IPCA
Independent Police Conduct Authority
Whaia te pono, kia puawai ko te tika

Review of pre-charge warnings

INTRODUCTION

1. On 14 May 2015, the Authority received a complaint from Officer A on behalf of his daughter (Ms A) about the use of a pre-charge warning to resolve a matter involving the theft of property from Ms A's car.

2. Officer A was also concerned about the way in which the pre-charge warning policy was applied in the Western Bay of Plenty Area[1]. He felt that the approach adopted had largely removed Police discretion, was being applied in a 'blanket' way to all offenders who met the eligibility criteria, and undermined victims' rights.

Summary of complaint

3. On 6 April 2015, Ms A's car was broken into while parked in the Tauranga Hospital carpark. Several personal items were taken. Her total loss was approximately $100.

4. Ms A's property was traced to Mr X's address. Mr X was arrested and taken to Tauranga Police Station for processing. It was decided that Mr X would be charged with receiving property under $500[2], but would be given a pre-charge warning rather than be prosecuted for the offence.

5. Officer A and Ms A were unhappy with this outcome. They complained that Police should not have given a pre-charge warning when Ms A had suffered financial loss. The decision not to prosecute Mr X meant that Ms A was unable to seek reparation for that loss.

6. Officer A and Ms A also complained that Police had not properly considered the public interest in prosecuting Mr X. Mr X had a substantial criminal history and gang associations, and had been involved in a type of crime that was prevalent at the time.

[1] Police districts are typically divided into several 'areas'. The Bay of Plenty Police District is divided into Western Bay of Plenty Area, Eastern Bay of Plenty Area, Rotorua Area and Taupo Area. Each area is led by an Area Commander.
[2] The offence of receiving is set out in section 246 of the Crimes Act 1961. Section 247(1)(c) provides that a person who receives property to a value not exceeding $500 is liable to imprisonment for a term of up to three months.

7. Officer A used the example of his daughter's case to raise wider concerns about how the pre-charge warning policy was being applied in the Western Bay of Plenty Area. He believed that, as long as the four basic eligibility criteria[3] were met, custody supervisors[4] and sergeants were required to issue an offender with a pre-charge warning. They had little or no discretion to take other important considerations into account as required by the policy, such as the victim's views, and the public interest in prosecuting the offender.

8. Officer A reported that many of his colleagues were unhappy with this approach, because it effectively *"decriminalised"* certain offences that commonly received pre-charge warnings.

9. The Authority decided to independently investigate the matters raised by Officer A and Ms A, and has separately reported its findings about Ms A's specific situation to them.

10. In brief, the Authority found that:

    1) There was insufficient evidence to determine whether Ms A's views were sought prior to the giving of a pre-charge warning, as required by policy.

    2) More generally, there was insufficient evidence to conclude that the issuing of a pre-charge warning breached policy.

    3) The pre-charge warning policy was not being applied in a 'blanket' way to all eligible offenders in the Western Bay of Plenty or elsewhere in the District.

    4) The use of the pre-charge warning policy in the Western Bay of Plenty did not breach section 11 of the Victims' Rights Act 2002 or section 27 of the Bill of Rights Act 1990.

    5) In the Authority's view, a pre-charge warning was not in the public interest in the circumstances of Ms A's case.

11. However, the Authority's investigation pointed to a number of problems and issues with pre-charge warning policy and practice that indicated the need for a more general review.

REVIEW OF PRE-CHARGE WARNING POLICY AND PRACTICE

12. The Authority therefore conducted an independent review of pre-charge policy and practice, to determine if the policy is adequate, and to assess if inconsistencies in practice exist between Police districts. This report sets out the Authority's conclusions and recommendations following that review.

13. The Authority analysed statistics of pre-charge warnings issued in different Police districts between March and April 2015, and selected three Police districts with apparent anomalies for closer assessment:

[3] These eligibility criteria are set out in step 4d of the pre-charge warning policy (see Table 1).
[4] Officers in charge of the custody unit in a Police station.

1) Waitematā Police District (lowest apparent use of pre-charge warnings[5]);

2) Southern Police District (highest apparent use of pre-charge warnings[6]); and

3) Waikato Police District (largest apparent discrepancy between the proportion of pre-charge warnings issued to offenders of Māori and New Zealand European descent[7]).

14. The Authority also analysed the percentage of eligible pre-charge warnings issued in the different 'areas'[8] within the Police districts listed above, and Bay of Plenty Police District, between March and August 2015, and then between February and April 2016.

15. The Authority interviewed custody supervisors and front line staff in all four Police districts. Officers were asked about their perceptions of pre-charge warning policy and practice in their local area.

THE PURPOSE AND SCOPE OF PRE-CHARGE WARNINGS

16. A pre-charge warning is a lawful alternative to prosecution for some minor offenders, involving the use of Police discretion under common law to determine whether or not to prosecute when there is sufficient evidence to do so. A pre-charge warning is issued after a person has been lawfully arrested for a qualifying offence, and other specific criteria are met.

17. The purpose of a pre-charge warning is to resolve offences that require Police intervention, but do not warrant prosecution under the 'public interest test[9]'. It is intended to be an effective mechanism for holding the offender to account and deterring them, by showing them that the offence is being treated seriously and recording the warning as part of their criminal history (see paragraph 21).

18. Current policy states that a pre-charge warning is issued at the custody suite of a Police station, at the discretion of a permanent custody supervisor or a sergeant or senior sergeant.

19. The principles intended to guide operational good practice for issuing pre-charge warnings are:

1) consistency;

2) transparency; and

3) integrity.

[5] 20.87% of all eligible arrests received a pre-charge warning during March and April 2015.
[6] 48.39% of all eligible arrests received a pre-charge warning during March and April 2015.
[7] During March and April 2015, only 24.27% of eligible Māori offenders received a pre-charge warning, compared with 55.17% of New Zealand European offenders.
[8] Police districts are typically divided into several 'areas', led by an Area Commander.
[9] The 'public interest test' is set out in the Solicitor General's Prosecution Guidelines. It is based on the premise that there will be circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, the offence is not serious and prosecution is not required in the public interest.

20. Police policy sets out a decision-making process which officers must follow to ensure consistency, transparency and integrity in issuing pre-charge warnings. The process is summarised below:

Table 1: Pre-charge warning decision process

Process step	Action and responsibilities
1-3	The arresting officer takes the prisoner to the custody suite, where the prisoner is searched and secured in custody. The arresting officer then briefs the custody supervisor on the grounds for the arrest, and the evidence to support the charge(s).
4a	The custody supervisor reviews the information presented and ensures that the prisoner has been lawfully arrested or detained.
4b	The custody supervisor ensures that the 'evidential sufficiency'[10] test is met, meaning there is an objectively reasonable prospect of a conviction on the evidence available. If 'evidential sufficiency' does not exist, the prisoner must be released.
4c	The custody supervisor determines whether or not it is in the public interest[11] to prosecute the prisoner or release him or her with a pre-charge warning, or a verbal warning[12].
4d	If a pre-charge warning is deemed an appropriate option, the offender must satisfy four criteria to be eligible: - the offender must be 17 years or older; - the offence must carry six months imprisonment or less; - the offence must not have arisen out of family violence; and - the offence must not involve the possession of methamphetamine.
4e	If the general criteria under step 4d demonstrate eligibility for a pre-charge warning, the custody supervisor must always ensure these factors are also taken into account: - **victim considerations** (noting that the issuing of a pre-charge warning is not contingent on the victim being agreeable);

[10] The 'evidential sufficiency' test is set out in the Solicitor General's Prosecution Guidelines (1 July 2013).
[11] See footnote 9.
[12] A verbal warning (labelled a K4 warning) is recorded in the Occurrences section of the Police computer system rather than as part of the person's criminal history.

	- **reparation considerations** (noting that the issuing of a pre-charge warning is not contingent on reparation being paid); - **criminal history or previous pre-charge warnings** (noting that these do not automatically exclude a prisoner from receiving a second or subsequent pre-charge warning).
5-8	Fingerprinting and photographing of the prisoner is completed (and destroyed if a pre-charge warning is issued). The custody supervisor then makes a final decision. The prisoner acknowledges committing the offence by signing the 'Pre-Charge Warning and Release Notice'. The pre-charge warning is entered into NIA[13].

Recording pre-charge warnings

21. Charges resolved by way of a pre-charge warning are recorded in NIA, the Police computer system, and form part of the person's criminal record. The NIA database prompts the custody supervisor or sergeant to record all relevant information.

22. When the prisoner is first brought forward for processing, the NIA database alerts the custody supervisor or sergeant if a proposed offence is eligible for a pre-charge warning. If the custody supervisor or sergeant decides not to issue a pre-charge warning, a suitable reason for this decision must be chosen from a drop-down menu:

    1) 'Offender behaviour' – the prisoner is a repeat offender, is facing existing charges or has received warnings in the past.

    2) 'Person refuses the pre-charge warning' - the prisoner refuses to accept the offer of a pre-charge warning (they may dispute the charge and wish to go to court).

    3) 'Police requirements' – the prisoner behaves in a manner while in Police custody which results in further charges, or Police consider that the prisoner will likely re-offend if released with a warning.

    4) 'Victim impact' – the victim is too seriously impacted by the offence to warrant a warning; or reparation is sought by the victim, which would be precluded by a warning.

    5) 'Youth' – the prisoner is under 17 years old, and ineligible to receive a pre-charge warning.

[13] The National Intelligence Application (NIA) is a Police database which holds information about individuals who have come into contact with Police.

POTENTIAL BENEFITS OF PRE-CHARGE WARNINGS

23. Police policy states that the benefits of the pre-charge warning policy are that, by reducing the number of prosecutions, they:

    a) reduce court appearances;

    b) allow for the faster processing of arrested offenders;

    c) reduce the requirement for prosecution files;

    d) allow for swifter redeployment for staff; and

    e) produce better outcomes for the justice system.

24. Almost all officers interviewed in the course of this review believed that pre-charge warnings produced these benefits. They particularly emphasised the reduced pressure on the court system and associated administrative costs that resulted from resolving minor matters (that would otherwise result in diversion[14], a modest fine or other nominal penalty). They also supported the reduction in required paperwork, and the faster processing of minor offenders that allowed front line staff to return to their duties more quickly.

25. One officer also commented that pre-charge warnings were a useful tool to deal with common 'street offences'[15] because they allowed Police to remove disorderly and intoxicated people from public places without the need to pursue a charge through the courts.

26. There is something of a contradiction here. Pre-charge warnings can only be used in cases where prosecution is not justified because the public interest test in the Solicitor's General's Prosecution Guidelines are not met. In principle, therefore, there ought to be no savings, since these cases should not ever be taken to court anyway.

27. Nevertheless the Authority recognises that the Police often see the need to deal with an offence in a formal way so as to hold the offender to account and record the offending as part of their history. Without that, there is likely to be a perception that prosecution is required. The Authority agrees that pre-charge warnings are an appropriate tool to deal with such cases. It is particularly appropriate to deal with cases such as street disorder where Police have arrested an offender to remove them from the situation and prevent the disorder from continuing, but the costs of prosecuting them far outweigh any conceivable benefits by doing so.

28. There is no evidence in such cases that a court appearance and a possible conviction is a more effective means of holding the offender to account or deterring them than an immediate informal disposition.

[14] Diversion is a scheme that provides an opportunity for Police to deal with some offences and /or offenders without going through formal court prosecution. Diversion involves an offender agreeing to fulfil certain conditions in exchange for the charges being withdrawn. Conditions may include apologising to the victim; making reparation; and attending counselling, treatment or education programmes.

[15] A 'street offence' refers to minor crime that occurs in a public place.

29. Indeed, there is some evidence showing the reverse. Using a research design known as propensity score matching[16], Police have compared the reoffending rates after one year of those receiving pre-charge warnings with a comparable group of offenders who were prosecuted and convicted.

30. Across all offences analysed, offenders given pre-charge warnings were 13% less likely to re-offend[17]. The difference between the two groups holds only for those receiving a first pre-charge warning (largely first offenders). There was no difference between those receiving a pre-charge warning for the second time and those prosecuted and convicted.

31. This suggests that pre-charge warnings may assist in reducing reoffending by offenders who have not previously been before the courts, either because they respond to the fact that they have been given a second chance, or because they avoid the stigma arising from a court appearance and conviction.

32. The Authority therefore concludes that in principle pre-charge warnings are justified from a cost-benefit perspective.

33. However, there are also risks with a policy that permits enforcement officers to deal informally with offenders in a way that affects their future. These risks must be addressed by a transparent system of checks and balances to ensure that decision-making is consistent and fair to both offenders and victims, and properly takes into account the interests of the community.

34. In the Authority's view, the existing policy and its application fails to provide that. The changes that the Authority considers necessary are discussed below.

PROBLEMS AND ISSUES WITH CURRENT POLICY AND PRACTICE

Inconsistency in decision-making within Police districts and variation between Police districts

35. As Table 2 shows, pre-charge warnings are used in 37% of eligible cases. However, there is substantial variation between Police districts in the extent to which pre-charge warnings are used - from nearly 50% of eligible offenders in Southern Police District to only 23% in Waitematā Police District.

Table 2: Proportion of cases receiving a pre-charge warning (for the period February to April 2016)

[16] This methodology matches offenders on an aggregate rather than person-to-person basis by reference to type of offence and other key variables related to the risk of reoffending.
[17] 'Pre-charge warning impact analysis' 1 October 2015.

Police District	Arrests eligible for PCW	PCWs issued	PCWs as % of all eligible arrests
Northland	328	111	33.84%
Waitematā	701	163	23.25%
Auckland City	919	385	41.89%
Counties Manukau	797	235	29.49%
Waikato	663	296	44.65%
Bay of Plenty	1070	492	45.98%
Eastern	521	142	27.26%
Central	690	222	32.17%
Wellington	786	269	34.22%
Tasman	369	135	36.59%
Canterbury	1156	445	38.49%
Southern	602	294	48.84%
New Zealand Total	8602	3189	37.07%

36. Officer A's complaint to the Authority maintained that there was a distinctive policy in the Western Bay of Plenty Area, promoted by the Area Prevention Manager, that pre-charge warnings should always be given to eligible offenders unless there were exceptional reasons not to do so.

37. The Area Prevention Manager, himself agreed in interview that there was a *"strong presumption"* in the area that eligible offenders should receive a pre-charge warning unless extraordinary circumstances justified prosecution. As a result, the officers we spoke to in the Western Bay of Plenty Area reported that there was little discretion not to issue an offender with a pre-charge warning when the criteria in step 4d[18] were met.

38. This contrasted with the way in which officers in other areas of the Bay of Plenty Police District, and in other Police districts, characterised the policy. They all said the policy required a pre-charge warning to be given unless there was *"good reason"* not to, but also regarded custody

[18] See Table 1.

supervisors as retaining considerable discretion on a case-by-case basis to determine whether or not to give a warning.

39. Given these apparently contrasting approaches, the Authority expected to see a much higher percentage of pre-charge warnings issued for eligible offences in the Western Bay of Plenty Area. In fact, however, while there were monthly variations, the percentage of eligible offenders receiving a pre-charge warning was not consistently higher in the Western Bay of Plenty Area than elsewhere in the District.

40. Moreover, as Table 2 shows, while the rate of pre-charge warnings in the Bay of Plenty Police District was on the high side by comparison with many other districts, it had a lower rate than the Southern Police District and was roughly the same as Waikato and Auckland City Police Districts.

41. Amongst those Police districts whose practice we reviewed, the only one that has developed a written local policy for the guidance of staff was Waikato. Although that policy provides some guidance on how factors such as previous offending and victims' views are to be applied, the guidance is brief and written in general terms. It is unlikely to account for the relatively high rate of pre-charge warnings in that district.

42. The variation in practice that exists between one Police district and another cannot therefore be readily attributable to any explicit local policies that interpret and apply the national policy in a distinctive way.

43. We have considered instead whether there may be differences between districts in offending patterns or offender characteristics that could account for the variations. Three possible factors may be in play in this respect.

44. First, offenders may not receive a pre-charge warning for an eligible offence for a range of reasons relating to the circumstances of the offence. For example:

- they may have committed other non-eligible offences relating to the same incident for which they are prosecuted;
- they may be arrested with co-offenders who are not eligible for a pre-charge warning; or
- the offence may have occurred in the context of domestic violence or methamphetamine use, thus rendering it ineligible for a pre-charge warning under the policy.

45. It is possible that there are systematic differences between Police districts in the extent to which these factors are present.

46. Secondly, there may be systematic differences between Police districts in the incidence of offences commonly given pre-charge warnings.

47. Pre-charge warnings are used more often for some types of eligible offences than other types of eligible offences. For example, minor offences, such as disorderly and offensive behaviour, are often resolved using pre-charge warnings (see paragraph 71 for further explanation).

48. If a higher proportion of the type of offence that is more commonly resolved with a pre-charge warning occurs in a particular Police district, then that Police district will register a higher proportion of pre-charge warnings. The opposite is also true.

49. The consistently low percentage of pre-charge warnings for eligible offences in Waitematā Police District may be partly explained by the fact that Waitematā has strong public alcohol restrictions[19], which means there are fewer alcohol-fuelled offences of disorderly or offensive behaviour.

50. Since these are the offences with the highest proportionate use of pre-charge warnings, it is to be expected that the overall rate of use in the District will be lower than elsewhere.

51. Thirdly, the characteristics of the offenders in the district may account for some of the variation. In particular, it is possible that the criminal histories of eligible offenders systematically differ between districts.

52. There may also be other offender-related factors that favour a pre-charge warning. For example, the high proportion of pre-charge warnings in Southern Police District may relate to the high proportion of overseas tourists that move through the District. Since tourists are unlikely to remain in the country long enough to attend multiple court hearings, officers may find it more practicable to give them a pre-charge warning for an eligible offence, that in other districts would be more likely to result in prosecution.

53. There is some statistical support for this proposition, with a slightly higher proportion of pre-charge warnings issued over the winter tourist period in the Otago Lakes Central Area.

54. In the Authority's view, while these three factors may account for some of the observed variation in the use of pre-charge warnings (such as the low rate in Waitematā Police District and the high rate in Southern Police District), they are highly unlikely to account for most of it.

55. It seems clear that the main reason for the variation in practice is actually the broad nature of the policy, and its failure to spell out in more detail when the public interest dictates the need for prosecution rather than a pre-charge warning. To a large extent officers are left to work that out for themselves, which inevitably which leaves considerable room for individual interpretation.

56. A number of arresting officers we spoke to in all districts talked of differences in approach between one custody supervisor and another in what amounted to *"good reasons"* or *"special circumstances"* justifying prosecution, and the degree of unpredictability in decision-making that existed as a result. They reported that officers placed different weights on the discretionary elements of the pre-charge warning decision process, described in steps 4c and 4e (see Table 1).

57. They also said that the high turnover of custody supervisors undermined the development of consistent practices within Police stations. Several custody supervisors we spoke to also asked for some form of guidance to assist with decision-making.

[19] Alcohol is banned in most city and town centres, and public consumption is severely restricted in park and beach reserve land. A Licensing Trust also operates in Waitematā.

58. The lack of guidance is exacerbated by the inadequacy of the drop-down boxes within the NIA reporting system (described in paragraph 22), in which officers record their reasons for not giving a pre-charge warning. Two custody sergeants commented that the options in the drop-down boxes were too generalised to accurately record the real reasons for not giving a pre-charge warning in different instances and their meaning was open to differing interpretation.

59. For example, one of the drop-down boxes is 'offender behaviour'. Although the narrative in the policy makes clear that this refers to the offender's previous history, the drop-down box does not include that information. As a result, officers may take it to imply that it is acceptable to withhold a pre-charge warning if the offender is uncooperative during the arrest process or while in the custody unit.

60. We acknowledge that Police have a legitimate discretion whether or not to prosecute, and that this must be preserved. Indeed, as prescribed in step 4c of the policy, the Solicitor-General's Prosecution Guidelines make clear that, where there is a reasonable prospect of conviction on the evidence, officers considering prosecution must always use their discretion to consider whether prosecution is required in the public interest.

61. However, the present lack of guidance in the policy about the nature of the public interest test makes the fair and consistent exercise of that discretion less likely.

62. In the Authority's view, more guidance should be provided. There should also be a requirement that, as is the practice in at least some areas, all pre-charge warning decisions should be routinely reviewed to ensure that the policy is being correctly and consistently applied.

The public interest test

63. The Solicitor-General's Prosecution Guidelines set out in some detail the factors that require consideration by a prosecutor when determining where the public interest lies in a particular case.

64. In summary, the public interest considerations in favour of prosecution focus on the nature and seriousness of the offence, which is measured by such factors as:

- the maximum sentence and the anticipated penalty;
- the degree of violence and risk of harm or serious financial loss;
- whether the offence was premeditated, carried out by a group or an incident of organised crime;
- whether the offence involved an abuse of trust or was committed against a vulnerable victim;
- whether the offence involved an element of corruption;
- whether the offence is prevalent; and

- whether the offence is likely to be continued or repeated.

65. To a large extent, these public interest considerations that are set out in the Solicitor-General's Prosecution Guidelines are addressed by the eligibility criteria in the pre-charge warning policy (see step 4d above). In particular, the fact that the policy excludes offences carrying a maximum penalty of more than six months imprisonment largely ensures that a pre-charge warning cannot be used for offences involving serious loss or harm to other people.

66. However, some of the other public interest factors listed in the Solicitor General's Prosecution Guidelines (such as premeditation, prevalence, abuse of trust and victim vulnerability) that count in favour of prosecution are not mentioned in the policy. Given that officers may not necessarily have these factors in their minds, the policy should make specific mention of them and demonstrate how they should be considered.

67. More importantly, the public interest criteria set out in the Solicitor General's Prosecution Guidelines are not confined to the seriousness of the offence. They also stipulate a number of other factors, including the following:

- the extent to which the defendant has a history of recurring conduct of this type or otherwise has relevant previous convictions, diversions or warnings;
- whether the victim accepts that the defendant has rectified the loss or harm that was caused;
- whether a prosecution is likely to have a detrimental effect on the physical or mental health of a victim or witness;
- whether the defendant was at the time of the offence suffering from significant mental or physical ill health; and
- whether the defendant is a youth or is elderly.

68. In the context of pre-charge warnings, the two most important of these factors appear to be:

- the views of the victim, and whether the loss or harm suffered by them has been rectified; and
- the defendant's previous criminal history, including whether there is a history of recurring conduct.

69. Oddly, however, these factors are not mentioned in step 4c of the decision making process. Rather, they appear in step 4e – supposedly **after** the decision has already been taken that it is not in the public interest to prosecute.

70. This is illogical, confusing and unhelpful. The policy should first require the decision maker to determine whether an offender is eligible for a pre-charge warning (presently specified as step 4d). Steps 4c and 4e ought then to be combined in the document and much more guidance provided as to how victim considerations and the offender's previous history are to be taken into account.

The eligibility criteria

71. In accordance with the eligibility criteria, pre-charge warnings are most often used for relatively minor 'street offences'[20]. For example, across all districts in November 2015 pre-charge warnings were given in 80% of arrests for disorderly or offensive behaviour and 97% of arrests for fighting in a public place.

72. They were also commonly used for a variety of other offences involving no direct victim, such as: unlawfully in an enclosed yard or building (49%); possession or use of cannabis (38%); obstructing or resisting Police (34%); and trespass (32%).

73. Nevertheless, the restriction to offences that carry a maximum penalty of six months' imprisonment or less results in some anomalies. For example, an offender who is found in possession of small amount of cannabis and a bong is ineligible to receive a pre-charge warning, because the maximum penalty for possession of a bong is 21 months' imprisonment.

74. There are similar anomalies with the exclusion of family violence offending, which is defined to cover all incidents when a family violence report (known as a POL 1310 report) is completed. This may include a minor instance of wilful damage caused during a domestic dispute that has resulted in no actual or threatened violence.

75. There would therefore be some benefit in reviewing whether there are specific offences with higher maximum penalties, and specific 'family violence' offences, that are generally minor enough that they should fall within the policy.

Differential treatment of Māori and New Zealand European offenders

76. When the Authority first began to examine the use of pre-charge warnings, there were very considerable differences in the extent to which they were being used for eligible New Zealand European and Māori offenders in a number of Police districts.

77. Across the majority of Police districts, New Zealand European offenders were given pre-charge warnings for eligible arrests in a much higher percentage than Māori offenders. For example, in a three month period from February to April 2015, they were used:

    - in Northland for 40% of New Zealand European offenders compared with 25% of Māori offenders;
    - in Counties Manukau 34% compared with 19%;
    - in Waikato 55% compared with 24%; and
    - in Canterbury 50% compared with 27%.

78. However, between that time and early 2016, Police National Headquarters alerted Police districts to the disparity between New Zealand Europeans and Māori offenders and directed

[20] A 'street offence' refers to minor crime that occurs in a public place.

staff to work toward reducing it. The differences were consequently reduced. In fact, in February 2016 there were very few differences between the two groups in any Police district.

79. Nevertheless this has not been a consistent pattern and some disparity between the ethnic groups remains: in April 2016, pre-charge warnings were used in:

- Northland for 46% of New Zealand European offenders compared with 22% of Māori offenders;
- in Counties Manukau 36% compared with 18%;
- in Waikato 52% compared with 39%; and
- in Canterbury 36% compared with 26%.

80. There are, of course, a number of possible reasons for the disparity in the statistics. Cases that are eligible for pre-charge warnings are routinely examined by local management staff, and sometimes by the Māori responsiveness managers in the district, and any cases which show unexplainable discrepancies are followed up with the officer concerned.

81. An offender who might appear eligible at first blush may not be able to receive a pre-charge warning for any of the reasons discussed in paragraphs 44-53, and there may be systematic differences between Māori and non-Māori offenders in these respects.

82. An audit of the use of pre-charge warnings between July and September 2015, undertaken by the Police Data Quality and Integrity Team, provides some support for the existence of such systematic differences. It found that, amongst those who did receive a pre-charge warning, 51 percent of non-Māori had no prior criminal convictions compared with only 26 percent of Māori. It is reasonable to assume that there was a similar difference between Māori and non-Māori who did not receive a pre-charge warning.

83. It ought not to be assumed, therefore, that the disparity is the result of differential treatment of Māori offenders on account of their ethnicity. Indeed, some officers told us that they thought the efforts by Police National Headquarters to reduce the disparity had resulted in some degree of positive discrimination.

84. The Authority has not come across any evidence that clearly demonstrates differential treatment on the basis of ethnicity. However, the possibility that it exists is enough to suggest that more guidance on the exercise of the discretion is desirable.

The views of the victim

85. Although pre-charge warnings are most often used for offences involving no direct victims, this is not always the case. For example, in November 2015 they were used in 40% of Summary Offences Act 1981 assault cases; 27% of shoplifting cases to a value of less than $500; and 10% of cases of other theft and receiving to a value of less than $500.

86. Custody supervisors all said that victim considerations were relevant to their decision-making, and that where practicable they should take into account the victims' views on the need for prosecution.

87. However, some officers pointed to the practical difficulties involved in obtaining the victims' views. In general, custody supervisors said that they relied on the arresting officer to ask the victim for their views about the appropriateness of a pre-charge warning at the time of arrest. However, as there was generally no explicit expectation that they did so, the arresting officers often brought eligible offenders to the custody unit without having ascertained the views of the victim.

88. When this happened, practice was variable. In the Southern Police District, front-line officers said that some custody supervisors required them to make reasonable efforts to contact and talk to victims, while others did not. Overall, the officers we interviewed across all districts reported that it was relatively uncommon for a custody supervisor or an arresting officer to contact a victim once the offender had arrived at the Police station and a pre-charge warning was being considered.

89. When the victim's views were obtained, officers all stated that the victim's views were *"not determinative."* In this respect, they were consistent with the policy position. However, it was not entirely clear what weight was placed on the victim's views. Officers from the Waitematā Police District reported being strongly influenced by a victim's views, while officers from other districts were more inclined to see them as relevant but not particularly influential.

90. The Authority notes that Police have an obligation under section 12(1)(b) of the Victims' Rights Act 2002[21] to inform the victim of an offence if an offender has been given a pre-charge warning for that offence, and to explain the reasons why no prosecution has been brought. The policy ought to be explicit in that respect, and specify who has the obligation to provide that information.

91. However, there is no parallel legislative obligation on the Police to consult the victim beforehand. In the Authority's view, it is neither practicable nor desirable for victims to be consulted in every case before a pre-charge warning is given.

92. It is not practicable because in a number of cases the arresting officer will not have a pre-charge warning in mind, nor will they have the opportunity to consult the victim at the time of the offender's arrest. In this circumstance, other work demands, or an inability to make immediate contact with the victim (for example, because there is no cell phone number for him or her) may prevent the arresting officer or the custody supervisor from making contact with the victim once the offender has arrived in the custody unit. It would not be in the interests of justice to keep the offender in custody until a victim was located.

[21] Section 12: Information about proceedings

(1) A victim must, as soon as practicable, be given information by investigating authorities or, as the case requires, by members of court staff, or the prosecutor, about the following matters:

….

(b) the charges laid or reasons for not laying charges, and all changes to the charges laid:

93. It is not desirable because in very minor cases where the factors counting against prosecution make a pre-charge warning inevitable, it is wrong to seek the views of the victim and give an expectation that his or her views carry weight. That is mere tokenism and does a disservice to victims.

94. In the Authority's view, therefore, it should be made clear in the policy that victims ought to be consulted about the possibility of a pre-charge warning only in cases where reparation is an issue (see below), or where the factors weighing for and against prosecution are relatively evenly balanced and the victim's views will carry some weight. Ms A's case was clearly such a borderline case that required her views to be sought and given careful consideration.

The need for reparation

95. It follows that, where the victim has suffered financial loss, his or her views should be sought and carry considerable weight, at least on the issue of reparation.

96. Custody supervisors acknowledged the need to take into account whether reparation was sought by the victim. However, there were wide variations in the extent to which, and the way in which, this was done.

97. In the Western Bay of Plenty Area, custody staff and front-line officers perceived that there was a strong expectation by management that pre-charge warnings would be given for eligible offences. Officer A pointed to Ms A's case as an example of the fact that reparation issues were therefore given little weight in pre-charge warning decision-making.

98. There is some doubt about whether reparation is available on a receiving conviction[22] (the charge potentially faced by the offender in Ms A's case). Nevertheless some of the officers interviewed by the Authority in the Western Bay of Plenty Area did provide some support for the allegation that reparation was by no means determinative of the decision, and often only a minor consideration.

99. In contrast, Waikato officers were fairly uniform in their view that cases where reparation was in issue should almost always be put before the Court, so that it could be considered as a condition of Police diversion or as a sentence following conviction. They noted that a pre-charge warning would be considered if reparation arrangements could be made *"on the spot"*, but said that this was not generally practicable.

100. In Waitematā and Southern Police Districts, officers gave more mixed responses. It was generally accepted that a pre-charge warning would be given only if the loss was small or the victim agreed to that course of action, although an exception was sometimes made for petrol drive-aways.

101. In relation to shoplifting, reported practice varied considerably. Some officers said they would only give a pre-charge warning if a 'small amount' was taken (although what constituted a 'small

[22] Under section 32 of the Sentencing Act 2002, the sentence of reparation may be imposed when the victim as suffered loss of or damage to property "through or by means of" the offence.

amount' varied between officers); the items could be returned in sellable condition; or the offender paid reparation on the spot. Others said they would be more likely to give a pre-charge warning where the victim was a large corporate entity, such as a supermarket, on the basis that they had recourse to other means of 'reparation' such as insurance.

102. There were also varying practices about the extent to which pre-charge warnings were given where a business had issued a 'civil recovery notice[23]'. One front-line officer said that in such a case he would recommend a pre-charge warning be given, as otherwise the business was engaging in *"double-dipping"* if they were also able to get reparation when the offender was prosecuted. In contrast, two other officers said that civil recovery notices were irrelevant to their decision making.

103. A number of officers reported that businesses were dissatisfied with the use of pre-charge warnings for repeat shoplifters, since they thought that it allowed them to offend with impunity. One front-line officer reported that in a recent case a well-known shoplifter with five pages of criminal convictions and two previous charges in that year was given a pre-charge warning after stealing two leather jackets worth $400 from a small retailer.

104. The officer strongly opposed this outcome, because the retailer's need for reparation was not taken into account. He went on to say that, when he anticipated that a pre-charge warning would be given for shoplifting from a small business, he would sometimes obtain money from the offender to cover the loss and give that directly to the business himself.

105. The Authority notes that recent research conducted by Police shows that pre-charge warnings appear to be particularly successful in reducing reoffending rates by those committing theft from retail outlets. Notwithstanding that, the Authority's view is that the victim should have the right to seek reparation, and that the actions of the Police should facilitate rather than impede the exercise of that right.

106. There is therefore a need to change both policy and practice so that a pre-charge warning is not given unless either the victim agrees to that course of action or enforceable and realistic arrangements for the payment of reparation are made.

Lack of clarity about the weight to be placed on an offender's criminal history

107. There was considerable lack of clarity about the extent to which previous criminal history should preclude a pre-charge warning. It was widely acknowledged as a *"grey area",* with custody supervisors having different views about the weight to be placed upon prior criminal history in decision-making.

108. The written policy in Waikato Police District stated that previous offending is relevant only in exceptional circumstances, and should be taken into account only if it was committed within the previous six months and was of a similar nature. It also stated that the fact that the offender

[23] A civil recovery notice is a notice issued to the shoplifter requiring the payment of a sum of money to cover the costs incurred by the theft. The amount is often set to cover not merely the loss but the cost of systems put in place by the business to detect shoplifters. It has no statutory basis and some officers questioned the appropriateness of the practice.

had earlier received a pre-charge warning did not preclude the issuing of a further warning, and that the *"two strikes and you're out"* rule should be used as a guide.

109. Practice in other areas was vaguer, and views more divided.

110. Some officers reported much the same approach as that taken in Waikato. One officer commented that he was not concerned about the offender's history and background, and did not have a problem giving a pre-charge warning more than once if a significant period of time had elapsed since the last offence. Another stated that an offender would get a pre-charge warning if the matter was minor, regardless of his or her history.

111. By contrast, one front-line officer thought that offenders should only have one opportunity to receive a pre-charge warning, and that multiple uses of pre-charge warnings for an offender *"watered down the policy"*. Another said that an offender with a history of similar offending or a previous pre-charge warning should be prosecuted unless the previous matters were *"old"*.

112. In the Bay of Plenty Police District some front-line officers expressed concern that some offenders such as shoplifters were receiving a pre-charge warning regardless of their criminal history. One custody supervisor reported feeling under pressure to keep issuing pre-charge warnings to *"career offenders"*, who were *"cottoning on"* to the fact that they would only ever receive a pre-charge warning and so could re-offend without serious consequences.

113. Although Police research has indicated that pre-charge warnings are effective in reducing reoffending only for those who have not previously received such a warning (see paragraph 30), pre-charge warnings should not be confined to such offenders.

114. The same research indicates that pre-charge warnings are no *less* effective than prosecution in this respect, and there are other cost-benefit advantages in dealing with minor street offences such as disorderly behaviour in a way that does not unnecessarily burden the court system.

115. However, in the Authority's view the policy ought to be much more explicit about how a previous history of both convictions, and formal and verbal warnings, are to be taken into account by officers making decisions about pre-charge warnings. In the end, the weight to be placed upon that history will be a matter of judgement for the individual decision-maker, but that judgement should not be unguided, or allowed to extend beyond defined parameters. Such an approach could result in unjustified inconsistencies between decision-makers and Police districts.

116. Detailed guidance, that is likely to differ from one offence type to another, is required. That guidance must be sufficiently simple and clear to allow for immediate and robust decision-making.

Lack of integration with other alternative actions

117. Pre-charge warnings are not the only alternative to prosecution and conviction that are available to the Police following an arrest where some action is warranted. The offender may instead be

given a verbal warning, referred to a Community Panel or Iwi Panel (in areas where they exist) or prosecuted and offered Police diversion.

118. These various options are not properly integrated, and the way in which they are currently used therefore produces a number of anomalies. There are two particular problems emerging from the Authority's review.

Verbal warnings

119. First, verbal warnings may be given to offenders who are not eligible to receive a pre-charge warning because of the nature or the seriousness of their offence. When the Authority asked officers how they would deal with ineligible offenders where prosecution was not warranted in the public interest, they said that they would give them a verbal warning.

120. However, it appears perverse that a verbal warning should be regarded as sufficient to deal with an offence that is too serious to be dealt with by way of a written pre-charge warning. The Authority recognises that verbal warnings may often be given on the street. They are therefore not subject to the same checks and balances as pre-charge warnings, since they do not require the consent of the offender, and are not subject to the scrutiny of a custody supervisor to ensure that sufficient evidence has been obtained.

121. However, the fact remains that verbal warnings should only be given when there is sufficient evidence to justify prosecution. The Authority therefore considers that the relationship between pre-charge warnings and verbal warnings requires clarification in order to ensure that the latter are not being given because the offence does not meet the pre-charge warning eligibility criteria.

Diversion

122. Secondly, a number of officers said that they would bring a prosecution and recommend Police diversion when reparation was an issue. The difficulty is that Police diversion has been largely confined to first offenders.

123. It is true that since 2013 there has no longer been a blanket restriction of this sort. Police have told the Authority that diversion is now offered to recidivist offenders "*if the Prosecutor believes that the conditions attached to the diversion could link the offender with programmes that could reduce reoffending*". Beyond this, however, it is unclear whether diversion can be used for recidivist offenders in order to ensure the payment of reparation. In fact, the Area Prevention Manager in Western Bay of Plenty did not regard diversion as a realistic option in Ms A's case because the offender had a number of previous convictions.

124. The relationship between pre-charge warnings and diversion therefore needs to be more clearly articulated. For example, a number of officers told the Authority that the introduction of pre-charge warnings means that diversion is generally now used for offences with a maximum penalty of more than six months' imprisonment. However, if this is the intent, the policy should say so.

125. Similarly, if it is intended that diversion be used for offences that are eligible for a pre-charge warning (but a prosecution is brought because reparation is required), the policy should also make that clear and specifically state that it is available to offenders with the same criminal history as those receiving a pre-charge warning.

126. The Authority understands that the Police are currently reviewing and updating the Graduated Response Model which is intended to differentiate between the available non-prosecution options. It is recommended that the Police ensure that the issues raised above are addressed as part of that review.

Inadequate Recording System

127. Officers giving a warning, regardless of its type, are required to enter the fact of the warning as a 'result' in the 'case statistics' field of the particular occurrence on NIA, and also to record the appropriate warning code in the 'charge clearance' fields. The 'charge clearance' field must be completed in order for the warning to appear in the offender's charge history.

128. In fact, it appears that officers giving verbal warnings sometimes only complete the 'case statistics' field. As a result, those warnings do not appear as part of the offender's charge history.

129. Officers reported to the Authority that, before making a decision whether to recommend or give a pre-charge warning, they generally examined only the offender's charge history and did not look at all of the individual occurrences relating to that person. To the extent that previous warnings had not been given the appropriate clearance code, these would not be visible to them and would not be taken into account in their decision-making.

130. Police have advised that work is underway to phase out the 'case statistics' field, so that officers will be required to make only one entry in NIA rather than two. The Authority recommends that, as part of this work, the reporting issue outlined above is addressed to ensure that all warnings appear as part of the charge history.

CONCLUSIONS AND RECOMMENDATIONS

Conclusion

131. The Authority accepts that pre-charge warnings are a practical way of resolving low-level crime, and are justified from a cost-benefit perspective. However, from both the statistical and anecdotal evidence gathered, it is apparent that there is a wide variation in the way that the policy is applied.

132. The Authority has no evidence that Police are routinely making unfair or unjustified decisions about pre-charge warnings. It also recognises that the specific policing demands and inherent nature of different Police districts will also influence practices. However, a clear and consistent approach to key aspects of the decision-making process would ensure operational transparency and integrity.

133. The Authority has concluded that:

133.1 The pre-charge warning policy ought to provide much more guidance on the application of the public interest test.

133.2 There should be a requirement that, as is the practice in at least some areas, all pre-charge warning decisions should be routinely reviewed to ensure that the policy is being correctly and consistently applied.

133.3 Some of the factors identified in the Solicitor-General's Prosecution Guidelines as affecting the seriousness of the offence (such as premeditation, prevalence, abuse of trust and vulnerability) ought to be specifically mentioned.

133.4 Consideration should be given to whether there are specific offences with maximum penalties higher than six months' imprisonment, and specific 'family violence' offences, that are generally minor enough that they should fall within the policy.

133.5 Steps 4c, 4d and 4e in the policy ought to be rewritten so that it is clear that the decision-maker must first determine that there is evidential sufficiency before deciding whether it is in the public interest to prosecute.

133.6 The policy should require that victims be consulted about the possibility of a pre-charge warning only in cases where reparation is an issue or the factors weighing for and against prosecution are relatively evenly balanced and the victim's views will carry some weight. Where the victim's views are sought, they ought to be given careful consideration, although they should not be determinative.

133.7 The policy should state that, where the victim has suffered financial loss through or by means of the offence and is seeking reparation, a pre-charge warning should not be given unless either the victim agrees to that course of action or enforceable and realistic arrangements for the payment of reparation are made.

133.8 The policy ought to provide detailed guidance about how a previous history of both convictions and formal and verbal warnings is to be taken into account. This is likely to differ from one offence type to another. The guidance must be sufficiently simple and clear to allow for immediate and robust decision-making.

133.9 The drop-down boxes in the NIA Police database (that provide officers with options for recording why a pre-charge warning has not been given), should be revised to reflect the proposed changes to policy outlined above.

133.10 Verbal warnings, pre-charge warnings and diversion are not presently being used in a consistent and coherent manner.

134. The Authority recommends that:

134.1 the pre-charge warning policy be reviewed to address the issues set out in paragraph 133;

134.2 the relationship between pre-charge warnings, verbal warnings, and diversion and the inconsistencies in their application, be addressed as part of the Graduated Response Model review; and

134.3 deficiencies in the recording of warnings given to offenders be addressed as part of work currently underway on phasing out the 'case statistics' field in NIA.

Judge Sir David Carruthers

Chair

Independent Police Conduct Authority

14 September 2016

IPCA: 14-2165

ABOUT THE AUTHORITY

Who is the Independent Police Conduct Authority?

The Independent Police Conduct Authority is an independent body set up by Parliament to provide civilian oversight of Police conduct.

It is not part of the Police – the law requires it to be fully independent. The Authority is overseen by a Board, which is chaired by Judge Sir David J. Carruthers.

Being independent means that the Authority makes its own findings based on the facts and the law. It does not answer to the Police, the Government or anyone else over those findings. In this way, its independence is similar to that of a Court.

The Authority employs highly experienced staff who have worked in a range of law enforcement and related roles in New Zealand and overseas.

WHAT ARE THE AUTHORITY'S FUNCTIONS?

Under the Independent Police Conduct Authority Act 1988, the Authority:

- receives complaints alleging misconduct or neglect of duty by Police, or complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- investigates, where there are reasonable grounds in the public interest, incidents in which Police actions have caused or appear to have caused death or serious bodily harm.

On completion of an investigation, the Authority must form an opinion about the Police conduct, policy, practice or procedure which was the subject of the complaint. The Authority may make recommendations to the Commissioner.

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