CRIMINAL CODE AMENDMENT (INFRINGEMENT NOTICES) BILL 2010

Second Reading

Resumed from 8 September.

MS M.M. QUIRK (Girrawheen) [11.41 am]: The Criminal Code Amendment (Infringement Notices) Bill 2010 seeks to enable minor offences created under the Criminal Code to be dealt with by way of a criminal penalty infringement notice, which, if paid on time, will not result in a criminal conviction. It is not clear from the bill which particular offences will be dealt with in this manner; they will be, in fact, prescribed by way of regulation. I make the observation that this is a growing trend, and I think that should be of concern to everyone in this place because doing it that way seeks to abrogate the role of the Parliament to properly scrutinise laws. It is not possible to do that when so much of the legislative regime will be contained in regulations, and although they are, themselves, subject to disallowance, Mr Acting Speaker will know intimately that disallowance is really permitted or recommended only on very limited, narrow and technical grounds.

It is an indictment when the explanatory memorandum is more than double the size of the actual bill. The vast bulk of what is mentioned in the explanatory memorandum does not even appear in the bill itself; however, I have been informed, by reading the minister's press release of 8 September, what the intention of this legislation is. The minister notes —

> People who commit minor criminal offences could be issued with an on-the-spot fine …

He goes on to state —

> … the Criminal Code Amendment (Infringement Notices) Bill 2010 proposed a new scheme into Western Australia whereby infringement notices could be issued for some Criminal Code offences.
>
> Mr Johnson said under the new system, police could issue Criminal Penalty Infringement Notices (CPINs) for offences such as stealing (only in cases where the value of goods is less than $500) and disorderly behaviour in public, which includes using offensive, insulting or threatening language or urinating.
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> "These CPINs will allow police to remain on frontline duties rather than having to go through a lengthy administrative process to bring an offender before the courts for relatively minor offences," he said.
>
> "It also saves the court system the cost of having to deal with relatively low-level crime, allowing the courts to reduce trial backlogs and focus on more serious criminal matters.
>
> "This is all about smarter and more effective law enforcement, ensuring that our police officers are on the beat fighting crime and our court system is working more efficiently."
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> It would not be mandatory for police to issue a CPIN under the proposed scheme. Police would exercise their discretion to caution, summons, arrest or issue a CPIN on a case-by-case basis.
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> To be eligible for a CPIN, a person must be at least 17 years of age and have their identity confirmed.
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> If a person was issued with a CPIN for any offence, they have the option of paying the fine or having the matter heard in court.
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> If the police issue an infringement notice but subsequently find that, in the light of further information, the matter should be heard in court, they can withdraw the notice and proceed by charge and summons.

I make the point that the vast majority of what is in the minister's press release is not apparent from the legislation.

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.

Although the bill is similar to that in New South Wales, it is not the same. New South Wales has used the opportunity, on a number of occasions, to review how the system was operating, and to then amend it to make it more equitable. Unfortunately, we have not actually learned from the lessons in New South Wales, and what we are introducing with this bill is effectively the same as the original, unamended New South Wales bill. That, I think, is unfortunate. Equally unfortunate, I think, is the omission from the bill of any ability to review the operation of the act. In the New South Wales experience, it has gained from having the capacity to conduct these reviews, and what has ultimately occurred is that it now has much better laws in place. The opposition will be moving amendments to insert a review provision and to also insert a provision requiring the tabling in Parliament of statistics in relation to the operation of the CPIN scheme.

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 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 part of this review, the Ombudsman made a number of recommendations. With the liberty of the house, I will refer to some of those as follows —

> 2 The requirement … that any prints taken in conjunction with the issue of a Criminal Infringement Notice be destroyed upon the payment of the penalty fine, should remain unaltered.
>
> 3 That Parliament consider extending the requirement … that any prints taken in conjunction with the issue of a Criminal Infringement Notice be destroyed upon the payment of the penalty fine, to include instances where a court, in the absence of a finding of guilt, dismisses the Criminal Infringement Notice charge or arrives at a finding of not guilty for the charge.
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> …
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> 5 That clear guidance on what does and does not constitute offensive language and conduct be provided to police officers to determine whether the Criminal Infringement Notice is the appropriate intervention.
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> 6 That the events recorded on COPS —

The New South Wales police database —

> relating to offensive language and conduct offences be reviewed by supervising officers to determine whether the Criminal Infringement Notices issued are the appropriate action to take in relation to the incident.
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> 7 That senior police officers withdraw those Criminal Infringement Notices that are considered to be an inappropriate response to a particular incident.
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> 8 If the Criminal Infringement Notice scheme is extended statewide —

At this stage it is still in a restricted area —

> that data relating to the issuing of Criminal Infringement Notices to Aboriginal persons for offensive language and offensive conduct be specifically recorded, monitored and evaluated

through the systems proposed for monitoring public order offences in the NSW Police *Aboriginal Strategic Direction 2003–2006*.

9 That … service of a Criminal Infringement Notice by post …

…

12 If the Criminal Infringement Notice scheme is extended statewide, that clear guidance be provided to frontline officers on the suitability of using Criminal Infringement Notices in high visibility operations.

…

18 That the use of Criminal Infringement Notices be kept under regular review by Local Area Commands as well as generally across NSW Police to ensure the continuing fair, proper and effective use of the scheme.

19 That Parliament establishes safeguards, by means of legislation, against the presentation to the courts of Criminal Infringement Notice histories where those matters have been satisfied by the payment of the prescribed penalty.

20 That records of Criminal Infringement Notices issued, and whether they have been paid or not, be maintained and police have access to those records to determine whether or not it is appropriate to issue a Criminal Infringement Notice to an offender.

21 That the body of a Criminal Infringement Notice include explanation of the potential consequences liable to be imposed in the event of each of (i) non-payment of the notice, and (ii) failure to successfully defend the matter in a court.

22 That the body of a Criminal Infringement Notice contain advice to the effect that receipt and payment of a Criminal Infringement Notice does not amount to a conviction or finding of guilt, and that it need not be declared as part of any check relating to the criminal history of the recipient.

23 … prior to court election or referral to the State Debt Recovery Office and that such a review facility incorporate the following elements:

- provision for a person to make a representation about a Criminal Infringement Notice within 21 days of its issue, either to NSW Police or the Infringement Processing Bureau
- a requirement that the representation be considered, including appropriate consideration by a senior police officer
- 'stopping the clock' whilst this process occurs, so that at the end of the considerations the person retains the capacity to either pay the fine or elect to proceed to court
- clear guidelines which specify the relevant matters to be considered in reviewing a Criminal Infringement Notice.

…

26 That the *Criminal Procedure Act* be amended to permit the Infringement Processing Bureau to receive and consider — or alternatively, to refer to the State Debt Recovery Office for consideration, without the person being fined incurring additional administrative costs — applications for the payment of a Criminal Infringement Notice by instalments or deferral to such time as agreed with the agency.

27 That the Infringement Processing Bureau and the State Debt Recovery Office introduce a standard form setting out the various arrangements that will be given consideration by the agency, that invites the applicant to select one of the arrangements to form the basis of an application for payment to be made by instalments and/or deferred.

The examination carried out by the Ombudsman was very comprehensive. The recommendations reflect the problems that the NSW police had with the scheme when it was operating at that time. In 2009 a second review was undertaken by the New South Wales Ombudsman. This focused on the impact of these notices on the Aboriginal and Torres Strait Islander population in New South Wales. A number of submissions were made in response to that review. One submission from the Public Interest Advocacy Centre of New South Wales stated —

> It is PIAC's experience that the fines system within NSW disproportionately affects the most vulnerable groups within our community including people from an ATSI —

Aboriginal and Torres Strait Islander —

> background, homeless people, people with an intellectual disability, people with mental health problems, and people from non-English-speaking backgrounds.

The report goes on to state —

> It appears that there is a general lack of consideration by enforcement officers of the person's capacity to pay the penalty, the impact that paying the penalty will have on the person's ability to meet other essential financial responsibilities, like pay the rent or buy food, or the likelihood of secondary offending because the unpaid fine remains outstanding for many months or years.
>
> Unfortunately, it is not surprising that while ATSI people make up only 2% of the NSW population they have received 4.9% of the CINs issued since this scheme commenced statewide in 2007.

The submission highlighted the issues that the Public Interest Advocacy Centre believed needed consideration, including —

1. a CIN recipient's capacity to pay the fine and any accumulated fine debt;
2. cancellation of a CIN recipient's driver's licence and/or vehicle registration;
3. the impact of accumulated debt on education and employment opportunities;
4. a reduction in cautions or warnings being issued (the so-called 'net-widening' of options for minor criminal offences that has been created by the CIN scheme);
5. the use by NSW Police of a recipient's CIN history in later court proceedings, even though the payment of a CIN is not an admission of guilt and does not result in a criminal record for that offence.

Those issues were highlighted very effectively by the Public Interest Advocacy Centre.

The New South Wales Law Society also made a submission to the Ombudsman dated 12 February 2009. It notes that Aboriginal people in remote areas are extremely disadvantaged by the negative impact of unpaid fines and their ability to get a licence. For reasons such as remoteness, lack of transport, hot climate et cetera, Aboriginal people will often drive their cars even when they do not have a driver's licence. It was talking about the impact that any fine default had on the ability to use licences. It also submits that the committee is opposed to the suggestion the police should be able to use fingerprints taken while issuing criminal infringement notices for the investigation of unrelated criminal matters, such as cold cases, that fingerprints are to be destroyed when the CIN is paid, withdrawn or dismissed at court, and that the ability to use fingerprints for the purposes suggested would create a serious temptation for police to issue a CIN simply to obtain fingerprints for cold case hits. 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.

In terms of using the history of the CIN, the Law Society goes on to say —

> The Committee is strongly opposed to the court being provided with a CIN history of a person who appears in court for sentence on a subsequent charge. Issuing a CIN is an administrative exercise and not a criminal proceeding …
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> The production of an offender's criminal history at the time of sentence is done to assist the court in determining an appropriate penalty. Indeed, it is one of the factors a Magistrate or Judge is required to consider … In other words it is a factor of influence.

The Ombudsman review states that payment of a CIN is not an admission of liability or guilt. Without an admission of guilt, it can be of no relevance to the court. Production of the CIN history would be prejudicial to the offender as to his or her character. The Law Society also highlights that the statistics show that only 58 per cent of CINs are paid, only 47 per cent are paid before reaching the State Debt Recovery Office and only seven per cent of Aboriginal recipients paid the CIN before it went to the State Debt Recovery Office, and that, it thinks, is a major concern.

In terms of providing people with limited fixed incomes with additional incentives to pay CINs, the society notes that it supports the suggestion of a discount for persons on limited fixed incomes to provide more of an incentive to pay the fine; and, similarly, it supports measures that begin to address the negative impact of the fine system on vulnerable people in the community.

I am sorry to belabour this point, but it is important that people understand that this system that we are bringing into Western Australia is not perfect in the sense that we could have learned more from the New South Wales experience and incorporated some of the recommendations made by bodies such as the Public Interest Advocacy Centre and also the New South Wales Law Society.

The New South Wales Ombudsman in his second report, which was in 2010, made certain recommendations in relation to Aboriginal and Torres Strait Islanders. He found that police issued almost 9 000 CINs in the first year of the statewide scheme, including 645 to Aboriginal suspects. He found that 70 per cent of all CINs, and 83 per cent of all CINs issued to Aboriginal people, were for offensive conduct or offensive language. For Aboriginal suspects, offensive language was by far the most common offence, making up 45 per cent of CINs issued to Aboriginal people. He further found that CINs are now the most common way for police to deal with offensive conduct and offensive language incidents. He notes that in the last three months of 2008, 57 per cent of all offensive conduct or offensive language incidents resulted in a CIN, while the remaining 42 per cent led to a charge. Recent changes to police procedures for recording of warnings or cautions issued to adults make it difficult to determine whether and how often adults are cautioned instead of being charged or issued with a CIN, and until 2008 between 16 per cent and 20 per cent of all offensive conduct and offensive language incidents involving adults resulted in the recording of a warning. Changes to the police computerised operational policing system in 2008 effectively removed this option. Police advised that adults are still informally cautioned where appropriate, but it is not clear how often this is occurring.

The Ombudsman further finds that the data suggests there has been a significant net increase in minor matters resulting in some form of sanction; that is, although fewer offensive conduct and offensive language suspects were brought before the courts in 2008, there was a steep rise in additional CINs issued that greatly outnumbered any decrease in the charges. Finally he notes that although police policy requires CINs to be served on a person at the time of or soon after the alleged offence, almost half were served by post, raising questions about how many suspects received the notice, what information police provide about options for dealing with a penalty notice and the consequences for failing to pay or challenging the payment. They were all issues that were identified by the New South Wales Ombudsman when he looked at the impact of these kinds of regimes on Aboriginal and Torres Strait Islander offenders.

A couple of the particular recommendations that the Ombudsman made were that police officers needed better training in what constituted offensive conducted; that local strategies needed to be developed for the over-representation of Aboriginal people; that police officers needed to be given the option of issuing an official caution in lieu of a CIN; that certainly the local area command of police needed to have information to assist Aboriginal people in managing the payment of their fines and any impact in terms of drugs or licence suspension; 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; that the State Debt Recovery Office consider keeping records about the Aboriginality of CIN recipients; and that the Minister for Police take steps to clarify whether fingerprint and palm print identification evidence gathered may also be used to investigate offences unrelated to the CIN notice. Again, these are wide-ranging deliberations.

Mr R.F. Johnson: What was their recommendation in relation to police using any fingerprints and palm prints in relation to a CIN offence? Are you saying that they oppose police being able to put that in the database to see whether they have committed any other crimes?

Ms M.M. QUIRK: The recommendation was that the Minister for Police take steps to have the Law Enforcement (Powers and Responsibilities) Act amended to clarify whether fingerprint and palm print identification that was gathered under a particular section of that act may also be used to investigate offences unrelated to the CIN and to consider the adequacy of associated safeguards. He is not necessarily recommending against it; what he was saying was that it needs to be clarified as there is some level of uncertainty.

The Law Society of New South Wales was also concerned that criminal infringement notice histories were being presented to courts and included as part of an offender's antecedents in subsequent proceedings. The NSW Law Society made representations to that state's Attorney General in August 2009, saying that the practice of providing CIN histories to the court was contrary to the legislative intent, and recommending that safeguards be put in place to prevent CIN matters from being presented as part of a criminal history for the reasons I set out earlier. We will of course be seeking some assurances from the Minister for Police during the consideration in

detail stage that those sorts of practices will not occur in Western Australia and also about the use of identifying material if an infringement is paid.

As I said, there is no sunset clause or provision in the bill for review of the operation of this scheme. From the valuable work that has taken place in New South Wales, I think we would benefit likewise if, after a certain time, there was the opportunity to do a similar detailed analysis of the impact of CINs in Western Australia. The minister will recall one of the findings I made reference to, which was that although there had been a decrease in the number of offensive behaviour cases that went to court in NSW, there was not a corresponding increase in the number of CINs issued but an escalation in the number of CINs issued. What happened was that more cases were dealt with by way of sanction for offensive behaviour than had previously occurred. Although the Ombudsman said that he was constrained by a lack of detailed statistics on cautions, it is quite clear that the use of cautions dropped considerably as well. This is reasonably important.

I will refer to a couple of other matters. The first is contained in an excellent paper written by the Law and Justice Foundation of New South Wales called "Fine but not fair: Fines and disadvantage". The paper sums up the issues in New South Wales that I think will also be relevant in the operation of this bill in Western Australia, and states —

> Fines are issued for a range of minor offences and are a valuable alternative to matters being taken to court. However, Foundation research suggests that people experiencing social or economic disadvantage are more vulnerable to incurring fines as a result of issues such as homelessness and mental illness. The situation is exacerbated by the number and range of finable offences and the lack of proportionality between some offences and the penalty amounts. Further, fines can disproportionately impact on people who are socially and economically disadvantaged and may lead to the accrual of multiple unpaid fines. This can in turn compound a person's disadvantage, especially when facing barriers to legal assistance.
>
> The NSW penalty notice system is difficult for disadvantaged people to negotiate, has little accommodation for those with 'special circumstances' and has few options available to those who are prepared to clear their fines although their financial means may be limited.

That will be equally applicable in this case. 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. As I said, we cannot satisfy ourselves about any of that stuff given that much of the detail is not in the legislation. We will have to take at face value the assurances of the Minister for Police on how some of these issues will be managed, which I hope he will provide during the consideration in detail stage.

The final issue I will raise is that of how the justice system impacts on marginalised people in our society. In the course of considering issues relating to the reform of the management of fines in New South Wales, the Homeless Persons' Legal Service of the Public Interest Advocacy Centre made an interesting suggestion in its paper "Not such a fine thing! Options for Reform of the Management of Fines Matters in NSW". It canvassed the idea of having a special circumstances court modelled on the system that operates in some parts of California under the homeless court program. The paper suggested that —

> The NSW justice system would be well served by introducing a Special Circumstances Court … to deal with fines and other legal problems for disadvantaged people. This could result in the court system becoming more efficient in its handling of fines matters. It would also be more accessible for people who are homeless, living in poverty or disadvantaged by physical or intellectual disabilities, chronic alcoholism or other drug dependence, family fragmentation, personal histories of abuse, illiteracy, discrimination and lack of social supports.
>
> The court could take an active role in resolving fines matters, rather than the present system where high levels of uncollected fines accumulate at the SDRO.

The document refers to the Circle Sentencing System operating in Aboriginal communities in parts of New South Wales as a possible model. It also makes reference to the counties, mainly in California, that operate specialist homeless courts, stating —

> The Homeless Court Program operates on a monthly basis at two of San Diego's largest shelters. A special voluntary court session is convened at the shelter — a judge, clerk, public defender and prosecutor come to the shelter to provide greater access to justice to homeless people with outstanding criminal misdemeanour warrants. The philosophy behind this unique program is rehabilitative rather than punitive, and no one is taken into custody.
>
> The key players involved in the program realise that outstanding criminal warrants often preclude homeless people from accessing vital services such as employment, housing, public benefits, and treatment for mental health and/or substance abuse problems. As such, the court seeks to address the legal problems of the homeless participants as well as linking them with appropriate services and treatment programs.

I think the government should, down the track, consider such an option.

There are sound public policy reasons to ensure that this regime works as efficiently and equitably as possible. The government should be open to the idea of exploring how well the system can work by making provision for a statutory review, which is not in the current legislation. I am not one to say, "I told you so", but I think that, based on the New South Wales experience, one could quite confidently predict that similar problems will arise in Western Australia. As the legislation stands, we have no way of evaluating the system; no way of bringing it back to Parliament to ameliorate any possible problems. For that reason, the opposition will seek to amend the bill.

In conclusion, the opposition will support the bill in principle. It will seek to amend the legislation to include a review of the laws after three years and will also seek an amendment mandating the minister to table in Parliament each year a report containing figures of the numbers and kinds of charges dealt with in this manner.

MR P. PAPALIA (Warnbro) [12.23 pm]: 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 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.

Mr R.F. Johnson: Surely this would be better than prison.

Mr P. PAPALIA: I agree. And I agree with the intent. As the shadow Minister for Police indicated, the opposition supports the intent of this legislation. I thoroughly endorse the shadow minister's recommendations and her proposal to move amendments. I urge the minister to consider her amendments for this reason: I agree that fines are far better than a term of imprisonment; however, this legislation has the potential for an inadvertent outcome whereby it places another burden on those individuals who are already being disproportionately impacted. As the shadow minister pointed out, in New South Wales a disproportionate number of criminal infringement notices were issued to a small proportion of the population—representing twice their representation in the population; that is, two per cent of the New South Wales population is Aboriginal yet that group received 4.9 per cent, or more than twice the rate, of criminal infringement notices. That is not to say that is necessarily a bad thing; hopefully, it could in many cases divert people from accumulating offences, going to court and ending up in the prison system. Nevertheless, the New South Wales experience has shown the real need for us to tread warily and to include the necessity for review in the legislation—to ensure statutory review of the outcomes on a regular basis. If we do not, we will find the problems when they emerge in the prison system. It will be too late to act then, or it will make the challenge of acting at a later stage even more difficult.

There is a need to learn from the New South Wales experience; if there is a way of making this legislation more equitable, I would urge the minister to consider it. The Minister for Police knows that the member for Girrawheen is forensic in her ability to research and assess legislative outcomes in other jurisdictions. I suspect that she has identified some very good amendments that the minister should really consider. The member for Girrawheen has probably done some work that perhaps even the minister's staff have not done. This is an opportunity, particularly in light of the big warning from the other place that the minister was given today about the general tenor of his law and order agenda.

Mr R.F. Johnson: I have not been given a big warning.

Mr P. PAPALIA: I think the minister received a fairly significant message today.

Mr R.F. Johnson: From the other place?

Mr P. PAPALIA: Yes; from the committee that reported in the other place.

Mr R.F. Johnson: You are talking about a committee report; you are not talking about the other place.

Mr P. PAPALIA: I think that is good enough, minister. What has happened is a message that will ring loud and clear in the state of Western Australia. Even the most benign, most superficial of media analysts will understand the message received from that committee in the other place. By majority finding, the committee determined that it could find no justification for that particular legislation. A string of legislation has been introduced by this government that has had that negative impact on a disadvantaged minority of the people of Western Australia, as identified by the Chief Justice, the Law Society and many people in this place, including on the government's own side. I think that it is time for the government to consider that perhaps it has embarked on a path that is purely populist in nature without giving thought to the consequences of its actions. The wider consequences will be beyond the immediate —

Mr R.F. Johnson: Are you talking about this bill or something else?

Mr P. PAPALIA: I am talking about the potential consequences of the Criminal Code Amendment (Infringement Notices) Bill, which is why I implore the minister to consider the amendments that will be moved by the opposition.

Mr R.F. Johnson: I always consider the member for Girrawheen's amendments—she knows that.

Mr P. PAPALIA: She moves them on behalf of the opposition and I hope that the minister will consider them in the context of the wider —

Mr R.F. Johnson: She is a very good advocate, I believe, and a responsible shadow Minister for Police. She is not an impostor that I have to put up with occasionally.

Mr P. PAPALIA: Is the minister's ego slightly bruised? Is the minister feeling a little under the pump in light of the absolute bashing he has received publicly over the past week with regard to his behaviour in this place and his response to some of the actions of some people in the police service for whom he as the minister is responsible? Is the minister perhaps feeling a little threatened? Is the minister perhaps feeling that he has gone so far down this path that it will be pretty difficult for him to turn around and go back?

Mr R.F. Johnson: Not at all.

Mr P. PAPALIA: Is the minister feeling that perhaps some of the other people on his side of the house might start to shift away from him with regard to some his legislative agenda and leave him isolated like the shag on the rock that he is? Is that what the minister is worried about?

Mr R.F. Johnson: I am not worried about anything, member—not about anything!

Mr P. PAPALIA: I would be worried if I were the minister because —

The ACTING SPEAKER (Mrs L.M. Harvey): Member for Warnbro, speak to the bill—the road traffic legislation amendment —

Mr P. PAPALIA: No, the criminal code amendment —

Mr R.F. Johnson: No, it is the criminal infringement notices legislation. But you're quite right, Madam Acting Speaker, the member is not talking to the bill at the moment; he's just trying to give me a serve again!

Mr P. PAPALIA: Madam Acting Speaker, I concede that I was digressing a little.

The ACTING SPEAKER: Somewhat!

Mr P. PAPALIA: I think that the points made by the member for Girrawheen should serve as suitable warning to the minister in light of the wider context of Western Australian society and what is going on in the lives of the people who will be most impacted on by this legislation. I think that the intended objectives of this legislation are laudable and, naturally, we do support the legislation. However, I think it is essential that the minister considers putting as many safeguards and precautions as is possible around this type of legislation, as well as other pieces of legislation the government might be considering introducing or even reintroducing to this place, as the government continues down this path it has started on.

I think there is no doubt that any additional burden that the government places on people who may be disadvantaged already—whether they are suffering economic disadvantage, suffering a psychiatric disability or are in a minority who probably suffer both of those and have already started with a very significant challenge in life—must be considered in its entirety as much as possible in advance and must come with the requirement for appropriate and regular review of the legislation. That will ensure we have the potential to analyse the outcomes before it is too late and hundreds and hundreds, even thousands, more people end up in our prison system. I particularly support the proposal by the shadow minister for a requirement for the accrual of statistical data on those who are impacted by this legislation. We need this information because I have seen in the corrective services world and in our prison system that there is an absolute paucity of real knowledge. It is not necessarily this government's fault; that situation has occurred over time.

There has been consistent failure on the part of the bureaucracy on behalf of this state to acquire the information needed to properly assess whether legislation actually achieves the objectives for which it was introduced. At the moment we know that that analysis is not possible in the corrective services world. We know that it is impossible for the Minister for Corrective Services, the Attorney General, to give a fair and accurate assessment of the state of mental health issues, the scope and nature of those issues, inside our prison system. It is not his fault; the system does not acquire that information. We know this because as recently as Tuesday, the Premier tabled a question, which we ended up giving on notice because last week the police system collapsed and was unable to provide us with the answers, and the lack of information available became clear in a series of questions asked about mentally ill people who had been escorted to a mental health facility from emergency departments in hospitals or from their homes by police in accordance with the Mental Health Act. The question was asked about how many times that had occurred in the past 12 months. We found out that it had occurred more than daily; there were 382 incidents. That was the only part of the question the government was able to answer. When I asked how many of those escort occasions had resulted in an assault on the police officer asked to escort the mentally impaired individual who is possibly suffering psychosis to a mental health facility, the government could not answer. It is appalling that the system cannot provide an answer for that question and provide that sort of information. The next question I asked was: how many of those people who were definitely mentally ill, possibly suffering psychosis, and going to be escorted by necessity by the police in accordance with the Mental Health Act under laws that we passed in this place, were charged for an offence that attracts mandatory sentencing? The government could not answer that question. That is appalling! It is disgraceful that we as a Parliament and the government of the day do not know the answer to that. That situation is not necessarily the

current government's fault but as the government in power now, it has the ability to address it. It is appalling and it is not satisfactory that we cannot even say how many mentally ill people are put in close proximity with police officers, although we introduced mandatory sentencing legislation that will result in those people going to prison if they assault the police, whereby potentially—I would suggest quite a few occasions out of that 382—those mentally ill people are suffering psychosis and are very likely to, but not always, be violent. We cannot even say how many times that circumstance occurred. Therefore, I am saying that the necessity now is that we consider at the outset of this legislation compelling the system to acquire the data to analyse how well we have done, whether this legislation works and whether it targets what we hope it will target, and enable us to raise the alarm in the event that it does not. We need this legislation to give us the ability to raise the alarm and cause us to pause in the event that we end up yet again targeting people who are already severely disproportionately represented in our prison system.

We know that the prison system fails to change behaviour. We know that the prison system results in the average person reoffending at a rate of 40 per cent. I suspect that this legislation will impact fairly significantly on Aboriginal people, and once Aboriginal people get into that prison system, they are virtually condemned to re-cycle through it for the rest of their lives because 60 per cent of Aboriginal people who go into prison reoffend within two years. These are the same people who can continue to cycle through the system and we condemn them to failure because we have failed. I do not endorse in any way criminality, poor behaviour or inappropriate behaviour, but we have to question whether what we are doing works. The way we do that is to take the opportunity when we introduce new legislation to impose requirements for a review and impose the necessity to acquire statistics that break down the detail of who has been impacted by the legislation.

DR J.M. WOOLLARD (Alfred Cove) [12.40 pm]: I support the Criminal Code Amendment (Infringement Notices) Bill 2010. I thank the minister for the briefing that was provided to me on this bill by Malcolm Penn, the executive manager, and Emma Clegg, the research officer, in the legal and legislative services area of WA Police. I found that briefing very helpful. I also appreciated listening to the debate this morning. The member for Girrawheen has done a lot of homework in this area, and I look forward to reading some of the reports that the member referred to. I believe that today we will be dealing only with the second reading and not the consideration in detail. Will we be doing the consideration in detail today, minister?

Mr R.F. Johnson: No.

Dr J.M. WOOLLARD: In that case I look forward to reading some of those reports before we go into consideration in detail. I do not agree with a lot of the things that the member for Girrawheen has said in this debate. But some of the things that she has said I do agree with.

The purpose of this bill is to introduce into the Criminal Procedure Act 2004 a new chapter dealing with infringement notices. As many members of this house would be aware, up until approximately 2004, the Criminal Code focused just on criminal offences and the penalties for criminal offences. The Criminal Law Amendment (Simple Offences) Act 2004 introduced non-criminal offences into the Criminal Code. Some of those non-criminal offences came from the Police Act, and some came from other acts. That is why some offences that are dealt with under in the Criminal Code do not have a penalty of imprisonment. Currently under the Criminal Code there is no mechanism for the police to issue infringement notices. As the minister said in his second reading speech, infringement notices are issued for things such as parking, traffic and littering offences. The minister said also that, more recently, infringement notices have been introduced into the Criminal Code of other states in Australia, and of the United Kingdom, for offences that have traditionally been characterised as criminal offences.

When this bill comes into effect, infringement notices will be issued by way of regulation. The member for Girrawheen said that we need to have a review of the act. I believe we also need to have a review of the Criminal Procedure Act. Part 2 of the Criminal Procedure Act is headed "Dealing with alleged offenders without prosecuting them". Section 5 of part 2, headed "Prescribed offences and modified penalties for them", provides —

> (1) Regulations made under a prescribed Act may prescribe an offence under the prescribed Act, or under the regulations made under the prescribed Act, to be an offence for which an infringement notice may be issued under this Part.
>
> (2) An offence must not be prescribed under subsection (1) if the penalty for the offence is or includes imprisonment.

The member for Girrawheen said that in order for an infringement notice to be issued, the offence has to be a minor offence. That is consistent with what is said in the Criminal Procedure Act. It goes on to provide —

> (3) For each offence prescribed under subsection (1), the regulations made under the prescribed act must prescribe —

(a) a modified penalty that is applicable in any circumstances in which the offence is committed; or

(b) a modified penalty that is applicable if the offence is committed in circumstances specified in the regulations.

(4) Any modified penalty prescribed under subsection (3) for an offence —

(a) must be an amount of money; and

(b) must not exceed 20% of the statutory penalty for the offence.

The member for Girrawheen said that we need to have a review of the act.

Ms M.M. Quirk: I am not talking about the act generally. It is just these particular provisions.

Dr J.M. WOOLLARD: But it is in relation to infringement notices. I was about to say that in dealing with alleged offenders without prosecuting them, the Criminal Procedure Act provides only for penalties. When we were debating the cannabis legislation, I wanted community work orders to be introduced as an option for dealing with offenders without prosecuting them. That would be an excellent idea also in this area. I therefore suggest that subsection (4) be amended so that instead of saying that any modified penalty must be an amount of money, it says that any modified penalty must be an amount of money; or must be a prescribed amount of time to be undertaken under a community work order. That would mean that if people cannot afford to pay a penalty of $500 for the offence, they will have the option of a community work order. For that reason, I believe we also need to have a review of the Criminal Procedure Act.

I look forward to reading the reports from the New South Wales Ombudsman that were mentioned by the member for Girrawheen. I wrote down the names of some of those reports. Some of the issues raised in those reports have been addressed in this legislation. I certainly discussed some of those issues when I had my briefing on the bill. However, the detail will be in the regulations. We will have an opportunity, when the regulations are tabled, to look at those recommendations from the New South Wales Ombudsman and see whether the regulations that are introduced under this act —

Ms M.M. Quirk: But this bill will already have passed.

Dr J.M. WOOLLARD: The bill may have passed, but all this bill does is allow for regulations to be written to provide for infringement notices for, at the moment, stealing and disorderly behaviour. Those regulations will then come back to this house.

Ms M.M. Quirk: No, they won't.

Dr J.M. WOOLLARD: They will; all regulations come back to the house.

Ms M.M. Quirk: Not from the Joint Standing Committee on Delegated Legislation, which recommends disallowance on very narrow grounds that are not necessarily dealing with equity; it has fairly restricted grounds. So it is not ordinarily the case that we see regulations in this chamber.

Dr J.M. WOOLLARD: Mr Deputy Speaker, I seek your counsel sitting in the chair.

Debate interrupted, pursuant to standing orders.