CHEAP AND EFFICIENT JUSTICE? NEOLIBERAL DISCOURSE AND CRIMINAL INFRINGEMENT NOTICES

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Criminal infringement notices (CINs) are now a familiar component of the criminal justice system, especially in the policing of public order and minor offences. Successive Australian state and territory governments have implemented CIN schemes with the objective of reducing administrative demands and trial backlogs, cutting down on paperwork, freeing up police time, saving costs and keeping police 'on the beat'. This article examines how CINs have been rationalised on the basis of neoliberal economic values, which have overshadowed ordinary criminal justice concerns of morality and responsibility. It focuses on the introduction of criminal code infringement notices in Western Australia for two offences: disorderly behaviour, and steal anything up to the value of $500. The author argues that there is a need to recognise—and to resist—the encroachment of neoliberal economisation discourses into the realm of criminal law.

INTRODUCTION

> 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 … Is it better for police? Is it better for the offender? I think it is. I think everybody is a winner here.[1]

In Western Australia (WA), police may issue criminal code infringement notices ('CCINs') for two offences: disorderly behaviour, and steal anything up to the value of $500. Commencing in March 2015, the scheme enables police to issue infringement notices with a 'modified penalty' of $500 as an alternative to the person being charged or summonsed and appearing before a court. The WA Government promised that CCINs would yield a number of benefits,

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[1] Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 November 2010, 8351b-8363a (Rob Johnson).

including diverting alleged offenders away from the court system; allowing 'victims' to have their cases remedied quickly; and enabling CCIN recipients to avoid a criminal record.[2]

Several months after the scheme commenced, WA police issued a CCIN fine of $500 to a 20-year-old Indigenous woman for allegedly stealing a $6.75 box of tampons at a Caltex service station in Coolgardie, a remote WA mining town. The fixed $500 fine amounted to 74 times the value of the stolen property. The woman's 'excuse' given to police was that she had taken the tampons for another woman who had been 'too ashamed' to purchase them. Constable Evans accepted this to be 'probably true'.[3] He nonetheless determined that issuing a CCIN was the appropriate course of action.

Following the incident, Coolgardie Police tweeted about their decision to issue the $500 fine on Twitter. The decision to issue the CCIN and the crowdfunding campaign soon attracted international media attention. *Essentials 4 Woman SA*, an organisation for disadvantaged women, responded by launching a crowdfunding campaign to cover the $500 penalty. The campaign acknowledged that sanitary items can be prohibitively expensive for women who are financially disadvantaged.[4] In just two days, the campaign had raised $3,456 over its goal of $500.[5]

In many ways, this case study reflects central problems with CCINs that will be further explored in this article. Firstly, it demonstrates how fixed infringement fines may be disproportionate to, and fail to take into account, the recipient's circumstances and level of culpability. Secondly, the WA Ombudsman has found that CCINs have had the starkest net-widening impact

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[2] Ibid 8351b-8363a (Rob Johnson).

[3] Calla Wahlquist, 'Aboriginal Woman in WA Fined $500 for Stealing $6.75 Box of Tampons' *The Guardian*, 15 October 2015 <http://www.theguardian.com/australia-news/2015/oct/15/aboriginal-woman-in-wa-fined-500-for-stealing-675-box-of-tampons>.

[4] Until recently, tampons, sanitary pads and liners (unlike condoms or lubricants) were considered to be 'non-essential' or 'luxury' items in Australia which attracted a 10% GST, raising approximately $38 million a year in revenue: Alice Workman, 'We Have The Receipts On How Much It Would Cost To Remove The Tampon Tax, And It Ain't That Much' *BuzzFeed*, 13 June 2017 <https://www.buzzfeed.com/aliceworkman/tamponomics>; Josh Butler, 'Senate Votes To Keep The GST On Tampons And Sanitary Pads' *Huffington Post*, 19 June 2017 <http://www.huffingtonpost.com.au/2017/06/18/senate-votes-to-keep-the-gst-on-tampons-and-sanitary-pads_a_22488719/>.

[5] The fine was paid on the woman's behalf with the remainder (minus the crowd funding fees) given to the woman and donated to charity: *Restoring Dignity for the Woman WA Police Fined $500 for Stealing Tampons!* <https://ozcrowd.com/campaign/1035>; Saffron Howden, 'Woman Fined for $6.75 Tampon Box Theft Donates Crowdfunded Money to Charity' *The Sydney Morning Herald*, 3 November 2015 <http://www.smh.com.au/national/woman-fined-for-675-tampon-box-theft-donates-crowdfunded-money-to-charity-20151103-gkpnfm.html>.

on Aboriginal females for alleged incidents of stealing.[6] Further, persons recorded as being of 'Aboriginal appearance'[7] accounted for 36% of CCIN recipients, despite Aboriginal Australians representing just 3.1% of the WA population.[8] Thirdly, the WA Ombudsman found a correlation between increased socio-economic disadvantage and an increased likelihood of receiving a CCIN.[9] Finally, the ability to source crowdfunding highlights O'Malley's critique of fines more generally as having 'the amazing characteristic' and 'striking peculiarity' of 'being virtually the only criminal penalty that legally can be borne by someone other than the offender'.[10]

What is exceptional about this case, however, is that the officer's tweet about the decision to issue the CCIN meant that in this instance, the police officer's exercise of discretion did not go 'under the radar' but was exposed to public scrutiny. Ordinarily, there is no public account of the rationale and process for issuing infringement notices. This is because unlike a judicial officer, a police officer is under no obligation to give reasons for their decisions. Instead, CCINs are examples of 'dividualised' justice—highly 'impersonal' sanctions that can 'be monitored, delivered and expiated privately and anonymously'.[11]

When Constable Evans was asked whether the decision to issue the CCIN was an appropriate use of police discretion, he rationalised the decision in terms of efficiency: 'prior to March, we would have to arrest her under suspicion, bring her back, do a recorded interview—it would have taken pretty much all day'.[12] This statement is misleading. Police had—and continue to have—the discretion to caution a suspect for low-level offending. But what is most striking about Evans' explanation is its lack of concern for the alleged offender's criminal culpability. Instead, the decision to issue a CCIN was based

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[6] WA Ombudsman, *A Report on the Monitoring of the Infringement Notices Provisions of The Criminal Code*, Final Report, WA Ombudsman, 2017) vol 3, 71 <http://www.ombudsman.wa.gov.au/Publications/Infringement-Notices.htm>.

[7] See n 67 for criticism of recording Aboriginal or Torres Strait Islander identity in police statistics in this way.

[8] Australian Bureau of Statistics, *2011 - 2016 Statistics: Western Australia* <http://stat.abs.gov.au/itt/r.jsp?RegionSummary&region=5&dataset=ABS_REGIONAL_ASGS2016&geoconcept=ASGS_2016&measure=MEASURE&datasetASGS=ABS_REGIONAL_ASGS2016&datasetLGA=ABS_REGIONAL_LGA2016&regionLGA=LGA_2016&regionASGS=ASGS_2016>.

[9] WA Ombudsman, above n 6, vol 3, 94-7.

[10] Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (Routledge, 2009) 4.

[11] Ibid 160–1.

[12] Wahlquist, above n 3.

on the notion of quick and efficient justice. The constable's message was echoed by then WA Police Minister, Liza Harvey, who explained that CCINs provide 'swift justice, save court time and allow police to continue frontline duties'. Harvey added: 'this Government doesn't apologise for handing out swift punishment of actual consequence'.[13]

Both police and politicians adopted a neoliberal discourse of economisation to justify the implementation and use of CCINs in WA. Within this discourse, CCINs are justified in terms of increasing police productivity and flexibility; reducing administrative demands, paperwork and trial backlogs; freeing up police time; and saving costs. Routine police investigation and traditional court processes are commodified and depicted as unnecessary impediments to productivity; while justice is measured in hours and dollars rather than in terms of procedural fairness, the punishment fitting the crime and the application of the rule of law.

This article examines the introduction and operation of CCINs in WA to demonstrate how criminal justice is being discursively reconstructed along neoliberal economic lines. This argument will be advanced via five parts. Part I outlines the methodology which informs the article. Part II examines key features of, and identifies problems associated with, criminal infringement notices (referred to generally as 'CINs', whereas the acronym 'CCINs' is used to refer specifically to the WA scheme). Part III examines key features of the CCIN scheme in WA and reflects on the WA Ombudsman's 2017 report ('the Ombudsman's report') on the scheme's operation from the year commencing 5 March 2015 ('the monitoring period').[14] After addressing key concerns relating to the use of CCINS, Part IV highlights how CCINs have been represented, legitimised and evaluated in discourse with reference to second reading speeches and ministerial statements relating to CCINS, as well as the Ombudsman's report.

Part V summarises key findings and evaluates the implications of these for the application of administrative fines to criminal offending more generally. It argues that criminal justice discourse in relation to infringement notices has fostered and naturalised an ideology in which fiscal goals overshadow and supplant values traditionally associated with criminal law and punishment:

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[13] Ibid.

[14] The *Criminal Code* (WA) s 723 provides that: 'For the period of 12 months after the commencement of this section [4 March 2015], the Ombudsman is to keep under scrutiny the operation of the provisions of this Chapter and the regulations made under this Chapter'.

impartiality, fairness, moral culpability, deterrence, rehabilitation and retribution. The author ultimately takes an interventionist stance by denaturalising the market logic that has infused criminal justice discourse. Prior to advancing this argument, the following section details the methodology used in the article.

I METHODOLOGY

In 2001, Bourdieu and Wacquant noticed how, within a matter of a few years, a 'new planetary vulgate' had entered the language of 'employers, international officials, high-ranking civil servants, media intellectuals and high-flying journalists'.[15] This strange 'Newspeak' was replete with a vocabulary that seemed to 'have sprung out of nowhere', yet now flowed freely from everyone's lips, with words including globalisation, flexibility, governance, employability, new economy and zero tolerance.[16] Alongside the emergence of this NewLiberalSpeak was the 'conspicuous' suppression of terms such as capitalism, class, exploitation, domination and inequality, such words having been 'peremptorily dismissed under the pretext that they are obsolete and non-pertinent'.[17]

These buzzwords associated with the domain of free market capitalism are now far from peculiar. Neoliberal free market thinking and values have made considerable inroads into areas where it was once thought the market did not belong. The tide of the 'Neoliberal project'[18] rose in the early 1980s, a period in which US and UK leaders Ronald Reagan and Margaret Thatcher maintained an unswerving commitment to free markets and private enterprise and alongside these, the dismantling of government institutions and social welfare. This neoliberal agenda was encapsulated in Reagan's mantra: 'Government is

[15] Pierre Bourdieu and Loïc Wacquant, 'NewLiberalSpeak: Notes on the New Planetary Vulgate' (2001) 105 *Radical Philosophy* 2, 2.
[16] Ibid.
[17] Ibid.
[18] Rick Matthews, 'Marxist Criminology' in Walter S DeKeseredy and Molly Dragiewicz (eds), *Routledge handbook of critical criminology* (Routledge, 2012) 93, 99; Neoliberalism is characterised by the 'deregulation of business, the privatization of state enterprises and responsibilities, the dismantling of social programs, the expansion of market forces into new corners of society, a much-weakened trade union movement, the return of unrestrained competition, and the rebirth of previously rejected free-market economic theories': Terrence McDonough, Michael Reich and David M Kotz, *Contemporary Capitalism and Its Crises: Social Structure of Accumulation Theory for the 21st Century* (Cambridge University Press, 2010) 9.

the problem'.[19] Adherents to neoliberal economic ideologies professed free, deregulated markets to be the primary means for achieving the public good. From the 1980s onwards, the market expanded into and 'colonised'[20] parts of the public realm.[21] As a result of this colonisation, we now have for-profit schools and hospitals; 'entrepreneurial universities'[22] —restructured and rebranded around the goals of increased outputs, competitiveness, customer-orientation, student employability, market relevance and private partnerships; and privatised prisons, where private companies are building prisons, providing food and medical care and are also involved in their day-to-day management, transforming this once government institution into a for-profit business.[23] As Sandel has observed: 'The reach of markets, and market-oriented thinking, into aspects of life traditionally governed by nonmarket norms is one of the most significant developments of our time'.[24]

The concepts associated with neoliberal economics and its jargon are reengineering all aspects of social, economic and cultural life, including criminal law and procedure. CINs are but one example of new measures implemented in the criminal justice system on the rationale of increasing efficiency and productivity while reducing expenditure. Another recent initiative is the New South Wales (NSW) Government's 'tough and smart justice' sentencing reforms. Introduced in 2017, the reforms encompass measures such as fixed sentencing discounts for the utilitarian value of early guilty pleas, regulating the early disclosure of evidence including the ability to serve briefs of evidence in inadmissible form, mandatory case conferencing between parties and the replacement of committal hearings presided over by a magistrate with senior prosecutors who 'screen out' cases through charge

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[19] Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Penguin, 2012) 6; Anthony S Campagna, *The Economy in the Reagan Years: The Economic Consequences of the Reagan Administrations* (Greenwood, 1994) 123.

[20] Norman Fairclough, 'Critical Discourse Analysis and the Marketization of Public Discourse: The Universities' (1993) 4(2) *Discourse and Society* 133.

[21] Christopher Hart, Piotr Cap and Gerlinde Mautner (eds), 'The Privatization of the Public Realm: A Critical Perspective on Practice and Discourse' in *Contemporary Critical Discourse Studies* (Bloomsbury, 2014) 461.

[22] Ibid.

[23] Paul Leighton and Donna Selman, 'Private Prisons, the Criminal Justice–Industrial Complex and Bodies Destined for Profitable Punishment' in Walter S. DeKeseredy and Molly Dragiewicz (eds), *Routledge Handbook of Critical Criminology* (Routledge, 2012) 265. Also of note are for-profit schools and hospitals.

[24] Sandel, above n 19, 7.

certification.[25] Similar to CINs, these reforms replace judicial processes with 'technocratic' [26] and administrative ones, reduce judicial discretion and oversight within the criminal justice process, and represent a significant departure from the traditional adversarial system. And like CINs, these reforms were sold to the public using utilitarian, neoliberal reasoning, in terms of their ability to 'deliver swifter, more certain justice' and to 'reduce time and money wasted on police, courts and lawyers'.[27]

With this socio-political context in mind, this research identifies—and argues against—free market and economic logic as a rationale for implementing on-the-spot fines for criminal offending. In doing so, the article builds on O'Malley's analysis of fines as melded into, and symptomatic of, consumer societies.[28] In 2009, O'Malley postulated that: 'The persistence and expansion of regulatory fines in the "post-social era", the era of consumer-led market liberalism, perhaps is due not to their "technical" nature alone, but also to their conformity with neoliberal political ideals'.[29] The author advances O'Malley's suggestion by demonstrating how CINs have been rationalised using neoliberal economic ideals of increasing efficiency and productivity, while cutting expenditure, paperwork and 'red tape'. These neoliberal ideals have crowded out criminal sentencing concerns which prioritise the proportionate punishment of an offender in a fashion which reflects the objective seriousness of the offence and their individual culpability.

The analysis is distinguished from O'Malley's in that its focus is not on *money's* peculiar characteristics as a legal sanction.[30] Instead, this article examines how CINs—a quasi-administrative, quasi-criminal sanction—have been legitimised using neoliberal economic reasoning. Criminal law scholars have largely overlooked how neoliberal economic principles have become the central justification for applying administrative fines to criminal offences.[31]

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[25] See *Justice Legislation Amendment (Committals and Guilty Pleas) Bill 2017* (NSW) and *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017* (NSW).
[26] Pat O'Malley, 'Technocratic Justice in Australia' (1984) 2 *Law in Context: A Socio-Legal Journal* 31.
[27] Community Relations Division and NSW Department of Justice, *Early Guilty Pleas* <http://www.justice.nsw.gov.au:80/Pages/Reforms/early-guilty-pleas.aspx>.
[28] O'Malley, above n 10.
[29] Ibid 169; see also Pat O'Malley, 'Simulated Justice: Risk, Money and Telemetric Policing' (2010) 50(5) *British Journal of Criminology* 795.
[30] See also Julia Quilter and Russell Hogg, 'The Hidden Punitiveness of Fines' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 9.
[31] However, see Melinda Cooper, *Money as Punishment: Neoliberal Budgetary Politics and the Fine*, 2017, where the issue of administrative fines and neoliberalism is critiqued from a sociological perspective <

Further, previous studies have failed to account for the role of *discourse* in fashioning a view of CINs as an appropriate and necessary solution to the asserted problem of administrative inefficiency in the justice system. This article fills these gaps in the literature by arguing that, with the advent of administrative fines for criminal offending, there has been a marked discursive shift in how criminal justice is conceived of and rationalised. The article evaluates the legitimacy of CINs from the premise that a critical analysis of *discourse* illuminates the various ways in which neoliberal economic ideologies have infiltrated the criminal justice system and transformed its values. Criminal 'justice' is being discursively reconstructed along neoliberal economic lines.[32]

Drawing on the methodology of Critical Discourse Analysis ('CDA'),[33] discourse is viewed as the primary unit of communication and defined as 'socially constructed ways of knowing some aspect of reality'.[34] The author analyses the limited set of written texts publicly available in relation to the operation of and justifications provided for CCINs to show how discourse plays a fundamental role in 'making the socio-economic transformations of new capitalism and policies of governments to facilitate them seem inevitable; representing desires as facts; and representing the imaginaries of interested policies—the interested possible realities they project—as the way that the world actually is'.[35] Simply put, a neoliberal discourse of economisation has reshaped practices within the criminal justice system, so much so that this commodification of justice is now accepted as obvious, logical and inevitable. A key principle of CDA is that discourse is both socially constituted and constitutive:[36] discourse plays a key role in structuring conduct, but it is also shaped by social conduct.[37] As the study is situated within the realm of criminal justice, the term *criminal justice discourse* is employed to describe how

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http://www.academia.edu/34333175/Money_as_Punishment_Neoliberal_Budgetary_Politics_and_the_Fine >.

[32] O'Malley, above n 10.

[33] Fairclough provides the example of how the 'language of management has colonised public institutions and organisations such as universities': Norman Fairclough, 'Critical Discourse Analysis' in James Paul Gee and Michael Handford (eds), *The Routledge Handbook of Discourse Analysis* (Routledge, 2013) 9, 283.

[34] Theo van Leeuwen, 'Discourse as the Recontextualization of Social Practice: A Guide' in Ruth Wodak and Michael Meyer (eds), *Methods of critical discourse analysis* (Sage, 2009) 144, 144.

[35] Fairclough, 'Critical Discourse Analysis', above n 33, 282.

[36] Norman Fairclough, *Discourse and Social Change* (Polity Press, 1992) 64.

[37] Gerlinde Mautner, 'The Entrepreneurial University: A Discursive Profile of a Higher Education Buzzword' (2005) 2(2) *Critical Discourse Studies* 95, 100.

'primary definers'[38] in criminal justice debates linguistically construct reality, with a focus on politicians, police and policy-review agencies such as the Ombudsman.[39] It pays particular regard to political discourse—the linguistic strategies used by political actors to mobilise support for CCINs.

Due to practical constraints, the study's focus is on the jurisdiction of WA, but uses as a point of comparison the operation of CINs in NSW. The texts selected for analysis detail the State's justification for the implementation of, evaluate the operation of and rationalise CCINs, including second reading speeches and parliamentary debates in relation to the CCIN scheme; ministerial press releases and statements made to media; and the WA Ombudsman's report which evaluated the operation of CCINs in their first year of operation. Further, the texts were selected due to their public availability: police need not give or publish reasons for issuing CCINs and the WA Police policy in relation to CCINs is, at the time of writing, not publicly available.

Through this selection of texts, the study examines 'not only the entry of discourses into new domains, but the diverse ways in which they are received, appropriated, and recontextualised'. [40] Having detailed the methodology informing the analysis of CCINs, the following Part traces the rise of infringement notices in criminal law and reviews the literature regarding their use.

II CRIMINAL INFRINGEMENT NOTICES

Criminal infringement notices (CINs, also referred to as CCINs in WA, expiation notices in SA, and more generally, penalty notices or on-the-spot fines)[41] are notices to the effect that if the person served does not elect to have the matter determined by a court (court-elect), they must pay the amount prescribed for the offence within a fixed time period. A once unconventional sanction limited to traffic and parking breaches, CINs are now a familiar component of the criminal justice system, especially in the policing of public order and minor offences.

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[38] Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998) 18–19.
[39] See Elyse Methven, *Dirty Talk: A Critical Discourse Analysis of Offensive Language Crimes* (University of Technology Sydney, 2017).
[40] Fairclough, 'Critical Discourse Analysis', above n 33, 283.
[41] While often referred to as 'on the spot', the fine itself is never exacted in the initial police-citizen interaction: Richard Fox, 'On Punishing Infringements Sentencing: Some Key Issues: Chapter II' (1995) 13 *Law in Context: A Socio-Legal Journal* 7, 9.

A *The Rise of CINs as a Criminal Justice Measure*

The creep of administrative fines into criminal law was overlooked by mainstream criminal law scholarship until Fox's analysis of administrative fines in 1995.[42] Fox then warned: 'To date, the offences which can be handled by way of an on-the-spot fine have not strayed sufficiently into the domain of 'real crime' to be regarded as posing a threat to civil liberties, but the potential is there.'[43] In the decades since that prediction, successive state and territory governments across Australia have touted CINs as the obvious solution to reducing court delays, increasing police productivity, saving money and even turning a profit.

All Australian states and territories now have CINs as an alternative to a criminal charge or summons for nominated offences.[44] For example in NSW, CINs currently apply to the crimes of larceny of property up to the value of $300, being unlawfully in possession of property, offensive behaviour, offensive language, unauthorised entry of vehicles, and drunk and disorderly behaviour following a move-on notice.[45] In Queensland, infringement notices are available for the crimes of solicitation for the purposes of prostitution;[46] certain drug offences;[47] public nuisance (including obscene or offensive language and

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[42] Ibid; Richard Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Institute of Criminology Canberra, 1995); Richard Fox, 'Infringement Notices: Time for Reform?' (51, Australian Institute of Criminology, 1995).

[43] Fox, above n 41, 19.

[44] *Criminal Procedure Regulation 2017* (NSW) sch 4; *Criminal Procedure Act 1986* (NSW) ss 333-40; *Summary Offences Regulations 1994* (NT) regs 3-4A; *State Penalties Enforcement Act 1999* (Qld) ss 13-15, 27-3; *State Penalties Enforcement Regulation 2014* (Qld) sch 1; *Expiation of Offences Act 1996* (SA); *Expiation of Offences Regulations 2011* (SA); *Police Offences Act 1935* (Tas) s 61; *Monetary Penalties Enforcement Act 2005* (Tas) s 14; *Summary Offences Act 1966* (Vic) ss 60AA and 60AB(2); *Criminal Code* (WA) ss 720-3; *Criminal Procedure Act 2004* (WA) pt 2; *Criminal Code (Infringement Notices) Regulation 2015* (WA) sch 1. For discussion of the use of penalty notices for offensive language in NSW see: Elyse Methven, 'Should Penalty Notices Be Issued for Using Offensive Language?' (2012) 37 *Alternative Law Journal* 63; Elyse Methven, 'A Very Expensive Lesson: Counting the Costs of Penalty Notices for Anti-Social Behaviour' (2014) 26 *Current Issues in Criminal Justice* 249.

[45] *Criminal Procedure Regulation 2017* (NSW) sch 4; *Summary Offences Act 1988* (NSW) s 9(1) provides that 'A person who: (a) is given a move on direction for being intoxicated and disorderly in a public place, and (b) at any time within 6 hours after the move on direction is given, is intoxicated and disorderly in the same or another public place, is guilty of an offence'.

[46] *Prostitution Act 1999* (Qld) s 73(1)(a), where it is a first offence.

[47] For example, *Drug Misuse Act 1986* (Qld) s 10(2): unlawful possession of thing used in connection with the administration, consumption or smoking of a dangerous drug.

disorderly, threatening or offensive behaviour), public urination, begging, wilful exposure, trespass, and tattooing or selling spray paint to a minor.[48]

B *Common Features of CINs*

CINs impose a uniform penalty regardless of the culpability of the offender or their ability to pay the fine. This means that the punishment imposed may be unduly lenient or unduly harsh. Despite the NSW Law Reform Commission's recommendation in 2012 that, except in 'exceptional' circumstances, penalty notice amounts should not exceed 25% of the maximum court fine for an offence, the fixed penalty notice amounts for a number of NSW offences range from 66-75% of the maximum court-imposed fines. For instance, the CIN amounts for offensive language and offensive conduct in NSW are $500, whereas the maximum fine a court can impose is $660.[49] The CIN amount for the continuation of intoxicated and disorderly behaviour following a move on direction is a sizeable $1100, while a court can impose a maximum fine of $1650. These fixed fine amounts are 'impossible to pay'[50] for many recipients, an issue that is examined below.

CINs are administrative rather than judicial in nature; the question of whether the recipient has committed an infringement offence is determined by a police officer (part of the executive branch of government), not adjudicated by a court (part of the judicial branch of government), and a police officer's findings in this regard do not carry the weight of a judicial officer's findings of criminal liability. The WA Police Force's webpage substantiates this when it states: 'Paying an infringement is not regarded as an admission for the purposes of any civil or criminal court case, and does not have to be declared on your

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[48] *State Penalties Enforcement Regulation 2014* (Qld) sch 1.

[49] For offensive conduct, a court can also impose up to three months' imprisonment, and there are also a range of other sentencing options available: Elyse Methven, above n 44; the NSWLRC has recommended that only in 'exceptional circumstances involving demonstrated public interest may a penalty notice amount be up to 50% of the maximum court fine, for example where (i) the harm caused by the offence is likely to be particularly severe, (ii) there is a need to provide effective deterrence because the offender stands to make a profit from the activity, or (iii) the great majority of offences are dealt with by way of penalty notices, so that the maximum court penalty is less significant as a comparator'. These exceptional circumstances currently do not exist for the crimes of offensive language or conduct in NSW: NSW Law Reform Commission, *Penalty Notices*, Final Report, (2012) 108.

[50] Australian Law Reform Commission, *Pathways to Justice–An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018) [12.182] <https://www.alrc.gov.au/publications/indigenous-incarceration-report133>.

criminal history.'[51] Because no determination of criminal guilt has been made, CIN recipients are neither 'offenders' nor 'criminals', although they are regularly misrepresented as such in criminal justice discourse.[52] The regular misuse of the label 'criminal' to refer to a person receiving a CIN, as well the association of CINs with criminal liability, demonstrates that despite being 'administrative' fines, the stigma associated with criminality attaches to those who receive a CIN.

As CINs are—or purport to be—administrative sanctions, police may use these fines to circumvent the protections and principles ordinarily attached to criminal prosecution, which aim to guard against arbitrary and unjust punishment. A CIN need not, and ordinarily does not, detail the facts constituting the charge; police need only specify the relevant criminal offence that has allegedly been committed on the notice.[53] Accordingly, CIN recipients considering whether or not to challenge the CIN through internal police processes or in court will not have available to them the details of the case against them (presumably, they may be apprised of these details once a request has been made to the police for such information).

Unless and until a CIN recipient decides to court-elect, the presumption of innocence does not apply. CINs reverse the onus and burden of proof, given that the State need not prove the elements of the offence, nor disprove any defences raised, to the standard of beyond reasonable doubt.[54] Given that CIN fines are punitive in effect (especially considering the serious fines-enforcement consequences attached to non-payment); carry the stigma of being criminal; and that police retain the threat of criminal charge until a fine has been paid in full, CINs belong in the 'foggy grey zone' between criminal and administrative

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[51] Western Australia Police, *Criminal Code Infringements* (19 September 2016) Western Australia Police <https://www.police.wa.gov.au/Police-Direct/Infringement-Payments-and-Enquiries/Criminal-Code-Infringements>.

[52] See, eg, Western Australia Police, *Criminal Code Infringement FAQs* Western Australia Police <https://www.police.wa.gov.au/Police-Direct/Infringement-Payments-and-Enquiries/Criminal-Code-Infringements/Criminal-Code-Infringement-FAQs> which states that: 'A CCIN is a Criminal Code Infringement Notice that will be issued to offenders for nominated minor criminal offences'; cf the *Criminal Code* (WA) s 722, which uses the wording of 'alleged offender' and 'alleged offence'.

[53] Under Article 14.3 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976), a person must be 'informed promptly and in detail in a language which he understands of the nature and cause of the charge against him'.

[54] *Woolmington v DPP* [1935] AC 462; see also Article 14.2 of the *International Covenant on Civil and Political Rights* ibid.

law, branded 'criministrative' law.[55] The fourth Part of this article will demonstrate the role of discourse in blurring these boundaries and displacing concerns about procedural safeguards and transparent justice, replacing these with market-related objectives of efficiency and productivity.

Recipients of CINs are encouraged to accept and pay their fines—or at the very least not appeal them—via a number of built-in 'incentives'.[56] Then WA Police Minister Rob Johnson recognised this when he stated that 'offenders would prefer to simply cop it sweet, pay a fine, not spend all that time in court and not attract a criminal record'.[57] As Johnson stated, by 'copping the fine', CIN recipients: avoid a judicial finding of criminal guilt and a criminal record; to some extent elude the stigma attached to a finding of guilt; save any time and expenses associated with court proceedings; and avoid the possibility that a court could impose a larger fine and, for some offences, a sentence of imprisonment.[58] A CIN recipient who believes that they are innocent of the alleged offence may nonetheless feel compelled to pay the fine to avoid the possibility of criminal punishment. This threat can be phrased coercively; for instance, the WA Police Force website warns: 'If you do not want to be prosecuted in court for the alleged offence, pay the Amount Due by the Due Date.'[59] Although this statement represents criminal prosecution as inevitable upon non-payment,[60] in practice, the consequence of non-payment by the due date is unlikely to result in the initiation of court proceedings, but in a Final Demand notice being issued.[61] That police nonetheless retain the threat of criminal prosecution until a fine is paid shows one way in which CINs amplify

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[55] Anne Weyembergh and Nicolas Joncheray, 'Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture That Needs to Be Addressed' (2016) 7(2) *New Journal of European Criminal Law* 190, 190.

[56] Fox, above n 41, 9.

[57] Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 November 2010, 8351b-8363a (Rob Johnson).

[58] For example, the crime of offensive conduct, contrary to the *Summary Offences Act 1988* (NSW) s 4, currently carries a penalty of $660 or imprisonment for three months, in comparison to a fixed CIN amount of $500.

[59] Western Australia Police, above n 52.

[60] For discussion of representations of causality in discourse, see Norman Fairclough, *Language and Power* (Longman, 1989) 51; see also Elyse Methven, 'A Little Respect: Swearing, Police and Criminal Justice Discourse' (2018) 7(3) *International Journal of Crime, Justice and Social Democracy* 58.

[61] WA Ombudsman, above n 6, vol 1, 16-17. If payment is not made in the 28 day time period specified in the Final Demand Notice, further fine enforcement measurements may be ordered after the fine is registered with the Fines Enforcement Registry: *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) ss 14-21A.

police power, by adding to the range of coercive tools at a police officer's disposal to control public behaviour.

Fox not only foreshadowed the likelihood that CINs would stray into other areas of the criminal law; he also foreshadowed their net-widening capacity,[62] in other words, the likelihood that CINs will result in the criminal justice system 'scooping into its net a larger group of citizens than might otherwise have been the case.'[63] Fox attributed the phenomenon of net-widening predominantly to the 'ease with which infringement notices can be issued'—police may choose to issue a CIN rather than ignore, caution or warn the alleged offender.[64] These contentions have since been, in some respects, validated by statistics collated in NSW and WA. For example, as detailed below, the WA Ombudsman found the net-widening effect of CCINs to be most striking for Aboriginal females having actions taken against them for alleged incidents of stealing.

C *Impact of CINs on Disadvantaged People and Indigenous Australians*

The literature demonstrates that CINs are disproportionately issued to Indigenous Australians and operate especially harshly against those who cannot, or will not, pay their fines.[65] In the year ending 31 March 2017, Indigenous Australians comprised 476 (11%) of the 4386 adults who received a CIN for offensive language or behaviour in NSW, despite Indigenous Australians representing only 3% of the NSW population.[66] The numbers in WA are even more troubling. Of the 1800 CCINs issued in the year ending 4 March 2016 for the crime of disorderly behaviour (which includes offensive language and behaviour), 752 (42%) were issued to recipients whose 'offender appearance' was recorded as Aboriginal. Of the total 2978 CCINs issued in that

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[62] 'Net-widening' refers to the phenomenon where people receive a CIN in circumstances where they would have otherwise had their conduct ignored, received a warning, a caution or had the proceeding dismissed in Court.

[63] Fox, above n 41, 10.

[64] Ibid.

[65] Gaye Lansdell et al, 'Infringement Systems in Australia: A Precarious Blurring of Civil and Criminal Sanctions?' (2012) 37(1) *Alternative Law Journal* 41; NSW Ombudsman, 'Review of the Impact of Criminal Infringement Notices on Aboriginal Communities' (Legislative Report, New South Wales Ombudsman, 1 August 2009) <https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0014/3407/FR_CINs_ATSI_review_Aug09.pdf >.

[66] Statistics obtained by researcher in 2017: NSW Bureau of Crime Statistics and Research, 'Persons of Interest (POIs) Proceeded against by the NSW Police Force for Offensive Language or Conduct Offences'.

period, 1080 (36%) were issued to recipients whose 'offender appearance' was Aboriginal.[67] This percentage more or less reflects that of the prisoner population in WA: Aboriginal and Torres Strait Islander Australians comprised 38% of the WA prison population as at 30 June 2016.[68] By way of contrast, the WA Indigenous population was recorded at 3.1% of the WA population in 2016.[69]

The WA Ombudsman found a correlation between increased vulnerability and socio-economic disadvantage, and an increased likelihood of receiving a CCIN.[70] Further, vulnerable CIN recipients, many of whom are also Indigenous Australians, often do not and cannot pay their fines on time, if at all. This leads to fines, the initial amount of which is already prohibitive, spiralling into insurmountable debt.[71] The NSW Ombudsman in 2009 documented that nine out of every 10 Indigenous Australians issued with a CIN failed to pay within the time allowed.[72] The WA Ombudsman also found a correlation between increased socio-economic disadvantage and a decreased likelihood of paying one's fine on time.[73] In addition, the Ombudsman found a low payment rate for CCINs generally: only 21% of all CCIN recipients had paid their CCINs in full as at 22 April 2016.[74] For Aboriginal recipients, only 3% had paid their CCIN for disorderly behaviour and just 1% had paid their CCIN for stealing.

The fact that Indigenous Australians are more likely to receive infringement notices for public order and other minor offences is a result of

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[67] The WA Police determine and record 'offender appearance' from three categories: Aboriginal, Caucasian and Other. There is no category for Torres Strait Islander People given the very small percentage of Torres Strait Islanders in WA: 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. Note that criticisms can be levelled at WA Police for identifying the Aboriginal or Torres Strait Islander identity of a person by means of 'offender appearance'. The standards for collecting and recording Aboriginal or Torres Strait Islander status should instead be derived from the identification of a person as Aboriginal or Torres Strait Islander, including by descent, self-identification, and acceptance of the person as an Aboriginal or Torres Strait Islander by their community: WA Ombudsman, above n 6, vol 1, 35-6; vol 4, 7.

[68] Ibid 35.

[69] Australian Bureau of Statistics, above n 8.

[70] WA Ombudsman, above n 6, 34, 46.

[71] Bernadette Saunders et al, 'An Examination of the Impact of Unpaid Infringement Notices on Disadvantaged Groups and the Criminal Justice System - Towards a Best Practice Model'<http://youthlaw.asn.au/wp-content/uploads/2012/05/CJRC-Examination-Web-Copy.pdf>.

[72] NSW Ombudsman, above n 65.

[73] WA Ombudsman, above n 6, 20. Advantage was measured using suburbs and addresses provided to WA Police and the Australian Index of Relative Socio-economic Advantage and Disadvantage.

[74] Ibid 18. Seventeen per cent of the total (2,978) had been paid after the initial notice was issued, and 4 per cent after a final demand notice was issued.

multiple and complex factors. Firstly, many Indigenous Australians are more likely to conduct everyday activities, including 'private' activities and disputes, in public space than non-Indigenous Australians.[75] This is primarily due to socio-cultural factors and Indigenous Australians' unique connection to the land. People who are homeless or living in temporary accommodation are also often forced to conduct their private lives, including personal disputes, in public spaces.[76] There is also a greater proportion of physical disability, mental illness, alcohol or drug-dependency, and a history of family and domestic violence among these groups.[77] Factors of disadvantage prevalent within Indigenous communities cannot be divorced from the intergenerational effects of colonisation and government policies which resulted in dispossession, disenfranchisement and the Stolen Generations.[78]

D *Fines Enforcement Sanctions*

Every Australian state and territory has progressive, often punitive, sanction regimes for fine default. If CIN fines are not paid on time, people may accumulate further debts, have their driver's licence suspended or disqualified, have property seized, their vehicle immobilised or may be ordered to perform community service work. In WA, the CCIN recipient's details may also be published on a website.[79]

Driver licence sanctions operate especially harshly on Aboriginal people living in regional, rural or remote communities, where private vehicles can be the only practical means of transport available to access work or basic services, such as health care.[80] In some circumstances, such as where a person is unable to comply with a community service order, fine default may lead to imprisonment.[81] Sentences of imprisonment may also be imposed as a result of

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[75] Tamara Walsh, 'Who Is "Public" in a "Public Space"?' (2004) 29 *Alternative Law Journal* 81; Jarrod White, 'Power/Knowledge and Public Space: Policing the "Aboriginal Towns"' (1997) 30 *The Australian and New Zealand Journal of Criminology* 275.
[76] Tamara Walsh, 'Poverty, Police and the Offence of Public Nuisance' (2008) 20 *Bond Law Review* 7.
[77] Australian Law Reform Commission, above n 50.
[78] Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013).
[79] WA Ombudsman, 'Monitoring of the Infringement Notices Provisions of The Criminal Code' (Consultation Paper, WA Ombudsman, 8 April 2016) <http://www.ombudsman.wa.gov.au/CCINs/Documents/Monitoring_infringement_notices_provisions_Criminal_Code_Consultation_Paper.pdf>.
[80] Australian Law Reform Commission, above n 50.
[81] Ibid ch 12; Mary Spiers Williams and Robyn Gilbert, *Reducing the Unintended Impact of Fines* (Indigenous Justice Clearinghouse, 2011); Elyse Methven, 'We Need Evidence-Based Law Reform to

secondary offending from fines enforcement actions, such as driving whilst unlicensed due to driver licence disqualification.[82] The Kimberley Community Legal Services has suggested that for many Indigenous people, those who are homeless and other groups experiencing disadvantage, the imposition of a $500 fixed fine for swearing is 'tantamount to a prison sentence'.[83] The Australian Law Reform Commission ('ALRC') recommended in a 2018 report that governments work with relevant Aboriginal and Torres Strait Islander organisations to develop options to reduce the imposition of infringement notices, limit penalty amounts, avoid suspension of drivers' licences for fine default and provide alternative ways of paying infringement notices.[84]

This article has so far examined key features of CIN regimes, and discussed related issues such as net-widening, arbitrariness, and entrenching socio-economic and Indigenous disadvantage. The following Part scrutinises the WA CCIN regime in detail, before addressing the role of criminal justice discourse in legitimising CCINs and overshadowing concerns raised thus far in relation to their operation.

IV CRIMINAL CODE INFRINGEMENT NOTICES

CCINs commenced operation in a pilot scheme across selected WA suburbs on 30 March 2015, and were rolled out across the state on 3 August 2015.[85] The scheme was modelled on the CIN scheme operating in NSW since 2008,[86] a key difference being that in NSW a recipient must be 18 years or older, whereas in WA the recipient need only have attained the age of 17 years.[87] As at the time of writing, CCINs apply to two prescribed offences: disorderly behaviour in public

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Reduce Rates of Indigenous Incarceration' *The Conversation* (online), 9 April 2018 <http://theconversation.com/we-need-evidence-based-law-reform-to-reduce-rates-of-indigenous-incarceration-94228>.

[82] Australian Law Reform Commission, above n 50; Methven, above n 81.

[83] Australian Law Reform Commission, above n 50, [12.182].

[84] Ibid, Recommendation 12-2.

[85] See WA Ombudsman, above n 6, vol 1, 13 for a list of the pilot suburbs.

[86] The CIN regime was introduced firstly in a trial in 2002, when legislation was passed to authorise a 12-month trial period for CINs for certain prescribed offences, including common assault, larceny or shoplifting, offensive language, offensive conduct, obtaining money by wilful false representation, obstructing traffic, and unauthorised entry of vehicle or boat. This list was subsequently amended with some offences being added and others - such as common assault - removed. The scheme was implemented state-wide in 2008: NSW Law Reform Commission, above n 49, 6; Western Australia, *Parliamentary Debates*, Legislative Council, 23 February 2011.

[87] *Criminal Code (Infringement Notices) Regulations 2015* (WA) reg 5.

or a police lock-up ('disorderly behaviour'),[88] and steal anything capable of being stolen to the value of $500.[89]

A *Issuing a CCIN*

Although colloquially referred to as on-the-spot fines, WA police do not actually serve infringement notices on-the-spot; currently, police must first return to the police station, enter the details of the CCIN into the NTIMS (the Non-Traffic Infringement Management Solution) system,[90] and following this, post the notice to, or serve it personally on, the recipient.[91] As evident in the example below, a CCIN specifies the offence which the recipient is alleged to have committed (for instance, 'behaving in a disorderly manner'), but does not stipulate further details of the conduct constituting the alleged offence (for instance, whether it was offensive language or insulting language), nor the officer's reasons for issuing the CCIN.

When a CCIN is issued, the suspect is taken to be 'charged' for the purposes of the *Criminal Investigation (Identifying People) Act 2002* (WA) (although for other purposes, the suspect has not been charged with a crime). This allows police to take and retain identity information such as fingerprints, photographs and the person's measurements on a forensic database.[92] Police need only destroy the identity information once requested to do so. The WA Ombudsman found that of the 2978 CCINs issued to 2817 individuals during the 12-month monitoring period, WA police obtained identifying particulars

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[88] *Criminal Code* (WA) s 74A(2).

[89] The enabling Act, the *Criminal Code Amendment (Infringement Notices) Act 2011* (WA), was introduced in 2011, however it took four years for the WA Parliament to introduce CCINS under this Act by introducing the Criminal Code (Infringement Notices) Regulations 2015 (WA); s 378 *Criminal Code* (WA).

[90] The Non-Traffic Infringement Management Solution (NTIMS) system is a computerised system developed by WA police to manage the use of CCINs. The development of this system was a key reason why it took WA approximately four years to implement the CCIN scheme from the date of the introduction of the legislation into Parliament. It is now also being used for other non-traffic infringements, such as infringements related to firearms: WA Ombudsman, above n 6, vol 2, 21.

[91] Ibid vol 1, 16.

[92] *Criminal Investigation (Identifying People) Act 2002* (WA) s 47. Note that for stealing, if considered a serious offence (as the statute contains a penalty of 12 months or more: s 3), the police may also retain other identity information such as dental imprints and the person's DNA profile. If the person does not consent or withdraws consent to the identifying procedure pursuant to s 49 of the *Criminal Investigation (Identifying People) Act 2002* (WA) the suspect may be arrested; and the procedure may be done on the suspect against the suspect's will. The identity information may be compared with other police information (whether or not this information is in the database) and could be used in any court proceedings.

from 530 (19% of) recipients. Extrapolating from statistics of state-wide data,[93] the Ombudsman estimated that none of the individuals who had paid off their fine had requested the destruction of their identity information.

CRIMINAL CODE INFRINGEMENT NOTICE

The Criminal Code of Western Australia

Infringement Notice No	10100000009361
Date of Issue	09 March 2015
Amount Due	$500.00 AUD
Due Date	07 April 2015

Payments made online or over the phone must be made before 9 pm Australian Western Standard Time on the Due Date to allow for processing times.

XANTHIPPE Jacob David
PO Box AB1234
FREMANTLE WA 6959

PART A OFFENCE DETAILS

Alleged Offender
Surname: XANTHIPPE Given Names: Jacob David
Alleged Offence
Description of Offence: Behaving in a disorderly manner in a public place or in sight or hearing of any person in a public place
The Criminal Code section: 74A (2) (a)
When: Date: 01 March 2015 Time: 07:45
Place: 4 Garden Street NORTHBRIDGE
Modified Penalty: $500.00 (Amount Due)
Officer Issuing Notice
Name: CONSTABLE Lace NEWSOME Registered Number: 1501
Police Station: PERTH POLICE STATION

PART B YOUR OPTIONS (ANY ACTION MUST OCCUR ON OR BEFORE THE DUE DATE)

It is alleged that you have committed the above offence.
i. If you do not want to be prosecuted in court for the alleged offence, pay the Amount Due; or
ii. Elect to have the matter heard in court.
Additional information is overleaf

EXAMPLE

PART C HOW TO PAY THE MODIFIED PENALTY (AMOUNT DUE)

Payments made online or over the phone must be made before 9 pm Australian Western Standard Time on the Due Date to allow for processing times.
BPay payment options are not available. Payments must be made in full. Part payments are not accepted.

Payment Online or By Telephone (MasterCard and VISA only)
Biller Code: 524512
Reference Number: 10100000009361
INTERNET Visit www.police.wa.gov.au/infringementpayment
PHONE 1300 BPOINT (1300 276 468)

In Person
Post Billpay
Pay in-store at Australia Post
*2670 10100000009361 07042015 $500.00 26
You may also pay in person at Police Stations with facilities to receive payment and only where there is no local Australia Post Office.
Please present this notice intact when paying in person.

By Post: Post this tear-off-slip, with a cheque or money order made payable to "Commissioner of Police", to:
Commissioner of Police
Payments Processing
2 Adelaide Terrace
EAST PERTH WA 6004
Do not send cash in the mail.

Alleged Offender	Infringement Notice Number	Due Date	Amount Due
XANTHIPPE Jacob David	10100000009361	07/04/2015	$500.00

Image I: example of a CCIN.[94]

B *Consequences of Non-Payment and Fine Enforcement Measures*

If a CCIN recipient fails to pay the prescribed amount within 28 days, the person receives a Final Demand Notice. Police also retain the discretion to prosecute the person in court for the alleged offence. If, following the additional 28-day period, the recipient fails to pay the amount specified on the Final Demand Notice, the infringement may be registered at the WA Fines Enforcement Registry and the infringement is made an order of the court. The

[93] State-wide, requests for destruction of identity information are made in only 0.02% of instances.
[94] Western Australia Police, above n 52.

recipient may then either pay the fine and added costs within a further 28 days, or elect to have the matter referred to a magistrate. If full payment is still not received within the specified time, enforcement action can include the CCIN recipient's driver's license being suspended or their details published on a website. Alternatively, an enforcement warrant may authorise the Sheriff to immobilise the recipient's vehicle and/or seize and sell their property to satisfy the debt.[95]

C *Offences Subject to CCINs*

As described above, the CCIN regime currently applies to two offences in the WA *Criminal Code*: disorderly behaviour and steal anything up to the value of $500. Each CCIN offence attracts a modified penalty of $500. These two offences were selected due to 'the volume of people committing these offences' and their 'low-level nature'.[96] It is anticipated that the regime will apply to further offences,[97] however there is no framework against which to assess whether CCINs should apply to a particular offence. In 2010, the NSW Law Reform Commission ('NSWLRC') recommended that guidelines should provide that penalty notices are suitable for minor offences (although the NSWLRC admitted that there was 'no consistency in submissions as to what a definition of "minor offence" should be').[98] The NSWLRC recommended that CINs are not suitable for offences involving violence.[99]

1 *Disorderly Behaviour*

The offence of disorderly behavior in s 74A of the *Criminal Code* comprises a number of discrete offences, including using insulting, offensive or threatening language and behaving in an insulting, offensive or threatening manner. The

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[95] Department of Justice: Court and Tribunal Services, *Infringement Notices* <http://www.courts.dotag.wa.gov.au/I/infringement_notices.aspx?uid=4916-1423-2566-8813>; *Criminal Code (Infringement Notices) Regulations 2015* (WA) sch 2.

[96] Peter Collier in contributing to the debate on the Bill, Western Australia, *Parliamentary Debates*, Legislative Council, 23 February 2011 911; WA Ombudsman, above n 6, vol 2, 45.

[97] See WA Ombudsman, above n 6.

[98] NSW Law Reform Commission, above n 49, 67.

[99] Ibid 69.

offence may target conduct ranging from swearing at police to urinating in public.[100] Conduct is considered 'disorderly' if it:

> …is conduct which, while sufficiently ill-mannered, or in bad taste, to meet with the disapproval of well-conducted and reasonable men and women, is also something more—it must … tend to annoy or insult such persons as are faced with it—and sufficiently deeply or seriously to warrant the interference of the criminal law.[101]

The crime of disorderly conduct has a location element, in that the behaviour must occur 'in a public place', 'in the sight or hearing of any person who is in a public place' or 'in a police station or lock-up'. The maximum sentence that a court can impose for disorderly conduct is a fine of $6000.

Given broad judicial definitions of 'disorderliness' and 'offensiveness', the discernment of disorderly conduct is highly subjective.[102] Words are considered to be 'offensive' if they provoke in the reasonable person an emotional reaction such as anger, resentment, disgust or outrage in the context in which they are used.[103] The WA Supreme Court has also held that language which challenges 'the authority of police officers' is likely to be considered offensive and disorderly.[104] Relevantly, the ALRC in 2018 recommended that state and territory governments review provisions which criminalise offensive language with a view to repealing these provisions or narrowing their scope.[105] This recommendation was made in light of the continued disproportionate use of offensive language and public nuisance charges against Indigenous Australians.[106] Police officers are regularly the 'victims' or addressees of behaviour characterised as disorderly, promoting a situation where the

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[100] *Criminal Code* (WA) s 74(1); Each of these adjectives (offensive, insulting and so on) is not defined in statute, but has been considered in case law. See Methven, above n 39.

[101] *Melser v Police* [1967] NZLR 437, 444 (Turner J); quoted with approval in *Heanes v Herangi* (2007) 175 A Crim R 175 (Johnson J at 209).

[102] For discussion, see Luke McNamara and Julia Quilter, 'Time to Define the Cornerstone of Public Order Legislation: The Elements of Offensive Conduct and Language under the Summary Offences Act 1988 (NSW)' (2013) 36 *University of New South Wales Law Journal* 534; Elyse Methven, '"Weeds of Our Own Making": Language Ideologies, Swearing and the Criminal Law' (2016) 34(2) *Law in Context* 117.

[103] *Coleman v Power* (2004) 220 CLR 1, 25–6 (Gleeson CJ); *Heanes v Herangi* (2007) 175 A Crim R 175, [135].

[104] *Heanes v Herangi* (2007) 175 A Crim R 175, [177].

[105] Australian Law Reform Commission, above n 50, Recommendation 12–4, 17 <https://www.alrc.gov.au/publications/indigenous-incarceration-report133>.

[106] Ibid; see also Tamara Walsh, 'Public Nuisance, Race and Gender' (2017) 26(3) *Griffith Law Review* 334.

investigator, enforcer and adjudicator of a CCIN may also be the alleged victim.[107] Consequently, a level of bias and self-interest may operate in an officer's determination of whether the conduct is disorderly.

2 *Stealing*

Under s 378 of the *Criminal Code*, a person who steals anything capable of being stolen is liable to imprisonment for up to seven years, although if the value does not exceed $1000, the person is liable to a summary conviction and a fine of up to $6000.[108] As noted above, CCINs can only be issued where the value of the property is no greater than $500. Generally, a thing is considered capable of being stolen if it is inanimate, moveable 'property'.[109] Stealing is further defined as 'fraudulently'[110] taking anything capable of being stolen or converting property to one's own use or the use of any other person, with an intent to permanently deprive the owner of the property. Despite being considered a 'low-level' offence where the value of the property stolen does not exceed $500, the criminal law elements of stealing are complex,[111] a factor which would weigh against its inclusion within a CCIN regime where liability is determined expediently by police officers.

The WA Ombudsman's report found that the option to use CCINs for stealing resulted in net-widening, and that this had the starkest impact on Aboriginal female alleged offenders. The number of actions (including CCINs, arrests and summonses) taken for stealing in the monitoring period when compared to the number of actions (arrests and summonses) taken in the

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[107] For example, a study conducted by the NSW Ombudsman found that, of those CINs issued for offensive language to Aboriginal people between 2002 and 2007, 70 per cent of the language used was directed at police only. Twenty three per cent of the language was directed at police and others: NSW Ombudsman, above n 65; See also Walsh, above n 106, in relation to the offence of public nuisance in Queensland.

[108] *Criminal Code* (WA) ss 378; 426(4). The section also contains aggravated offences with higher penalties depending on the nature of the item stolen (for example, the stealing of a testamentary instrument or an aircraft attracts a penalty of up to 10 years).

[109] The term 'property' is defined inclusively in s 371(7) and comprises any real and personal property, money, debts, bank credits, and legacies and all deeds and instruments relating to or evidencing the title or right to any property or giving a right to recover or receive any money or goods. Things considered capable of being stolen also include tame animals and wild animals kept in a state of confinement (such as a lion in a zoo), or dead bodies of animals; for a complete list, see s 370.

[110] *Criminal Code* (WA) s 371(3) provides that the 'taking or conversion may be fraudulent, although it is effected without secrecy or attempt at concealment'.

[111] See *Ilich v The Queen* (1987) 162 CLR 110.

benchmarking period (the year before CCINs commenced operation) increased by 34% for Aboriginal female alleged offenders, and 18% for Aboriginal male alleged offenders.[112] Exemplified by the case study examined at the outset of this article, in some of these instances, the $500 fine would have been disproportionate to the gravity of the offence committed.

The Ombudsman offered a number of explanations for the large proportion of CCINs issued for the offence of stealing during the monitoring period. Notable among these is that where a CCIN is issued, police are able to return the property alleged to have been stolen to the apparent owner or possessor. In contrast, where a defendant is charged with stealing, the property owner may have to forfeit the property to police as 'evidence' to be presented in court. This distinction is likely to render CCINs a preferred option for the alleged victim, given that CCINS not only give the impression of 'swift' retribution, but also, the alleged victim avoids the time and effort associated with the investigatory process and giving evidence in court, and can have their property returned to them 'on the spot'. These factors in turn provide an incentive for police to issue a CCIN as an alternative to a charge, summons or caution.[113]

This Part has detailed the framework of the CCIN regime in WA, and considered its operation with respect to the crimes of stealing and disorderly behaviour in light of the WA Ombudsman's findings. It has brought to the fore a number of concerns relating to the 'swift justice' delivered by CCINs, including increased arbitrariness; excessive police discretion; the reversal of the onus of proof; the imposition of disproportionate punishment; a lack of oversight and accountability; and the reproduction of inequalities. With these concerns in mind, Part IV evaluates how CCINs have been discursively represented and legitimised as beneficial to the police, the public and the court system.

[112] The number of actions by police in response to incidents of stealing for Aboriginal male offenders increased by 18 per cent: WA Ombudsman, above n 6, vol 1, 39.
[113] Ibid vol 1, 40.

IV A Discourse Of Economisation

> 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.[114]

A *Cheap and Efficient Justice*

While criminal punishment has manifold aims, it is commonly recognised that punishment should be proportionate to the gravity of the crime and the culpability of the offender, denounce the conduct, deter the offender and others from committing similar offences, rehabilitate the offender, account for any harm occasioned to the victim, and protect the community.[115] The justifications provided for introducing CCINs in WA and the principles upon which they were based bear little resemblance to ordinary objectives of criminal punishment.[116] When the Criminal Code Amendment (Infringement Notices) Bill 2010 ('the Bill') was first introduced in WA Parliament, then WA Minister for Police, Rob Johnson, touted CCINS as a 'quick alternative to arrest' which would reduce administrative demands, increase productivity and deliver cost-savings.[117] The Minister's press release explained that CCINs would deliver

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[114] Rob Johnson, 'Police to give on-the-spot fines for minor crimes' (Media Statement, 8 September 2010) <https://www.mediastatements.wa.gov.au/Pages/Barnett/2010/09/Police-to-give-on-the-spot-fines-for-minor-crimes.aspx>.

[115] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; See *Veen v The Queen (No 2)* (1988) 164 CLR 465; Also of significance in the last three decades is the rise of 'restorative justice' measures. These measures emphasise reintegration, reparation, and mediation between offenders, victims, families, other affected parties and the wider community, and may include circle sentencing, reintegrative shaming, reconciliation, and new and emerging forms of conflict resolution. David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) 1228.

[116] A cursory reference was made to deterrence. The Minister for Police said in the Second Reading Speech to the Bill that CCINs would still 'provid[e] an incentive for behaviour change': Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 September 2010 6138 <http://www.parliament.wa.gov.au/Hansard/hansard.nsf/o/9b4f1c5d51fc1370482577d8003006bb/$FILE/A38+S1+20100908+p6137d-6139a.pdf>.

[117] The Minister outlined that the 'key objectives' of the scheme would be: 'to reduce the administrative demands on police in relation to relatively minor offences by providing a quick alternative to arrest …to reduce the time taken by police in preparation for and appearance at court; to allow police to remain on front-line duties rather than having to take the offender back to the police station; to provide an additional general tool in the array of responses available to police; to provide police with greater flexibility in their response to criminal behaviour; to … reduc[e] both court time and trial backlogs; and to provide a diversionary option for the community as a means of avoiding court appearances for minor offences'. Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 October 2010 6138–9.

'smarter' and 'more effective' law enforcement. Johnson stated that the regime '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'; will save 'the court system the cost of having to deal with relatively low-level crime'; and will ensure 'that our police officers are on the beat fighting crime and our court system is working more efficiently.'[118]

This emphasis on increasing efficiency, reducing paperwork and allowing police to remain on the streets was reflected in the language of the Opposition Labor Party and the National Party, which each supported the legislation.[119] This message was also reproduced a few days prior to the commencement of the pilot scheme on 25 March 2015, when then Police Minister Liza Harvey was questioned about the operation of CCINs. Harvey stated: 'Police officers welcome this initiative. It will reduce red tape. It will take them from behind a desk and onto the front line. It will allow us to divert offenders from the criminal justice system and from the courts.'[120]

There are some noteworthy features of the political discourse in relation to CCINs. Firstly, the politicians represent the capacity of CCINs to cut paperwork, save time and divert offenders away from the court system as categorical facts by repeatedly prefacing each proposition with the high modality phrase: 'It will'.[121] This expresses the speaker's certainty of, or categorical commitment to, CCINs achieving these objectives. Many of the politicians' overwhelmingly positive statements about the diversionary and productive capacity of CCINs are framed as objective truths (as opposed to subjective opinions), without the politicians providing any evidence to ground

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[118] Rob Johnson, *Media Statement: Police to Give on-the-Spot Fines for Minor Crimes* (8 September 2010) Parliament of WA <https://www.mediastatements.wa.gov.au/Pages/Barnett/2010/09/Police-to-give-on-the-spot-fines-for-minor-crimes.aspx>.

[119] Kate Doust (Labor, Opposition), in her contribution to the debate on the Bill, stated: 'I imagine it will make the lives of police on the street a lot easier, particularly given that they will have the discretion to issue these notices. I imagine that it will save them a lot of paperwork, which will ultimately free them up to have a greater presence on the streets, and I think that is something we all want to see' Western Australia, *Parliamentary Debates*, Legislative Council, 22 February 2011 782. The Greens Party also supported the Bill, Giz Watson (Greens) stated in the debate on the Bill: 'we do in principle support the bill, but we want to ensure that the scheme is evaluated properly and in its entirety, and successfully moved an amendment that the Ombudsman keep under scrutiny the operation of its provisions, with particular regard to the impact of their operation on Aboriginal and Torres Strait Islander communities'. As did the National Party - see contribution to the debate of Philip Gardiner (Nationals) Western Australia, *Parliamentary Debates*, Legislative Council, 23 February 2011 910–11, 915–6.

[120] (Liza Harvey, Police Minister), Questions: Criminal Code Infringement Notices, Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 March 2015 2169b-2169b.

[121] See Fairclough, above n 20, 147.

their assertions. Further examples include Johnson's claim that: 'These [CCINs] will allow police to remain on frontline duties rather than having to go through a lengthy administrative process', as well as then President of the WA Law Society, Hylton Quail's statement that 'there'll be reduced backlog in the courts' and 'that'll also liberate resourcing in policing'.[122] Each of these statements presents the idea that CCINs will benefit the criminal justice system as a universal truth without qualification.

Another noteworthy feature of the political rhetoric in relation to CCINs is the politicians' reduction of complex processes into simple nouns, pronouns and metaphors.[123] Consider Harvey's statement: 'It will reduce red tape.' In this concise sentence, the pronoun 'It' replaces the CCIN scheme introduced by the Bill. This abstraction misrepresents the truth, for the legislation which introduced the scheme cannot, on its own, 'reduce red tape'. Whether CCINs will perform their stated objectives will depend on how often police officers issue CCINs in circumstances where they would otherwise have charged the recipient, and how often CCIN recipients pay their fine on-time rather than 'court-elect' or are subject to fine enforcement measures. In this way, the political rhetoric oversimplifies the productive and diversionary capacity of the legislation, and masks the variables (such as police exercise of discretion) upon which the Bill's ability to reduce red tape depends.

B *Reducing Red Tape*

Another transformation within the sentence 'It will reduce red tape' is the replacement of a variety of actions with the metaphor 'red tape'. Red tape serves as a symbol for all manner of ills associated with an 'overly constrictive bureaucracy';[124] red tape could allude to unnecessary or meaningless paperwork; too many formal processes or constraints; unnecessary or overly-

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[122] *Police to Issue On-the-Spot Fines for Disorderly Conduct* (8 September 2010) ABC News <http://www.abc.net.au/news/2010-09-08/police-to-issue-on-the-spot-fines-for-disorderly/2252724>. Then Minister for Energy, Peter Collier, similarly represented the positive contribution that CCINs will make by the use of high modality phrases: '… it is an eminently sensible bill. It will free up time for police to do their work in other areas. It will reduce the administrative demands on police. It will reduce the time taken by police for court appearances and it will save court time, amongst a number of other advantages': Western Australia, *Parliamentary Debates*, Legislative Council, 23 February 2011.

[123] For discussion of transformations see Roger Fowler and Gunther Kress, 'Critical Linguistics' in Roger Fowler et al (eds), *Language and Control* (Routledge & Kegan Paul, 1979) 185, 207–8.

[124] Li Lan and Lucy MacGregor, 'Colour Metaphors in Business Discourse' [2009] *Language for professional communication: Research, practice and training* 11, 19–20.

restrictive rules, procedures and regulations; or unjustifiable delays.[125] Of course, red tape is not actually being reduced by the Bill in a physical sense.[126] Instead, metaphors structure our experience of one thing in terms of another, and are an important ideological means by which to (re)construct reality.[127]

Harvey's use of the phrase 'red tape' with reference to CCINs must be viewed in the broader context of her, and her political party's, neoliberal agenda to reduce forms of government regulation and oversight. Harvey cited CCINs as an example of the WA government's 'red tape reduction initiatives' introduced in 2015.[128] The Bill can be viewed as part of a broader package of WA government initiatives, including a 'Red Tape Reduction Report card', calls for the public to submit ideas to Treasury to #ShredTheRed and a 'Red Tape Rapid Assessment Tool' to identify areas in which red tape could be reduced by Government.[129] In her inaugural speech in 2008, Harvey argued: 'We must reduce bureaucratic interference and needless compliance. Government needs to keep its nose out of the business of small business, thereby encouraging prosperity in their enterprises'.[130] While initially as Minister for Small Business, Harvey's red-tape-cutting agenda was concentrated on business and consumers, in 2015 as Police Minister, this focus was expanded to include reducing 'bureaucratic interference' in criminal justice measures, such as allowing suspects to be kept in custody without being personally guarded by a

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[125] Barry Bozeman, 'A Theory of Government "Red Tape"' (1993) 3(3) *Journal of Public Administration Research and Theory* 273, 274.

[126] SIL, *Glossary of Linguistic Terms* <http://www.glossary.sil.org/term/ontological-metaphor>.

[127] George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press, 2nd ed, 2003).

[128] Government of Western Australia, 'Police Back on the Beat after Red Tape Slashed' (Media Statement, 18 November 2015) <https://www.mediastatements.wa.gov.au/Pages/Barnett/2015/11/Police-back-on-the-beat-after-red-tape-slashed.aspx>.

[129] Western Australia Department of Treasury, *Red Tape Rapid Assessment Tool* <http://www.treasury.wa.gov.au/uploadedFiles/Site-content/Economic_Reform/Reducing_Red_Tape/Red-Tape-Rapid-Assessment-Tool.pdf.>; Parallels can be drawn to the Commonwealth Liberal/National Party's annual 'red tape repeal day', which commenced in 2014, when the Australian Government under then Prime Minister Tony Abbott announced plans to 'cut $1 billion in red tape every year': Australian Government Department of Jobs and Small Business, *Deregulation Agenda | Department of Jobs and Small Business, Australian Government* (9 March 2018) Department of Jobs and Small Business <https://www.jobs.gov.au/deregulation-agenda>.

[130] Western Australia, *Inaugural Speech: Mrs Liza Harvey*, Legislative Assembly, 25 November 2008 <http://www.parliament.wa.gov.au/parliament/Memblist.nsf/(MemberPics)/F47B019922A3A598C82574D0001EBED1/$file/Inaug+Harvey+final.pdf>.

police officer, and—relevant to this article—introducing CCINs.[131] By tracing the increasing application of the phrase red tape and its associated goals of cost-cutting and reduced paperwork to criminal justice policies, we see how business and market-oriented values colonise parts of the public sphere 'traditionally governed by nonmarket norms'.[132]

In *Metaphors We Live By*, Lakoff and Johnson observed that once metaphors are naturalised into our understanding of reality, they can guide appropriate future actions that 'fit the metaphor', becoming 'self-fulfilling prophecies'.[133] If red tape is conceived of in negative terms as unnecessarily burdensome, the obvious solution is to cut or eliminate it, hence its correlation with the verb 'reduce' in the sentence: 'It will *reduce* red tape'.[134] Lakoff and Johnson also remind us that metaphors provide only *partial* and not total understandings of concepts; for if metaphors were total, that concept would actually *be* the other, rather than be understood *in terms of* the other concept. As metaphors provide partial understandings of concepts, they also obscure or downplay other aspects of concepts.[135] And the understandings that metaphors create can be resisted by substituting new metaphors or symbols for old ones.

In Harvey's sentence: 'It will reduce red tape', the processes that the metaphor 'red tape' replaces—investigating and prosecuting crime, taking a suspect back to a police station to be charged and fingerprinted, interviewing suspects, drafting up witness statements, proving a crime beyond reasonable doubt, providing reasons for decisions, and adducing fair and admissible evidence in court—do not have to (and it is argued, *should not*) be conceived of in negative terms. In addition, Harvey's lexical choice to replace such processes with the metaphor red tape was not inevitable; she could have chosen to spell out the processes which she replaced, or alternatively, used phrases with more

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[131] As then Finance Minister Bill Marmion stated: 'By cutting red tape, WA Police have been able to reduce the administrative burden on their officers and ensure they are on the beat responding to crime, providing a more efficient service to the community': Government of Western Australia, above n 128.

[132] Sandel, above n 19, 7.

[133] Lakoff and Johnson, above n 127, 156.

[134] See also then NSW Attorney-General Bob Debus comment on CINs in NSW: 'I am told by my colleague the Minister for Police that he has visited dozens of police stations during his time in office, and he has been told on dozens of occasions not only that officers would like to be less involved with paperwork and red tape but also that officers have consistently supported a scheme of this nature is a way of cutting down on paperwork': NSW Ombudsman, 'Put on the Spot - Criminal Infringement Notices Trial' (Discussion Paper, NSW Ombudsman, August 2003), 6 <https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0019/3484/Put-on-the-Spot-Criminal-Infringement-Notices-Trial-Discussion-paper-August-2003.pdf>.

[135] Lakoff and Johnson, above n 127, 12–13.

positive connotations, such as 'procedural justice'[136] or 'procedural safeguards'. From a different ideological standpoint—one concerned less with reducing government 'interference' and increasing 'efficiency'—the processes that Harvey replaced with the phrase red tape would be correlated with positive values such as increasing fairness, oversight and accountability, and reducing the risk of bias and prejudice. As Kaufman has observed: 'one person's "red tape" may be another's treasured safeguard'.[137] However the business-focused, anti-bureaucratic discourse which characterised the introductions of CCINs meant that questions of procedural fairness were framed as impediments to efficiency and productivity.

C *The Vocabulary of Business and Economics*

The lexis in parliamentary debates, press releases and police websites in relation to CCINs, as well as the Ombudsman's evaluation of the scheme, is replete with near-synonymous words, ordinarily associated with the fields of business and economics. In the texts analysed, terms and phrases such as 'red tape', being 'behind a desk', 'paperwork', 'in-house office work', 'administrative demands', 'court time' and offenders being dealt with in 'the criminal justice system' are framed in negative terms, and collocated with verbs such as reduce, free up, save, cut, slash and divert. Meanwhile, terms such as 'efficiency', 'flexibility', 'economic benefits' and 'productivity' are positively appraised, and collocated with verbs such as increase, provide and improve.

Much of this vocabulary evokes the NewLiberalSpeak described by Bourdieu and Wacquant, and shows an 'intense preoccupation'[138] of the speakers with a narrow set of free market values. Like the phrase 'red tape', many of these words such as 'efficiency', 'productivity', 'administrative demands' and 'paperwork' are examples of abstractions in that they abstract away from more specific micro-actions. Being abstract in form, each of these terms could be infused with a number of different interpretations, depending on the textual context in which they are used, and the ideological position and background of the audience infusing the terms with meaning. For example, 'efficiency' in the context of criminal justice to some might necessitate each

[136] See Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Springer Science & Business Media, 1988).
[137] Herbert Kaufman, *Red Tape: Its Origins, Uses, and Abuses* (Brookings Institution Press, 2015) 1.
[138] Fowler and Kress, above n 123, 211–12.

police officer imposing the highest number of fines in the least amount of time (which may or may not have regard to culpability) to achieve maximum profit to the State. To others, efficiency might involve only imposing fines on those who have the means to pay them, or only issuing CCINs where they might produce a diversionary effect.[139] An imprecise measure of success when applied to the criminal justice system, the term 'efficiency' is apt to be misused and abused depending on the motivations of the person using it.

D *Out of the Office and On the Beat*

An additional preoccupation discerned from the parliamentary debates and media statements is that of 'frontline policing'. The politicians commonly express that the best—and sometimes the only—place for police to be is 'on the streets', 'out amongst the public or on the road', 'on the beat', 'outside the office', doing 'frontline duties' or 'on the front line'.[140] By contrast, police should not be 'typing' 'in-house', 'behind a desk' and doing 'paperwork'.[141] This notion that police belong on the streets is encapsulated in the following excerpt from the speech of then Minister for Agriculture and National Party member, Philip Gardner, regarding the Bill:

> [T]he best place for the police is, mostly, out amongst the public or on the roads … They play a valuable role in ensuring that those of us who are tempted or pressured to break the law in minor ways hold to the law. Therefore, anything that reduces police paperwork is a good thing. Those of us who have been in police offices must be appalled at how much typing and in-house office work the police are meant to do. Coming from an agricultural background, I can say that the more time spent in the office, the less time spent where the work that needs to

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[139] Of course, these are just a couple of the multiple meanings which can be ascribed to this abstract word in the context of CCINs and the criminal justice system.

[140] Kate Doust, Western Australia, *Parliamentary Debates*, Legislative Council, 22 February 2011 781b-787a; Peter Collier; Phillip Gardiner Western Australia, *Parliamentary Debates*, Legislative Council, 23 February 2011 900c-916a; Government of Western Australia, above n 129; Western Australia Police, *Criminal Code Infringement Notices* Western Australia Police <https://www.police.wa.gov.au/About-Us/News/Criminal-Code-Infringement-Notices>; Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 October 2010; Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 November 2010.

[141] Kate Doust, Western Australia, *Parliamentary Debates*, Legislative Council, 22 February 2011 781b-787a; Phillip Gardiner Western Australia, *Parliamentary Debates*, Legislative Council, 23 February 2011 909c-916a; Liza Harvey (Police Minister) Questions: Criminal Code Infringement Notices Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 March 2015 2169b-2169b.

> be done is, because the season is always pressing for the work out in the paddock to be done. In my view, the same principles apply to the police function.

In this excerpt, Gardiner draws similarities between the occupations of policing and farming. If one were to unpack this analogy, it could be argued that a police officer's primary responsibilities: to detect crime, enforce the law and protect the community, bear little resemblance to those of the average Western Australian farmer: sowing seeds, planting crops or raising animals for human consumption to make a profit. This analogy, and the consistent pairing in parliamentary debates of 'police' with places such as 'on the front line' and 'on the beat', promote a dichotomous ordering of the environment in which police belong outside, or are 'in place'[142] on the street, but are 'out of place' inside a courtroom or an office. With repetition, the notion that police belong on the street assumes the character of 'orthodoxy', a taken-for-granted truth or 'law and order commonsense'.[143] Not one politician in the parliamentary debates in relation to the Bill interrupted or challenged this orthodoxy by proposing the heretical view that time spent indoors typing, documenting interactions and doing research might be necessary or appropriate tasks for police officers to undertake.[144]

V CONCLUSION

This article has demonstrated how CCINs have been legitimised as a necessary criminal justice measure in WA using neoliberal economic reasoning. Drawing on CDA, the author has demonstrated how market values have been applied to criminal law and procedure, displacing the application of criminal justice policies that incorporate due process, transparency and accountability. In

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[142] See Tim Cresswell, *In Place/Out of Place: Geography, Ideology, and Transgression* (University of Minnesota Press, 1996); Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (Routledge & Kegan Paul, 1966).

[143] See Hogg and Brown, above n 38.

[144] Deputy Leader of the Opposition, Kate Doust, stated: 'The application of this set of arrangements is probably commonsense; I imagine it will make the lives of police on the street a lot easier, particularly given that they will have the discretion to issue these notices. I imagine that it will save them a lot of paperwork, which will ultimately free them up to have a greater presence on the streets, and I think that is something we all want to see'. Member for the Greens Party, Giz Watson, voiced concerns about the potential disproportionate impact of CCINs on Indigenous communities, but stated that 'we [the Greens] do in principle support the bill, but we want to ensure that the scheme is evaluated properly and in its entirety'. Western Australia, *Parliamentary Debates*, Legislative Council, 22 February 2011 781b-787a.

addition, from the discourse examined, it is clear that policy-makers and evaluators have privileged the 'engine of economic activity'[145] over traditional criminal punishment objectives relating to proportionate punishment, deterrence, denunciation of the conduct, rehabilitation, protection of the community, and recognition of the harm done to the victim and the community.

A key problem with evaluating criminal or quasi-criminal sanctions in terms of economic objectives is that in doing so other priorities, particularly those concerned with morality, culpability and justice, are overshadowed. Language associated with the domains of business and free-market capitalism is particularly adept at stifling moral and ethical values, especially when the primary imperative of business is to increase its profits or maximise shareholder value.[146] As John Lanchester has argued: 'The language of money doesn't express any implied moral perspective: Judgements of right and wrong are left out.'[147] An alternative proposition, and one that this author finds even more convincing, is that the language of money *does* profess a moral judgment, a morality which prioritises profit over all other goals.

Neoliberal goals of maximising productivity and profit, while reducing government expenditure and oversight, can distract us from the central question of whether administrative fines for criminal offences are capable of delivering *justice*. To this end, the author suggests that the following justice-related factors, raised in the analysis above, should replace (or at least be ranked before) neoliberal concerns if we are to properly evaluate the operation and legitimacy of CINs schemes:

- the lack of evidence linking CINs to sentencing objectives such as community safety, denunciation, deterrence and rehabilitation;
- police officers issuing CINs perform the (often conflicting) roles of investigator, enforcer, judge and sometimes also the alleged victim;
- CINs displace the criminal burden and standard of proof, police need not provide reasons for their decision to issue a CIN and there is little oversight of this decision;

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[145] Bourdieu and Wacquant, above n 15, 3.

[146] Milton Friedman, 'The Social Responsibility of Business Is to Increase Its Profits' *The New York Times Magazine* (New York), 13 September 1970; Frank Stilwell, *Oh, the Morality: Why Ethics Matters in Economics* The Conversation <http://theconversation.com/oh-the-morality-why-ethics-matters-in-economics-5963>.

[147] John Lanchester, *How to Speak Money* (Faber and Faber, 2014) 16.

- the fixed penalty imposed by a CIN may be disproportionate to—and fail to account for—the culpability and financial means of the offender;
- police may be motivated to issue CINs by reasons other than the culpability of the offender or their capacity to deter further offending (such as cost-savings, time-savings or returning property back to the victim);[148]
- many recipients have not challenged their CINs in circumstances where they may have escaped criminal sanction;
- CINs have been disproportionately used against those who are financially disadvantaged, homeless, have a mental illness or disability, and/or are Aboriginal and Torres Strait Islander.

These factors taken together not only operate as a barrier to any further implementation of CINs schemes; they also provide a strong foundation for an argument that Parliaments should reconsider their use in the context of minor and public order offences, at least until issues such as unequal application, lack of transparency and judicial oversight, and disproportionate punishment are adequately addressed. The focus of lawmakers, and those evaluating CINs, must shift to whether CINs adequately incorporate these criminal justice safeguards.

This argument is made with knowledge of the likelihood that CINs will apply to an increasing number of offences in the near future. On this issue, the WA Ombudsman in 2017 recommended that CCINs be used 'for a range of other appropriate offences subject to consideration of the findings and recommendations in this report regarding the impact on Aboriginal and Torres Strait Islanders and vulnerable communities.'[149] This recommendation was made with the objective of maximising profit and increasing productivity, being largely based on the Ombudsman's assessment that broadening the CCIN scheme will result in an 'economic benefit'. The NSW Police have similarly foreshadowed an expanding use of CINs in that state. The NSW Police Force's Corporate Plan for the years 2016-2018 lists as one of its priorities: 'Maximise use of available court alternatives for minor offences'. The strategy that the NSW Police will implement to achieve this is to: 'Explore legislative

[148] This is not to say that the return of property to the victim, and the victim's experience in the criminal justice system, should not be improved where possible; rather, it is to say that the immediate return of property to the alleged victim should not trump the proper investigation of criminal offences and the evaluation of the most appropriate action to be taken for the alleged offence by the police officer.

[149] WA Ombudsman, above n 6, Recommendation 11, vol 1, 56.

amendment to expand the use of criminal infringement notices'. Incredibly, in light of the many variables upon which criminal offending numbers depend, the Corporate Plan lists as an 'indicator of success' the NSW Police Force achieving a target of greater than or equal to 11,300 CINs.[150]

There is a need to question the consequences of expanding the application of on-the-spot fines to minor offences, and alongside this, to resist the intrusion of a neoliberal discourse into the domain of criminal justice. This is not to say that questions of cost and efficiency should not be considered in criminal justice policy reform. Instead, market values should not be the dominant paradigm according to which (quasi-) criminal sanctions are measured. By implementing criminal justice reform based on neoliberal economic values, we risk displacing the safeguards ordinarily attached to the criminal justice system.

[150] NSW Police Force, *Corporate Plan 2016-2018* <https://www.police.nsw.gov.au/about_us/publications/publications/corporate_plan>.