement notices were issued to Aboriginal male recipients (549) at a similar rate to female recipients (527). However, the proportion of Aboriginal male recipients and female recipients who were issued a Criminal Code infringement notice varied between the two prescribed offences, as follows:

- male recipients accounted for 60 per cent of the 752 Criminal Code infringement notices issued for the prescribed offence of disorderly behaviour (448 males, 300 females, four unknown);
- female recipients accounted for approximately 69 per cent of the 328 Criminal Code infringement notices issued for the prescribed offence of stealing (101 males, 227 females); and
- the gender of recipients was unknown in 0.37 per cent or four Criminal Code infringement notices issued to recipients whose 'Offender Appearance' was recorded by WAPOL as Aboriginal (Figure 1).

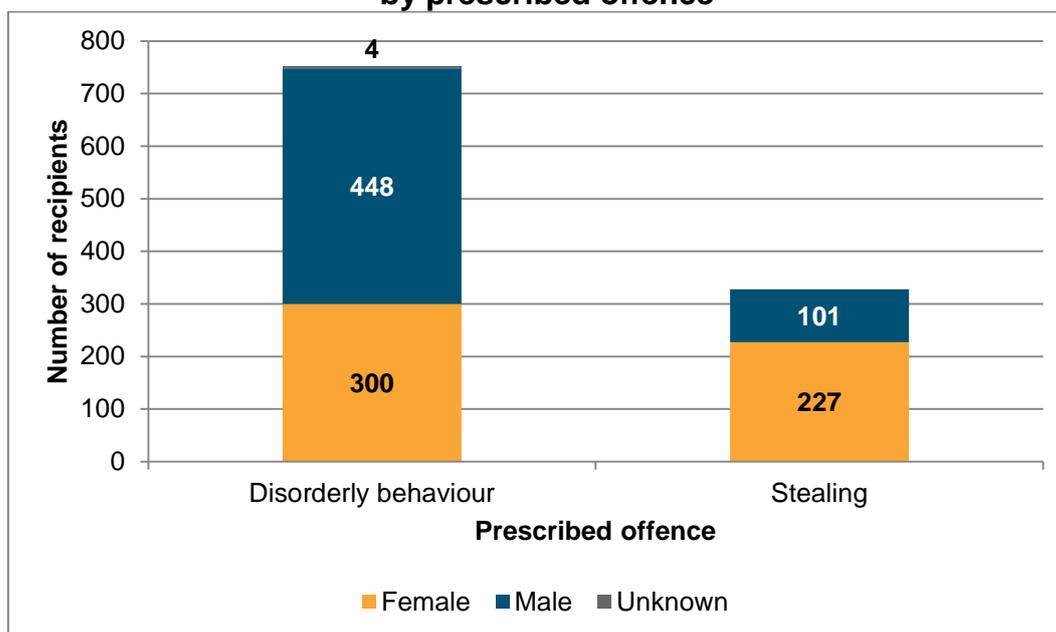
⁷⁵ Australian Bureau of Statistics, 4517.0 Prisoners in Australia, 2016, Australian Bureau of Statistics, Canberra, 2017, viewed 19 May 2017, <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Western%20Australia~22>>.

⁷⁶ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009, p. 38.

⁷⁷ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009, p. 38.

⁷⁸ 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>>.

Figure 1: Gender of Aboriginal recipients of Criminal Code infringement notices, by prescribed offence



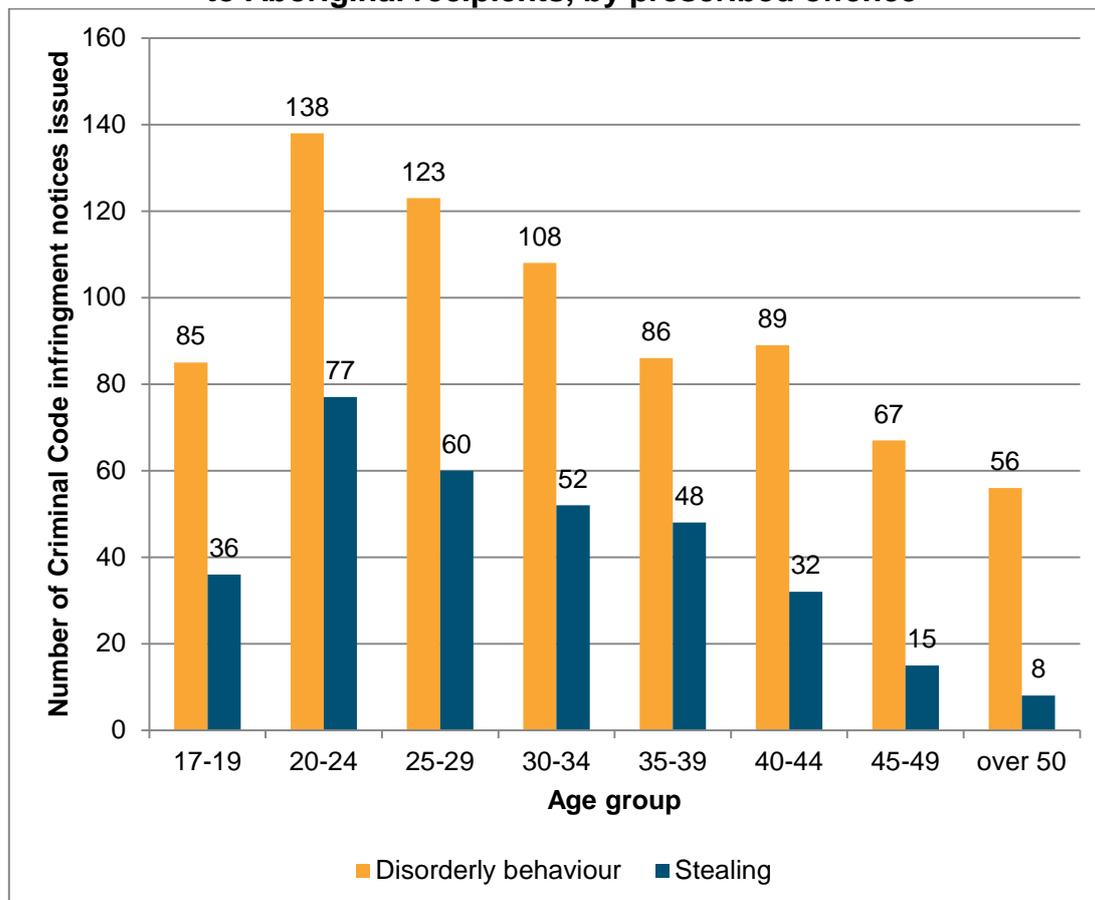
Source: Ombudsman Western Australia

3.1.3 Twenty per cent of Aboriginal recipients of Criminal Code infringement notices were aged between 20 and 24 years

The Office found that the greatest number of Criminal Code infringement notices were issued to Aboriginal recipients in the age group 20-24 years (215 Criminal Code infringement notices or 20 per cent). Of the 215 Aboriginal recipients aged between 20 and 24 years, 138 (64 per cent) received their Criminal Code infringement notice for the prescribed offence of disorderly behaviour (Figure 2).

Seventeen year olds accounted for 2.8 per cent (30) of the 1,080 Criminal Code infringement notices issued to Aboriginal recipients. This is similar to the rate for non-Aboriginal 17 year old Criminal Code infringement notice recipients (3.1 per cent).

Figure 2: Age group of Criminal Code infringement notices issued to Aboriginal recipients, by prescribed offence



Source: Ombudsman Western Australia

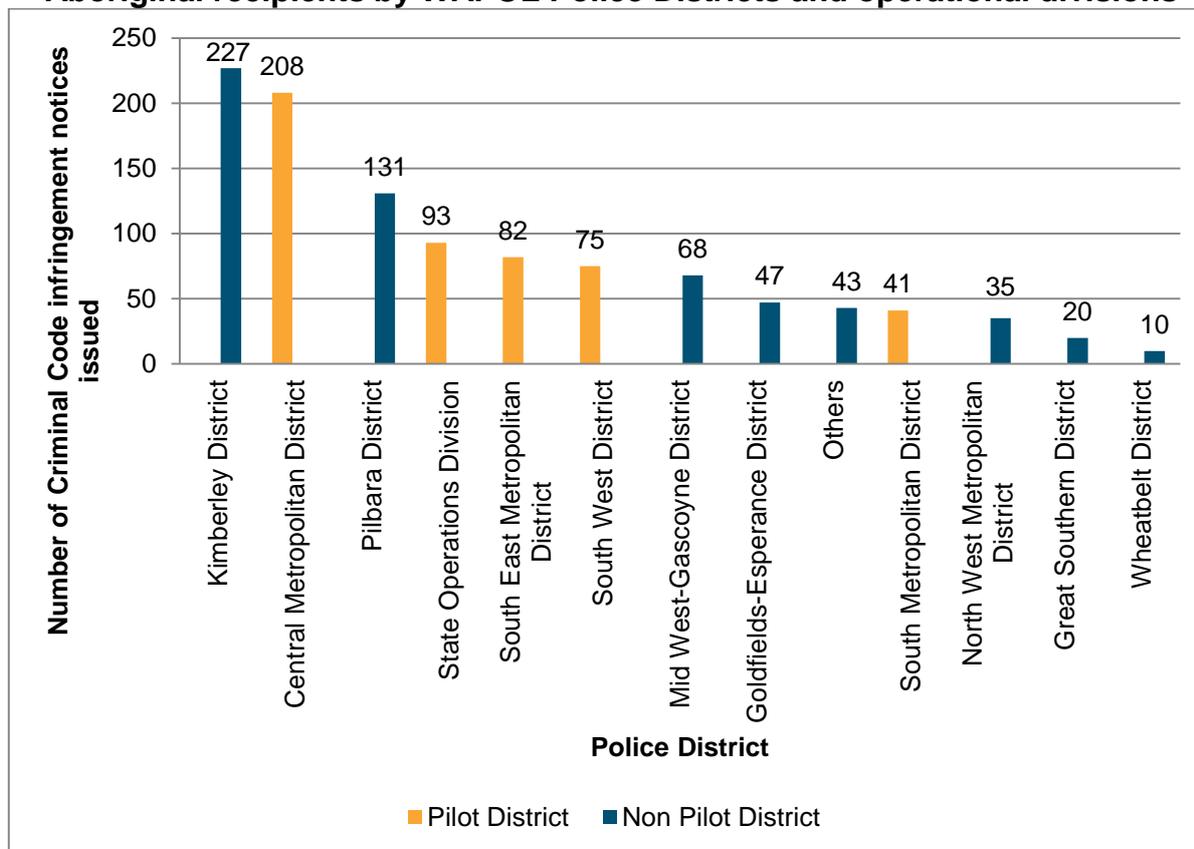
3.1.4 Fifty four per cent of Criminal Code infringement notices issued to Aboriginal recipients were issued in regional locations

The Office found that, of the 1,080 Criminal Code infringement notices issued to Aboriginal recipients, 579 (54 per cent) were issued in regional Western Australia. Of these 579 Criminal Code infringement notices, 227 were issued in the Kimberley District (39 per cent) and 131 (23 per cent) were issued in the Pilbara District. For context, Aboriginal and Torres Strait Islander people in Western Australia are more likely to reside in regional locations with 38.9 per cent living in 'Greater Perth' and 60.4 per cent in the 'Rest of the State'.⁷⁹

Further information will be required to understand long term use of Criminal Code infringement notices in the Kimberley and Pilbara regions, particularly due to the relatively high numbers of Criminal Code infringement notices issued to Aboriginal people in these areas. Of the 501 Criminal Code infringement notices issued in the metropolitan area, 208 (42 per cent) were issued in the Central Metropolitan District (Figure 3).

⁷⁹ 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.

Figure 3: Number of Criminal Code infringement notices issued to Aboriginal recipients by WAPOL Police Districts and operational divisions



Source: Ombudsman Western Australia

3.1.5 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.

This finding is consistent with the research literature which suggests that Aboriginal people are overrepresented in public order offences across Australia.⁸⁰ Possible reasons for this difference are discussed immediately below.

⁸⁰ Allard, T, 'Understanding and preventing Indigenous offending, Indigenous Justice Clearinghouse, Brief 9, 2010, p. 5.

3.2 Factors affecting the overrepresentation of Aboriginal people as recipients of Criminal Code infringement notices

3.2.1 The visibility of Aboriginal people using public space increases the likelihood that they will be issued a Criminal Code infringement notice for the prescribed offence of disorderly behaviour

As identified above, the Office found that of the 1,080 Criminal Code infringement notices issued to Aboriginal people, 752 (70 per cent) were issued for the prescribed offence of disorderly behaviour. Taking into account that 1,800 Criminal Code infringement notices were issued for the prescribed offence of disorderly behaviour, this also means that 42 per cent of Criminal Code infringement notices issued for the prescribed offence of disorderly behaviour were issued to Aboriginal people.

The Office's findings are consistent with the research literature which suggests that, while Aboriginal people are 'over-represented generally in the criminal justice system ... [t]his over-representation is pronounced for public order offences.'⁸¹ 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.'⁸² The research literature further suggests that these types of offences, including disorderly behaviour, arise from 'the contested nature of public space',⁸³ 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.'⁸⁴

Public space is important to Aboriginal and Torres Strait Islander people, with the research literature suggesting that:

... Indigenous people occupy public space more often than non-Indigenous people as a result of their spiritual and cultural connection to the land. This connection may lead them to choose a life of permanent itinerancy, or to socialise with large groups in public places of significance to them. Their frequent presence in public space may render them more likely to attract a public nuisance charge.⁸⁵

⁸¹ Crime and Misconduct Commission (Queensland), *Policing Public Order: A Review Of The Public Nuisance Offence*, Crime and Misconduct Commission, May 2008, p. 18.

⁸² Commissioner Elliott Johnston, *National Report, Volume 3*, Royal Commission into Aboriginal Deaths in Custody, Canberra, 1991, RCN.0002.0001.0530.

⁸³ Crime and Misconduct Commission (Queensland), *Policing Public Order: A Review Of The Public Nuisance Offence*, Crime and Misconduct Commission, May 2008, p. 20.

⁸⁴ Crime and Misconduct Commission (Queensland), *Policing Public Order: A Review Of The Public Nuisance Offence*, Crime and Misconduct Commission, May 2008, p. 20.

⁸⁵ Walsh, T, *No offence: the enforcement of offensive behaviour and offensive language offences in Queensland*, University of Queensland, Brisbane, 2006, p. 19.

Submissions received by the NSW Ombudsman in relation to the 2009 NSW Ombudsman's Report also reflected this;

... household arguments or grievances in Aboriginal communities may be more likely to be dealt with and resolved in public settings rather than 'behind closed doors'.⁸⁶

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.'⁸⁷ This issue is explored in detail in Chapter 4 below.

3.2.2 Homeless people were likely significantly overrepresented as recipients of Criminal Code infringement notices; the rate of homelessness of Aboriginal and Torres Strait Islander people is 14 times the rate of non-Indigenous Australians

The Office analysed the WAPOL state-wide data for Criminal Code infringement notices to identify recipients who may have been homeless. To undertake this analysis, the Office reviewed the addresses recorded by WAPOL for all Criminal Code infringement notice recipients at the time of receiving the Criminal Code infringement notice.

Of the 2,978 Criminal Code infringement notices issued, the Office found that 57 (2 per cent) recorded an address for a recipient which the Office identified related to a homelessness or community support organisation. The Office's finding suggests that, at the time, at least 2 per cent of recipients of Criminal Code infringement notices were homeless (without a permanent residential address). For comparison, the ABS estimates⁸⁸ that, in Western Australia in 2011, the rate of homeless⁸⁹ persons per 10,000 of the population was 42.8⁹⁰ (that is, 0.4 per cent of the Western Australian population).

In relation to Aboriginal recipients, of the 57 alleged offenders who were recorded with an address related to a homelessness or community support organisation, 30 (53 per cent) were recorded as Aboriginal, 26 (46 per cent) were non-Aboriginal and one (one per cent) was of unknown ethnicity. The Australian Institute of Health and Welfare identifies that the

⁸⁶ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, August 2009, p. 56.

⁸⁷ Australian Institute of Health and Welfare, *Australia's Health 2014*, Canberra, 2014, p. 297.

⁸⁸ In relation to this publication the Australian Bureau of Statistics notes that '[w]hile homelessness itself is not a characteristic that is directly collected in the Census of Population and Housing, estimates of the homeless population may be derived from the Census using analytical techniques based on both the characteristics observed in the Census and assumptions about the way people may respond to Census questions. This publication presents estimates of the prevalence of homelessness, and the characteristics and living arrangements of those likely to be homeless, on Census night 2011 ...', (Australian Bureau of Statistics, *Census of Population and Housing: Estimating homelessness, 2011*, cat. no. 2049.0, ABS, Canberra, November 2012.)

⁸⁹ The Australian Bureau of Statistics divides homelessness into the following six 'operational groups': Persons who are in improvised dwellings, tents or sleepers out; Persons in supported accommodation for the homeless; Persons staying temporarily with other households; Persons staying in boarding houses; Persons in other temporary lodging; Persons living in 'severely' crowded dwellings. (Australian Bureau of Statistics, *Census of Population and Housing: Estimating homelessness, 2011*, cat. no. 2049.0, ABS, Canberra, November 2012.)

⁹⁰ Australian Bureau of Statistics, *Census of Population and Housing: Estimating homelessness, 2011*, cat. no. 2049.0, ABS, Canberra, November 2012.

'rate of homelessness for Indigenous Australians was 14 times as high as the rate for non-Indigenous Australians in 2011 ... [d]espite making up 3% of the population, Indigenous people represented 22% of people accessing specialist homelessness services in 2012-13.'⁹¹ That is, Aboriginal people were overrepresented among homeless recipients of a Criminal Code infringement notice.

The Office notes that, while it has identified that 57 (2 per cent) recipients may have been homeless, this is likely to be an underestimate; it is not possible from the WAPOL state-wide data to identify all recipients who may be homeless. According to the Australian Institute of Health and Welfare '[h]omelessness can mean different things to different people.'⁹² In particular, those people who identify as being from an Aboriginal and Torres Strait Islander background can have a different understanding of what homelessness is and, although they may not consider themselves homeless, they may fit the ABS definition.⁹³ Further, the Australian Institute of Health and Welfare observes:

... [People] are assumed to be 'homeless' if they are: living without shelter, in improvised or inadequate accommodation; staying in short-term temporary accommodation; or living in a house, townhouse or flat with relatives for free or couch surfing or with no tenure ... [People] are assumed to be 'at risk of homelessness' if they have sought assistance from a homelessness agency but do not fall into a homeless category – that is, they are living in social housing, private or other housing, or an institutional setting.⁹⁴

While the Office's findings indicate that homeless people were overrepresented as recipients of Criminal Code infringement notices, the research literature suggests that '[h]omeless people are disproportionately represented in the criminal justice system and the rate of recidivism amongst homeless offenders is high'.⁹⁵ The Australian Institute of Health and Welfare further reports that '[o]ne-quarter (25%) of prison entrants reported being homeless in the 4 weeks immediately prior to imprisonment, including 19% who were in short-term or emergency accommodation and another 6% who were in unconventional housing or sleeping rough.'⁹⁶

The Office's finding is also consistent with the research literature which suggests that homeless people are vulnerable to attracting fines and infringements, particularly for public space offences,⁹⁷ 'because they are forced to carry out their private lives in public

⁹¹ Australian Institute of Health and Welfare, *Australia's Health 2014*, Canberra, 2014, p. 310.

⁹² Australian Institute of Health and Welfare, *Homelessness among Indigenous Australians*. Cat. no. IHW 133. Canberra: AIHW, p. 4.

⁹³ Australian Institute of Health and Welfare, *Homelessness among Indigenous Australians*. Cat. no. IHW 133. Canberra: AIHW, pp. 5-6.

⁹⁴ Australian Institute of Health and Welfare, *Homelessness among Indigenous Australians*. Cat. no. IHW 133. Canberra: AIHW, p. 18.

⁹⁵ Improving the Administration of Justice for Homeless People in the Court Process: Report of the Homeless Persons' Court Project, Public Interest Law Clearing House, August 2004, cited in: Monash University Castan Centre for Human Rights Law, Alternatives to Imprisonment for Vulnerable Offenders, International Standards and Best Practice, Report for Australian Government Attorney-General's Department, Monash University, July 2012, p. 15.

⁹⁶ Australian Institute of Health and Welfare, *The health of Australia's prisoners 2015*, Australian Institute of Health and Welfare, Canberra, p. 28.

⁹⁷ 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.

places.⁹⁸ The Office found that, of the 57 Criminal Code infringement notices issued to a recipient who was recorded with an address related to a homelessness or community support organisation, 34 (60 per cent) were issued for the prescribed offence of disorderly behaviour.

Homeless people are particularly vulnerable to receiving infringements because of their visibility in the public space. However, homeless people may also have additional vulnerabilities which can lead to infringements, including 'physical disability, mental illness, alcohol or drug dependency and a history of abuse and family and domestic violence.'⁹⁹

The same vulnerabilities 'limit their ability to resolve the infringements through payment or engaging in the review process'¹⁰⁰ with advocates identifying that the financial burden infringement notices and fines place on the homeless contribute to 'perpetuating conditions of homelessness.'¹⁰¹

The research literature further suggests that the type of public space offences homeless people are susceptible to are often 'directly related to homelessness, and include being drunk in public; begging; and using offensive language;'¹⁰² behaviour that 'would be lawful if conducted in a home.'¹⁰³ Respondents to the Consultation Paper echoed this view and noted:

Of the 14 people participating in the consultation 11 were currently sleeping rough (sleeping in parks, squats, cars, etc). They identified that this made them more likely to receive infringement notices, particularly for disorderly conduct. They spoke about having no home to go to so that they could drink in private and so were being picked up for drinking in public. Likewise, they have no privacy when they have disagreements; so argue in the street. Even when not participating in activities that constitute disorderly conduct, daily activities of homeless people can attract police attention and escalate into situations resulting in infringement notices. One person spoke about a time when he was looking for somewhere to sleep and was asked to move on by police. He got angry about this, partly because of the fatigue and frustration of being homeless and the pressure to find somewhere to sleep. The police responded to his anger and he was issued with an infringement notice.¹⁰⁴

One respondent to the Consultation Paper, an outreach service working with Aboriginal clients 'to improve their well-being and personal safety',¹⁰⁵ expressed the view that 'the

⁹⁸ Justice Connect, *Infringements and public space offences*, Justice Connect, Melbourne, viewed 17 June 2016, <<https://www.justiceconnect.org.au/our-programs/homeless-law/law-and-policy-reform/infringements-and-public-space-offences>>.

⁹⁹ Street Law Centre WA Inc., *Law Reform Proposal for the Enforcement of Infringement Notices and Fines*, East Perth, May 2015, p. 6.

¹⁰⁰ Homeless Law in Practice, 'Infringements', viewed 14 October 2016, <<http://www.hlp.org.au/Infringements>>.

¹⁰¹ Street Law Centre WA Inc., *Law Reform Proposal for the Enforcement of Infringement Notices and Fines*, East Perth, May 2015, pp. 6-7.

¹⁰² Justice Connect, *Infringements*, Justice Connect, Melbourne, viewed 20 June 2016, <<http://www.hlp.org.au/Infringements>>.

¹⁰³ 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. 16.

¹⁰⁴ D. Zanella, RUAH Community Services, submission dated 20 May 2016, p. 4.

¹⁰⁵ Nyoongar Outreach Services, submission dated 20 May 2016.

use of move on notices and infringements for homeless people poses a clear question about social conscience and responsibility for the State. Where is the person expected to go?¹⁰⁶ The respondent provided the following example of an Aboriginal client who was issued a Move on Order together with an infringement (the Office notes that a Criminal Code infringement notice alone does not require a person to move on):

Mr B was drinking in public and WA Police would usually tip out the drink and issue a warning not to drink in public. Mr B is known to [the service provider] for about sixteen years and likes to drink but is not aggressive or loud and has nowhere else to go when his community is closed. He is entirely dependent upon services provided in the immediate area where the notice and infringement were issued. Further, Mr B has no capacity to pay the fine and will be likely to be summoned to appear in court and, as with most people in his position of disadvantage, he would plead guilty, resulting in his being placed on a good behaviour bond. This would start a cycle of court appearances and eventual likely incarceration resulting from outstanding fines and breached notices.

Mr B does not hold a licence or own any property in order to meet the needs of the penalties available under section 14 [of] the FPINE legislation. Mr B relies on welfare services to get food and blankets and street based support.

The reasoning behind infringing this person is difficult to understand. A move on order and a \$500 infringement displaces Mr B to an area where support services are unable to make contact to provide support services, including pending communications from other departments (ie: Housing, Medical and Centrelink). Mr B, while unable to access the area for essential services, is also incapable of paying a fine or attending court to defend his behaviour on the day, and, as already identified, may end up with further penalties, a conviction and jail time.¹⁰⁷

The Office notes that the New South Wales Government has developed and implemented a *Protocol for Homeless People in Public Places*¹⁰⁸ (**the Protocol**). The Protocol was introduced 'to help ensure that homeless people are treated respectfully and appropriately and are not discriminated against on the basis of their homeless status.'¹⁰⁹ The Protocol provides a framework for interactions between officials of participating New South Wales government organisations and homeless people in public places. Of particular note, the Protocol has been endorsed by NSW Police Force.

The Protocol 'includes guidance on what officials should do if they encounter people who appear to be homeless and some underlying principles regarding the rights and responsibilities of homeless people, other members of the public and officials.'¹¹⁰ The Protocol states that:

¹⁰⁶ Nyoongar Outreach Services, submission dated 20 May 2016.

¹⁰⁷ Nyoongar Outreach Services, submission dated 20 May 2016.

¹⁰⁸ NSW Government, *Protocol for Homeless People in Public Places*, Family and Community Services, New South Wales, August 2014.

¹⁰⁹ NSW Government, *Protocol for Homeless People in Public Places*, Family and Community Services, New South Wales, August 2014, p. 1.

¹¹⁰ NSW Government, *Protocol for Homeless People in Public Places Guidelines for Implementation*, Family and Community Services, New South Wales, p. 5.

A homeless person is not to be approached unless:

- they request assistance
- they appear to be distressed or in need of assistance
- an official seeks to engage with the person for the purpose of information exchange or provision of a service
- their behaviour threatens their safety or the safety and security of people around them
- their behaviour is likely to result in damage to property or have a negative impact on natural and cultural conservation of environment, including cultural heritage, water pollution and fire risks
- they are sheltering in circumstances that place their or others' health and safety at risk (for example, staying in derelict buildings, high risk areas)
- they are a child who appears to be under the age of 16
- they are a young person who appears to be 16 to 17 years old who may be at risk of significant harm
- they are a child or young person who is in the care of the Director-General of the Department of Family and Community Services or the parental responsibility of the Minister for Family and Community Services.

The Protocol does not prevent organisations from taking appropriate action where health or safety is at risk or a breach of the peace or unlawful behaviour has occurred. If homeless people require assistance, officials can

- involve appropriate services directly
- provide advice or information on available services
- provide a contact point that the homeless person can either call or go to for further advice or help.¹¹¹

The Protocol is informed by the following 'underlying principles':

- Homeless people have the same entitlement as any member of the public to
 - be in public places, at the same time respecting the right of local communities to live in a safe and peaceful environment
 - participate in public activities or events, and
 - carry with them and store their own belongings.
- Organisations that work in areas where their responsibilities are likely to bring them into contact with homeless people will receive sufficient information to enable them to assist homeless people if required, or help homeless people make contact with appropriate services.
- Homeless people have diverse backgrounds and needs, these should be considered in any response:
 - Cultural sensitivity and respect should be applied when engaging with Aboriginal homeless people and those from different cultural, linguistic or religious backgrounds. Officials should use interpreter services to assist with referring people to relevant services as required.

¹¹¹ NSW Government, *Protocol for Homeless People in Public Places*, Family and Community Services, New South Wales, August 2014, p. 1.

- Many homeless people have complex needs such as mental health and/or drug and alcohol issues, or cognitive impairment. These issues may result in behaviour that is seen to be antisocial.
 - Homeless people may have experienced other issues that affect their needs. For example, they may have experienced domestic violence or left custody or statutory care, or they may be asylum seeking refugees with no contacts in the community.
 - The Protocol does not override existing laws, statutory requirements or regulations. It does not reduce the powers of organisations or their authority to enforce specific laws and regulations.
- Homeless people have the same access to a right of reply and appeals/complaints mechanisms as all members of the public.¹¹²

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.

¹¹² NSW Government, *Protocol for Homeless People in Public Places*, Family and Community Services, New South Wales, August 2014, pp. 1-2.

3.2.3 People with a mental illness and/or intellectual disability are vulnerable to the receipt of infringement notices, as their condition may ‘manifest in behaviours for which they are penalised’

The records of WAPOL, DOTAG and the courts examined by the Office did not identify whether alleged offenders who received a Criminal Code infringement notice were people with a mental illness or an intellectual disability. However, the Western Australian Mental Health Commission reports that ‘[i]nternal modelling suggests that 59 [per cent] of the adult prison population, and 65 [per cent] of the juvenile prison population in Western Australia has a mental illness, almost three times the prevalence of the general population.’¹¹³

People with a mental illness and/or intellectual disability are also vulnerable to the receipt of infringement notices, as their condition may ‘manifest in behaviours for which they are penalised’.¹¹⁴ The research literature identifies that people with a mental illness in particular are highly visible to law enforcement, as a result of ‘perceived socially “inappropriate behaviour”’.¹¹⁵ This was also identified by respondents to the Consultation Paper, who expressed the view that ‘people with mental ill health come to the attention of police because their behaviour is misunderstood.’¹¹⁶

The research literature also suggests that people with a mental illness may be more vulnerable to receiving fines and infringements as they may have ‘[d]ifficulty understanding conflict and coping with stressful situations: This can lead to an argument or misunderstanding escalating into the issue of [an infringement notice].’¹¹⁷ Further, fines and infringement notices ‘may not have a deterrent effect because of the nature of a particular person’s illness or impairment (for example, inability to comprehend the nature of the offence or the consequence of receiving [an infringement notice]).’¹¹⁸

The New South Wales Law Reform Commission described a submission regarding the impact of penalty notices on people with an intellectual disability as follows:

The Intellectual Disability Rights Service (“IDRS”) has argued that the high levels of socio-economic disadvantage and marginalisation within the community experienced by people with an intellectual disability, as well as literacy and/or communication difficulties, make it difficult for them either to pay fines or access assistance to deal with the penalty notice by means other than payment.¹¹⁹

¹¹³ Mental Health Commission, *The Western Australian Mental Health, Alcohol and Other Drug Services Plan 2015–2025*, Government of Western Australia, 2015, p. 14, citing: Mental Health Commission, *Internal Modelling: 2014*, Government of Western Australia, 2014.

¹¹⁴ 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. 17.

¹¹⁵ New South Wales Law Reform Commission, *Consultation Paper 10: Penalty notices*, NSWLRC, Sydney, September 2010, p. 122.

¹¹⁶ D. Childs, CEO Helping Minds, submission dated 20 May 2016.

¹¹⁷ New South Wales Law Reform Commission, *Consultation Paper 10: Penalty notices*, NSWLRC, Sydney, September 2010, p. 122.

¹¹⁸ New South Wales Law Reform Commission, *Consultation Paper 10: Penalty notices*, NSWLRC, Sydney, September 2010, pp. 122-123.

¹¹⁹ New South Wales Law Reform Commission, *Consultation Paper 10: Penalty notices*, NSWLRC, Sydney, September 2010, p. 123.

3.2.4 The research literature suggests that Aboriginal and Torres Strait Islander people are more likely to have a mental illness and/or intellectual disability

Research literature drawing on the available statistics about the mental health of Aboriginal and Torres Strait Islander communities finds that:

Indigenous Australians have a markedly higher burden of disease and injury than the general Australian population. Most of this has been attributed to higher rates of non-communicable diseases, including mental disorders, but as there are no national data on the prevalence or incidence of diagnosed mental disorders for Indigenous people, proxy measures of relative rates have been used to estimate this component of the burden of disease.

Although there have been small studies of mental health in specific Indigenous communities over the past 50 years, the only national statistics that have been available until recently were the suicide rate, the hospitalisation rate for diagnosed mental disorders, emergency department attendances for mental health and substance misuse-related conditions and contacts with public community health services, which indicate a relative prevalence two or three times the corresponding general population rate. Even this is likely to be an underestimate, as many Indigenous people do not access regular health services, or delay seeking help until problems are severe.¹²⁰

The research literature further suggests that:

Aboriginal and Torres Strait Islander people may have higher levels of psychological distress because they experience more stressful events than non-Indigenous people. There were differences between men and women with more women reporting high levels of psychological distress than males. People living in non-remote areas reported higher levels of psychological distress than those in remote areas...

Stressors like 'trouble with the police' and 'gambling problems' were five and six times more likely to be reported by Indigenous people than by the general population.¹²¹

The research literature also suggests that, in Western Australia, 'Aboriginal and Torres Strait Islander peoples [represent] 7.4 per cent of all people registered with intellectual disability.'¹²²

With regard to alleged offenders of the prescribed offence of disorderly behaviour, the research literature suggests that at least 15 per cent of alleged offenders experience a cognitive, behavioural or psychological impairment, as follows:

¹²⁰ Jorm, A F, Bourchier, S J, Cvetkovski, S and Stewart, G, 'Mental health of Indigenous Australians: a review of findings from community surveys', *The Medical Journal of Australia*, 2012, vol. 196, no.2, p. 118.

¹²¹ Australian Indigenous HealthInfoNet, 'Summary of Aboriginal and Torres Strait Islander health status 2015', viewed 7 October 2016, <<http://www.healthinonet.ecu.edu.au/uploads/docs/2015-summary.pdf>>, p. 7.

¹²² Parker, R, Balaratnasingam, S, Roy, M, Huntley, J and Mageean, N, 'Intellectual Disability in Aboriginal and Torres Strait Islander peoples', *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice*, Department of Health and Ageing, Canberra, 2014, p. 307.

A significant number of people with recognised cognitive, behavioural or psychological impairments are prosecuted for public nuisance. The results of this research suggest that around 15% of public nuisance defendants suffer from impairment, however this is likely to be a gross underestimate. This figure represents only those defendants whose impairment was raised during the court proceedings. Since cognitive, behavioural and psychological impairments amongst disadvantaged people often remain undiagnosed, and/or go unrecognised by lawyers and court personnel, the rate of impairment amongst public nuisance defendants is likely to be much higher ...¹²³

3.2.5 It can be difficult for police officers to identify people who may be offending due to their mental health and/or intellectual disability

WAPOL has informed the Office that all police officers are required to comply with the *Mental Health Act 1996* and WAPOL's *MI-01.01 Persons with Mental Illness – General Policy* in addition to WAPOL's CCIN Policy. The Office's review of WAPOL's *MI-01.01 Persons with Mental Illness – General Policy* identified that this policy does not provide any advice regarding the issuing of infringements to people with mental illness. However, the policy provides guidance on:

- actions to be taken when a person has been identified as being suspected as suffering from a mental illness, including how to arrange for a psychiatric assessment;
- procedures to be followed when a person who has been arrested is suspected to be suffering from a mental illness; and
- the transportation of people suspected to suffer from a mental illness.¹²⁴

WAPOL has further informed the Office that all police officers are required to complete 'Mental Health' training at the Western Australian Police Academy. WAPOL informed the Office that this training session runs for 70 minutes and includes the following:

Outcomes:

Cover Learning Outcomes:

1. Define Mental Illness.
2. Outline the Police powers in relation to the:
 - apprehension/detention,
 - transportation,
 - search and seizure,
 - powers of entry,
 - and use of force, in relation to mentally ill persons.
3. Define 'involuntary patient' and 'authorized hospital'.
4. Explain the use of Transport Orders and the procedures for conducting escorts.
5. Outline the procedures for dealing with seized property from mental patients.

While some training is received in relation to WAPOL's *MI-01.01 Persons with Mental Illness – General Policy*, no training appears to be provided regarding identifying people with a suspected mental illness, and exercising discretion to taken action in response to

¹²³ Walsh, T, *No offence: the enforcement of offensive behaviour and offensive language offences in Queensland*, University of Queensland, Brisbane, 2006, pp. 20-21.

¹²⁴ Western Australia Police, *MI-01.01 Persons with Mental Illness – General Policy*.

the actions of people with suspected mental illness (including, for example, deciding whether it is appropriate to issue a Criminal Code infringement notice). Training is also not provided in relation to people with intellectual disabilities.

The Office's review of the research literature suggests that it can be difficult for individual police officers to identify offenders who may be offending due to their mental health and/or intellectual disability, and who may benefit from diversion, as follows:

...one police survey (Mental Health Legal Centre Inc. 2010) confirmed that police often experience difficulty identifying persons who are eligible for diversion.

These results confirmed similar views expressed by McGillvray and Waterman in 2003. Their study examined Victorian criminal lawyers' knowledge of and attitudes towards intellectually disabled offenders. With regard to questions relating to criminal justice staff, 96.9 per cent of respondents stated that police require further training in order to understand intellectually disabled offenders (McGillvray and Waterman 2003:249). Legal representatives (30 per cent) who participated in our research also reported that transport officers, the police and other enforcement personnel required training to alert them to these issues and the need to exercise their discretion through warnings, cautions, or referrals to support services in lieu of issuing fines. It is more likely that magistrates or judicial registrars with considerable experience in dealing with disadvantaged persons will consider the links between the accused's 'special circumstances' and his or her offending.¹²⁵

Further research literature states that, in relation to face-to-face infringement notices specifically:

... when infringements are issued on a face-to-face basis, it might be difficult to ascertain whether an individual is eligible for such concessions. Many issuing officers are not adequately educated to recognise disabilities and people may also attempt to hide their disabilities.¹²⁶

At the Police Officer Forums, participants expressed the view that it is sometimes difficult to identify if an offender has a mental illness or if they are under the influence of alcohol or drugs.

The Office notes that the Council of Australian Government's (COAG) *The Roadmap for National Mental Health Reform 2012-2022 (the Roadmap)* recognises many of the above issues, and relevantly observes that:

Early detection of mental health issues and mental illness, followed by appropriate, timely intervention can significantly reduce the severity, duration and recurrence of mental illness and its associated social disadvantage, no matter when in life the episode or episodes occur. Early detection of mental

¹²⁵ 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. 379.

¹²⁶ Saunders, B et al, *An Examination of the Impact of Unpaid Infringement Notices on Disadvantaged Groups and the Criminal Justice System – Toward a Best Practice Model*, Criminal Justice Research Consortium, Monash University, February 2013, p. 90.

health issues can improve people's prospects of completing education and training, increase their opportunities for securing and retaining employment, help them maintain stable accommodation, and minimise their interactions with the corrections and justice system.

Early signs of mental health issues need to be more widely recognised to ensure early and accurate detection and timely, effective intervention across the lifespan. Improvements to the ease and speed with which people can connect with appropriate services and supports, including culturally appropriate and accessible services for Aboriginal and Torres Strait Islander people and people from cultural and linguistically diverse backgrounds needs to be improved.

This can be achieved through building the knowledge and skills of carers, childcare workers, teachers, employers, first responders (including police and ambulance officers), correctional officers, social workers and other service providers as well as those of the general public. This will enable them to identify the early signs of mental health issues, communicate appropriately and effectively with anyone they believe may be experiencing a mental health issue or episode of mental illness, and be aware of the available referral pathways for a person who requires support.¹²⁷

The Roadmap goes on to specify a set of strategies, which include to:

23. Improve the mental health awareness and competency of frontline professionals (including in health, education, the justice sector and community services) to identify and respond to the early signs of mental health issues and refer people to appropriate services and supports, including for people from culturally and linguistically diverse backgrounds.

...

25. Strengthen the cultural competency of frontline professionals, including police, education and early childhood providers and healthcare professionals, to detect and appropriately intervene early in mental health concerns for Aboriginal and Torres Strait Islander people.¹²⁸

The Office's findings support the implementation of these strategies.

The Office notes that respondents to the Consultation Paper offered, through their submissions, to assist WAPOL to train police officers. In relation to the provision of disability awareness training the Director General of the Disability Services Commission of Western Australia stated that:

The Commission can offer disability awareness training to WA Police if deemed necessary, which could focus on understanding disability, recognising where it may be necessary to engage a support person, communication, and how to respond to behaviours of concern.¹²⁹

¹²⁷ Council of Australian Governments, *The Roadmap for National Mental Health Reform 2012-2022*, endorsed by the Council of Australian Governments on 7 December 2012, p. 22.

¹²⁸ Council of Australian Governments, *The Roadmap for National Mental Health Reform 2012-2022*, endorsed by the Council of Australian Governments on 7 December 2012, p. 22.

¹²⁹ Disability Services Commission, submission dated 18 May 2016.

Further, the CEO of HelpingMinds expressed the following views in response to the Consultation Paper:

Families often tell us that it would be hugely beneficial if police used their discretion regarding the issue of an infringement notice to determine if the person under consideration is experiencing a mental health issue. The person could then be referred to relevant supports and, where appropriate, assistance sought from the individual's family/support network. It is vitally important that officers who are authorised to use infringement notices are adequately resourced to provide effective support and to exercise discretion in a manner that achieves positive outcomes for people experiencing mental ill health and for their families.

HelpingMinds is one of many community-based organisations keen to work cooperatively with the police towards providing preventative supports for people with mental ill health. To hear in more detail about the issues police face when using their discretion to refer people with mental ill health to supports, as opposed to issuing an infringement notice, would improve our ability to provide WA Police with feedback that could lead to further improvements in policing and lead to better outcomes for families and individuals.¹³⁰

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*.

3.2.6 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

As set out above, the Office has 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:

- 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

¹³⁰ HelpingMinds, submission dated 20 May 2016.

- potentially higher rates of mental illness and intellectual disability in Aboriginal communities.

Section 8.1 identifies, and discusses in detail, that 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. Of particular relevance, the research literature suggests that:

Cultural competence should be considered an ideal that is strived for rather than an end point that can be reached, ticked off and forgotten about. Cultural competence involves the knowledge, skills, attitudes and values necessary for effective intercultural transactions within diverse social, cultural and organisational contexts ... [and] encompasses elements of knowledge, values and beliefs, and skills considered necessary to enhance the cultural competence of practitioners ... These different dimensions need to be understood within a nested system that operates simultaneously at both individual, professional, organisational and system levels, recognising that a culturally incompetent system can undermine culturally competent practitioners.¹³¹

The Office also notes that the Western Australian State Coroner, Ros Fogliani, in the 2016 *Inquest into the death of [Ms] Dhu*, made the following recommendations regarding WAPOL's cultural competency training, and training in local community issues:

Recommendation 3 – cultural competency training

I recommend that the Western Australia Police Service develops its cross-cultural diversity training to address the following:

1. That there be mandatory initial and ongoing cultural competency training for its police officers to assist in their dealings with Aboriginal persons and to understand their health concerns;
2. That Aboriginal persons be involved in the delivery of such training;
3. That successful trainees should be able to demonstrate cultural competency – that is a well-developed understanding of Aboriginal issues and the skills to deal effectively with Aboriginal communities; and
4. That the initial training and at least a component of the ongoing training is to be delivered face-to-face.

¹³¹ Dudgeon, P, Milroy, H and Walker, R, *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice*, Australian Government Department of the Prime Minister and Cabinet, Telethon Institute for Child Health Research, Kulunga Research Network the University of Western Australia, Canberra, 2014, p. 202.

Recommendation 4 – training tailored to local community issues

I recommend that the Western Australia Police Service develops its training for police officers who are transferred to a new police station to address the following:

1. That it be a standard procedure for all police officers transferred to a location with a significant Aboriginal population to receive comprehensive cultural competency training, tailored to reflect the specific issues, challenges and health concerns relevant to the location;
2. That members from the local Aboriginal community be involved in the delivery of such training, and that it be ongoing to reflect the changing circumstances of the location; and
3. That the initial training and at least a component of the ongoing training is to be delivered face-to-face.¹³²

The Office's findings support Recommendations 3 and 4 of the *Inquest into the death of [Ms] Dhu*.

Recommendation 20

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

¹³² Western Australian State Coroner Ros Fogliani, *Inquest into the death of [Ms] Dhu (11020-14)*, Coroner's Court of Western Australia, Perth, 15 December 2016, pp. 137-138.

4 Exercising discretion to issue Criminal Code infringement notices to 17 year olds

As noted above, 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.'¹³³ In this Chapter, the Office has 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.

4.1 The inclusion of 17 year olds in the infringement notices provisions of *The Criminal Code*

4.1.1 Legislative requirements

Criminal Code infringement notices can only be issued to persons 17 years of age or older on the day on which the alleged offence is believed to have been committed. Regulation 5 of the *Criminal Code (Infringement Notices) Regulations 2015* provides for when Criminal Code infringement notices cannot be issued, as follows:

5. When infringement notices cannot be issued (*The Criminal Code* s. 721(3)(b) and (c))

However, an infringement notice cannot be issued under the CP Act Part 2 for an offence specified in Schedule 1 in the following situations —

- (a) if, on the day on which the alleged offence is believed to have been committed, the alleged offender is under 17 years of age;
- (b) if —
 - (i) the alleged offence is under *The Criminal Code* section 378; and
 - (ii) the value of the thing alleged to have been stolen exceeds \$500.

¹³³ Australian Institute of Health and Welfare, *Australia's Health 2014*, viewed 12 August 2016, <<http://www.aihw.gov.au/australias-health/2014/indigenous-health/>>.

4.2 Factors affecting the impact of the infringement notices provisions of *The Criminal Code* on 17 year olds

4.2.1 Australia's Aboriginal and Torres Strait Islander population is younger than the non-Aboriginal population

In 2016, despite making up 3.1 per cent of Western Australia's population, Aboriginal and Torres Strait Islander people accounted for 4.9 per cent of 17 year olds in Western Australia.¹³⁴ The Australian Aboriginal and Torres Strait Islander population has a younger age structure than the non-Aboriginal population, 'with larger proportions of younger people and smaller proportions of older people.'¹³⁵ The research literature identifies that this difference is due to higher rates of fertility among the Aboriginal and Torres Strait Islander population, the younger ages of Aboriginal and Torres Strait Islander mothers, and the deaths of Aboriginal and Torres Strait Islander people occurring at younger ages.¹³⁶ The research literature identifies that, in June 2011:

- the median age of the Aboriginal and Torres Strait Islander population was 21.8 years, compared with 37.6 years for the non-Aboriginal population;
- over one-third (36 per cent) of Aboriginal and Torres Strait Islander people were aged under 15 compared with 18 per cent of non-Aboriginal people; and
- people aged 65 and over comprised 3.4 per cent of the Aboriginal and Torres Strait Islander population compared with 14 per cent of the non-Aboriginal population.¹³⁷

4.2.2 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.¹³⁸

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,'¹³⁹ and that 'their use of public space is increasingly regulated'.¹⁴⁰ Public space is important to young people, serving as a 'free

¹³⁴ To determine the population of Aboriginal and Torres Strait Islander 17 year olds in Western Australia, the Office generated a customised table using the Australian Bureau of Statistics data '2016 Census – Cultural and Language Diversity', *Census of Population and Housing 2016*.

¹³⁵ 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.

¹³⁶ Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander peoples: 2015*, Cat. No. IHW 133, Canberra, 2015, pp. 10-12.

¹³⁷ Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander peoples: 2015*, Cat. No. IHW 133, Canberra, 2015, p. 10.

¹³⁸ 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*.

¹³⁹ 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>>.

¹⁴⁰ 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.

and democratic space'¹⁴¹ that allows them to 'assert their autonomy and to congregate ... in places outside of close adult or state control.'¹⁴² 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.'¹⁴³

However, the research literature also suggests that young people are often subjected to increased policing within the public space, with perceptions of young people as 'dangerous or disruptive,' and as 'disturbing to other ... users of public space'.¹⁴⁴

Although young people are members of the public, many people in our community have trouble with young people's use of public space. What is normal social interaction for young people is often branded anti-social behaviour. Media stories about "youth gangs" and "graffiti hooligans" fuel perceptions of young people as a threat. This is especially so for young people who are male, of non-English speaking background or who hang around in groups.¹⁴⁵

Respondents to the Consultation Paper identified that some young people 'feel vulnerable to discrimination by police',¹⁴⁶ and this is consistent with earlier Australian research identifying that '[t]he majority of young people in the focus groups stated that young people are regularly hassled and harassed by police when hanging around together in public places'.¹⁴⁷

4.2.3 Aboriginal 17 year olds who were recipients of Criminal Code infringement notices

In relation to Aboriginal and Torres Strait Islander young people in Western Australia in particular, the Aboriginal Legal Service of Western Australia has stated that:

Young Aboriginal people and young adults often become victims of disadvantaged and dysfunctional family backgrounds. Young Aboriginal people and young adults are then more likely to be on the streets, interacting with police, and in turn become absorbed in a system that is ill-equipped to assist them.¹⁴⁸

¹⁴¹ 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.

¹⁴² R. White, *Young People, Community Space and Social Control*, January 1992, paper presented at the National Conference on Juvenile Justice, Adelaide, p. 199.

¹⁴³ 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.

¹⁴⁴ 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, pp. 18-19; R. White, *Young People, Community Space and Social Control*, January 1992, paper presented at the National Conference on Juvenile Justice, Adelaide, p. 189.

¹⁴⁵ 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.

¹⁴⁶ C. Pettit, Commissioner for Children and Young People WA, submission dated 3 May 2016.

¹⁴⁷ 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>>.

¹⁴⁸ Aboriginal Legal Service of Western Australia (Inc.), *Submission To The Parliament Of Australia House Of Representatives House Standing Committee On Aboriginal And Torres Strait Islander Affairs Inquiry Into The High Level Of Involvement Of Indigenous Juveniles And Young Adults In The Criminal Justice System*, Aboriginal Legal Service of Western Australia (Inc.), Perth, Western Australia, December 2009, p. 5.

As noted above, 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.

4.3 The *Young Offenders Act 1994* and the infringement notices provisions of *The Criminal Code*

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*. Accordingly, the Office has considered these potential issues in detail below.

4.3.1 Legislative requirements

There are specific legislative requirements which are relevant to the issuing of Criminal Code infringement notices to young people who are 17 years old as 'Parliament has identified that this justice system will treat young people differently from adults. The *Young Offenders Act 1994* and its subsequent amendments ... set out how young people will be dealt with in the justice system.'¹⁴⁹

In particular, the *Young Offenders Act 1994*, provides for young people to be referred to juvenile justice teams, which 'aim to provide an alternative to court for young people who have committed a non-scheduled offence ... [and] seek to assist behavioural change by identifying services to deal with the young person's offending ...'¹⁵⁰

Section 29 of the *Young Offenders Act 1994* relevantly provides that:

29. First offenders usually should be referred to team

- (1) The discretion given by section 27 or 28 is to be exercised in favour of referring the matter to a juvenile justice team if the young person has not previously offended against the law.
- (2) A young person is not to be taken to have previously offended against the law merely because he or she —
 - (a) has been cautioned under section 22; or
 - (ba) has been given an infringement notice, as defined in section 25(3); or
 - (b) has accepted responsibility for the act or omission constituting the offence under section 25(4); or
 - (c) has agreed to comply or has complied with the terms specified by a juvenile justice team for disposing of a matter under section 32.

¹⁴⁹ Office of the Auditor General, *The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994*, Office of the Auditor General, Perth, June 2008, p. 6.

¹⁵⁰ Office of the Auditor General, *The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994*, Office of the Auditor General, Perth, June 2008, p. 36.

However, section 25 provides that an infringement notice is preferred for offences where an infringement notice can be given, unless there are circumstances that make the giving of an infringement notice inappropriate:

25. Only certain matters may be referred to teams

...

- (2) If an offence is one for which an infringement notice can be given, the giving of an infringement notice for the offence is to be preferred to referring the matter to a juvenile justice team unless there are circumstances that make the giving of an infringement notice inappropriate.

...

4.3.2 WAPOL's CCIN Policy

WAPOL's CCIN Policy provides that police officers consider the *Young Offenders Act 1994* as follows:

Process for Issuing A CCIN

...

Determine if a CCIN is the most appropriate course of action having considered alternative legislative options such as, caution, summons, or arrest. Consideration must be given to YOA options, such as written caution or JJT referral when the offender is 17 years of age Refer *Section 25(2) (YOA)* which states *an infringement must be issued in preference to a JJT referral.*

4.3.3 Seventeen year old alleged offenders were issued Criminal Code infringement notices as an alternative to arrests or summonses; the rate of referral to juvenile justice teams was not affected

In relation to the issuing of Criminal Code infringement notices in preference to referring young alleged offenders to a juvenile justice team, it is 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*.

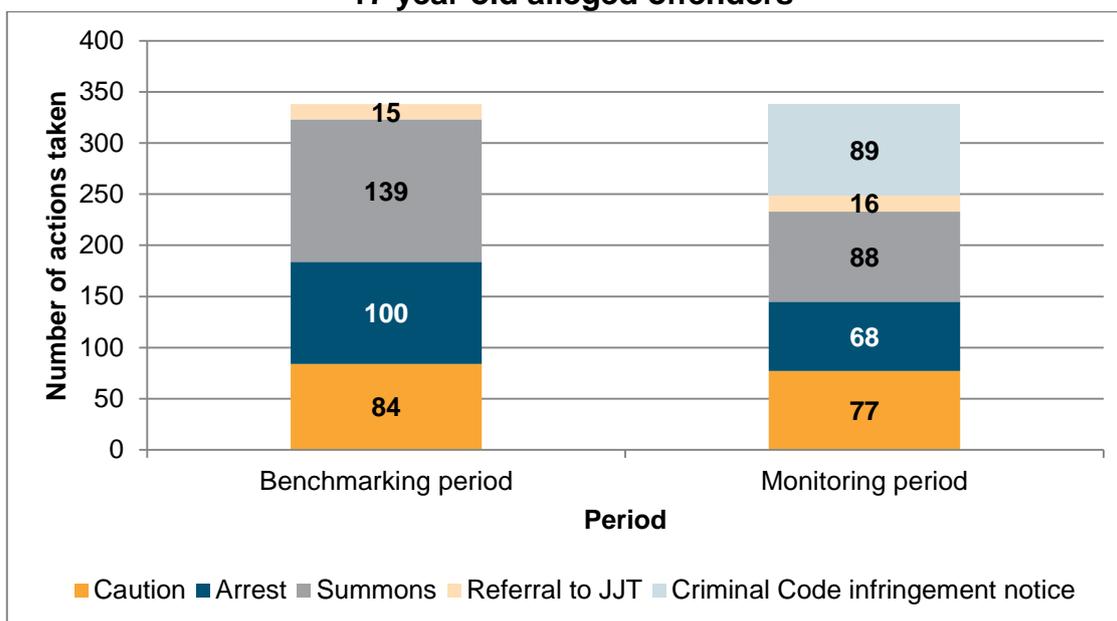
Having given consideration to the interaction of section 25(2) of the *Young Offenders Act 1994* with Criminal Code infringement notices, the Commissioner for Children and Young People's response to the Consultation Paper stated:

... I remain concerned about several matters related to the use of infringement notices for young people. Section 25(2) of the *Young Offenders Act* states that if an offence is one for which an infringement notice could be given, it is to be 'preferred' to referring the matter to a Juvenile Justice Team. While I understand that this approach places less of a burden on court and youth justice resources, it restricts a young person from accessing assistance in addressing the behaviour,

and does not allow an opportunity for the young person to apologise to the victim or otherwise make reparation for their offence.¹⁵¹

Seventeen year olds accounted for three per cent of Criminal Code infringement notices (89 recipients). To determine whether the introduction of Criminal Code infringement notices has resulted in a reduction in referrals to juvenile justice teams, 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, where the alleged offender was 17 years old (Figure 4).

Figure 4: Action taken in response to the two prescribed offences; the benchmarking period and the monitoring period, 17 year old alleged offenders



Source Ombudsman Western Australia

As identified above, the Office's analysis of the benchmarking data found that there were 338 incidents attributed to alleged offenders aged 17 years. Of these 338 incidents:

- 239 (71 per cent) resulted in the 17 year old alleged offender being arrested or summonsed;
- 84 (25 per cent) resulted in the 17 year old alleged offender being cautioned; and
- 15 (4 per cent) resulted in a police officer referring the 17 year old alleged offender to a juvenile justice team.

The Office's analysis of the monitoring data also found that there were 338 incidents attributed to alleged offenders aged 17 years. Of these 338 incidents:

- 156 (46 per cent) resulted in the 17 year old alleged offender being arrested or summonsed;

¹⁵¹ C. Pettit, Commissioner for Children and Young People, submission dated 3 May 2016.

- 77 (23 per cent) resulted in the 17 year old alleged offender being cautioned; and
- 16 (5 per cent) resulted in a police officer referring the 17 year old alleged offender to a juvenile justice team.

In addition, 89 (26 per cent) resulted in a Criminal Code infringement notice being issued to a 17 year old alleged offender.

The Office's analysis set out above suggests that 17 year old alleged offenders were issued Criminal Code infringement notices as an alternative to arrests or summonses and the rate of referral by police officers to juvenile justice teams was not impacted.

4.3.4 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

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.'¹⁵²

Again, 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. Relevantly, section 72 of the *Young Offenders Act 1994* provides that the court must consider the young offender's capacity to pay the fine as follows:

72. Offender must be able to pay

- (1) A fine is not to be imposed under this Division or any other written law on a young person unless the court is satisfied, after making reasonable enquiry, that the person who is ordered to pay the fine, or any of it, has the means to pay either on demand or by instalments related to such means.
- (2) The court is to have regard to any order for the payment of compensation or restitution when considering the means of a person to pay a fine.

To consider the imposition of court fines in this context, the Office analysed the court data in relation to all court outcomes for the two prescribed offences, for the benchmarking and monitoring periods, for 17 year old alleged offenders.

The Office's analysis found that, during the benchmarking period, 52 alleged offenders who were aged 17 years attended court for a prescribed offence.¹⁵³ All 52 matters were

¹⁵² New South Wales Law Reform Commission, *Consultation Paper 10: Penalty notices*, NSWLRC, Sydney, September 2010, p. 105.

¹⁵³ 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.

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.

The Office's analysis of the monitoring period found that, 38 alleged offenders who were aged 17 years attended court for a prescribed offence.¹⁵⁴ 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. In relation to lowering penalty notice amounts for children and young people specifically, the New South Wales Law Reform Commission stated that:

A lower rate would recognise that children and young people earn significantly less money than adults, if they earn any money at all. Setting penalty notice amounts at a level that a young person is capable of paying may prevent young people being overwhelmed by debt, and consequently increase compliance and reduce enforcement costs. Higher levels of compliance could offset any discount in penalty notice amounts. Lowering penalty notice amounts would also improve consistency with court imposed fines and child-specific offences, which already acknowledge that children and young people have a lower financial capacity.¹⁵⁵

The New South Wales Law Reform Commission concluded that in relation to children and young people:

Without resiling from our recommendation that, in appropriate cases, the primary response should involve the issue of a warning or caution, but recognising that there are cases where a penalty will be justified, we recommend that lower penalty notice amounts and lower enforcement costs should apply to children and young people.¹⁵⁶

¹⁵⁴ 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.

¹⁵⁵ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. 334.

¹⁵⁶ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. 337.

4.3.5 During the monitoring period no sentence was imposed for 58 per cent of 17 year old alleged offenders who attended court for a prescribed offence

The *Young Offenders Act 1994* also provides, under sections 66 and 67, that the court may refrain from issuing a punishment in some cases:

66. Court may refrain from punishing in some cases

- (1) Subject to subsection (2), the court may refrain from imposing any punishment.
- (2) The court cannot exercise the power given by subsection (1) with respect to more than 2 offences but, for the purpose of this subsection, multiple offences arising from the one incident are to be treated as one offence.

...

67. Undertakings and informal punishment

- (1) The court may refrain from imposing any punishment upon being satisfied that —
 - (a) such undertakings as the court may approve have been or will be given by the offender or a responsible adult; or
 - (b) such punishment as the court may approve has been, or on the undertaking of a responsible adult will be, inflicted on the offender.
- (2) The power given by subsection (1) is independent of the power given by section 66(1).

In relation to these provisions, the Commissioner for Children and Young People's response to the Consultation Paper stated that:

It is also relevant that under the *Young Offenders Act*, a young person can be found guilty of an offence but the Court may impose a sentence of 'no punishment and no conditions' (s.66) or 'no punishment but conditions' (s.67). This option is not available if the young person accepts an infringement notice and does not elect to be prosecuted (i.e. be heard in court) for that offence.¹⁵⁷

In addition to the options provided by sections 66 and section 67, the court may also make a referral to a juvenile justice team. Section 32 of the *Young Offenders Act 1994* provides for the power of juvenile justice teams, including the power to determine the way in which the matter should be disposed of:

32. Powers of juvenile justice team

- (1) A juvenile justice team dealing with a young person for an offence may determine the way in which it considers the matter should be disposed of

¹⁵⁷ C. Pettit, Commissioner for Children and Young People, submission dated 3 May 2016.

and invite the young person to comply with terms to be specified by the team.

...

Section 33(2) further provides that if the court determines that the young person has complied with the terms specified by the juvenile justice team, the charge must be dismissed, as follows:

33. Effect on liability to be dealt with by court

...

- (2) If a young person has complied with the terms specified by a juvenile justice team dealing with the person for an offence, a court hearing a charge of the offence, upon being satisfied that the person has complied with the terms, must dismiss the charge without determining it.

...

The Office undertook further analysis of the court data to examine the application of the *Young Offenders Act 1994*, where no sentence was imposed by the court. As identified above, the Office's analysis found that, during the benchmarking period, 52 alleged offenders who were aged 17 years attended court for a prescribed offence.¹⁵⁸ No sentence was imposed in 30 of these instances (58 per cent), as follows:

- in 22 instances (73 per cent) charges were dismissed in accordance with section 33(2) of the *Young Offenders Act 1994*;
- in five instances (17 per cent) no punishment was imposed in accordance with section 67 of the *Young Offenders Act 1994*;
- in one instance (3 per cent) no punishment was imposed in accordance with section 66 of the *Young Offenders Act 1994*; and
- a further two charges were dismissed without reference to the *Young Offenders Act 1994*.

As identified above, the Office's analysis found that, during the monitoring period, 38 alleged offenders who were aged 17 years attended court for a prescribed offence.¹⁵⁹ No sentence was imposed in 22 of these instances (58 per cent), as follows:

- in seven instances (32 per cent) charges were dismissed in accordance with section 33(2) of the *Young Offenders Act 1994*;
- in four instances (18 per cent) no punishment was imposed in accordance with section 67 of the *Young Offenders Act 1994*;
- in three instances (14 per cent) the matter was referred to a juvenile justice team; and
- a further seven charges were dismissed, and one matter was withdrawn, without reference to the *Young Offenders Act 1994*.

¹⁵⁸ 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.

¹⁵⁹ 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 findings set out above suggest that the majority of 17 year old alleged offenders who appear before the court do not have a sentence imposed. Where no sentence is imposed by the court, this is often due to the application of the provisions of the *Young Offenders Act 1994*, in particular through compliance with terms specified by juvenile justice teams, or the court determining that no punishment should be imposed.

Collectively, the Office's analysis and findings suggest that police officers are not substituting Criminal Code infringement notices for cautions or referrals to juvenile justice teams, however, Criminal Code infringement notices are being used to divert 17 year old alleged offenders away from court. However, the Office's analysis suggests that these 17 year olds may have received a lesser penalty if they had appeared before a court.

4.3.6 Debate in the Western Australian Parliament

During debate in the Western Australian Parliament of the Second Reading of the Bill, the (then) Minister representing the Minister for Police, the Hon. Peter Collier MLC, explained the rationale for the inclusion of 17 year olds, as follows:

Why are we issuing only to persons over 17 years of age? This question was also asked by Hon. Giz Watson. There are a range of options for dealing with young people under the Young Offenders Act, nearly all of which are diversionary in nature. Given these existing diversionary options, if CPINs [Criminal Code infringement notices] are not issued to a young person under the age of 17, they will not be denying that young person a benefit. The basis for issuing a [Criminal Code infringement notice] to persons over the age of 17 is based around that person's ability to pay a modified penalty. **A person 17 years and over has finished schooling and we would presume is generating an income and therefore some capacity to pay a modified penalty.** A young person under this age would not have such a capacity to pay a modified penalty as they would still be at school and therefore not earning an income. When we consider that giving a [Criminal Code infringement notice] to a young person under the age of 17 without the capacity to pay a modified penalty and there are better options for dealing with the matter under the Young Offenders Act, it is logical that [Criminal Code infringement notices] be issued only to persons over 17. Further, there is eligibility for government assistance schemes, such as the assistance scheme available through Centrelink, which are not generally available to persons under 17. Secondly, a person 17 years and over may have a driver's licence, which means that the Fines Enforcement Registry will have more ability to enforce the provisions of the Fines, Penalties and Infringement Notices Enforcement Act, which would see a person's licence suspended on the failure to pay the modified penalty.¹⁶⁰ [Emphasis added]

¹⁶⁰ The Hon. Peter Collier MLC, Minister representing the Minister for Police, Legislative Council, Parliamentary Debates (Hansard), 23 February 2011, pp. 909c-916a.

4.3.7 It is now probable that if a 17 year old is issued with a Criminal Code infringement notice they will be subject to the compulsory education period

In 2011, at the time that Criminal Code infringement notice legislation was considered by Parliament, the compulsory education period for a child was 'until the end of the year in which the child reaches the age of 17'.¹⁶¹ However, this requirement was amended by the *School Education Amendment Act 2012*. Subsequent to these amendments, section 6(1)(c) of the *School Education Act 1999*, provides that:

6. Term used: compulsory education period

(1) The compulsory education period for a child is as follows —

...

(c) from 1 January 2014 —

- (i) from the beginning of the year in which the child reaches the age of 5 years and 6 months; and
- (ii) until —
 - (I) the end of the year in which the child reaches the age of 17 years and 6 months; or
 - (II) the child reaches the age of 18, whichever happens first.

In practice, this means that the basis for the inclusion by Parliament of 17 year olds, namely that:

The basis for issuing a [Criminal Code infringement notice] to persons over the age of 17 is based around that person's ability to pay a modified penalty. **A person 17 years and over has finished schooling and we would presume is generating an income and therefore some capacity to pay a modified penalty.** A young person under this age would not have such a capacity to pay a modified penalty as they would still be at school and therefore not earning an income.¹⁶² [Emphasis added]

is no longer current, nor applicable.

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.

If the view is that Criminal Code infringement notices should continue to be applicable to 17 year olds, then the following recommendations are considered to be appropriate based on the Office's analysis of evidence and findings set out in this Chapter.

¹⁶¹ *School Education Act 1999*, Part 1 - Preliminary, section 6(1)(a)(ii) & (b)(ii).

¹⁶² The Hon. Peter Collier MLC, Minister representing the Minister for Police, Legislative Council, Parliamentary Debates (Hansard), 23 February 2011, pp. 909c-916a.

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.

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5 The use of Criminal Code infringement notices as a diversionary option

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 a Criminal Code infringement notice to be issued as a substitute for a caution or warning, rather than as a diversion from court. The 2009 NSW Ombudsman's report observes that there is the 'potential for [Criminal Infringement Notices] to be issued in circumstances where previously a warning or caution was given, and for any such net-widening to undermine efforts to reduce offending and over-representation of Aboriginal people in the criminal justice system.'¹⁶³

In this Chapter the Office analysed the WAPOL state-wide data and the court data to identify patterns and trends in the use of Criminal Code infringement notices as a diversionary option, to determine whether this potential issue was present in relation to Criminal Code infringement notices in Western Australia, with a focus on the impact on Aboriginal and Torres Strait Islander alleged offenders.

5.1 The overall impact of the infringement notices provisions of *The Criminal Code* on the actions taken by police in response to Aboriginal alleged offenders

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

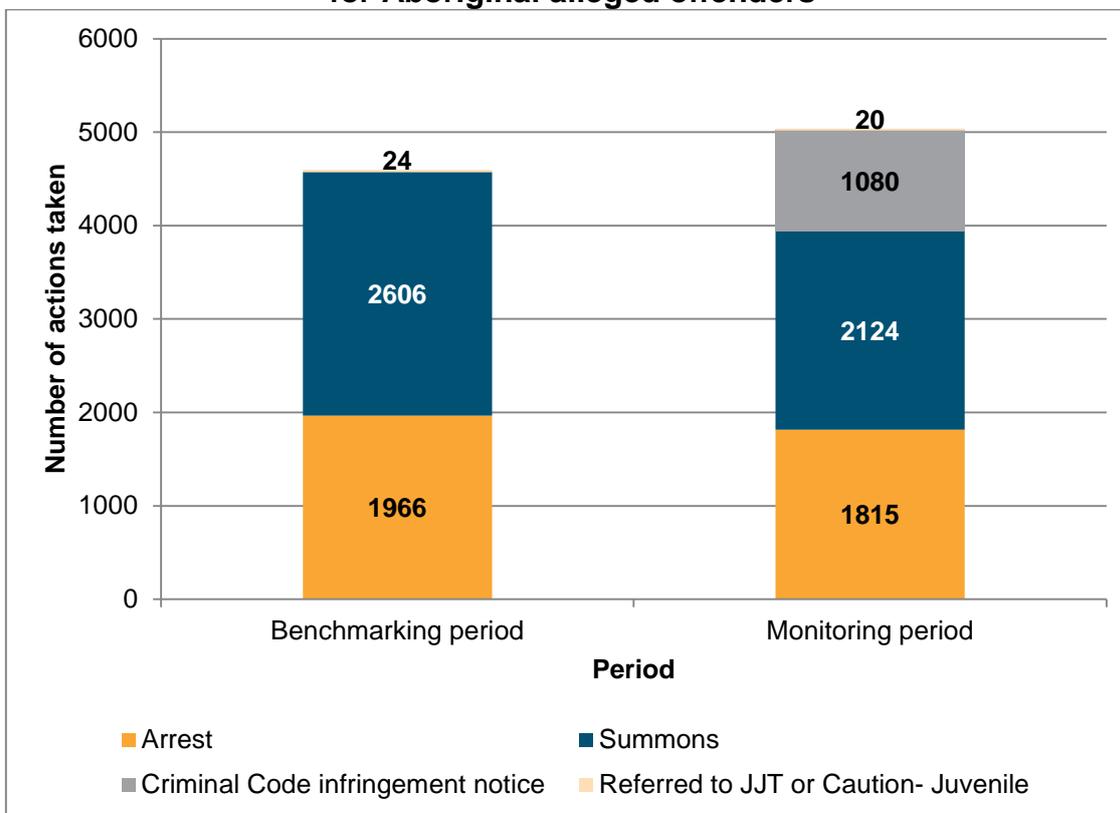
As discussed in detail in Volume 2, the Office found that arrests and summonses for the two prescribed offences reduced by 18 per cent between the two periods.

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) (Figure 5); 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.

¹⁶³ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009, p. 14.

Figure 5: Action taken in response to the two prescribed offences, for the benchmarking period and the monitoring period, for Aboriginal alleged offenders



Source: Ombudsman Western Australia

5.1.2 Arrests and summonses of Aboriginal alleged offenders decreased for the prescribed offence of disorderly behaviour and increased for the prescribed offence of stealing

In order to better understand the use of Criminal Code infringement notices as a diversionary option for Aboriginal people, the Office undertook further analysis of the use of Criminal Code infringement notices for each of the two prescribed offences. The Office found that there was a reduction in arrests and summonses for the prescribed offence of disorderly behaviour, but that there was an increase in arrests and summonses for the prescribed offence of stealing.

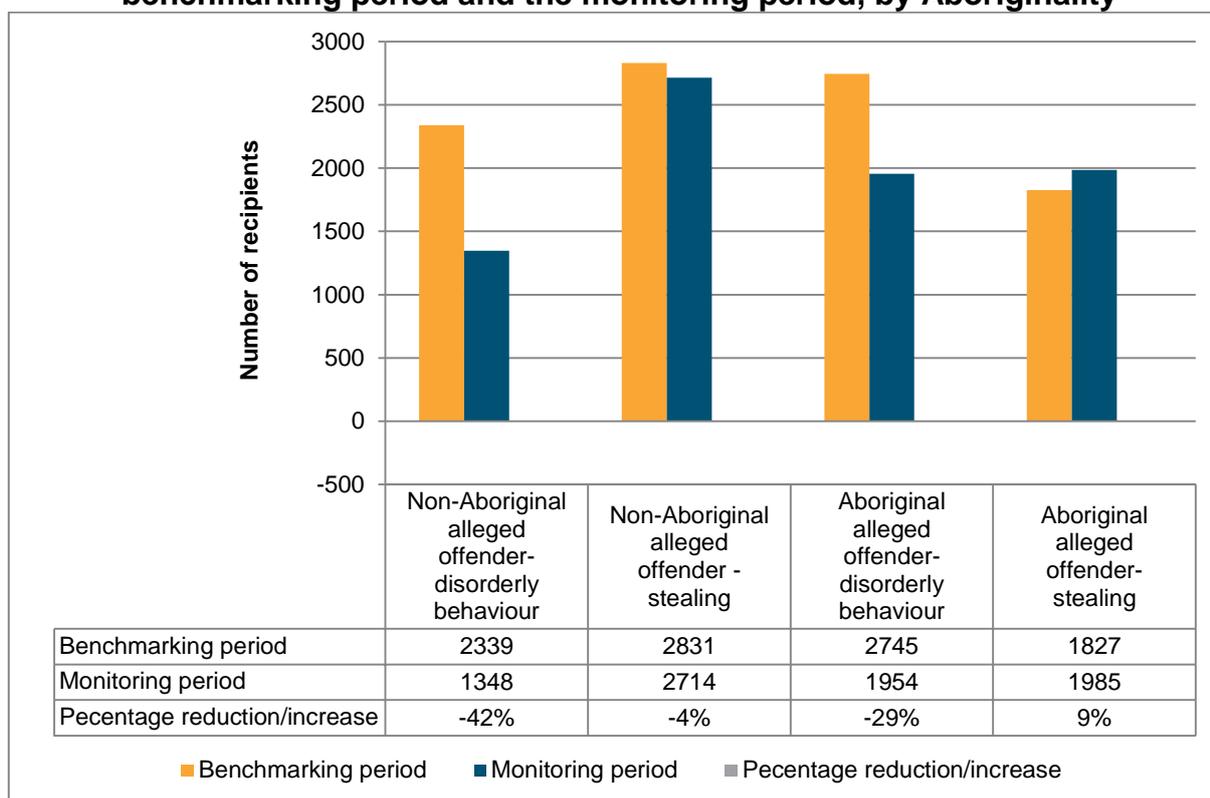
For the prescribed offence of disorderly behaviour, where the alleged offender was Aboriginal, comparing the benchmarking period and the monitoring period shows that:

- the number of arrests and summonses decreased by 29 per cent, or 791, (from 2,745 to 1,954):
 - the number of arrests decreased by 230, from 825 to 595;
 - the number of summonses decreased by 561, from 1,920 to 1,359; and
- in the monitoring period, 752 Criminal Code infringement notices were issued.

For the prescribed offence of stealing, where the alleged offender was Aboriginal, comparing the benchmarking period and the monitoring period shows that:

- the number of arrests and summonses increased by 9 per cent, or 158, (from 1,827 to 1,985):
 - the number of arrests increased by 79, from 1,141 to 1,220;
 - the number of summonses increased by 79, from 686 to 765; and
- in the monitoring period, 328 Criminal Code infringement notices were issued.

Figure 6: Arrests and summonses for the two prescribed offences; the benchmarking period and the monitoring period, by Aboriginality



Source: Ombudsman Western Australia

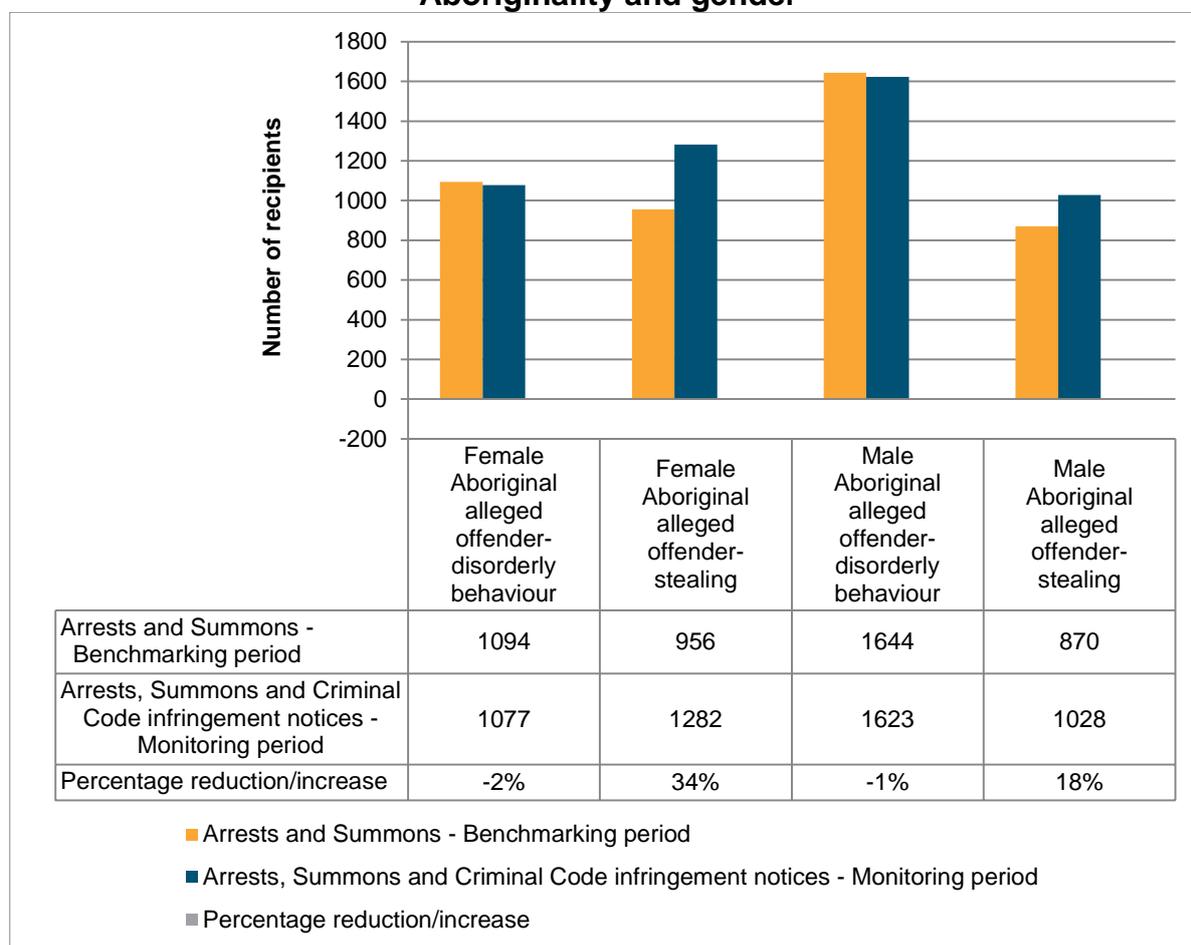
As shown in Figure 6, the Office has found that the number of arrests and summonses of Aboriginal alleged offenders for the prescribed offence of stealing increased by nine per cent comparing the benchmarking and monitoring periods; comparatively, arrests and summonses of non-Aboriginal alleged offenders decreased by four per cent. The Office’s findings suggest that, for the prescribed offence of stealing, Criminal Code infringement notices were issued in addition to arrests and summonses of Aboriginal alleged offenders, that is, they were not used to divert Aboriginal alleged offenders away from the court system.

The Office has also found that, for the prescribed offence of disorderly behaviour, while there was a 29 per cent reduction in arrests and summonses of Aboriginal alleged offenders, this was less than the 42 per cent reduction in arrests and summonses of non-Aboriginal alleged offenders.

5.1.3 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 police¹⁶⁴ 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 (Figure 7).

Figure 7: Arrests, summonses, and Criminal Code infringement notices, for the two prescribed offences; the benchmarking period and the monitoring period, by Aboriginality and gender



Source: Ombudsman Western Australia

Figure 7 above shows that, 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 female Aboriginal alleged offenders, and 18 per cent for male Aboriginal alleged offenders. If Criminal Code infringement notices were being used to

¹⁶⁴ 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.

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.

5.1.4 For the prescribed offence of stealing, 86 per cent of Aboriginal alleged offenders who were arrested or summonsed had appeared before the court more than once in a five year period

The Office identified a number of factors that could be impacting on the use of Criminal Code infringement notices for Aboriginal alleged offenders for the prescribed offence of stealing. As noted above, at the Police Officer Forums, participants expressed the view that, for the prescribed offence of stealing, alleged offenders were more often considered to be 'repeat offenders' and, in accordance with WAPOL's Criminal Code infringement notice training presentation, the 'issuing officer should assess whether or not it is appropriate to issue a CCIN to repeat offenders ... [and] consider on the balance of time saved against the need to have an appropriate penalty imposed for the offence to ensure that community expectations are adequately reflected.'

The Office analysed the court data for all alleged offenders over a five year period¹⁶⁵ to assess the impact of this factor and found that 66 per cent of all alleged offenders charged with the prescribed offence of stealing had appeared before the court more than once in the five year period, and would therefore be considered 'repeat offenders'. This finding supports the views expressed by police officers that considerations of prior criminal history can be a barrier to issuing a Criminal Code infringement notice for the prescribed offence of stealing.

The Office undertook further analysis to determine whether this issue may have had a particular impact on Aboriginal alleged offenders for the prescribed offence of stealing.¹⁶⁶ As shown in Figure 8 below, the proportion of alleged offenders with prior court appearances varied by Aboriginality and prescribed offence, as follows:

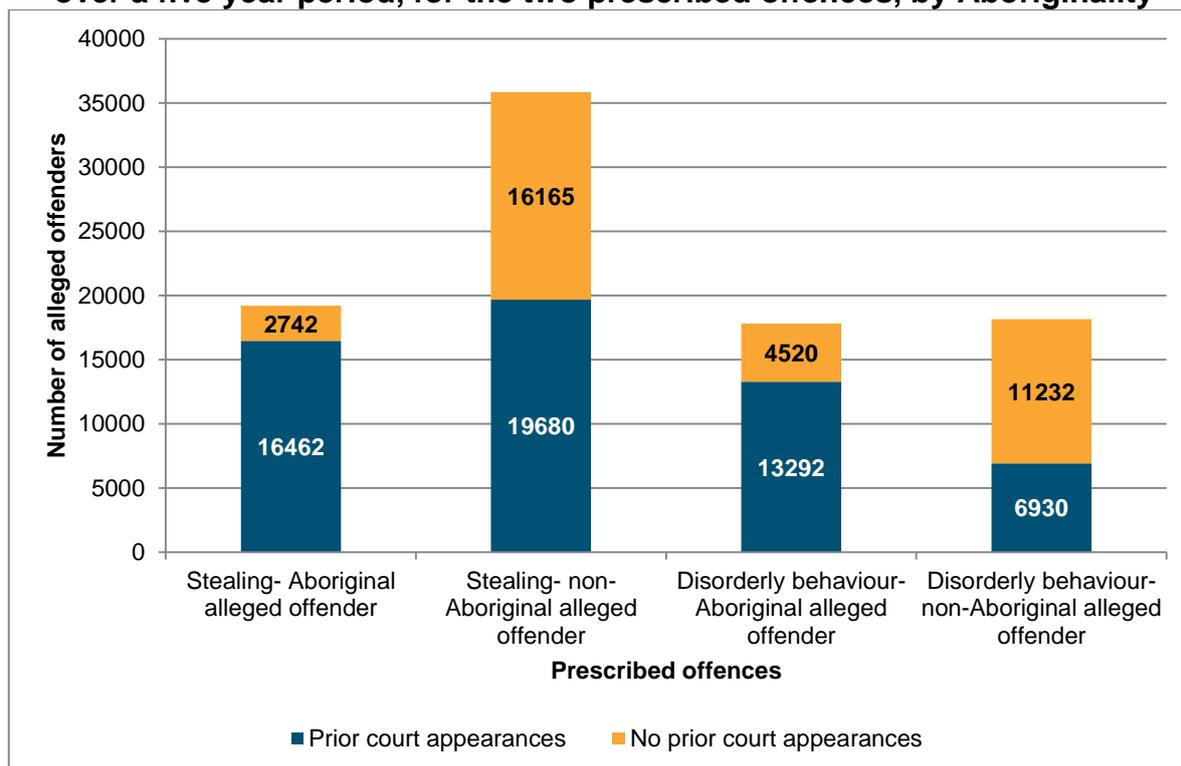
- for the prescribed offence of stealing:
 - fifty-five per cent (19,680 of 35,845) of non-Aboriginal alleged offenders had appeared before the court more than once in the five year period; and

¹⁶⁵ The Office considered five years' worth of court data in order to provide a more robust analysis of the offending history of alleged offenders for the two prescribed offences.

¹⁶⁶ The Aboriginality of 3,013 alleged offenders was unknown.

- eighty-six per cent (16,462 of 19,204) of Aboriginal alleged offenders had appeared before the court more than once in the five year period.
- for the prescribed offence of disorderly behaviour:
 - thirty-eight per cent (6,930 of 18,162) of non-Aboriginal alleged offenders had appeared before the court more than once in the five year period; and
 - seventy-five per cent (13,292 of 17,812) of Aboriginal alleged offenders had appeared before the court more than once in the five year period.

Figure 8: Number of alleged offenders with prior court appearances over a five year period, for the two prescribed offences, by Aboriginality



Source: Ombudsman Western Australia

The Office's analysis suggests that the comparatively high rate of prior court appearances by Aboriginal alleged offenders for the prescribed offence of stealing may have contributed to the lower proportion of Criminal Code infringement notices issued for this prescribed offence.

Additionally, a further factor contributing to this finding is the benefit of Criminal Code infringement notices to alleged victims of stealing 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 court¹⁶⁷ 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.

¹⁶⁷ 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.

5.1.5 Arrests and summonses of Aboriginal alleged offenders have not decreased at the same rate as non-Aboriginal alleged offenders

The Office's findings set out above indicate that, while some Aboriginal alleged offenders were diverted away from court through the use of Criminal Code infringement notices for the prescribed offence of disorderly behaviour, the overall reduction in arrests and summonses during the monitoring period was less than for non-Aboriginal alleged offenders. The Office's finding is consistent with the Western Australian research literature, which suggests that 'Aboriginal people are under-represented in offenders sentenced to alternative penalties, [and] in offenders diverted from the formal criminal justice system'.¹⁶⁸

The Office's analysis also suggests that, for the prescribed offence of stealing, Criminal Code infringement notices are being used in addition to arrests and summonses. The Office's analysis and Police Officer Forums indicate that this is partly because police officers are considering prior criminal history (in accordance with WAPOL's CCIN Policy), and that this impacts particularly on Aboriginal alleged offenders.

5.2 The use of Criminal Code infringement notices as a diversionary option

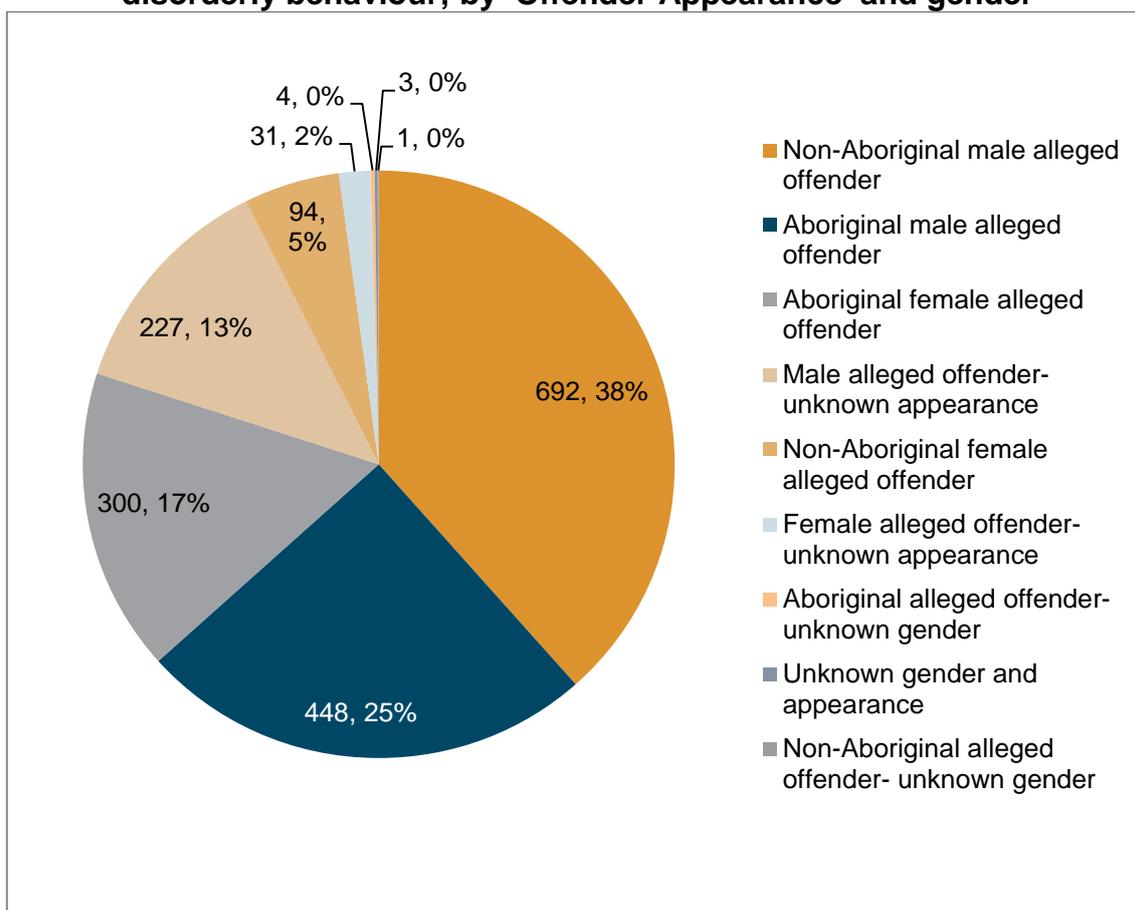
5.2.1 Men aged between 17 and 34 avoided the most court appearances; accounting for 56 per cent of all Criminal Code infringement notices issued for the prescribed offence of disorderly behaviour

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, and this is explored in detail at Chapter 7. 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, as shown in Figure 9 below.

¹⁶⁸ MacWilliam, H, 'Aboriginal Over-Representation Project', Aboriginal Policy and Services, Department of Justice, Western Australia, 2001, p. 2.

Figure 9: Criminal Code infringement notices for the prescribed offence of disorderly behaviour; by 'Offender Appearance' and gender



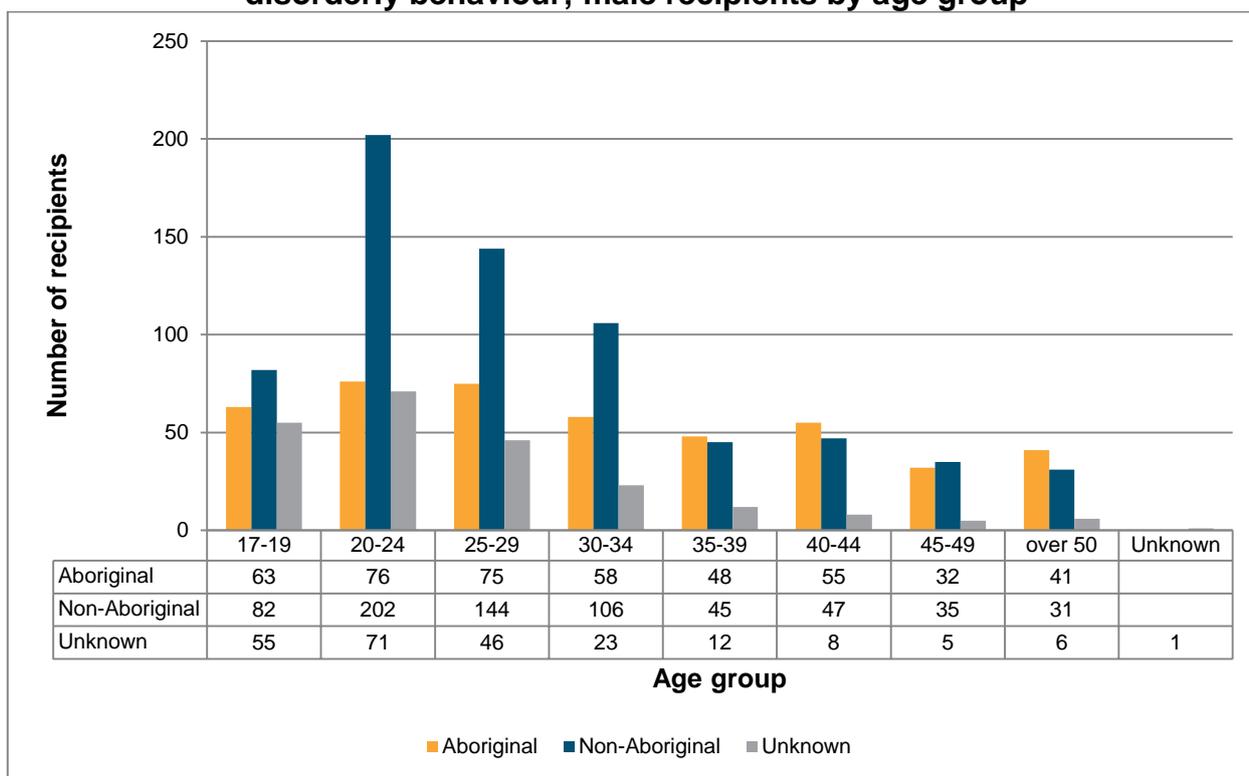
Source: Ombudsman Western Australia

The Office 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. As shown in Figure 10 below, 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.

Figure 10: Criminal Code infringement notices for the prescribed offence of disorderly behaviour; male recipients by age group



Source: Ombudsman Western Australia

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.

5.2.2 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.¹⁶⁹

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

¹⁶⁹ The Hon. Giz Watson MLC, Legislative Council, Parliamentary Debates (Hansard), 22 February 2011, pp. 781b-787a; Aboriginal Legal Service, submission dated 28 April 2016.

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.¹⁷⁰

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, as discussed in detail in Chapter 3 above 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.¹⁷¹

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 offences¹⁷² 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

¹⁷⁰ 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.

¹⁷¹ Homeless Law in Practice, *Going to court*, viewed 20 June 2016, <<http://www.hlp.org.au/page/2170/going-to-court>>.

¹⁷² 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.

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.

The Office also recognises that recipients of Criminal Code infringement notices can elect to have the matter heard in court, however this rarely occurs. The Office found that, of the 2,978 Criminal Code infringement notices issued, 41 (1.4 per cent)¹⁷³ recipients elected to be prosecuted instead. Of the 41 recipients who elected to go to court, 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 received a fine equal to \$500 (21 per cent); and
 - five recipients received a fine less than \$500 (26 per cent);
- 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.

The Office's findings therefore suggest that there was a comparatively lower rate of sentences imposed on the 35 recipients of Criminal Code infringement notices whose cases had been finalised by the court, than that imposed on alleged offenders who had been arrested or summonsed for the two prescribed offences.

5.2.3 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.

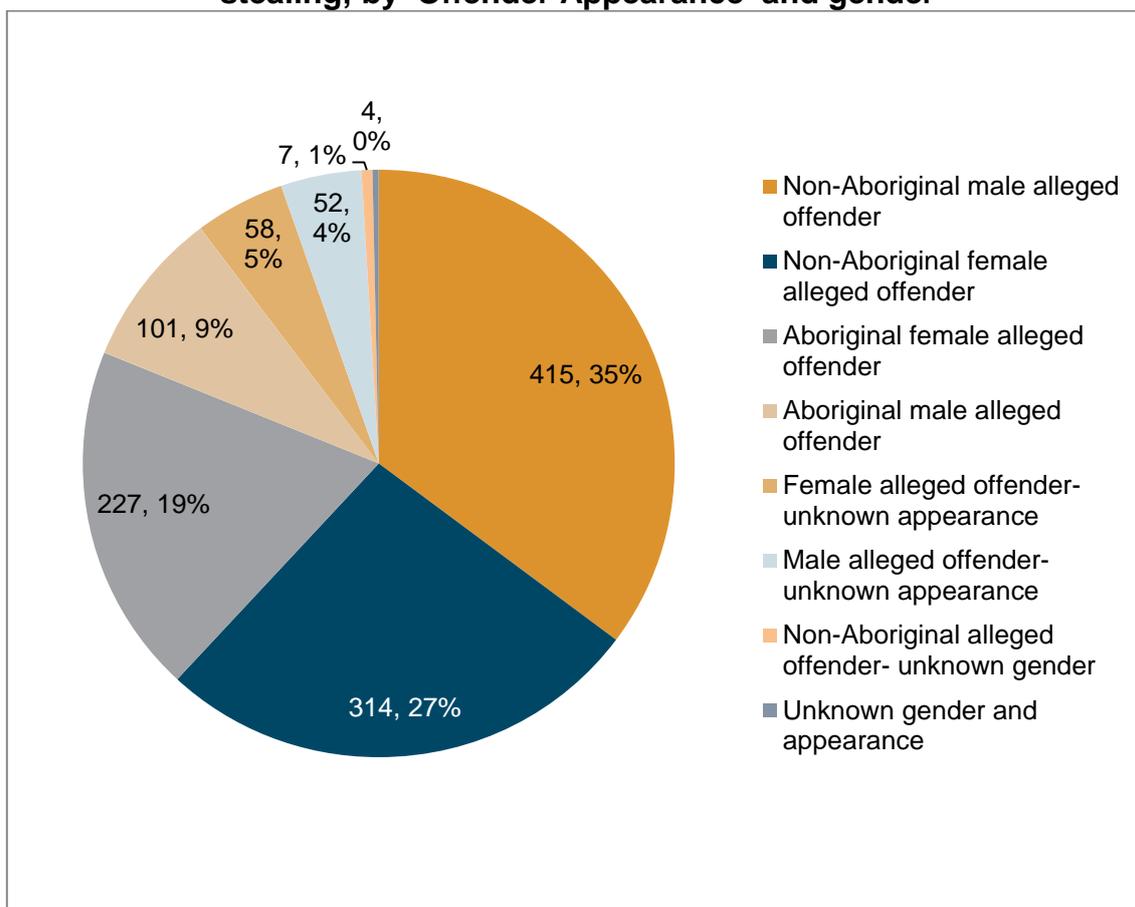
However, as noted above, police officers have identified that there is a benefit of Criminal Code infringement notices for the prescribed offence of stealing to the alleged victims of these offences. Police officers expressed the view that, based on their experience with victims, the loss of the stolen 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.

¹⁷³ 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.

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, as shown in Figure 11 below.

Figure 11: Criminal Code infringement notices for the prescribed offence of stealing; by 'Offender Appearance' and gender



Source: Ombudsman Western Australia

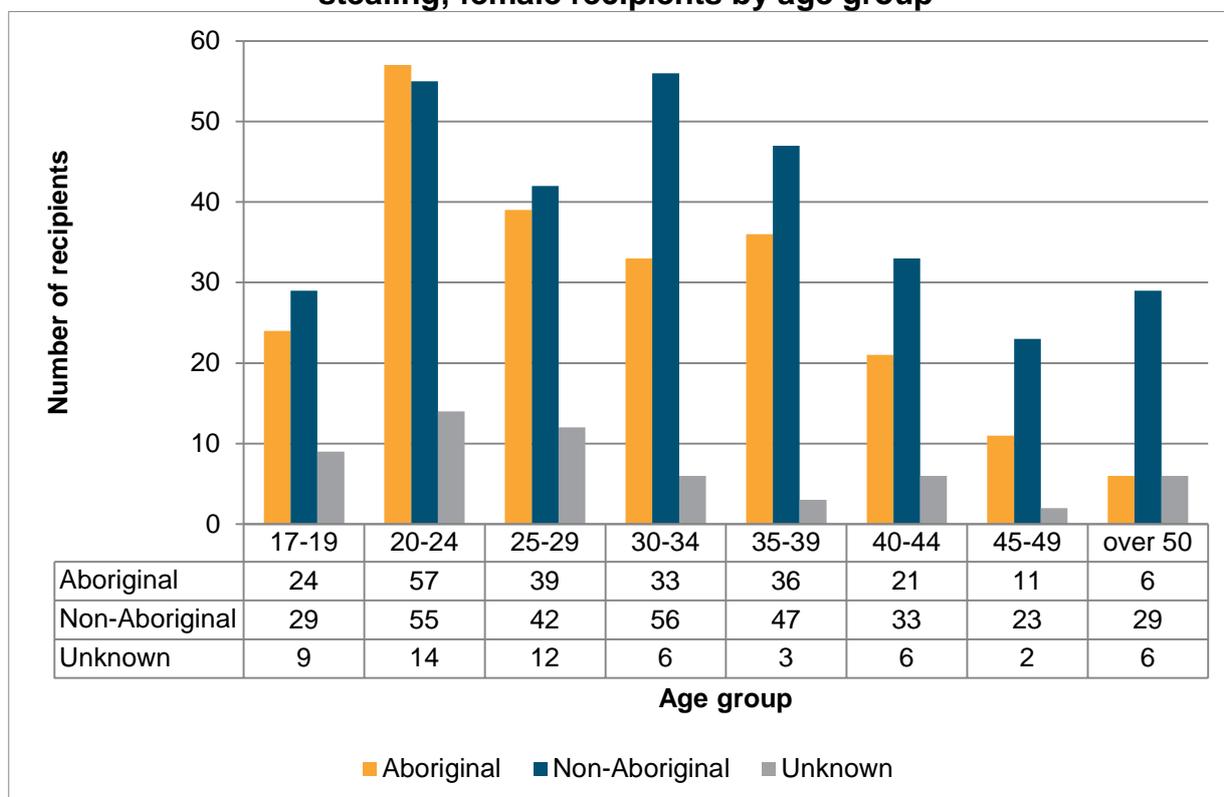
The Office found that, of the 1,178 Criminal Code infringement notices issued for the prescribed offence of stealing:

- 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 estimates¹⁷⁴ that, in Western Australia in 2011, Aboriginal females made up 1.9 per cent of Western Australia's population.¹⁷⁵ That is, Aboriginal females were overrepresented by a factor of 10 as recipients of Criminal Code infringement notices for the prescribed offence of stealing.

As shown in Figure 12 below, 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.

Figure 12: Criminal Code infringement notices for the prescribed offence of stealing; female recipients by age group



Source: Ombudsman Western Australia

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

¹⁷⁴ 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).

¹⁷⁵ 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.

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).

Chapter 8 of this report explores in detail a range of options for mitigating the potentially negative impacts of the infringement notices provisions of *The Criminal Code*. This includes options for revoking Criminal Code infringement notices in special circumstances, and opportunities to expiate infringement debt while simultaneously addressing offending behaviour.

6 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.¹⁷⁶ 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.

The Office reviewed the following aspects of the operation of Criminal Code infringement notices in relation to understanding, and responding to, Criminal Code infringement notices:

- service of Criminal Code infringement notices;
- withdrawal Criminal Code infringement notices;
- election to be prosecuted; and
- payment of Criminal Code infringement notices.

The Office has examined each of these in turn.

6.1 Service of Criminal Code infringement notices

6.1.1 Legislative requirements

The CP Act provides that a Criminal Code infringement notice must be served within 21 days of the relevant offence, as follows:

8. Issuing infringement notices

...

- (2) The infringement notice must be served under section 10 within 21 days after the day on which the alleged offence is believed to have been committed.

¹⁷⁶ D. Zanella, RUAH Community Services, submission dated 20 May 2016.

Section 10 of the CP Act provides as follows:

10. Service of infringement notices

Unless section 12(1)(b)(i) applies, an infringement notice must be served on an alleged offender —

- (a) if the offender is an individual, in accordance with Schedule 2 clause 2 or 3; or
- (b) if the offender is a corporation, in accordance with Schedule 2 clause 3 or 4; or
- (c) if the offender's address is ascertained at the time of or immediately after the alleged offence was committed, by posting it to the offender at that address

Schedule 2 of the CP Act provides for the method of service for documents, including Criminal Code infringement notices, including as follows:

Schedule 2 — Service of documents and other things

...

2. Personal service on individuals

- (1) This clause does not apply in relation to serving a corporation.
- (2) To serve a document or other thing on an individual (the **named person**) in accordance with this clause, another person must —
 - (a) hand it to the named person in person;

...

3. Postal service on individuals and corporations

...

- (11) A document or other thing that is posted under this clause is to be taken to have been served on the named person on the fourth working day after the date on which it was posted unless the postal service returns it to the sender or the contrary is proved.

6.1.2 WAPOL's CCIN Policy

WAPOL's CCIN Policy directs officers to issue a Criminal Code infringement notice as follows:

How a CCIN is issued?

A CCIN is issued to the alleged offender via the [Non-Traffic Infringement Management System] **NTIMS** information technology application.

A CCIN can be either delivered by post or personally served on the alleged offender by hand. (Refer to 'Process for issuing a CCIN').

6.1.3 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 recipients’ 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.¹⁷⁷ 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.¹⁷⁸

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.

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.

¹⁷⁷ D. Zanella, RUAH Community Services, submission dated 20 May 2016.

¹⁷⁸ Jacaranda Community Centre, submission dated 19 May 2016; D. Zanella, RUAH Community Services, submission dated 20 May 2016.

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.

The 2009 NSW Ombudsman's Report considered the relative merits of in person service and postal service, with a particular focus on vulnerable groups, concluding that in person service is the preferred option:

... there was little or no support outside of the NSW Police Force for provisions allowing officers to serve CINs by post. The main criticism was that using ordinary mail was seen to be a highly unreliable way of initiating a legal process that can have important consequences for recipients. Another criticism was that, as with delayed personal service, serving CINs by post may effectively deny recipients an important opportunity to respond to the police allegation or explain their actions when it matters most – at the time that officers are deciding what sanction to impose in relation to the offence. The chance to respond to allegations is important for all accused offenders, but more so for people with poor literacy or limited formal education. Unless they have ready access to quality legal advice to assist in mounting a formal defence, the only realistic chance that many people may have to defend themselves against police allegations is to explain their actions at the time that police are deciding whether the conduct alleged warrants a CIN or alternative action.¹⁷⁹

The 2009 NSW Ombudsman's Report further identified that personal service is also the preferred option according to New South Wales Police Force training and advice, as follows:

NSW Police Force training and advice emphasises that CINs should be served at the time of the offence or, if there are sound reasons for delaying service, in person as soon as it is reasonable to do so. Serving a CIN by post should only be considered when there is no other option:

The legislation allows service by postage. However, this should only occur as a last resort; it must be stressed it is an on-the-spot fine. It can be posted, but try to avoid this if possible ... police are only to post CINs after all reasonable attempts to serve personally have been exhausted.

In most instances serving a CIN in person is preferable to service by post, as personal service ensures the recipient:

- has an opportunity to explain his or her actions or provide mitigating information
- actually receives the CIN
- is told why it was issued
- is given advice on the options for disposing of or contesting the fine, and

¹⁷⁹ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009, p. 82.

- is warned of the additional sanctions likely to be imposed if the CIN is ignored.¹⁸⁰

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.

6.2 Withdrawal of Criminal Code infringement notices

6.2.1 Legislative requirements

The CP Act provides that an approved officer may withdraw an infringement notice, as follows:

15. Withdrawal of infringement notices

- (1) An approved officer may withdraw an infringement notice.
- (2) To withdraw an infringement notice an approved officer must give the alleged offender a notice in a form prescribed under the prescribed Act stating that the notice has been withdrawn.
- (3) An infringement notice may be withdrawn whether or not the modified penalty has been paid.
- (4) If an infringement notice is withdrawn after the modified penalty is paid, the amount of money paid is to be refunded.

The infringement notices provisions and the Regulations do not specify the circumstances in which a Criminal Code infringement notice is eligible to be withdrawn.

6.2.2 WAPOL's CCIN Policy

WAPOL's CCIN Policy outlines the adjudication and withdrawal guidelines as follows:

Adjudication

Adjudication is required when an alleged offender believes the CCIN was issued in error. The alleged offender can apply to have the matter reviewed by a senior police officer. A claim for adjudication will need to meet one or more of the following criteria:

- The CCIN was issued to the wrong person (false particulars);

¹⁸⁰ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009 p. 81.

- **The alleged behaviour was due to an established mental illness or impairment. (A medical certificate must be provided confirming the mental illness or impairment);**
- The issue of the CCIN was incorrect at law e.g. the alleged offender was under 17 years at the date of the offence, the offence was not a prescribed CCIN offence at the date of the offence; or
- An alternative means of action is more appropriate than the issuance of a CCIN.

To request the CCIN to be assessed for adjudication, the recipient, or their legal representative will need to contact in writing the Manager, Infringement Management & Operations (IMO). Contact details for IMO are located on the CCIN and WA Police Internet site.

Withdrawal of a CCIN

Section 15 (1) Criminal Procedure Act 2004 provides:

1. A senior police officer may withdraw a CCIN issued by a police officer pursuant to this section; and
2. A senior police officer must withdraw a CCIN immediately if directed to do so by the Director of Public Prosecutions.

If a CCIN is inadvertently issued to a person under 17 years of age, or the issue of the CCIN was incorrect at law or is withdrawn for any other reason *Section 15(4)CPA* of the states,

‘The prescribed amount for the offence for which the CCIN was issued is not payable and if the amount has been paid it is to be repaid to the alleged offender.’

As set out above, WAPOL’s CCIN Policy provides for recipients to seek to have their Criminal Code infringement notice adjudicated and withdrawn on the basis of a mental illness, however a medical certificate must be provided.

WAPOL’s approach to considering a person’s mental illness in the context of Criminal Code infringement notices is consistent with the approach suggested by the New South Wales Law Reform Commission:

Currently, a person’s cognitive or mental health impairment is a factor to be taken into account when issuing a penalty notice and is a reason to withdraw a notice that has been issued. We do not consider that this approach should be replaced by a policy against issuing penalty notices to people with mental health and cognitive impairment. We believe that such an approach is both inappropriate and unlikely to be effective.

...

A blanket policy against issuing penalty notices in such cases is not appropriate because it treats people with cognitive and mental health impairments as a homogenous group who all lack capacity, when this is not the case. Many people with such impairments can and do understand what is required of them and avoid offending. However, if they do offend, it is appropriate that the penalty notice system respond in an informed and appropriate way to their situation.

...

Prohibiting the issue of penalty notices to people with cognitive and mental health impairments is unlikely to be effective because of the difficulties of identifying such people. While some of the arguments in favour of prohibition concern the poverty of people with cognitive and mental health impairments, these arguments apply with equal force to other vulnerable groups who may also suffer economic hardship and find it difficult to navigate the penalty notice system or to access help. These would be better addressed through the fine mitigation measures... rather than by amending the law to preclude penalty notices from being issued to people with cognitive and mental health impairments.

...

However, there are some people with cognitive and mental health impairments who do not have the capacity to understand offending behaviour and who are unlikely ever to have such capacity. It is appropriate to make special arrangements for such people ...¹⁸¹

However, the New South Wales Law Reform Commission went on to make the following suggestion in relation to the withdrawal of penalty notices for people 'who have impairments and who do not understand the nature and consequences of their behaviour', namely:¹⁸²

An internal notation or flagging system to identify those people who would be eligible for automatic withdrawal of their penalty notices appears to be a fair and efficient approach to dealing with this group.¹⁸³

As with other infringements, WAPOL's CCIN Policy does not provide for consideration of approaches to adjudicating and withdrawing Criminal Code infringement notices issued to recipients from other vulnerable groups, for example financially and socially disadvantaged people or homeless 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.

¹⁸¹ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, pp. 357-358.

¹⁸² New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. 360.

¹⁸³ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. 360.

6.3 Election to be prosecuted

6.3.1 Legislative requirements

Section 9(1)(f) of the CP Act and Form 1 of the Schedule 2 to the Regulations set out both the form and substance of the alleged offender's right to elect to be prosecuted for the alleged offence (rather than pay the modified penalty).

6.3.2 WAPOL's CCIN Policy

WAPOL's CCIN Policy provides that police officers should inform Criminal Code infringement notice recipients of the option to have the matter dealt with in court:

Process for Issuing a CCIN

...

- Explain payment methods and the option for the matter to be dealt with in court.

In addition to any verbal information that may be provided by police officers at the time of the alleged offence, Part F of the Criminal Code infringement notice provides information about how to elect to have a matter dealt with by prosecution in court.

If the recipient chooses to have the matter heard in court they are required to complete the 'Court Election' section of the Criminal Code infringement notice and post it to the WAPOL Infringement Management and Operations Unit at the address contained on the form within 28 days of receiving the Criminal Code infringement notice.

6.3.3 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.¹⁸⁴

As discussed above, a potential reason for this low percentage is that recipients may not always understand the process for dealing with a Criminal Code infringement notice. In Parliamentary debate during the Second Reading of the Bill, the Hon. Margaret Quirk MLA raised this issue, in particular public awareness of rights and responsibilities, and the capacity of alleged offenders to understand and utilise these rights, as follows:

¹⁸⁴ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, pp. xv-xvi.

A couple of the particular recommendations that the [NSW] Ombudsman made were ... that the New South Wales police and the State Debt Recovery Office consider the feasibility of providing additional information about payment and review options; that a fact sheet be developed and sent with notices so that people were aware of their rights and obligations ...¹⁸⁵

And also:

The New South Wales Law Society also made a submission to the Ombudsman dated 12 February 2009.

...

The society also goes on to say that whilst the notice states that a person has 21 days to send the notice back or pay the fine, it assumes that the person has the capacity to understand the process. Someone suffering with literacy issues or an intellectual disability may not be able to comprehend the process and may simply do nothing. Alternatively, the person may appreciate that he or she should seek legal advice but not have access to it. It notes that there was no provision to apply for an extension of the 21-day period to elect or to seek a review at a later time, and it says that in the case of a person who does not or cannot obtain legal advice within the 21-day period, he or she is estopped from defending the charge before a court.¹⁸⁶

Similarly, the New South Wales Law Reform Commission observed that, '[s]ervice providers representing vulnerable groups were particularly concerned about poor levels of information currently provided on penalty notices about court election.'¹⁸⁷

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.¹⁸⁸

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'.¹⁸⁹

¹⁸⁵ The Hon. Margaret Quirk MLA, Legislative Assembly, Parliamentary Debates (Hansard), 21 October 2010, pp. 8194b-8204a.

¹⁸⁶ The Hon. Margaret Quirk MLA, Legislative Assembly, Parliamentary Debates (Hansard), 21 October 2010, pp. 8194b-8204a.

¹⁸⁷ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p.154.

¹⁸⁸ D. Zanella, RUAH Community Services, submission dated 20 May 2016.

¹⁸⁹ Aboriginal Legal Service, submission dated 28 April 2016.

6.3.4 Consideration of an alleged offender's personal circumstances by the court

As discussed at section 5.2.2, for vulnerable defendants the court may take their personal circumstances into account, and this could potentially result in a lesser penalty.¹⁹⁰ Bearing this in mind, the New South Wales Law Reform Commission observed that lawyers for people on low incomes advise low income clients to elect to go to court:

In consultations lawyers representing people on low incomes told us that they try to persuade clients to go to court because, for a minor offence committed by a person who is living on benefits, a non-financial penalty will often be imposed. However they reported difficulty in persuading people to court-elect because they fear going to court (particularly the cost of lost income or representation) or because they risk a conviction for the offence.¹⁹¹

The Sentencing Advisory Council of Victoria has also observed that the consideration of an alleged offender's financial circumstances is particularly important where financial hardship can be an issue:

When a court imposes a fine, it must take into account a person's financial circumstances in determining the fine amount. This reflects the principle that the law should have an equal effect: the effect of a \$100 fine on someone with a low income is considerably greater than on someone with a high income.

While the infringements system contains some measures to alleviate financial hardship (such as payment plans and extensions of time to pay), it does not provide concessional or reduced infringement penalty amounts for people who are experiencing financial hardship.¹⁹²

In addition, the New South Wales Law Reform Commission identified the following impacts of fixed financial penalties on vulnerable groups:

A further problem with penalty notices is that the penalty is fixed and cannot be tailored to the circumstances of the recipient. Members of some vulnerable groups may be particularly susceptible to receiving penalty notices and also be ill-equipped to pay a monetary penalty.¹⁹³

...

Financial penalties imposed by courts can be determined by reference to the income levels of those who are fined, whereas a penalty notice involves a fixed financial penalty. Fixed penalties are efficient and cost effective to administer. On a superficial level they appear fair, since everyone pays the same amount for the same offence. However, this 'fairness' is one-dimensional because a fixed penalty will have a much greater impact upon low-income earners than others. For example, a \$200 penalty notice for fare evasion may be very

¹⁹⁰ Sentencing Advisory Council (Victoria), *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria Report*, Sentencing Advisory Council, Melbourne, Victoria, May 2014, p. xli.

¹⁹¹ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. 316.

¹⁹² Sentencing Advisory Council (Victoria), *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria Report*, Sentencing Advisory Council, Melbourne, Victoria, May 2014, p. xli.

¹⁹³ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. xvi.

onerous for someone on a low income but have less impact on a person earning an average income.¹⁹⁴

In response to these issues, the Sentencing Advisory Council of Victoria and the New South Wales Law Reform Commission recommended different approaches. The Sentencing Council of Victoria recommended that penalty amounts be adjusted, taking into account the financial circumstances of recipients, as follows:

Infringement penalty recipients who are experiencing financial hardship should receive a reduced infringement penalty amount of 50% (**Recommendation 39**). Eligibility for the adjusted penalty should be the same as eligibility for automatic entitlement to a payment plan outlined in the *Attorney General's Guidelines to the Infringements Act 2006* (**Recommendation 40**).

The adjusted penalty amount is intended to provide equality before the law by appropriately mitigating the penalty amount for eligible infringement recipients. This will afford the infringements system a broad measure to recognise the differential impact of an infringement penalty amount on people experiencing financial hardship compared with people who are not. The credibility and effectiveness of the infringements system will be improved by enhancing the equality of its impact, perceptions of fairness, and the prospects of compliance by low-income infringement recipients.¹⁹⁵

However, the New South Wales Law Reform Commission concluded that the Commission does:

... not support the creation of a concession rate for low-income earners. While there was some support for this in submissions, there were few contributions, and no consistency, about the way in which it would be administered. A concession rate would add considerably to the complexity of the penalty notice system. The main difficulty would be determining who would be eligible for a concessionary rate and what that rate, or amount, should be. It might also encourage greater resort by issuing agencies to placing offenders before the courts, thereby diminishing an important advantage of, and reason for, the penalty notice system.¹⁹⁶

Instead, the New South Wales Law Reform Commission stated that:

... we do not support the creation of a concession rate for low-income earners.

... we have made many other recommendations throughout this report ... that respond to the needs of people on low incomes who receive penalty notices. For example we recommend the availability of an extension of time-to-pay arrangements to apprentices and trainees and for others experiencing unavoidable financial hardship. We support the recommendation of the recent Attorney General and Justice evaluation of the *Fines Act 1996* (NSW) to relax

¹⁹⁴ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. 316.

¹⁹⁵ Sentencing Advisory Council (Victoria), *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria Report*, Sentencing Advisory Council, Melbourne, Victoria, May 2014, p. xli.

¹⁹⁶ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. 322.

the definition of acute economic hardship for eligibility for WDOs [Work and Development Orders] so that the test will be satisfied if a person is in receipt of an eligible Centrelink benefit. Further, we recommend the development of an improved test for economic hardship. In relation to write-offs, we make recommendations to make writing off fines easier for vulnerable people, especially those who have made significant efforts towards paying off their penalty debts through WDOs, or who are making periodical payments via time to pay arrangements.¹⁹⁷

At this time, the Office does not recommend that a concession rate be established for low-income earners who are recipients of Criminal Code infringement notices. However, the Office has identified a range of alternative measures to mitigate the impact of Criminal Code infringement notices on people experience financial hardship.

6.3.5 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 evidence to the criminal standard or where there may a defence at law available.'¹⁹⁸ 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.

The Office's findings are consistent with the 2009 NSW Ombudsman's report, which also found that 'Aboriginal people are less likely to request a review or elect to have the matter heard at court',¹⁹⁹ and that fewer than one per cent of Aboriginal recipients elected to go to court.²⁰⁰ In New South Wales, only seven of 895 CIN recipients who identified as Aboriginal elected to have their infringements reviewed in court.²⁰¹ When interviewed or contacted by mail, Aboriginal recipients in New South Wales cited distance as a barrier (living in rural or remote areas) with no access to a car or public transport to court.²⁰²

¹⁹⁷ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. 322.

¹⁹⁸ Aboriginal Legal Service, submission dated 28 April 2016.

¹⁹⁹ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009, Foreword by Bruce Barbour, Ombudsman.

²⁰⁰ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009, p.93.

²⁰¹ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, August 2009, p. 102.

²⁰² New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, August 2009, p. 114.

6.3.6 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'.²⁰³ To consider this issue fully, the Office analysed the court data in relation to court outcomes for the two prescribed offences,²⁰⁴ 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.

Respondents to the Consultation Paper also observed that there are more flexible repayment options for repayment of a court fine and that:

... choosing this option [election to go to court] may have changed the options people had available to them if they were unable to pay. Most of the people consulted assumed that if they could not pay the fine they could choose to do time in prison in lieu of payment. Advice suggests that this may not be the case for infringement notices, but may be possible if people receive court fines.²⁰⁵

This issue is explored further immediately below.

²⁰³ Aboriginal Legal Service, submission dated 28 April 2016.

²⁰⁴ 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.

²⁰⁵ D. Zanella, RUAH Community Services, submission dated 20 May 2016.

6.4 Payment options for Criminal Code infringement notices

As noted above, a Criminal Code infringement notice is an ‘infringement notice’, as distinct from a ‘fine’.²⁰⁶ Infringement notices and fines, when not paid, result in different further penalties and/or consequences.

DOTAG sets out the differences between infringement notices and fines as follows:

A court fine is a monetary penalty handed down by judge, magistrate or justice of the peace in a Western Australian court. ... The fine may be your whole sentence or just part of it.

...

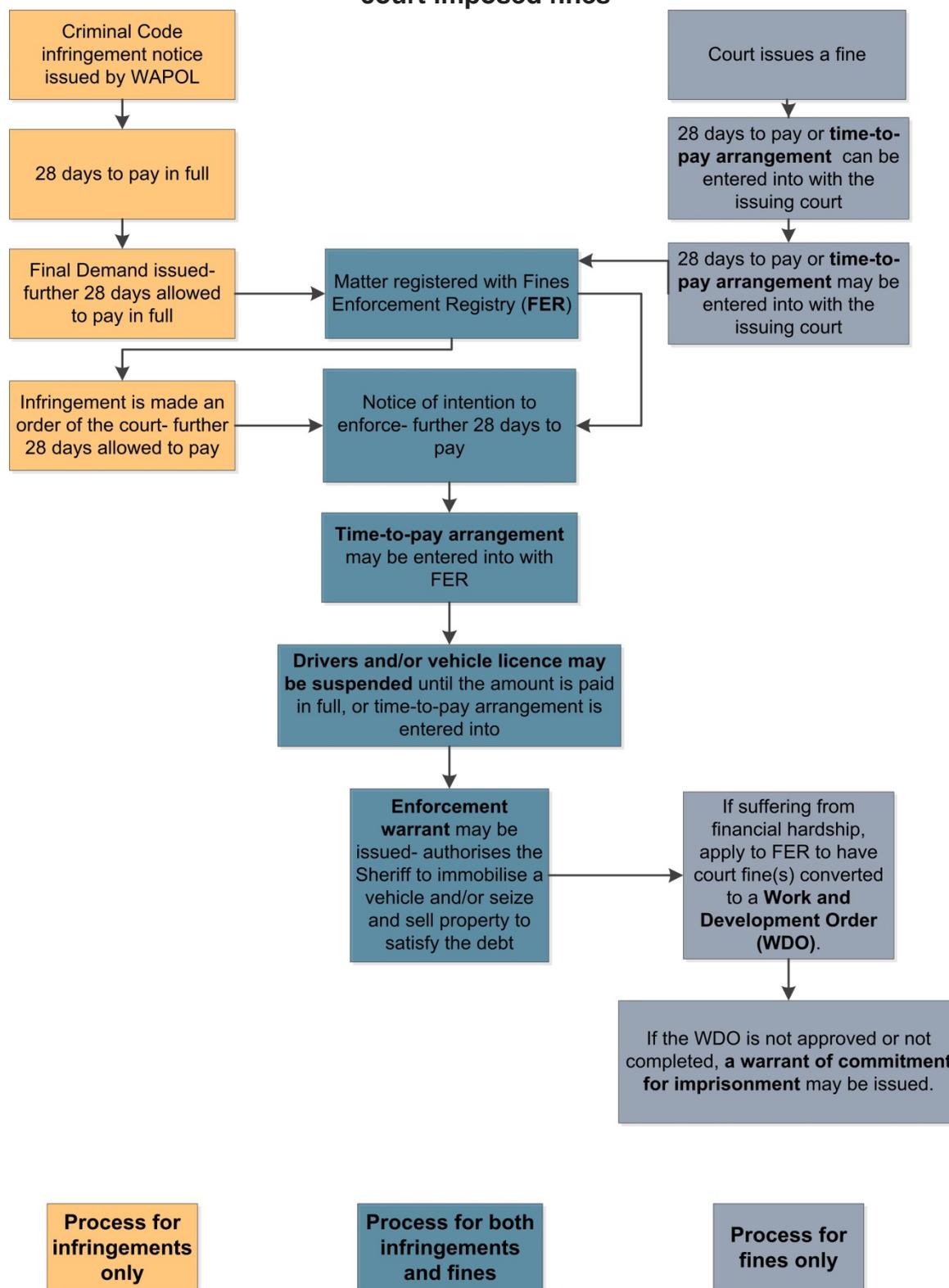
Infringement notices are issued by the police, local government authorities and various other prosecuting agencies, either in person or through the post.²⁰⁷

The Office has summarised the different potential pathways for unpaid Criminal Code infringement notices and court fines in Figure 13 below.

²⁰⁶ 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’.

²⁰⁷ Department of the Attorney General, ‘Frequently Asked Questions’, Department of the Attorney General, viewed 25 August 2016, <http://www.courts.dotag.wa.gov.au/F/fines_frequently_asked_questions.aspx?uid=1192-1055-7947-1752>.

Figure 13: Potential pathways of unpaid Criminal Code infringement notices and court imposed fines



Source: Ombudsman Western Australia and Department of the Attorney General²⁰⁸

²⁰⁸ Department of the Attorney General, 'Fines and Infringements', Department of the Attorney General, viewed 25 August 2016, <http://www.courts.dotag.wa.gov.au/F/fines_infringements.aspx?uid=2423-9549-1013-8009>.

As shown above, one notable difference between the options to pay an infringement notice and a court fine is the ability to request a time to pay order from the Court Registry²⁰⁹ immediately for a court imposed fine. This option is not available for a Criminal Code infringement notice, though, as stated previously, an approved officer may extend the time to pay a modified penalty as set out in the CP Act.

Another notable difference between the consequences of failing to pay an infringement notice and a fine relates to the ability of a fine recipient to apply for or be issued a Work and Development Order (**WDO**) as an alternative to payment. A WDO cannot be requested for a Criminal Code infringement notice. In addition, if a WDO is not approved or not completed, a 'warrant of commitment' for imprisonment may be issued. A warrant of commitment cannot be issued for non-payment of a Criminal Code infringement notice. The absence of access to these different repayment options and the impact on recipients of Criminal Code infringement notices is discussed in detail in Chapter 7 below.

The Office found that there was a lack of understanding regarding the consequences of non-payment of a Criminal Code infringement notice, compared with a court fine. The Office found that this lack of understanding was prevalent amongst community service providers, community group leaders and some police officers who participated in the Police Officer Forums. In these instances, it was believed that non-payment of Criminal Code infringement notices could lead to imprisonment.

At the Police Officer Forums, some participants expressed the view that a Criminal Code infringement notice had the same consequences as a court imposed fine. These participants expressed the view that an alleged offender would rather choose to spend time in prison than pay the infringement, and also that some alleged offenders believed that if the stolen item/s was under \$500 they could receive the infringement and just pay the infringement off in prison time.

Similarly, during the Community Consultation Forum, Aboriginal stakeholders expressed their concerns over alleged offenders believing that the option of going to prison to pay off the 'fine' is an option, and that they are unaware there is a difference.

The research literature suggests the same lack of understanding was apparent in other schemes across Australia. For example, as stated in the 2009 NSW Ombudsman Report:

For many Aboriginal people outside of the NSW Police Force, our interviews and consultations were the first they had heard of CINs, even though our consultations strategy deliberately sought out groups and individuals who actively assist people experiencing difficulties in managing fine-related debts in locations where police actively use CINs. Thus there was little awareness of how CINs differed from other types of penalty notices issued by police or the likely consequences of failing to pay on time.²¹⁰

²⁰⁹ Department of the Attorney General, 'Fines and Infringements', Department of the Attorney General, viewed 25 August 2016, <http://www.courts.dotag.wa.gov.au/C/court_fines.aspx?uid=5880-3651-1523-0950>.

²¹⁰ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009, p.49.

Stakeholders present at the Community Consultation Forum suggested that there should be an education campaign to improve understanding within the community around Criminal Code infringement notices generally. This campaign should cover the ability to obtain legal advice, options to elect to go to court, and the differences between options for paying an infringement and a fine, particularly that paying off an infringement with prison time is not an option.

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).

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7 The impact of not paying Criminal Code infringement notices

The (then) Minister for Police, the Hon. Robert Frank Johnson MLA described the impact of the infringement notices provisions of *The Criminal Code* as including intended benefits to offenders. These benefits arise when offenders are diverted away from court through a Criminal Code infringement notice, as follows:

This legislation is better for police and it is better for the offender. I think the offenders would prefer to simply cop it sweet, pay a fine, not spend all that time in court and not attract a criminal record in that instance. Is it better for police? Is it better for the offender? I think it is. I think everybody is a winner here.²¹¹

That is, the benefit of a Criminal Code infringement notice is realised immediately if the recipient pays the modified penalty, and the matter is concluded. However, for Aboriginal and Torres Strait Islander recipients, who are more likely to experience financial and social disadvantage²¹², the research literature suggests that these recipients 'are unlikely to pay outstanding fines'²¹³, and therefore unlikely to realise the benefits of a Criminal Code infringement notice.

The Office's review of debate in the Western Australian Parliament during the Second Reading of the Bill, in conjunction with the relevant research literature, identified that this potential issue concerning the impact of the infringement notices provisions of *The Criminal Code* on Aboriginal and Torres Strait Islander communities, was identified frequently, in particular noting the potential for Aboriginal and Torres Strait Islander people, and other vulnerable people, to be further disadvantaged due to a lack of capacity to pay and the impact of adding to existing debts (including the impact of the loss of driver's licences). The 2009 NSW Ombudsman's Report summarised this issue as follows:

Of the Aboriginal people contributing to this review who already knew of [Criminal Infringement Notices] ... all voiced concerns that any benefits arising from diverting minor offenders in this way were likely to be eclipsed by the much more pervasive problems associated with fine default, especially with respect to the high number of Aboriginal people who are ineligible to drive or register a vehicle because of sanctions imposed as part of measures to enforce unpaid fines.²¹⁴

²¹¹ The Hon. Robert Frank Johnson MLA, Minister for Police, Legislative Assembly, Parliamentary Debates (Hansard), 9 November 2010, pp. 8351b-8363a.

²¹² New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. 315.

²¹³ 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.

²¹⁴ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, NSW Ombudsman, August 2009, p. 49.

decile number of 10. This means that areas are divided up into ten equal sized groups, depending on their score.²¹⁸

The ABS further advises that '[a]s measures of socio-economic conditions, the indexes are best interpreted as ordinal measures that rank (order) areas ... we generally recommend using the index rankings and quantiles (e.g. deciles) for analysis, rather than using the index scores'.²¹⁹

In addition, it is important to note that this analysis:

... measures relative advantage and disadvantage at an area level, not at an individual level. Area level and individual level disadvantage are separate though related concepts. Area level disadvantage depends on the socioeconomic conditions of a community or neighbourhood as a whole. These are primarily the collective characteristics of the area's residents, but may also be characteristics of the area itself, such as a lack of public resources, transport infrastructure or high levels of pollution.²²⁰

In undertaking this analysis the Office excluded recipients when the address provided:

- was not a residential address (for example, a Post Office Box);
- was identified by the Office as relating to a homelessness or community support organisation;
- was an interstate address; and/or
- was in an area not classified by the ABS (for example, in a suburb which did not exist in 2011).

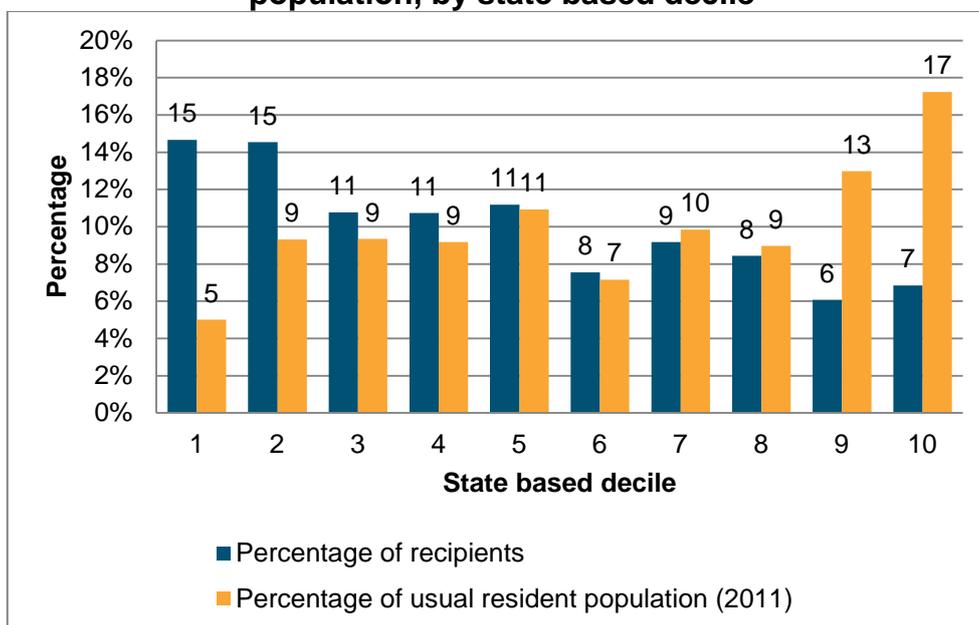
After the above exclusion criteria were applied, the Office analysed the state based deciles of the addresses provided by the remaining 2,701 Criminal Code infringement notice recipients. For comparison, the Office also considered the percentage of Western Australia's population usually resident in each state based decile. As shown in Figure 14 below, as a general trend, as relative socio-economic disadvantage decreased so did the rate of issue of Criminal Code infringement notices. 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.

²¹⁸ Australian Bureau of Statistics, 2033.0.55.001 - *Census of Population and Housing: Socio-Economic Indexes for Areas (SEIFA), Australia, 2011*, ABS, Canberra, March 2013, viewed 21 June 2016, <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2033.0.55.001main+features100162011>>.

²¹⁹ Australian Bureau of Statistics, *Technical Paper: Socio-Economic Indexes for Areas (SEIFA 2011)*, ABS, Canberra, March 2013, p. 5.

²²⁰ Australian Bureau of Statistics, *Technical Paper: Socio-Economic Indexes for Areas (SEIFA 2011)*, ABS, Canberra, March 2013, p. 6.

Figure 14: Percentage of Criminal Code infringement notice recipients by state based decile of residence vs Western Australia’s usual resident population, by state based decile



Source: Ombudsman Western Australia

Consistent with the Office’s findings, the research literature suggests, and respondents to the Office’s Consultation Paper consistently expressed the view, that people who are financially and/or socially disadvantaged are more likely to be disproportionately impacted by infringement systems, such as Criminal Code infringement notices.²²¹ The research literature suggests that, while fines and infringements ‘are issued to people from all walks of life ... people who are socially or economically disadvantaged are more vulnerable to attracting fines and less likely to have the means and capacity to pay them.’²²² This is partly attributable to the fact that ‘the problem of poverty is common to many of the people who are likely to encounter the difficulties that are discussed ... For example, [young people] have difficulties with [infringement] notices because many of them have little or no income ... Those who have a mental health or cognitive impairment are more likely to be in receipt of government benefits and to have financial difficulties with [infringements].’²²³

This is also partly an issue as financially or socially disadvantaged people are often visible, and therefore ‘the subject of disproportionate police scrutiny and attention.’²²⁴ Of direct relevance to Criminal Code infringement notices, the 2005 NSW Ombudsman’s Report

²²¹ 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; New South Wales 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. Pettitt, Commissioner for Children and Young People WA, submission dated 3 May 2016.

²²² 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.

²²³ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. 315.

²²⁴ P Lynch, *Making PERIN Fairer for People Experiencing Financial or Social Disadvantage: Submission to the Victorian Parliament Law Reform Committee Inquiry into Warrant Powers and Procedures*, Public Interest Law Clearing House, Melbourne, August 2004, p. 17.

found that many offences subject to the trial ‘could be described as offences of poverty’, stating:

In our experience, the majority of people charged with offensive language, offensive conduct, goods in custody and petty theft are unemployed or otherwise economically disadvantaged.²²⁵

Rates of poverty are also strongly related to the education level of a family, with rates of poverty for families with less than a Year 12 education ‘at least double the national average.’²²⁶ Accordingly, the research literature further suggests that financially and socially disadvantaged people are more susceptible to receiving fines and infringements because they ‘may not be appraised of their rights or have the resources to enforce them. They are less likely to be able to justify or provide a ‘reasonable excuse’ for their conduct.’²²⁷

At the Police Officer Forums, participants generally expressed the view that they are not required, and it is beyond the scope of their role, to consider an alleged offender’s capacity to pay when exercising their discretion to issue a Criminal Code infringement notice.

7.1.2 Aboriginal recipients of Criminal Code infringement notices were more likely to experience financial and social disadvantage

As discussed in detail above, in order to determine if there were any patterns or trends in the socio-economic status of Aboriginal 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 IRSAD of the suburb of their address.

After the exclusion criteria described above were applied, the Office analysed the state based deciles of the addresses provided by the remaining 2,701 Criminal Code infringement notice recipients. Of the 2,701 recipients:

- 1,436 (53 per cent) were recorded by WAPOL as non-Aboriginal;
- 912 (34 per cent) were recorded by WAPOL as Aboriginal; and
- ‘Offender Appearance’ was unknown for 353 (13 per cent) recipients.

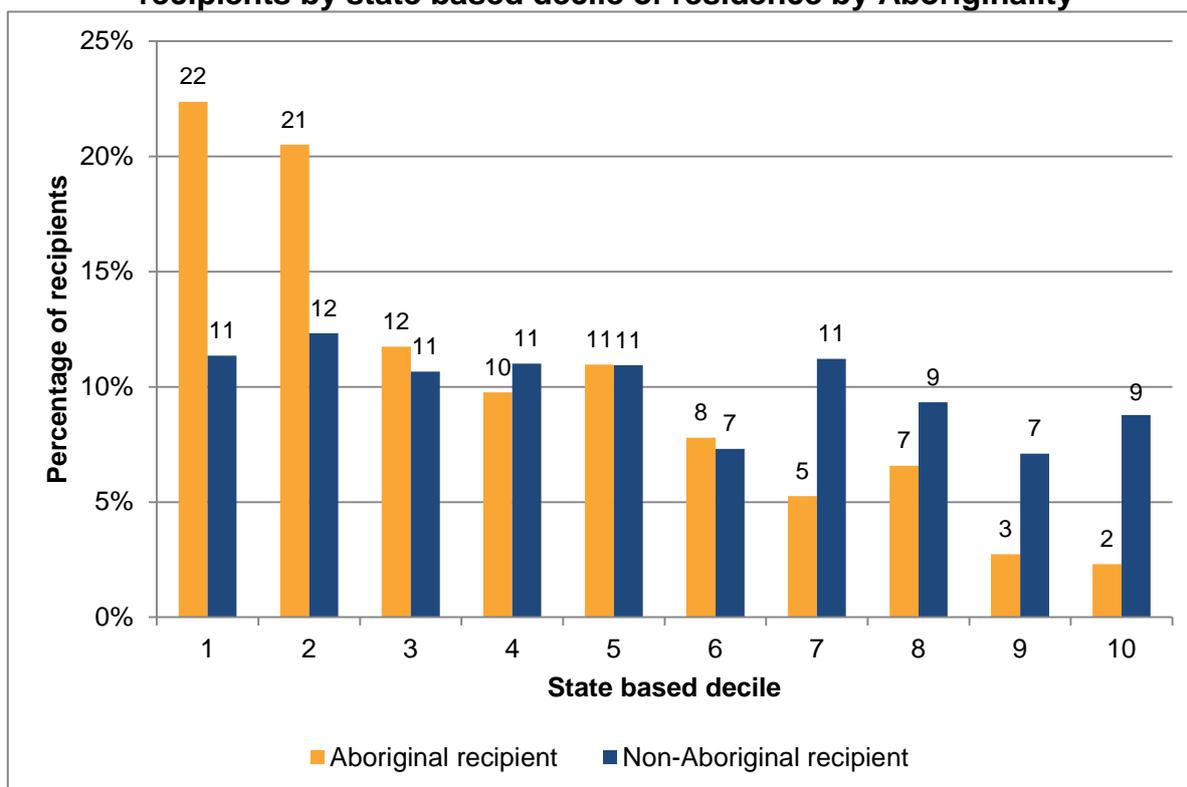
As shown in Figure 15 below, when comparing the socio-economic status of Aboriginal recipients of Criminal Code infringement notices to that of non-Aboriginal recipients, larger numbers of Aboriginal recipients resided in suburbs classified as those of greater disadvantage.

²²⁵ New South Wales Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, NSW Ombudsman, Sydney, 2005, p. 84.

²²⁶ B. Phillips, R. Miranti, Y. Vidyattama & R. Cassells, *Poverty, Social Exclusion and Disadvantage in Australia*, National Centre for Social and Economic Modelling, University of Canberra, Canberra, 2013, pp. 21-22.

²²⁷ 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. 17.

Figure 15: Percentage of Criminal Code infringement notice recipients by state based decile of residence by Aboriginality



Source: Ombudsman Western Australia

In a submission to the 2005 NSW Ombudsman’s Report, Aboriginal and Torres Strait Islanders Services stated that:

Anecdotal evidence suggests that indigenous people who receive fines often have little or no capacity to pay and thus simply accumulate debts.²²⁸

Additionally the 2009 NSW Ombudsman’s Report noted that in relation to CINs given to people in Aboriginal communities;

Another common concern was that fresh debts from CINs could add to the cumulative stresses associated with poverty in [Aboriginal] communities already struggling to cope with chronic debt ... submissions noted that poverty tends to be concentrated in communities that are also affected by high levels of family conflicts, domestic violence, substance abuse, gambling and other symptoms of dysfunction and disadvantage.²²⁹

²²⁸ New South Wales Ombudsman, *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police*, April 2005, p. 84

²²⁹ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, August 2009, p. 50.

7.1.3 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.'²³⁰ The disproportionate impact of infringement notices on financially and socially disadvantaged people can 'entrench and perpetuate a state of poverty and disadvantage.'²³¹

During debate in the Western Australian Parliament of the Second Reading of the Bill, the Hon. Kate Doust raised the issue of capacity to pay and the impact this can have on people from vulnerable recipients:

I am not sure whether the level of the fine is listed in the second reading speech, so the minister might tell me the actual amount of the fine. Although it may act as a deterrent to give people an on-the-spot fine, sometimes it will just complicate the matter, particularly when we are dealing with young people, people of low income or, in some cases, Indigenous people who may not have a high or regular income. What happens if they cannot afford to pay the on-the-spot fine? What happens if they receive a number of on-the-spot fines? It may just exacerbate problems for those individuals if they are burdened with a range of monetary penalties, low as they might be. I would like some information on how the government will deal with that.²³²

Respondents to the Consultation Paper expressed a similar view; that people from vulnerable groups are least likely to be able to pay Criminal Code infringement notices and that this can result in further disadvantage²³³ and associated distress.²³⁴ One respondent described the long term impacts as follows:

A few of those involved in the consultation spoke about the longer term impact of fines and debts. One spoke about feeling suicidal. For him the debt and fines are tied up with his homelessness and the constant pressure to survive. Another spoke about humiliation and the lack of dignity involved in the interactions with police and the process. He felt shame about having to use a homeless service as an address and felt the matter could have been dealt with more humanely by a caution.²³⁵

²³⁰ 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.

²³¹ G Hazmi, *Submission to the Department of Justice & Regulation: Review of Infringement Regulations*, Law Institute of Victoria, Melbourne, April 2016, p. 3.

²³² The Hon. Kate Doust MLC, Legislative Council, Parliamentary Debates (Hansard), 22 February 2011, pp. 781b-787a.

²³³ Jacaranda Community Centre, submission dated 19 May 2016, p. 1.

²³⁴ Jacaranda Community Centre, submission dated 19 May 2016; D. Zanella, RUAH Community Services, submission dated 20 May 2016.

²³⁵ D. Zanella, RUAH Community Services, submission dated 20 May 2016, p. 10.

The research literature also suggests that there are consequences of imposing financial penalties on people with no capacity to pay, with the NSW Law Reform Commission stating that:

... Such people are dealing with many complex problems in their 'often... chaotic lives', apart from penalty notice debt; such as 'finding food and shelter, dealing with a mental illness or navigating the world with a cognitive impairment'. Accumulating penalty notice debt thus merely 'generates, reinforces and exacerbates disadvantage'. In this situation vulnerable people 'are more likely not to respond quickly to address the matter and even ignore the penalty notice'. This in turn increases the likelihood of secondary offending among vulnerable people, exacerbating more serious conflict with the legal system ...²³⁶

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

As noted above, 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.

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.²³⁷ 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'.²³⁸ Another respondent identified that \$500 could be equal to one week's total income.²³⁹ The Australian Law Reform Commission also observes that:

Aboriginal and Torres Strait Islander peoples are over-represented as fine recipients and are less likely than non-Indigenous people to pay a fine at first notice (attributed to financial capacity, itinerancy and literacy levels), and are consequently susceptible to escalating fine debt and fine enforcement measures.²⁴⁰

²³⁶ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. 318.

²³⁷ 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.

²³⁸ Jacaranda Community Centre, submission dated 20 May 2016.

²³⁹ Western Australian Aboriginal Advisory Council (WAAAC), submission dated 16 June 2016.

²⁴⁰ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper No 84*, Australian Law Reform Commission, Canberra, 2017, p. 108.

Western Australia's Aboriginal Affairs Coordinating Committee identifies that 'economic indicators highlight the significant disparity that exists between Aboriginal and non-Aboriginal people in Western Australia'.²⁴¹ For example, 'in 2008, the average unemployment rate for Aboriginal people in WA was 16.9 per cent, compared to the non-Aboriginal unemployment rate of 3.3 per cent' and 'the median gross weekly household income for Aboriginal households is estimated to be \$1,043 a week compared to \$1,425 a week for non-Aboriginal households'.²⁴²

The research literature also suggests that, frequently, Aboriginal households experience a shortage of money and/or access to sufficient financial resources. The 2008 National Aboriginal and Torres Strait Islander Social Survey (**NATSISS**) included several measures which could be used to identify Aboriginal households that were experiencing financial issues. Two of these measures included whether:

- a household could raise \$2,000 within a week in an emergency;
- any household members ran out of money for basic living expenses in the 12 months/2 weeks prior to interview ...²⁴³

The NATSISS survey found that:

In 2008, just under half (47%) of Aboriginal and Torres Strait Islander people aged 15 years and over were living in households where members were unable to raise \$2,000 within a week in an emergency ... The proportion of people who lived in households that had run out of money for basic living expenses in the previous 12 months also decreased from 44% in 2002 to 28% in 2008 ...²⁴⁴

Attendees at the Community Consultation Forum expressed the view that 'humbugging' plays an important role in the responsibility for, and payment of debts incurred by members of their family. It was further emphasised that in an Aboriginal extended family, where one member was a recipient of a Criminal Code infringement notice and unable to pay the modified penalty, the need to pay may fall to other members of the family. Attendees identified that this is usually the grandparent (most often the grandmother) who is frequently the main provider for the children in the extended family. Attendees observed that this additional expense on the family's income may mean 'little is left for the necessities of life' and would have a significant impact on their ability to provide food and outings for the children.

Attendees at the Community Consultation Forum also expressed the view that receiving a Criminal Code infringement notice, and the associated \$500 modified penalty, could lead to the family having to 'hock' goods or feel they have to 'resort to' criminal behaviour in order to obtain the funds required to pay the penalty. In a 2016 submission to the national

²⁴¹ Aboriginal Affairs Coordinating Committee, *Aboriginal Economic Participation Strategy 2012-2016*, Government of Western Australia, Perth, p.4.

²⁴² Aboriginal Affairs Coordinating Committee, *Aboriginal Economic Participation Strategy 2012-2016*, Government of Western Australia, Perth, p.4.

²⁴³ Australian Bureau of Statistics, 4720.0, *National Aboriginal and Torres Strait Islander Social Survey: User Guide, 2014-15, 2016*, <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4720.0Main+Features222014-15>>. Accessed 17/10/2016.

²⁴⁴ Australian Bureau of Statistics, 4704.0, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, 2010*, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter230Oct+2010>>.

Inquiry into Aboriginal and Torres Strait Islander Experiences of Law Enforcement and Justice Services the University of New South Wales Law Society expressed the view that:

Fine defaulting is a substantial cause for the rising rate of incarceration for Indigenous women. In Western Australia, the number of Indigenous women in prison for fine defaults escalated by 576 per cent since 2008. Alarming, two thirds of women serving a custodial sentence for fine defaults are Indigenous. The policy operates disproportionately on those most vulnerable, particularly Indigenous women and only exacerbates poverty and disadvantage, [i]t furthermore fails to deter fine defaulting or gather fine revenue.²⁴⁵

7.1.5 Recipients are not provided with extensions of time to pay their Criminal Code infringement notice prior to registration with the Fines Enforcement Registry

Once a Criminal Code infringement notice has been issued, the alleged offender has 28 days after the date of the notice to pay the modified penalty.²⁴⁶ If 'the modified penalty has not been paid as required by the infringement notice' and 'the time for paying the modified penalty has elapsed'²⁴⁷ then 'a final demand must be served on the alleged offender'²⁴⁸ requiring payment of the modified penalty and enforcement fees 'within 28 days after the date of issue of the final demand'.²⁴⁹ If the modified penalty and enforcement fees are not paid within the 28 days then 'the infringement notice may be registered with [the Fines Enforcement Registry] after which a licence suspension order may be made and further enforcement fees may be imposed.'²⁵⁰

The Office's review of responses to the Consultation Paper found that one of the reasons people from vulnerable groups do not pay infringements or fines on time is because they have no or very limited income and pre-existing high levels of debt.²⁵¹ One respondent to the Consultation Paper noted that of the 14 people it consulted with who use its services:

All of those involved in the consultation had experience related to payment of a modified penalty. Despite the modified penalty being less than would be expected in court, homeless people frequently have high levels of debt related to fines and infringements. These debts can be a combination of court fines, transport fines and the Criminal Code infringement notices fines that are the subject of this submission. The highest level of debt from fines reported in this consultation was over \$36,000. This was closely followed by a second person who was paying off over \$30,000 in fines. Most people had debts between \$5,000 - \$15,000. One person reported having over 20 fines for disorderly conduct ...

²⁴⁵ University of New South Wales Law Society, submission to the *Inquiry into Aboriginal and Torres Strait Islander Experiences of Law Enforcement and Justice Services* cited in: the Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services*, Commonwealth of Australia, 2016, p. 83.

²⁴⁶ CP Act section 9(1)(f).

²⁴⁷ *Fines, Penalties and Infringements Notices Act 1994* (WA) section 14(1) (c) and (d).

²⁴⁸ *Fines, Penalties and Infringements Notices Act 1994* (WA) section 14(2).

²⁴⁹ *Fines, Penalties and Infringements Notices Act 1994* (WA) section 14(4).

²⁵⁰ *Fines, Penalties and Infringements Notices Act 1994* (WA) section 14(4).

²⁵¹ D. Zanella, RUAH Community Services, submission dated 20 May 2016, pp. 7-8.

All of those involved in the consultation were on low incomes so were unable to pay the fines within the 28 day time frame. Of the 14 interviewed, 5 had no income because they were New Zealanders. The rest were in receipt of Centrelink benefits.²⁵²

The CP Act provides approved officers with the authority to extend the time to pay a modified penalty.²⁵³ The Office identified that, despite this authority, no extensions of time to pay had been requested or granted. WAPOL advised the Office that it does not inform alleged offenders, including potentially vulnerable recipients, of their ability to request an extension. One respondent to the Consultation Paper expressed the view that it would be beneficial to people from vulnerable groups to be provided with an extension from WAPOL in order to 'get a booking with a financial counsellor' to assist the Criminal Code infringement notice recipient to 'devise a suitable budget taking into consideration all priority needs and debts'.²⁵⁴

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.

7.2 Registration of Criminal Code infringement notice debt with the Fines Enforcement Registry

7.2.1 Registration of a Criminal Code infringement notice with the Fines Enforcement Registry incurs additional costs

The Office found that, during the monitoring period, 1,202 Criminal Code infringement notices were registered with the Fines Enforcement Registry. Of these 1,202 registered infringements, 457 (38 per cent) were recorded by DOTAG as relating to an Aboriginal recipient. However, it is important to note that, at the conclusion of the monitoring period, not all unpaid Criminal Code infringement notices had become eligible for registration with the Fines Enforcement Registry.

Respondents to the Consultation Paper expressed the view that registration of a fine with the Fines Enforcement Registry adds costs to the Criminal Code infringement notice, and, for a large proportion of their Aboriginal clients, they already have pre-existing debts registered for enforcement.²⁵⁵

Respondents to the Consultation Paper also referred to time to pay arrangements, which enable alleged offenders to elect to enter into an arrangement using Centrepay, a service to pay bills and expenses as regular deductions from their Centrelink payments. However, as discussed in detail below, the Office's review of responses to the Consultation Paper found that, if a person's Centrelink payments cease due to missed appointments or non-attendance with Centrelink, they may then default on other Fines Enforcement

²⁵² D. Zanella, RUAH Community Services, submission dated 20 May 2016, pp. 6-7.

²⁵³ CP Act, section 14.

²⁵⁴ Jacaranda Community Centre, submission dated 19 May 2016, p. 2.

²⁵⁵ D. Zanella, RUAH Community Services, submission dated 19 May 2016.

Registry debts.²⁵⁶ Of particular relevance to Aboriginal people, one respondent stated that the reasons for non-attendance can include funeral attendance, medical reasons and issues surrounding domestic violence.²⁵⁷

7.2.2 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

As noted above, 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'²⁵⁸ due to the addition of enforcement fees.

During debate in the Western Australian Parliament of the Bill, the (then) Minister representing the Minister for Police, the Hon. Peter Collier outlined what happens when a person does not pay a Criminal Code infringement notice and the matter is referred to the Fines Enforcement Registry:

What happens if a person does not pay? If a person does not elect to have the matter heard in court and the infringement notice goes unpaid, the matter is lodged with the Fines Enforcement Registry. The Fines Enforcement Registry issues a final demand for payment. If the final demand is ignored, the registrar has a range of options available under the Fines, Penalties and Infringement Notices Enforcement Act 1994 to deal with the matter, including suspending the person's driver's licence, making a time-to-pay order and considering any hardship grounds.²⁵⁹

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.'²⁶⁰ 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. Time to pay orders are provided for under section 27A of the *Fines, Penalties and Infringement Notices Enforcement Act 1994*, as follows:

²⁵⁶ Jacaranda Community Centre, submission dated 19 May 2016, p. 1.

²⁵⁷ Jacaranda Community Centre, submission dated 19 May 2016, p. 1.

²⁵⁸ D. Zanella, RUAH Community Services, submission dated 20 May 2016, p. 9.

²⁵⁹ The Hon. Peter Collier MLC, Minister representing the Minister for Police, Legislative Council, Parliamentary Debates (Hansard), 23 February 2011, pp. 909c-916a.

²⁶⁰ 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>

27A. Registrar may suspend enforcement in certain cases of hardship

- (1) If an infringement notice has been registered, the alleged offender may request the Registrar —
 - (a) not to make a licence suspension order; or
 - (b) to cancel a licence suspension order that has been made,in respect of the alleged offender on the grounds that the licence suspension order would or does deprive the alleged offender of —
 - (c) the means of obtaining urgent medical treatment for an illness, disease or disability known to be suffered by the alleged offender or a member of his or her family; or
 - (d) the principal means of obtaining income with which to pay the modified penalty and enforcement fees,or on the grounds that the licence suspension order would or does seriously hinder the alleged offender in performing family or personal responsibilities.
- (2) A request cannot be made —
 - (a) if the alleged offender is a body corporate; or
 - (b) if an election has been made under section 21; or
 - (c) if an enforcement warrant issued under section 21A is in force in relation to the infringement notice.
- (3) A request —
 - (a) must be made in accordance with the regulations; and
 - (b) must include an offer to pay the modified penalty and enforcement fees before a specified date or by regular instalments.
- (4) If the Registrar is satisfied that —
 - (a) there are grounds to accede to the request; and
 - (aa) the alleged offender has a reasonable excuse for any contravention of a time to pay order made previously under this section in respect of the infringement notice; and
 - (a) the alleged offender's offer to pay by regular instalments is reasonable,the Registrar must make a time to pay order and, as the case requires —
 - (c) suspend the process in Division 2 for enforcing the infringement notice; or
 - (d) cancel a licence suspension order that has been made in respect of the alleged offender.
- (5) Without limiting paragraph (d) of subsection (1), the Registrar may, for the purposes of that paragraph, consider the effect that a licence suspension order would have or has had on the ability of the alleged offender to seek or obtain employment.
- (6) The time to pay order is to require the alleged offender to pay the modified penalty and enforcement fees either —
 - (a) before a specified date; or

(b) by instalments on or before set dates.

- (1) The time to pay order must be served on the alleged offender together with notice of the action that has been taken under subsection (4)(c) or (d) and the consequences of not complying with the order.
- (2) If a licence suspension order is cancelled, the Registrar must advise the Director General forthwith.
- (3) For the purposes of the Road Traffic Act 1974, the cancellation of a licence suspension order takes effect when the order is cancelled.

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.

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. The research literature suggests that there are issues with the time to pay order process and its potential impact on vulnerable people:

Under the infringements system, a Time To Pay Order may only be requested once the infringement notice has been registered. This means that when an offender is issued with an infringement notice, they must wait for the initial 28 day time period to expire. Once this time has elapsed, the offender is issued a Final Demand and then must wait another 28 days before the infringement notice is registered at the [Fines Enforcement Registry]. By this time, the enforcement fees will amount to \$73.70. For our clients, access to a Time To Pay Order is essential and the fact that they need to wait 56 days and incur large enforcement fees before they can make an application adds to their already difficult situation.²⁶¹

One respondent described their clients' situations as follows:

Of the 14 people who participated in the consultation, 5 had set up extensions of the period of time to pay. As indicated earlier, 2 of these found the system simple. The others sought help from Street Law, Ruah Centre staff and other homeless people. Their opinions and experience of this varied. One person

²⁶¹ Street Law Centre WA Inc., *Law Reform Proposal for the Enforcement of Infringement Notices and Fines*, Street Law Centre WA, Western Australia, May 2016, pp. 16-17.

talked about choosing to pay the maximum amount he could afford out of his Centrelink benefits (\$40) because he didn't want to hide from the debt and whilst it would take time he wanted to get it cleared. Another spoke about paying the minimum amount allowable (\$25) and how he had been paying down his debt for 4 years and still had over \$5,000 to go. One person talked about how it took them over a year to pay off a single infringement notice. Another person talked about paying down his fines because he didn't want to go to prison. He was scared of losing his house, which after years of homelessness was very important to him.

A further 5 people in the consultation could not arrange an extension of the period of time to pay. These people were New Zealanders and did not receive any income at all. They were all sleeping rough and could not make any payments so their fines automatically escalated through the system incurring more financial penalties along the way. These people talked about being in a "vicious cycle" of poverty and homelessness. They had no income so slept rough. They got fined and incurred debt but had no money to pay. Because of fines they could not get their driver's license and without this could not get work. Without work they had no income to either pay the debt or move out of homelessness. One person talked about how even if he got some money, the fines would not be his first priority. He would get himself a bed for the night, food and toiletries. He also spoke about how at times he felt like he would need to "commit a crime to pay for his crime" i.e. steal to cover the cost of fines.

The remaining 4 people chose to ignore the infringement notices and not pay. They felt overwhelmed by the level of their debt, the other priorities of their life and were disengaged from both the justice system and other support services that could assist. One person said they used to worry about it, but being homeless they had bigger worries. Staff at the Centre said they see large numbers of infringement notices coming through the mail system for clients who use the service as a postal address. While a small number seek help to make payments, a significant proportion do not open or simply bin the notices.²⁶²

A further issue identified with time to pay orders was identified through the Office's review of responses to the Consultation Paper, which found that if a person's Centrelink payments cease due to missed appointments or non-attendance with Centrelink, then they default on other Fines Enforcement Registry debts.²⁶³

One respondent expressed the view that their clients have had positive experiences with the Fines Enforcement Registry assisting them with their time to pay order, but noted that the additional costs have accumulated prior to this option being available:

The financial counsellor works mainly with the Fines Enforcement Registry. If we can present a good case sometimes the client does not have to try and find an upfront amount e.g. \$100 prior to entering into a repayment. The Registrar is also helpful in putting other fines together so once one is paid the next one gets started rather than the client trying to negotiate on different fines. They are also good at accepting our repayment plan because we have done a thorough budget and know the clients income and expenditure. The difficulty is when it

²⁶² D. Zanella, RUAH Community Services, submission dated 20 May 2016, pp. 7-8.

²⁶³ Jacaranda Community Centre, submission dated 19 May 2016, p. 1.

gets to the Registrar it has already incurred additional costs. If it was allowed to be negotiated paid through Centrepay without additional costs then it would be a fairer system as **the most financially disadvantaged are the ones that end up paying extra fees.**²⁶⁴ [Emphasis added]

7.3 The impact of suspension of driver's licences

7.3.1 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*, as follows:

19. Licence suspension order

- (1) If —
 - (a) 28 days have elapsed since the date of issue of a notice of intention to enforce; and
 - (b) the modified penalty, and enforcement fees, specified in that notice have not been paid to the Registry; and
 - (c) the alleged offender has not made an election under section 21,then, whether or not an enforcement warrant issued under section 21A is in force, the Registrar may make a licence suspension order in respect of the alleged offender.
- (2) A licence suspension order is an order as to such of the matters in subsections (3) and (4) as the Registrar thinks fit.
- (3) If the alleged offender is an individual a licence suspension order may disqualify the alleged offender from one of the following:
 - (a) from holding or obtaining a driver's licence; or
 - (b) from holding or obtaining a vehicle licence in respect of those vehicles specified in the order; or
 - (c) from holding or obtaining a vehicle licence in respect of any vehicle.

...

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

²⁶⁴ Jacaranda Community Centre, submission dated 19 May 2016, p. 1.

made it very difficult for them to both seek and attend work. **As such, this restriction acts to continue the poverty trap.**²⁶⁵ [Emphasis added]

Similarly, the Law and Justice Foundation of New South Wales observed the following impacts of driver's licence suspension of people from vulnerable groups:

The suspension of a driver licence can have a significant impact on people who need a licence for employment, job interviews or while caring for children, and on homeless people who use their cars for accommodation. Homeless people and people living in regional or rural areas where there is poor public transport infrastructure are particularly disadvantaged if their licence is suspended. **Loss of licence can mean that people are less able to access services and participate in the community, contributing to the alienation and isolation these people may already be experiencing.**²⁶⁶ [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:

49. Driving while unlicensed or disqualified

(1) A person who —

(a) drives a motor vehicle on a road while not authorised under the *Road Traffic (Authorisation to Drive) Act 2008* Part 2 to do so;

...

commits an offence.

Penalty:

...

(b) if subsection (3)(d), but no other paragraph of subsection (3), applies —

(i) a fine of not less than 4 PU or more than 30 PU; and

(ii) imprisonment for not more than 12 months,

and the court may order that the offender be disqualified from holding or obtaining a driver's licence for a period of not more than 3 years;

...

(3) If an offence under subsection (1)(a) is committed by a person —

...

²⁶⁵ D. Zanella, RUAH Community Services, submission dated 20 May 2016, pp. 10-11.

²⁶⁶ Law and Justice Foundation of New South Wales, *Fine but not fair: Fines and disadvantage*, Law and Justice Foundation of New South Wales, New South Wales, February 2009, p. 7.

- (d) who is no longer authorised to drive because of penalty enforcement laws, as described in subsection (9),

a police officer may, without a warrant, arrest the person.

...

- (9) When subsection (3)(d) refers to a person who is no longer authorised to drive because of penalty enforcement laws, it means that the person —
 - (a) has been disqualified from holding or obtaining a driver's licence under section 19 or 43 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994*; or
 - (b) is the subject of any disqualification or suspension under a law of another jurisdiction that is prescribed to be a corresponding law for the purposes of this subsection.

However, the *Road Traffic Act 1974* further provides that police may also decline to charge the driver and may instead issue a caution to the driver, in accordance with section 49A:

49A. Person breaching s. 49(1)(a) having lost licence etc. due to penalty enforcement laws, police may caution etc.

- (1) This section applies if a police officer finds a person (the **driver**) committing an offence under section 49(1)(a) in the circumstances referred to in section 49(3)(d).
- (2) If this section applies and the police officer suspects on reasonable grounds that, at the time of committing the offence, the driver —
 - (a) did not know of the circumstances referred to in section 49(3)(d); and
 - (b) had not been cautioned previously under this section since those circumstances came about,

the police officer may decline to charge the driver with an offence under section 49(1)(a) and may instead issue a caution to the driver.

- (3) The caution must be in a prescribed form.

...

WAPOL advised the Office that police officers exercise their discretion to caution drivers in accordance with section 49A of the *Road Traffic Act 1974*.

7.3.2 Suspension of a driver's licence for non-payment of a Criminal Code infringement notice exposes Aboriginal people to the risk of imprisonment

As discussed at section 7.3.1, section 19 of the *Fines, Penalties and Infringements Notices Act 1994* provides that, if a Criminal Code infringement notice recipient does not pay the Criminal Code infringement notice once it is registered with the Fines Enforcement Registry, they may have their driver's licence suspended. 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;
- 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 licence is suspended.

Many of these impacts are consistent with the Office's review of the research literature. For example, a 2015 study of 'Indigenous driving issues in the Pilbara region'²⁶⁷ (**the 2015 study**) found that living in a remote location makes driving a necessity, stating:

The reality of living in a remote area is that people have a very real need to drive. It is impossible to compare driving in the city to driving in the Pilbara; the vast distances, harsh environment and lack of public transport means people must drive whether or not they hold a valid licence. Many of the communities in the Pilbara are very remote, with people needing to get into town to conduct business, access medical services, shop and attend court, and many people live hours away from towns. The cost of taxis is prohibitive, with taxis in Newman charging \$10 per person to drive three kilometres; and due to the long distances and harsh conditions, other options like walking or riding bicycles are not realistic.²⁶⁸

Loss of a driver's licence 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. The Western Australian Aboriginal Advisory Council expressed the view to the Office that the loss of their driver's licence is a significant issue for Aboriginal people and can lead to their imprisonment.²⁶⁹ Similarly, the Australian Law Reform Commission observes that a 'person with unpaid fines may have their driver licence suspended and may ultimately be imprisoned for driving while disqualified. These elements of enforcement regimes have a disproportionate impact on Aboriginal and Torres Strait Islander peoples ...'²⁷⁰

²⁶⁷ Barter, A, 'Indigenous driving issues in the Pilbara region', *Proof of Birth*, Future Leaders, Victoria, 2015.

²⁶⁸ Barter, A, 'Indigenous driving issues in the Pilbara region', *Proof of Birth*, Future Leaders, Victoria, 2015, pp. 66-67.

²⁶⁹ Western Australian Aboriginal Advisory Council, submission dated 16 June 2016.

²⁷⁰ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper No 84*, Australian Law Reform Commission, Canberra, 2017, p. 107.

The 2015 study supports this view, suggesting that cultural reasons for driving can outweigh other considerations, exposing Aboriginal people to the risk of driving without a licence:

There are also cultural reasons for driving without a valid licence. The notion of 'culture' has two different aspects: first, people need to travel for law business, funerals, hunting and to visit family; second, in Indigenous law in the Pilbara, a person must do what an elder tells them, so they can be forced into driving even if they do not want to. Indigenous people in the Pilbara have a lack of understanding and lack of respect for 'whitefella' law as many people see their cultural obligation and traditional law as more important than mainstream law. In the local Indigenous cultures, bereavement or 'sorry time' is very important and people are expected to leave employment or other obligations to travel vast distances to pay their respects to the deceased person and their family. Many of the places they need to travel to are only accessible by driving a car.²⁷¹

A 2001 study by the University of Western Australia explored the issue of licence suspension as an effective legal sanction in Western Australia.²⁷² In relation to the suspension of Aboriginal people's driver's licences arising from unpaid fines, the study found that:

Aboriginal involvement in fine suspensions was significant: in 1995, the Indigenous rate of fine suspension was nine times greater than the non-Indigenous rate and, by 2001, this had increased to eleven times greater. The majority of Indigenous fine suspensions were for unpaid court fines (justice and good order offences) and railway infringements (fare evasion). Between 1995 and 2001, the proportion of Indigenous fine suspensions for railway offences increased from 0.7% to 23.5%.

...

The study found that many disqualified drivers were *repeat offenders* (those having five or more disqualifications): one quarter (26%) of all disqualified drivers accounted for 72% of all disqualifications. Repeat offenders were more likely to be Indigenous, have a criminal record and have a history of non-payment of fines. There was a significant overlap between licence disqualification for traffic offences and licence suspension for non-payment of fines: one quarter of all disqualified drivers had incurred both types of disqualifications over the study period. There was also evidence that increases in disqualifications (arising primarily from fine suspensions) have been due to the activities of, and actions against, repeat offenders rather than drivers who are new to licence disqualification.²⁷³

The 2009 NSW Ombudsman's Report identified that that;

²⁷¹ Barter, A, 'Indigenous driving issues in the Pilbara region', *Proof of Birth*, Future Leaders, Victoria, 2015, p. 67.

²⁷² Ferrante, A, *The Disqualified Driver Study: A Study of Factors Relevant to the Use of Licence Disqualification as an Effective Legal Sanction in Western Australia*, Crime Research Centre, University of Western Australia, Perth, 2003.

²⁷³ Ferrante, A, *The Disqualified Driver Study: A Study of Factors Relevant to the Use of Licence Disqualification as an Effective Legal Sanction in Western Australia*, Crime Research Centre, University of Western Australia, Perth, 2003, p. vii.

... the imposition of [Road and Traffic Authority NSW] sanctions in response to unpaid CIN penalties appears to have increased the risk of secondary offending by Aboriginal people, particularly young recipients...²⁷⁴

The 2009 NSW Ombudsman's Report further identified that:

Of the Aboriginal people contributing to this review ... all voiced concerns that any benefits arising from diverting minor offenders ... were likely to be eclipsed by the much more pervasive problems associated with fine default, especially with respect to the high number of Aboriginal people who are ineligible to drive or register a vehicle because of sanctions imposed as part of measures to enforce unpaid fines.²⁷⁵

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,²⁷⁶ and further, that Aboriginal people may have cultural obligations which require them to travel by car.

In response to a range of the issues identified above, the Office notes that the Australian Law Reform Commission, in its recent publication, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper No 84*²⁷⁷, has posed the following two questions for further consideration:

Question 6–7 Should fine default statutory regimes be amended to remove the enforcement measure of driver licence suspension?

Question 6–8 What mechanisms could be introduced to enable people reliant upon driver licences to be protected from suspension caused by fine default? For example, should:

- (a) recovery agencies be given discretion to skip the driver licence suspension step where the person in default is vulnerable, as in NSW; or
- (b) courts be given discretion regarding the disqualification, and disqualification period, of driver licences where a person was initially suspended due to fine default?²⁷⁸

²⁷⁴ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, August 2009, p. vi.

²⁷⁵ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, August 2009, p. 49.

²⁷⁶ 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

²⁷⁷ 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.

²⁷⁸ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper No 84*, Australian Law Reform Commission, Canberra, 2017, p. 126.

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

Throughout the preceding chapters the Office has explored a range of potential issues associated with the impact of the infringement notices provisions of *The Criminal Code* on Aboriginal and Torres Strait Islander and other communities. The potential issues examined by the Office included:

- the potential for Aboriginal and Torres Strait Islander alleged offenders, and vulnerable alleged offenders, to be more likely to receive a Criminal Code infringement notice;
- 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;
- 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;
- the potential for people to not understand how to respond to Criminal Code infringement notices, including their options for:
 - seeking internal review (adjudication and withdrawal);
 - electing to have the matter determined by a court; and
 - paying Criminal Code infringement notices; and
- the potential for Aboriginal and Torres Strait Islander alleged offenders, and vulnerable alleged offenders, to be disproportionately negatively impacted as a result of not paying Criminal Code infringement notices.

The Office has found that many of these potential issues and their associated negative impacts were present in Western Australia, and arose predominantly when Aboriginal and Torres Strait Islander, and other, alleged offenders were vulnerable for reasons including being financially and socially disadvantaged, being young, experiencing homelessness and/or those that have an intellectual disability or mental illness.

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).²⁷⁹

The Office's analysis and findings also indicate that Aboriginal people were overrepresented as alleged offenders who were issued a Criminal Code infringement

²⁷⁹ 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.

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. Accordingly, the Office has included below discussion of a range of these measures and, where appropriate, recommended that the Minister consider whether legislative amendments may be appropriate with respect to the operation of the infringement notices provisions of *The Criminal Code*.

8.1 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’²⁸⁰ 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.’²⁸¹

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.²⁸² 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’.²⁸³

²⁸⁰ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. xvi.

²⁸¹ New South Wales Law Reform Commission, *Report 132: Penalty Notices*, New South Wales Law Reform Commission, Sydney, 2012, p. xvi.

²⁸² 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.

²⁸³ Attorney-General (Victoria), *Attorney-General’s Guidelines to the Infringements Act 2006*, Department of Justice, Victoria, 2006, p. 1.

Critically, the Victorian *Attorney-General's Guidelines to the Infringements Act 2006 (the Guidelines)* 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 infringement 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.²⁸⁴

The Guidelines outline the expectations and responsibilities of Victorian enforcement agencies, this includes their responsibilities regarding the introduction of new offences to be enforced by infringement notices.²⁸⁵ The Guidelines require that '[f]rom 1 July 2006, any department or enforcement agency wishing to propose new offences to be dealt with by way of infringement must consult with the Infringement System Oversight Unit in the Department of Justice'²⁸⁶ in order 'to ensure that a proposed infringement offence satisfies the annexed Policy on infringement offences and if it does not, to make clear the reasons and justification why it does not.'²⁸⁷

The 'annexed Policy' referred to above is *Annexure A to Attorney-General's Guidelines: Policy on Infringement Notices, Infringements System Policy Framework (the Policy)*. The Policy notes that '[b]ecause infringement notices depart from the standard practice of court hearings to enforce breaches of the law, their use must be carefully scrutinised, and limited to suitable offences.'²⁸⁸ The Policy contains Guidelines which:

... aim to establish primary principles as a guide to the type of offences that are suitable for enforcement by infringement notice. Departments and agencies are expected to comply with the Guidelines in introducing new infringement offences and reviewing existing infringement offences. A case must always be demonstrated as to the suitability of the offence for the infringements system.²⁸⁹

Of particular relevance, the Policy provides that:

In preparing proposals for considering whether an offence is one appropriate to be dealt with by way of infringement all proposals (to the Infringements System Oversight Unit) must consider the following:

...

²⁸⁴ Attorney-General (Victoria), *Attorney-General's Guidelines to the Infringements Act 2006*, Department of Justice, Victoria, 2006, pp. 2-3.

²⁸⁵ Attorney-General (Victoria), *Attorney-General's Guidelines to the Infringements Act 2006*, Department of Justice, Victoria, 2006, p. 1.

²⁸⁶ Attorney-General (Victoria), *Attorney-General's Guidelines to the Infringements Act 2006*, Department of Justice, Victoria, 2006, p. 3.

²⁸⁷ Attorney-General (Victoria), *Attorney-General's Guidelines to the Infringements Act 2006*, Department of Justice, Victoria, 2006, p. 3.

²⁸⁸ Attorney-General (Victoria), *Attorney-General's Guidelines to the Infringements Act 2006*, Department of Justice, Victoria, 2006, p. 10.

²⁸⁹ Attorney-General (Victoria), *Attorney-General's Guidelines to the Infringements Act 2006*, Department of Justice, Victoria, 2006, p. 10.

Will the proposal adversely affect fairness and rights within the community? (This is particularly important in relation to the impact on vulnerable members of the community); ...²⁹⁰
[Original emphasis]

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 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.

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.

8.2 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*. The term 'special circumstances' is defined under section 3 of the *Infringements Act 2006*:

²⁹⁰ Attorney-General (Victoria), *Attorney-General's Guidelines to the Infringements Act 2006*, Department of Justice, Victoria, 2006, p. 11.

3 Definitions

...

"special circumstances", in relation to a person means—

- (a) a mental or intellectual disability, disorder, disease or illness where the disability, disorder, disease or illness results in the person being unable—
 - (i) to understand that conduct constitutes an offence; or
 - (ii) to control conduct that constitutes an offence; or
- (b) a serious addiction to drugs, alcohol or a volatile substance within the meaning of section 57 of the Drugs, Poisons and Controlled Substances Act 1981 where the serious addiction results in the person being unable—
 - (i) to understand that conduct constitutes an offence; or
 - (ii) to control conduct which constitutes an offence; or
- (c) homelessness determined in accordance with the prescribed criteria (if any) where the homelessness results in the person being unable to control conduct which constitutes an offence; or
- (d) family violence within the meaning of section 5 of the **Family Violence Protection Act 2008** where the person is a victim of family violence and the family violence results in the person being unable to control conduct which constitutes an offence; [Original emphasis]

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'²⁹¹ 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.²⁹²

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.

²⁹¹ 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.

²⁹² 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.

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.

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

As discussed in detail in Chapter 7, 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 Registry²⁹³ and/or the option to complete community work.²⁹⁴

It was also noted by respondents to the Consultation Paper that fees associated with late or non-payment could be avoided by allowing earlier payment plans.

If it was allowed to be negotiated paid through Centrepay without additional costs then it would be a fairer system as the most financially disadvantaged are the ones that end up paying extra fees.²⁹⁵

In New South Wales, the legislative framework for repayment of Criminal Infringement Notices (similar to Western Australian Criminal Code infringement notices) provides for a range of alternative options.

In New South Wales, rather than the distinction between fines and infringements:

There are two types of fines:

- Court fines, and
- Penalty notices (sometimes referred to as infringement notices or on-the-spot fines).²⁹⁶

Criminal Infringement Notices are a penalty notice, which is 'a fine issued by an authorised officer which contains details of the alleged offence and the monetary penalty attached to that offence.'²⁹⁷ New South Wales has a range of options to 'deal with people whose personal circumstances make it difficult to acquit their fine debt.'²⁹⁸ In particular, the New

²⁹³ Jacaranda Community Centre, submission dated 19 May 2016; D. Zanella, RUAH Community Services, submission dated 20 May 2016.

²⁹⁴ Department for Child Protection and Family Support, submission dated 19 May 2016.

²⁹⁵ Jacaranda Community Centre, submission dated 19 May 2016; D. Zanella, RUAH Community Services, submission dated 20 May 2016.

²⁹⁶ Legal Aid New South Wales, *Fined Out: A practical guide to people having problems with fines*, Inner City Legal Centre, Redfern Legal Centre and Legal Aid New South Wales, Sydney, 2014, p. 10.

²⁹⁷ Legal Aid New South Wales, *Fined Out: A practical guide to people having problems with fines*, Inner City Legal Centre, Redfern Legal Centre and Legal Aid New South Wales, Sydney, 2014, p. 14.

²⁹⁸ New South Wales Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities*, New South Wales Ombudsman, August 2009, p. 139.

South Wales *Fines Act 1996* provides for a range of options in the fines enforcement process, including at the penalty notice stage:

- permitting a person to pay the amount by part payments, as long as the full amount payable under a penalty notice is to be paid within the time required by the penalty reminder notice;²⁹⁹
- permitting a person (if in receipt of a Government benefit) further time to pay a fine. This can include extending the time for payment of the whole fine, or allowing the fine to be paid in instalments of particular amounts;³⁰⁰ and
- undertaking a review of the decision to issue a penalty notice on application by or on behalf of the person who received the notice,³⁰¹ which may result in a penalty notice being withdrawn.³⁰² Grounds for seeking a review include 'a diagnosed mental health condition, cognitive impairment or homelessness.'³⁰³

Further options are also provided for at the enforcement order stage, once the State Debt Recovery Office has commenced enforcement action, including:

- permitting a person to enter into a time to pay arrangement. This can include extending the time for payment of the whole fine, or allowing the fine to be paid in instalments of particular amounts;³⁰⁴
- writing off a fine, or part of a fine, if satisfied that, due to the financial, medical, or personal circumstances, the fine defaulter does not have, and is not likely to have, sufficient means to pay the fine; civil enforcement action has not been or is unlikely to be successful in paying the fine; and if the fine defaulter is not suitable to be subject to a community service order;³⁰⁵ and
- making a community service order requiring the fine defaulter to perform community service work in order to work off the amount of the fine that remains unpaid.³⁰⁶

The Office's findings strongly suggest that current approaches to recovering Criminal Code infringement notice debt from vulnerable people, particularly people experiencing financial hardship, can result in further disadvantage. Similar to the New South Wales model, legislation could provide for greater consideration of a person's hardship and greater flexibility in expiating their debt, both prior to the registration of the debt with the Fines Enforcement Registry, and through the Fines Enforcement Registry process, to mitigate the negative impact on vulnerable people.

The Office notes that, on 23 August 2017, the Leader of the House representing the Attorney General, the Hon. Sue Ellery MLC, stated that '[t]he government is considering a package of amendments to the Fines, Penalties and Infringement Notices Enforcement Act 1994, the intent of which is to reduce the number of people imprisoned for fine

²⁹⁹ Fines Act 1996, s. 33(2)

³⁰⁰ Fines Act 1996, s. 100

³⁰¹ Fines Act 1996, s. 24(A)

³⁰² Fines Act 1996, s. 24(G)

³⁰³ New South Wales State Debt Recovery Office, *Review Guidelines*, New South Wales Government, Sydney, February 2016, p. 2.

³⁰⁴ Fines Act 1996, s. 100

³⁰⁵ Fines Act 1996, s. 101

³⁰⁶ Fines Act 1996, s. 79

default.³⁰⁷ Such amendments could also consider providing flexible options for the payment of infringement notices.

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.

One particular measure identified by the Office allows for alleged offenders to repay their debts through non-financial options while concurrently addressing their alleged offending behaviour. In Victoria such a measure is in place and aims to:

...provide vulnerable and disadvantaged Victorians with non-financial options to simultaneously expiate infringement debt while addressing offending behaviour through approved activities and treatment. People eligible to participate in the WDP [Work and Development Permit] scheme will include those with an intellectual or mental disability, addiction, or people experiencing homelessness or acute financial hardship, which may include victims of family violence. This scheme will provide a new option for those who may not be eligible for internal review and who are unable to pay their infringement fines.³⁰⁸

A similar scheme operates in New South Wales (**the New South Wales scheme**), where Work and Development Orders (**WDOs**) are issued by the State Debt Recovery Office to:

... allow eligible people to satisfy their fine debt through unpaid work or certain courses or treatment with approved organisations and health practitioners. WDOs are open to people who:

- have a mental illness,
- have an intellectual disability or cognitive impairment,
- have a serious addiction to drugs, alcohol or volatile substances,
- are homeless, or
- are experiencing acute economic hardship.³⁰⁹

The New South Wales scheme is only available to recipients meeting the above criteria and is only run with 'approved organisations and health practitioners.'³¹⁰

The New South Wales scheme is similar to Western Australia's Work and Development Orders, however in Western Australia the ability to apply for a Work and Development Order is available to all court fine recipients and is not restricted to vulnerable persons. In addition, as noted above, WDOs in WA are not available to Criminal Code infringement notice recipients.

³⁰⁷ The Hon. Sue Ellery MLC, Leader of the House representing the Attorney General, Legislative Council, Parliamentary Debates (Hansard), 23 August 2017, pp. p3152a-3152a.

³⁰⁸ The Hon. Martin Pakula, Attorney General, Victoria, Legislative Assembly, Parliamentary Debates (Hansard), 24 February 2016, p. 562

³⁰⁹ New South Wales Attorney General, *Work and Development Order Guidelines 2012*, 12 March 2012, p. 1.

³¹⁰ New South Wales Attorney General, *Work and Development Order Guidelines 2012*, 12 March 2012, p. 1.

An evaluation of the New South Wales scheme by the New South Wales Attorney General and Justice Department found that ‘... 90% of respondents stated that the ... scheme was of ‘great benefit or some benefit’ to their clients.’³¹¹ A further qualitative evaluation also stated that ‘94% of sponsors agreed that the WDO scheme is achieving its objective of enabling vulnerable people to resolve their outstanding NSW fines by undertaking activities that benefit them and the community’ and that ‘most participants received no further fines during their participation in the scheme.’³¹² The Senate Finance and Public Administration References Committee has also identified that ‘[s]ince the establishment of the WDO program \$44 million worth of fines have been waived, of which \$9 million has been in Aboriginal communities.’³¹³

Currently in Western Australia there is no opportunity for vulnerable and disadvantaged members of the community to expiate infringement debt while simultaneously addressing offending behaviour through approved activities and treatment. However, the Office notes that, in September 2016, the (then) Attorney General stated that DOTAG is currently undertaking ‘an independent evaluation of its fines enforcement methods.’³¹⁴ The (then) Attorney General also introduced the Sentencing Legislation Amendment Bill 2016 into the Western Australian Parliament, which proposed ‘allowing an offender to undertake community work in lieu of paying a fine under an enhanced Conditional Release Order regime.’³¹⁵ In relation to these amendments, the (then) Attorney General stated that:

These changes are reflective of the State Government's commitment to prevent and reduce the number of Aboriginal deaths in custody, as well as the over-representation of Aboriginal people in the justice system.³¹⁶

The Office notes that, while the *Sentencing Legislation Amendment Act 2016* received Royal Assent on 7 December 2016, the provisions providing for ‘allowing an offender to undertake community work in lieu of paying a fine under an enhanced Conditional Release Order regime’³¹⁷ are yet to be proclaimed. The Office further notes that, in August 2017, a spokeswoman for the Attorney General, the Hon. John Quigley MLA, stated that ‘the state government would also continue to implement reforms resulting from a review of the *Sentencing Act*, including alternative options for people convicted of lower level offences.

³¹¹ Aboriginal Legal Service of Western Australia (Inc), *Addressing fine default by vulnerable and disadvantaged persons: Briefing Paper*, August 2016, p. 21.

³¹² Inca Consulting, *Evaluation of the Work and Development Order Scheme: Qualitative Component, Final Report*, May 2015, p. 2.

³¹³ Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services*, Commonwealth of Australia, 2016, p. 88.

³¹⁴ The Hon. Michael Mischin, MLC, Attorney General, quoted in *The West Australian*, September 5 2016, viewed 3 October 2016’ <<https://au.news.yahoo.com/thewest/wa/a/32530074/bid-to-dock-fine-dodgers-dole>>.

³¹⁵ The Hon. Michael Mischin, MLC, Attorney General, *Bid to reduce Aboriginal incarceration in WA*, 15 September 2016, viewed 3 October 2016, <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2016/09/Bid-to-reduce-Aboriginal-incarceration-in-WA.aspx>>.

³¹⁶ The Hon. Michael Mischin, MLC, Attorney General, media statement viewed 3 October 2016, <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2016/09/Bid-to-reduce-Aboriginal-incarceration-in-WA.aspx>>.

³¹⁷ The Hon. Michael Mischin, MLC, Attorney General, *Bid to reduce Aboriginal incarceration in WA*, 15 September 2016, viewed 3 October 2016, <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2016/09/Bid-to-reduce-Aboriginal-incarceration-in-WA.aspx>>.

They could instead be subject to enhanced conditional release orders, allowing them to complete community work in lieu of paying a fine'.³¹⁸

In August 2016, the Aboriginal Legal Service of Western Australia released a report entitled *Addressing fine default by vulnerable and disadvantaged persons: Briefing paper*³¹⁹ (the **ALSWA Briefing Paper**). While the ALSWA Briefing Paper focuses on the imprisonment of fine defaulters in Western Australia, it examines approaches 'whereby vulnerable and disadvantaged fine defaulters are encouraged to engage in appropriate treatment, education or training to address the causes of offending and the reasons why they are unable to pay off their fines.'³²⁰ Accordingly the findings of the ALSWA Briefing Paper could also be used to inform debate regarding appropriate methods for collecting debt arising from Criminal Code infringement notices. Of particular relevance, the ALSWA Briefing Paper examines the NSW scheme in detail, including its legislative framework, operation, and effectiveness. Arising from this examination, the ALSWA Briefing Paper concludes that:

ALSWA considers that people who have the financial means and capacity to pay their fines, or make appropriate arrangements in a timely manner should be distinguished from those who are socially and economically disadvantaged or vulnerable ... ALSWA strongly urges the Western Australian Government to implement a similar scheme as exists in New South Wales. Although ALSWA considers the merits of this approach beyond question, it may be worth considering establishing a pilot program in a particular locality or localities with high levels of fines default in order to enable the permanent establishment of the scheme (including necessary legislative amendments) to be fully informed by practical and operational issues that occur in Western Australia and to enable any necessary divergence from the New South Wales model to reflect particular Western Australian circumstances.³²¹

The ALSWA Briefing Paper makes a number of recommendations, including that:

1. The Western Australian government introduce a work and development order scheme for vulnerable and disadvantaged persons based upon the New South Wales WDO scheme.
- ...
2. The Western Australian government investigate the option of also enabling the scheme to be accessible prior to fine default in order to ensure that persons who are fined or receive infringements can apply to participate in the scheme at the earliest opportunity and before enforcement action commences. In order to access the scheme prior to default, the applicant would need to demonstrate the existence of the same conditions outlined above and, that as a consequence of their particular vulnerability or

³¹⁸ SBS NITV News, *WA still locking people up for unpaid fines after Ms Dhu's death*, 6 August 2016, viewed 13 September 2017, <<http://www.sbs.com.au/nitv/nitv-news/article/2017/08/06/wa-still-locking-people-unpaid-fines-after-ms-dhus-death>>.

³¹⁹ Aboriginal Legal Service of Western Australia (Inc), *Addressing fine default by vulnerable and disadvantaged persons: Briefing paper*, Aboriginal Legal Service of Western Australia (Inc), Perth, Western Australia, August 2016.

³²⁰ Aboriginal Legal Service of Western Australia (Inc), *Addressing fine default by vulnerable and disadvantaged persons: Briefing paper*, Aboriginal Legal Service of Western Australia (Inc), Perth, Western Australia, August 2016, p. 2.

³²¹ Aboriginal Legal Service of Western Australia (Inc), *Addressing fine default by vulnerable and disadvantaged persons: Briefing paper*, Aboriginal Legal Service of Western Australia (Inc), Perth, Western Australia, August 2016, p. 24.

disadvantage, the applicant is unlikely to be in a position to pay the fine within a reasonable period.³²²

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 exiate 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. In relation to this issue and its impact in New South Wales (where approved organisations and health practitioners are known as ‘sponsors’), the ALSWA Briefing Paper observes that:

One issue for attracting and retaining sponsors is the lack of funding support – sponsors do not receive any funding to be part of the scheme and for some organisations and health practitioners this is a disincentive because (although not overly burdensome) there remains compliance and reporting requirements. Legal Aid cautioned that in the current climate of reduced funding for non-government organisations, this lack of funding may cause additional problems in the future.³²³

The Office further notes that the Australian Law Reform Commission, in its recent publication, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper No 84*³²⁴, has observed that:

The availability of community-based sentencing options for Aboriginal and Torres Strait Islander offenders can be affected by remoteness and suitability requirements, including the requirement that offenders not have an alcohol or drug dependency and have suitable accommodation.³²⁵

Accordingly, the Australian Law Reform Commission makes the following proposal:

Proposal 4–1 State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are more readily available, particularly in regional and remote areas.³²⁶ [Original emphasis]

³²² Aboriginal Legal Service of Western Australia (Inc), *Addressing fine default by vulnerable and disadvantaged persons: Briefing paper*, Aboriginal Legal Service of Western Australia (Inc), Perth, Western Australia, August 2016, pp. 24-25.

³²³ Aboriginal Legal Service of Western Australia (Inc), *Addressing fine default by vulnerable and disadvantaged persons: Briefing paper*, Aboriginal Legal Service of Western Australia (Inc), Perth, Western Australia, August 2016, p. 15.

³²⁴ 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.

³²⁵ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper No 84*, Australian Law Reform Commission, Canberra, 2017, p. 88.

³²⁶ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper No 84*, Australian Law Reform Commission, Canberra, 2017, p. 88.

The Office's findings support proposal 4-1 of the Australian Law Reform Commission's *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper No 84*. The Office notes that this proposal could be expanded to include consideration of community-based orders other than court sentences (as discussed above).

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.

Ombudsman Western Australia

Level 2, Albert Facey House, 469 Wellington Street Perth WA 6000

PO Box Z5386 St Georges Terrace Perth WA 6831

Tel 08 9220 7555 • Freecall (outside metropolitan area) 1800 117 000 • Fax 08 9220 7500

Email mail@ombudsman.wa.gov.au • Website www.ombudsman.wa.gov.au