

**The problematic use of alcohol - a law and order
perspective:
Policing of transgression in public places
and the maintenance public order**

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Presented by Greg Swensen

B. App. Sc. (Soc Work), MA (Public Policy), LLB, LLM

Enrolled PhD candidate
University of Western Australia, School of Law
email: 17802005@student.uwa.edu.au

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The problematic use of alcohol - a law and order perspective: Policing of transgression in public places and the maintenance of public order

Presentation by Greg Swensen to 8th Annual ANZSOC Postgraduate Conference, 30 September 2014, University of Sydney

1 Abstract

The enduring nature of the role performed by the police to maintain public order is the subject of this presentation, which involves an exploratory review of law enforcement responses over the 25 year period since public drunkenness was decriminalised in Western Australia (WA) in April 1990. The review of these recent responses will place these measures in a wider context, by reference to similar measures implemented under the *Police Act 1892* and other legislative arrangements over the contemporary period of the State's existence since 1900 up to the present.

The expectation that the 1990 reform would bring about a transformation in policing of transgressive behaviours, away from a long-standing punitive approach, to one that utilised health and restorative measures delivered through the development of community based services and low threshold sobering up services to effect changes in those who were problematic users of alcohol.

However, as it seems that some of the expectations of the 1990 reforms have been rolled back, as since 2004 there have been a series of legislative reforms, such as the introduction of move on notices (MONs), which have broadened police powers for them intervene before an offence has been committed, which resemble some of the concepts which had previously existed in the *Police Act 1892*.

The expanded use of administrative measures such as MONs to deal with behaviour in public places is a form of 'policy transfer', as similar measures have been adopted in the UK and other jurisdictions, often driven by a growing community apprehension about increased levels of alcohol-related public disorder associated with the participation of young people in the night time economy. These measures have in particular been found to have a disproportionate impact on Indigenous people.

The increased emphasis on the regulation of problematic behaviour in public places, through offences such as of 'being disorderly in public by behaving in an insulting, offensive or threatening manner', has not only become a major tool to regulate the behaviour young people in entertainment precincts but to also exclude other groups from other public places. Recent developments indicate that there continues to be a growing reliance on far-reaching restrictive measures such as prohibited behaviour orders (PBOs) and banning notices, which like MONs are intended to capture a wide range of 'anti-social behaviour'.

Information will be presented in the paper, which is primarily concerned with mapping the legislative measures adopted in WA over the period 1900 to 2010, as part of a wider research agenda to critically examine the impact of these arrangements in relation to the problematic use of alcohol. The research will have broader use in identifying and supporting more effective measures to manage the use and availability of alcohol, as well as considering specific policy options involving marginalised groups such as young people and Indigenous people, to support an argument that these measures forms part of a wider agenda to control and transform public spaces into places of homogeneity.

2 Background

Historically the existence of laws which made public drunkenness an offence can be traced at least back to Tudor England where management of this problem was criminalised by being bundled into a suite of offences which utilised harsh punishments to target vagrancy and those not having a visible means of support or without a place to live, which would have also encompassed many of those who were habitually drunk.¹

‘The history of drunkenness as a crime dates from 1606, when Parliament passed “An Act For Repressing The Odious And Loathsome Sin Of Drunkenness”.² Under prior English common law, drunkenness was not an offence unless accompanied by public nuisance. The ecclesiastical courts, however, were able to punish drunkenness. In the United States, public drunkenness has usually been a common law offence.’³

The penalisation of public drunkenness which first occurred in 1606, represents a significant change in how the consequences of alcohol had been viewed, as prior to 1606, excessive use of alcohol had for many centuries been widely tolerated, as its use was regarded as a necessary and important part of the daily diet of the population.⁴ The penalty for an offence of intoxication was three shillings and four pence or confinement in the stocks for six hours, with a penalty of five shillings for subsequent offences. The moral taint surrounding the offence is to be noted, as this perspective on drunkenness persisted as a key influence in the criminal law on managing offenders until recent history in Great Britain and in Western Australia and many other jurisdictions.

‘Whereas the loathsome and odious sin of drunkenness is of late grown into common use within this Realm, being the root and foundation of many other enormous sins, as a bloodshed, stabbing, murder, swearing, fornication, adultery and such like, to the great dishonour of God, and of our nation, the overthrow of many good arts and manual trades, the disabling of divers workmen and the general impoverishing of many good subjects abusively wasting the good creatures of God.’⁵

This long history of treating drunkenness has meant that the police have always played a key role in managing drunkenness, which as noted in the report by the United Kingdom (UK) Working Party on Habitual Offenders, whilst drunkenness *per se* was not an offence, it became an arrestable offence where the individual was in a public place or was on licensed premises. Furthermore,

‘(i)n addition to simple drunkenness, the law provides for a miscellany of offences in which drunkenness in public is combined with other forms of antisocial behaviour, or is exhibited in circumstances which exacerbate the act of drunkenness itself. For convenience they are usually referred to collectively as “drunkenness with aggravations”. The most common is that

¹ Brown D. Police offences. (1971-1972) 10 *University of Western Australia Annual Law Review* ; Working Party on Vagrancy and Street Offences, Working Party on Vagrancy and Street Offences working paper, Chairman AJE Brennan London, UK: Her Majesty's Stationery Office, 1974..Brown D (1971-1972),

² 4 James 1, c. 5 (1606)

³ SM Kirbens. Chronic alcohol addiction and criminal responsibility. (1968) 54 *American Bar Association Journal* , 878

⁴ RV French, *Nineteen centuries of drink in England: a history (reprint)* London, UK: National Temperance Publication Depot, 1895.

⁵ French (1895), 184

of being guilty, while drunk, of riotous or disorderly behaviour or, to use the more familiar abbreviation, “drunk and disorderly”.⁶

Indeed, it was noted in a 1978 Scottish inquiry that the opprobrium attached to the problematic use of alcohol extends beyond the criminal law, by the adoption of a range of social, fiscal and legal controls over alcohol, which reflect ‘the disapproval expressed by the community over certain acts, such as exhibition of drunkenness. These attitudes can be reflected in police practice and the sentencing of offenders by magistrates.’⁷

This long standing approach to managing public drunkenness, is supported by a range of terms used to refer to such individuals, such as being “chronic public inebriates”.⁸ As a consequence these has meant there has been a consensus by both law enforcement agencies and the wider community, which has only recently has to some extent been eroded, that the appropriate approach was to punish drunkenness as being criminal justice matter as it represented a threat to public order.

Indeed, it was difficult for an intoxicated person in a public place, who may not have otherwise have committed an offence, to avoid not being arrested and charged, given they could commit a number of offences, such as resisting arrest, assaulting a police officer, failing to provide a name or address or being disorderly.

This meant has meant since the inception of Western Australia if someone was drunk⁹ in a public place in WA, it was likely they would be charged by the police and processed through the criminal justice system either because they charged with simple drunkenness or had committed an aggravated offence. The settlement of WA as a British colony in 1829 meant it adopted the social and legal controls that had existed at that time in the UK, until local proclamations and ordinances varied or replaced the imported colonial legislative arrangements.

The salience of public drunkenness as a law and order issue was soon recognised after colonisation. For example, in a newspaper article that catalogued a long list of court cases due to alcohol abuse for the month of September 1853 that were dealt with by the Perth magistrates court it was observed.

“The consumption of alcohol provided a release from the cares of everyday life for many of Western Australia’s workers. The government responded not by dealing with the root problems but by closing public houses, increasing the duty on liquor and so on. But the heavy drinking went on, as evidenced by an article in the Perth Gazette.”¹⁰

These concerns from the early days of the Colony of Western Australia meant that within a short period of time colonial governments imposed greater controls on public houses in serving those

⁶ Working Party on Habitual Drunken Offenders, *Habitual drunken offenders: report of the Working Party*, Chairman Weiler TG London, UK: Her Majesty's Stationery Office, 1971. 15.

⁷ Hamilton JR; Griffith A; Ritson B & Aitken RCB, *Detoxification of habitual drunken offenders*, Scottish Health Service Studies No. 39 Edinburgh, Scotland: Scottish Home & Health Department, 1978.

⁸ Cox GB; Walker RD; Freng SA; Short BA; Meijer L & Gilchrist L. Outcome of a controlled trial of the effectiveness of intensive case management for chronic public inebriates. (1998) 59(5) *Journal of Studies on Alcohol* ; Pittman DJ & Gordon CW, *Revolving door: A study of the chronic police case inebriate* New Haven, Connecticut: Yale Center of Alcohol Studies, 1958..

⁹ The past tense is used as the offence of public drunkenness was decriminalised in WA in April 1990.

¹⁰ Aveling M, ed. *Westralian voices: documents in Western Australian social history* Perth, WA: University of Western Australia Press, 1979., 79.

who were intoxicated. In addition to attempts to regulate behaviour on licensed premises associated with problematic use of alcohol, police powers were also progressively increased and expanded to deal with public order offences like public drunkenness. An example being the 1849 *Ordinance for regulation the police in Western Australia* (12th Vict. No. 20), which provided, in Order 8, that:

‘it shall be lawful for any constable to apprehend without warrant, any person whom he shall find drunk in any street or public place in any of the said towns at any hour of the day or night, and any loose, idle, drunken, or disorderly person whom he shall find therein disturbing the public peace, or whom he shall have just cause to suspect of any evil design, and any person whom he shall find between sunset and sunrise lying or loitering in any street, highway, yard, or other place within the said towns, and not giving a satisfactory account of himself.’

3 Criminal law and drunkenness

Public drunkenness – Police Act 1892 (1892 – 1975)

The starting point for contemporary approach of how public order offences were dealt with in WA is the *Police Act 1892*, which whilst it consolidated into a single statute a number of colonial ordinances and proclamations that had been enacted between 1829 and the late nineteenth century, it also replicated the offences and principles that had existed in UK legislation which had been established in Tudor times through the vagrancy laws.

A feature of the approach to dealing with public order offences in WA was that the law remained ‘frozen’ in the original form the *Police Act 1892* remained largely unchanged from when passed in 1892, for more than 80 years, until the mid 1970s.

A characteristic of the *Police Act 1892* in relation to punishment of those convicted of public drunkenness, was that it continued the approach in earlier British laws, of there being a defined set of penalties that applied to someone convicted of public drunkenness as a first tier offender and to having a system of extended and escalated penalties, depending on the circumstances, for repeat offenders. The *Police Act 1892* provided for that the penalty for a simple offence against Section 53 compared to the penalty for repeat offenders, also variously referred to in other jurisdictions as chronic alcoholic offenders,¹¹ or habitual drunken offenders¹².

When the *Police Act 1892* was passed in March 1892 it brought together into one piece of legislation offences previously in a number of ordinances and proclamations, such as the *Ordinance to provide a more suitable mode of inflicting punishment for drunkenness* (14 Vict No. 25), *Ordinance for the more effectual suppression of drunkenness* (17 Vict No. 8) and the *Police ordinance 1861* (25 Vict No. 15) and ordinances concerned with gaming and liquor licensing, as well as establishing the administrative and organisational requirements for establishing a police force responsible for law enforcement throughout the State.

This marked the beginning of the growth and development of a professional police service vested with responsibility for the enforcement of criminal laws and ensuring compliance with other regulatory areas, such as weights and measures and licensing of motor vehicles, supplanting earlier arrangements such as the use of former service personnel, the Enrolled Pensioner Force, who had operated between 1850 and 1880,¹³ for enforcing law and order.

¹¹ Rubington E. The chronic drunkenness offender. (1958) 315 *Annals of New York Academy of Political & Social Science*

¹² Hamilton JR; Griffith A; Ritson B & Aitken RCB (1978)

¹³ Stevens L. Virtual crystal ball. (2006) 08 *CIOInsight.com*

The key provisions required for police to deal with public drunkenness and other public order offences in the *Police Act 1892*, was for there to be (a) the power to arrest someone found “drunk or disorderly” in Section 43 and (b) to create the offence of being found “drunk in any street, public place, or in any passenger boat or vehicle” in Section 53.

When originally passed in 1892, the offence in Section 53 of being drunk in a public place, provided a penalty of a fine of one pound for a first time offenders or imprisonment for up to seven days, with or without hard labour and a fine of up to five pounds or imprisonment with or without hard labour for up to 21 days for second and subsequent offences. When decimal currency was introduced in 1966 these penalties were converted to a fine of \$2 for first offenders and \$10 for repeat offenders.

Section 53 - Penalty on drunkards

Every person who shall be found drunk in any street, public place, or in any passenger boat or vehicle, shall for the first offence be liable on conviction to a penalty not exceeding two dollars, or to imprisonment, with or without hard labour, for any term not exceeding seven days, and for any second or subsequent offence to a penalty not exceeding ten dollars, or to imprisonment, with or without hard labour, for any period not exceeding twenty-one days.

The penalties of \$2 and \$10 remained unchanged until an amendment in November 1975, when the fine was increased to \$10 and \$25, for first time and repeat offenders, respectively. There was no change in the term of imprisonment that could be imposed, ie up to seven days for a first time offender or up to 21 days for repeat offenders.¹⁴

Public drunkenness – Police Act 1892: Repeat offenders (1892 – 1975)

The *Police Act 1892* adopted a layered approach towards managing public drunkenness by differentiating between one-off or occasional offenders from those who were repeat offenders, by establishing a series of increasingly harsh punitive consequences for recidivists. This meant that a repeat offender who appeared before a summary court charged with public drunkenness faced the prospect that he or she could ultimately be declared an “Idle and disorderly person”, a “Rogue and a vagabond” or penultimately an “Incorrigible rogue” through the operation of a framework of escalated punishments.

The provisions contained in Sections 65(6) 66(7) for dealing with repeat offenders, described in the legislation as “Habitual drunkards,” replicated a long-standing approach established in English law for dealing with vagrancy and disorderly behaviour.

Under Section 65(6) of the *Police Act 1892*, if a person had been convicted three times for drunkenness within a 12 month period they were deemed to be a habitual drunkard, which could result in them being declared by a Magistrate as being an “Idle and disorderly person”. The declaration of being an idle and disorderly person occurred if the individual had been convicted three times for drunkenness over the previous 12 month period, resulting in them being imprisoned for up to six months, with or without hard labour.

Whereas, if a person had reappeared in court for public drunkenness, but was convicted outside of the time frame of being convicted within the last 12 months, they faced a punishment of a fine of not more than \$10 or not more than 21 days imprisonment before the 1975 amendment, when the fine increased to \$25.

¹⁴ Australia changed from the Imperial units to decimal currency in February 1966. A penalty of £1 converted to \$2: *Decimal Currency Act 1965* [Act 1965/113].

The next escalated consequence contained in the *Police Act 1892* was contained in Section 66 “Rogues and vagabonds”. This affected those who had been convicted more than three times for public drunkenness under Section 65(6) and had been declared an “Idle and disorderly person”. It also covered other offences, such as resisting arrest. Being dealt with under Section 66(7) meant a person was deemed a “Rogue and vagabond” and could be imprisoned for up to 12 months, with or without hard labour.

The penultimate escalated consequence was that if a “Rogue and vagabond” committed further offences, including a Section 66(7) offence, they could be declared an “Incorrigible rogue”, which provided imprisonment for up to 18 months, with hard labour.

In its simplest form, the *Police Act 1892* in the first tier provided a scale of penalties for public drunkenness, from a fine of up to one pound for a first time offender up to a fine of up to five pounds or imprisonment for up to 21 days for someone previously convicted, as provided in Section 53.

The second tier of offences encompasses other offences related to disorderly conduct (Section 54), being an idle and disorderly person (Section 65), being a rogue and vagabond (Section 66) and being an incorrigible rogue (Section 67); which were directly transposed from the vagrancy and public order offences established in Tudor times in England.

Substantially harsher and more serious penalties attached to second tier offences. For example, the penalties for disorderly conduct, in Section 54, which had a penalty of a fine of not more than ten pounds or imprisonment with or without hard labour for up to six month, or to both a fine and imprisonment.

A court was required to deem someone as a “idle and disorderly person” under Section 65 if they had been previously convicted of a number of offences, which meant that they could be sentenced for up to six months imprisonment. An alternative option for a fine was not provided. There was the provision in Section 65(6) for a person to be declared a “habitual drunkard” if “thrice convicted of drunkenness within the preceding twelve months”.

A Magistrate was required to deem someone as a “rogue and vagabond” under Section 66, which attracted a penalty of up to 12 months imprisonment, if they committed a number of specified offences. As also occurred for Section 65, there was not an alternative provision for a fine instead of imprisonment. A specified offence was in Section 66(1), when a person had previously been convicted as an idle and disorderly person.

The upper end of the second tier of consequences was a declaration of being an “incorrigible rogue”, resulting in imprisonment of up to 18 months. Section 67(2) provided if a person had committed any offence that resulted in them being convicted as being a rogue and vagabond, they were declared an incorrigible rogue under Section 67(2).

Reforms which came into operation in November 1975 due to the *Police Act Amendment Act (No. 2) 1975* effected resulted in the replacement of provision for someone to be deemed an ‘idle and disorderly person’ by substituting the terms of ‘having committed an offence ‘on summary conviction’ in Sections 65(6) and 66(7). This reform stemmed from a Law Reform Commission report that had recommended reform of the archaic provisions based on the vagrancy concepts which had been part of the legislation for some 80 years.

There were further reforms involving archaic or outdated provisions in the *Police Act 1892* occurred with the *Criminal Law Amendment (Simple Offences) Act 2004*, which deleted and/or amended a number of the public nuisance and public order-related offences, such as provisions

in Section 43 and Section 44, which had remained in Part V of the *Police Act 1892* after the decriminalisation of drunkenness in April 1990.

The removal of these archaic provisions in 1990, which as noted earlier replicated the approach which had its genesis in much earlier English law, was considered to be problematic by the WA Police, as revealed in hearing conducted in 2006 by the Standing Committee on Legislation, Inquiry into Criminal Investigation Bill 2005, Criminal Investigation (Consequential Provisions) Bill 2006 and Criminal and Found Property Disposal Bill 2005, in evidence given on 23 August 2006 by Inspector Carver of the WA Police.

‘It is very important to us because some legislation was removed from the statutes that specifically empowered us to deal with lots of street offences, particularly in relation to loitering with intent, and evil designs, where we clearly suspected that a person was about to commit an offence. That legislation was removed. We fought quite hard for the introduction of the move-on notice legislation.’¹⁵

This perceived deficiency in police powers meant that similar broad provisions to those that the earlier vagrancy laws had sought to cover behaviour, involving conduct involving someone about to or suspected of committing an offence, were reintroduced into WA criminal law in 2006, in the form of move on notices. This issue will be further examined in this paper below.

Public drunkenness – Police Act 1892 (November 1975 – March 1990)

The *Police Act Amendment Act (No. 2) 1975* increased the fine for a first time offender to \$10 or imprisonment, or for a repeat offender, a fine of up to \$25, with term of imprisonment remaining unchanged of up to 21 days. Before this modest increase in the fine, the penalty in Section 53 had remained unchanged in WA for more than 80 years up until to 1975.

Whilst the amendment of November 1975 marginally increased the penalty for public drunkenness up to \$10 for a first offence and \$25 for repeat offenders, the penalty for disorderly conduct (Section 54), had been increased in November 1964 from \$20 to \$100 (but without an increase in imprisonment).

An outcome of the November 1975 amendment was that the courts were able to impose a fine instead of a term of imprisonment for second tier offence. Whilst the November 1975 amendment removed the definition of an “idle and disorderly person” and replaced it with the term of being convicted “on summary conviction”, nevertheless the *Police Act 1892* continued to retain its long standing two tier structure of penalties involving public order offences. The 1975 amendment meant the penalty for a Section 65 offence was a fine of up to \$500 or imprisonment of up to six months.

The provision for being declared a habitual drunkard, of being convicted three times for drunkenness in the preceding 12 months, was retained in Section 65(6) and the penalty for a Section 66 offence (now with the heading of “Subsequent offences against s. 65”) was increased to a fine of up to \$1,000 or imprisonment of not more than 12 months, if a person had committed an offence against Section 65.

Statistical overview

¹⁵ Standing Committee on Legislation. Transcript of evidence taken on 23 August 2006 to Inquiry into Criminal Investigation Bill 2005 by Standing Committee on Legislation. Perth, WA, Perth, WA Parliament of Western Australia. 2006, 1.

As Figure 1 gives an overview covering an extended period in WA, from the year 1899/1900 to 2010/2011 it enables the reader to identify broad patterns and trends the rate of charges for public drunkenness. Thus it can be seen the highest rate occurred in the first decade leading up to the onset of World War I, when a peak rate of 1,849 per 100,000 occurred 1914/1915 year and reached its lowest rate of 395 per 100,000 in 1933/1934, associated with the time of the Great Depression.

From the low point in 1933/1934 there was a steady increase in the rate of charges for public drunkenness over the following four decades up to the year 1971/1972, when the rate of 1,497 per 100,000 was reached. There was a sharp drop in the rate, to 850 per 100,000 in 1976/1977, which remained relatively constant, fluctuating in a range of about 1,000 to 1,200, over much the following period up to the year 2008/2009 (rate of 1,051), followed by a modest decrease up to the end of the period, with a rate of 766 per 100,00 in 2010/2011.

It should be noted that over this extended period, whilst the core offence of public drunkenness remained unchanged in the *Police Act 1892*, until it was repealed as part of the legislative reform to “decriminalise” public drunkenness, which came into effect in May 1990, it is likely some of the fluctuations were related to exogenous factors, such as changes in policing practices, revised sentencing practices by the courts, reforms in liquor licensing (such as the lowering of the drinking age from 21 to 18 in 1971) and the shifts in perceived seriousness of problematic alcohol use by the community.

Another caveat on the interpretation of a trend involving a single offence over an extended period is that different measures of drunkenness have had to be adopted to compile this data series, due to changes in reporting practices and publication of police and court data in annual reports and revised schema for classifying criminal offences, including public drunkenness.

Accordingly, the number of annual counts of charges for public drunkenness is based on different definitions – on charges over the period 1899/1900 to 1962/1963, on convictions for the period 1963/1964 to 1987/1988, on charges for the period 1988/1989 to 1991/1992 and on apprehensions of intoxicated persons and admissions to sobering up centres (SUCs) for the period 1992/1993 to 2010/2011.

The term ‘charges’ has been used for simplicity to refer the variations over this period depending on whether data was published as charges, convictions or apprehensions/admissions to SUCs. The trend in counts of charges when compared to the rate in Figure 1, shows the lowest annual count of 1,749 occurred in 1933/1934 and that subsequently the annual number steadily increased up to the year 2007/2008, when there was a total of 22,670 charges (ie apprehensions/admissions to SUCs). The subsequent drop to 17,956 charges in 2010/2011 is most likely related to the closure of a number of SUCs.

Figure 1: Trends in number & rate of charges for drunkenness WA, 1899/1900 – 2010/2011

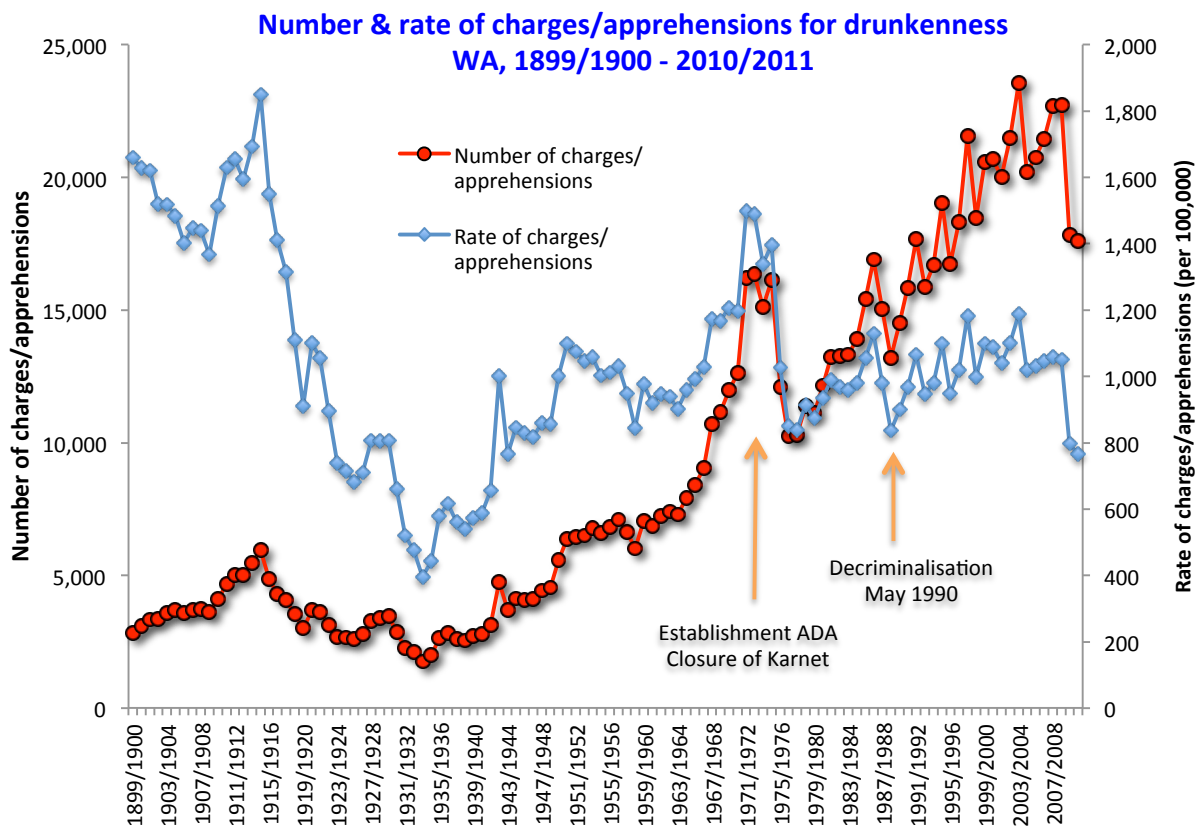


Figure 2, which presents data concerning the number of charges for the period from 1904/1905 to 1962/1963, provides another snapshot of the impact of alcohol-related offending which occurred in WA up to the early 1960s. The cut off point of 1962/1963 is due to the cessation of the publication of comprehensive data concerning arrests and outcomes covering a wide range of offences, which up to that year had been included as data tables appended to annual reports of the WA Police Department.

As after the 1962/1963 annual report, when only limited summary data was included in annual reports, other sources of data about offending and court outcomes have been identified, such as the development of reports published by the Australian Bureau of Statistics.

The nearly six decade period in Figure 2 indicates that public drunkenness has represented a major, if not an extraordinary, component of policing, up to 1927/1928. Up to this time charges involving this specific offence represented between about one quarter and one third of all offences that police dealt with that resulted in a formal charge. After 1927/1928, when 23.9% of all charges were for public drunkenness, the proportion of public drunkenness offences dropped to 11.0% in 1938/1939, then increased to about one in five of all offences until 1950/1951 (21.6%), then declined to 12.8% in 1962/1963.

Figure 3 confirms that somewhat surprising result that throughout this period a higher proportion of female offending involved the public drunkenness, compared to the males. There were two peaks in the proportion of public drunkenness charges involving females which appear to be related to the period during and immediately after first and second World Wars.

Figure 2: Charges for drunkenness & % drunkenness charges of all charges, WA, 1904/1905 – 1962/1963

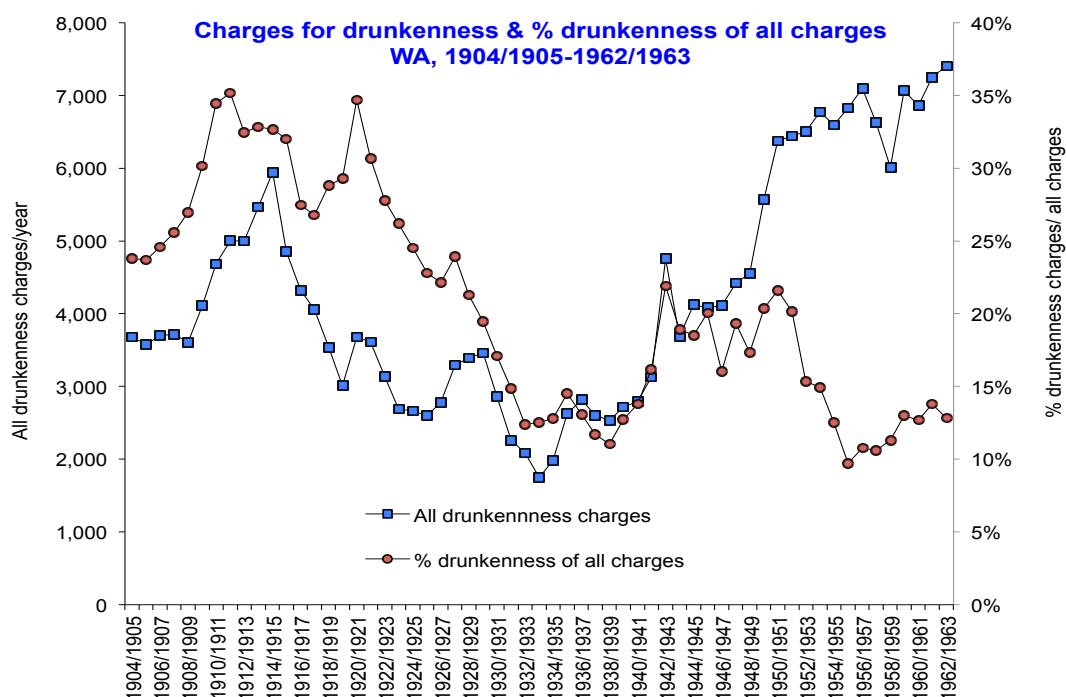
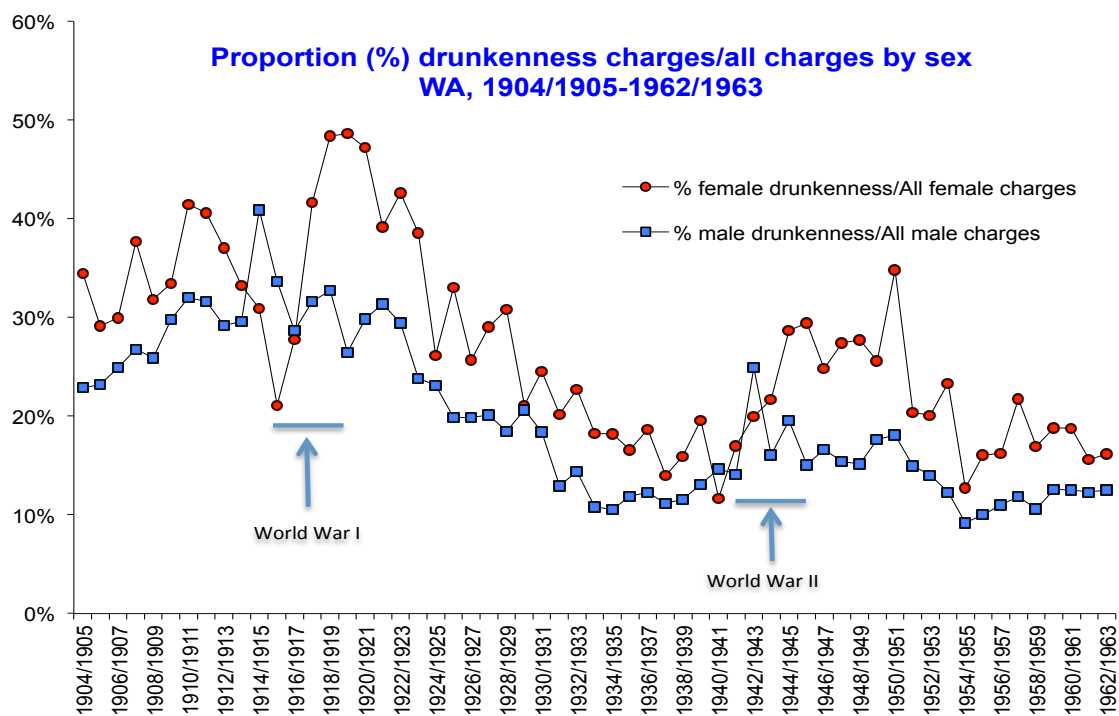


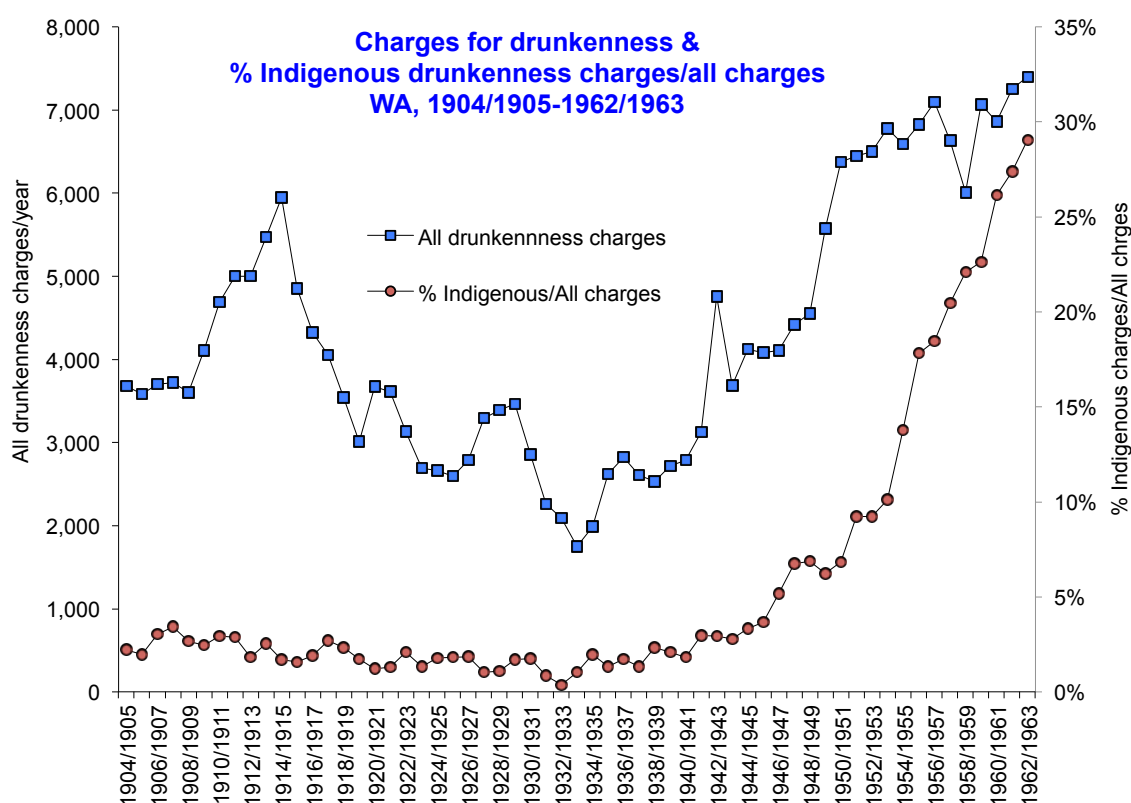
Figure 3: Proportion (%) of drunkenness charges of all charges by sex, WA, 1904/1905 – 1962/1963



The data in Figure 4 which covers the period 1904/1905 to 1962/1963 concerns a breakdown of offending by Indigenous status, which had been included as part of the set of annual data tables appended to annual reports of the Police Department.

It can be seen that public drunkenness charges represented about 2 per cent or less of all charges that were laid by police involving Indigenous adults over the four decades up to 1940/1941. The proportion of Indigenous charges for public drunkenness increased to about one in 10 charges over the period between 1940/1941 up to 1952/1953.

Figure 4: Drunkenness charges & proportion (%) of drunkenness charges of all charges by Indigenous status, WA, 1904/1905 – 1962/1963



However, after 1952/1953 there was a marked and sustained increase in the proportion of charges involving Indigenous people for public drunkenness, reaching 29.3% in 1962/1963. It is likely that this increase in charges for public drunkenness is associated with an amendment to the *Licensing Act 1911*, which for the first time included a provision in the liquor licensing legislation, which made it an offence to drink alcohol in a public place, which included in its definition as being “within a townsite on or in any road, street, footpath or lane” or “within any park or reserve”.¹⁶

¹⁶ Licensing Act 1911, Section 134A (1), commenced January 1952.

4 Disorderly conduct

Disorderly conduct (1892-2005): Police Act 1892 Section 54

The *Police Act 1892* had always had a provision that someone charged with the offence of disorderly conduct under Section 54 faced a more severe consequence compared if they had been charged under Section 53 (public drunkenness).

When originally passed in 1892, the penalty for a Section 54 offence was a fine of up to 10 pounds and/or imprisonment for up to six months imprisonment, or both. There would appear to have been some scope for police to exercise discretion in relation to whether to charge someone with a Section 53 offence if they were behaving in a disorderly manner when they were also drunk, with an attendant a lower penalty, compared to if they charged the person with a Section 54 offence.

Clearly the legislature regarded disorderly conduct as a more serious offence, given the divergence in penalties that occurred between Section 53 and 54. The monetary penalty for the offence of disorderly conduct was increased to 50 pounds in 1964 by the *Police Act Amendment Act 1964*, which became \$100 with the introduction of decimal currency in 1966:

Section 54 - Disorderly conduct

Every person who shall be guilty of any disorderly conduct on any street, public place, or in any passenger boat or vehicle, any Police Station, or lock-up, shall, on conviction, be liable to a penalty of not more than one hundred dollars for every such offence, or to imprisonment, with or without hard labour, for any term not exceeding six calendar months, or to both fine and imprisonment.

Disorderly conduct – Police Act 1892 s. 54 (April 1990 – April 2005)

The *Acts Amendment (Detention of Drunken Persons) Act 1989* represented a major shift in the management of public drunkenness from being a primary role of the police, to being a shared responsibility involving both the police and health and welfare agencies.

This legislation repealed two provisions in the *Police Act 1892*, Section 53 and Section 65(6) and amended Section 43. However, in its amended form, even though the term ‘drunk’ had been removed, Section 43 was still applied to a spectrum conduct associated with drunkenness as in its amended form it substituted the term “disorderly manner” for someone being “drunk or disorderly”.

Whilst Section 54 was amended by removing the term “drunk” it also replaced this with term “disorderly conduct” with fine of \$100 which had been established in 1964. The fine for this offence was increased in 1975 to a fine of up to \$500 or imprisonment for up to six months, or both, by the *Police Act Amendment Act (No. 2) 1975*, which commenced in March 1976.

Section 54: Disorderly conduct

Every person who shall be guilty of any disorderly conduct on any street, public place, or in any passenger boat or vehicle, and Police Station, or lock-up, shall, on conviction, be liable to a penalty of not more than \$500 for every such offence, or to imprisonment for any term not exceeding 6 calendar months, or to both fine and imprisonment.

The *Criminal Law Amendment (Simple Offences) Act 2004*, which commenced in June 2005, repealed Section 54.

Statistical overview

Figure 5 complements the data contained in an earlier figure, by including a breakdown of the annual proportion of charges for both public (also referred to as “good”) order offences and public drunkenness. It is conceivable that intoxication with alcohol would have been a factor in a person also being charged with a public order offence, such as fighting, abusive language, resisting arrest or disorderly conduct.

Therefore, when read in conjunction with the earlier observation that public drunkenness constituted one in three of all charges laid by police up until the early 1920s, the trends in public order charges lends support to the belief that alcohol was contributing factor in a significant proportion of police work in WA, quite possibly up to half of all offending, certainly up to the period prior to the Second World War.

The convergence in the proportion of both public order and public drunkenness offences by the end of the period in 1962/1963, may be due to changes in legislation, such as offences involving Indigenous people, as well as changes in policing strategies and priorities.

Figure 5: Proportion (%) of public order charges of all charges & % drunkenness charges of all charges, WA, 1904/1905 – 1962/1963

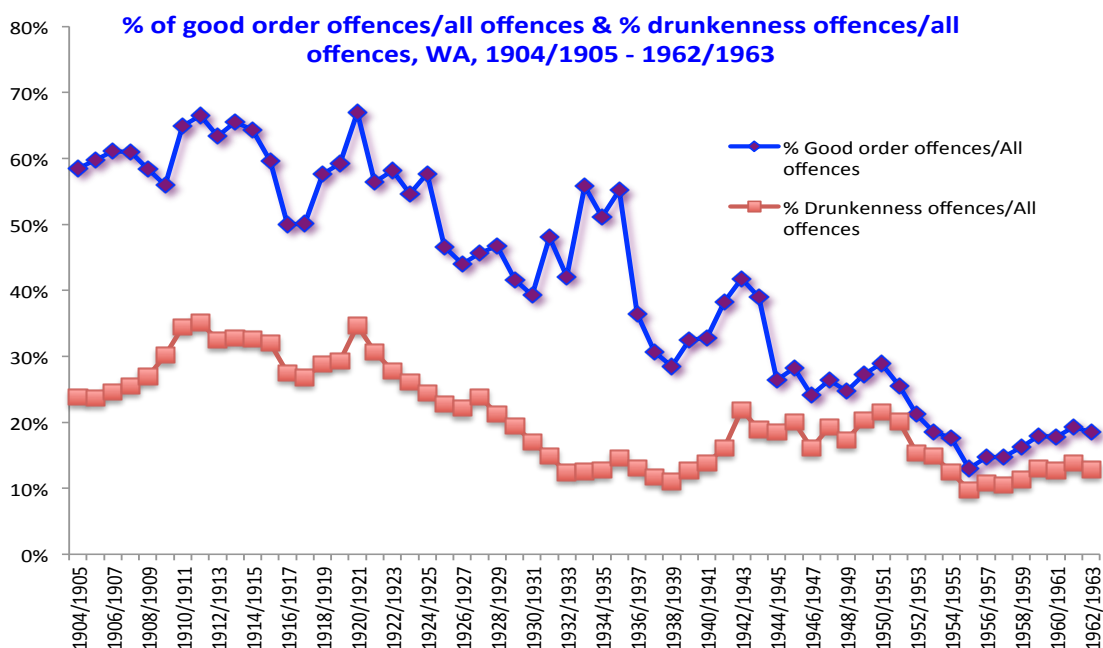


Figure 6: Rate of arrests for public order charges, drunkenness charges & rate of imprisonment for drunkenness + street drinking offences, WA, 1904/1905 – 1962/1963

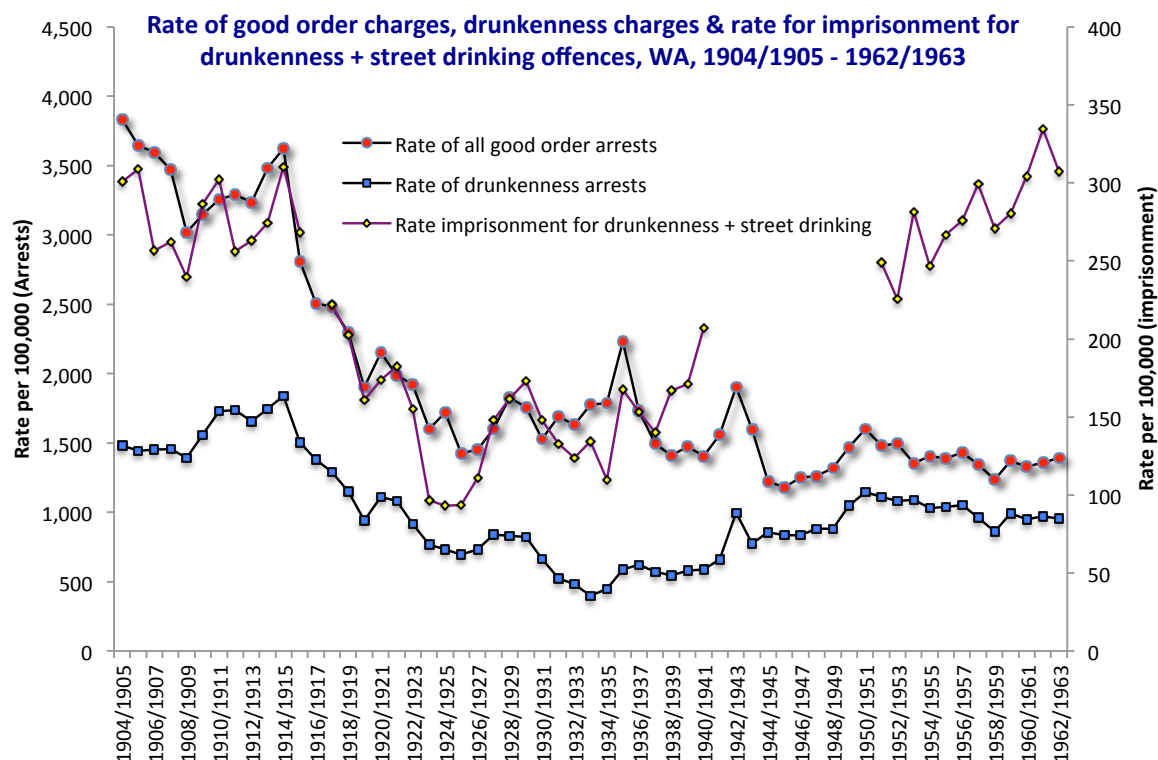


Figure 6 has been included to provide a somewhat broader picture of the interactions between laws which targeted drunkenness and public order offences and introduction of new provisions, such as the criminalisation of park and street drinking in early 1952.

The striking increase in the combined rate of imprisonment for both public drunkenness and street drinking which can be seen in Figure 6 to have commenced in the early 1950s may represent the incarceration of those individuals who would not otherwise been able to have paid the \$40 fine (at the time 20 pounds), of whom many could have been Indigenous people.

Figure 7 underscores the impact of the policy that public drunkenness was a criminal offence and the use of a system of escalated penalties and punishments, of which commitment to prison was the ultimate consequence. The consequence of the criminalisation drunkenness and the penalisation of those who committed such offences is starkly demonstrated in Figure 7, which meant that for most of the period up to 1971/1972, about one third of those committed to prison in WA were there because of public drunkenness, reaching a peak of 41% of all commitments to prison in the 1949/1950 year

Figure 7: Commitments to prison & % commitments for drunkenness of all commitments, WA, 1899/1900 – 1995/1996



5 Law reform

Public drunkenness – Decriminalisation (April 1990 - 2005)

The major reform concerning public drunkenness in WA occurred in April 1990 with passage of the *Acts Amendment (Detention of Drunken Persons) Act 1989*. This legislation repealed both Sections 53 and 65(6) of the *Police Act 1892* and added a new section, Part VA – Apprehension and detention without arrest, which spelt out how intoxicated adults should be dealt with by the police. The management of intoxicated juveniles was addressed separately through amendments to the *Child Welfare Act 1947* to enable police to apprehend intoxicated juveniles.

The impetus for decriminalisation was in large part as a result of the Royal Commission Into Aboriginal Deaths in Custody (RCIADIC), which included both national and jurisdiction specific investigations.¹⁷ Another stimulus for reform had been a request in 1986 for the WA Law Reform Commission to review the need for retention and reform of offences in the *Police Act 1892*. In its 1992 report the Commission identified a range of offences, including those concerned with vagrancy and argued reform was required as the Act was seriously outdated and no longer appropriate given changes in community standards.¹⁸

¹⁷ Royal Commission Into Aboriginal Deaths in Custody, Regional report of inquiry into individual deaths in custody in Western Australia, Commissioner DJ O'Dea Canberra, ACT: Australian Government Publishing Service, 1991.; Royal Commission Into Aboriginal Deaths in Custody, Regional report of inquiry into underlying issues in Western Australia, PL Dodson Commissioner Canberra, ACT: Australian Government Publishing Service, 1991.

¹⁸ Law Reform Commission of Western Australia, Police Act offences: Discussion paper, Project No. 85 Perth, WA: Law Reform Commission of Western Australia, 1989.; Law Reform Commission of Western Australia, Police Act offences: report, Project No. 85 Perth, WA: Law Reform Commission of Western Australia, 1992.

The 1989 reform also amended Section 43 of the *Police Act 1892*, by replacing the broad power for police to apprehend a person who had been “drunk and disorderly” instead with a power involving when someone was “conducting himself in a disorderly manner”. The power for the police to detain an intoxicated person was set out in Section 53A:

Circumstances in which a person may be apprehended

53A. (1) Subject to section 33A of the *Child Welfare Act 1947* where a police officer has reasonable grounds for believing that a person is intoxicated and the person is in a public place or trespassing on private property, the police officer may, without warrant, apprehend and detain the person.

Part VA provided police with three options when dealing with an intoxicated person:

- to detain him or her “for as long as it reasonably appears to a police officer that the person remains intoxicated” (Section 53D); or
- to release the intoxicated person into the care of an approved hospital without him or her being required to enter into a recognisance or as a condition of an order for bail (Section 53H); or
- to release the intoxicated person into the care of some capable of taking adequate care of the person (Section 53G).

Part VA also included a number of checks and balances, such as the length of time a person could be detained, with the requirement if that after eight hours police believed the person was still intoxicated, that police could seek an extension of the period of time of detention by application before a Justice. Another protection in Part VA was that a detained person could not be charged with an offence, be questioned about an offence, be photographed or have other personal identifying features taken (Section 53F).

The 1989 reform legislation also amended the *Child Welfare Act 1947*, to provide a power for an intoxicated child to be detained, as was set out in Section 33A of the *Child Welfare Act 1947*, whereby such a child could be taken to his or her place of residence or be released into the care of another person.

In 1995 Section 33A provision in the *Child Welfare Act 1947* for the detention of juveniles, was repealed and re-enacted as Section 18 of the *Young Offenders Act 1994*, which commenced in March 1995, spelt out that police may also detain an intoxicated young person. A new piece of legislation, the *Children and Community Services Act 2004*, which commenced in March 2006, repealed Section 18 of the *Young Offenders Act 1994* and brought the power for police to apprehend a juvenile where the police believed such person was at an “immediate or substantial risk”, which would include an intoxicated individual, under a general power set out in Section 87 of the *Children and Community Services Act 2004*.

In November 2000 Part VA of the *Police Act 1892* was repealed and its provisions were shifted to a new piece of legislation, the *Protective Custody Act 2000*, which commenced in January 2001. The *Protective Custody Act 2000* expanded the scope of the detention of intoxicated persons, extending to alcohol as well as other substances, by the definition of intoxicants “as being either alcohol or a drug or a volatile or other substance capable of intoxicating a person”.

The trigger for detention occurs when the person has such “a significant impairment of judgment or behaviour” whether they are in a public place or trespassing on private property, that they should be apprehended to either protect their health or safety, the health or safety of others, or to prevent damage to property”.

The intention of the repeal of provisions concerned with public drunkenness by the *Acts Amendment (Detention of Drunken Persons) Act 1989* was that management of drunk and intoxicated persons should be regarded a health responsibility, a principle which retained by *Protective Custody Act 2000*. However, the effectiveness of the reform in managing drunk and intoxicated persons remains an open question, given that many of those who were to be diverted from the criminal justice system to sobering up services were socially marginalised Indigenous people mostly in remote areas in the North West as well as in the Goldfields and that sobering up centres only provided short stay overnight accommodation and were explicitly not part of the health system.

Liquor Control Act 1988 - Infringements

The *Liquor Control Act 1988*,¹⁹ which commenced on 1 February 1989, permitted infringements to be issued for a range of liquor licensing offences in WA. Whereas previously the police had dealt with those who had committed a liquor licensing offence, from December 1989 responsibility for detecting and dealing with such offenders was transferred to liquor licensing inspectors employed under the Office of Racing, Gaming and Liquor.

One important consequence of this reform meant that an offender who was issued with an infringement would only face a fixed monetary penalty, as provided under Section 167(3), which could only be 10% of the maximum fine that was otherwise provided in the *Liquor Control Act 1988*.

This was a marked change in how offenders were dealt with for liquor licensing offences compared to the previous system where police would have charged an offender and dealt with them either by summons or by arrest.

An example of how this reform worked is the offence of consuming alcohol in an unlicensed premises, such as on any park or reserve in Section 119(1) or in Section 119(4) drinking on any public road or outside a licensed premise, each of which provided a fine of \$2,000. However, if an individual received an infringement this would attract a fixed penalty of \$200 and which did not result in a record of conviction.

The three most frequent types of offences that were dealt with by infringement, as can be seen in Figure ##, involved drinking in public places – which typically accounted for about eight out of 10 of all infringements, followed by about one out of 10 infringements involving juveniles (ie under age drinking) and with about one in 20 infringements related to disorderly conduct on licensed premises (eg drunkenness).

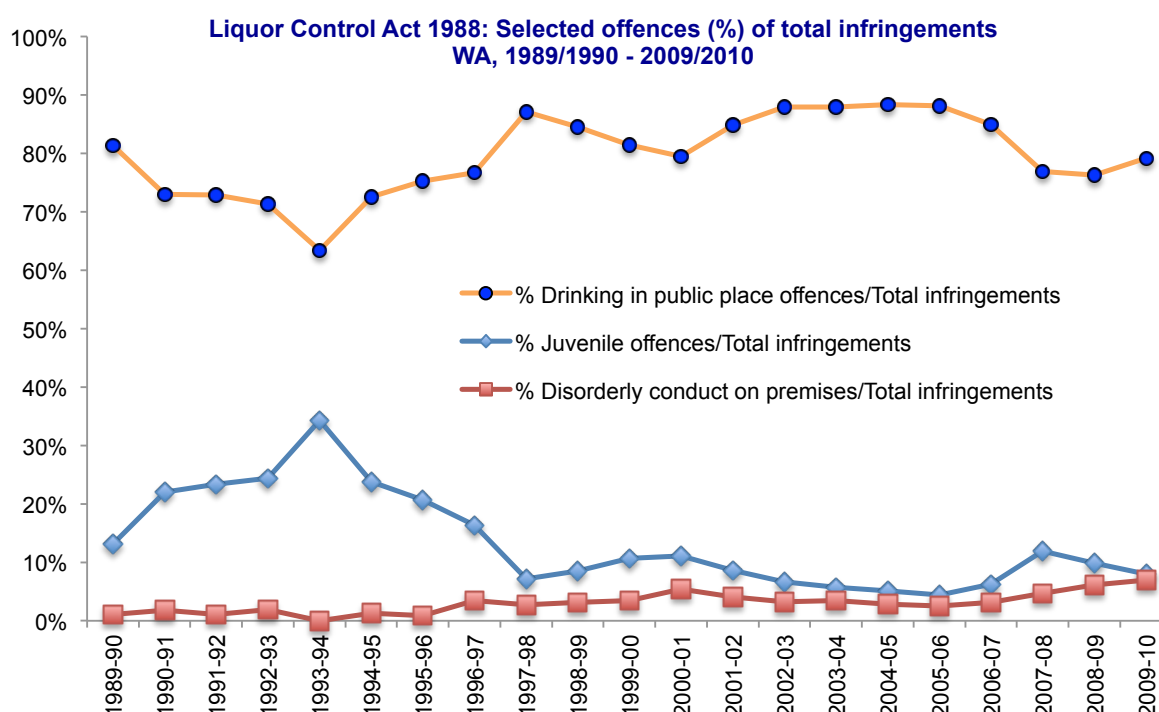
¹⁹ The act was formerly known as the *Liquor Licensing Act 1988*.

Statistical overview

The trends in Figure 8, which covers the period from the reform which commenced in February 1989, when infringements were able to be issued for a range of liquor licensing offences, shows that for much of the period about eight out of 10 of all infringements were concerned with the offences of drinking in a public place.

It can also be seen that infringements issued to juveniles for being under age and on licensed premises made up between one in 10 and about one third of all infringements up to 1993/1994 and have since represented ten per cent or less of all infringements issued. The third most frequent liquor licensing category of offence, involving disorderly conduct related offences on licensed premises, has constituted less than one in 20 infringements issued for much of the period.

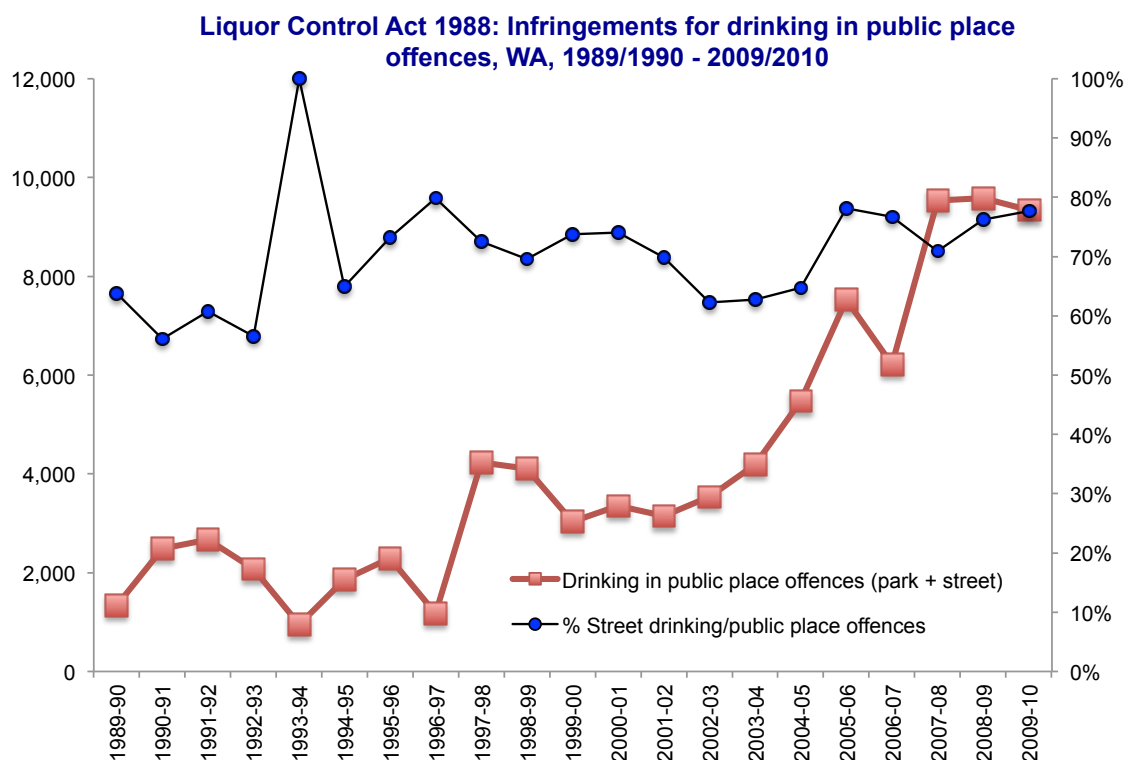
Figure 8: Proportion (%) of infringements for selected offences under Liquor Control Act 1988, WA, 1989/1990 – 2009/2010



The breakdown of infringements issued for drinking in public places, which encompasses Section 199 offences, ie drinking in a park or a reserve (Section 119(1)) or drinking in a street or on a road reserve (Section 119(4)(a)), in Figure 9, shows that over the period the proportion of street drinking of all offences involving drinking in a public place remained relatively constant, accounting for about three quarter or more of all such offences.

However, the annual number of offences related to consuming alcohol in a public place substantially increased after 1996/1997, from about 2,000 infringements per annum to about 9,500 infringements by 2007/2008.

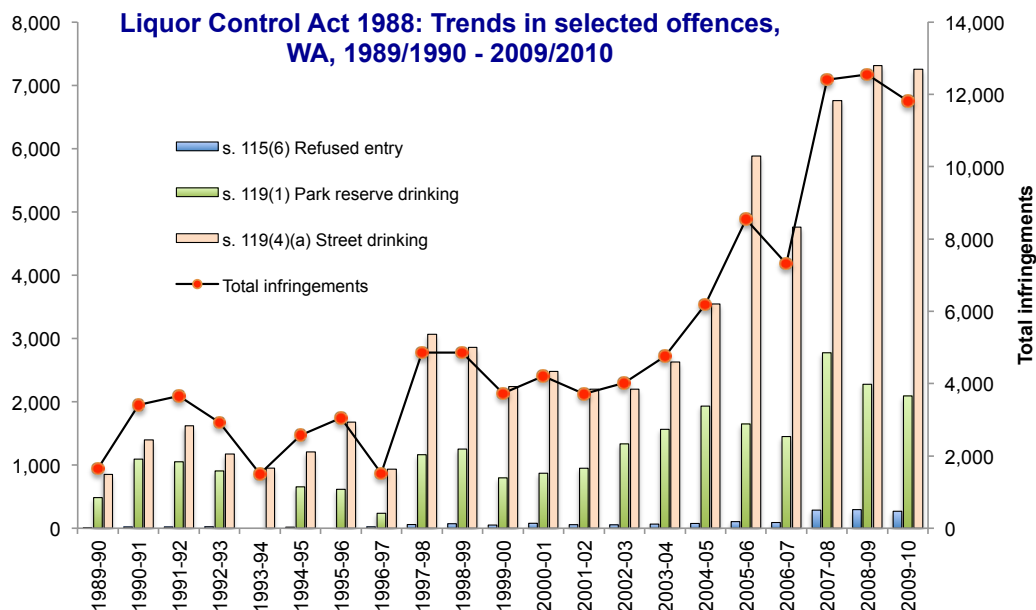
Figure 9: Infringements for drinking in public places & % street drinking infringements of all infringements for offences under Liquor Control Act 1988, WA, 1989/1990 – 2009/2010



The significance of the growth in offences concerned with street drinking, ie Section 119(4)(a) is apparent in Figure 10, which indicates that there were three broad phases related to this offence:

- the eight year period from 1989/1990 to 1996/1997, when there between 1,000 to 1,500 street drinking offences dealt with annually by infringement,
- the seven year period from 1997/1998 to 2003/2004, when there were about 2,500 street drinking offences dealt with annually by infringement, and
- the most recent six year period, from 2004/2005, when the annual number of street drinking offences dealt with by infringement increased up to about 7,500 by 2009/2010.

Figure 10: Trends in infringements for major offences under Liquor Control Act 1988, WA, 1989/1990 – 2009/2010



Criminal Investigation Act 2006 - Move on notices

The *Criminal Law Amendment (Simple Offences) Act 2004* was passed in November 2004 and commenced on 1 June 2005 and was a long overdue reform of the State's two primary pieces of legislation, the *Police Act 1892* and the *Criminal Code*, which largely cover minor and serious criminal offences in Western Australia (WA).

The *Criminal Law Amendment (Simple Offences) Act 2004* resulted in a range of amendments to both of these acts and had been introduced as part of a wide ranging agenda of law reform²⁰ spearheaded by the Labor Government's Attorney General Hon. Jim McGinty, including modernisation of archaic provisions in the *Police Act* and streamlining the processing of offences by the courts which had been identified in two major earlier reviews of WA criminal laws in 1983²¹ and 1992²². In his second reading speech on 23 September 2004 the Attorney General observed that

'The Criminal Law Amendment (Simple Offences) Bill owes its origins to another report of the Law Reform Commission of Western Australia - namely, its "Report on Police Act Offences" of August 1992. The commission recognised that few provisions of the *Police Act* have been developed in the context of contemporary life and modern conditions. Most are provisions of considerable antiquity and can be traced to provisions in the United Kingdom legislation of the early nineteenth century or New South Wales statutes of the same period. Over time, some provisions have been amended, others removed, and some transferred to the *Criminal Code* or replaced by more specific legislation. The

²⁰ Cf: Criminal Investigation (Identifying People) Act 2002, Sentence Administration Act 2003, Corruption and Crime Commission Act 2003, Criminal Procedure Act 2004, Cannabis Control Act 2004, Criminal Investigation Act 2006

²¹ MJ Murray, *The Criminal Code: a general review* Perth, WA: Attorney General's Department, 1983.

²² Law Reform Commission of Western Australia (1992)

result is that the Police Act 1892 is now an incoherent collection of miscellaneous offences.²³

This paper is concerned with a specific reform brought about by the *Criminal Law Amendment (Simple Offences) Act 2004*, which inserted a new section, Section 50, in the *Police Act 1892*, which for the first time gave police in WA the power to order a person suspected of being about to commit a minor offence to “move on”.

This reform meant that police did not need to arrest someone, which had been the situation that previously existed Section 43(1), if police suspected that the person was about to commit an offence. The effect of the 2004 reform in relation to this type of situation was set out in the explanatory memorandum to the Criminal Law Amendment (Simple Offences) Bill 2004:

‘The proposed Section 50 is intended to partially replace the offences of “being suspected of being about to commit an offence”, “loitering” and “evil designs” set out in section 43(1) of the Police Act 1892 and the offence of “hindering a lawful activity” in section 82B(3) of the Police Act 1892 (all of which are being repealed by the Bill).

The move on provision in Section 50 of the *Police Act 1892* operated between 1 June 2005 and 30 June 2006 and then became an offence under Section 27 of the *Criminal Investigation Act 2006*, which commenced on 1 July 2007.²⁴ In its re-enacted form, sub-sections 1 and 2 of the former Section 50, were retained but additional amendments were made in sub-sections 3 to 7 in the remainder of Section 27 of the *Criminal Investigation Act 2006*.

A key outcome of the consolidation of the move on provision into Section 27, was that the *Criminal Investigation Act 2006* retained the same penalty which existed in the former Section 50, that non-compliance with a move on notice is an offence, with a penalty of a fine of up to \$12,000 and/or imprisonment up to 12 months (Section 153).

27. Suspects and others may be ordered to move on

(1) A police officer may order a person who is in a public place, or in a vehicle, vessel or aircraft used for public transport, to leave it, or a part of it specified by the officer, if the officer reasonably suspects that the person —

(a) is doing an act —

- (i) that involves the use of violence against a person;
 - (ii) that will cause a person to use violence against another person; or
 - (iii) that will cause a person to fear violence will be used by a person against another person;
- or

(b) is just about to do an act that is likely to —

- (i) involve the use of violence against a person;
 - (ii) cause a person to use violence against another person; or
 - (iii) cause a person to fear violence will be used by a person against another person;
- or

(c) is committing any other breach of the peace; or

(d) is hindering, obstructing or preventing any lawful activity that is being, or is about to be, carried out by another person; or

²³ Hon. Jim McGinty, Attorney General. Second reading speech, Criminal Law Amendment (Simple Offences) Bill 2004. Hansard, Legislative Assembly, 23 September 2004, p. 6531.

²⁴ Section 50 of the Police Act 1892 was repealed by the Criminal Investigation (Consequential Provisions) Act 2006, which commenced on 1 July 2007.

- (e) intends to commit an offence; or
- (f) has just committed or is committing an offence.

(2) A police officer giving an order under subsection (1) may in addition do either or both of the following —

- (a) order the person to go beyond a reasonable distance from a place, or the part of a place, set by the officer;
- (b) order the person to obey the order or orders for a period set by the officer; but the period must not be longer than 24 hours.

(3) When giving a person an order under subsection (1), a police officer must take into account the likely effect of the order on the person, including but not limited to the effect on the person's access to the places where he or she usually resides, shops and works, and to transport, health, education or other essential services.

(4) For the purpose of giving an order under this section to a person whose personal details (as that term is defined in the Criminal Investigation (Identifying People) Act 2002 section 16) are unknown to the officer, a police officer may request the person to give the officer any or all of the person's personal details.

(5) If a request is made under subsection (4), the Criminal Investigation (Identifying People) Act 2002 section 16 applies to and in relation to the request in the same way as it applies to a request made under subsection (2) of that section.

(6) Any order given under this section must be in writing on a prescribed form.

(7) A person is not in breach of the move on order if the person is taking reasonable steps to comply with the order and move out of the area.

(8) This section does not prevent a police officer from charging a person with an offence without having exercised a power in this section.

Because police in WA have been able to issue move on notices since June 2005 to underpin strategies to manage low levels of public disorder, it is conceivable that intoxication and related social and behavioural consequences from the use of alcohol in public places would be captured by Section 27's broad provisions involving circumstances such as someone doing or about to do an act of "violence", or committing a "breach of the peace" or "hindering, obstructing or preventing any lawful activity" by another person.

It is difficult to test this proposition that alcohol-related offending was an important component of the spectrum of law and order behaviour which was used by the police to issue a move on notice under Section 27 does not differentiate as to the nature of the offending. A further difficulty in being able to identify the spectrum of offending that police regard as appropriate for issuing a move on notice, is that statistical data concerning move on notices is not routinely separately published in annual reports of the WA Police Service.

This lack of accountability of the application of the law for move on notices has not escaped the attention of Members of Parliament (MPs), who have resorted to asking questions with or without notice, of the Minister for Police and through evidence obtained by Parliamentary committees, to develop an understanding of how this law has been applied. An important outcome of this effort has been the identification of the disproportionate impact of the move on notice law on Indigenous people in the Perth metropolitan area.

However, this piecemeal approach has resulted in a patchy level of detail as it depends on the existence of MPs particularly interested in this issue and having the skill in framing questions which are able to yield a useful breakdown of data.

Without the dogged and persistent nature of the use of parliamentary procedures by a number of MPs to request information, little data would be publicly available about the number of move on notices issued in WA since June 2005, as shown by the following sources of data.

Data for the period June 2005 to September 2006 was provided by Inspector Carver, a WA Police Service witness to the Standing Committee on Legislation, which investigated the Criminal Investigation Bill 2005²⁵ and data for the remaining periods were obtained through a series of Questions on notice. These are listed below in the source for Table 1.

Statistical data concerning the annual number of move on notices issued by the police, which has grown over the period (nearly doubling from 2008, the first complete year of data to 2012), suggests the use of move on notices has become an increasingly important method being used by police to deal with public disorder, as can be seen in Table 1 and Figure 11.

Statistical overview

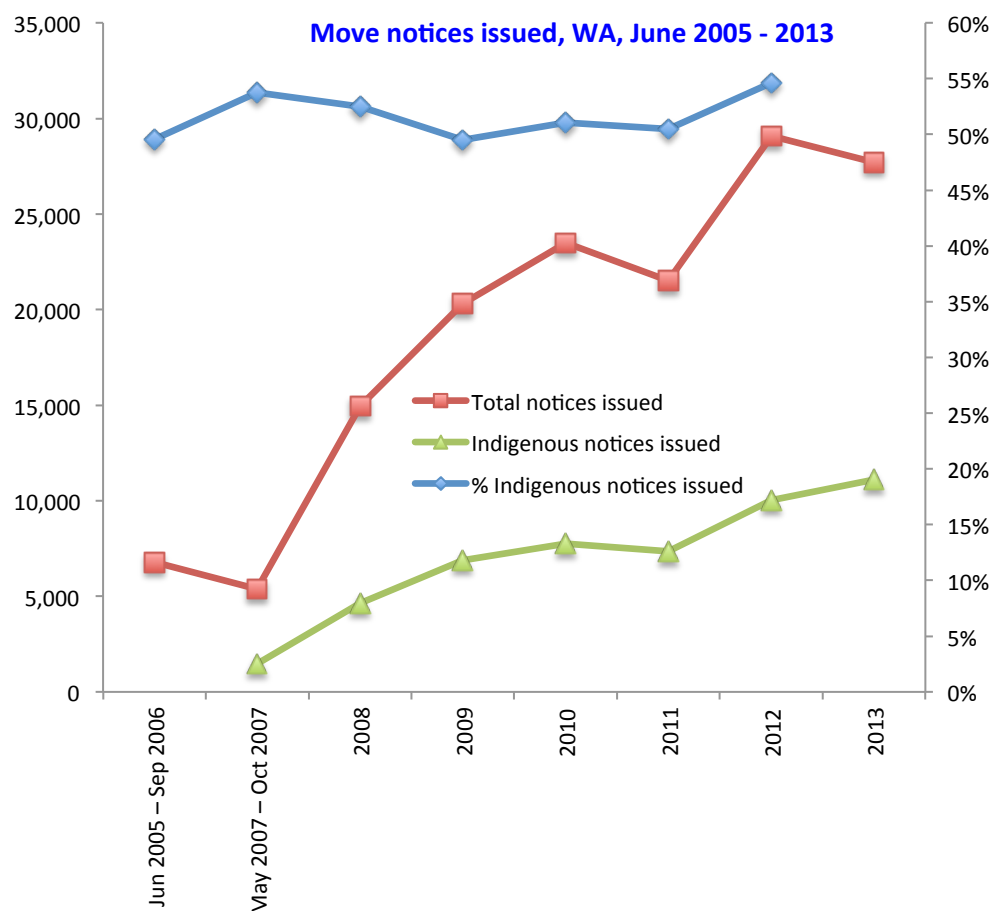
Table 1: Number of move on notices issued (Section 27), WA, June 2005 - 2013

Period	Indigenous		Other	Unknown	Total issued
	n	%			
Jun 2005 – Sep 2006	-		-	-	6,800
May – Oct 2007	1,467	49.6%	1,492	2,421	5,380
2008	4,635	53.7%	3,991	6,322	14,948
2009	6,878	52.5%	6,229	7,211	20,318
2010	7,764	49.5%	7,921	7,810	23,495
2011	7,361	51.0%	7,060	7,108	21,529
2012	10,022	50.5%	9,839	9,202	29,063
2013	11,103	54.6%	9,230	7,364	27,697

Source: June 2005 – September 2006: Evidence given by Inspector Carver to Standing Committee on Legislation, Criminal Investigation Bill 2005, 14.
 May 2007 – October 2007: Question on notice, Hon. Giz Watson, Hansard, Legislative Council, 14 November 2007, 7055.
 February 2008 – January 2009: Question on notice, Hon. Giz Watson, Hansard, Legislative Council, 17 March 2009, 1848.
 January 2009 – October 2011: Question on notice, Hon. Margaret Quirk, Hansard, Legislative Assembly, 1 December 2011, 10451.
 September 2011 – September 2012: Question on notice, Hon. Margaret Quirk, Hansard, Legislative Assembly, 6 November 2012, 7946.
 2008 – May 2013: Question on notice, Hon. Ben Wyatt, Hansard, Legislative Assembly, 6 August 2013, 2723; Question on notice, Hon Margaret Quirk, Hansard, Legislative Assembly, 8 August 2013, 3140.
 2009 – May 2013: Question on notice, Hon Margaret Quirk, Hansard, Legislative Assembly, 21 November 2013, 6499.
 2008 – 2013: Question on notice, Hon Margaret Quirk, Legislative Assembly, 8 May 2014

Note: Proportion of notices issued to Indigenous persons is based on sum of 'Indigenous' and 'Other' & excludes 'Unknown' cases.

²⁵ Standing Committee on Legislation, Criminal Investigation Bill (2005) Perth, WA: Legislative Council, WA Parliament, 2006.

Figure 11: Move on notices issued, WA, June 2005 – 2013

The gross over representation of Indigenous people as recipients of move on notices, involving half or more of all notices issued, is linked to a further issue, of consequences for failure to comply with a move on notice. Limited up to date information is required in Table 2 to identify whether, as is anticipated, the majority of breaches under Section 153 involve Indigenous persons.

There has been significant concern about the disproportionate impact of move on notices on Indigenous people, which has resulted in a small but visible group of individuals being targeted and subject to ongoing contact with the police and the criminal justice system, as it claimed that

“move on laws’ are used by police as a mechanism for the social control of Aboriginal people. The laws are used to move individuals from well known public places in city areas where Aboriginal people congregate. The laws have become another example of discriminatory policing of an already over-policed Aboriginal population and are further contributing to the huge overrepresentation of Aboriginal people in the WA criminal justice system.”²⁶

More recently other groups have been issued with move on notices, such as the example in 2012 of environmental protesters involved in action about the proposed development by Woodside Petroleum of a major onshore gas processing complex at James Price Point.²⁷

²⁶ D Eggington and K Allingham. Move on justice: a new mechanism for police control. (2006) 6 *Indigenous Law Bulletin*

²⁷ Australian Financial Review. 'WA police move on gas hub protesters'. Australian Financial Review, 11 September 2012.

Table 2: Breach of move on notices issued (Section 153), WA, June 2005 - 2013

Period	Total issued (Section 27)	Breach of notice (Section 153)	
		n	%
Jun 2005 – Sep 2006	6,800	680	10.0%
May – Oct 2007	5,380	503	9.3%
Feb 2008 – Jan 2009	15,396	1,436	9.3%
2008	14,948	-	
2009	20,318	1,855	9.1%
2010	23,495	1,862	7.9%
2011	21,529	-	
2012	29,063	-	
2013	27,697	-	

Source: As for Table 1.

Prohibited Behaviour Orders

An expansion in police powers to regulate anti-social behaviour in WA occurred with the passage of the *Prohibited Behaviour Orders Act 2010*, which commenced 23 February 2011. The following somewhat lengthy quote from the text of the Attorney-General's second reading speech shows that a driver for this legislation was the 'law and order' agenda which been spelt out in the Liberal government's pre-election platform and the use of prohibited behaviour orders (PBOs) was conceived as a tool to support a broader agenda to regulate some forms of behaviours in public spaces involving particular groups of individuals.²⁸

This bill fulfils a key Liberal Party commitment given during the 2008 state election campaign, which is driven by what is, in the government's view, significant, ongoing and informed concern amongst the community about several categories of lower level, higher volume antisocial criminal offending.

The second point is that volume crime often impacts very publicly. Some kinds of criminal activities that I have mentioned—for example, graffiti and hooning—often occur literally on public property, or at least within the public view. Other categories—disorderly conduct would be the prime example of this—include as a statutory element of the offence that they occur in public. Other categories of offending impact on places and people who are providing a public service; for example, aggressive and threatening behaviour on public transport or in hospitals and emergency rooms.

The third point is that the rate at which many of these volume offences are being dealt with in the lower courts is, based on the experience of the last decade, increasing. Between 2000 and 2008, there was a 147 per cent increase in the number of traffic and vehicle offences dealt with in the Magistrates Court. In the same time frame, there was a 73 per cent increase in public order offences, a 59 per cent increase in property damage offences and a 59 per cent increase in acts intended to cause injury dealt with in the Magistrates Court. Consequently, there is an understandable and very strong community concern about the forms of offending to which I have referred, and a clear mandate exists to legislate in a new attempt to curtail the activities of the perpetrators of antisocial offending.

²⁸ Hon Michael Mischin, Hansard, Legislative Council, 15 September 2010, 6643-6646

This concept is related to a particular form of antisocial behaviour order used in the United Kingdom, known as criminal anti-social behaviour orders, which can be made only following conviction for a criminal offence. In crafting this legislation, the government has paid close attention to those elements of the UK scheme that have been most efficient. Targeting this form of intervention against persons already engaged in repeat criminal offending means that the focus of police and courts will squarely be on the persistent group of offenders who are responsible for a disproportionate amount of antisocial behaviour.

Under the Prohibited Behaviour Orders Bill 2010, PBOs are orders that are civil in nature but can only be made once a person has been convicted of a criminal offence. These orders ban people from doing acts, which, whilst not unlawful in themselves, contribute, assist or relate to that person's offending. In keeping with the bill's focus on serial offenders, PBOs may only be made against an offender who has committed multiple relevant offences and is either an adult or a juvenile aged 16 years and over.

The imposition of a PBO is not intended as a punishment. They are designed as a practical mechanism to prevent further offending by enhancing the capacity of the state to restrict and monitor the behaviour of such offenders.

Breaches of PBOs are criminal offences punishable by, if the PBO was made in the Children's Court, a fine of \$2,000 or imprisonment for two years, or both; if the PBO was made in the Magistrates Court, a fine of \$6,000 or imprisonment for two years, or both; and if the PBO was made by the Supreme or District Court, a fine of \$10,000 or imprisonment for five years, or both.

In all instances, it should be recognised that despite criminalising behaviour that would otherwise be lawful, PBOs will be applied in situations in which offenders have engaged in a pattern of sustained unlawful behaviour.

At this time, due to a lack of published data on how many PBOs have been issued and characteristics of offenders and the types of offences, it is difficult to determine whether the objectives of the legislation are being met, or possibly whether due to poor compliance this method of control results in increased contact and escalating consequences for non-payment of fines imposed for a breach of a PBO.

Criminal Code – Infringement notices

A recent development has been the passage of the *Criminal Code Amendment Act (Infringement Notices) Act 2011*, which inserted a new chapter (Chapter 83 – Infringements) in the *Criminal Code* and enables police to issue a Criminal penalty infringement notice (CPIN). The amendment was passed by the WA Parliament and assented to on 2 May 2011, but it has not been proclaimed. The amendment provides for the offences to be prescribed for which an infringement may be issued by regulations and for classes of offenders for whom a CPIN may not be issued.

The amendment has a provision for the Ombudsman to review the legislation after it has been operational for 12 months "to include review of the operation of the provisions ... on Aboriginal and Torres Strait Islander communities"..

An excerpt from the Second reading speech of the then Minister for Police suggests that the object of this legislation is for a CPIN to be issued for a “minor offence”, instead of police arresting an offender.²⁹

The Criminal Code Amendment (Infringement Notices) Bill 2010 introduces a new scheme into Western Australia by which infringement notices can be issued for Criminal Code offences that are considered relatively low level or minor. Historically, infringement or penalty notices have been used for myriad offences of a regulatory nature, such as parking offences, minor traffic offences, fare evasion, littering, breaches of requirements for heavy vehicle drivers, and breaches of business registration and reporting requirements.

More recently, there have been moves in Australia and the United Kingdom to expand the use of infringement notices for offences usually characterised as criminal in nature. In the United Kingdom, summary or public order offences such as being drunk and disorderly and threatening behaviour may be dealt with by way of a penalty notice for disorder. In New South Wales, criminal infringement notices, or CINs, can be issued for eight nominated criminal offences, including common assault, shoplifting, offensive conduct and offensive language.

Victoria is currently undergoing a three-year trial to issue infringement notices for offences such as shop theft, disorderly or offensive conduct and alcohol-related offences. The arguments for the transition of infringement notice schemes from offences of a regulatory nature into areas traditionally viewed as being the province of the criminal justice system have largely focused on the potential productivity—time—savings for police and the criminal justice system, with the attraction for affected persons being a quick and relatively simple process whereby the payment of a fixed penalty expiates the offence with, usually, no record of a conviction, notwithstanding the implied admission of culpability.

In February 2011 the opposition in the Legislative Council sought to have this Bill referred to the Standing Committee on Legislation, a move that ultimately failed, for the reasons as outlined by Minister in the Upper House who had responsibility for the legislation.³⁰

A number of issues have been raised by various members and I will go through them individually. Suffice to say, at this stage the criminal penalty infringement notices will be issued for disorderly behaviour or stealing. The person who receives the CPIN can elect to pay the fine or have the case heard in court. They still have that at this stage.

Hon Kate Doust wanted some explanation on other types of low-level breaches of the Criminal Code for which a CPIN will be issued. As I mentioned a moment ago, disorderly conduct and stealing to a value of less than \$500 have been selected as the first two offences for which a CPIN can be issued. The reason these offences in particular were selected was made on an analysis of the volume of people committing these offences, the maximum and diversionary impact away from the criminal justice system and the low-level nature of these offences. Disorderly conduct and low level stealing are both high-volume offences of which the court outcome is a fine.

²⁹ Code Amendment (Infringement Notices) Bill 2010, Hon Rob Johnson, Minister for Police, Second reading speech. Hansard, Legislative Assembly, 8 September 2010, 6137-6139.

³⁰ Hon. Peter Collier, Hansard, 23 February 2011, 909-916.

It was thought that these offences would be the appropriate offences to maximise the benefits of CPINs on the offender, the court system, the community and WA Police. These offences will be provided for in regulations. Other offences can be added by way of regulations in the future, although it is not thought that this will occur until some time after CPINs have been thoroughly evaluated at the 12-month mark.

Hon Kate Doust also asked at what point does the capacity to issue a CPIN stop and a prohibited behaviour order kick in. One only applies for a PBO when that person is convicted for a relevant offence. This means that a court process has commenced, which is not the case for CPINs. CPINs are an alternative to prosecuting the person for an offence. There is no court process. A PBO is a separate application lodged with the court between conviction and sentencing. In effect, they are at different ends of the criminal justice spectrum. How many times can a CPIN be given? The emphasis for CPINs must be court diversion.

Both Hon Giz Watson and Hon Kate Doust asked a question relating to the modified penalty. This is still to be determined but will ultimately be based on the average fine imposed by the courts. Under the *Criminal Procedure Act 2004*, the modified penalty cannot be more than 20 per cent of the maximum penalty under the offence. What happens if a person does not pay? If a person does not elect to have the matter heard in court and the infringement notice goes unpaid, the matter is lodged with the Fines Enforcement Registry.

Perhaps the government has had second thoughts on this legislation, given it has not so far been proclaimed. If it does become law it is anticipated there is certainly the potential for it to result in some net widening as the legislation has the effect that offenders who may have otherwise may have been informally cautioned, will instead be officially recorded. The operation of the legislation for which CPINs would be issued, disorderly conduct and stealing of low value goods, may also result in targeting of particular groups offenders, such as young people and Indigenous people.