



Investigation into the
Use of Police Powers
under the *Intoxicated Persons*
(*Care and Protection*) Act 1994 (ACT)

**Report under section 41A of the
*Complaints (Australian Federal Police) Act 1981***

December 1998

Report Into The Use Of Police Powers Under The Intoxicated Persons (Care And Protection) Act 1994.

Table of Contents

EXECUTIVE SUMMARY.....	1
PART 1. INTRODUCTION.....	6
BACKGROUND.....	6
PART 2. OPERATION OF THE ACT.....	8
STATISTICS.....	8
AFP OFFICERS' USE OF THE ACT.....	12
<i>Beat Squad.....</i>	<i>12</i>
<i>City Watch-house.....</i>	<i>13</i>
<i>Internal Investigations.....</i>	<i>14</i>
<i>Other ACT Regions.....</i>	<i>15</i>
<i>Transportation of Detainees.....</i>	<i>17</i>
<i>Conclusion.....</i>	<i>17</i>
<i>Recommendation.....</i>	<i>18</i>
<i>'On-line Charging' Video Tapes.....</i>	<i>18</i>
<i>Discussion.....</i>	<i>21</i>
<i>Recommendation.....</i>	<i>24</i>
PART 3. LEGISLATION AND GUIDELINES.....	25
PAST AND PRESENT PROVISIONS.....	25
<i>Legislation in the Australian Capital Territory (ACT).....</i>	<i>25</i>
<i>Section 351 of the Crimes Act 1900.....</i>	<i>25</i>
<i>Inebriates Act 1900.....</i>	<i>25</i>
<i>Intoxicated Persons (Care and Protection) Act 1994.....</i>	<i>26</i>
<i>Other Relevant Provisions.....</i>	<i>27</i>
OTHER JURISDICTIONS.....	28
<i>New South Wales.....</i>	<i>28</i>
<i>South Australia.....</i>	<i>28</i>
<i>Northern Territory.....</i>	<i>29</i>
<i>Western Australia.....</i>	<i>29</i>
AFP GUIDELINES.....	30
<i>Conclusion.....</i>	<i>30</i>
<i>Recommendations.....</i>	<i>30</i>
ACT LEGISLATION.....	31
<i>Conclusions.....</i>	<i>33</i>
<i>Recommendations.....</i>	<i>33</i>
PART 4. SOBERING UP SHELTER.....	35
HISTORY.....	35
OPERATION OF THE SHELTER.....	35
<i>Conclusion.....</i>	<i>36</i>
<i>Recommendation.....</i>	<i>37</i>
ATTACHMENT A - OTHER RELEVANT REPORTS AND VIEWS.....	38
ATTACHMENT B - REFERENCES.....	39
ATTACHMENT C - INVESTIGATION METHODOLOGY.....	40

EXECUTIVE SUMMARY

1. Public drunkenness often results in antisocial behaviour and can be disruptive of community life. Members of the public may find this behaviour offensive or intimidating. It is a social problem to which the police are necessarily expected to respond.

2. In the ACT, the Australian Federal Police (AFP) are funded by the ACT Government to provide community policing, and the management of public drunkenness constitutes a large part (up to 40%) of this work. Indeed, it is our understanding that specific funding is provided by the ACT Government to enable the deployment by the AFP of extra officers in problem areas.

3. In 1994 the ACT Government decriminalised public drunkenness with the introduction of the *Intoxicated Persons (Care and Protection) Act 1994* (the Act). Since then my office has received a considerable number of complaints about the way in which police officers are using their powers under the Act.

4. Therefore, my predecessor initiated an 'own motion' investigation to examine how the Act is being used in practice and to what extent practice conforms with the intent of the legislation. Quantitative and qualitative information was obtained by my investigators, and case studies from complaints received by the Ombudsman's office have been used to illustrate some of the issues.

5. The investigation has highlighted a number of problems which, when taken together, indicate that the care and protection aim of the Act is not fully reflected in its implementation by police. At times police handling of intoxicated persons may be construed as punitive. The main problems are:

- a) insufficient means for review of police exercising their powers under the Act to detain intoxicated persons;
- b) the lack of a Sobering Up Shelter, as provided for in the Act, where police can detain intoxicated people;
- c) unclear provisions within the Act, particularly regarding the definition of 'intoxication', and the potential for overlap between the criterion of disorderly behaviour in the Act and street offences proscribed under the *Crimes Act 1900*; and
- d) unsatisfactory police practices in the application of the Act, such as, police use of protective custody powers to control antisocial behaviour.

6. An additional difficulty is that people with health and social

homelessness may also be dealt with by police using their powers under the Act. As a result, people experiencing these problems may be inappropriately caught up in the criminal justice system.

7. In the second reading of the Bill the then ACT Attorney General, described the legislation as providing ‘a legislative basis for places where people can sober up when, due to intoxication from alcohol and/or other drugs, they have temporarily lost the capacity to care for their own safety’. The clear intent of the legislation at the time was to provide care and protection for intoxicated people.

8. However, the original intent of the legislation does not appear to be fully realised in the application of the Act by police. From our investigation, there is evidence that on occasion officers use the Act inappropriately as a means of controlling antisocial behaviour in public places. As a result, there is the risk that the community could see such practices as having the effect of ‘recriminalising’ public drunkenness.

9. Accordingly, I believe that consideration should be given to reviewing the Act to clarify the intended purpose and scope of the legislation. Additionally, I consider that the AFP should review the guidance it provides to its officers regarding offences associated with alcohol consumption to ensure officers do not treat the provisions of the Act as complementary to, rather than distinct from, the summary offences provisions of the *Crimes Act 1900*.

10. As a result of this investigation, I make the following recommendations in relation to the Act, its operation, and police practices:

GUIDELINES

- 1. The AFP should review its approach to transporting intoxicated people to ensure their safety, and that the AFP’s methods of transportation are consistent with the intent of the Act.**

Supported in principle by the AFP. AFP Regional Guideline 4/96 is being revised.

- 2. In all cases where intoxicated persons do not respond to stimuli, or are lapsing in and out of consciousness, they should not be transported in a police vehicle but taken in an ambulance to hospital.**

Supported by the AFP. AFP Regional Guideline 4/96 is being revised to strengthen existing guidance.

Report Into The Use Of Police Powers Under The Intoxicated persons (Care And Protection) Act 1994 In The ACT.

- 3. Officers at the Watch-house should only place those intoxicated people who are violent or likely to injure themselves in holding cells. For other detainees, particularly in the situation where a Sobering Up Shelter is not available, officers at the Watch-house should be required to be more proactive in pursuing the release of detainees into the care of a responsible person, as envisaged by the legislation.**

Supported in part by the AFP.

The AFP supports further research in consultation with the relevant ACT Government agencies and the Ombudsman's Office into the identification of alternative options for the early transfer of intoxicated persons into the care of a responsible adult, or alternative arrangements.

- 4. AFP procedures at the Watch-house should be streamlined to ensure that detainees are treated by Watch-house staff in a care and protection framework, as distinct from procedures relating to custody of offenders. Further, detainees should be processed quickly to facilitate appropriate release, or to confirm continued detention if necessary.**

Supported by the AFP. Procedures at the City Watch-House are being reviewed.

- 5. The AFP should review its AFP Regional Guideline 4/96 to ensure that it fully reflects the care and protection role of officers in relation to intoxicated persons.**

Supported by the AFP. AFP Regional Guidelines are being reviewed to remove any ambiguity.

- 6. The AFP should amend its AFP Regional Guideline 4/96 to provide clear guidance to officers on charges for street offences or the use of other powers, such as breach of the peace, in relation to intoxicated persons. The AFP should continue to provide training to its officers to ensure their use of powers under the Act is consistent with the intent of the Act.**

Supported by the AFP. Regional Guidelines are being reviewed to strengthen guidance.

LEGISLATION

7. **The ACT Government should give consideration to a review of the Act and examine possible amendments to clarify the intended purpose and scope of the legislation in order to ameliorate problems associated with an apparent overlap between summary offences provisions and protective custody provisions for intoxicated persons. A principal aim of such amendments should be to provide clear guidance to the principal users of the legislation, the police.**
8. **The ACT Government should consider amendments to the Act to ensure that the definition of 'intoxication' refers to a level of intoxication which seriously affects the functioning and behaviour of individuals. Further, the amended definition should be the accepted standard for AFP officers exercising their powers under the Act.**
9. **The ACT Government should consider amendments to the Act to provide a mechanism for immediate review of detentions, and for authorisation by a superior officer of periods of detention greater than 4 hours, up to the maximum 8 hours allowable under the Act.**

Review of the Act is supported by the AFP having regard to the matters raised in this report. The AFP has initiated action to revise Regional Guidelines to require a documented review of any person detained in protective custody by the officer-in-charge of the City Watch-House at the 4 hour point.

The Chief Minister's Department has advised that the recommendations concerning legislation and matters of Government policy will require consideration by the Government. However, on the basis of consultation with ACT Government Departments, there is support for a re-examination of the Act in the context of developments in other jurisdictions and the issues raised in this Report.

SOBERING UP SHELTER

10. **As envisaged by the legislation, the ACT Government should ensure the provision of a Sobering Up Shelter. Any new sobering up facility would be most useful if established in the Civic area and may need to have the capacity to accommodate up to 15 male and 5 female admissions at any one time.**

The Act Department of Health and Community Care has advised that the establishment of a Sobering up Shelter is endorsed Government policy. The Department conducted a tender process for an operator of the shelter but no contract was awarded. However a suitable site is yet to be identified. The size of any facility would also have resource implications.

**Report Into The Use Of Police Powers Under The Intoxicated persons (Care 5
And Protection) Act 1994 In The ACT.**

It is noted that the AFP has by necessity assumed the role of providing care and protection of intoxicated persons by detaining intoxicated persons in protective custody in the City Watch-House.

- 11. The ACT Government, in consultation with the AFP, may wish to give consideration to the practical benefits of locating such a sobering up facility in the City Watch-house. Additionally, any such facility should utilise health care professional staff, to ensure that intoxicated people receive appropriate care .**

Pending resolution of the establishment of a permanent Sobering Up Shelter, the AFP supports further research in consultation with the relevant ACT Government agencies and the Ombudsman's Office into the identification of alternative options for the early transfer of intoxicated persons into the care of a responsible adult, or alternative arrangements.

I intend that my office review operation of the revised arrangements and procedures for the management of intoxicated persons in 12 months.

PART 1. INTRODUCTION

Background

1.1. In the Australian Capital Territory (ACT), the Australian Federal Police (AFP) are empowered under the *Intoxicated Persons (Care and Protection) Act 1994* (the Act), in prescribed circumstances, to detain and take intoxicated persons into protective custody for periods of up to 8 hours. Protective custody can be used by police without reference to any external authority and the Act provides no mechanism for appeal. Generally, the only review that occurs of any police decision to take a person into protective custody is on a retrospective basis through the complaints process, or in cases where the detained person is also charged with a substantive offence and subsequently defends the matter in the Courts.

1.2. Since the introduction of the Act in 1994, 3312¹ people have been taken into protective custody under the provisions of the Act. This indicates that police officers regularly apply the legislation and that a sizeable number of people in the ACT community have at some time been affected by the provisions of the Act.

1.3. As the legislation creates no criminal offence, the Courts are generally not in a position to scrutinise the use of police powers under the Act, and therefore it is arguable that there is less protection for the civil liberties of those persons taken into protective custody under the Act, than those persons charged with substantive offences and brought before the Courts.

1.4. Since 1994, the Ombudsman has received in excess of 60 complaints of misuse by police of their powers under the Act. The majority of these complainants dispute the assessment by police of their level of intoxication when they were taken into protective custody; that their actions did not warrant police intervention; or that they were mistreated when taken into custody.

1.5. In a recent investigation the Ombudsman found that a young man had been unlawfully taken into protective custody by police under the Act. Evidence obtained during the course of the investigation indicated that although the young man had consumed a small amount of alcohol, he was not intoxicated and that the arresting police officer was not in a position to have assessed the man's level of intoxication.

¹ This being the figure for the period 15 December 1994 to 30 June 1997.

**Report Into The Use Of Police Powers Under The Intoxicated persons (Care 7
And Protection) Act 1994 In The ACT.**

1.6. In the course of the investigation information was also obtained which suggested that other police officers may have been using their powers under the Act in a manner inconsistent with its original intent.

1.7. We are also aware of a small number of cases before the ACT Magistrates Court where persons have been dealt with on charges (usually resist arrest and assault police) arising out of the circumstances of police taking the person into protective custody. In some of these cases Magistrates have been critical of the assessment by police of the level of intoxication of the detained person, and in some instances have found the actions of police in taking the person into protective custody to have been outside the provisions of the Act. An example of such a case is given in Case Study 5.

1.8. A further factor that has impeded the operation of the Act was the closure of the only sobering up shelter in the ACT on 22 July 1996. The closure followed a coronial inquest into a death in the shelter. As envisaged by the Act, the shelter provided police with an alternative facility to lodge persons detained under the legislation. With the closure of the sobering up shelter, one of the primary purposes of the Act could not be fulfilled. Consequently, police can only detain intoxicated persons in the City Watch-house, with no option for release to a sobering up shelter.

PART 2. OPERATION OF THE ACT

2.1. To determine how AFP officers are using the Act, quantitative and qualitative information was obtained by the Ombudsman's investigators from a number of sources.

2.2. The AFP Statistical Services provided statistical information about persons taken into protective custody by AFP officers over the period of operation of the Act and prior to the Act. The Ombudsman's analysis of the data is presented below.

2.3. Qualitative information was obtained through three different sources; officers from the City Beat Squad; a series of consultations with AFP officers from the different ACT Regions; City Watch-house staff; Internal Investigations and the ACT Regional Command. Views were also canvassed with the ACT Secretary of the Australian Federal Police Association.

2.4. Lastly, videotapes from the City Watch-house of the 'online charging' of a random sample of 146 people detained under the Act were reviewed and a subjective rating of the condition of the detainees being made to assess their apparent level of intoxication and their suitability for release from custody to either an alternative facility, or to the care of a responsible person. Further details of the investigation methodology are outlined at Attachment C.

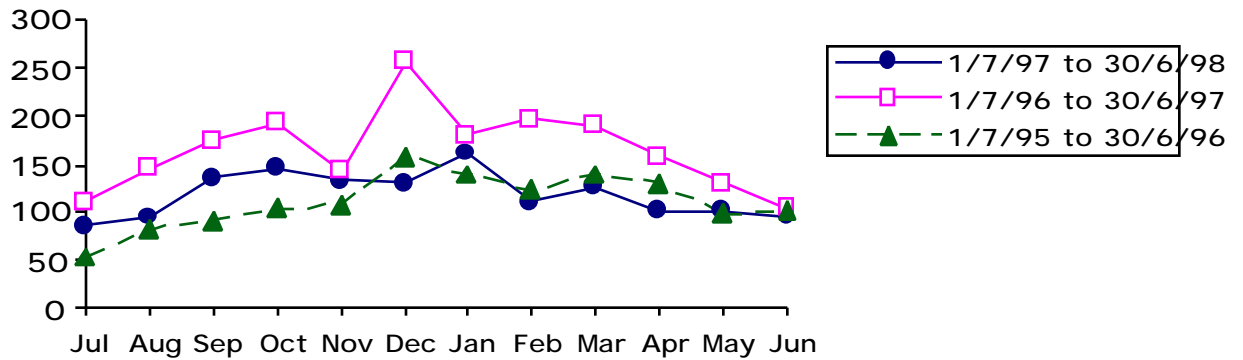
Statistics

2.5. The Act was gazetted on 15 December 1994. However, in order to capture data which represents the full operational use of the Act by the police, the period 1 July 1995 to 30 June 1997 has been used for the Ombudsman's analysis, noting that the investigation was initiated in May 1997. Data for the period 1 July 1997 to 30 June 1998 is included in Figures 1., 2., and 3., and is discussed at paragraph 2.9.

2.6. Figure 1. shows that there was a sizeable increase in the number of detentions of intoxicated persons from the first to the second year of operation of the Act. In the third year, the data is more consistent with the first year of operation. A further breakdown of the figures is presented in Figure 2, based on the three main criteria for detention under the Act for a three year period.

Report Into The Use Of Police Powers Under The Intoxicated persons (Care And Protection) Act 1994 In The ACT.

Fig. 1: Comparison of persons taken into protective custody during periods 1/7/95 to 30/6/96, 1/7/96 to 30/6/97 and 1/7/97 to 30/6/98.



2.7. Figure 2 indicates that for the period 1/7/95 to 30/6/96, police assessed approximately 21% of persons taken into protective custody as being incapacitated and requiring protection from harm. Although the figure for detention of persons under this criteria was static for the following period 1/7/96 to 30/6/97, the proportion dropped to approximately 13.5% of the total number of persons taken into protective custody at a time when the overall numbers of detentions increased by nearly 50% against the previous period.

Fig. 2 : Comparison of use of the Act over 3 years commencing 1/7/95 to 30/6/98.

Period	Disorderly	Incapable of protecting self	Injury/Property Damage	Total
1/7/97-30/6/98	573	236	611	1420
1/7/96-30/6/97	1054	270	654	1978
1/7/95-30/6/96	718	276	331	1325
			Total	4723

2.8. The large increase in detentions is anomalous when considered in relation to figures over a 5 year period. 1992-93 AFP statistics show a 16% increase in 1993-94, then a 12% decrease in 1994-95², followed by a 15% increase in 1995-96. The nearly 50% increase in detentions in 1996-97 either suggests a significant change in the behaviour of the community, or

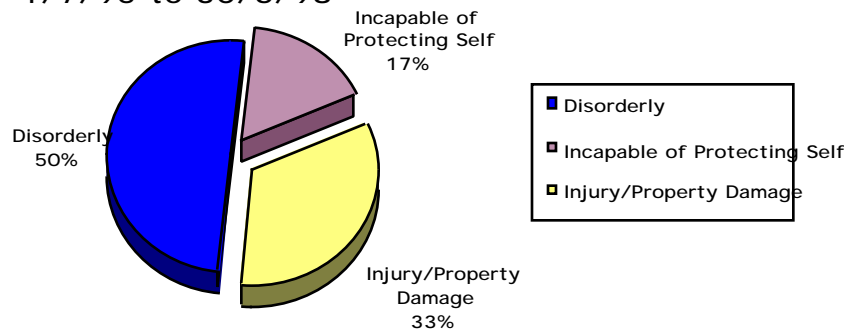
² These figures to 1994-95 record police action under previous legislative provisions but provide a reasonable comparison with police action under the Act.

(more likely) more active policing practices associated with greater use of the provisions of the Act.

2.9. As illustrated in the above figures, the number of intoxicated persons detained by police over the period 1 July 1997 to 30 June 1998, reduced by some 16% from the previous year. While the cause for this reduction has not been examined, it is noted that the reduction followed commencement of the investigation. It is encouraging that the greatest decline occurred in the number of intoxicated persons taken into protective custody for disorderly conduct, noting the concerns outlined at paragraphs 3.37. to 3.44 of this report.

2.10. A general picture of the proportion of persons taken into protective custody under the different criteria of the Act over the three years is presented in Figure 3.

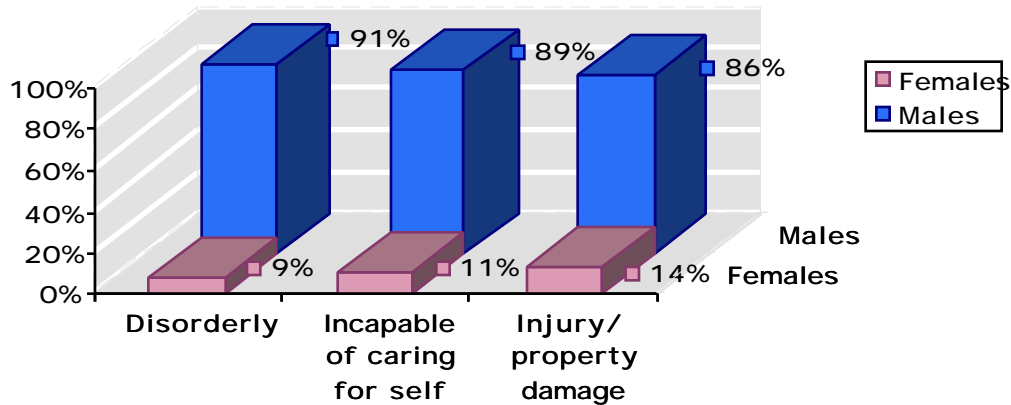
Fig. 3: Proportion of persons taken into protective custody under the different criteria of the IP(C&P) Act for the period 1/7/95 to 30/6/98



Note: Anecdotal evidence obtained by the Ombudsman from police applying the Act suggests that the categories of disorderly behaviour and injury or damage to property, which make up 83% of all detentions, are often used interchangeably. The majority of persons released to the care of the previous sobering up shelter appear to have been drawn from the remaining 17%, described as incapable of protecting themselves.

Report Into The Use Of Police Powers Under The Intoxicated persons (Care 11 And Protection) Act 1994 In The ACT.

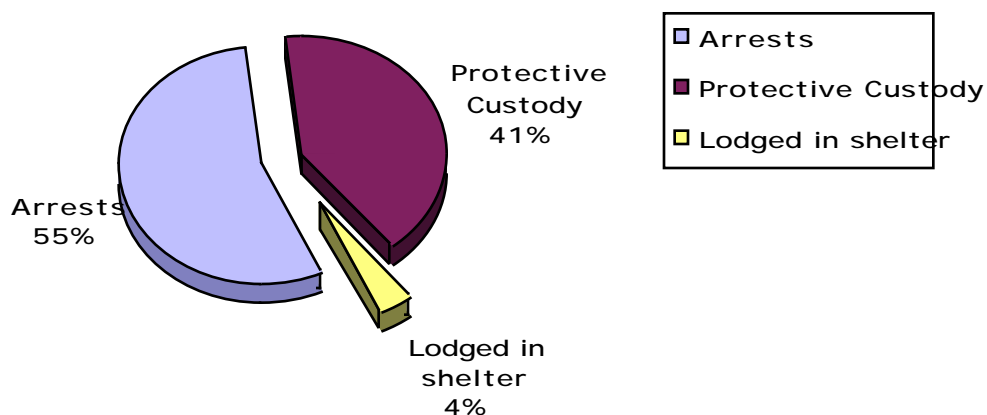
Fig. 4: Proportion of male and female persons taken into protective custody for period 1/7/95 to 30/6/97.



2.11. In Figure 4 the data was also examined for gender difference in detentions under the different criteria of the Act. Overall, the detainees are predominantly male with only 11% being female.

2.12. The proportional use of police powers for the year is presented in Fig. 5 above. During the year ended 31/12/96, the total number of persons taken into custody by the AFP was 10,259, of which the use of protective custody represented 41%.

Fig. 5: Proportional use of police powers for year ending 31/12/96



Note: These figures are affected to a minor degree by instances where police have used protective custody in conjunction with charges for street offences and/or the execution of warrants. This practice by police is discussed later in this report.

AFP Officers' Use of the Act

2.13. To gain a practical appreciation of the application of the Act by police, the Ombudsman's investigators conducted a series of discussion meetings with police from the various ACT Regions. In addition, the Ombudsman's investigators accompanied police on the City Beat in Civic and Manuka on two occasions to view first hand the application of the Act.

2.14. The views of the majority of police officers generally reflected a reasonable awareness of the purpose of the Act but their views were strongly associated with an inclination towards the use of the Act to protect the community from the anti-social behaviour of intoxicated persons. For example, some officers expressed the view that the Act assisted them in 'cleaning up the streets.'

2.15. The following outlines the major issues arising from discussions/visits with local police:

Beat Squad

- The City Beat Squad operates to a well planned schedule (based on their knowledge and experience of trouble spots) to deal with potential problems in the Manuka and City areas.
- The City Beat Squad largely patrols the nightclub areas, where the customers are predominantly young people in the 18-25 year old age group.
- The officers indicated that the concentration of nightclubs in the Civic area is problematic, particularly as it creates an increased potential for violent behaviour between rival groups.
- The officers expressed concerns that liquor licensing regulations are ineffective and exacerbate problems with intoxicated persons, mainly because they believe police are restricted in the action they can take against licensees who continue to serve alcohol to intoxicated persons. The officers also stated that Liquor Licensing inspectors have the primary role in enforcing the regulations. I note that the Liquor Act was amended in 1996 to address difficulties in proving the offence of selling alcohol to intoxicated persons.
- At the time, licensed premises were required to close at 4am. This created an overlap between the shift changeover of taxi drivers and the departure of customers from the nightclubs. Substantial queues of people resulted with significant potential for conflict to arise. A significant number of City Beat Squad officers are then required to mind the taxi rank in East Row, Civic from 5:30-6am to maintain order.

Report Into The Use Of Police Powers Under The Intoxicated persons (Care 13 And Protection) Act 1994 In The ACT.

Although closing hours have now been extended to 5am City Beat Squad officers advise that the problem remains.

- More recently, officers have been encouraged by the shift Sergeants to charge people with substantive offences (where appropriate) rather than using the Act. This approach was seen as providing a more effective deterrent than the use of protective custody.

City Watch-house

- Watch-house staff reported that responsible persons were regularly contacted by Watch-house officers and, where the person was appropriate and the detainee in a suitable condition (that is, not severely intoxicated, violent or suicidal), the intoxicated person was released into the care of the responsible person. (This statement is not supported by the AFP statistics, which show a low early release rate for detainees. See paragraph 2.37.)
- Any decision to release detainees however, was contingent on concerns about: ensuring the suitability of the 'responsible persons'; the willingness of 'responsible persons' nominated by detainees to accept responsibility for their care; whether, despite the transfer of care, the police remain responsible for the safety of the intoxicated person; and a lack of direction in the Act about transfer of responsibility.
- The sobering up shelter which previously operated in the ACT was considered by Watch-house officers to be unsatisfactory for the following reasons:
 - there was an inadequate number of beds (4);
 - protocols about the condition of intoxicated persons (that is, where they were violent or suicidal) severely restricted the number of people that could be released to the shelter;
 - the care available in the shelter was not adequate; video monitoring facilities were necessary; and people released to the shelter could walk out at any time; and
 - there was a danger that some intoxicated persons who were initially sleeping could wake up and become violent on the premises.

2.16. Other procedural matters discussed by the Sergeants which indicated some confusion about practices in relation to the Act, included:

- concern as to whether the Watch-house Sergeants could refuse detainees telephone access to a Legal Aid duty solicitor.
- some inconsistency of views expressed as to the definition of 'intoxicated person'.

- concern by some of the Sergeants that intoxicated persons should face consequences/penalties for their actions, but some difference of opinion as to whether this was best achieved through the use of the Act or by preferring charges.
- the Sergeants noting there is now no real difference in the time it takes officers to complete paperwork in relation to substantive offences or protective custody.
- the Sergeants indicating that keep the peace powers could be used to move people on, or secure undertakings that could cool situations down, but appear reluctant to use these provisions. They stated that the original 'move on' powers did not work because the legislation allowed people to comply with directions by moving away and then returning to incidents. They also commented that defended matters regularly resulted in unsuccessful prosecutions in the courts.

Internal Investigations

2.17. The main operational problems identified by Internal Investigation officers were:

- some officers noted that the demeanour of detainees can improve dramatically when they arrive at the Watch-house, giving the impression that their detention was questionable.
- amongst the reasons given for officers not preferring street offences charges, was the suggestion that the courts were generally unreceptive to successful prosecutions. The officers stated for example, that the courts may take a different view to police as to what constitutes 'offensive language'. There was also some concern expressed that a defence of 'intoxication' can be offered in the courts when substantive charges are made.
- officers expressed the view that the Act has two purposes. Firstly, to provide care and safety for intoxicated people incapable of caring for themselves. Secondly, to deal with disorderly behaviour by intoxicated people and in the process, provide community protection.
- there was general agreement it was not a police function to 'care' for intoxicated persons but that police have to be involved because they are most likely to be the point of first contact. Additionally, the City Watch-house was seen as the most suitable facility to accommodate the majority of intoxicated people.
- some support was expressed for the independent measurement of the assessment of intoxication by officers, such as use of Alcolmeters, but the officers also noted that there were problems with setting standards for levels of intoxication and that suitable equipment was not available

**Report Into The Use Of Police Powers Under The Intoxicated persons (Care 15
And Protection) Act 1994 In The ACT.**

Other ACT Regions

2.18. Ombudsman's investigators met with police officers from Belconnen Police Station in July 1997 and from the Woden Police Station in August 1997 to ascertain how officers in the ACT regions apply the Act. Access to the City Watch-house is clearly more logistically difficult for officers in these regions although they do not have to contend with the high concentration of nightclubs located in the Civic/Manuka area.

2.19. The officers' comments on operational issues relating to the use of the Act are as follows:

- the regions have a limited number of patrol vehicles in operation on any shift. As a result, there is a significant loss of operational capacity if a patrol is required to take detainees to the City Watch-house.
- rather than transport intoxicated people to the City Watch-house officers will endeavour to send them home in taxis, or on occasion, drive them home. Some concerns were expressed, however, about the duty of care in handing over an intoxicated person to a responsible person, that is, did the officers continue to be responsible if something then went wrong.
- street offences are often not used because offenders may be quickly bailed and return to the scene. Some officers saw this as simply delaying the problem by allowing the alleged offender back on to the streets, to cause further problems for the police. Other officers adopted a more pragmatic view, that is, that if an offender was affected by alcohol then the person's bail could be delayed until their condition warranted release. Such a delay would diminish the risk of the person coming to police notice again.

2.20. Other concerns were delays associated with paperwork and the consequences for prisoners charged with offences, such as the negative effects of a conviction. There is also a perception among some police that it is more difficult for police to pursue such charges through the Courts than to detain people under the Act.

- police necessarily must have a role in dealing with intoxicated persons although this involved a lot of effort and resources. The officers also considered they had a responsibility to the community to remove intoxicated persons from the streets.
- there was strong support for the reinstatement of 'move on' powers, although questions were raised about the effectiveness of the previous 'move on' powers. Some officers reported that the power was opposed successfully in court in cases where the individual initially moved some distance then returned to the scene. This undermined the authority of the officers' directions to continue to move on. The officers felt any new legislation would have to address this situation.

2.21. The officers expressed strong views about the release of intoxicated people to a sobering up shelter. Their concerns were:

- whether a shelter could provide a sufficient degree of care. The officers' experience with the previous shelter was that only a limited number of detainees, who were not violent or suicidal, could be taken there. It was also suggested that the average age of detainees was becoming younger and that this group was less likely to agree to be lodged in a shelter.
- it was suggested that the City Watch-house could take on a mixed role allowing for 'medical/social' care of detainees in the facility.

2.22. The Ombudsman's investigators noted certain comments by officers that indicated some potential for misuse of the provisions of the Act. Of particular concern were comments that showed:

- some officers had a limited knowledge, or understanding, of provisions of the Act. For example, these officers appeared to consider the power of detention under the Act to be a useful adjunct for extending the period of custody of detainees who had been charged with summary offences, and would otherwise be released immediately on bail.
- some officers were willing to rely on lower levels of intoxication when exercising their powers of protective custody. In fact, an example given by one officer envisaged using protective custody for conduct where intoxication was not a factor.
- officers agreed that, on occasion, the Act is used to resolve the more problematical situations where other powers are not applicable. For example, officers indicated people may be detained if they perceive there is potential for conflict to occur.

2.23. Useful discussions were also held with senior police from the ACT Region and the Secretary of the ACT Branch of the Australian Federal Police Association.

2.24. The Ombudsman's investigators were informed by officers at Regional Command that detentions under the Act represented a significant part of police work (up to about 40%) in the ACT region.

2.25. I believe that ACT Community Police place considerable importance on their responsibilities to protect the community, and are prepared to use the Act as a 'preventative' measure to limit the potential for intoxicated persons to cause harm to the general public. It appears that the Act is increasingly being used by police as an alternative to powers such as a general 'move on' power, to inappropriately remove people from public places who are engaging in antisocial behaviour (see Recommendation 5).

**Report Into The Use Of Police Powers Under The Intoxicated persons (Care 17
And Protection) Act 1994 In The ACT.**

Transportation of Detainees

2.26. The statistical data for persons taken into protective custody because of intoxication indicates that the majority of persons are taken into custody from the Civic and Manuka areas. More often than not, intoxicated persons are transported to the City Watch-house in a police van equipped with a rear locked compartment. There are a number of problems with this form of transportation for intoxicated persons.

2.27. In broad terms, intoxicated persons are able to be placed in two categories, aggressive or non aggressive. In the case of aggressive intoxicated persons, it is recognised that for the safety of the public, police, the individual, and at times other persons, it will often be necessary to transport the person in a locked van. This will not necessarily be the case for those intoxicated persons who comply with police instructions.

2.28. Police vans are not designed to provide protection for persons whose physical coordination may be significantly impaired by their level of intoxication. As a result, there is a real risk of injury to any intoxicated person taken into protective custody because the locked facility on police vans are made of hard metal with no padding or restraints. Additionally, detained persons could lapse into unconsciousness and inhale vomitus, causing respiratory collapse. A recent case example highlights these potential problems.

Case Study 1 *A young man who was heavily intoxicated was found lying on a footpath by police. The young man had apparently vomited and was difficult to rouse. Police took the young man into protective custody and transported him by caged vehicle to the Watch-house.*

On his arrival at the Watch-house the custody Sergeant examined the young man in the back of the police vehicle and determined that the young man was too intoxicated to be kept at the Watch-house. The young man was then transported to hospital in the police vehicle.

Although the young man was discharged from the hospital a few hours later, he experienced headaches and returned to the hospital. It was then ascertained he had suffered injuries to the head, raising concerns about how he had incurred these injuries.

2.29. The above case illustrates the care that police need to take when assessing and transporting intoxicated persons and the associated risk of physical injury occurring during the transporting of intoxicated persons, or any person, in the rear cage of police vehicles without restraint.

Conclusion

2.30. In my view, steps need to be taken to provide for a safer means of transporting intoxicated persons, which better recognise and cater for the reduced motor skills of intoxicated persons. While I recognised that any

solution to this problem will be difficult, there is an onus on police in exercising custody powers to minimise the potential for injury or other health risks to detainees. I note, for example, that in other jurisdictions such as Victoria, the caged containment areas of police vans are fitted with seat belts.

Recommendation

1. The AFP should review its approach to transporting intoxicated people to ensure their safety and that the AFP's methods of transportation are consistent with the intent of the Act.

Supported in principle by the AFP. Regional Guideline 4/96 is being revised.

2. In all cases where intoxicated persons do not respond to stimuli, or are lapsing in and out of consciousness, they should not be transported in a police vehicle but taken in an ambulance to hospital.

Supported by the AFP. Regional Guideline 4/96 is being revised to strengthen existing guidance.

'On-line Charging' Video Tapes

2.31. As part of the qualitative information obtained on police use of the Act, a sample of video tapes of 146 detained persons being processed through the 'on-line charging' procedures at the City Watch-house during the period 1/1/97 to 30/6/97 was reviewed by the Ombudsman's investigators. The videotapes were chosen to cover a selection of the busiest shifts (Friday evening shift to midnight Sunday) on a random basis during this period.

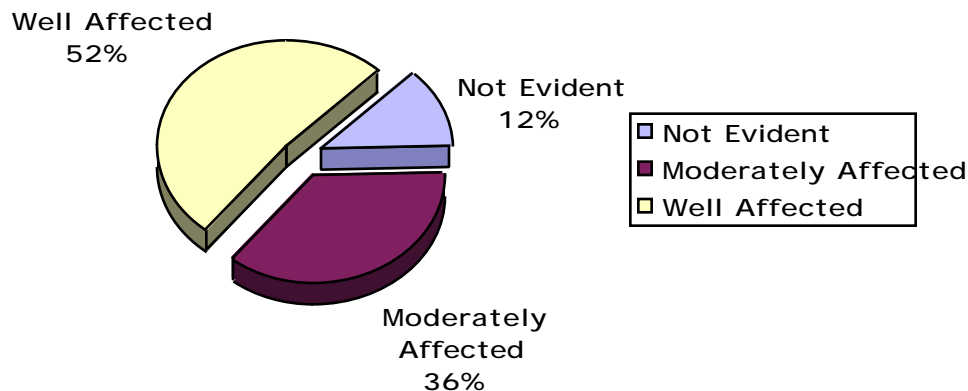
2.32. Ombudsman's investigators made a subjective rating of the level of intoxication of each person as the Watch-house Sergeant informed them of the basis of their detention, including an assessment as to whether the person could have been released from custody, lodged in a sobering up shelter, or needed to be kept in protective custody, given the person's condition and behaviour evident on the video tape.

2.33. The Ombudsman's investigators were limited in their assessment to the visual information about detainees captured on the videotapes. It should be noted that the officers in the Watch-house would have been able to observe other possible signs of intoxication, for example the smell of alcohol about a person. However, the Ombudsman considers that the videotape evidence provided a good general guide on the main signs of intoxication and the condition of the detainees.

Report Into The Use Of Police Powers Under The Intoxicated persons (Care 19 And Protection) Act 1994 In The ACT.

2.34. Fig. 6 below shows that the majority of persons detained by police were moderately to well affected by alcohol and/or drugs and could satisfy the broad definition of 'intoxication' under the Act.

Fig. 6: Assessed level of intoxication of sample detainees in City Watch-house during period 1/1/97 to 30/6/97



2.35. It is of concern that 12% of the detainees viewed did not appear to display any signs of intoxication. While video recordings may not give a complete picture of the person's condition, it suggests that this group of persons may have been detained on the basis of a low level of intoxication, and not for any other apparent reason. This was the situation in the following case study:

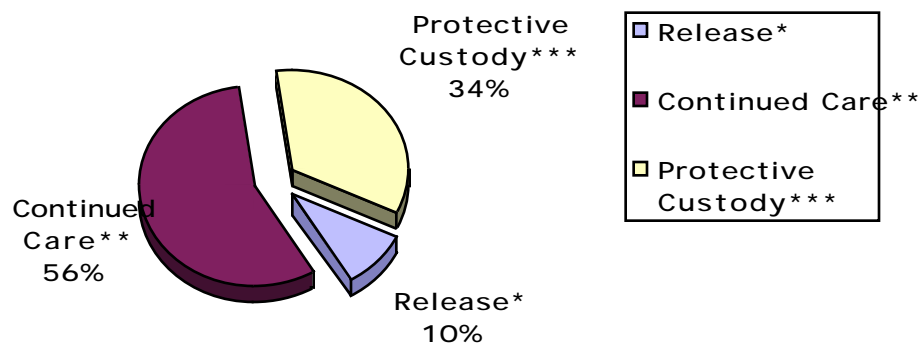
Case Study 2 A man, who was a bystander during an incident at a night club, was taken into protective custody by police for being intoxicated and disorderly. The man subsequently complained to AFP Internal Investigations and to the Ombudsman that he was not intoxicated and that an officer had used excessive force when detaining him.

Evidence obtained by the Ombudsman and AFP Internal Investigations indicated that although the complainant had probably used abusive language towards police during the incident, he had consumed only a small amount of alcohol that night. Further, there had not been a sufficient opportunity during the incident for the officer concerned to have assessed the complainant's level of intoxication, prior to detaining him.

2.36. Approximately 400 people might fit into this category, if the figure was reflected consistently over the period of operation of the Act (see also Case Study 4 below). In the sample of detained persons reviewed, this group were kept in custody on average for a period of between 6 to 8 hours.

2.37. On the basis of their observable condition and demeanour during on line charging process, each of the sample of the 146 detained persons was assigned to one of three categories as a means of assessing subsequent management. These categories are 'Release'* (ie., release from custody), 'Continued Care'** (ie., release into the care of a responsible adult or a sobering up shelter), or 'Protective Custody'*** meaning continuation of protective custody at the City Watch-house. The results of the assessments are given in Figure 7 below.

Fig. 7: Assessment of detainees for suitability for release or custody during period 1/1/97 to 30/6/97.



2.38. AFP statistics for the sample period show that only a small percentage of detainees were released quickly, with less than 3% of detainees being released within 1½ hours of their apprehension by police. Less than 7% of detainees were released within 2½ hours. Even allowing for delays in processing detainees, this figure suggests that the custody Sergeants at the City Watch-house do not give a high priority to using alternatives to protective custody in their management of detained persons.

2.39. During the period of operation of the sobering up shelter only 14% of detained persons were lodged in the shelter by police (see statistics in Sobering Up Shelter section). This contrasts significantly with the 56% of detained persons assessed by the Ombudsman's investigators as possibly suitable for lodgement at such a shelter or for release into the care of a responsible adult.

Report Into The Use Of Police Powers Under The Intoxicated persons (Care 21 And Protection) Act 1994 In The ACT.

Discussion

2.40. In some instances police are not completing an adequate assessment of the condition of persons they suspect of being intoxicated and in need of protective custody. This can result in detentions under the Act that are not justified in the circumstances. This is demonstrated in the following case study, which provides one example of poor assessment practices by police:

Case Study 3 *A woman who attended a night club was taken into protective custody by police for being intoxicated and incapable of caring for herself. The woman was also charged by police with resisting arrest and assaulting police, arising from this detention.*

The woman complained to the Ombudsman that although she had consumed a significant amount of alcohol, her condition arose from the actions of a security guard who, she alleged, had restrained her in a manner which constricted her air supply. She also alleged that she had been assaulted by police.

The resist arrest and assault charges against the complainant were dismissed in the Magistrates Court. While the Magistrate held that the complainant had been lawfully detained, he criticised the officers for acting hastily and failing to take proper account of concerns expressed by the complainant's companions that she was experiencing an epileptic fit.

Evidence obtained by the Ombudsman and AFP Internal Investigations indicated that the officers took the complainant into protective custody prior to obtaining a medical assessment of her condition by ambulance officers.

2.41. Clearly, police encounter people with a wide range of health and social problems, whose behaviour may appear to justify the use of protective custody under the Act. However, how a person presents may be affected at the time by such factors as diabetes, epilepsy, mental illness, or the effects of prescribed medication. The person's social circumstances may also affect their behaviour.

2.42. Before exercising their powers under the Act, police must take time to complete adequate assessments to ensure that a person is genuinely intoxicated and does not suffer from a medical condition that requires treatment. It is also inappropriate to use the Act to detain people for behavioural disturbances associated with personal or social problems.

2.43. Of equal importance, police should be careful to reflect the care and protection aim of the Act through their actions and communications

when they take intoxicated persons into protective custody. Detainees should not be treated in the same manner as offenders and protective custody should not be used as a sanction against antisocial behaviour.

2.44. The following two case studies also show the problems that can arise when police officers do not observe an adequate process in assessing whether a person is intoxicated and whether the intoxication has, in cases of anti-social behaviour, caused that behaviour:

Case Study 4 *A young woman, who had apparently been fighting with another woman in a public place, was taken into protective custody by police for being intoxicated and disorderly.*

When the young woman was informed of the basis of her detention by the custody Sergeant, she denied consuming alcohol. She further stated that she was allergic to alcohol and that she would require medical treatment if she consumed alcohol.

As the young woman displayed no signs of intoxication the custody Sergeant queried the basis of her detention with the officers concerned. The COPS entry states that 'Police were of the opinion [name of the detainee] was under the influence of alcohol because of the strong smell of alcohol in the area. At this point the police discontinued her detention under the Act and charged her with fighting in a public place.

Case Study 5 *A man was observed by a police officer to be kicking a ball on a roadway in an apparently dangerous manner. The complainant was taken into protective custody by the police officer for being intoxicated and disorderly. The officer also charged the complainant with resisting arrest and possession of cannabis.*

The substantive charges were dismissed in the Magistrates Court on the basis that the officer had unlawfully taken the complainant into protective custody. The Magistrate found that the officer did not have reasonable grounds for believing that the complainant was intoxicated. The Magistrate further concluded that there was insufficient evidence that the complainant was behaving in a disorderly manner and that there was no basis for the officer to have linked the complainant's behaviour with intoxication.

As part of his finding the Magistrate also rejected the officer's reliance on the complainant smelling of intoxicating liquor and swearing as sufficient evidence of intoxication. The Magistrate noted that there was "no evidence as to his walking, loss of balance, slurred speech, in fact

Report Into The Use Of Police Powers Under The Intoxicated persons (Care 23 And Protection) Act 1994 In The ACT.

there was none of the other usual indicia of intoxication that one finds”³. The Magistrate concluded he was “not satisfied beyond reasonable doubt that there were reasonable grounds for [the police officer] to form the belief that whatever behaviour he observed in respect of [the defendant] was caused by intoxication”⁴.

2.45. The finding by the Magistrate makes it clear that police officers should ensure that a person is displaying a range of signs consistent with at least a moderate to high level of intoxication before placing that person in protective custody.

2.46. As discussed previously, because the Act provides no guidance on a required level of intoxication some police officers are prepared to exercise their powers of detention under the Act where a person’s level of intoxication is not excessive. Statements by some ACT police officers to the Ombudsman’s investigators confirm this practice does occur.

2.47. Additionally, as is discussed in the ‘**On Line Charging**’ Video Tapes section (paras 2.33 -2.35), a number of detained persons from the sample of City Watch-house video tapes viewed by the Ombudsman’s investigators during this investigation showed no apparent signs of intoxication. It is doubtful that the Act was intended to permit the detention of persons with such a minimal level of intoxication.

2.48. It is also of concern that there is a very low rate of early release of persons from the City Watch-house, with the majority of intoxicated persons being detained for around 7 hours. While the custody Sergeants do not currently have the option of lodging intoxicated persons in a sobering up shelter, they do not appear to utilise other alternatives for early release with any frequency.

2.49. As many of the detained persons are in the 18-25 year age group, parents or other family members could be contacted to enable them to be released into the care of a responsible person. Indeed, as the following case study shows, problems can occur where parents are not informed by police that their son or daughter has been taken into protective custody:

Case Study 6 *A man was taken into protective custody by police for being intoxicated and disorderly and detained at the City Watch-house. While he was being processed by the Watch-house Sergeant the man became agitated and aggressive. He was then placed in a padded cell.*

³ Australian Capital Territory Magistrates Court; Transcript of Proceedings No. CC95/06538 p. 6; 26 August 1996.

⁴ Ibid; p. 7.

The man's father initially complained to AFP Internal Investigations about his son's detention but accepted that the detention was reasonable. The complainant however also complained that his son had not been given the opportunity to contact his parents to inform them of his whereabouts and to give them the option of collecting him from the Watch-house. This appears to have occurred in part because normal procedures were suspended when the man's behaviour deteriorated.

2.50. The Act clearly contemplates that police officers will exercise their judgement in releasing persons taken into protective custody into the care of responsible persons. It is noted that this occurs more frequently in the regional areas where, due to logistical problems, police frequently arrange for intoxicated people to be conveyed to their homes.

Recommendation

- 3. Officers at the Watch-house should only place those intoxicated people who are violent or likely to injure themselves in holding cells. For other detainees, particularly in the situation where a Sobering Up Shelter is not available, officers at the Watch-house should be required to be more proactive in pursuing the release of detainees into the care of a responsible person, as envisaged by the legislation.**

Supported in part by the AFP.

The AFP supports further research in consultation with the relevant ACT Government agencies and the Ombudsman's Office into the identification of alternative options for the early transfer of intoxicated persons into the care of a responsible adult, or alternative arrangements.

- 4. AFP procedures at the Watch-house should be streamlined to ensure that detainees are treated by Watch-house staff in a care and protection framework, as distinct from procedures relating to custody of offenders. Further, detainees should be processed quickly to facilitate appropriate release , or to confirm continued detention if necessary.**

Supported by the AFP. Procedures at the City Watch-House are being reviewed.

PART 3. LEGISLATION AND GUIDELINES

PAST AND PRESENT PROVISIONS

Legislation in the Australian Capital Territory (ACT)

3.1. Prior to 1994 the control and care of intoxicated persons in the ACT were governed by two pieces of legislation. These were section 351 of the *Crimes Act 1900* and the *Inebriates Act 1900*. These provisions are discussed in greater detail below.

3.2. In 1983, following the Royal Commission into Aboriginal Deaths in Custody, there was a national movement to decriminalise public drunkenness. In the ACT a new approach was adopted for intoxicated persons based on a care and protection model. This approach was translated into legislation in 1994 with the introduction of the Intoxicated Persons (Care and Protection) Act. The Act is discussed in detail below.

Section 351 of the Crimes Act 1900

3.3. Section 351 of the Crimes Act was promulgated in the ACT in 1983 and provided the police with powers to take a person who was 'drunk' into custody. It allowed police to deal with the immediate circumstances where a person was:

- a) behaving in a disorderly manner;
- b) behaving in a manner likely to cause injury to themselves or others;
or
- c) incapacitated due to drunkenness and in need of physical protection.

Under the section a person could be detained in custody until the person ceased to be drunk or for a period of up to 8 hours.

3.4. Section 351 was repealed in December 1994 when the Act was gazetted.

Inebriates Act 1900

3.5. This Act serves a different purpose to section 351 of the Crimes Act in that it is concerned with habitual abusers of alcohol and drugs and allows the courts to impose either custodial or noncustodial treatment on a person declared to be an inebriate by the court. This involves the person entering into a recognisance whereby he or she agrees to abstain from the consumption of intoxicating substances for a period of not less than 12 months.

3.6. Custodial treatment for inebriates is generally provided through Kenmore Hospital in Goulburn.

3.7. The Act has not been repealed by subsequent legislation and continues to provide an option for the courts in diverting people with alcohol and drug addictions for treatment.

Intoxicated Persons (Care and Protection) Act 1994

3.8. During the agreement in principle stage of the debate on the Intoxicated Persons (Care & Protection) Bill, the then ACT Attorney-General on 10 November 1994 clearly described the intent of the legislation. In the Attorney-General's words, the Bill was designed to 'provide a legislative basis for places where people can sober up when, due to intoxication from alcohol and/or other drugs, they have temporarily lost the capacity to care for their own safety'⁵.

3.9. To accomplish these changes, the powers given to police under section 351 of the Crimes Act were transferred to the Act, empowering police to take 'intoxicated persons' into protective custody and to detain them for up to 8 hours, with an option of allowing persons to remain voluntarily at the Watch-house for a further 4 hours.

3.10. The power of detention is complemented by provision for police to release intoxicated persons into the care of the manager of a licensed place under section 4(5) of the Act. This provision is dependent upon the existence of a sobering up shelter, or similar facilities which are licensed, and admission is on a voluntary basis. A sobering up shelter was established and operated in the ACT until July 1996. The sobering up shelter is discussed in greater detail in the **Sobering Up Shelter** section later in the report.

3.11. The Act also allows for an intoxicated person to be released by police at any time into the care of a responsible person (as defined by the Act).

3.12. There are two other aspects of the Act that warrant further discussion, as in the Ombudsman's view, they have had a significant impact on its operation. First, the definition of 'intoxicated' in the Act is 'apparently under the influence of alcohol, another drug, or a combination of drugs'. As this definition provides no guidance on the level of intoxication of a person that should be observed by police officers, the opportunity exists for police to detain persons who are only mildly intoxicated, but whose behaviour is in some other way undesirable.

⁵ Hansard; Second reading of the Intoxicated Persons (Care and Protection) Bill 1994, 10 November 1994, p. 4030

Report Into The Use Of Police Powers Under The Intoxicated persons (Care 27 And Protection) Act 1994 In The ACT.

3.13. Second, this problem is exacerbated because 'disorderly' behaviour does not have a formal definition. The behaviour generally considered to constitute 'disorderly' behaviour may also, in some instances, be covered by summary offences legislation. For example, offensive language or fighting in a public place are both offences and regular components of disorderly behaviour. This creates a potential overlap between the protective custody provisions of the Act and summary offences provisions.

3.14. As a result, police officers have the opportunity to make a judgement about the efficacy of using protective custody, as opposed to the consequences of making arrests for substantive offences. As the use of police powers under the Act is generally not subject to judicial review, it can become a convenient vehicle for maintaining public order rather than, as is intended by the Act, providing for the care and protection of intoxicated persons.

Other Relevant Provisions

3.15. Other relevant legislative provisions that relate to the broader issue of alcohol consumption and to intoxicated persons also need to be considered.

Liquor Licensing Laws

3.16. The sale of alcohol and licensing of premises in the ACT is regulated under the *Liquor Act 1975*. The powers under the Act are vested with police officers and inspectors working under the direction of the Registrar of Licences, for the purposes of investigating certain offences. Licensing hours, which until recently required licensees to cease trading at 4:00am, and now 5.00am, have been contentious. They also impact on the strategies police have had to adopt to manage intoxicated people, particularly in the Civic and Manuka areas, which house the majority of licensed venues frequented by younger people.

Summary Offences

3.17. Under Part XIV of the *Crimes Act 1900*, police are able to arrest people in public places on a range of charges, which are dealt with as summary offences. These include for example:

- offensive language;
- fighting in a public place; and
- breach of the peace.

3.18. As discussed earlier, these matters relating to street offences cover a range of disorderly behaviour. They attract minor penalties and allow the Courts the option of not recording convictions against first offenders.

A pragmatic consideration for police is that, in general, custody Sergeants are expected to bail these offenders promptly once they had been processed at the Watch-house. By contrast, if officers want to keep a person off the streets, they can use protective custody to detain the person for up to 8 hours.

Other Jurisdictions

3.19. Comparison with the legislative approaches of other States and Territories reveal differences in operation that may reflect different intentions for the operation of such legislation.

New South Wales

3.20. In New South Wales (NSW) the comparable legislation is the *Intoxicated Persons Act 1979*, which represents a similar model but with important differences.

3.21. The first is that the NSW legislation applies a test of degree in its definition of intoxication by including the word 'seriously', whereas there is no such provision in the ACT Act.

3.22. Second, the NSW legislation, through section 5(1A), clearly expresses the *care* and *health* focus of the legislation by providing that police may not take intoxicated persons to the police station unless there is no other 'proclaimed place' (sobering up shelter); it is impracticable to take the person home; or the behaviour of the person is too 'violent' for the person to be taken to a proclaimed place or home. No similar provision exists in the ACT legislation.

3.23. Third, NSW legislation also prevents police from detaining a person under its provisions if the person's disorderly behaviour, or behaviour likely to cause injury or damage to property, 'constitutes an offence under any law'. This provision has the effect of ensuring that the legislation is used for its intended purposes and removes the opportunity for police to use the Act as a means of dealing with incidents which properly should attract a summary offence. The ACT legislation does not contain a similar provision.

South Australia

3.24. *The Public Intoxication Act 1984* in South Australia (SA) is much more specific in its focus than the ACT legislation. Most notably the SA legislation allows police officers to detain persons 'under the influence of a drug or alcohol' only where such persons are unable to take care of themselves. The legislation does not include criteria relating to disorderly behaviour, injury to others or damage to property, as grounds for detention. In effect, SA police are required to charge offenders with an

**Report Into The Use Of Police Powers Under The Intoxicated persons (Care 29
And Protection) Act 1994 In The ACT.**

offence in instances of this kind of behaviour if they wish to take them into custody.

3.25. A further difference is that persons detained under the SA legislation are deemed to be in lawful custody even when lodged in a sobering up shelter. By contrast, under the ACT legislation, intoxicated persons may only be lodged in a sobering shelter on a voluntary basis, raising the questions as to the extent to which lawful custody continues to affect people placed in a shelter.

3.26. An additional provision is that a person detained under the legislation may apply to the Magistrates Court within 30 days for a declaration that they were not under the influence of alcohol or drugs. However, if the court decides that a declaration should be made it does not establish that the detention was unlawful.

Northern Territory

3.27. In the Northern Territory (NT) the relevant police powers for the detention of intoxicated persons are contained under Division 4 (titled Apprehension without Arrest) of the *Police Administration Act 1996*. The Division contains three main mechanisms that limit police powers to care and protection. Firstly, it imposes a test of degree in its definition of 'intoxicated' by requiring that it 'means seriously affected by a drug or alcohol'. Secondly, section 130 does not permit an intoxicated person to be charged with an offence or questioned in relation to an offence. Thirdly, section 132 requires external review through a justice if a person is to be kept in custody for more than 6 hours.

3.28. By contrast with the ACT legislation, the NT provisions do not make reference to criteria relating to the conduct of intoxicated persons, such as disorderly behaviour or likely to cause injury to self or others. As such, the NT legislation does not provide guidance to police as to what kind of conduct by intoxicated people warrants the use of their powers of protective custody.

Western Australia

3.29. Police powers in relation to the detention of intoxicated persons are not established under separate legislation in Western Australia (WA) but are contained in the *Police Act 1892*. The WA legislation provides for intoxicated persons to be released to 'approved hospitals' and the period of detention is limited to 8 hours before judicial review of the condition of detainees.

3.30. The WA legislation also contains provision for an application to the courts, within 30 days, for declarations that persons detained under these powers were not intoxicated.

3.31. The remaining Australian jurisdictions of Victoria, Queensland and Tasmania have yet to decriminalise public drunkenness.

AFP GUIDELINES

3.32. AFP Regional Guideline 4/96 concerns the 'Care of Persons in Police Custody'. Sections 31 to 34 of the Guideline relate to protective custody and require officers to give due consideration to either releasing intoxicated persons into the care of responsible adults or lodgement in a sobering up shelter, before electing to lodge such persons in the Watch-house.

3.33. The Guideline sets out procedures for lodging intoxicated persons in a sobering up shelter including warrant and criminal history checks but also specifically notes that the officer in charge of the Watch-house may decide to release intoxicated persons from the Watch-house into the care of a sobering up shelter.

3.34. The effect of the Guideline reflects the original intent of the legislation in that it focuses on the care and protection of intoxicated persons. The Guideline however, is silent on the use of the Act in relation to street offences or management of antisocial behaviour.

3.35. The current AFP Guideline for the handling of intoxicated persons provides no guidance to police in relation to either charges for street offences or use of other powers such as 'breach of the peace' in relation to intoxicated persons. The Ombudsman considers that these issues should be addressed in the Guideline.

Conclusion

3.36. In my preliminary view, the absence of guidance in relation to offences associated with alcohol consumption allows officers to treat the provisions of the Act as complementary to, rather than distinct from, the summary offences provisions of the Crimes Act. This adds to the risk that the Act can inappropriately be used by police as a means of control, rather than the care and protection of intoxicated persons.

Recommendations

5. The AFP should review its AFP Guideline 4/96 to ensure that it fully reflects the care and protection role of officers in relation to intoxicated persons.

Supported by the AFP. Regional Guidelines are being reviewed to remove any ambiguity.

6. The AFP should amend its Guideline to provide clear guidance to officers on charges for street offences or the use of other powers, such as

Report Into The Use Of Police Powers Under The Intoxicated persons (Care 31 And Protection) Act 1994 In The ACT.

breach of the peace, in relation to intoxicated persons. The AFP should continue to provide training to its officers to ensure their use of powers under the Act is consistent with the intent of the Act.

Supported by the AFP. Regional Guidelines are being reviewed to strengthen guidance.

ACT LEGISLATION

3.37. The ACT Intoxicated Persons (Care and Protection) Act makes no requirement of police officers to charge offenders where an offence has been committed. Instead, the Act contains criteria such as 'disorderly behaviour' and 'damage to property' which creates an overlap with street offences provisions of the ACT Crimes Act 1900.

3.38. This overlap means that the Act provides an option for police officers to use protective custody in place of, or in association with, street offences provisions. Examples of this practice are given in Case Studies 7 and 8 below, and previously at Case Studies 4 and 5. Police can then impose an 8 hour period of detention at the City Watch-house as an apparent sanction for antisocial behaviour, without review.

Case Study 7 *A man (who was the complainant) and his companion were apprehended for shoplifting by security staff for a shop in Civic. Police were called and arrested the two men for theft. As the police officers were removing the men from the premises and placing them in the police vehicle the complainant was allegedly offensive, both in his demeanour and language, towards the officers and members of the general public.*

Subsequently, the arresting officer also detained the complainant at the City Watch-house for approximately 4 hours for being intoxicated and disorderly. The complainant disputed that he was intoxicated at the time of his arrest but admitted to having ingested a mixture of minor tranquillisers and alcohol prior to his arrest.

Although it would appear that the complainant was intoxicated for the purposes of the IP(C&P) Act, we were concerned that the complainant appeared not to have been disorderly in his behaviour prior to his arrest by police.

3.39. I consider that these police practices create a risk that the community will view the operational effect of the Act as 'recriminalising' public drunkenness. The interface between summary offences provisions and protective custody under the Act are clearly demonstrated in the following case study.

Case Study 8 *Police attended a dispute at a night club where a man had been refused entry because he was eating a pie. The man had allegedly become abusive and (according to the arresting officer) was swearing. When the man failed to comply with warnings to control his behaviour, police took him into protective custody for being intoxicated and disorderly.*

The arresting officer gave evidence that his initial intention was to charge the man with offensive behaviour. The evidence of other witnesses at the incident suggest that while there was a dispute between the man and the doorman, the man's conduct did not amount to disorderly conduct.

3.40. The powers given to police under the Act mean they can deprive a person of their liberty for a period of up to 8 hours. However, there is no corresponding review or appeal mechanism of any nature to protect the rights of individuals against possible misuse by police of protective custody.

3.41. From our investigation and review of other jurisdictions, some additional safeguards could be instituted. Two additional levels of review could be included in the Act and/or through AFP operational guidelines. First, appropriate authorisation by a superior officer (above the level of custody Sergeant) of detention of intoxicated persons beyond 4 hours (up to the maximum 8 hours); and second, notification to the Ombudsman on a regular basis of statistics relating to detainees kept in the Watch-house on such authorisations.

3.42. Our review of relevant legislation has identified four main differences which lead to police/community friction in the operation of the Act:

- because the Act does not refer to the degree of intoxication in its definition of 'intoxicated person', police can detain persons who are only mildly or moderately affected by drugs and alcohol. In these instances it is arguable whether a detainee's behaviour can be attributed to intoxication, or that the person is in fact in need of care.
- the inclusion of 'disorderly behaviour' as one of the criteria for the use of protective custody has resulted in the legislation being used by police for two, sometimes conflicting, purposes; the care and protection of intoxicated persons who are incapable of protecting themselves; and protection of the general public from antisocial behaviour associated with disorderly conduct.
- related to both of the previous problems, and unlike a number of the other jurisdictions, the Act does not preclude the use of criminal charges or summary offences where a person is taken into protective custody. This means that the 8 hour period of detention can be used

Report Into The Use Of Police Powers Under The Intoxicated persons (Care 33 And Protection) Act 1994 In The ACT.

by police as a form of immediate 'summary justice' as an alternative to proceeding with summary charges before the courts.

- detainees are sometimes required by Watch-house officers to answer warrants when intoxicated. It is arguable that if police consider a person meets the criteria of the Act for protective custody, the person should not be required to answer a warrant until they are fit to be released from protective custody. The NT legislation, for example, appears to address this situation.

Conclusions

3.43. In my view, the Act provides inadequate and conflicting provisions to meet the intent of the legislation as foreshadowed during the agreement in principle stage of the debate on the Bill by the then ACT Attorney-General. As a result, the legislation has at times been applied by police in a manner that may be construed as punishing people for anti-social behaviour. This is at odds with the primary purpose of the Act, which is to provide a means for the care and protection of intoxicated persons.

3.44. I consider that police use of protective custody in relation to intoxicated persons should be subject to greater external scrutiny than currently exists under the Act.

Recommendations

7. The ACT Government should give consideration to a review of the Act and examine possible amendments to clarify the intended purpose and scope of the legislation in order to ameliorate problems associated with an apparent overlap between summary offences provisions and protective custody provisions for intoxicated persons. A principal aim of such amendments should be to provide clear guidance to the principal users of the legislation, the police.

8. The ACT Government should consider amendments to the Act to ensure that the definition of 'intoxication' refers to a level of intoxication which seriously affects the functioning and behaviour of individuals. Further, the amended definition should be the accepted standard for AFP officers exercising their powers under the Act.

9. The ACT Government should consider amendments to the Act to provide a mechanism for immediate review of detentions, and for authorisation by a superior officer of periods of detention greater than 4 hours, up to the maximum 8 hours allowable under the Act.

Review of the Act is supported by the AFP having regard to the matters raised in this report. The AFP has initiated action to revise Regional Guidelines to require a documented review of any person detained in

protective custody by the officer-in-charge of the City Watch-House at the 4 hour point.

The Chief Minister's Department has advised that the recommendations concerning legislation and matters of Government policy will require consideration by the Government. However, on the basis of consultation with ACT Government Departments, there is support for a re-examination of the Act in the context of developments in other jurisdictions and the issues raised in this Report.

PART 4. SOBERING UP SHELTER

History

4.1. As noted previously, in keeping with the decriminalisation of public drunkenness, the Act provided police with the power to release intoxicated persons into the care of a sobering up shelter. Therefore, the establishment of such a facility was a necessary adjunct to the Act.

4.2. In 1994 the ACT Government provided funding of \$100,000 per annum to Assisting Drug Dependents Incorporated (ADDINC) to establish a sobering up shelter in grounds of the Arcadia House Withdrawal Centre. The shelter commenced operation from August 1994, being open for business from Thursday to Monday each week and had a capacity of 4 beds.

4.3. As discussed earlier, the shelter was closed on 9 July 1996 following the death of a client and a subsequent coronial inquest. There has been no community sobering up facility licensed under the Act since the closure of the shelter.

Operation of the Shelter

4.4. In 1996 ADDINC completed a review of the shelter⁶. The statistics contained in the review clearly demonstrate the shelter had a limited role in accommodating intoxicated people in the ACT. Over the 2 years of its operation the ADDINC shelter accommodated 196 persons at an average of 8 persons each month. This compares to a total of over 1400 people detained by police over the same period under the Act. Thus only about 14% of people taken into protective custody by police were lodged at the sobering up shelter.

4.5. Not unexpectedly there were considerable differences in demand on a seasonal basis with 38% of clients accommodated in summer and only 7% in winter.

4.6. Other useful facts to emerge from the review included:

- Saturday was the busiest day of the week with the peak admission time being between 10 pm and 4 am;
- the clientele was predominantly male (89%) and below 25 years of age (61%); and
- the average length of stay in the shelter was 5hrs 10mins.

⁶ Assisting Drug Dependents Incorporated - Sobering Up Shelter Report, 1996.

4.7. The closure of the ADDINC sobering up shelter in July 1996 has meant that police do not have the option of lodging intoxicated persons in a shelter. The ACT Department of Health and Community Care is considering the re-establishment of a shelter with a budget of approximately \$100,000 per annum. It is understood that this facility may have a capacity of 4-6 beds, which would be similar to the original 1994 shelter.

4.8. From the information gathered for this report, to effectively meet the intent of the legislation and the needs of the community, a sobering up shelter in the ACT with a capacity for 20 beds (15 male and 5 females) appears to be needed. If the aim of the shelter is to provide a place where persons can voluntarily seek care and protection, it should be where there is the greatest need.

4.9. One option for a sobering up shelter could be to modify part of the City Watch-house. A significant advantage would be that this facility would certainly be used by the police. It could be staffed by health care workers with the appropriate skills in drug and alcohol abuse, thereby freeing up police for other duties.

4.10. Where intoxicated people were violent or significantly disruptive they might still need to be held in cells and police would retain responsibility for their management.

4.11. Co-location of the Sobering Up Shelter within the City Watch-house would also provide for an integrated approach to the management of intoxicated persons along with scope for early health care intervention and education programs.

4.12. It is likely this option would reduce the associated costs of the establishment of a separate sobering up facility, and its ongoing operational costs. It would also ensure that health care workers in the shelter would have ready access to police assistance if required. Importantly, the City Watch-house already meets all the requirements for the safe keeping of persons in custody. In particular, it meets the standards recommended by the Royal Commission into Aboriginal Deaths in Custody.

Conclusion

4.14. I consider that a sobering up facility should be re-established in the ACT to ensure that police have the option of releasing intoxicated persons into the care of a shelter, as envisaged by the Act. In my view this would help to reinforce the role of police in providing care and protection for intoxicated persons.

**Report Into The Use Of Police Powers Under The Intoxicated persons (Care 37
And Protection) Act 1994 In The ACT.**

Recommendation

10. As envisaged by the legislation, the ACT Government should ensure the provision of a Sobering Up Shelter. Any new sobering up facility would be most useful if established in the Civic area and may need to have the capacity to accommodate up to 15 male and 5 female admissions at any one time.

The ACT Department of Health and Community Care has advised that the establishment of a Sobering Up Shelter is endorsed Government policy. The Department conducted a tender process for an operator of the shelter but no contract was awarded. However a suitable site has yet to be identified. The size of any facility would also have resource implications.

It is noted that the AFP has by necessity assumed the role of providing care and protection of intoxicated persons by detaining intoxicated persons in protective custody in the City Watch-House.

11. The ACT Government, in consultation with the AFP, may wish to give consideration to the practical benefits of locating such a sobering up facility in the City Watch-house. Additionally, any such facility should utilise health care professional staff, to ensure that intoxicated people receive appropriate care.

Pending resolution of the establishment of a permanent Sobering Up Shelter, the AFP supports further research in consultation with the relevant ACT Government agencies and the Ombudsman's Office into the identification of alternative options for the early transfer of intoxicated persons into the care of a responsible adult, or alternative arrangements.

I intend that my office review operation of the revised arrangements and procedures for the management of intoxicated persons in 12 months.

R N McLeod

Commonweath Ombudsman

ATTACHMENT A - OTHER RELEVANT REPORTS AND VIEWS

ACT Department of Health and Community Care

The ACT Department of Health and Community Care, through its Mental Health and Drug Strategy Unit, has overseen the development of a Standard, called the *Care and Protection of Intoxicated Persons Standard*. The Standard was gazetted as part of the Act in early 1998.

The Standard establishes protocols that 'carers' are expected to follow relating to the way in which intoxicated people should be managed in a sobering up shelter, including treating these people with respect and dignity, ensuring their privacy, safeguarding their health safety and property, and requirements for the skills and qualifications of staff.

Although it relates to sobering up shelters, it is important that the AFP is cognisant of the principles that underpin the Standard. These principles should also be considered as guidance to police on their approach to handling intoxicated persons.

Community Law Reform Committee Report

In September 1997 the ACT Community Law Reform Committee handed down its report into street offences⁷. The Committee examined legislation relating to offences in public places, such as breach of the peace and offensive behaviour, and made recommendations for change which might be relevant to any review of the Intoxicated Persons (Care and Protection) Act.

Although the report of the Committee only mentions the Act in passing, it makes some recommendations in relation to 'preventative justice', an aspect of police work strongly emphasised by police in their discussions with the Ombudsman's investigators. For example, it recommended the possible creation of a formal power to separate people to be used strictly as an aid to prevent a possible breach of the peace.

If such a power was enacted and used effectively by police to deal with antisocial behaviour, then it is possible that police would be less likely to use the Act for this purpose.

⁷ Community Law Reform Committee, Report 15: **Street Offences**, September 1997.

**Report Into The Use Of Police Powers Under The Intoxicated persons (Care 39
And Protection) Act 1994 In The ACT.**

ATTACHMENT B - REFERENCES

ACT Department of Health and Community Care, *The Re-establishment of a Sobering Up Shelter in the ACT: A Discussion Paper*, June 1997.

Assisting Drug Dependents Incorporated, *Sobering Up Shelter Report*, 1996.

Australian Capital Territory Magistrates Court; Transcript of Proceedings No. CC95/06538 ; 26 August 1996.

Community Law Reform Committee, *Report 15: Street Offences*, September 1997, tabled in the ACT Legislative Assembly on 25 September 1997.

Hansard; *Agreement in principle debate on the Intoxicated Persons (Care and Protection) Bill 1994*, 10 November 1994, pp 4030-4033.

ATTACHMENT C - INVESTIGATION METHODOLOGY

1. Statistical information was provided by AFP Statistical Services.
2. Qualitative information was drawn from:
 - ACT Community Police Officers;
 - AFP Internal Investigations;
 - Watch-house Staff;
 - Complaints; and
 - Watch-house video recordings of persons placed in protective custody.
3. The video sampling accounted for 7.5% of persons taken into protective custody over the sample period 1/1/97 to 30/6/97. This period was selected recognising that the Act had been in operation for some two years; the period represented an equal distribution between summer and winter months and provided for a six month sample.
4. Video samples were taken from peak nights, (Thursday to Saturday nights) on a two week cycle. This approach was intended to provide for in excess of a 10% sampling. However because of corrupt recordings, the sample size was reduced to 7.5%.
5. Video recordings were jointly reviewed by two senior investigation officers against a check off list of objective indicators of slurred speech, offensive language, agitated, unsteady on feet, dishevelled, aggressive being assessed against a scale of intoxication of not evident, moderately affected and seriously affected.
6. Persons were only classified as intoxication not evident if none of the objective indicators were evident. If the category was not clear, than the person was classified as moderately intoxicated.