



Australian Federal Police

USE OF POWERS UNDER THE *INTOXICATED
PEOPLE (CARE AND PROTECTION) ACT 1994*

October 2008

Report by the Commonwealth and Law Enforcement Ombudsman,
Prof. John McMillan

REPORT NO. **11|2008**

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EXECUTIVE SUMMARY

Dealing with intoxicated people is often a difficult and demanding job, and it features in much police activity. Police are at the front line of addressing problems arising from abuse of alcohol and other drugs, including violence, other criminal offending and anti-social behaviour.

This is the Ombudsman's third own motion investigation and report on the Australian Federal Police's (AFP) exercise of powers under the *Intoxicated People (Care and Protection) Act 1994* (ACT) (the IPCP Act). This investigation has come at a time of increasing focus, both nationally and in the Australian Capital Territory (ACT), on problems arising from alcohol sale and consumption, particularly in relation to hazardous drinking amongst young people. The ACT Government is currently conducting a wide-ranging review of the *Liquor Act 1975* (ACT), following the Auditor-General's finding in 2007 that licensing procedures were not sufficiently robust to ensure the integrity and effectiveness of the ACT liquor licensing regime. The findings of this report, particularly in relation to police concerns about licensing issues, should be considered as part of that review.

The Ombudsman's first report in 1998 focused on the need for police to adopt practices and procedures that reflected the 'care and protection' elements of the legislation. The second report in 2001 found that the AFP had implemented many of the recommendations but that there was still scope for improvement in police guidelines and practices. Some new issues had emerged, including the possible unlawful detention of people beyond the statutory eight-hour limit. This office undertook to maintain a continuing interest in the issues.

Prompted by concerns over a pattern of complaints to this office since 2003, particularly in relation to use of force and alternatives to police custody, we considered it timely to investigate what, if any, changes have occurred in the way police exercise their powers under the IPCP Act. A major change since the last report was the establishment in 2004 of an ACT sobering up shelter, managed by Centacare and open three nights a week. The AFP did not make use of that facility until early in 2006 and police referrals have dropped significantly since that year.

While police acceptance of the Shelter appears to have become more widespread since its opening and the relationship between the AFP and Centacare appears to be generally positive, there is room for improvement. Eligibility criteria between the two organisations need to be made more consistent. Lingering concerns amongst some police about the Shelter's suitability, at least some of which appear to be based on lack of awareness, need to be addressed, and more effort should be made to divert those who do not need to be held in the Regional Watchhouse (previously called the City Watchhouse) to the facility purpose built for caring for intoxicated people.

As was first identified in the Ombudsman's 1998 report, there needs to be more emphasis on the 'care and protection' focus of the IPCP Act. Being intoxicated in a public place has not been an offence in the ACT since 1983, yet police training materials still refer to the provisions of the IPCP Act under the heading of 'street offences'. There is evidence of some use by police of the provisions as a preventative measure to enforce public order rather than to care for the intoxicated person, despite the clear statement in the IPCP Act that a person may only be taken into custody if there is no other alternative for the person's care and protection. There also appears to be a widely held view, backed by AFP statistics on detention times,

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that if a person is detained at the Watchhouse under the IPCP Act, he or she will be held for close to the statutory limit to sober up. More effort needs to be made to arrange suitable alternatives, such as release to a responsible person. In some jurisdictions legislation makes this mandatory.

Because many people who are held at the Watchhouse are either detained under the IPCP Act or are intoxicated at the time of their arrest, many of the issues relating to the care and custody of intoxicated people have been dealt with in our joint review with the AFP in 2007 of the operations of the Watchhouse. This investigation has focused on issues specific to detention under the IPCP Act rather than on general custody issues.

This investigation looked at the responsibilities of the AFP and the ACT Department of Health. Consequently, the investigation was undertaken in the dual capacities of the office of Commonwealth and Law Enforcement Ombudsman and ACT Ombudsman.

Both the AFP and ACT Health were given a copy of the draft report of this investigation and their comments were invited. ACT Health responded to recommendations 5 and 6, as discussed in Part 3, and provided some general comments. The AFP chose not to respond to the recommendations but provided some comments which are addressed where appropriate in this report.

Recommendations

RECOMMENDATION 1

AFP training material on the IPCP Act should be revised to:

- (i) emphasise the care and protection aim of the Act and distinguish powers under those provisions clearly from street offences
- (ii) provide more guidance to police on the circumstances in which use of the IPCP Act provisions is appropriate compared with other options, including breach of the peace and charging with a substantive offence.

RECOMMENDATION 2

AFP training in de-escalation of conflict should be increased, particularly emphasising dealing with people who are affected by alcohol or other drugs.

RECOMMENDATION 3

The AFP should review and update the guidelines relating to breach of the peace to specify how intoxicated people should be dealt with, given that there may be concerns about their capacity to understand fully the consequences of giving an undertaking as a condition of release.

RECOMMENDATION 4

All ACT Policing members should receive initial and ongoing training on the risks arising in the transport and custody of intoxicated people, such as the training recently provided by Clinical Forensics ACT.

RECOMMENDATION 5

ACT Health, as the agency with policy responsibility for the IPCP Act, should ensure that a memorandum of understanding is in place between Centacare and the AFP, as required by the Intoxicated Persons (Care and Protection) Standard 2004 (No 1).

RECOMMENDATION 6

The AFP and ACT Health should work with Centacare to ensure a high degree of consistency in eligibility criteria in Shelter and AFP guidelines.

RECOMMENDATION 7

The AFP should ensure that appropriate ACT Policing training enhances police awareness of, and confidence in, the Sobering Up Shelter.

RECOMMENDATION 8

The AFP should amend its Sobering Up Facility guidelines so that Indigenous people are not precluded from consideration for diversion to the Sobering Up Shelter. Similarly, the AFP guidelines should be reviewed to ensure that other groups of people defined as at risk in police custody, including those who are highly intoxicated, are not automatically precluded from diversion to the Shelter.

RECOMMENDATION 9

The AFP should amend the Watchhouse Manual to ensure that:

- (i) the officer-in-charge of the Watchhouse considers before admitting an intoxicated person whether that person would be more appropriately cared for at the Sobering Up Shelter
- (ii) people detained for intoxication are asked on admission whether they wish to nominate a responsible person into whose care they may be released at some future point if the officer-in-charge of the Watchhouse considers it appropriate.

RECOMMENDATION 10

The AFP should amend the Watchhouse Manual to ensure that those people who are detained under the IPCP Act and who seek to contact a lawyer are allowed to do so.

RECOMMENDATION 11

The AFP should ensure that officers accurately and consistently record lodgement and release times for those detained under the IPCP Act. This may require considering whether the redesign of the AFP PROMIS database can include prompts to minimise mistakes in use of the 24-hour clock.

RECOMMENDATION 12

The AFP should amend its guidelines to ensure that the officer-in-charge of the Watchhouse reviews an intoxicated person's detention after four hours to determine whether the person may be released into the care of a responsible person or otherwise allowed to leave, and that this review is documented in the Cell Management system.

RECOMMENDATION 13

The AFP should ensure that where a person detained for intoxication asks to stay at the Watchhouse beyond the eight-hour limit, the person's consent is always recorded in the Cell Management system. To ensure compliance with the eight-hour limit, automatic alerts to the Cell Management system after seven hours should be considered. Where the person is asleep, he or she should be woken so that consent can be obtained.

RECOMMENDATION 14

The AFP should amend the Watchhouse Manual to remove any reference to consideration by police of 'rolling detentions' of periods of eight hours.

PART 1—BACKGROUND

Overview

1.1 This is the Ombudsman's third own motion investigation and report on the exercise of police powers under the IPCP Act.

1.2 The first report, issued in December 1998, focused on the need for police to adopt practices and procedures that reflected the 'care and protection' elements of the legislation.¹

1.3 The second investigation aimed to determine to what extent the AFP had implemented the 1998 recommendations. The second report, issued in June 2001, found that the AFP had adopted practices and procedures to implement many of the recommendations.² However, there was still scope for improvement and refinement of certain police guidelines and practices. Some new issues had emerged, including the possible unlawful detention of people beyond the statutory eight-hour limit. This office undertook to maintain a continuing interest in the issues.

1.4 Ten years on from the first report, it is timely to consider what, if any, changes have occurred in the way police exercise their powers under the IPCP Act, particularly since the establishment of an ACT sobering up shelter in 2004. The investigation was initiated on 14 August 2006 under s 21A of the *Complaints (Australian Federal Police) Act 1981* (Cth) concerning the responsibilities of the AFP and s 5(1)(b) of the *Ombudsman Act 1989* (ACT) concerning the responsibilities of the ACT Department of Health. This investigation was prompted by concerns raised in more than thirty complaints between 2003 and mid 2006 involving police dealings with intoxicated people.³

Review of Watchhouse operations

1.5 After this investigation commenced, the AFP approached the Ombudsman's office to conduct a joint review of operations of the Watchhouse. The review was prompted partly by concerns raised in complaints from people held in custody at the Watchhouse. A report was released in June 2007⁴, and a follow-up review was conducted in 2008.

1.6 Because many people who are held at the Watchhouse are either detained under the IPCP Act or are intoxicated at the time of their arrest, many of the issues relating to the appropriate care and custody of intoxicated people are dealt with in that report and its follow-up. To avoid overlap, this investigation has focused on those issues specific to detention under the IPCP Act rather than on general issues.

¹ Commonwealth Ombudsman, *Investigation into the use of police powers under the Intoxicated Persons (Care and Protection) Act 1994 (ACT)*, 1998.

² Commonwealth Ombudsman, *AFP use of powers under the Intoxicated Persons (Care and Protection) Act 1994 (ACT)*, 2001.

³ Further complaints were received during the investigation, including notification by the AFP of 19 Category 3 complaints involving detentions under the IPCP Act after commencement of new arrangements for investigating AFP complaints on 30 December 2006 (discussed at paragraph 3.54).

⁴ Commonwealth Ombudsman and Australian Federal Police, *Review of ACT Policing's Watchhouse Operations: a joint report by the Australian Federal Police and the Commonwealth Ombudsman* (Report No 6/2007), June 2007.

Context of investigation

1.7 Dealing with intoxicated people is often a difficult and demanding job, and it features in much police activity. While police data systems do not accurately measure the full extent of the impact of alcohol on police activities, studies show a high correlation between alcohol consumption and criminal offending, violence and anti-social behaviour.⁵

Increasing concern about problem drinking

1.8 This investigation has occurred at a time when increasing attention is being paid both nationally and in the ACT to problems arising from alcohol sales and consumption, particularly in relation to hazardous drinking amongst young people.

1.9 In March 2008 the Australian Government announced a \$53.5 million strategy to combat binge drinking amongst young people.⁶ All Australian jurisdictions agreed through the Ministerial Council on Drug Strategy in May 2008 to fast track the development of that strategy, including assessing trials of late night lock-outs for licensed premises and developing a national policy framework for responsible service of alcohol. The Senate Standing Committee on Community Affairs recently considered a bill to restrict alcohol advertising and require health information labelling on alcohol products.⁷ Police commissioners throughout the country have also called for restrictions on liquor sales.⁸

1.10 The ACT Government is currently reviewing the *Liquor Act 1975*. The Discussion Paper⁹ released on 1 April 2008 examines the regulation of alcohol sales and consumption and poses questions on reform to licensing applications and conditions, appropriate penalties, underage drinking, crowd control, staff training, on the spot fines, alcohol-free areas and compliance measures, amongst other issues. A report by the Department of Justice and Community Safety to the ACT Attorney General was due by 31 July 2008.

⁵ See S J Doherty & A M Roche *Alcohol and licensed premises: best practice in policing*, Australasian Centre for Policing Research, National Drug Law Enforcement Research Fund, 2003, page 18, citing one NSW study that estimated that alcohol was involved in 62% of all police attendances, 73% of all assaults, 77% of street offences and 40% of domestic violence incidents (C S Ireland & J L Thommeny, 'The crime cocktail: licensed premises, alcohol and street offences', *Drug and Alcohol Review*, 1993, 12, 143–150). See also J White & R Humeniuk, *Alcohol misuse and violence: exploring the relationship*, AGPS, 1994, and R J Stevenson, *The impact of alcohol sales on violent crime, property destruction and public disorder*, NSW Bureau of Crime Statistics and Research, 1996.

⁶ \$14.4 million in community initiatives to confront the binge drinking culture, \$19.1 million to support early intervention and diversion programs for young people under 18, and \$20 million for an advertising campaign.

⁷ Senate Standing Committee on Community Affairs, *Alcohol Toll Reduction Bill 2007 [2008]*, June 2008.

⁸ AAP 'Top cops want booze laws reformed', *The Age*, 27 May 2008. See also K Lawrence '24 hr pub ban: police chief says Sydney "drowning in alcohol"', *The Daily Telegraph*, 28 May 2008; M Naidoo 'Police blast booze brawls', *The Mercury*, 3 June 2008.

⁹ The ACT Attorney General, Simon Corbell MLA, stated that the review was promoted by concern about alcohol-related incidents in public areas in Canberra 'especially at popular nightspots and at Summernats': 'Ministerial Foreword', *Review of the Liquor Act 1975*, ACT Department of Justice and Community Safety, 2008, page 7.

1.11 The ACT Government's review follows the ACT Auditor-General's audit in 2007 of the regulation of ACT liquor licences.¹⁰ The audit found that licensing procedures were not sufficiently robust to ensure the integrity and effectiveness of the liquor licensing regime and that there was no formalised risk-based strategy to assess the regulatory risks, the types of activities and resource requirements necessary, to monitor licensees' compliance with the *Liquor Act 1975*. The audit also found that the number of compliance inspections had declined significantly in recent years.

Association with liquor licensing issues

1.12 Drinking in licensed venues is associated with high level of alcohol-related problems including violence and aggression.¹¹ A recent report by the National Drug Research Institute has confirmed previous research that an increase in the number of liquor outlets is associated with an increase in alcohol-related violence and assault in the surrounding area.¹²

1.13 A 2002 national report on best practice in policing licensed premises found the following:

- proactive policing of licensed premises, using enforcement as a tool, is more effective than reactive policing
- there is a need for training and education programs in disorder reduction strategies or problem-solving methodologies by police officers with integrated liquor licensing, crime and disorder reduction and problem-solving skills since many police officers have limited experience
- a sharper and more coordinated focus on licensed drinking environments is needed.¹³

1.14 The report also noted that regular violence in public drinking locations cannot simply be blamed on the natural consequences of intoxication. Local situational variables such as management practices, legislation, regulation and enforcement affect the level of violence.¹⁴

¹⁰ ACT Auditor-General's Office, *Regulation of ACT liquor licences*, Performance Audit Report, ACT Department of Justice and Community Safety, June 2007. The aim of the audit was to assess whether the ACT government had an efficient and effective regulatory program to encourage and promote responsibility in the sale and consumption of liquor.

¹¹ R Homel & J Clark 'The prediction and prevention of violence in pubs and clubs' in R Clarke (ed) *Crime Prevention Studies*, Monsey, New York, Criminal Justice Press, 1994, 3:1–46; C S Ireland 'Alcohol and its contribution to violence: new directions for policing alcohol-related violence, crime and anti-social behaviour in New South Wales' in D Chappell & S Egger (eds) *Australian violence: contemporary perspectives 11*, Australian Institute of Criminology, 1995, cited in S J Doherty & A M Roche *Alcohol and licensed premises: best practice in policing*, Australasian Centre for Policing Research, National Drug Law Enforcement Research Fund, 2003, page 17.

¹² National Drug Research Institute, *Restrictions on the sale and supply of alcohol: evidence and outcomes*, Curtin University of Technology, 2007.

¹³ S J Doherty & A M Roche, *Alcohol and licensed premises: best practice in policing*, Australasian Centre for Policing Research, National Drug Law Enforcement Research Fund, 2003, pages 52–56.

¹⁴ M J Arnold & T J Laidler, *Situational and environmental factors in alcohol-related violence*, AGPS, 1994, cited in S J Doherty & A M Roche, *Alcohol and licensed premises: best practice in policing*, Australasian Centre for Policing Research, National Drug Law Enforcement Research Fund, 2003, page 17.

Intoxicated people are at risk

1.15 Young men aged 18–30 are the group most likely to drink in licensed premises and to be involved in violent incidents when drinking.¹⁵ While people who are grossly intoxicated are less likely to initiate violence, they are more likely to be victims of alcohol-related aggression and to suffer injuries, for example, through falls. Drinking is also becoming increasingly common amongst young women in Australia and excessive drinking is an increasing problem in this group.

1.16 Intoxication by alcohol also places a person at more risk of harm in custody. In a study of 260 incidents of injury occurring in New South Wales (NSW) police custody, alcohol was a common factor.¹⁶ Many of the incidents resulted from the person kicking, punching or head-butting a blunt object such as a wall or door. There was also a high incidence of injury during transportation. Another danger in heavily intoxicated people is asphyxia.

1.17 The study recommended that police consider alcohol as a risk factor when taking someone into custody and devise strategies to deal with those circumstances, including exploring the use of alternatives such as sobering up shelters. The study also recommended that police officers are given sufficient training in identifying those people at risk of harm and in defusing potentially volatile situations during the custody process.

Methodology

1.18 This investigation followed the approach taken in the previous two investigations. The investigation involved:

- a review of all complaints received by our office since January 2003 where concerns have arisen about the custody of intoxicated people
- an analysis of AFP data relating to detentions under the IPCP Act for the same period
- a review of current police practices, procedures, guidelines and training material related to dealing with people detained under the IPCP Act
- discussions with AFP members at police stations throughout the ACT, Beats teams and the Watchhouse
- observation of police beats in Civic
- meetings with relevant government and non-government agencies: ACT Health, Centacare, Sobering Up Shelter staff and Clinical Forensics ACT, which provides medical services to the Watchhouse
- examination of equivalent legislation in other Australian jurisdictions and published information about police referrals to sobering up shelters.

¹⁵ S J Doherty & A M Roche, *Alcohol and licensed premises: best practice in policing*, Australasian Centre for Policing Research, National Drug Law Enforcement Research Fund, 2003, pages 52–55. Males aged 20–29 are the most likely group to consume alcohol at risky or high risk levels for short term harm at least weekly (Australian Institute of Health and Welfare, *2007 National Drug Strategy Household Survey: First results*, Drug Statistics Series No 20, April 2008, page 24).

¹⁶ J Sallybanks, *Monitoring injuries in police custody: a feasibility and utility study*, Australian Institute of Criminology, 2005. There was a statistical association with incidents involving abusive language, aggressiveness and threats of injury to self or others. Most of those injured were males aged 21–30.

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1.19 The AFP was also asked to respond to the 2001 report recommendations. That response is at Appendix 1.

1.20 Both the AFP and ACT Health were given a copy of the draft report of this investigation and their comments were invited. ACT Health responded to recommendations 5 and 6, as discussed in Part 3, and provided some general comments. The AFP chose not to respond to the recommendations but provided some comments which are addressed where appropriate in this report.

The legislation

1.21 The IPCP Act (previously titled the *Intoxicated Persons (Care and Protection) Act 1994*¹⁷) came into force in December 1994. Its purpose was to provide a legislative basis for places where people found intoxicated in public could sober up in a safe environment. The then Attorney General described the detention of intoxicated people in the Watchhouse as ‘a waste of police resources and an inappropriate place for people whose problem is not criminal but, rather, that they have had far too much to drink’.¹⁸

1.22 Public drunkenness had already been decriminalised in the ACT in 1983¹⁹, based on the New South Wales legislation. The bill for the IPCP Act took the existing provisions from the *Crimes Act 1900* (NSW) and added provisions to allow for licensed sobering up centres and to regulate the powers and responsibilities of those operating or working in them.

1.23 Mere intoxication is not sufficient for police to detain a person under the IPCP Act. Police may detain people who they reasonably believe are intoxicated in a public place and who, as a result of that intoxication, are:

- behaving in a disorderly way
- behaving in a way likely to cause injury or damage to property
- incapable of protecting themselves from physical harm (s 4(1)).

1.24 One of these three elements must be satisfied before police may take the person into custody.

1.25 The definition of intoxication is not confined to alcohol: ‘intoxicated’ means ‘apparently under the influence of alcohol, another drug, or a combination of alcohol, drugs or substances’. A ‘public place’ is defined as a place to which the public or a section of the public has access, including any school and associated land or premises.

1.26 Before taking an intoxicated person into custody the police officer must be satisfied that there is no other alternative available for the person’s care and protection (s 4(2)). Alternatives to custody may include the availability of a ‘licensed place’ (a sobering up facility) or suitable carers.

1.27 A person in protective custody must be released when he or she is no longer intoxicated or after eight hours, whichever is earlier (s 4(2)). Police can release the

¹⁷ The *Statute Law Amendment Act 2005* changed the title of the Act from intoxicated ‘persons’ to ‘people’.

¹⁸ Terry Connolly MLA, ‘Intoxicated Persons (Care and Protection) Bill 1994, Second Reading Speech’, *Hansard*, ACT Legislative Assembly, 10 November 1994, page 4030.

¹⁹ Through amendments to the *Crimes Act 1900* (NSW) as it applied in the ACT, s 351.

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person at an earlier time if they believe it reasonable to do so (s 4(5)). Releasing the person into the care of the manager of a licensed place is taken to be reasonable action (s 4(6)).

1.28 A person may choose to remain at the police station for up to 12 hours after being detained (for example, while awaiting transport after release). Police must not allow a person to remain beyond that time (s 4(3)).

1.29 The IPCP Act also contains a range of provisions dealing with licensed caring services that provide short-term care for intoxicated people. Those provisions address such matters as admission and search of intoxicated people, transfer for medical treatment and inspection of licensed places. An intoxicated person may remain up to 15 hours at a licensed place and may leave at any time. The Act also allows the Minister to issue standards on a range of issues such as the condition and maintenance of premises and equipment and training of staff (s 31). A standard was made in 2004.²⁰

1.30 The Act has been amended numerous times since 1994. Most of those amendments have been minor changes to ensure consistency with other legislation or drafting practices (for example, by amending definitions). Key amendments in 1996 and 2004, discussed in more detail below, gave staff in licensed places the power to search intoxicated people and take their property for safe storage before admission.

Police guidelines

1.31 The AFP has various written guidelines relevant to the exercise of powers under the IPCP Act. These are referred to in more detail in relevant sections of this report:

- *AFP National Guideline on Police Custodial Facilities and People in Custody* (issued 14 March 2007, and revised on 3 June 2008)
- *ACT Policing: Practical Guide: Persons in Custody* ('the Custody Guidelines') (issued 18 February 2007, and revised on 16 June 2008)
- *ACT Policing: Practical Guide: ACT Sobering Up Facility* ('the AFP Sobering Up Facility Guidelines') (issued 1 February 2006)
- *ACT Policing: Guideline for Best Practice 20/93: Breach of the Peace* (issued 3 September 1993)
- *ACT Policing – Regional Watchhouse: Watchhouse Operations Manual* (issued 1 January 2008, and revised on 11 July 2008).

The Sobering Up Shelter

1.32 A major change since the 2001 report has been the establishment of a Sobering Up Shelter, which provides a new alternative to detention of intoxicated people in the Watchhouse.

²⁰ Intoxicated Persons (Care and Protection) Standard 2004 (No 1), replacing an earlier standard made in 1998.

Background

1.33 Before the IPCP Act was enacted, a sobering up centre was set up as a pilot program in August 1994.²¹ A facility operated at Arcadia House, Russell, with funding from the ACT Government.

1.34 In July 1996 a 25-year-old male died of asphyxia at Arcadia House whilst under the influence of several drugs including methadone. The sobering up facility subsequently closed. At that time, staff in licensed places under the IPCP Act did not have any powers to search intoxicated persons. The coroner recommended to the then Attorney General that the Government consider clarifying the powers of search in such situations.²²

1.35 The IPCP Act was subsequently amended in 1997 to allow staff in licensed places to search an intoxicated person before admission and take possession of any articles, but only where staff reasonably believed the person did not object.²³ In 2004 the Act was further amended to make frisk searches by staff and safe storage of an intoxicated person's possessions conditions of entry to a licensed place.²⁴

The current Shelter

1.36 The Sobering Up Shelter is at Minosa House at the rear of Ainslie Village in Quick Street, Campbell, just out of the city centre. Initially planned as a 12-month pilot from 2 December 2004, the pilot was extended three times to enable a fuller test.²⁵ Government funding has now been provided until 2010.²⁶ The Shelter is a licensed place under the IPCP Act.²⁷

1.37 The Shelter is open from Thursday to Saturday nights from 11 pm to 11 am, with the last admission at 6 am. It has five beds in three rooms on a single level. One of the five beds is a designated female bed and the room can be locked off from the rest of the sleeping area, with access to a separate bathroom. There is a living area and kitchen, staff area and admissions area with adjoining bathroom. Another 12 beds that have not yet been commissioned for use are located upstairs. There are cameras in areas other than the sleeping areas and bathrooms, and these are monitored in the staff area. Admission to the Shelter is voluntary.

1.38 Three staff members are on duty each night, two for the whole shift and the third from 11 pm to 7 am. People admitted to the Shelter are checked by two staff every 15 minutes for the first four hours and after that at 30-minute intervals.

²¹ Terry Connolly MLA, 'Intoxicated Persons (Care and Protection) Bill 1994: Second Reading Speech', *Hansard*, ACT Legislative Assembly, 10 November 1994, page 4031. The aim of the pilot program was 'to develop effective referral and care protocols'.

²² Because a licence under the Act was never sought, the facility did not meet the definition of 'licensed place'. Accordingly the coronial inquiry found that the death was not a 'death in custody' as defined by the *Coroners Act 1956*.

²³ *Intoxicated Persons (Care and Protection) (Amendment) Act 1997* (ACT).

²⁴ *Intoxicated Persons (Care and Protection) Amendment Act 2004* (ACT). The search and property provisions are in ss 6A–6C of the IPCP Act.

²⁵ Australian Catholic University, *Evaluation of Centacare Sobering up Shelter*, June 2006, page 2. The pilot was extended until 14 March 2006, to 30 June 2006 and then to 30 September 2006.

²⁶ ACT Health, *Annual Report 2006–07*, page 26.

²⁷ Advice from ACT Health, 10 June 2008.

Commonwealth Ombudsman—AFP: Use of powers under the Intoxicated People Act

1.39 The Shelter's criteria for admission as at April 2007 were that a person must be:

- 18 years of age or over
- referred from the ACT and surrounding geographical area
- intoxicated with either drug or alcohol use or misuse
- conscious
- not displaying violent behaviour on arrival at the Shelter.²⁸

1.40 In January 2008 the Shelter's eligibility criteria were revised. While a person must still be over 18, intoxicated by alcohol or other drugs or substances (the criteria now employ the same definition as applies under the IPCP Act), conscious and willing to enter the facility voluntarily, the criteria no longer include a requirement that the person not be displaying violent behaviour on arrival.²⁹ This last change was a deliberate decision based on Centacare's assessment that often people brought to the Shelter in police custody are agitated and that they usually calm down once police leave and staff have the opportunity to talk with them. The AFP's eligibility criteria are different in several key respects from those of the Shelter, and these differences are discussed further in Part 3.

1.41 An intoxicated person is free to leave the Shelter at any time. If staff assess a person as still intoxicated when seeking to leave or when the Shelter closes, staff will either seek to locate a responsible adult to collect the person and ensure their safety, or refer the person to an appropriate service for support and monitoring until they recover.³⁰ If those options are not possible, staff will notify police (as required by s 9 of the IPCP Act, which specifies that when an intoxicated person considered to be a danger to themselves, another person or property leaves or is about to leave a licensed place, police must be notified).

1.42 Shelter admission procedures require staff to interview and assess the person, including taking information on their alcohol and drug history and any mental health issues. Clients are given a change of clothing and, if staff do not assist them and thus observe them changing, they are required to undergo a frisk search as a condition of admission. Any unlawful items are handed to police, and the person will not be admitted to the Shelter if found in possession of prohibited substances (s 6A(c) of the IPCP Act). Other personal property is secured in individual lockers. Clients are offered the opportunity to contact a responsible person who may collect them (as required by s 8 of the IPCP Act). If they wait for someone in the common area, they are not recorded as a 'bed admission'.

1.43 Police who refer an intoxicated person to the Shelter must complete an admission statement as required by s 6 of the IPCP Act. The statement must include the person's details, the time and date of detention, a list of any property police took from the person and confirmation that the property has been passed to the manager

²⁸ Centacare, *Sobering Up Shelter – Eligibility Policy NT09–06*, created September 2006.

²⁹ The criteria included a requirement that the person be detained under the IPCP Act and did not include referrals from other agencies or self-referrals. When we queried this omission, Centacare staff noted that it had not been intended to exclude referrals from sources other than police, and the eligibility criteria were accordingly amended in June 2008.

³⁰ Centacare, *Sobering Up Shelter – Intoxicated at Discharge Policy and Procedure*, October 2007.

of the Shelter. Police may also pass on any information they believe will assist in caring for the person.

1.44 In the morning, clients are offered breakfast and a shower. Staff also speak with them to establish what other needs they may have and whether any information or referrals to other services are required.

The law and practice in other jurisdictions

1.45 The recommendations of the Royal Commission into Aboriginal Deaths in Custody in 1991 were the impetus for decriminalising drunkenness and the establishment of sobering up centres in many states.³¹ Some jurisdictions, including NSW and the ACT, had already decriminalised drunkenness. Others, including Tasmania, have done so much more recently. Only in Victoria and Queensland is public drunkenness still an offence, although Queensland legislation now requires police to take an arrested drunken person to a place of safety at the earliest reasonable opportunity and release him or her.

1.46 Details of each jurisdiction's legislation and, where available, information about police referrals to sobering up shelters are at Appendix 2.

1.47 From the available information, certain patterns can be identified.

- Only in NSW and the ACT are police able to detain an intoxicated person in a public place on the basis that their behaviour is disorderly. Unlike the ACT, the NSW legislation specifies that a police officer is not to detain an intoxicated person because of behaviour that constitutes an offence.³² In NSW, as in other states and in the ACT, police may charge a person with a range of public order offences, including offensive behaviour.
- In other jurisdictions where drunkenness has been decriminalised (South Australia, Western Australia and Tasmania), detention of an intoxicated person on the basis of disorderly conduct is not an available option. The Northern Territory is the only jurisdiction where an element of harm or risk is not required (the only requirement for detention is being seriously affected by alcohol or a drug in a public place or trespassing on private property). This was not the model recommended by the Royal Commission into Aboriginal Deaths in Custody.³³
- Legislation in all jurisdictions where drunkenness has been decriminalised, as well as in Queensland, refers to the release of an intoxicated person into the care of a responsible person in appropriate circumstances. In some jurisdictions, such as New South Wales and Tasmania, the legislation requires police to release the intoxicated person to such care unless it is not appropriate to do so, that is, there is a positive obligation not to keep the person in police custody.

³¹ Royal Commission into Aboriginal Deaths in Custody, *National Report*, vol 1, AGPS, 1991, recommendations 79–81.

³² *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 206(1).

³³ The Royal Commission into Aboriginal Deaths in Custody recommended that detention on the basis of intoxication in public should only be available if the person was incapable of taking proper care of himself or herself, or was behaving in a manner which was likely to cause harm to others or likely to cause damage to property (*National Report*, vol 1, AGPS, 1991, paragraph 21.1.35).

1.48 The Royal Commission into Aboriginal Deaths in Custody stressed that decriminalisation of public drunkenness should be monitored so as to ensure that public drinking was not 'recriminalised' through new offences. The Royal Commission also recommended that police services monitor the effect of the legislation to ensure that people are not detained in police cells when they should be taken to places of care.³⁴ In 2005 the Australian Institute of Criminology's national police custody survey found that despite legislative and other reforms, large numbers of people throughout Australia continue to be placed in police cells for public drunkenness:

Police cells still appear to be used as a temporary solution to public drunkenness, regardless of whether public drunkenness is an offence or not. While there has been a decline in the percentage of all custody incidents attributable to public drunkenness since 1995 ... it appears that alternatives such as sobering-up shelters are not being used as widely as they otherwise might.³⁵

³⁴ Royal Commission into Aboriginal Deaths in Custody, *National Report*, vol 1, AGPS, 1991, recommendation 85.

³⁵ N Taylor & M Bareja, *National police custody survey*, Australian Institute of Criminology, 2005, Conclusions, reporting on the survey in 2002. The report also found that Indigenous people were 42 times more likely than non-Indigenous people to be involved in incidents of police custody for drunkenness nationally.

PART 2—DETENTIONS UNDER THE IPCP ACT AND REFERRALS TO THE SOBERING UP SHELTER

Overview

2.1 Statistics on lodgements under the IPCP Act at the Watchhouse were obtained from the AFP for the period 1 January 2003 to 24 March 2008. They reveal some interesting trends and patterns of use of police powers under the Act, as outlined below.

2.2 Data was also obtained from Centacare on police referrals to the Sobering Up Shelter. In addition, a sample of 99 cases where people were detained in the Watchhouse in 2008 (31% of the total detentions in the first part of 2008) was examined for information about detention outcomes. The findings from this sample are discussed in more detail in Part 4.

Detentions at the Watchhouse

Total detentions and reasons for detention

2.3 In the first three financial years of operation of the IPCP Act (1995–96 to 1997–98), the annual totals of detentions for intoxication at the Watchhouse were 1,420; 1,978 and 1,325 respectively.³⁶ By the time of the Ombudsman's second report, annual detentions had dropped to 1,026 in 1999–2000.³⁷

2.4 Statistics for the last five calendar years show a steady increase from a low of 699 in 2003 to a high of 1,636 in 2006 (Figure 1). In 2007 the number dropped to 1,418 and in the first few months of 2008 (1 January to 24 March 2008) the total (321) was lower than in the equivalent period for 2006 and 2007 (419 and 392 respectively).

2.5 The most common reason for detention is disorderly conduct (58% of total detentions) (Figure 2). It was the rise in people detained for this reason that was responsible for most of the increase in 2006 (when disorderly conduct accounted for 67% of total detentions).

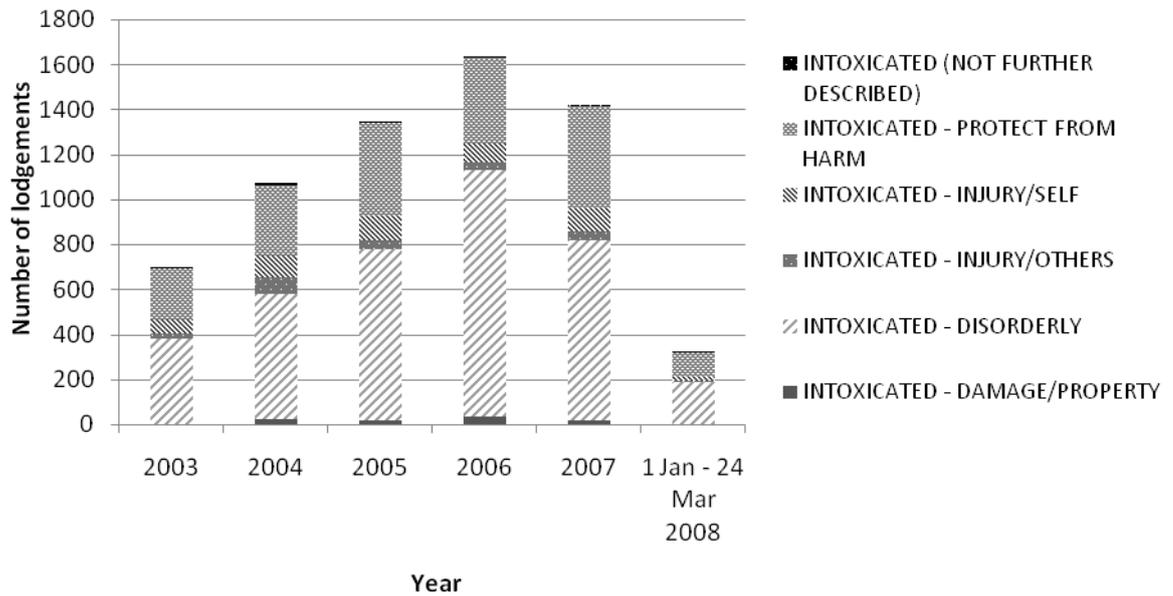
2.6 This increase may reflect in part Operation Cobalt, an ACT Policing operation that commenced in November 2005 to maintain public safety in nightclub precincts in Civic, Kingston and Manuka. The operation included high visibility beat patrols and security and licensing inspections in conjunction with liquor licensing inspectors and the ACT Fire Brigade. While ACT Policing noted that the method of recording operation results was not consistent, police dealt with 378 intoxicated people as a result of the operation between November 2005 and February 2006. While some of those people may have been referred to the Sobering Up Shelter, others would have been detained at the Watchhouse. Operation Cobalt was repeated later that year (November 2006 to February 2007), resulting in police dealing with 175 intoxicated people. The operation has since been conducted several times for shorter periods.³⁸

³⁶ 1998 report, page 9.

³⁷ 2001 report, page 6.

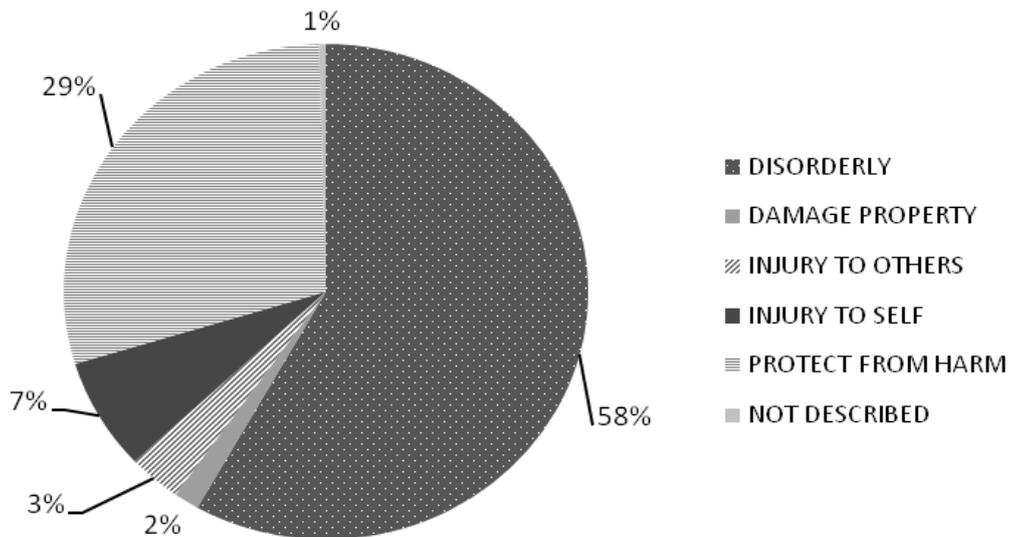
³⁸ 20–22 April 2007, 22–24 June 2007, 8–10 February 2008 (coinciding with the ACT Multicultural Festival) and 4–6 April 2008.

Figure 1—Detention reason by year, 1 January 2003 to 24 March 2008



2.7 The second most common reason for detention is that the person was assessed as being incapable of protecting himself or herself from harm (29% of total detentions). Police record the criteria of behaving in a manner likely to cause injury to the person, injury to another person or damage to property as three separate categories, and these comprise a small proportion of total detentions (7%, 3% and 2% respectively). In 1% of cases, the reason was not recorded.

Figure 2—Reason for detention, 1 January 2003 to 24 March 2008



Age and gender of detainees

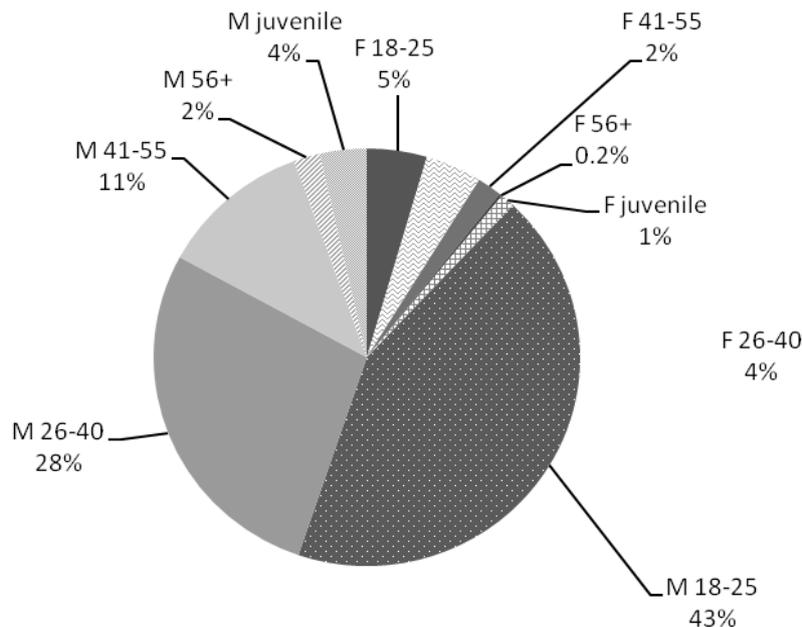
2.8 Figure 3 shows the age and gender of people detained. Males accounted for the great majority of detainees (88%). Of those for whom age data was recorded (6,445 of the total of 6,492 detentions), young men aged 18 to 25 accounted for 43% of the total and men 26 to 40 for a further 28%, that is, 71% of those detentions were of men aged 18 to 40.

2.9 Juveniles (male and female) accounted for 5% of total detentions, with the proportion varying between 3% and 5% each year. In the first part of 2008 (1 January to 24 March), the proportion of juveniles jumped to 11% of total detentions.

2.10 The age of people detained at the Watchhouse because of intoxication varied greatly from the youngest at 12 to the oldest at 80. The median age was 25 and almost two thirds (64%) were aged under 30.

2.11 These statistics accord with other studies that show that people coming to the attention of police for intoxication are predominantly young men.

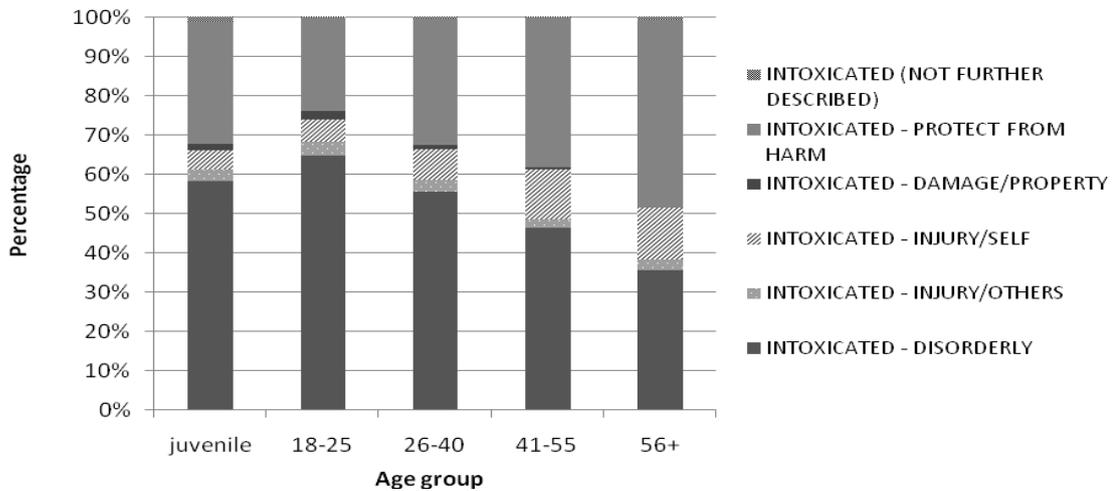
Figure 3—Detentions by age and gender, 2003 to 2008



F = female; M = male

2.12 The proportion of people detained for disorderly conduct was highest in the 18–25 year age group and decreased in each successive age group. Correspondingly the proportion of people detained for being unable to care for themselves or for being likely to injure themselves increased as they aged, as indicated in Figure 4.

Figure 4—Reason for detention by age group, 2003 to 2008

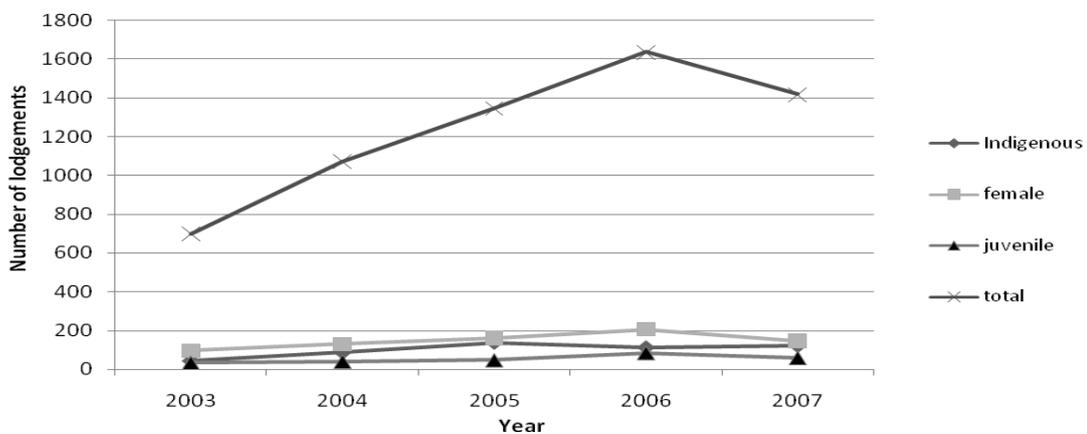


2.13 The most common reason for detention for both males and females was disorderly behaviour (59% for males and 51% for females). Females were more likely to be detained for their own protection or because of police concerns that they might injure themselves (37% and 9% respectively, compared with 28% and 7% for males). For both genders, damage to property and injury to others formed a much smaller proportion of overall detentions.

Indigenous people

2.14 Aboriginal and Torres Strait Islander people comprised between 6% and 10% of the total annual detentions, despite comprising only 1.2% of the ACT’s population.³⁹ The total number of people in detention and the number of Indigenous people, women and juveniles in detention 2003 and 2007 are shown in Figure 5.

Figure 5—Number of females, Indigenous people and juveniles detained, and total number of detentions, 2003 to 2007



³⁹ ABS statistics from the 2006 Census of Population and Housing, based on usual place of residence. 4.6% of people did not state whether or not they were Indigenous.

Time of detention

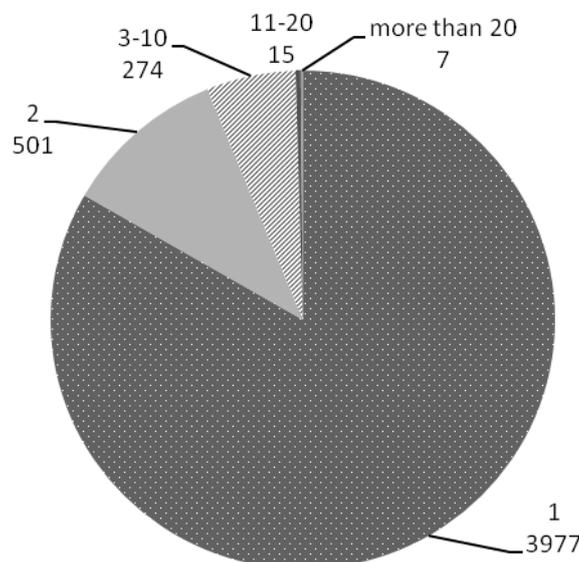
2.15 Thursday to Saturday nights are the busiest times for police dealing with intoxicated people. During the period under review, more than half of the detentions under the IPCP Act (52%) were made between the hours of 11 pm and 5 am on Thursday, Friday and Saturday nights.

Repeat detentions

2.16 During the period under review, most people who were taken into custody for intoxication were detained only once, as Figure 6 shows. This finding should be treated with caution as there appeared to be discrepancies in the data. For example, 31 instances were noted where the identity of a person detained seemed highly likely to be the same as that of a person detained on a previous occasion, as indicated by the same date of birth and either only a slight change of spelling in one of the recorded names or else the omission of a middle name from one or more of the entries. In five cases the person's last name was not known. People may also change their names or give a different name to police, and in the absence of identification such as a driver's licence or a police officer's personal knowledge of an intoxicated person, any previous detentions for intoxication may not be apparent.

2.17 Based on the raw data, 83% of individuals were detained once only, 11% were detained twice, 6% between three and 10 times, and 0.5% were detained more than 10 times. The seven people most frequently detained accounted for 207 detentions, with the highest number of detentions for a person being 55. Six of the seven people most frequently detained were aged over 30.

Figure 6—Number of detentions per person (Number of people), 2003 to 2008



Police referrals to the Sobering Up Shelter

2.18 Although the Shelter was established in December 2004, it was not effectively used by the AFP until February 2006. During its first 14 months of operation, only three admissions were police referrals, including one from NSW Police in Queanbeyan.

Commonwealth Ombudsman—AFP: Use of powers under the Intoxicated People Act

2.19 The reasons for the AFP's initial failure to make use of the Shelter are not clear. ACT Policing was asked to explain the reasons but did not do so. The Australian Catholic University's evaluation of the Shelter suggests the AFP had been concerned about some aspects of Shelter procedures, such as intake procedures, video surveillance and staff training in frisk searches, and helped Centacare to refine those procedures over some months.⁴⁰

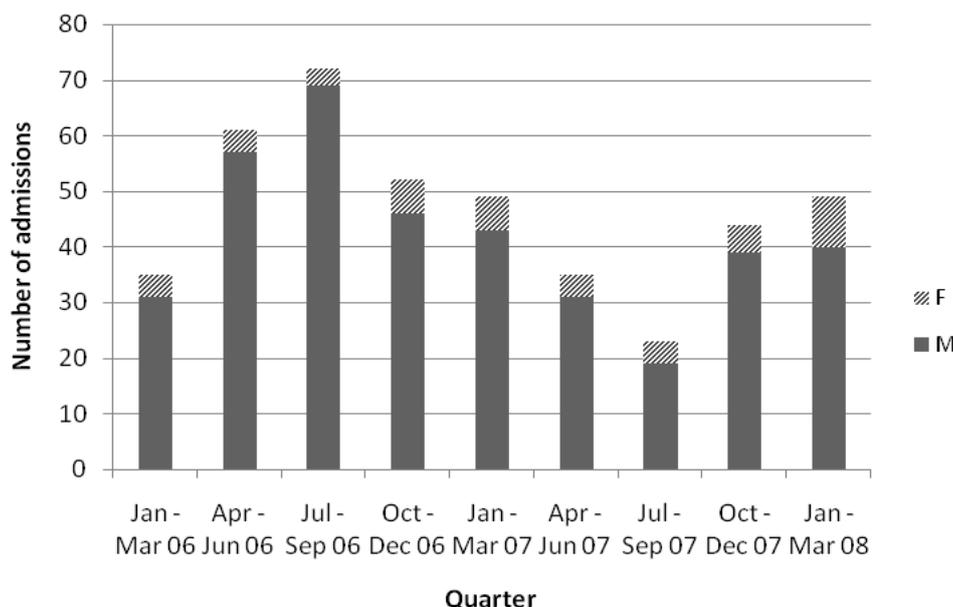
2.20 Referrals by police are the main source of admissions to the Shelter. Shelter statistics from December 2004 to March 2007 revealed the following:

- the AFP were responsible for 78% of referrals, with NSW Police referring 1%
- self-referrals comprised 11%
- other referral sources, each comprising less than 3%, were Ainslie Village, hospitals, Minosa House, the mental health Crisis Assessment and Treatment Team (CATT), other crisis accommodation and the ambulance service.

2.21 Most of those who stayed at the Shelter (58%) were from residential addresses in the ACT. Homeless people comprised 22%, 10% were from regional NSW near the ACT, and the remainder from other areas of NSW (6%), and other parts of Australia or overseas (4%). The gender distribution was not greatly dissimilar to that of people detained for intoxication (91% male and 9% female). Almost half (45%) were aged 18 to 25, similar to the proportion in Watchhouse detentions, and almost 5% were Indigenous. The busiest night was Saturday (41%), followed by Friday (33%) and Thursday (27%).⁴¹

2.22 Quarterly admission statistics provided by ACT Health show that Shelter admissions have fluctuated since 2006 and dropped significantly in 2007 (Figure 7).

Figure 7—Quarterly admissions to Sobering Up Shelter, January 2006 to March 2008



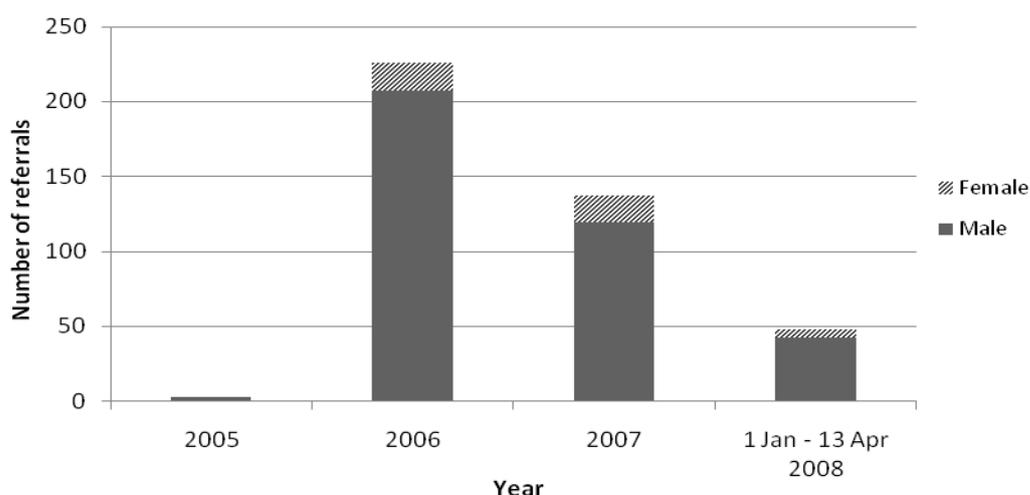
⁴⁰ Australian Catholic University, *Evaluation of Centacare Sobering Up Shelter*, June 2006, page 21.

⁴¹ Total percentages exceed 100% because of rounding to the nearest whole per cent.

Commonwealth Ombudsman—AFP: Use of powers under the Intoxicated People Act

2.23 Once the AFP began referring people to the Shelter, police referrals jumped to 228 in 2006, that is, an average of approximately four people per week (Figure 8). However, the numbers have since declined. In 2007, the number of people taken by police and admitted to the Shelter dropped to 138, that is, a decrease of 90 people or 39%. Police referrals to the Shelter in the first part of 2008 appear to be similar in number to 2007. Between 1 January and 13 April 2008, police referred 48 people to the Shelter, compared with 50 in the equivalent period in 2007.

Figure 8—Police referrals to Sobering Up Shelter, 1 January 2005 to 13 April 2008



2.24 This drop in police referrals to the Shelter since 2006 is far higher than the drop in intoxication detentions at the Watchhouse over the same period. Watchhouse detentions for intoxication fell from 1,636 in 2006 to 1,417 in 2007, that is, a decrease of 13%. However, the decrease reflected a drop in detentions based on disorderly behaviour, from 1,095 in 2006 to 803 in 2007. The number of people detained at the Watchhouse because they needed to be protected from harm in fact increased from 383 in 2006 to 456 in 2007, and those who were detained because they were considered likely to injure themselves also rose from 88 in 2006 to 102 in 2007.

2.25 Many of the intoxicated people taken to the Watchhouse are assessed by police as not suitable for admission to the Shelter because of their violent behaviour. Others who might meet the eligibility criteria are detained outside the Shelter's opening hours. However, it would appear that at least some of the people who are detained at the Watchhouse could be appropriately cared for at the Shelter. Of the 3,375 people detained at the Watchhouse between 2006 and 2008, 531 were adults who were detained during the Shelter admission hours (11 pm to 6 am Thursday, Friday and Saturday nights⁴²) either because they needed protection from harm or were at risk of injuring themselves.

⁴² The last admission is at 6 am but the Shelter remains open until 11 am, allowing a person admitted at 6 am to remain up to five hours.

Summary

2.26 Most people detained at the Watchhouse for intoxication between 2003 and 2008:

- were young men (43% were males between 18 and 25, and 60% of all people detained were aged under 30)
- were detained only once
- were detained because of disorderly behaviour (the proportion of those needing protection from harm rising with successive age groups).

2.27 Police referrals to the Sobering Up Shelter:

- are the major source of referrals
- did not commence until February 2006
- dropped significantly in 2007 although there was an increase in the numbers of intoxicated people detained by police because they needed to be protected from harm or were at risk of injuring themselves.

PART 3—POLICING ISSUES ON THE STREET

Overview

3.1 This part examines issues arising from the time police decide to detain an intoxicated person under the IPCP Act until the point at which a person is lodged in custody at the Watchhouse. Issues considered are:

- when police use their powers under the IPCP Act in preference to other available options
- use of force against intoxicated people when taking them into custody
- the transport of intoxicated people
- police use of the Sobering Up Shelter, including referrals of Indigenous people
- police concerns about broader issues.

3.2 Our investigation raises concerns about various issues, including:

- the continuing need for clarification and guidance on officers' responsibilities when dealing with problem behaviour in public places
- the diversion of intoxicated people from police custody, including police awareness of Shelter facilities, policies and procedures
- the policy concerning referrals of Indigenous people to the Sobering Up Shelter
- the transport of intoxicated people, including the use of caged vehicles.

When the IPCP Act powers are used

3.3 As discussed in Part 1, alcohol is a common factor in criminal behaviour and public order issues. Depending on the circumstances, police have a range of options when dealing with an intoxicated person in a public place:

- charging the person with an offence
- detaining the person for breach of the peace
- directing the person to leave the area using 'move on' powers
- using powers under the IPCP Act.

Details of those alternatives are set out below.

Charging the person with a substantive offence

3.4 Various criminal offences may be appropriate when police attend a disturbance where intoxicated people are present. They include assault, criminal damage, criminal trespass, fighting in a public place and offensive behaviour (which includes behaving in a riotous, indecent, offensive or insulting manner within the view or hearing of someone in a public place). There are also various offences under the *Liquor Act 1975* (ACT), including consumption of liquor in a prescribed public place (s 154) and under-age drinking (s 139).

3.5 Police commented that it can be difficult to prosecute an intoxicated person for fighting in a public place if the people involved successfully argue that they were acting in self-defence and police were not present when the fight broke out.

Breach of the peace

3.6 A police officer's power to detain a person for breach of the peace is a common law power. A breach of the peace occurs when harm is actually done or is likely to be done to a person or their property in their presence, or where someone fears harm through an assault, riot, unlawful assembly or other disturbance.⁴³ Breach of the peace, while not an offence, is the basis of the common law powers relating to public order and is an element of common law offences such as unlawful assembly. It has also been incorporated into the statutory powers given to police to enter private premises in emergencies.⁴⁴

3.7 Police may grant bail for breach of the peace with or without conditions, including requiring the person to give an undertaking such as to leave an area.⁴⁵ Observations during this investigation showed that intoxicated people tend to be held at the Watchhouse until they are sober and can understand the consequences of the undertaking that is a condition of their release.

3.8 There is an AFP guideline on breach of the peace (*ACT Policing: Guideline for best practice 20/93: breach of the peace*). It notes that members must be satisfied there is a genuine fear that violence will break out on a serious scale if police do not intervene, and that the power is not to be used if there is no violence or apprehension of violence. The guideline also states that breach of the peace powers are characterised as preventive justice and should not be used when a person has committed an offence.

3.9 The guidelines then state that once the person is removed from the scene, police are to offer the person the opportunity of entering an undertaking not to return to the scene or resume the conduct. If this is accepted the member should release the person immediately. If the person will not provide the undertaking, he or she is to be taken to the Watchhouse, where the sergeant shall again offer the person the opportunity to enter an undertaking. If the person does so, he or she is to be released.

3.10 There is no reference to intoxication in the guidelines and what effect this may have on the person's capacity to give an undertaking.

Move on powers

3.11 Under s 4 of the *Crime Prevention Powers Act 1998* (ACT), a police officer may direct a person to leave a public place if the officer believes that the person has engaged, or is likely to engage, in violent conduct in that place. If the officer has reasonable grounds for believing that the person is likely to engage in violent conduct while, or immediately after, leaving the vicinity by a particular route, the direction may include a condition that the person leaves by a different route. The person may also be directed not to return to the vicinity for up to six hours.

⁴³ *R v Howell* [1982] 3 All ER 383, followed in *Innes v Weate* [1984] Tas R 14 and *Panos v Hayes* (1987) 44 SASR 148 at 151.

⁴⁴ *Crimes Act 1900* (ACT), ss 188 and 190 allow police to enter premises and take necessary action to prevent an offence or breach of the peace, or to protect life and property.

⁴⁵ *Bail Act 1992* (ACT), ss 8 and 28.

3.12 Police commented that use of the move on powers where there are groups of intoxicated people may be restricted by their capacity to understand the directions and the consequences of failing to comply. In addition, police would need to consider their capacity to enforce a direction if groups of people refused to leave or returned a short time later.

The care and protection aim of the IPCP Act

3.13 The aim of the IPCP Act is to allow police to intervene for the care and protection of intoxicated people in public places. In 1998 this office found that police implementation of the legislation was not fully reflecting that aim.⁴⁶ In particular, it appeared that on occasion officers used the provisions to control anti-social behaviour. The report also pointed to the lack of clarity between the criterion of disorderly behaviour under the IPCP Act and street offences.

3.14 The second report in 2001 found that while AFP practices and procedures had improved in many respects, there was room for further improvement, particularly in clarifying and providing guidance to officers on their responsibilities in relation to street offences.

3.15 Ten years on we still have concerns about the use by some police of their powers under the IPCP Act.

- Complaints we received include some where people taken into custody claimed they were not sufficiently intoxicated to justify this action. Some people said police did not tell them why they were being taken into custody. These incidents often resulted in the person resisting police or becoming aggressive, and in some of those cases the person ended up being injured.
- Other complaints were that police did not pursue reasonable alternatives to taking intoxicated people into custody, particularly where those people were already making their way home or were in the company of friends who told police they were willing to care for them.
- While police commonly refer to 'protective custody' under the IPCP Act, it was clear that often they were concerned about protecting the community or seeking to prevent certain behaviour rather than, or as much as, protecting the intoxicated person.

The grounds for detention

3.16 Eleven complainants to this office between 2003 and 2006 argued that they were not sufficiently intoxicated to justify being taken into custody.

3.17 The IPCP Act does not specify a degree of intoxication. Police statements examined during this investigation showed that in judging whether a person is intoxicated, police usually refer to indicators such as slurred speech, unsteady gait, bloodshot eyes and the smell of alcohol. Beat officers said that their assessment of intoxication was based on common sense and experience. Some of those indicators are common to other conditions such as diabetes, as was discovered in one incident in 2008 after a person was brought to the Watchhouse for intoxication and was subsequently taken to hospital. In another case, a person taken to the Sobering Up Shelter was found not to be intoxicated and was taken home by police.

3.18 However, it is clear that sometimes people do not realise how intoxicated they actually are. Staff at the Sobering Up Shelter confirmed police observations on this

⁴⁶ 1998 Report, Executive Summary, paragraph 5.

point, pointing out that the Shelter kept a breathalyser to help educate people about their level of intoxication, sometimes when they arrived and sometimes the following morning if they appeared to be still intoxicated. The tendency for people to underestimate their level of intoxication emphasises the importance of police giving people unmistakable warnings about their behaviour and being very clear about why they are being taken into custody, particularly if the person has not committed any act that would justify arrest, such as assault or property damage.

3.19 As discussed in Part 1, the IPCP Act requires more than mere intoxication in a public place: police must reasonably believe the intoxication is causing the person to be behaving in a disorderly way, likely to cause injury or damage to property or incapable of looking after himself or herself. The 2001 report recommended that AFP guidelines make clear the need for officers to be reasonably satisfied of this causal link (recommendation 10). The AFP responded that the Custody Guidelines specifically refer to the provisions of the IPCP Act and ‘that by ensuring AFP members understand the Act, they will understand [that] necessity’.

3.20 While this is not the most compelling response in terms of reinforcing the legislative requirements, data provided during this investigation indicated that police were considering the causal link because one of the statutory reasons for detention was recorded in almost all cases.⁴⁷ During our observations we noted that the reason was also listed next to each person’s name on the Watchhouse whiteboard that records cell occupants. However, clarity was sometimes lacking in the police statement of facts for each person’s detention. In the sample of cases from 2008, the justification for detention was not always clear, sometimes referring to both ‘care’ and ‘disorderly’ elements and at other times describing elements that supported one ground for detention when a different ground was recorded as the lodgement reason in AFP data.

3.21 Being ‘disorderly’ is not clearly defined and can become a point of conflict between police and intoxicated people. The IPCP Act does not define ‘behaving in a disorderly way’, but disorderly conduct has been interpreted by the courts. A commonly cited definition of ‘disorderly behaviour’ in the context of a criminal offence is ‘any substantial breach of decorum which tends to disturb the peace or to interfere with the comfort of other people who may be in, or in the vicinity of, the street or public place’.⁴⁸ The behaviour must do more than ‘seriously offend against recognised values of orderly conduct’.⁴⁹ In its response to the draft investigation report, the AFP argued that ‘what constitutes “disorderly” behaviour for the purposes of the Act could reasonably be considered to be at a lower threshold than for a criminal offence’, but made no suggestion as to what that threshold might be. Given that a determination of disorderly behaviour can result in a loss of liberty for an intoxicated person without any opportunity for a court to examine the reasonableness of that determination, it might equally be argued that the threshold should be as high. No definition of what constitutes ‘disorderly behaviour’ under the IPCP Act appears to be included in AFP training materials.

⁴⁷ While 27 cases were listed as ‘intoxication – not further described’, all others specified the reason.

⁴⁸ *Barrington v Austin & ors* [1939] SASR 130, per Napier J at page 132.

⁴⁹ *Melser & ors v the Police* [1967] NZLR 437, approved in *McDonald v Sherrin* [1998] TASSC 126 per Evans J. After reviewing the authorities Evans J found that for a conviction of being drunk and disorderly, it must be proved the conduct, ‘viewed in the light of the surrounding circumstances, was a substantial breach of public decorum which was likely to disturb, alarm or annoy others’.

3.22 Section 4(2) of the IPCP Act obliges police to look for other options to resolve an incident, stating that a person may only be taken into custody if there is no other reasonable alternative for the person's care and protection. The Custody Guidelines reflect this provision, stating that members should consider other options and are to view detention 'as a final option' (section 15). However, police appear to use their powers at times to control a situation and as a preventative measure rather than to protect the person from harm. Their statements of reasons frequently refer to the person's aggressive demeanour or verbal abuse towards police. Sometimes such interventions end in injury to the intoxicated person or, if they resist, criminal charges of resisting a Commonwealth official or assault. The case study *Arguing with police* is an example of when matters can escalate, particularly if an intoxicated person lacks judgement or feels aggrieved about an incident or behaviour.

CASE STUDY: Arguing with police

Mr A, his 24-year-old son and a male friend alleged that a security officer assaulted them when they were trying to enter a night club around midnight in 2005. Police attended, one officer stating that he saw the son being pushed and falling backwards onto the footpath. The son approached police asking why they did not arrest the security officer. Police formed the view the son was intoxicated, gave him a card and asked him to come to the station the next day when sober if he wished to make a statement.

Unsatisfied, the three men went to the City Station about an hour later seeking to make statements. When directed to leave the station they refused. They were then detained for being intoxicated and disorderly, the police referring to a belief that unless they were removed from the area 'there would be further incidents'. The three men were released about four hours later. Mr A complained that police had wrongly assessed him as intoxicated, an allegation which police disputed, and asked why his liberty had been taken away. The complaint was conciliated.

3.23 In some cases it appears that conflict has arisen when intoxicated people have told police they should drive them home. Two complainants alleged that they were joking and were making their own way home, but the incidents escalated and they ended up in custody. The case study *Lift home* illustrates one such case. Some police officers told us that they were 'not a taxi service' and appeared resentful that they might be treated as such. Other officers appeared to accept that in some cases, particularly in a suburban area, the best available alternative was to take the person home so as to remove them from a potentially dangerous or difficult situation.

3.24 Police also differed in their views on whether they could reason with an intoxicated person. Some officers said it was not possible, while others said it was almost always possible to get through on some level to a person who was drunk, although frequent repetition was often necessary.

CASE STUDY: Lift home

Mr B stated that early one Sunday morning he was walking home from Civic next to the main thoroughfare, Northbourne Avenue, and called out to a passing police vehicle to give him a lift home, stating he was 'having a bit of a laugh'. Police stopped and ended up taking him into custody for being intoxicated and disorderly. Mr B admitted he subsequently caused problems in the Watchhouse, including by pressing the buzzer repeatedly to get police attention and causing damage to the cell.

3.25 In another case, the complainant was at home and had done nothing to attract adverse attention. However, when police sought his assistance, conflict escalated to the point that he was detained and suffered injury, as shown in the case study *At home*.

CASE STUDY: At home

Mr C complained that one evening in 2005 police came to his home and advised him that his mother had been making nuisance calls to a police station. The police sought Mr C's assistance so that they could access his mother's home, which was nearby, to stop her making the calls. Mr C, who had been drinking, agreed to assist. However, after leaving his residence Mr C began behaving in a disorderly manner and made it clear he no longer wished to assist.

Although Mr C was just outside his home and had not shown any intention of behaving in a disorderly manner until then, the police decided to take him into custody because he appeared heavily intoxicated and because of his behaviour. They handcuffed Mr C and attempted to place him in a van. Mr C struggled and his foot became caught in the door of the van, gashing his ankle severely.

Mr C's injury was not noticed by the police present, or on arrival at the Watchhouse, despite Mr C's attempts to draw attention to it. However, as soon as Watchhouse staff identified the injury, they called the ambulance service. Mr C was subsequently released into the ambulance service's care so that his injury could be treated.

On investigation of Mr C's complaint, we considered his care and protection would have been more assured if police had returned Mr C to his home rather than take him from outside his residence to the Watchhouse. We questioned the judgement of the police involved, but considered no individual was responsible for the unfortunate chain of events. We thought it more a reflection of poor communication and lack of experience. Given Mr C had been induced to leave his home by police solely to assist them, we recommended the AFP apologise to Mr C for his injury. However, the AFP did not accept that fault lay with its members and did not apologise to Mr C.

3.26 Another incident, shown in the case study *Communication breakdown*, arose when police sought to take a disabled person into custody for his own protection, resulting in great distress and raising questions about more appropriate means of resolving the situation.

CASE STUDY: Communication breakdown

Mr D, who has multiple disabilities (hearing and visual impairments and walking with an uneven gait due to difficulties with balance) was attempting to leave a club with his guide dog one evening in December 2004, after spending some hours there. He asked club staff to call him a taxi, as was his regular practice. There were communication difficulties and a staff member who was concerned about him called police to remove him.

Mr D said that he did not know the people who approached him were police. He could not make his address understood. Police offered to drive him home but when they attempted to remove his wallet from his back pocket to check his address he resisted, believing he was being robbed.

Mr D attempted to walk home with his guide dog and walked into a barrier. Police decided to take him into custody for his own protection. He thought he was being attacked and struggled with police, becoming very distressed. Police pulled him to the ground, handcuffed him and placed him in a caged vehicle. They removed his wallet in an attempt to find a contact for him. A member of the public identified Mr D and his partner was eventually contacted. Because he was calling out, his dog was placed in the vehicle with him. The dog defecated in the closed vehicle. It was a warm evening and when his partner arrived approximately 50 minutes after he was detained, Mr D was released from the vehicle and collapsed to the ground. At some point, either when he was detained or when he fainted, his cochlear implant was damaged. By this time seven police officers were in attendance, including one sergeant.

After his partner calmed him, she and Mr D agreed to attend the local police station the following day to talk over the matter with the sergeant. The next day they spoke with another officer who discussed with them how police could identify themselves to Mr D and communicate basic information to him. The officer subsequently wrote up this information and distributed it with Mr D's photograph to other police.

The guide dog was traumatised by the incident and has had significant retraining but had not returned to full effectiveness. The incident has also had a significant impact on Mr D, who has received counselling for post traumatic stress disorder.

An alternative: care by an appropriate person

3.27 Several complainants alleged that police did not consider allowing them to leave in the company of an appropriate responsible person.

3.28 The Custody Guidelines state that, prior to the decision to detain a person under the IPCP Act, police should consider other options and view detention as a final option (section 15). Post detention, if the intoxicated person is fit to nominate a responsible person, and subject to their clear and unambiguous consent, police are to ensure reasonable attempts are made to contact that nominated person and ascertain their suitability and willingness to assume the responsibility for the care of the intoxicated person. However, it appears that the Guidelines are not always reflected in police practice.

3.29 During our discussions officers gave examples of when they sought a responsible person to care for someone who was intoxicated. It was a foremost consideration in the case of juveniles, with police being obliged to advise a parent or guardian when a juvenile is taken into custody.⁵⁰ The practice of finding a responsible adult also appeared more common in areas far from the city centre, where police were concerned about the time and resources taken to transport and lodge someone at the Watchhouse. Officers commented that the person nominated may not always be appropriate (such as a friend under 17, or a companion who is also intoxicated to such a degree that they may not be responsible).

3.30 Beat team members said that they preferred to place an intoxicated person into the care of a responsible adult or direct them to take a taxi rather than take them

⁵⁰ *Children and Young People Act 1999* (ACT), s 80. The Act is to be replaced: the *Children and Young People Act 2008* (ACT) was passed on 1 July 2008 but is yet to commence. The new Act contains a similar provision to s 80 (s 252I). Issues relating to juveniles are discussed further in Part 4.

to the Watchhouse. However, if people were incapable of caring for themselves or might pose a threat to themselves or the public, police would detain them.

3.31 The following two case studies, *Walking away* and *Out with friends*, are examples of cases where police detained intoxicated people who argued that they could have been allowed to go home in the care of their friends.

CASE STUDY: Walking away

After drinking with work colleagues, Mr E was walking to the taxi rank at about 2.30 am with two others when he asked police to take him home. Mr E said he had been joking and claimed that one of the officers swore at him, an allegation that his two colleagues supported but that police denied. Police directed the three men to dispose of their open bottles of alcohol and Mr E threw his in a bin, the bottle smashing against the side.

As he was walking away, police detained him for being intoxicated and disorderly, noting in later statements that he had been argumentative with police and aggressive in his demeanour. He struggled whilst they were attempting to place him in the caged vehicle and capsicum spray was used to subdue him. Mr E received a large gash to the back of his head as a result of hitting it on the back of the vehicle. He also complained that the police slammed the door on his foot several times when attempting to close it. Mr E was taken to the Watchhouse and after he had been placed in a holding cell police decided to seek medical treatment for him. The ambulance was called and Mr E was conveyed to hospital where he received stitches to his head. His colleagues who had gone to the station to check on his welfare had been told he would be detained for eight hours for being intoxicated.

Mr E complained amongst other things that the officers did not communicate the reason for restraining him despite repeated requests, that he was not excessively drunk at the time, that he was with two responsible adults who were not drunk, that they had not been behaving in a disorderly way, and that at the time he was detained he was heading for the taxi rank intending to catch a taxi home. His colleagues supported his claims and expressed concern about police behaviour.

Nine months later, Mr E received a summons for resisting a Commonwealth official and causing harm to a Commonwealth public official. The office of the Director of Public Prosecutions (DPP) later advised the AFP that they considered there was no prospect of success, largely because police had not satisfied the IPCP Act requirement for there to be no reasonable alternative for the person's care and protection. The DPP's advice noted that Mr E had not been warned that if his behaviour continued he would be taken into custody, referring to supporting statements by his two colleagues, and that Mr E had been walking away towards the taxi rank when police detained him. The DPP offered no evidence when the charges came before the court and the matter was dismissed.

CASE STUDY: Out with friends

Ms F attended a work party in Civic in 2004. When she was later walking to a bar with her colleagues, she injured her ankle and was limping. After security staff at the premises refused her entry, she went in and would not leave when asked. Security staff sought assistance from police who had attended in relation to another matter. When approached Ms F again refused to leave and swore at police. Police took her into custody for being intoxicated and disorderly. Ms F complained that police should have allowed a friend who had offered to drive her home to do so, claiming that the friend had explained to police that Ms F was injured.

When admitted to the Watchhouse just before 3 am she complained of injury to her ankle but was not given medical treatment, although she said police provided an ice pack later in the night. The following morning she was wheeled out of the Watchhouse in a wheelchair. She subsequently sought medical treatment and found that her ankle was fractured. Ms F is pursuing legal action for unlawful arrest.

3.32 On occasions, as the case study *Reassessing the situation*, a police officer has determined to take an intoxicated person into custody, but a more senior officer has intervened to suggest that the person could appropriately be released into the care of their friends or relatives. This intervention has de-escalated the conflict and not only avoided a person being held in custody, but also saved police from being diverted from other duties. One police officer with many years service suggested to us that senior officers could have a valuable role to play through this kind of intervention in appropriate circumstances, particularly if less experienced officers were involved and conflict had died down.

CASE STUDY: Reassessing the situation

Ms G was involved in a fight at a club where she had been drinking with a group of friends and relatives. Her conflict with a woman in another group resumed outside the club as both groups were leaving. Police were called and arrived as the two groups were walking home.

When police spoke with Ms G they said she became argumentative and abusive. Ms G claimed she became angry when one of the officers whistled at her, which police denied while acknowledging she had believed it to be so. Police determined to take her into custody due to her level of intoxication and aggressive demeanour. The arresting officer twisted her arm behind her and attempted to push her into the police vehicle. Ms G said her face and neck were injured by being forced against the vehicle. When she continued to resist, a senior officer intervened suggesting that she could be allowed to go home in the custody of her friends, and she was released.

Ms G complained of incivility and excessive force. The AFP found the complaint of incivility unsubstantiated and acknowledged that the injury, which was substantiated in a medical report, may have occurred when the officer was trying to put her into the vehicle. However, the AFP found that the force used was proportional in the circumstances.

The distinction between public order offences and the intoxication provisions

3.33 The 1998 report recommended that the ACT Government consider legislative amendments to clarify the Act's purpose and scope, so as to ameliorate the apparent overlap between disorderly behaviour under the IPCP Act and street offences, and to provide clear guidance to police (recommendation 7). The AFP responded at that time that it supported review of the Act.⁵¹

3.34 In 2001, the second report found there was still a lack of clarity in the distinction between street offences and detention for intoxication, noting:

The revised [Custody] Guidelines make only oblique, but contradictory, references to the use of charges for street offences as an alternative to protective custody. The Guidelines direct that 'Prior to the decision to detain a person under the Act, members should consider other options to resolve the incident'. They also direct that 'Members are encouraged to view detention as a final option; however, it is recognized that in some circumstances there is no other reasonable option'. The Watch-house Guidelines generally discuss the role of the Officer-in-charge of the Watch-house in relation to charges, but do not address the issue of proposing street offence charges against an intoxicated person.

3.35 The 2001 report recommended that the AFP amend its guidelines to provide clear guidance to officers on charges for street offences or the use of other powers, such as breach of the peace, as an appropriate alternative. 'Disorderly conduct' for the purposes of protective custody should be clearly distinguished from 'offensive behaviour' for the purposes of charging (recommendation 9).

3.36 In May 2008, the AFP reported that the recommendation had not been adopted, stating that 'It is still up to the discretion of officers as to how they react to intoxication and the threat to the person, community and property.'. The Custody Guidelines have not changed from the words quoted above.

3.37 Discussions with AFP officers revealed different approaches to use of the powers. Officers generally found it difficult to explain when different options should be used, referring frequently to police having a 'suite of options'.

3.38 As outlined above, police guidelines state that the breach of peace power is only to be used if there is violence or apprehension of violence. Several police identified breach of the peace as the appropriate option in a private residence where violence was apprehended. However, people who were clearly intoxicated were also observed being brought into the Watchhouse for breach of the peace after being involved in conflict in a public place. Other officers indicated that detention for breach of the peace is considered a more serious option with graver consequences than detention for intoxication, where the person is released the next morning without any consequences such as the possibility of a criminal record. Police saw the advantage of detention under the IPCP Act as a means of removing the person from the situation of risk.

3.39 In relation to charging people with offences such as fighting in a public place, some officers observed that prosecution may be difficult, for example, where each person claims to have acted in self-defence and there are no witnesses to the start of the conflict.

⁵¹ 1998 Report, page 3, recommendation 6.

Training for ACT police

3.40 As well as considering police guidelines, we were interested in the type of training police receive on dealing with intoxicated people.

3.41 During their initial training, ACT Policing recruits undertake two modules that deal with the IPCP Act. The first, 'Police Powers', deals with powers of arrest, entry, search and seizure, and includes the power of detention and search under the IPCP Act. The second module, entitled 'Street Offences', refers to 'offences covered by the term' as including the provisions of the IPCP Act. The module also covers the offences of consuming liquor in a prescribed public place, offensive weapons, trespass, offensive behaviour, indecent exposure, fighting in a public place, littering and move on powers.

3.42 This emphasis on dealing with intoxicated people in terms of offending behaviour does not reflect the care and protection aim of the Act. As noted above, s 4(2) of the Act specifies that a person may be taken into custody for intoxication only if a police officer is satisfied that there is no other reasonable alternative for the person's care and protection—not that there is no reasonable alternative for protecting other people or of the community at large, or preventing offences. Training material for the 'Street Offences' module states:

Section 4(2) — if you can find a better way to deal with them (ie [you're] five minutes from their home and a responsible person is there to care for them), why not use this option as opposed to a trip and the paperwork associated with going to the watch house?

3.43 While giving examples is useful, the one used presents taking a person to the care of a responsible person nearby as an *option* for police to consider in terms of saving them time and work, rather than a reasonable alternative which the IPCP Act *requires* police to pursue.

3.44 The written training material does not indicate when police should use the IPCP Act powers and when using other powers, such as breach of the peace or charging the person with a street offence, would be considered preferable.

3.45 In addition, the written training material does not refer to the Sobering Up Shelter. However, AFP Training advised that some recruit classes since 2007 have been taken to the Shelter as part of familiarisation visits to appropriate facilities such as hospitals, psychiatric facilities and rehabilitation facilities. Four recruit classes visited the Shelter in 2007 and another four were scheduled for 2008. AFP Training advised that on occasion in late 2007 the Shelter could not accommodate police visits because of timing, although ACT Health advised that it was only aware of one instance where the Shelter was unable to accommodate an AFP request. Shelter staff also reported occasional visits by police officers during their shifts, particularly officers in the Beats squad.

3.46 Another important area of training for police in dealing with intoxicated people is conflict de-escalation. Because verbal abuse such as swearing appears to be the catalyst for at least some of the conflicts between intoxicated people and police, it is important that officers are skilled in conflict resolution. During recruit training this topic forms a small section of the Use of Force training module.

3.47 In terms of ongoing training for serving ACT police, our discussions with police revealed that much appears to be left to the discretion of each police station.

Conclusions

3.48 Dealing with intoxicated people presents police with many challenges. They can be difficult, verbally aggressive, argumentative and slow to respond to direction. However, the IPCP Act is there to provide for their care and protection, and to ensure that they are not taken into police custody if there is any other available option. Detention under the IPCP Act is essentially unreviewable detention, as there are no charges to come before a court.

3.49 As was first observed in 1998, there is still a tendency amongst some police to use the powers under the IPCP Act as a preventive measure, that is, to stop certain anti-social behaviour by detaining the person, rather than to provide for the person's care and protection. This is contrary to s 4(2) which specifies that a person should only be detained if there is no reasonable alternative for the person's care and protection. In cases where Watchhouse staff have determined that the intoxicated person has needed medical treatment, the person has been released to the care of the ambulance service, raising questions about whether depriving them of their liberty for up to eight hours was warranted in the first place.

3.50 Training material for new ACT Policing recruits must emphasise the care and protection purpose of the IPCP Act and give officers more guidance as to when use of those powers is appropriate and when other options such as breach of the peace or charging with an offence are to be preferred. The AFP guidelines on breach of the peace should also be revised to clarify how these powers are to be used in practice when a person may not be able to understand the consequences of giving an undertaking because of intoxication, a common occurrence.

3.51 There should also be increased emphasis on skills development in conflict resolution. It is disturbing that in some cases a person can be taken into custody for their care and protection and end up suffering injury. There have also been examples, such as those in the case studies in this Part, where police have been called to a disturbance and, after the conflict appears to have died down or the person has been walking away, have felt the need to take action by taking the person into detention. Some police commented to us during discussions that when they had been called to an incident, they sometimes felt pressure to resolve it by taking firm action, and that they did not always have time to talk issues through with someone who was intoxicated. Another officer trained in negotiation skills offered the view that there should be more police training in de-escalation of conflict, stating that he considered himself lucky to lead a team of officers who emphasised that approach.

3.52 In addition, this office considers that the IPCP Act should be reviewed, as the Ombudsman's 1998 Report recommended. Its aims should be clarified and detention on the basis of disorderly behaviour, and the possible overlap with street offences, should be further considered. As noted in Part 1, some jurisdictions have addressed this issue in their legislation dealing with intoxicated people. In NSW the legislation specifies that a police officer is not to detain an intoxicated person because of behaviour that constitutes an offence.⁵² As noted in Part 1, in South Australia, Western Australia and Tasmania, detention of an intoxicated person on the basis of disorderly conduct is not an available option. Disorderly behaviour was not one of the grounds of detention recommended by the Royal Commission into Aboriginal Deaths in Custody.

⁵² *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 206(1).

RECOMMENDATION 1

AFP training material on the IPCP Act should be revised to:

- (i) emphasise the care and protection aim of the Act and distinguish powers under those provisions clearly from street offences
- (ii) provide more guidance to police on the circumstances in which use of the IPCP Act provisions is appropriate compared with other options, including breach of the peace and charging with a substantive offence.

RECOMMENDATION 2

AFP training in de-escalation of conflict should be increased, particularly emphasising dealing with people who are affected by alcohol or other drugs.

RECOMMENDATION 3

The AFP should review and update the guidelines relating to breach of the peace to specify how intoxicated people should be dealt with, given that there may be concerns about their capacity to understand fully the consequences of giving an undertaking as a condition of release.

Use of force

3.53 This office has received complaints about police using excessive force when taking people into custody for intoxication. Some of these complaints involved allegations of inappropriate use of capsicum spray. Three of the case studies outlined above involved injuries, two of them serious, that occurred when police were putting the person in a police vehicle.

3.54 Since this office lost responsibility for overseeing all AFP complaints from members of the public from 30 December 2006⁵³, the AFP has been required to notify us of the more serious complaints (known as Category 3 complaints), which include complaints about use of force. As of May 2008, 19 Category 3 complaints have involved detention under the IPCP Act. Of those, several complained about excessive use of force when detained. Injuries reported by complainants were of bruising to the upper arms, a chipped tooth, bruising to arms and legs, gravel rash, an unspecified 'assault' and infliction of capsicum (OC) spray without proper advice on decontamination and follow-up treatment.

3.55 Several other complaints about excessive force have arisen from circumstances where the person was not detained under the IPCP Act but had been intoxicated in a public place. Sometimes the injury has been serious. A complainant who admitted being heavily intoxicated at a work function was involved in an altercation with a colleague that resulted in police attendance. As he attempted to escape he was apprehended by police who forced him to the ground and twisted his left arm behind his back. After arrival at the Watchhouse an ambulance was called

⁵³ AFP Professional Standards is responsible for resolving complaints in accordance with Part V of the *Australian Federal Police Act 1979* (Cth). The Ombudsman reports to Parliament at least annually on the comprehensiveness and adequacy of the AFP's complaint handling.

and he was subsequently treated in hospital for a dislocated shoulder. Another complaint outlined in the case study *Serious injury* involved a broken clavicle.

CASE STUDY: Serious injury

Mr H, who has an intellectual disability, cerebral palsy and other health issues, rang 000 from a public phone threatening suicide. He was very intoxicated. The operator who dispatched a police vehicle noted amongst other things that extreme care should be taken when conveying Mr H and ambulance transport should normally be used. The operator also contacted the ambulance service and the mental health crisis team. Mr H had previously been the subject of police attention in similar circumstances.

Police who arrived at the scene decided to take Mr H into custody for being intoxicated and disorderly, stating that he slumped to the ground and would not follow police directions. They took him to the Watchhouse in the police vehicle. When Mr H was brought into the Watchhouse, police stated that he was resisting and applied wrist locks to him. Mr H suffered a broken clavicle when his left arm was forced behind his back and he was taken to the ground to be restrained. Mr H was transported by ambulance to hospital for treatment.

An advocate made a complaint on behalf of Mr H about excessive force, the complaint being later withdrawn.

3.56 In circumstances where police determine that they need to use force to restrain someone, minor injury will not be uncommon. However, serious injuries raise concern about excessive force and underline the need for appropriate training.

Transport of intoxicated people

3.57 Intoxicated people are at risk of injury during transportation by police. One study of 260 incidents of injury in NSW police custody found that 17% occurred during transportation, leading to a recommendation that police review the safety of cages in police vehicles.⁵⁴ This office had already recommended in the 2001 report that AFP guidelines provide that where appropriate, non-aggressive people who are responding to police directions should be transported in a sedan (recommendation 1). The AFP has adopted this recommendation⁵⁵, although during discussions some police said they also preferred to call for a caged vehicle if the person was highly intoxicated, due to the risk of vomiting in a police sedan and the consequent time needed to clean the car and get it back on the road.

3.58 The 2001 report also recommended that the AFP continue to ensure that officers exercise care when transporting intoxicated persons, especially in caged vehicles (recommendation 2). The AFP stated that it has adopted this recommendation, specifically referring to two sections of the Custody Guidelines. Former section 18(c) (now section 22) states:

'Extreme care is to be taken when transporting people in custody who are under the influence of alcohol or drugs, or appear to be suffering from a medical condition' [original emphasis]

⁵⁴ J Sallybanks, *Monitoring injuries in police custody: a feasibility and utility study*, Australian Institute of Criminology, 2005.

⁵⁵ Custody Guidelines, section 18(e).

3.59 Former section 18(d) (now also section 22) states:

In instances where an intoxicated person is taken into protective custody and a caged vehicle is utilised members must be vigilant to ensure the safety of the individual. For example, an intoxicated person could lapse into unconsciousness and inhale vomitus causing respiratory collapse. The reduced motor skills of an intoxicated person may also be sufficient for that person to accidentally injure themselves. The onus is on police to minimise any potential for injury when exercising custody powers.

3.60 While police guidelines are important, they are not sufficient to ensure that officers exercise sufficient care, as indicated in the previous case study. Providing appropriate training and monitoring officer performance are two important means of ensuring compliance.

3.61 While the AFP response did not refer to any such measures, we found that relevant issues have been canvassed in recent training provided by Clinical Forensics ACT to Watchhouse staff and some Beat officers. The training emphasises the care and protection of intoxicated people and the dangers arising in their transport through discussion of such issues as positional asphyxia and handcuff injuries. Feedback on this training, including in written evaluations seen by this office, was very positive, with comments such as 'This should be mandatory training, particularly before working in the Watch House'.⁵⁶

3.62 Given the high incidence of alcohol and drug use amongst those taken into custody, we agree that this type of training should be mandatory for all ACT Policing members.

RECOMMENDATION 4

All ACT Policing members should receive initial and ongoing training on the risks arising in the transport and custody of intoxicated people, such as the training recently provided by Clinical Forensics ACT.

Police use of the Sobering Up Shelter

3.63 In 2001 police appeared generally sceptical of the value of a sobering up shelter, believing that in most cases the Watchhouse was the most suitable facility to accommodate intoxicated people.⁵⁷

3.64 Although the Shelter opened in late 2004, there were almost no referrals by police until February 2006. While police have referred over 400 people to the Shelter since that time, the number of people detained at the Watchhouse for intoxication has increased significantly in the same period, as discussed in Part 2. In addition, police referrals to the Shelter decreased significantly from 2006 to 2007, and referrals in 2008 appear to be in line with 2007 numbers.

3.65 While police acceptance of the Shelter appears to have become more widespread since 2006, it is not universal. Not every officer with whom this office had discussions was aware of the Shelter's location, with the officer-in-charge of one station referring to the previous facility in Russell. Many officers had not visited or

⁵⁶ AFP officer evaluation, Beat Squad Medical Training provided by Clinical Forensics ACT, 2008.

⁵⁷ 2001 report, page 5.

taken anyone to the Shelter, and some were uncertain about its facilities and procedures.

Eligibility for the Shelter

3.66 The AFP's eligibility criteria for referral to the Shelter are different from those of the Shelter.

3.67 As outlined in Part 1, the Shelter eligibility criteria require a person to be at least 18 years old, intoxicated by alcohol or other drugs, conscious and willing to enter the Shelter voluntarily. The Shelter guidelines were last revised in June 2008.

3.68 The criteria outlined in the AFP Sobering Up Facility guidelines are more restrictive. The person must be:

- at least 18 years of age
- intoxicated by alcohol and/or drug use or misuse
- incapable of caring for themselves
- willing to enter the Shelter
- conscious
- able to walk unassisted
- at no time displaying, or have displayed, violent behaviour.

3.69 In addition the person must:

- be in need of a safe, supported and supervised environment
- not have suitable alternative personal supports available
- not be in need of detention by ACT Policing
- not require clinical observation
- not require medical intervention
- not be displaying any type of aggressive or violent behaviour
- not be deemed a 'person at risk'.

3.70 In relation to the last point, the AFP Sobering Up Facility guidelines state that:

a 'person at risk' means a person in custody:

- (i) who is an Indigenous Australian
- (ii) who is highly intoxicated
- (iii) who has shown any inclination of, or is believed by any person to be capable of harming themselves or another person
- (iv) with whom there is any cause for concern as to their physical or mental wellbeing
- (v) who is suffering from a medical condition
- (vi) who is incapable of making a rational decision on their need for medical treatment
- (vii) who is at risk of being harmed by other people in custody due to the circumstances of their incarceration.

3.71 This is the same definition of 'person at risk' as that in the Watchhouse Manual and the Custody Guidelines. If there is any doubt about the status of a person in custody, they are to be treated as a person at risk.

3.72 Although there are some common eligibility criteria, the AFP's criteria are more restrictive than the Shelter's criteria in some key areas:

- the person must be able to walk unassisted
- the person must not be a person at risk, so must not be Indigenous, be highly intoxicated, suffer 'a medical condition' (which is not defined), show any inclination towards self-harm or be displaying any aggressive or violent behaviour.

3.73 Differences of opinion about those criteria and the extent to which they are observed are discussed below.

Police concerns about the Shelter

3.74 Some police voiced concerns that intoxicated people are not compelled to stay at the Shelter and may leave at any point, raising concerns about the police duty of care. Some officers at one station called for a detention facility where they could be assured that the person would be held safely without risk of returning to the streets or causing injury or damage. One said she wanted to be sure for her own peace of mind at the end of her shift that the person was safely detained, referring to her duty of care to members of the public, to Shelter staff, to the intoxicated person and even to other officers. Several other officers referred to concerns about exposing Shelter staff to possible violence or aggression. There was also some uncertainty about how far an officer's duty of care to an intoxicated person extended if the person was taken to the Shelter. Some officers were not aware that a death at a licensed place under the IPCP Act is deemed to be a death in the custody of the manager of the licensed place, rather than in police custody⁵⁸, and there were references to the police duty of care possibly extending up to 48 hours after release.

3.75 Some officers raised as a concern the Shelter's location on the north side some distance from their area of responsibility, referring to the time needed to take a person there. However, police who had taken people to the Shelter universally commented that admission was straightforward and easy and that Shelter staff were helpful. Some noted that the time taken to refer a person to the Shelter was less than that required to lodge a person at the Watchhouse during busy periods, when it was often necessary to wait for other police vehicles to enter and leave the facility and for each person to undergo the admission procedures.

3.76 Some police reported that the Shelter's limited opening hours restricted its usefulness. Examination of the sample of 2008 cases showed that some officers had recorded that they had checked if the Shelter was open on particularly busy days, such as New Year's Eve. Police also mentioned Melbourne Cup Day, Summernats and the ACT Multicultural Festival as busy times for dealing with intoxicated people. The Shelter's opening hours on three nights of the week reflect available funding and the busiest nights for police detentions of intoxicated people.

3.77 Finally, some police argued that because of the restrictive admission criteria the Shelter only took the 'happy' or 'nice' 'drunks'. They were not aware that the Shelter criteria and the AFP criteria are different in some key areas, as outlined in the previous section, and some thought the restrictions were imposed by the Shelter rather than being AFP policy. In its response to the draft investigation report, the AFP stated that 'police are bound to apply the criteria outlined in their own governance framework.' While AFP officers are of course obliged to follow AFP policies, the lack

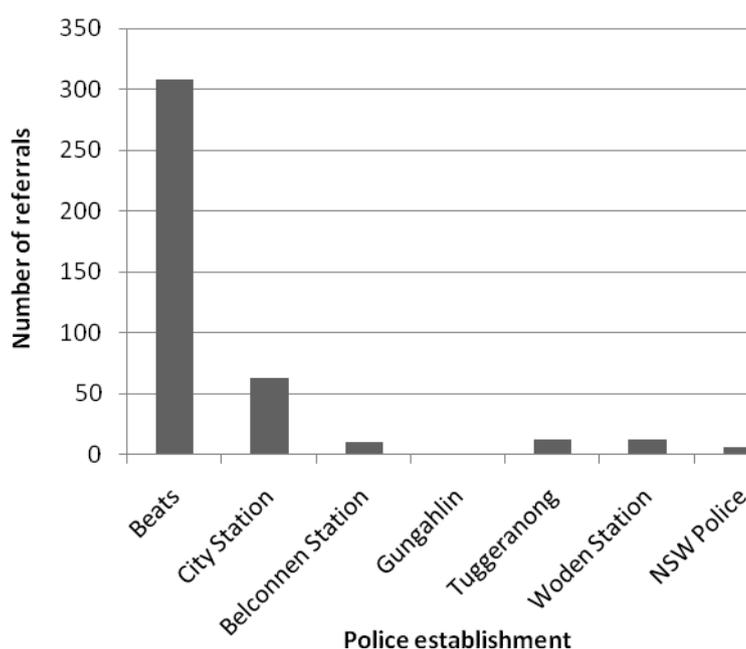
⁵⁸ *Coroners Act 1997* (ACT), s 3C(1)(h).

of consistency on the key issue of who should be brought to the Shelter, given that the AFP is the source of most referrals, suggests the desirability of further discussion between the AFP and Centacare. This is particularly so in light of Centacare’s view that Shelter staff are able to deal with people who may be initially less compliant.

Police referrals to the Shelter

3.78 Analysis of referrals to the Shelter shows that most are made by the Beats squad and officers from the City Station. Police based at stations further away from the Shelter have referred far fewer people, as Figure 9 shows.

Figure 9—Referrals to Sobering Up Shelter by police establishment, December 2004 to 13 April 2008



Note: ‘Beats’ was initially City Beats and later became ACT Beats, its area of responsibility extending beyond the City centre.

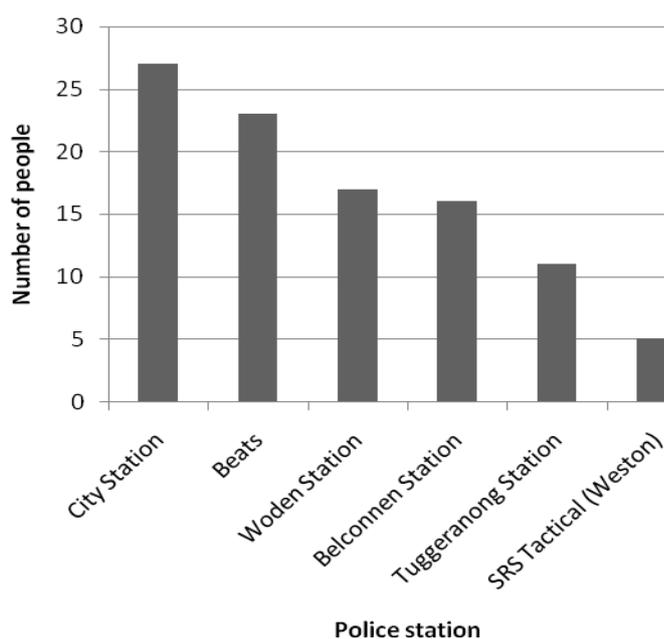
3.79 Shelter staff told us that initially the patterns of police referrals to the Shelter reflected who was on shift, that is, certain officers in the Beat team were noticeably more willing to take people to the Shelter and were seen there regularly. However, this pattern was no longer so noticeable and acceptance appeared to have grown more widespread amongst police.

3.80 When asked about their use of the Shelter, officers at stations outside the city centre said that they tried to find local alternatives to detention wherever possible. A primary motivation appeared to be the time taken to transport a person to the city, either to the Watchhouse or to the Shelter, and thus the removal of an available vehicle and officers from the area, often for a substantial period when there may be other demands. In some cases, finding an alternative required police to take an intoxicated person back to the local station while they arranged for a responsible person to collect the person.

3.81 Some officers at one station offered a different perspective, stating that it was understandable that Beat team members who were engaged in more proactive policing of areas where licensed premises were clustered would intervene to refer more people to the Shelter for sobering up. By contrast, officers at regional stations tended to respond to disturbances or incidents notified by the public. In those cases, they considered disorderly behaviour and detention in the Watchhouse were more likely outcomes.

3.82 A sample of 99 cases from 2008 was examined to see at which stations police were based when they brought a person into the Watchhouse for intoxication.

Figure 10—Sample of people taken to the Watchhouse by police team, 1 January 2008 to 24 March 2008



Note: City Station includes detentions by the Crime Prevention team (2) and Traffic Operations (1) but does not include Beat team members.

3.83 This sample shows much less disparity between police teams in relation to Watchhouse detentions for intoxication than in relation to referrals to the Shelter, as indicated in Figure 10. While City Station and the Beats team were still responsible for most lodgements (50 out of 99), the proportions of total Watchhouse intoxication detentions by officers from more distant stations are larger.

3.84 In the sample of 99 cases from 2008, police statements specifically referred to the Shelter as not being a suitable option in 36 cases. The most common reason given was the person's aggression or aggressive demeanour. In nine cases the officer referred to the person's high level of intoxication, in six cases it was noted that the Shelter was not available at the time, one person did not want to go to the Shelter, and four were juveniles and therefore ineligible.

Removals from the Shelter

3.85 In certain circumstances police must remove a person from the Shelter, for example, if the person is violent or is carrying illicit drugs.

3.86 Centacare advised that 34 people had been removed by police between December 2004 and 13 April 2008, usually soon after they were brought to the Shelter while police were still in attendance. The main reason was that the person refused to stay or was unwilling to participate (20). Other reasons were inappropriate behaviour (five), removal to the Psychiatric Services Unit at the Canberra Hospital (two), being unable to answer questions (one), removal at the person's request (one) and not being intoxicated (one, whom police took home). Three people were removed by police in relation to criminal matters (one on an outstanding warrant, one arrested for possession of drugs and a third found to be in possession of drugs and assessed as at risk). In one case, the reason for removal was not specified.

3.87 When asked why some people may not be willing to participate, Shelter staff suggested that for some people, detention in a known environment where they had been before (that is, the Watchhouse) may seem preferable to being in an unfamiliar place. However, staff also pointed out that some people who had stayed at the Shelter had expressed their gratitude the following morning that police had brought them there rather than taking them to the Watchhouse.

Liaison between the Shelter and the AFP

3.88 Centacare and senior ACT policing representatives meet approximately every six months, last meeting in February 2008. However, the two groups have not entered a formal memorandum of understanding.

3.89 The Standard made under the IPCP Act⁵⁹ requires the licensee of a licensed place to ensure that a memorandum of understanding is in place to establish procedures when police presence or notification may be necessary, where legislation does not address these matters. Types of procedures specifically mentioned in the Standard include those governing refusal of admission to the Shelter, removal of a person from the Shelter and the discovery of prohibited substances or weapons.

3.90 The IPCP Act provides only for notification to police where an intoxicated person whom a carer considers to be a danger to themselves, another person or property leaves or is about to leave the licensed place.⁶⁰ The other matters to which the Standard refers appear to be covered by Shelter policies and procedures.⁶¹

3.91 Centacare and Shelter staff described the relationship with the AFP as generally positive. Centacare staff referred favourably to occasions when the AFP had included the Shelter in strategies for particular events when high levels of intoxication were anticipated. For example, publicity material for a responsible drinking campaign, including posters and drink coasters with the logo 'Where are you staying tonight?', had included the Shelter's logo as well as that of the Nightrider bus.

⁵⁹ The Intoxicated Persons (Care and Protection) Standard 2004 (No 1), section 6.5. The Standard is made by the Minister under s 31 of the IPCP Act. Section 6.5 is headed 'Security for persons and property to be adequate'.

⁶⁰ IPCP Act, s 9.

⁶¹ Centacare Sobering Up Shelter, *Refusal of Admission Policy and Procedure*, October 2007; *Prohibition Weapons Policy and Procedure*, May 2008; *Breach of Rules Policy and Procedure*, October 2007; *Intoxicated at Discharge Policy and Procedure*, October 2007; *Prohibited Substances Policy and Procedure*, May 2008.

Centacare staff believed that such moves tended to arise from the initiative of individual police officers who contacted them directly, and would like to be involved in other activities of this kind.

Conclusion

3.92 The relationship between the AFP and the Shelter appears to be positive and police acceptance of the Shelter has grown. However, it is clear that some police still have concerns about taking people to the Shelter and that officers outside the Beat squad and the City Station rarely do so. Some of the police concerns reflect a lack of awareness of Shelter facilities, procedures and training, while others reflect uncertainty about any remaining duty of care when police release a person to the custody of the Shelter manager, including concerns about the safety of Shelter staff.

3.93 Shelter staff have undergone specific training in the care and counselling of intoxicated people.⁶² The Shelter has a high staffing ratio and, while bedrooms are not under video surveillance, Shelter guidelines provide for frequent and direct checking of the welfare of intoxicated people. They require observation of an intoxicated person at least every 15 minutes for the first four hours after admission and every 30 minutes thereafter. This is just as intensive monitoring of intoxicated people as is required in the Watchhouse, or even more so.⁶³ Staff members have the time to talk through issues with people on arrival and before they leave in the morning, and provide an exit pack and referral to other agencies where appropriate. In that way they can help to address longer term issues.

3.94 It will always be the case that some people are not appropriate for referral to the Shelter, particularly if they are violent. In addition, because admission is voluntary, some will choose not to participate. On occasion, police may be called to attend the Shelter because of a person's inappropriate behaviour. Nonetheless, the decline in police referrals to the Shelter since 2006 is of concern. Not only is the Shelter an appropriate place to care for intoxicated people, as was intended by the IPCP Act, but the time taken to lodge a person there appears likely to be significantly less than the time required to lodge an intoxicated person at the Watchhouse, thus freeing up police resources.

RECOMMENDATION 5

ACT Health, as the agency with policy responsibility for the IPCP Act, should ensure that a memorandum of understanding is in place between Centacare and the AFP, as required by the Intoxicated Persons (Care and Protection) Standard 2004 (No 1).

RECOMMENDATION 6

The AFP and ACT Health should work with Centacare to ensure a high degree of consistency in eligibility criteria in Shelter and AFP guidelines.

⁶² As required by the Intoxicated persons (Care and Protection) Standard 2004 (No 1).

⁶³ The Watchhouse Manual states (page 63) that cell checks of intoxicated people are to be conducted every 30 minutes for the first two hours and then at no greater than one hour intervals, and 'at risk' detainees are to be checked every 15 minutes for the first two hours, then at no greater than one hour intervals. From our examination of cell management records in complaints and in the sample of 2008 cases, it appears that cell checks are not always carried out that frequently (see Part 4).

RECOMMENDATION 7

The AFP should ensure that appropriate ACT Policing training enhances police awareness of, and confidence in, the Sobering Up Shelter.

3.95 ACT Health agreed in principle with recommendation 5 and advised it would work with Centacare to ensure a memorandum of understanding is developed with the AFP as a matter of priority. ACT Health also agreed with recommendation 6, noting that recent discussions with the AFP had highlighted several opportunities for improving Watchhouse staff awareness of the Shelter:

- the AFP providing Centacare with details of an appropriate management contact at the Watchhouse for liaison as required
- the AFP and Centacare investigating the feasibility of a pilot outreach component for Shelter staff to the Watchhouse
- the listing of the Shelter on SupportLink (the ACT online referral system for people facing an emergency or crisis).

3.96 ACT Health stated that it would work with the AFP and Centacare to pursue those opportunities as a matter of priority.

3.97 The AFP confirmed that discussions with ACT Health and Centacare had commenced in relation to recommendations 5 and 6.

Indigenous people

3.98 The AFP was asked to clarify whether the AFP Sobering Up Facility guidelines were intended to prohibit police from taking any Indigenous person to the Shelter. A response from the Deputy Chief Police Officer (Response) dated 2 May 2008 stated:

ACT Policing is bound by the requirements of the Recommendations arising from the "Royal Commission into Aboriginal Deaths in Custody 1991". When Police take an Indigenous Australian into custody, the safety and care of that person becomes primarily the responsibility of Police. The death of an Aboriginal person whilst lodged at a previous, similar shelter highlighted the issues involved. Indigenous Australians are considered a high risk group, requiring monitoring to ensure their safety, and under the Guide are not taken to the Facility.

The Guide was developed in accordance with the rules and conditions under which the Sobering-up Facility was granted its funding and licence to operate.

3.99 There is no restriction on Indigenous people in the Shelter protocols and procedures. Nor is there any such restriction in the Act or the Standard made under the Act (which deals with such issues as admission, care, monitoring and security).

3.100 We have several concerns about the AFP's response. Key recommendations of the Royal Commission into Aboriginal Deaths in Custody included the decriminalisation of public drunkenness and the establishment of sobering up shelters (recommendations 79 to 81). It is contrary to the spirit of the Royal Commission's findings to exclude Indigenous people from diversion from police custody to those services on the basis that they are an 'at risk' group in police

custody. It is also likely to be a contravention of human rights and discrimination laws to deny Indigenous people the opportunity for diversion on the basis of their race.⁶⁴

3.101 In addition, the death in custody in an ACT shelter to which the AFP's response refers occurred in a different institution in 1996, in circumstances where staff had no power to search those admitted. Following the coroner's suggestions, the IPCP Act was amended to give staff those powers, and in consultation with the AFP, new protocols and procedures were developed. The Standard and the current Shelter's procedures provide for a high degree of surveillance of people admitted to the facility, as discussed at paragraph 3.93.

3.102 In any case, it appears that operational police are unaware of ACT Policing's policy position. Shelter statistics show that police are referring Indigenous people to the Shelter (17 of 414, that is, 4% of police referrals to 13 April 2008). During our meetings with police at various stations, when asked to identify particular groups who may not be suitable for admission to the Shelter, no-one nominated Indigenous people. Similarly, officers who were asked if Indigenous people would be treated any differently under the IPCP Act made no reference to the Shelter.

3.103 ACT Policing's policy position may reflect underlying police concerns about the safety of people who require close monitoring and the capacity of other agencies to avert those risks. However, as discussed above, there have been no deaths at the Shelter. Staff are trained in assessing and responding to persons who are at risk⁶⁵, and their monitoring procedures for people on the premises are intensive.

3.104 Accordingly the AFP should review the guidelines in relation to the eligibility of Indigenous people for the Shelter. The AFP should also closely examine its other criteria, including the criterion excluding those who are 'highly intoxicated' from referral to the Shelter. Such people would appear to be a large proportion of the facility's target group. While the AFP is to be commended for identifying certain groups of people as at risk when in police custody, that does not support the retention of those people in custody rather than diversion to an appropriate service established for the specific purpose of looking after intoxicated people.

RECOMMENDATION 8

The AFP should amend its Sobering Up Facility guidelines so that Indigenous people are not precluded from consideration for diversion to the Sobering Up Shelter. Similarly, the AFP guidelines should be reviewed to ensure that other groups of people defined as at risk in police custody, including those who are highly intoxicated, are not automatically precluded from diversion to the Shelter.

3.105 In its response to the draft investigation report, ACT Health stated that its local consultations 'have highlighted significant interest in the community in Aboriginal or Torres Strait Islander people having access to the [S]helter'. ACT Health also commented that it was not aware of any impediment to admitting Indigenous people to the Shelter.

⁶⁴ Such as the *Human Rights Act 2004* (ACT), s 8(3); the *Discrimination Act 1991* (ACT), ss 8 and 27(2), and the *Racial Discrimination Act 1975* (Cth), s 9.

⁶⁵ Australian Catholic University, *Evaluation of Centacare sobering up shelter*, 2006, page 22.

The broader issues

3.106 During this investigation we were keen to hear from police about the broader issues surrounding their dealing with intoxicated people. Police face challenges as the front line response to many social and health problems in the community arising from abuse of alcohol and other drugs. Key matters discussed were liquor licensing issues, lack of transport, intoxication by illicit drugs and mental illness.

3.107 During our discussions, AFP members repeatedly referred to extended trading hours and the lack of enforcement of liquor licensing conditions as matters that exacerbated public drunkenness and anti-social behaviour. Their concerns echoed the recent calls by police in other states for tighter controls on the sale and consumption of alcohol, as discussed in Part 1. While acknowledging the resource constraints on liquor licensing inspectors, some AFP members also criticised the Liquor Licensing Board for failing to take strong enforcement action where licence conditions have been contravened, and for focusing on issues which may be easier to enforce, such as underage drinking.

3.108 Police also referred to the problems caused by the lack of taxis and public transport in areas late at night where there are high concentrations of intoxicated people. This aggravated the risk of fights breaking out when people were waiting for long periods to be taken home.

3.109 Much of our discussions and almost all the intoxication-related complaints made to this office concerned intoxication by alcohol. When asked about the problems caused by intoxication by other drugs such as methamphetamine ('ice'), police said this was not an enormous problem in the ACT, although some officers considered it was growing. However, dealing with intoxication by ice presents special difficulties for police as it tends to make people very violent and unresponsive to attempts to reason with them. If force was required, capsicum spray often had little or no effect.

3.110 Another issue of great concern to police was dealing with intoxicated people who have a mental illness and the adequacy of support services to assist them in that task. Dual diagnosis (that is, mental illness combined with substance abuse) is common. Police reported problems on occasion with the availability of mental health services, including access to the Psychiatric Services Unit and the response of the CATT when called by police if a person was at risk.

3.111 All of these issues point to the need for a coordinated community response to problems arising from intoxication. Detention by police under the IPCP Act is a valuable option but should be the last resort, as the Act specifies. The ACT Government's current review of liquor licensing should pay heed to police concerns, particularly in relation to regulation and enforcement issues.

PART 4—CUSTODY AT THE WATCHHOUSE

Introduction

4.1 As noted in Part 1, issues relating to the care of intoxicated people in custody at the Watchhouse were examined in the Watchhouse Review in 2007 and the follow up report undertaken this year. Accordingly this own motion investigation has not considered the general issues again. However, some issues specific to the IPCP Act are discussed below.

4.2 Those issues are:

- release from the Watchhouse into the care of a responsible person
- time in detention
- juveniles
- health care support at the Watchhouse.

Release into the care of a responsible person

4.3 The 2001 report concluded that Watchhouse staff were not making sufficient efforts to release intoxicated persons early into the care of a responsible adult (paragraph 3.40). The report made a series of recommendations aimed at facilitating early release.

- Watchhouse officers should be required to be more proactive in pursuing release of detainees into the care of a responsible person, and AFP guidelines should make consideration of release mandatory if appropriate and if the person consents (recommendation 4)
- AFP guidelines should be reviewed to provide a clear statement of the rights of a person held in protective custody to communicate with a legal representative and/or friends or relatives (recommendation 5)
- Watchhouse recording procedures should be reviewed to ensure that sufficient information in relation to early release is recorded, including identification of the responsible adult, any attempts at contacting a responsible adult, and any reasons for not contacting a responsible adult (recommendation 7).

4.4 The IPCP Act states that a police officer is not prevented from releasing a detained person if, in the officer's opinion, it is reasonable to do so (s 4(5)). The Custody Guidelines confirm this principle, stating that a member who has custody of an intoxicated person will consider the possibility of releasing the person into the care of a responsible adult, if in the opinion of the member it is reasonable and appropriate to do so (section 15).

4.5 The Custody Guidelines also oblige police to ensure that reasonable attempts are made to contact someone if the intoxicated person is fit to nominate a responsible person, subject to the person's clear and unambiguous consent (section 15). An intoxicated person should be released as soon as possible after that person is deemed to have recovered to a point where they are no longer at risk.

4.6 However, these obligations do not appear to be met consistently in practice. During the admission of intoxicated people to the Watchhouse, the standard

questions asked by the officer-in-charge do not include any that relate to the nomination of a responsible person. Instead, people are only asked if they consent to police advising anyone who inquires that they are in the Watchhouse, a question which reflects privacy concerns.

4.7 The Watchhouse Manual states that if a reasonable alternative for an intoxicated person's care and accommodation can be organised, it is 'prudent' to facilitate the person's release into the care and custody of a responsible person as soon as possible (page 50). The Watchhouse Manual also states that 'further consideration' must be given to lodgement of intoxicated people at the Sobering Up Shelter 'before admission' (page 51). However, discussions with senior Watchhouse staff did not identify any case where a person had been released from the Watchhouse to the Shelter, or where the officer-in-charge had refused to admit the person and instead asked for police to take the person to the Shelter. Nor did the sample of 2008 cases reveal any case where the person had been transferred to the Shelter from the Watchhouse. In the view of the senior officer-in-charge of the Watchhouse, it was the arresting officer's duty to consider alternatives to custody. Refusal to admit a person or transfer to another facility usually arose when hospital treatment was considered necessary. Other Watchhouse officers noted that a major concern when considering early release was that the intoxicated person may return to licensed premises and continue to drink.

4.8 We considered a sample of 99 cases from 2008 in relation to time in detention and release outcomes. The special considerations relating to detention of juveniles are discussed later in this Part. Of the 82 adults, only eight (five of whom were in the 18–25 age group) were recorded as having been released to a responsible adult—some to a friend or girlfriend and others to a parent. Two people were taken to hospital, one person was held on a warrant, one was released on bail and one asked to stay beyond the eight-hour period. The rest appeared to have stayed in custody until police considered it appropriate to release them.

4.9 This office considers that Watchhouse staff should be more proactive in identifying alternatives to keeping intoxicated people in police custody. It is not simply the responsibility of the officer who made the decision to take a person into custody. While some people may continue to be aggressive and unsuitable for release, others may calm down once removed from the area where police found them behaving in a disorderly way. Asking those who are admitted to the Watchhouse if they wish to nominate a responsible person if the officer-in-charge determines that would be appropriate at a future point would be a straightforward process for most people. Some may prefer to sleep off their intoxication. Others, based on complaints made to this office about late release, may welcome the opportunity to have a responsible person collect them. While the discretion to release must remain with the officer-in-charge of the Watchhouse, more efforts could be made in this area, as the discussion on time in detention illustrates below. In its response to the draft investigation report, ACT Health referred to various proposals for increasing Watchhouse staff awareness of the Shelter and its services (see paragraph 3.95), and such initiatives may assist.

RECOMMENDATION 9

The AFP should amend the Watchhouse Manual to ensure that:

- (i) the officer-in-charge of the Watchhouse considers before admitting an intoxicated person whether that person would be more appropriately cared for at the Sobering Up Shelter
- (ii) people detained for intoxication are asked on admission whether they wish to nominate a responsible person into whose care they may be released at some future point if the officer-in-charge of the Watchhouse considers it appropriate.

Right to communicate with a lawyer

4.10 The 2001 report also recommended that the AFP guidelines provide a clear statement of the rights of a person held in protective custody to communicate with a legal representative and/or friends or relatives (recommendation 5). The AFP response in May 2008 noted that, while AFP guidelines contain no specific reference to the rights of intoxicated people in custody, section 3(b) of the Custody Guidelines at that time (now section 7) referred to all persons in custody, requiring:

All persons in custody must be advised promptly that they are entitled to have access to facilities to enable them to communicate with a legal practitioner and/or a relative or friend. Where such a request is made these facilities are to be made available at the time of the request, or in any case, as soon as is practicable to do so. If the person has difficulties speaking, hearing or understanding the English language, an interpreter service must be provided.

4.11 The AFP response stated that the guidelines 'are still applicable to those detained under the [IPCP] Act as they are held in a form of custody'. The Watchhouse Manual, however, conflicts with the Custody Guidelines, stating that a person detained for intoxication is not to be given the opportunity to contact a lawyer by telephone from the Watchhouse, as they are not being charged with an offence and 'legal advice is unnecessary' (page 67). The Watchhouse Manual does allow that persons in protective custody should be given an opportunity to contact a responsible friend and/or relative who may be able to collect the person 'and take them into their own protective custody'.

4.12 Nonetheless, written statements about the right to contact a lawyer to seek legal advice are provided in Watchhouse cells. These statements do not differentiate between those under arrest and those in custody on other grounds. This office does not consider that a person detained for intoxication should be denied the right to contact a lawyer on request. A person who is under arrest and who wishes to communicate with a lawyer must be given the opportunity to do so unless exceptional circumstances apply.⁶⁶ People held in immigration detention also have the right to contact a lawyer. Given that detention under the IPCP Act is essentially unreviewable detention, a person who wishes to challenge the basis on which he or she is held or to seek other advice should be allowed to do so. If people are given the opportunity to nominate a responsible person, there should be few instances where they press for the opportunity to seek legal advice. Accordingly the Watchhouse Manual should be amended to remove the conflict with the Custody Guidelines.

⁶⁶ *Crimes Act 1914* (Cth), ss 23G and 23L.

RECOMMENDATION 10

The AFP should amend the Watchhouse Manual to ensure that those people who are detained under the IPCP Act and who seek to contact a lawyer are allowed to do so.

Recording details of a responsible person

4.13 The 2001 report recommended that the AFP review Watchhouse recording procedures to ensure that sufficient information in relation to early release is recorded, including identification of the responsible adult, any attempts at contacting a responsible adult and any reasons for not doing so (recommendation 7).

4.14 The AFP responded that this recommendation had been implemented and was 'cemented' in the Custody Guidelines. The response referred to then sections 11(i) and (j):

- (i) When a member releases an intoxicated person into the care of a responsible person the member will ensure that a record is made of the incident in PROMIS. The record should, where practicable, include identification details of the responsible person.
- (j) When an intoxicated person is released from the City Watch House into the care of a responsible person, the Watch House Sergeant will ensure that sufficient details are entered into the PROMIS Cell Management System including, but not limited to:
 - (i) a record of attempts made to contact a responsible person;
 - (ii) any reasons for not contacting a responsible person;
 - (iii) the time of release; and
 - (iv) identification details of the responsible person.

4.15 These sections remain with very minor changes in the most recent Custody Guidelines (section 15). The AFP also noted that the AFP Sobering Up Facility guidelines refer to this recommendation at section 8(h), which requires police to make a record in PROMIS when they release a person into the care of such a facility. The AFP advised that where a person has been taken directly to the Sobering Up Shelter, a PROMIS record is made but that data would be difficult to extract for our purposes as it is in free text. Accordingly we did not pursue that information.

4.16 When considering the sample of 2008 cases, we noted that while some entries contained basic details of attempts to contact a responsible person, identification details such as that person's name were not always complete. These issues are discussed in more detail below in relation to juveniles.

Time in detention

4.17 As noted in Part 1, an intoxicated person may be held for up to eight hours or until in the opinion of police it is reasonable to release the person. The person may also ask to remain at a police station for up to 12 hours, but no longer (s 4(4) of the IPCP Act). This situation may arise, for example, if the eight-hour limit is reached in the early hours of the morning and it would be difficult for the person to return home or arrange transport at that time.

4.18 Both the 1998 and the 2001 reports noted that there was a low rate of early release of people from the Watchhouse. The 1998 report noted that most people

were detained for around seven hours.⁶⁷ The 2001 report noted that 57% of the people detained in 1999–2000 were detained for more than seven hours, with only 8% released in the first two hours and 12% held for longer than eight hours.⁶⁸

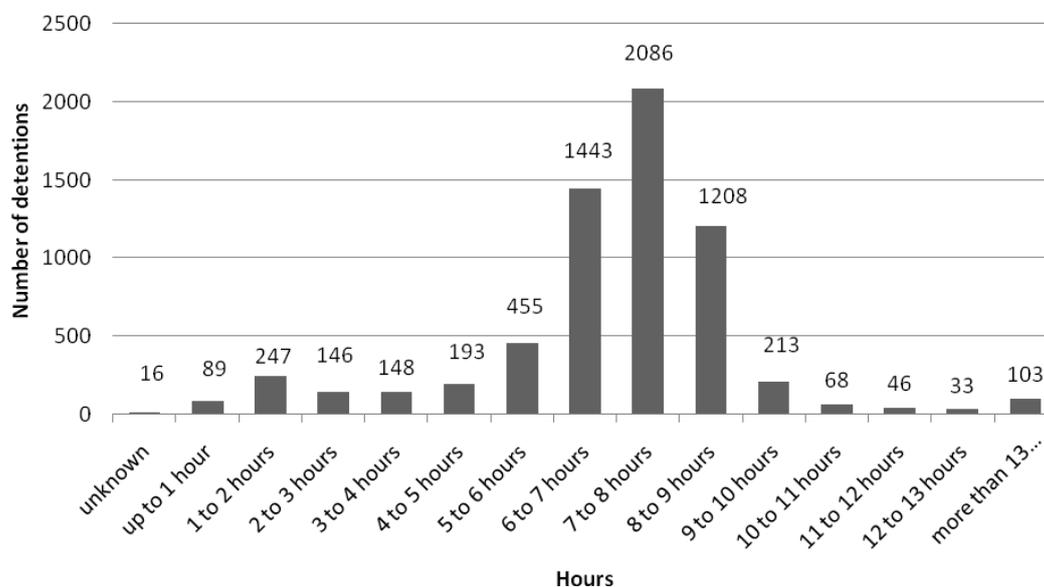
4.19 The 2001 report noted that some of those detained were held legitimately on charges, but that in many cases the recorded late release time was due to poor recording on the PROMIS database.⁶⁹

4.20 To address these issues, the 2001 report recommended that the AFP:

- ensure that officers accurately and consistently record lodgement and release times for those in protective custody, possibly involving adjustments to the fields and messages in the AFP PROMIS system (recommendation 6)
- review Watchhouse procedures to ensure that persons in protective custody are not detained for longer than eight hours (recommendation 8)
- revise Guidelines to include a documented review by the officer-in-charge of the Watchhouse of any case of an intoxicated person detained in protective custody at the four-hour point (recommendation 11).

4.21 Data from 2003 to +2008 examined during this investigation shows a similar pattern to that identified in the two previous reports (Figure 11). Only 5% of people were released in less than two hours. Three quarters (75%) were released between six and nine hours after they were detained, with nearly one third (32%) released between seven and eight hours. Some were held for significantly longer periods, and this is discussed in the next section.

Figure 11—Time in detention for intoxication, 2003 to 2008



⁶⁷ 1998 report, page 23.

⁶⁸ 2001 report, paragraph 2.16, page 8.

⁶⁹ 2001 report, paragraphs 3.31–3.33.

Detention over eight hours

4.22 In response to the 2001 report recommendation that the AFP review Watchhouse procedures to ensure that people are not detained longer than eight hours, the AFP stated that there is no explicit reference to this in AFP Guidelines. However, the AFP claimed this requirement was addressed ‘through the requirement that AFP members wholly comply with the Act which would necessitate detention for no longer than eight hours’. The AFP also stated that the Custody Guidelines encouraged early release, referring to then section 11(k) (now section 15) which states that intoxicated people ‘should be released as soon as possible after the person is deemed to have recovered to a point where they are no longer at risk’.

4.23 While the AFP response did not refer to the Watchhouse Manual, we note that the Manual states that to avoid a person being held for longer than eight hours, the release time to be written on the Watchhouse noticeboard should be seven hours from the time the person is apprehended, so as to accommodate any unanticipated delays arising at the time due for release (page 52). This was observed to be the practice during our Watchhouse observations. It is a practical measure which should assist to minimise incidences of detention beyond eight hours. Nonetheless, it is clearly not fully effective. When we examined 31 cases relating to detention beyond 13 hours (discussed in the next section), the information provided in 14 of them gave no indication why the period was longer than eight hours.

Remaining at the Watchhouse for more than 12 hours

4.24 Examination of the data the AFP initially provided showed that 136 people remained at the Watchhouse longer than 12 hours. As some times suggested that police may have made errors in use of the 24-hour clock when recording the time of arrest, the AFP was invited to examine those cases further. The AFP compared the time of arrest with the incident start time, which is the time recorded by police communications as the time a disturbance is reported or when police come across an incident.

4.25 In relation to the 103 cases where detention times of longer than 13 hours were recorded, the AFP advised that four people were held on other charges. In another 68 cases there appeared to be time recording errors, given that the incident start time was approximately 12 hours after the recorded time of arrest. We asked for details on the remaining 31 cases.

4.26 In eight of the 31 cases, the person was recorded as having asked to stay beyond the eight-hour limit when that period expired during the night. In six cases there was a possible error in entering the time, two entries appeared to be mistakes (one person was recorded as having never arrived at the Watchhouse and another appeared to be a duplicate record) and one was a juvenile who was collected by his sister the next morning after unsuccessful attempts had been made to contact his home. However, for the other 14 cases, no reason for the overstay at the Watchhouse was apparent from the information the AFP provided.

4.27 In relation to the 33 cases where the time recorded was between 12 and 13 hours, the AFP, after comparing the arrest time and incident start time, provided no explanation. Given that in nine of those 33 cases the release time was within 10 minutes of the 12 hours, it is possible that the person was released within the maximum time but the entry in the PROMIS database took some minutes longer. However, many of the detention times in that group of 33 cases were closer to 13 hours.

4.28 These findings raise serious concern. Either some people are being held or are remaining in the Watchhouse in contravention of the time limits in the Act, or significant problems remain with police recording of times of detention. In 16 cases, no release time was provided in the AFP's data. The AFP had also expressed concern about the reliability of its data when we requested information on times of detention and had initially declined to provide it.

4.29 In response to recommendation 6 of the 2001 report about ensuring that police record accurate and consistent lodgement and release times, possibly involving changes to PROMIS, the AFP stated that it had 'implemented more comprehensive requirements in record keeping' than those recommended. The AFP referred to then section 11(m) (now section 15) of the Custody Guidelines which require half hourly cell checks to be recorded in the PROMIS Cell Management system and a check by the Watchhouse sergeant after four hours. However, the AFP's response does not address the need to ensure that lodgement and release times are accurately recorded or consider whether or how the PROMIS system may be amended to ensure, for example, that 24-hour clock errors do not occur. We understand that the PROMIS system is currently being redeveloped and consideration might be given to this problem.

4.30 We also noted that the Custody Guidelines state that where a person asks to stay at the Watchhouse beyond eight hours, his or her consent should be obtained in writing, or where practicable recorded electronically (section 15). From our examination of sample cases this did not appear to be common practice. Electronic recording of consent, presumably by bringing the person from the cell to the charge counter where audio recording is available, may be too onerous a requirement for little benefit where the person simply wants to sleep for a few extra hours. The Watchhouse Manual states that the person's request should be clearly noted in the Cell Management records on PROMIS, and this does appear to be recorded more regularly, although perhaps not as frequently as the number of detention times well over the eight-hour limit would suggest. In some cases, Cell Management records noted that the person was asleep around the eight-hour mark. In such cases the person should be woken, as detention without consent is unlawful whether the person is awake or not. In the redevelopment of the PROMIS system, the AFP should also consider whether an automatic alert to Watchhouse staff through the Cell Management system after seven hours detention is feasible.

A mid point review of detention at four hours

4.31 As noted above, the 2001 report recommended a documented review by the officer-in-charge of the Watchhouse at the four-hour point.

4.32 The AFP response stated that this recommendation had not been adopted 'in its specific terms' but that the Custody Guidelines allowed such a review. Former section 11(m) (now section 15) states that 'Where a person is still in custody after four hours, the Watch House Sergeant will create a Cell Management record that will acknowledge existing cell checks and include their observations of the person'. The AFP response stated that this was 'an informal review from a superior officer on the actions of Watchhouse staff'. The Watchhouse Manual quotes the section from the Custody Guidelines (page 63) but contains no other reference to a four-hour review.

4.33 From our discussions with police and from comments made in complaints investigated by our office, it appears there is an assumption that once a person is brought into custody for intoxication, the general rule is that they will remain for seven or eight hours to sober up. We consider that this practice requires attention.

Detaining the person again if still intoxicated

4.34 Another concern arose when we examined relevant parts of the Watchhouse Manual.

4.35 The Manual refers (page 50) to circumstances where police may have concerns about the welfare of an intoxicated person towards the end of the eight-hour period (for example, where the person is still ‘clearly intoxicated by drugs’). The Manual states that consideration can be given to releasing the person ‘out the Watchhouse gates’ and, ‘if they are still deemed to be intoxicated and behaving disorderly/incapable of protecting themselves from harm/behaving in a manner likely to cause themselves harm whilst they are in a public place, then consideration may be given to re-apprehending and re-lodging the person at the [Watchhouse] (again, for no longer than eight hours)’.

4.36 While police may well retain concerns about a person’s welfare, there is a danger in construing the IPCP Act to allow for ‘rolling’ detentions of periods of eight hours. This option is not envisaged by the terms of the Act, which states that the person must be released at the end of eight hours or when the person is no longer intoxicated, *whichever comes first* (s 4(3)). If police remain concerned about a person’s level of intoxication and their propensity for self-harm or injury after eight hours, other options should be explored, such as referral to drug and alcohol agencies, seeking medical advice, identifying a responsible person to assume care for the person or other options. The Watchhouse Manual acknowledges (page 50) that if concerns are still held about an intoxicated person’s welfare towards the eight-hour limit, medical assessment should be sought to ensure no head injury or mental health condition is present. If the AFP considers the time limit to be a serious flaw in the legislation in a small number of cases, the ACT Government may wish to consider whether the IPCP Act should be reviewed to allow for other appropriate options.

RECOMMENDATION 11

The AFP should ensure that officers accurately and consistently record lodgement and release times for those detained under the IPCP Act. This may require considering whether the redesign of the AFP PROMIS database can include prompts to minimise mistakes in use of the 24-hour clock.

RECOMMENDATION 12

The AFP should amend its guidelines to ensure that the officer-in-charge of the Watchhouse reviews an intoxicated person’s detention after four hours to determine whether the person may be released into the care of a responsible person or otherwise allowed to leave, and that this review is documented in the Cell Management system.

RECOMMENDATION 13

The AFP should ensure that where a person detained for intoxication asks to stay at the Watchhouse beyond the eight-hour limit, the person’s consent is always recorded in the Cell Management system. To ensure compliance with the eight-hour limit, automatic alerts to the Cell Management system after seven hours should be considered. Where the person is asleep, he or she should be woken so that consent can be obtained.

RECOMMENDATION 14

The AFP should amend the Watchhouse Manual to remove any reference to consideration by police of 'rolling detentions' of periods of eight hours.

Juveniles

4.37 When police take a juvenile into custody, they must promptly take all reasonable steps to notify a parent or guardian.⁷⁰ Juveniles who are charged with an offence and held in custody must be taken to a shelter or correctional centre as soon as practicable.⁷¹ However, those who are intoxicated are held in the Watchhouse if there is no alternative for their release. They are not eligible for admission to the Sobering Up Shelter.

4.38 As outlined in Part 2, juveniles comprised 5% of total intoxication detentions in the period under examination. While they comprised between 3% and 5% annually between 2003 and 2007, the proportion increased to 11% in the first part of 2008 for which data was available. The reasons for that higher proportion are not known, although we note that 14 of the 34 detentions occurred either early on New Year's Day or over the Australia Day long weekend and that the number of juveniles as a proportion of total detentions may well diminish over a full year.

4.39 The reasons for detention of intoxicated juveniles in the Watchhouse are very similar to those of the total detention population as discussed in Part 2. Disorderly behaviour was the reason for 59% of detentions (the second highest proportion for all age groups after 18–25 year olds). Protection from harm was the reason in 31% of cases, injury to self 5%, injury to others 3% and damage to property 2%.

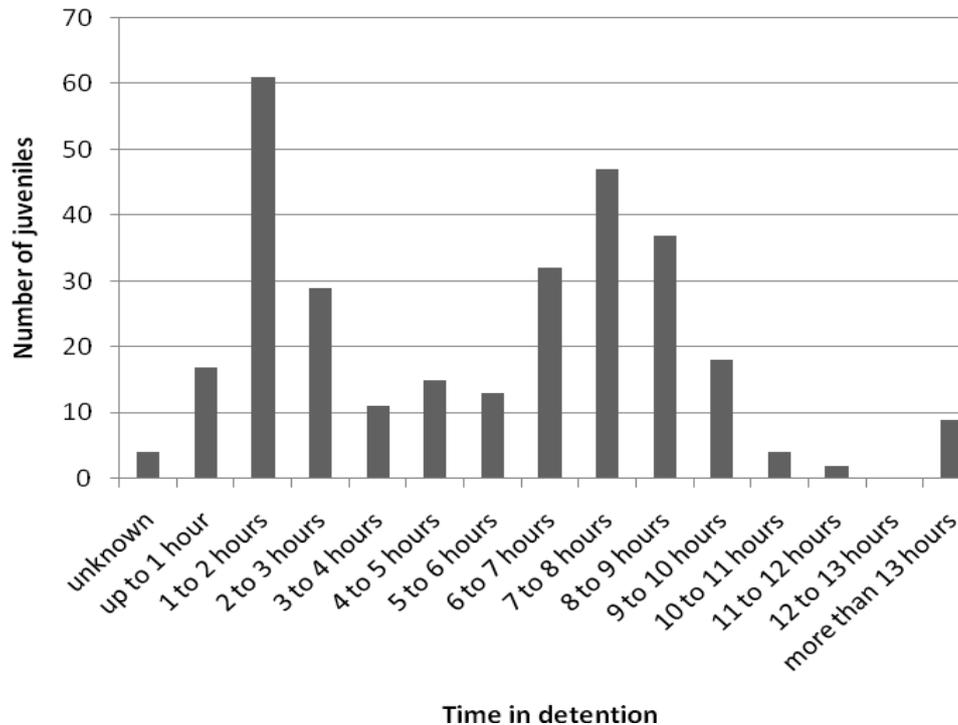
4.40 Figure 12 shows the length of time juveniles have been kept at the Watchhouse because of intoxication since 2003. There is a clear difference from the overall detention patterns across all age groups. Over a third of juveniles (36%) were released within the first three hours, no doubt reflecting police efforts to release them from custody to a parent's care where appropriate. However, like the adults, many juveniles (24%) remained beyond the eight-hour detention limit, although it appears that eight of the nine cases where a time of more than 13 hours was recorded contained errors.⁷²

⁷⁰ *Children and Young People Act 1999* (ACT), s 80.

⁷¹ *Children and Young People Act 1999* (ACT), s 85.

⁷² The AFP's comparison of incident start times indicated that six cases were probable errors in use of the 24-hour clock and in one case, the time of detention may not have been correct, based on the time those with him were detained. In the last case a juvenile remained until his sister collected him in the morning, despite attempts by Watchhouse staff to contact his family the previous evening.

Figure 12—Watchhouse detention times for juveniles, 2003 to 2008



4.41 In our sample of 99 cases from 2008, we deliberately over-represented juveniles (randomly sampling half of the 34 juveniles detained in the period) so as to examine their time in detention and details of their release. Examination of the records provided by the AFP showed that attempts had been made to contact parents in 15 of the 17 cases, with information lacking in the other two cases. Four juveniles were released into the custody of their parents. In two other cases, when the parent came to the Watchhouse, the juvenile was not released at that time due to aggressive behaviour and was released some hours later. In another case, police recorded that the mother of a 17-year-old had said she was happy for her son to remain in the Watchhouse until he was sober. In the remaining ten cases, the circumstances of the juvenile’s release were unclear, although a detention period of less than an hour in two of those cases suggested that a responsible person may have collected the juvenile. Full details of the responsible adult were not always recorded in the Cell Management records, with references such as ‘his father’ and ‘his parents’ sometimes appearing to be the total recorded information.

4.42 In summary, while a large proportion of juveniles held for intoxication are detained for many hours, it is evident that police are mindful of their responsibility to contact a parent or guardian and are making attempts to do so and to release the juvenile into their care where appropriate. Unfortunately in some cases, there appears to be no alternative to keeping them in the Watchhouse.

Health care support at the Watchhouse

4.43 The 2001 report recommended that the AFP explore the possibility of providing health-care support for intoxicated persons held at the Watchhouse (recommendation 3). As discussed in Parts 1 and 3, in the past 18 months a new medical service provider, Clinical Forensics ACT, has been providing medical services to the Watchhouse. Feedback both from Clinical Forensics ACT staff and from AFP officers suggests that there has been an improvement in health care services provided to those in custody and a greater willingness by Watchhouse staff to seek medical assistance, as comments from two officers suggest:

... it was great to hear the FMO [Forensic Medical Officer] is so accessible, in the past I have been reluctant to contact them unless it was urgent.

and

I believe that presentations such as today assist in reinforcing the importance of medical assessment of all detainees and help to overcome the inevitable complacency that occurs when dealing with dozens of detainees.⁷³

4.44 General custody issues are explored in more detail in the review of the Watchhouse report referred to in Part 1. Accordingly we have made no recommendation about health care services at the Watchhouse as part of this investigation, other than that concerning police training discussed in Part 3.

⁷³ AFP officer evaluations, Beat Squad Medical Training provided by Clinical Forensics ACT, 2008.

APPENDIX 1—AFP RESPONSE TO THE 2001 REPORT

Following is the AFP's response to the 2001 report recommendations, provided to this office in May 2008.

AFP use of powers under the *Intoxicated Persons (Care and Protection) Act 1994 (ACT)* after the report by the Commonwealth Ombudsman

In response to the report by the Commonwealth Ombudsman, (2001) Own Initiative Investigation: AFP Use of Powers under the *Intoxicated Persons (Care and Protection) Act 1994 (ACT)*, ACT Policing has adjusted its practices in relation to the conferred powers. The report referred to two AFP ACT Policing Guidelines which have now been revoked, these are *Guidelines for Best Practice 4/96: Care of People in Police Custody* and *Guideline for Best Practice 30/97: Watch House*. Those Guidelines which currently inform ACT Policing practice are referred to as 'Practical Guides' and are mentioned under the appropriate recommendations.

Recommendations

- 1. The AFP should revise Guidelines to state that 'Where appropriate, a non-aggressive individual who is responding to police directions should be transported in a sedan'.**

This recommendation has been adopted by the AFP. Section 18(e) of the *ACT Policing Practical Guide: Persons in Custody* now states: 'Where appropriate, a non-aggressive person who is responding to police directions should be transported in a sedan.'

- 2. The AFP should continue to ensure that officers exercise care when transporting intoxicated persons, especially in caged vehicles.**

This recommendation has been adopted by the AFP and specific reference is made in the *ACT Policing Practical Guide: Persons in Custody* to safe transportation of intoxicated persons. The relevant sections in this Guide are section 18 (c) which states:

Extreme care is to be taken when transporting people in custody who are under the influence of alcohol or drugs, or appear to be suffering from a medical condition [original emphasis]

and s. 18 (d):

In instances where an intoxicated person is taken into protective custody and a caged vehicle is utilised members must be vigilant to ensure the safety of the individual. For example, an intoxicated person could lapse into unconsciousness and inhale vomitus causing respiratory collapse. The reduced motor skills of an intoxicated person may also be sufficient for that person to accidentally injure themselves. The onus is on police to minimise any potential for injury when exercising custody powers.

3. The AFP should explore the possibility of providing health-care support for intoxicated persons held at the Watch-house.

At present, there does not appear to be an adoption of this recommendation by the AFP. This recommendation, however, was made at a time when a sobering-up shelter did not exist and the health-care support was left entirely to Watch-house staff. The Department of Health and Community Care (as cited in 3.71 of the 2001 Report) found that Watch-house staff were 'providing a satisfactory level of care'. The form of health-care support provided by the Watch-house at present is the release of intoxicated persons into the custody of a licensed place, such as the Sobering Up Shelter at Ainslie, as under the *Intoxicated Persons (Care and Protection) Act 1994* (ACT) (the Act). Under the ACT Policing Practical Guide: ACT Sobering Up Facility, if a person meets the eligibility requirements (s.6), they may be transported to the facility.

It should also be noted that those persons ineligible for transportation to the facility are often aggressive and the primary concern of Watch-house officers is to ensure their immediate safety from harm.

4. Officers of the Watch-house should be required to be more 'proactive' in pursuing releases of detainees into the care of a responsible person. Towards this end, AFP Guidelines 4/96 should be amended to make mandatory the consideration of early release to a responsible adult if appropriate and of consent is obtained.

This recommendation does appear to have been translated into AFP guidelines. The referenced Guideline has been revoked and the relevant guideline is now *ACT Policing Practical Guide: Persons in Custody*, in particular section 11. At 11 (g) it states:

Within the eight-hour detention period, a member who has custody of an intoxicated person will consider the possibility of releasing the person into the care of a responsible adult, if in the opinion of the member it is reasonable and appropriate to do so.

The use of the directive 'will' implies that it is mandatory for officers of the Watch-house to consider early release of detainees if appropriate. This is also a change from the *Guidelines for Best Practice 4/96: Care of People in Police Custody* which employed the word 'may' in relation to considering early release.

The issue of consent is addressed at 11 (h) of the ACT Policing Practical Guide:

If the intoxicated person is fit to nominate a responsible person, and subject to their clear and unambiguous consent, a member will ensure reasonable attempts are made to contact that nominated person and ascertain their suitability and willingness to assume the responsibility for the care of the intoxicated person.

Thus, in the relevant ACT Policing Guidelines, the consideration of early release is made to be a mandatory requirement if it is appropriate and consent can be obtained.

5. The AFP should review Guidelines to provide a clear statement of the rights of a person held in protective custody to communicate with a legal representative and/or friends or relatives.

The guideline which addresses this recommendation is *ACT Policing Practical Guide: Persons in Custody* at section 3(b) which states that:

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All persons in custody must be advised promptly that they are entitled to have access to facilities to enable them to communicate with a legal practitioner and/or a relative or friend. Where such a request is made these facilities are to be made available at the time of the request, or in any case, as soon as is practicable to do so. If the person has difficulties speaking, hearing or understanding the English language, an interpreter service must be provided.

At present, the AFP guidelines refer to the legal rights of people in custody, not specifically protective custody. However, the guidelines are still applicable to those detained under the Act as they are held in a form of custody.

6. The AFP should ensure that officers accurately and consistently record lodgement and release times for those in protective custody, possibly involving adjustments to the fields and messages in the AFP PROMIS system.

The AFP has implemented more comprehensive requirements in record keeping than suggested by the recommendation. In section 11(m) of the *ACT Policing Practical Guide: Persons in Custody* it requires that:

Where an intoxicated person is detained in protective custody, Watch House staff will conduct half hourly cell checks and record those checks within the PROMIS Cell Management system. Where a person is still in custody after four hours, the Watch House Sergeant will create a Cell Management record that will acknowledge existing cell checks and include their observations of the person.

7. The AFP should review Watch-house recording procedures to ensure that sufficient information in relation to early release is recorded, including identification of the responsible adult, any attempts at contacting a responsible adult, and any reasons for not contacting a responsible adult.

This recommendation has been implemented by the AFP and is cemented in the *ACT Policing Practical Guide: Persons in Custody*. The relevant sections are 11(i) and (j) which state that:

- (i) When a member releases an intoxicated person into the care of a responsible person the member will ensure that a record is made of the incident in PROMIS. The record should, where practicable, include identification details of the responsible person.
- (j) When an intoxicated person is released from the City Watch House into the care of a responsible person, the Watch House Sergeant will ensure that sufficient details are entered into the PROMIS System including, but not limited to:
 - (i) a record of attempts made to contact a responsible person;
 - (ii) any reasons for not contacting a responsible person;
 - (iii) the time of release; and
 - (iv) identification details of the responsible person.

There is also reference in the *ACT Policing Practical Guide: ACT Sobering Up Facility* at section 8(h) to this recommendation:

When a member releases an intoxicated person into the care of a Manager/Carer of a facility the member will ensure that a record is made of the incident in PROMIS. The record should, where practicable, include identification details of the responsible person. A task will be sent through PROMIS to the Drug and Alcohol Policy Coordinator advising of the lodgement at the facility.

It can be seen that the AFP instructs its members to record as much detail as possible about those persons detained in the Watch-house under the Act.

8. The AFP should review Watch-house procedures to ensure that persons in protective custody are not detained for longer than eight hours.

There is no explicit reference to ensuring persons are not detained for longer than eight hours in AFP Guidelines. This recommendation is addressed through the requirement that AFP member wholly comply with the Act which would necessitate detention for no longer than eight hours. The *ACT Policing Practical Guide: Persons in Custody* refers to procedures to be followed by Watch-house officers in order to comply with the Act. The early release of detainees is encouraged which would inhibit the opportunity for persons in protective custody to remain so for more than eight hours. In particular, section 11(k) states that:

If no other option is available for the release of an intoxicated person, they may be lodged in the Watch House. Such persons should be released as soon as possible after the person is deemed to have recovered to a point where they are no longer at risk.

Many of the persons detained under the Act are well known to the police and will often consent to stay in custody for up to 12 hours. This is so that they are released after a comfortable night's sleep and leave the Watch-house in daylight hours when they can more easily make their way home.

9. The AFP should amend its Guidelines to provide clear guidance to officers on charges for street offences or the use of other powers, such as breach of the peace, as an alternative to protective custody where appropriate. This should include a clear distinction between 'disorderly conduct' for the purposes of protective custody and 'offensive behaviour' for the purposes of charging.

As such, this recommendation has not been adopted by the AFP. It is still up to the discretion of officers as to how they react to intoxication and the threat to the person, community and property.

10. The AFP should ensure that Guidelines make clear the need for officers to be reasonably satisfied as to the causal link between a person's intoxication and the existence of one of the three legislative criteria (disorderly behaviour, protection from harm, risk of injury or property damage) before taking that person into protective custody.

The AFP guidelines make specific reference to the Act and the need for reasonable belief/satisfaction as to the causal link for the purposes of applying the powers under the Act. In *ACT Policing Practical Guide: Persons in Custody*, the relevant sections are 11(a) and (b) which note that:

- (a) The Intoxicated Persons (Care and Protection) Act 1994 (IPCPA) allows members to take intoxicated people into protective custody and decriminalises public intoxication, focusing on the care and protection of people (including other members of the public) and property (including the intoxicated person's property).
- (b) Section 4 of the IPCPA provides for the detention of a person who, being found in a public place, is reasonably believed to be intoxicated and as a result of which is:
 - (i) behaving in a disorderly manner; or
 - (ii) behaving in a manner likely to cause injury to himself, herself or another person, or damage to any property; or

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(iii) incapable of protecting himself or herself from physical harm;

the officer may take the person into custody and detain him or her only if the officer is satisfied that there is no other reasonable alternative for the person's care and protection.

It can be seen that by ensuring AFP members understand the Act, they will understand the necessity of establishing a causal link between intoxication and the legislative criteria.

11. The AFP should revise Guidelines to include a documented review by the officer-in charge of the City Watch-House of any case of an intoxicated person detained in protective custody at the four-hour point.

This recommendation has not been adopted by the AFP in its specific terms, however, section 11(m) of the *ACT Policing Practical Guide: Persons in Custody* allows for such a review to occur:

Where an intoxicated person is detained in protective custody, Watch House staff will conduct half hourly cell checks and record those checks within the PROMIS Cell Management system. Where a person is still in custody after four hours, the Watch House Sergeant will create a Cell Management record that will acknowledge existing cell checks and include their observations of the person.

This section suggests that the involvement of the Watch-house Sergeant at the four-hour point is an informal review from a superior officer on the actions of Watch-house staff. At this point in time, the Sergeant may release the person or continue to detain them, keeping a well-documented record of their experience in the Watch-house.

APPENDIX 2—OTHER JURISDICTIONS

State and territory legislation in relation to detention of intoxicated people is outlined below, together with some information on sobering up centres where publicly available.

More detail on the law, policies and procedures in NSW, the Northern Territory, South Australia and Western Australia as at 2001 is contained in the report of the Victorian Parliament's Drugs and Crime Prevention Committee on public drunkenness.⁷⁴

New South Wales

Until 2002, the *Intoxicated Persons Act 1979* (NSW) allowed police in NSW to detain a person found intoxicated by alcohol in a public place, on similar grounds to those applying in the ACT. Police could release the person to the care of a responsible person, detain the person at a police station in certain circumstances, or take the person to a government or non-government facility that was a proclaimed place under the Act. A person running a proclaimed place had the power to detain intoxicated people.

In 2000 those laws were significantly revised, particularly in terms of removing the detention powers in proclaimed places and extending the legislation to intoxication by other drugs. The legislative amendments aimed to ensure, amongst other things, 'that police retain the power to detain intoxicated persons where there is no other alternative; ensure that detention of intoxicated persons in police cells is only where it is necessary to do so, for example where the intoxicated person is violent or where there are no practical alternative places at the police station ...'⁷⁵

The current NSW legislation, the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), allows a police officer to detain an intoxicated person found in a public place where the person is behaving in a disorderly manner or in a manner likely to cause injury to that person or another or damage to property, or is in need of physical protection because of the person's intoxication (s 206(1)). The Act specifies that a police officer is not to detain a person under its provisions because of behaviour that constitutes an offence. An 'intoxicated person' is defined as a person who appears to be seriously affected by alcohol or another drug or a combination of drugs (s 205), as compared with the ACT where the requirement is only that the person be 'affected'.

The intoxicated person must be taken to and released to the care of a responsible person who is willing immediately to undertake the person's care (s 206(3)) and capable of undertaking that care. A responsible person includes a friend or family member, or a member of staff of a government or non-government organisation or facility providing welfare, alcohol or drug rehabilitation services (s 205). A responsible person does not have the power to detain the intoxicated person (s 206(6)).

An intoxicated person may be detained in an 'authorised place of detention' (a police station or a juvenile detention centre) only in three situations:

⁷⁴ Drugs and Crime Prevention Committee, *Inquiry into public drunkenness*, Parliament of Victoria, 2001, Part G.

⁷⁵ Mr Bryce Gaudry MLA, *Intoxicated Persons Amendment Bill 2000: Second Reading Speech*, *Hansard*, 30 May 2000.

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- if it is necessary to do so temporarily in order to find a responsible person,
- if a responsible person cannot be found, or the intoxicated person is not willing to be released into the care of a responsible person and it is impracticable to take the intoxicated person home, or
- if the intoxicated person is behaving or is likely to behave so violently that a responsible person would not be capable of taking care of and controlling them (s 206(4)).

An intoxicated person detained in police station or juvenile detention centre must be given a reasonable opportunity by the person in charge to contact a responsible person, and must be released as soon as he or she ceases to be intoxicated (s 207(2)). The person must not be detained in a cell unless it is necessary or it is impracticable to detain the person elsewhere in that facility. The person must, as far as is reasonably practicable, be kept separately from any person detained for an offence (s 207(2)).

Northern Territory

Under the *Police Administration Act 1996* (NT), police may apprehend an intoxicated person found in a public place or trespassing on private property (s 128). Intoxicated is defined as 'seriously affected apparently by alcohol or a drug' (s 127A). Unlike all other jurisdictions where public drunkenness has been decriminalised, there is no further requirement in relation to the person's behaviour or risk of harm.

The person may be held in police custody for as long as it reasonably appears to police that the person remains intoxicated (s 129(1)). After six hours, if the person is still intoxicated, a senior police officer of at least the rank of superintendent may authorise the person's continued detention to a maximum of 10 hours (s 132(2)), and in such a case police must arrange for a health practitioner (a doctor, nurse or Aboriginal health worker) to examine the person as soon as practicable. At any time during detention, the intoxicated person may ask to be taken before a justice to apply for release, and the officer must do so 'forthwith' if it is reasonably practicable (s 133).

At any stage police may release the person into the care of a person whom they reasonably believe is capable of taking adequate care of the intoxicated person, unless the intoxicated person objects (s 131).

South Australia

Legislation

The *Public Intoxication Act 1984* (SA) enables police or other authorised officers to detain a person who is in a public place under the influence of a drug or alcohol only if the person is unable to take proper care of himself or herself (s 7(1)).⁷⁶ 'Drug' is defined as any substance declared to be such for the purposes of the Act (s 5(1)). As soon as reasonably practicable the person must be taken to one of several places listed in the Act: to the person's place of residence, to an approved place under the Act, to a sobering up centre for admission as a patient, or to a police station (s 7(3)). The legislation contains no preference as to disposition of the person.

⁷⁶ While disorderly behaviour is not a ground for detention of an intoxicated person, it is an offence to behave in a disorderly or offensive manner in a public place (*Summary Offences Act 1953*, s 7).

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The maximum period of detention at a police station is ten hours. A detainee must be discharged if, in the opinion of the officer-in-charge, the detainee has recovered sufficiently to be able to take care of himself or herself. If not, the person must be transferred to a sobering up centre at the end of the ten-hour period (s 7(4)). In contrast to other jurisdictions where sobering up centres do not have detention powers, the South Australian legislation contains provisions allowing sobering up centres to detain an intoxicated person as a patient for up to 18 hours or until he or she is able to take care of himself or herself (s 7(5)). However, as at 2001 those provisions had not been proclaimed and were considered unlikely to be.⁷⁷ Where a solicitor, relative or friend requests that the person be discharged into their care, and the officer-in-charge is satisfied that the person is willing and able to provide proper care, the person must be discharged (s 7(9)).

It is an offence to ill-treat or wilfully neglect a person detained under the Act (punishable by \$2000 or imprisonment for one year). A person may apply within 30 days of discharge to a court of summary jurisdiction for a declaration that he or she was not under the influence of a drug or alcohol at the time of detention (s 8).

There has been a steady decline in police apprehensions for intoxication since 1986–87, when 7,914 people were detained (of whom 4,073 were in Adelaide). In 1999–2000, police detained 2,729 people (of whom 1,229 were in Adelaide).⁷⁸

Sobering up centres

In 2001, there were three sobering up centres in Adelaide and two in regional South Australia (Ceduna and Port Augusta), with another proposed for Coober Pedy. In 1999–2000, police took 23% of the people detained under the Act to their home and 21% to sobering up centres.⁷⁹

Tasmania

Under amendments to the *Police Offences Act 1935* (Tas) that came into operation in 2002⁸⁰, a police officer may detain an intoxicated person who is in a public place and whom the officer reasonably believes to be behaving in a manner likely to cause injury to himself, herself or another person, or damage to property, or to be incapable of protecting himself or herself from physical harm (s 4A(2)).⁸¹ The officer may release the person to a responsible person or a place of safety (defined as a hospital, charitable institution or other appropriate facility capable of caring for an intoxicated person, or a place declared by the Minister) (s 4A(3)). The intoxicated person may only be held in police custody if the officer has made reasonable inquiries to find a place of safety or responsible person and has been unable to do so (s 4A(4)).

Police may detain the person for eight hours or when police consider release to be reasonable, whichever is earlier (s 4A(6)). If at the end of eight hours a police officer of or above the rank of inspector believes on reasonable grounds that the person

⁷⁷ Drugs and Crime Prevention Committee, *Inquiry into public drunkenness*, 2001, page 250.

⁷⁸ Unpublished data on apprehensions and sobering up centre admissions from the Drug and Alcohol Services Council (SA), March 2001, cited in Drugs and Crime Prevention Committee, *Inquiry into public drunkenness*, Parliament of Victoria, 2001, page 251.

⁷⁹ Data supplied by the Drug and Alcohol Services Council (SA) to the Drugs and Crime Prevention Committee, *Inquiry into public drunkenness*, Parliament of Victoria, 2001, pages 252–253.

⁸⁰ *Police Offences Amendment (Public Drunkenness) Act 2000* (Tas), applied in March 2002.

⁸¹ It is an offence to engage in disorderly conduct or disturb the public peace in a public place (*Police Offences Act 1935* (Tas), s 13).

remains likely to cause injury or damage property or is incapable of protecting himself or herself, the person may be detained for a further four hours (s 4A(6A)).

Western Australia

Legislation

Drunkenness was decriminalised in Western Australia in 1990.⁸² The current legislation, the *Protective Custody Act 2000* (WA), covers intoxication by both alcohol and other drugs.

An authorised officer (a police officer, a community officer appointed by the Commissioner of Police, or a security officer under the *Public Transport Authority Act 2003* (WA)), may apprehend a person who is in a public place or trespassing on private property if the officer reasonably suspects the person is intoxicated and needs to be apprehended to protect the health or safety of the person or any other person, or to prevent the person causing serious damage to property (s 6). There is no provision for detention on the basis of disorderly behaviour.

The person may not be detained when no longer intoxicated, or for any longer than is necessary to protect the health and safety of any person, or to prevent the person causing serious damage to property (s 7(2) and s 7(3)). If the person is in a police station or lock-up, a police officer may decide not to release the person between midnight and 7.30am if release during those hours is not in the person's best interests (s 7(4)), but in such circumstances the police officer must record reasons for that decision (s 7(5)). Detention in a police station or lock-up is only permitted if exceptional circumstances arise in the time needed to comply with the release of the person into another's care, or if it is impracticable to release the person into another's care (s 12(4)).

An authorised officer must release an intoxicated person, as soon as practicable, into the care of another person who applies for their release and who is reasonably believed to be capable of taking care of the person, unless (if the intoxicated person is an adult) the person objects. Alternatively, the authorised officer may release the person into the care of a person in charge of an approved facility (s 13(1)). In the case of juveniles, the authorised officer must give paramount consideration to the juvenile's safety and welfare (s 11(2)). There is no maximum limit on the time for which a person may be detained, but if after eight hours the authorised officer reasonably believes the person cannot be released, the person must be taken before a justice of the peace so that detention can be reviewed and appropriate directions made (ss 18 and 19).

'Intoxicated' is defined as affected or apparently affected by alcohol or a drug or other substance to such an extent that there is a significant impairment of judgement or behaviour (s 3).

Sobering up centres

The first sobering up centre opened in inner city Perth in May 1990 and is managed by the Salvation Army. It primarily provides a service to the East Perth police lock-up and is co-located with a detoxification centre.⁸³ Sobering up centres were progressively established in identified high priority areas of the state, particularly in

⁸² When the *Acts Amendment (Detention of Drunken Persons) Act 1989* commenced.

⁸³ Drug and Alcohol Office, *Utilisation of Sobering Up Centres 1990–2002*, Statistical Bulletin No 17, September 2003, page 1.

remote northern regions. By 2005 there were 14 centres, of which three were in Perth and six in the Kimberley region in the north.⁸⁴

Between 1992 (the first full year complete police data was available) and 2005, annual admissions to sobering up centres grew from 3,613 to 19,280, and annual police detentions for drunkenness dropped from 12,346 to 1,972, that is, a decline of 84%.⁸⁵ Much of the growth in admissions to sobering up centres was in the Kimberley region (which had 11,022 admissions in 2005).⁸⁶ Nonetheless, there were 35,388 admissions to the three Perth sobering up centres from 1990 to 2005, compared with only 2,130 detentions in police lockups in the catchment areas serviced by those sobering up centres from 1992 to 2005.

In contrast to the ACT where more than two thirds of police detentions for intoxication since 2003 have been of people under 30, most people admitted to sobering up centres in Western Australia between 1992 and 2005 were older (for example, most of those admitted to the main Perth centre were males aged 35 to 49), although there were significant regional variations. The vast majority of those admitted to sobering up centres were Indigenous.

Queensland

In Queensland, public drunkenness is still an offence under the *Summary Offences Act 2005* (Qld) (s 10). However, police may discontinue the arrest of an intoxicated person if satisfied it is more appropriate that the person is taken to a place where he or she can receive the necessary treatment or care to recover safely (*Police Powers and Responsibilities Act 2000* (Qld), s 378). Police have a duty to take the person to the place of safety and release him or her at the earliest reasonable opportunity (s 378(2)).

In Brisbane a diversionary service for intoxicated Indigenous people in police custody is provided by Murri Watch. As well as providing a watchhouse cell visitor service for Indigenous people, the Diversionary Centre, open seven days a week, accepts intoxicated persons from the watchhouse as well as those referred by other agencies. The Centre accommodates both male and female clients over 17 years of age. It provides a short-term sobering-up support service for those who are at risk to themselves or others because of their inebriated state and who are prepared to admit themselves voluntarily.

Victoria

In Victoria, public drunkenness remains a criminal offence. Two recent parliamentary committee reports have recommended decriminalisation of public drunkenness and the establishment of sobering up centres⁸⁷, supporting legislation similar to the NSW model but extending beyond public places to include intoxicated people found trespassing on private property. The Victorian Ombudsman and Office of Police

⁸⁴ One centre in Midland operated from June 2002 to June 2006.

⁸⁵ Drug and Alcohol Office, *Utilisation of Sobering Up Centres 1990–2005*, Statistical Bulletin No 36, June 2007, page 5.

⁸⁶ Drug and Alcohol Office, *Utilisation of Sobering Up Centres 1990–2005*, Statistical Bulletin No 36, June 2007, page 3.

⁸⁷ Drugs and Crime Prevention Committee, *Inquiry into public drunkenness*, Parliament of Victoria, 2001, Recommendations 3–7; *Inquiry into strategies to reduce harmful alcohol consumption*, Parliament of Victoria, 2006, vol 1, Recommendation 17.

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Integrity supported those recommendations in 2006⁸⁸, as did the Victorian Law Reform Commission in 2007.⁸⁹

Recently the Victorian Government announced funding of \$32 million over five years to implement an Alcohol Action Plan.⁹⁰ While decriminalisation of drunkenness is not mentioned, the Plan includes a 2 am lock-out in licensed premises in inner Melbourne areas for a trial period of three months from 3 June 2008, following successful trials in regional areas. An analysis of the trial is to be put to the Ministerial Council on Drugs and Alcohol in December 2008. The Plan also includes a 12-month freeze on late night liquor licences in inner city areas where venues are clustered together.

⁸⁸ Ombudsman Victoria and Office of Police Integrity, *Conditions for persons in custody*, 2006, page 64.

⁸⁹ Victorian Law Reform Commission, *Review of the Bail Act*, 2007, Recommendation 146.

⁹⁰ Victorian Government, *Victoria's Alcohol Action Plan 2008–2013*, May 2008.

ABBREVIATIONS AND ACRONYMS

ACT	Australian Capital Territory
AFP	Australian Federal Police
AFP Sobering Up Facility Guidelines	<i>ACT Policing: Practical Guide: ACT Sobering Up Facility</i>
CATT	Crisis Assessment and Treatment Team
Cth	Commonwealth
Custody Guidelines	<i>ACT Policing: Practical Guide: Persons in Custody</i>
DPP	Director of Public Prosecutions (ACT)
IPCP Act	<i>Intoxicated People (Care and Protection) Act 1994 (ACT)</i>
NSW	New South Wales
NT	Northern Territory
Qld	Queensland
s	section
SA	South Australia
Shelter	Sobering Up Shelter at Minosa House
Tas	Tasmania
Vic	Victoria
WA	Western Australia
Watchhouse	Regional Watchhouse (previously the City Watchhouse)
1998 Report	Commonwealth Ombudsman, <i>Investigation into the use of police powers under the Intoxicated Persons (Care and Protection) Act 1994 (ACT)</i> , 1998
2001 Report	Commonwealth Ombudsman, <i>AFP use of powers under the Intoxicated Persons (Care and Protection) Act 1994 (ACT)</i> , 2001