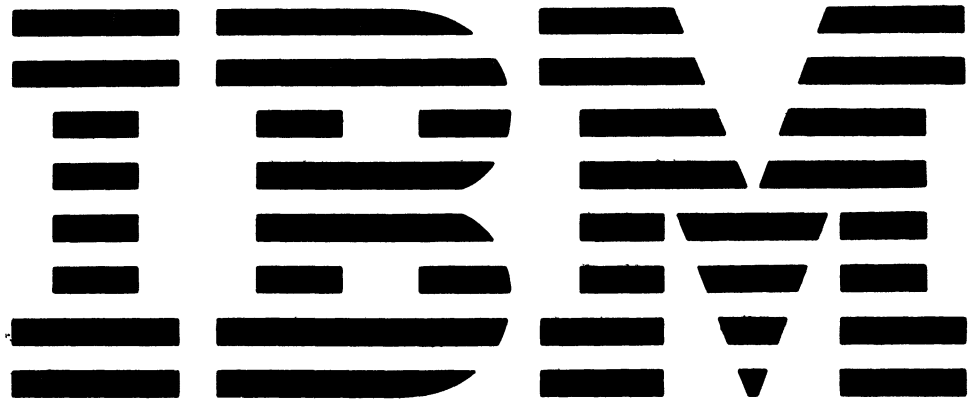

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Public drunkenness: no offence taken?

Gordon W. Stewart*

In 1981 public drunkenness was removed from the list of criminal offences in New Zealand. In its place, the police were given powers to remove intoxicated persons to their homes, to a temporary shelter, a detoxification centre, or as a last resort to a police station. Gordon Stewart examines this new development in the law and, in particular, the effect it has on the role of the police.

I. INTRODUCTION

In 1981, Parliament replaced the Police Offences Act 1927 with the Summary Offences Act 1981. This new legislation enacted that, among other changes, being found intoxicated in a public place would no longer be a criminal offence.[1]

Under section 41 of the old Police Offences Act, the situation regarding public intoxication was clear, albeit perhaps unpopular and controversial:

> *Persons found drunk* — Every person found drunk in any public place is liable —
>
> (a) To a fine not exceeding $20;
>
> (b) On a third conviction within a period of 6 months, to imprisonment for any term not exceeding 14 days, or, at the discretion of the convicting Court, to a fine not exceeding $20 . . . ; and
>
> (c) On any subsequent conviction within such period of 6 months, to imprisonment for any term not exceeding 3 months.

Section 42 of that Act empowered the police to deliver a serviceman found drunk into Armed Forces' custody, and section 44 prescribed the attention to be given by police and judges to arrested drunks, and covered such areas as the duty to regularly inspect the arrested person in his cell, the duty to prevent the arrested person suffering from cold or exhaustion, the duty to procure medical attention if necessary, the possibility of remanding the arrested person to a hospital and the effects of this move, the issue of expenses being recoverable from the arrested person, and the action to be taken in the event of default of such payment.

Sections 41, 42 and 44 were repealed by section 49 of the Summary Offences Act 1981, which also inserts the new section 37A into the Alcoholism and Drug Addiction Act 1966. This has the effect of making drunkenness no longer a criminal offence.

* This paper was presented as part of the LL.B. (Honours) programme.

1 Section 47, Summary Offences Act 1981.

The following article focusses on the new provisions in the Alcoholism and Drug Addiction Act 1966. It is divided into four sections: (1) the need for decriminalisation, (2) the method of decriminalisation — section 37A, (3) the legal aspects of that decriminalisation and (4) the immediate results of decriminalisation.

II. THE NEED FOR DECRIMINALISATION OF PUBLIC DRUNKENNESS IN NEW ZEALAND

Speaking on law reform in general, the Canadian Law Commission made an observation which is highly appropriate to the present topic:[2]

> Often . . . the letter of the law isn't the main problem. The rules themselves, not just their wording, may need change . . . The values which those rules enshrine may be untenable or no longer be the values of the society those rules serve . . . [Law reform] must consider how the law is thought of and accepted by the society it serves. It must examine how far the law and social attitudes to it are justified.

In New Zealand, the Police Offences Act 1927 provided a definite illustration of the Canadian Law Commission's point. The Act was far from contemporary. As the Hon. Mr. J. McLay, M.P., pointed out in 1981:[3]

> The present Act is more than 50 years old. Although some of its provisions are of more recent vintage, others can be traced directly back to English legislation of 1824. Some of those provisions, in turn, have their roots in social and legal concepts from the fourteenth and sixteenth centuries.

But it was not only in Parliament that disaffection with the Act had been evident. There were murmurings of discontent from the police, from concerned parties — such as social, medical and justice-related groups — and from the public in general. These grumblings led to a call being made for a review of the law:[4]

> Wednesday, the 7th day of March 1973.
> On motion of the Hon. Dr. Finlay, it was ordered that the Statutes Revision Committee be instructed to consider the Police Offences Act 1927 and to report to the House what changes, if any, it considers should be made in the law in the light of the present day attitudes and social conditions.

In the course of this review, the Committee, in a novel move for its day, called for public submissions on the existing Police Offences Act.

The interested and disgruntled parties were not slow to respond. The Select Committee received forty eight submissions from a wide variety of bodies and individuals[5], with the submissions' span of 292 pages being a graphic indication of the depth and length to which the concerned witnesses felt bound to go.

2 Law Reform Commission of Canada *Third Annual Report 1973-74: A True Reflection* (Information Canada, Ottawa, 1974) 4.

3 New Zealand Parliamentary debates Vol. 437, 1981: 418, Hon. Mr. J. K. McLay, M.P.

4 Statutes Revision Committee *Report on Police Offences Act 1927* New Zealand. Parliament. House of Representatives. Appendix to the journals, vol. 4, 1974, I.5A: 4. (Commonly referred to as 'The Finlay Report'.)

5 Forty-six of which are available to the public, and it is they which span the 292 pages. The submissions of the Department of Justice and the New Zealand Police Department remain a closed book.

The submissions touched upon all aspects of the old Police Offences Act, with the central theme being one of discontent. That the Act was outdated was unquestionable. That some of its provisions were downright antiquated was even more obvious. The Act had been the product of a now alien values system. It had grown through days when moral wrongs were offences, when sins were crimes. In those times was spawned the criminal offence of public drunkenness.

It cannot be denied that some justification for this offence's existence can be found, for instance that drunkards may be more likely to participate in subsequent criminal activity. However, much of the premise of the offences lay in the values of the day: it was not "right" to be drunk in public, it was a sin, an aggravant to crime, an indication of a heinously intemperate person.

Although no longer viewed through such strict Victorian eyes, traces of that attitude may still linger on, but not emphatically enough to warrant the continuance of the criminal offence. Consequently, when in 1973 it was conceded that much of the foundation for the offence was gone, it was a logical corollary that the offence itself should no longer stand. It was not merely a change in public attitudes that led to this. Medical opinion, for instance, played a major part: drunkenness, it could be argued, reflected alcoholism, and alcoholism is a disease, not simply a chosen lifestyle. Drunkenness was symptomatic of an illness, it was not deliberate wrongdoing.

Further, jurisprudential questions had been raised: to penalise drunks did absolutely nothing to deter them from recommitting, nor did it lend itself to rehabilitation. While a hefty fine made it more difficult for a person to get drunk again, that was hardly the equivalent of constructive rehabilitation. To punish for public drunkenness was largely ineffective. It simply amounted to punishing a person for a medical condition rather than for voluntary actions.

The aim of decriminalisation was not to ignore the problem, but to meet it by means other than those previously used. The submissions clearly illustrated this, and suggested new methods of dealing with the issue.

The Submissions

In so far as they related to section 41, the tenor of the submissions was that public drunkenness should no longer remain a criminal offence. Drunkenness, it was felt, was the symptom of a larger social problem and should be dealt with by more appropriate legislation.

It was recognised that there was some anomaly in a society displaying massive billboard enticements to 'Have a Beer' or such like, and then that same society, or its machinery of justice at least, turning around and penalising the person who accepts such an invitation:[6]

> In a society where alcohol is encouraged and is present at virtually every state, business or social function, those who become addicted to it are shunned and held in contempt, and victimised by the law.

6 Wellington Community Action Project (Inc.). Submission to the Statutes Revision Commitee, 1973.

The submissions went deeper, however, than to call blithely for decriminalisation of public drunkenness. Many specifically suggested moves to facilitate this recommendation. For example, several suggested the establishment of what have come to be, in the 1981 Act, temporary shelters and detoxification centres. The Auckland Council for Civil Liberties stated that " . . . the annoying drunk and the drunk without means could be taken away to a centre for a compulsory period to sober up . . . "[7] and the Faculty of Law of Victoria University said: "The police should be given a special power to compel the drunk to accompany them to a medical or detoxification centre."[8]

Tentative suggestions on the form and the administration of these centres/shelters accompanied the submissions: "Such centres to be run initially by voluntary labour and, if possible, by groups with no strong religious aversion to drink;"[9] and " . . . in the larger cities specific centres would be set up which could be under the control of the Health Department or private organisations . . . "[10] Those who examined the matter in greater depth went as far as to discuss the legality of such moves, with particular emphasis on the nature of the powers of detention which might be given to the police and to the centres/shelters under any new scheme, bearing in mind at all times the rights of the individuals:[11]

> It is, of course, not generally the practice to empower the Police to arrest persons for conduct which is not prescribed as an offence under the criminal law. However, there is a precedent provided by section 315(2)(a) and (b) of the Crimes Act 1961 which empowers a constable to arrest persons disturbing, or persons whom he has reasonable grounds for believing to have disturbed, the public peace. Also, such a provision does not lower the protection afforded a citizen by the civil law against false arrest and imprisonment.

Such is an illustration of the 1973 submissions, but it was not until the draft Bill of 1981 was introduced that these interested parties were provided with some substance into which they could truly sink their teeth. The draft Bill reflected many of the 1973 submissions, significantly the provision for the introduction of temporary shelters and detoxification centres.[12] The submissions of 1981 shared a common thrust in that almost without exception they all called for positive and concrete action to be taken on the implementation of centres/shelters. For example:[13]

> (1) While the "decriminalising" of the offence of drunkenness will undoubtedly result in the saving of time in the Courts, and the reduction of records, not a great deal

7 Auckland Council for Civil Liberties. Submission to the Statutes Revision Committee, 1973.

8 Faculty of Law, Victoria University of Wellington. Submission to the Statutes Revision Committee, 1973.

9 Idem.

10 Auckland Council for Civil Liberties, supra n.7.

11 R. A. Moodie. Submission to the Statutes Revision Committee, 1973.

12 Clause 50, Summary Offences Bill 1981. (Later to become s.49, Summary Offences Act 1981.)

13 (1) The Salvation Army. Submision to the Statutes Revision Committee, 1981. (2) Auckland Alcoholism Co-ordinating Committee. Submission to the Statutes Revision Committee, 1981, and (3) Faculty of Law, Victoria University of Wellington. Submission to the Statutes Revision Committee, 1981.

of social advance is going to result from the change unless adequate provision is made for night shelters and detoxification centres.

(2) However, it is considered essential that there must be concomitant funding made available to services or organisations prepared to operate detoxification facilities in cooperation with the police.

(3) We fear, however, that unless detoxification centres are established on a widespread basis, what may occur is the same old crowding of police cells with drunks "sleeping it off".

The appeals were genuine, but they were not to be answered in anything like the degree hoped. The Summary Offences Act 1981 made statutory provision for detoxification centres and temporary shelters, but their reality has so far been confined to the pages of the Act.

By creating section 37A of the Alcoholism and Drug Addiction Act, section 49 of the Summary Offences Act can be seen as purporting to have two goals: (i) to decriminalise public drunkenness and (ii) to provide positive aid in combatting alcoholism. Bearing in mind this dual aim, when section 37A is analysed as a whole, incorporating its contributory bodies — the Police and the Health Departments — the true effect of the legislation becomes clear.

III. THE METHOD OF DECRIMINALISATION — SECTION 37A

Section 37A will be dealt with in four stages. In this, part III of the article, there will be a broad description of the provisions of the section; a focus on what is clearly the primary element — the detoxification centres and temporary shelters; and finally, a consideration of some of the policy aspects of section 37A. In part IV, the legal aspects of section 37A will be addressed.

A. The Provisions of Section 37A: An Overview

Section 37A had two objectives. The first was to decriminalise public intoxication. The second was to tidy up existing police practice, but at the same time provide the police with a new alternative: in addition to taking the drunk home or to the cells, the police now have the option of taking him to a detoxification centre or temporary shelter. This was a step towards providing for the fight against alcoholism as a disease. These centres would be of official status, and would be designated as such by the Minister of Health in the Gazette.

If the drunk could not be taken home or to a centre/shelter, he could be detained in police cells for up to twelve hours, after which time he may leave or, if he is still intoxicated, be taken to a centre/shelter. Other provisions cover the rights of the prisoner, the state he should be in before being detained, and the justification of the constable acting in the detention.

B. The Detoxification Centres and Temporary Shelters

Section 37A(1) of the Alcoholism and Drug Addiction Act 1966 reads as follows:

Persons found intoxicated in public places — (1) For the purposes of this section, the Minister may from time to time, by notice in the Gazette, declare any premises to be a temporary shelter or a detoxification centre.

The first of the realities to which section 37A is subject is that there are as yet no centres or shelters gazetted for the purposes of the Act. It might be argued that by a not uncommon quirk of New Zealand legislative drafting, the Minister need never declare any premises. He is given the power, but not the duty or onus, to implement the intent of the section: he "may" declare premises to be centres or shelters, rather than he "shall".

Should the Minister interpret this as an absolute discretion, enabling him to do nothing at all if he so wished, then he may run the risk of attracting a writ of mandamus. However, this would be subject to three immediate difficulties inherent in and peculiar to actions against the Crown:

(1) When attempting to use mandamus as a lever to activate the performance of a duty, the applicant must first convince the court of his right to be granted legal standing — i.e., that he has a personal interest in the performance of the duty;

(2) The availability of mandamus, when the respondent is the Crown, is not assured. Depending upon the circumstances of the case, the Crown enjoys various degrees of immunity which can effectively block the action;

(3) When the exercise sought is the exercise of a discretion, rather than of a duty, the problem is complicated. With duties, the approach taken by the courts is understandably clearer:[14]

> Where . . . a duty has been directly imposed by statute for the benefit of the subject upon a Crown servant as persona designata, and the duty is to be wholly discharged by him in his own official capacity, as distinct from his capacity as an adviser to or instrument of the Crown, the courts have shown readiness to grant applications for mandamus by persons who have a direct and substantial interest in securing the performance of the duty.

Where a discretion is granted, however, the court (if, indeed, it even comes to consider the issue) must decide whether or not the discretion has been properly exercised, is on valid grounds, and is altogether intra vires the Act. This review is compounded if a minister's decisions fall into the policy ambit.

As regards section 37A, the realistic final point may be this: cleverly clothed in the appropriate language(e.g. by presenting a decision not to gazette as being based on financial constraints and current policies) a ministerial decision can be presented in such a form as to render judicial review impossible. The "may" in section 37A has the potential to undermine substantially the effect of the Act.

Proceeding however on the assumption that, "may" notwithstanding, the Act was drafted to be used, this article now moves to the question of what is envisaged by the Act when it speaks of detoxification centres and temporary shelters. To answer this question, the writer approached the Department of Health, within whose sphere much of section 37A now lies, and the Alcoholic Liquor

14 S. A. De Smith *Judicial Review of Administrative Action* (4 ed., Stevens, London, 1980) 554.

Advisory Council [ALAC], a "quango" already operating in the area of detoxification.[15]

The foundation upon which all views of the Health Department stand is that there is, in the Department's opinion, a great difference between detoxification (and consequently, detoxification centres) and "drying out" or "sobering up" (which, in terms of section 37A, equates with temporary shelter.)

Detoxification is the sophisticated, lengthy, medical process whereby a person's body chemistry is reconstituted to its healthy level. The poisons in the body are expelled, and the transition period, which, incidentally, is seen in terms of days and weeks, is closely monitored. It is often, in fact, the alternative to death, and may involve intensive care in its early stages.

This process, then, can be contrasted with the more idiomatic use of the term "detoxification" — simply put, the sobering-up period. There is a recognisable distinction between "medical" detoxification (the sophisticated process) and "social" detoxification (the sobering-up period; colloquially, a good night's sleep). By recognising this distinction from the outset, one has an understanding of how the Health Department will operate the scheme envisaged by section 37A when it eventually becomes established. Detoxification, in the Department's meaning, is the work of hospitals (whether private or public.) Sobering-up is more the task of the temporary shelters, since a great many drunks detained by the police will not need detoxification in its fullest sense.

(1) Detoxification centres

At present, Hospital Boards offer alcohol units, which provide long-term detoxification facilities. For two reasons, these units are unlikely to be gazetted as detoxification centres for the purposes of section 37A:

(1) To do this would mean subjecting these units to the possibility of attempted admission of drunks by the police, and these units are not geared to that type of operation. Rather, they are aimed at providing treatment for the medical problem that is alcoholism, and are based upon a system of voluntary admission.[16]

15 For assistance from these two organisations, I owe thanks to Dr. J. Roxburgh and Mr. P. Butler, both of the Department of Health, and to Mr. K. Evans, Alcoholic Liquor Advisory Council, Wellington.

16 Under s.9 of the Alcoholism and Drug Addiction Act 1966, a District Court Judge is given the power to order the detention and treatment of an alleged alcoholic upon request by a relative or approved person. The alleged alcoholic is also given the opportunity to state a case against admission to an institution, but is required to undergo an examination by two medical practitioners. If, on all the evidence, the Judge feels that detention and treatment is expedient and/or in the interests of the subject, and if the managers of the institution are willing to take the subject, the Judge may make an order for detention. This "forced" detention is not readily comparable, however, to the envisaged system of admission by the police acting under the auspices of s.37A. The admission under the Alcoholism and Drug Addiction Act is a prelude to a full course of treatment, not simply a means by which a drunk might be sobered up. Moreover, once admitted under such an order, the subject is under the control of the court: powers of detention prevail.
For these two reasons the admission procedure under the Alcoholism and Drug Addiction Act involves a sophisticated system of checks and evaluation. This system of checks justifies the involuntary nature of admission.

These units have no wish to enter into the fray of handling unwilling admissions: it is a tenet of medical law, and a pre-requisite to the success of the treatment of alcoholism, that the patient be willing before treatment is given.[17]

(2) In that format, the present alcohol units are handling quite ably the responsibilities of the Health Department in assisting alcoholics to overcome their disease. There is no pressing need for change. To gazette these units would perhaps do more harm than good.

While the police have a definite role to play vis-a-vis the temporary shelters, their involvement with detoxification centres is less than necessary. However, since the legislature did not separate the centres/shelters when allocating to the police their role, such acknowledgment of that separation must come from the parties involved in the practice of the section: the health authorities and the police.[18]

(2) Temporary shelters

Although detoxification facilities are offered by the hospitals, albeit non-gazetted, temporary shelters will not be. The hospitals are in the business of providing medical services. They do not double as surrogate "bed-and-breakfast" venues:[19]

> A drunken coma is a medical emergency, and there is a very real danger of death, either from sheer overdose of alcohol, or inhaling vomit. Hospitals are not, however, happy about taking obstreperous drunks who are only needing social detox or someone to keep them out of trouble while they sober up. (And a police cell isn't all that inappropriate a place for that.)

Accepting that detoxification centres are not the place for "overnight drunks", the question arises as to where such drunks will be given this simple sobering-up shelter. The voluntary organisations that operate at the moment are not totally committed to admitting drunks. The Night Shelter in Wellington, for example, provides a roof and a bed for the homeless, a term that covers a wide field — someone in town who cannot find a hostel, hotel or flat for a night or two, or, anyone, who, for one reason or another, is without a place to sleep. The service is not aimed at, nor was it initially intended as, shelter for drunks per se.

17 Such a stance binds the hands of the profession when faced with persons who, for religious reasons, refuse some form of medical treatment. See *R.* v. *Blaue* [1975] 3 All E.R. 446 for an illustration of a Jehovah's Witness's refusal to accept a blood transfusion.

18 The involvement of the police in this section of the Summary Offences Act is a continuing thorn in the side of the legislation. Their position of overlap with the Health Department is but a further example of the problem. Why the police have been given a role in this health legislation is a question with many answers. One, which is relevant to the Health Department/Police Department dichotomy, is this: decriminalisation overseas led to police ignoring the problem of drunkenness, with the result that drunks were being left, quite literally, in the gutters. The New Zealand Parliament recognised this possibility, and legislated for a continuing police involvement. To do this, the legislation nominated the police to exercise s.37A, and gave to them that section's alternative courses of action. Anomalously, the key to some of these doors was put in the hands of the Minister of Health, and until he moves, police practice will remain unchanged. And as the Minister sees no immediate need to gazette premises — a move which, in the first instance would simply be to accommodate for the police role — the prospects of change are remote.

19 Dr. J. Roxburgh, correspondence outlining personal impressions of the new legislation.

Further, the Night Shelter is not gazetted as a temporary shelter, and consequently is not recognised as such by the police. Nor could it be gazetted as it operates at present: for the Night Shelter to accommodate admissions made throughout the night, it would need to change its entire system of work. At the moment, admissions are usually completed by 9.00 p.m., after which time there is every likelihood that the warden/supervisor will be in bed.

Other provision, then, must be made for shelters, both in Wellington and throughout the country, unless the existing facilities are to be expected to subject their systems to upheaval. What is needed is not new temporary shelters, but more efficient use made of existing resources. Certainly, more shelters, if built anew, would be filled, but simply because the supply would prompt the demand, and not vice versa.

When considering the format-to-be of temporary shelters, much can be gained from a glance at overseas operations in this field:

(i) Administration and operation

Keith Evans, working with ALAC in Wellington, provided an insight into the working of one overseas system with which he had first-hand practical experience — the temporary shelter scheme operated in Brisbane, Australia.

On details of the New Zealand shelters, Evans envisaged them as running along the same lines as their Brisbane counterpart. First and foremost, they should be financed by central government. Whether via the coffers of the Health Department, Justice Department or Social Welfare Department is immaterial. If Parliament wishes to change the law, then, quite simply, it must finance this change. As the facilities already exist, but are simply under-utilised, it is only the financial, not the physical, building which is necessary.

As for the operation of the shelters, of particular interest is the use of a "multiple facility" system in Brisbane. That is to say, each shelter holds a record of the admission status of all other shelters in the vicinity, and so, instead of fronting up on the doorstep with a drunk, the police are encouraged to ring before calling. That way, if shelter A is full, the police can be referred to shelter B if its status at that time renders admission possible, thus saving police time, and retaining a high police opinion of the scheme in general.

One further element of the operation of the Brisbane system is worth noting as a model for New Zealand. The system provided for an inebriate to be admitted three times a week. If he arrived for a fourth time, he stood, under house rules, to be declined admission. This was for two not unrelated reasons:

(a) The "abuse" of the shelter by one inebriate meant that there was a place not available for use by one who might benefit more from his or her stay. One who fronted up time after time showed less likelihood of responding to counselling or treatment, and so perhaps should be by-passed in an effort to cater for the more receptive patient. On the fourth visit of a "regular", he would be found alternative accommodation; he would not simply be turned out into the streets.

(b) Associated with this is the concern for staff morale. The same faces every night can weigh heavily on a staff dedicated to therapy. One new face was one new challenge. Ironically, the ideal situation involved never seeing that new face again — an indication that advice or treatment proposals had been heeded.

Overseas operations can provide copious examples — of which the above are but two — upon which the New Zealand shelters might model their approach.

(ii) Physical structure

When it comes to the question of the buildings which constitute the shelters, it must be noted that here there is scope for flexibility. James Leddy, in a paper delivered to the National Society on Alcoholism and Drug Dependence, New Zealand (Inc.) 1981 Summer School,[20] writes about the system that is employed by his group in Vermont, U.S.A. Of relevance here is a mention regarding his organisation's approach to the detoxification centre itself (and in this instance, we can substitute the term "temporary shelter"; in many instances, the two are used interchangeably):[21]

> . . . in one of the smaller counties, we use a renovated room in the county jail, which also doubles as the county's emergency service centre. We average about one incident a week here . . . In another community we rent a motel room from a sympathetic motel owner. It is used on an "as needed basis" about three times a month . . . In one town we rent an apartment with three bedrooms. We call it Paradise Lost.

Leddy also outlined the use made of private homes, a move which meets two needs: First in the more isolated areas of the county, this prevented a long trip with an intoxicated person to a more formal centre; and secondly, even in areas where more formal centres were immediately available:[22]

> We use private homes for women clients. Most of our facilities are spartan and male oriented, and even constitute a barrier to female clients. The care and comfort available in a private home often help the woman alcoholic to overcome the double stigma that is often hers.

This would hold equally for New Zealand. "In virtually all these cases", writes Leddy, "the private homeowners (or at least one member of the immediate family) are recovered alcoholics." While there are circumstances and conditions in Vermont which render such practices possible (and necessary, perhaps), and while these conditions may not prevail in New Zealand, there is nonetheless food for thought in what Leddy writes. In some modified form, much of it might be applicable here.

Regardless of whatever form and function the shelters adopt, one point is certain the shelters will not aspire to powers of detention. For practical purposes, neither a centre nor shelter would wish to detain someone who does not want to

20 James Leddy *Expanding Alcohol Treatment Services Through the Use of Volunteers and Other Non-Traditional Resources.* NSAD Summer School, 1981, Wellington, New Zealand. Paper No. 3. J. Leddy is the Executive Director of Howard Mental Health Services, Burlington, Vermont, U.S.A.

21 Ibid. 5.

22 Idem.

stay. Furthermore, to give the centres/shelters powers of detention would be to elevate them to the level of imprisonment, and this, in turn, would reflect a note of criminality, which section 37A purports to dispel.

If a patient, still drunk, wishes to leave a shelter ten minutes after being admitted by the police, then it should be the practice for the shelter officer to contact the police and inform them of this happening. Otherwise, the street constable who is faced with the same drunk whom, twenty minutes previously, he had admitted to the shelter, eventually inclines towards a negative opinion of the effectiveness of the shelter. By being informed of an imminent departure, however, the police are given the opportunity to exercise their option of taking the drunk to the cells.

As a final point on the discussion of the detoxification centres and temporary shelters, and the role to be played by the Health Department in this sphere, it should be observed that where the Department comes into the new legislation, it will do so in a reactive rather than pro-active manner. If an independent organisation wishes to provide detoxification or shelter services, then, if it adheres to the Department's criteria, the Department will acknowledge it by declaring it in the Gazette. Unfortunately, the benefits to be gained from this are mainly intangible, and certainly not financial. The motivation for independent bodies to offer their services is purely, and admirably, noble: a commitment to the battle against alcoholism.

There have been approaches made to the Department, since the inception of section 37A, by private organisations with an eye to offering such services. As these private bodies make their long-term plans, they are providing for centres/shelters, and their appearance can be expected some four or five years hence.

(c) The Policy Aspects of Section 37A

M. R. Goode has said:[23]

> . . . decriminalisation and reliance upon police intervention in a compulsory yet therapeutic system leads to conflicts in the police role, especially where the system is itself the result of conflicting and confused pressures. Therapeutic intervention may conflict with police self-image as crime-fighters, and may not be attractive to a police officer under pressure to maintain an arrest rate.

There is clearly an immediate inconsistency when, under the Summary Offences Act, the police are given the task of enforcing what is now, in effect, a piece of health legislation.

Why delegate the police to enforce the new Act? What is the police attitude?[24] It has traditionally been the task of the police to deal with inebriates, for two reasons: first, there is often concurrent offensive behaviour; secondly, the police

23 M. R. Goode "Public Intoxication Laws: Policy, Impolicy and the South Australian Experience" (1980-81) 7 Adelaide L.R. 253, 259.

24 For information regarding the perceived role of the police in the new legislation, the writer thanks Inspector Kerr, Senior Legal Advisor, New Zealand Police Department.

constitute the only twenty-four hour agency with the facilities and administration to handle such events.

The police attitude, it is claimed, has not changed in the manner suggested by Goode simply because drunkenness is no longer a criminal offence. There are three reasons for this:

(1) There is no "role identification" amongst police whereby they see themselves as crime-fighters, and consequently whereby the pick-up of drunks might be a ground for role conflict. The duties of the police are laid down in statute and enumerated in maxim. In short, they are: (i) the protection of life and property; (ii) the prevention of crimes; (iii) the detention and apprehension of criminals; and (iv) the preservation of the Queen's peace.[25] Obviously, then, the apprehension of intoxicated persons might clearly fall within two of those categories — (i) and (iv) — and perhaps also within (ii): that is to say, the removal of the drunk may avert a later drink-related crime. If it was said that the police role was to chase and apprehend criminals, then there may be a role conflict amongst individual officers. But in New Zealand, the role is not as constrained as that, and the apprehension of drunks is squarely part of the policeman's duty.

(2) There is no official arrest rate to be maintained in New Zealand: this is merely a fallacy of the public, prompted in part by fanciful scriptwriters. Rather, most arrests occur, not because the constable has a predilection for arresting, but as the result of outside pressures — the constable is pressed into making the arrest by the action of either the ultimate arrestee, or by dogmatic complaints. Nor, it must be added, is an impressive arrest record a springboard to promotion. Likewise, an 'unimpressive' record does not hold one back.

(3) It is not a question of attitude that leads a constable to attend or ignore a public drunkenness call — it is the pressure of the public to have its complaints attended to. The decriminalisation of public drunkenness will not remove the pressure. The police will continue to function as they always have in this sphere.

Such, then, is the official stance of the Police Department. However, the theory that the police will enthusiastically use section 37A to remove drunks — genuine drunks, committing no other offence — from the streets is, this paper submits, a long way removed from reality.

Inspector Kerr outlined the four-point duty of the police, But it is suggested here that the police officer on the street would not readily agree: he might not see those duties as his task. He is a crime-fighter, not a social worker. The public sees him as a crime-fighter rather than a social worker, and, Inspector Kerr's assertion nothwithstanding, the Police Department sees him as a crime-fighter:[26]

> During the past 12 months, further emphasis was placed on preventative policing. Although it is inevitable that the traditional enforcement role of the police encompassing *the detection of crime and the apprehension and prosecution of offenders* will remain, the move towards prevention is well justified.

25 Number (iv) is specified in s.37(1) of the Police Act 1958 — the Police Oath.

26 *Report of the New Zealand Police for the year ended 31 March 1981* (Government Printer, Wellington, 1981) 3. Emphasis added.

If a person is genuinely drunk and incapable of looking after himself, then unless there has been a public complaint about his condition or conduct, the police officer is not motivated to detain him. He may do so once out of a sincere concern for his fellow man. He may, indeed, detain that same drunk the next night, motivated in a like fashion once again. But after hosing out the urine and scraping down the vomit from the patrol car for the nth time, the police officer may re-evaluate his role. And that re-evaluation will conclude that he is a police officer, not a social worker. Section 37A needs social workers, if it is to be given the effect that we assume it was intended to have.

It is not impossible to have bodies other than the police to administer legislation of the nature of section 37A. In May 1973, the Minnesota Legislature explicitly sanctioned civilian pick-up of public drunks,[27] and the Hennepin County Alchoholism Receiving Centre in 1977 staffed a "Civil Pick-Up Van", designed to reduce pressure on the Minneapolis Police Department in areas where the need was most acute. In New South Wales, Australia, persons and their vans may be registered with the New South Wales Government to pick up drunks in the cities and take them to a detoxification centre. The vans are clearly marked as being registered. This move was seen as preferable to the police carrying out this function, since it removed all stigma of criminality from the area of public drunkenness.[28]

There are two not unrelated reasons, then, for the present police role in section 37A being discordant. First, police involvement means a complexion of criminality still pervades the topic of public drunkenness, derogating claims of decriminalisation. Secondly, the work involved in effecting section 37A does not sit comfortably within a police officer's expectation of his job and his role.

In general, the public have never viewed their "social work" tasks favourably. While a scintilla of the ciminal element was present, however, some justification for their participation (albeit reluctant) could be found. Such a trace of "bona fide police work" was involved in enforcing the drunkenness laws under the old Police Offences Act 1927. The decriminalisation of the offence now means that the work is the same, but the last vestige of justification has disappeared: the social work ingredient has eclipsed the police work element. Reluctant participation looks set to become positive rejection. Yet while the work lies in their laps, the police cannot refuse to do it. As Maurice Punch pertinently pointed out, the police have become our "Secret Social Service":[29]

> It is scarcely surprising then that, among those cases which the policeman considers to be of low status and virtually worthless, are traffic, extra duties (football matches, escort duties, processions), and "social work" tasks. Their characteristics are that they

27 Treatment for Alcohol and Drug Abuse Act (U.S.A.), Minn, Stat. Ann. s.254A 01-17. Supp. 1972. See D. E. Aaronson, C. T. Dienes and M. C. Musheno "Changing the Public Drunkenness Laws: the Impact of Decriminalisation" (1978) 12 Law and Soc. R. 405, 413.

28 Information courtesy of K. Evans, supra. n.15.

29 M. Punch "The Secret Social Service" in S. Holdaway (ed.) *The British Police* (Edward Arnold, London, 1979). Consolidated from pp. 111, 112 and 110 respectively.

> can take up a lot of time, lead to no discernible result, and rank low in the official and informal reward systems.
> . . . the police culture places a low value on "social" aspects of police work. American policemen view this area as *"shit"* work, and therefore as morally degrading to them as upholders of public safety.
> . . . Indeed, I suspect that this identification of "real" police work with the crime-fighting model is fairly universal and that generally detective work has higher status because it exemplifies the symbolic rites of investigation, arrest, interrogation, confession, and of justice being done.

IV. THE LEGAL ASPECTS OF SECTION 37A

A. Section 37A(2)

Section 37A(2) of the Alcoholism and Drug Addiction Act 1966 empowers a constable to detain a person found "intoxicated" in any public place. Section 41 of the old Police Offences Act 1927 gave authority to arrest a person found "drunk" in any public place. Is there any real difference? Section 37A(7) gives a statutory definition of "intoxicated":

> For the purposes of this section, a person is intoxicated if he is under the influence of intoxicating liquor, drug or other substance to such an extent as to be incapable of properly looking after himself.

This subsection serves two useful purposes: first, it widens the scope of intoxicants, and second, it defines "intoxicated".

The old Police Offences Act, although it worked well for the police in many respects, had the drawback that the public drunkenness provision related only to alcohol. No power was given to the police to apprehend drugged persons. They could not be detained unless they were committing some concurrent offence. However, the usual practice became that the drugged person would be picked up (with police fingers crossed) as a drunk, and allowed to sleep off the euphoria, as much for his own good as for the public's. Now, under subsection (7), the police are given express powers to detain anyone from drinkers to glue-sniffers.

The definition provided by subsection (7) is frustratingly uncertain as regards the state a person must be in before the police are authorised to detain him. All that is required is that the person be "incapable of properly looking after himself", but exactly what that encompasses is not clear. Statutory context indicates that one can be "intoxicated" while still being in some control of both mental and bodily functions: "37A(4) Where any person is being detained under subsection (2) (c) of this section, he shall be entitled to telephone 1 person of his choice." We can assume, then, that although intoxicated, a person can still be capable of making a phone call, yet "incapable of properly looking after himself". This is in contrast with the state of incapacity required before arrest was authorised under the Police Offences Act.

The difference between the two states is illustrated in *Brown v. Bowden*,[30] a case concerning a prosecution under section 146 of the Licensing Act 1881: "If any innkeeper . . . sells any liquor to any person already in a state of

30 (1900) 19 N.Z.L.R. 98.

intoxication . . . he shall be liable to . . . " Stout C.J. outlined the intoxication/drunkenness distinction thus:[31]

> What is meant by "already in a state of intoxication"? In my opinion, the words mean that state in which through intoxicating liquors, a person has lost the normal control of his bodily and mental faculties . . . I do not think the words "drunk and incapable" are an exact equivalent of "in a state of intoxication". It seems to me that those words signify some degree less than absolute incapacity from drunkenness. It is, in fact, assumed that this "person already in a state of intoxication" is capable of asking for more drink, and, apparently, capable of paying for it . . . I agree . . . that the words ["in a state of intoxication"] show that a less degree of drunkenness is required than what is mentioned under, for example, the Police Offences Act 1884, section 19, which simply speaks of a person being found drunk.

Indeed, section 37A requires even less incapacity than did Stout C.J. Section 37A(4) indicates more of a retention of mental and bodily faculties.

It is understandable that the Summary Offences Act should give the police the power to detain a person at an earlier stage in the process of reaching total drunkenness. First, it would be illogical for the legislature to expect that a person be "absolutely incapacitated from drunkenness", or close to it, before a constable could detain him. To attempt to exercise fully the options offered by section 37A(2), the police might require some degree of participation from the arrested person, even if only the giving of an address.

Secondly, under the Police Offences Act, it was a criminal offence, carrying punishment of fine or imprisonment, to be drunk in public. Consequently, one should warrant the penalties of the criminal law before one is subjected to them — hence, the offence was not committed until one was more than merely intoxicated: one had to be drunk. Now, one need only be deemed to be incapable of properly looking after oneself. Some guidance is given for the assessment of this by the context of section 37A, and by the historical differences between such a state and drunkenness. Ultimately, it will be the arresting constable's interpretation of "properly" which will decide the question, and this will undoubtedly be based on visible factors such as the outward appearance of the subject, his behaviour and his gait, as well as being based on the constable's own values and perception of the person's behaviour.

1. Paragraph (a)

Section 37A(2) (a) says that a constable "[m]ay take or cause that person to be taken to his usual place of residence or, if he is temporarily residing elsewhere,

31 Ibid. 102. Section 19 of the 1884 Act was effectively the same as s.41 of the 1927 Act: it provided for increasingly severe punishment with each successive conviction, commencing with a fine of not more than £1 (or 48 hours imprisonment) for a first conviction, £3 or 7 days for the second within six month, £5 and 14 days for the third within the same six months, and finally —

> "On any subsequent conviction within such period of six months [every person found drunk in any public place] shall be deemed to be a habitual drunkard, and shall be liable to be imprisoned for any period not exceeding three months."

This clearly illustrates the change in attitude towards drunkenness over the years: four times drunk in six months in Queen Victoria's era and one was "a habitual drunkard".

to his temporary place of residence". For the past nine years, Police General Instructions (which, as this is being written, are being revised to accommodate the changes brought by the Summary Offences Act) incorporated this course of action as an alternative to taking the drunk to the cells. Nothing has been changed dramatically by the new Act. The police will still exercise this discretion according to their available resources, and according to the pressures of work prevailing. That is to say, the drunk picked up in town on a busy night can least expect to be taken home if the cells are just around the corner.

2. Paragraph (b)

Section 37A(2) (b) states:

> If that place cannot reasonably be ascertained or if it is not reasonably practicable to take that person to it or it may not be safe to leave him there, may take that person or cause him to be taken to any temporary shelter or detoxification centre.

This provision constitutes the essential difference between the Police General Instructions and the new Act. Although they do not as yet exist, the legislation has made provision for the use of the centres/shelters when they are finally introduced. The Act specifically provides for the fact that the police will be dealing with persons perhaps too drunk to give an address; where, in the past, such an event led to the police taking the person to the cells, an intermediate course is now available.

Clear consideration is given " . . . if it is not reasonably practicable to take that person to it . . . " to such possibilities as a person from Invercargill being found drunk in Auckland, and consequently "taking him home" would be out of the question. What is meant by "not reasonably practicable" also has a secondary meaning, touched upon very briefly under section 37A(2)(a) above — the availability of police resources. For example, with the stretched nature of some resources, such as police cars, the police may often have to deem it not reasonably practicable to take a drunk home, regardless of where the drunk's home may be, be it 100 miles or 100 yards away.

There are, apparently, two considerations implicit in the condition " . . . or it may not be safe to leave him there . . . ":

(i) If the drunk, although incapable of looking after himself, is nonetheless obstreperous or violent, then his wife and/or family at home would be endangered if he was deposited in their laps. Therefore, the police are offered the alternative of taking the drunk to a centre/shelter. However in such a case it is unlikely that the centre/shelter admitting officer would wish to accept the drunk.

(ii) If the drunk lives alone, it would be unsafe to take him home and leave him there, bearing in mind that he was detained in the first place because a constable deemed him incapable of properly looking after himself. If the drunk is left at home, it might be inferred that the constable now believes the drunk to be capable of caring for himself, in which case the constable no longer has any reason to be dealing with the person. The constable's justification for detaining that person has evaporated.

3. Paragraph (c)

Section 37A(2)(c) states:[32]

> If neither the course authorised by paragraph (a) nor that authorised by paragraph (b) of this subsection is reasonably practicable, detain or cause that person to be detained in a police station for any period not exceeding 12 hours.

Looking at subsection (2)(c), we can now see the three options open to the police, and the guidelines for their adoption or rejection:

(a) Take the drunk home, unless this would be unsafe or impracticable;

(b) Take the drunk to a detoxification centre or temporary shelter, unless this would be impracticable;

(c) Take the drunk to the cells. Presumably, this is always practicable and always safe — the drunk can do himself little or no harm, since the watch-house officer physically checks the drunk every half hour.

Note, however, that under the Act, the police are expressly to consider the safety angle when deciding whether to take the drunk home. Their considerations when deciding whether to take him to a centre/shelter cover only factors of practicability. This may be because the legislature only considered "safe", as regards leaving a drunk somewhere, as relating to his safety, rather than to the safety of others — e.g., his wife and/or family. Consequently, a drunk would always be safe at a centre/shelter, but this ignores the issue of whether the staff and other patients will also be safe. In practice, of course, the centres/shelters can be expected to lay claim to a discretion as to whether to admit or reject a police admission, and the admitting officer will consider the safety angle missed by the Act.

By its specification of a period of detention of not exceeding twelve hours, section 37A(2)(c) raises some serious medical, social and legal problems.

(a) Medical

Medically, twelve hours is an insufficient period of time in which to sober up completely (depending, of course, on how drunk one was at the outset). Sobering-up occurs at a rate of 15mg of alcohol, per 100ml of blood, being lost per hour. After twelve hours, 180mg would be lost. For the purpose of the Summary Offences Act, there is no defined alcohol/blood level over which one is deemed incapable of properly looking after oneself. Instead, the police work generally on appearances.

However, under the Transport Amendment (No. 3) Act 1978, section 58(1)(b), the alcohol/blood level over which one is deemed incapable of driving a vehicle is 80mg/100ml. Taking this admittedly low level, if one entered the cells with 350mg/100ml alcohol/blood level, after twelve hours one's count would be down to 170mg/100ml — still 90mg/100ml over the Transport Authority (No. 3) Act level.

32 Section 37A(2)(c) reads very clumsily. This is due to the omission of "may", which should have been drafted between "practicable" and "detain". This omission was also in the Bill, but despite being advised of it in submissions (see Faculty of Law, Victoria University, 1981 submission, paragraph 40), the writers of the Act either forgot or chose to ignore that advice.

Even by doubling the low transport level to 160mg/100ml alcohol/blood, one would still be over that higher level, even after twelve hours.

The point is that after twelve hours sleep, one may still be quite drunk, even working from a basis of only 350/mg/100ml alcohol/blood: it is not impossible for a person to have a higher count than that.[33]

(b) Social

The "social" problem of subsection (2)(c) is so labelled because it is neither medical nor legal. It is simply this. If a person is detained at, say, 3.00 p.m., and is subsequently put into the cells for twelve hours, this would make their possible release time 3.00 a.m. This appears to be a ludicrous hour of the morning at which to turn a person into the streets, more so if that person has nowhere to go — a not unlikely possibility, since detention in the cells is sometimes contingent upon that person having nowhere else to be taken.

To overcome this problem, it is suggested here that any person be able to stay in the cells voluntarily for up to six hours after the maximum period even in the statute, i.e. twelve hours. If unrealistic hours of release are recognised as being those hours between midnight and 6.00 a.m., then the opportunity to remain in the cells for an additional six hours would take an unrealistic release time through to being something a little more acceptable. This would remove the possibility of tossing people into the streets in the early hours of a morning, and would safeguard the police from claims of unlawfully extended detention, by virtue of the extension being voluntary.

(c) Legal

Subsection (2)(c) empowers a constable to arrest and detain an intoxicated person in the cells for up to twelve hours. However, as it stands, this subsection also allows detention of any person who, though intoxicated when picked up (i.e. "incapable of properly looking after himself"), has sobered up within twelve hours. Such a person may be detained until the twelve hour period is expended. To overcome this, subsection (2)(c) should be amended by the addition of the words " . . . or until no longer intoxicated, if this occurs within 12 hours."

B. Section 37A(3)

Section 37A(3) states:

> If, after being detained under subsection (2)(c) of this section for a period of 12 hours, any person is still, in the opinion of any constable, so intoxicated as to be incapable of properly looking after himself, the constable may take that person or cause him to be taken to a temporary shelter or detoxification centre.

33 Inspector Kerr, Senior Legal Adviser, New Zealand Police Department, commented that on one occasion he submitted a count for one of his prisoners of 420mg/100ml, which led to an enquiry into whether the recordings had been tampered with — medical opinion was that the subject should be dead by then.
Street alcoholics have had still higher levels recorded after drinking methylated spirits and milk.

Aside from the legal problems implicit in this subsection, there arises the practical problem that the centre/shelter may not admit the drunk brought to them after twelve hours in the cells. The drunk was in the cells, courtesy of subsection (2)(c), because he could not be taken home or to a centre/shelter. If his rejection from the centre/shelter had been based upon a safety consideration, then if the subject is still intoxicated, the centre/shelter may be no more willing to take him now than they were twelve hours ago. Or if the reason for the initial rejection of the subject was simply that the centre/shelter was full, then if it is still so, it will obviously be unable to accept the subject.

The police, moreover, do not, under subsection (3), have the power to take the still-intoxicated person home after twelve hours in the cells, presumably because it would be unsafe to leave him there. If the centre/shelter will not take the drunk, the police are faced with a legal problem: their powers of detention do not extend beyond twelve hours. The only immediate option open to the police is to cast the drunk back onto the streets — as act possibly in straight violation of parts of the four-point duty of the police.[34]

Of course, there may be nothing to stop the police releasing the drunk from the cells after twelve hours, and then instantly picking him up once again and re-admitting him to the cells on a "revolving door" basis. However it is a sad Act that must resort to farce before it can be totally utilised.

One other small point worth noting: if, after twelve hours precisely, the inmate is still believed to be intoxicated, but the centre/shelter is now willing to accept him — e.g., an available place in the previously full centre/shelter has now been found — to be totally protected against civil suit, in the event of error regarding his continuing state of intoxication, the constable must release the drunk, then reapprehend him, before he and his charge can enter the police car to drive to the centre/shelter. Otherwise, the constable's justification for erroneous detention, having ended at precisely twelve hours after apprehension, the trip to the centre/shelter is not a valid detention. A small matter if the centre/shelter is proximate, rather more serious if it be an hour's drive away. Of course, if the drunk goes voluntarily, no problem exists. Nor is there any problem if the person is still genuinely intoxicated: section 37A(3) provides the necessary power of detention.

C. Section 37A(5)

The whole area of justification for police actions is dealt with under subsection (5):

> Every constable is justified in detaining in accordance with this section, for any period not exceeding 12 hours, any person whom he believes on reasonable and probable grounds to be intoxicated.

The effects of this provision warrant close examination. Prima facie, subsection (5) appears only to offer justification for actions taken pursuant to subsection (2)(c) — i.e., detention in the cells. The power given under subsection (2)(c) is

34 Specifically, protection of life and property, and preservation of the Queen's peace.

couched in terms of "for any period not exceeding 12 hours", and the justification provided by subsection (5) accords with those terms.

The justification subsection is necessary to protect the constable who errs in exercising the powers given under the section. However, such an interpretation suggests that a constable may have no justification for any errors made pursuant to the exercise of section 37A(2)(a) or (b), or 37A(3). It could be said that subsection (5) shows some attempt to indicate its wider application — i.e., beyond subsection (2)(c) — by virtue of its phrase, "in accordance with this section". If so, then this is but a weak indication, overshadowed at the moment by the uncertainty raised by the twelve hour period specification and its blatant link with subsection (2)(c).

To clarify decisively the applicability of subsection (5), if it is meant to reach beyond subsection (2)(c), subsection (5) might be amended thus: "This justification shall apply to any actions taken under subsection (2)(a), (b), (c), or (3) of this section." (For convenience in respect of the remainder of this paper, it will be assumed that subsection (5) covers all parts of subsection (2).)

The phrase, "in accordance with this section", is not without meaning, however. It is relevant when the constable comes to exercise the options given under section 37A(2). Again, it relates to justification, but from a slightly different perspective.

It may be that subsection (2)(a), (b) and (c) are not simply options, but rather are sequential options. That is to say, (2)(a) must be attempted before (2)(b); (2)(b) before (2)(c). For although (2)(a), (b) and (c) are alternatives in as much as they are divided by "or", the wording of each successive paragraph indicates that it should be utilised if and when the previous one has proved to be inoperable. Therefore, a constable, to have justification at all under subsection (5), must act "in accordance with the section"; i.e., exercise the paragraphs sequentially. By failing to do so, the constable may face a suit of false imprisonment.

The possibility of error is an ever present risk faced by a constable who is trying to assess whether or not a person is intoxicated — hence the need for some justification provision. For example, a diabetic suffering from a fall-off in blood-sugar level can give the appearance of being intoxicated, and subsection (5) protects any constable who errs accordingly. However, the extent of the justification deserves some scrutiny.

What is the situation, for example, if such a person (i.e., not genuinely intoxicated) resists the arresting officer, or escapes from custody? Can a prosecution ensue? If the detainee is genuinely intoxicated, and in the course of his detention (i.e., while the constable is taking him — sequentially, of course — to his home, to a centre/shelter or to the cells) the detainee escapes or resists, then prima facie he may be prosecuted. It is highly unlikely, however, that a prosecution for escape from lawful custody would ever be instigated. First of all, if a person is capable of engineering and executing an escape, it is possible that he was never intoxicated to the extent of being incapable of properly looking

after himself" — the statutory criterion — and so the constable's power to detain in the first place would be suspect. Secondly, unless some concomitant offence was committed, the police may have no immediate wish to exercise the overkill of such a prosecution. If the detainee was not an intoxicated person, but was of the nature of the diabetic outlined above, then the situation changes considerably. The constable has not been given the power to detain a diabetic. The custody of the diabetic is lawful in so far as the constable cannot be sued for his genuine error — subsection (5) blocks such a civil suit. The custody should not be lawful, however, in so far as permitting the constable to prosecute the diabetic for any resistance or escape. Whether or not this will be so depends upon how the New Zealand courts treat the authorities in this area. In *Biron's* case,[35] the defendant was charged with resisting a peace officer in the execution of his duty. His defence was that his arrest was not lawful because he had not been committing an offence at the time of his arrest. Statutory justification for this wrongful arrest was provided for the protection of the officer. Could it be extended to give the officer the power to arrest, and therefore make any subsequent resistance to be resistance of lawful arrest? The majority of the Supreme Court of Canada thought so. "Justified" was used, but not defined, in the Act in question, and the majority interpreted it as including an empowering element. The justification provision rendered the custody lawful for the purposes of prosecution in addition to its purposes of defence. The minority, on the other hand, thought differently:[36]

> To do that is to turn a protective provision, a shield, for the constable into a sword against an accused by treating the protection as an expansion of the powers of arrest given by [the Act].

It is unlikely that *Biron* will be followed in New Zealand. Not only does section 37A provide a justification clause (section 37A(5)), but it also defines "justified" in a manner which precludes interpreting it as including an empowering element: "37A(8) In subsection (5) of this section, 'justified' means not guilty of an offence and not liable to any civil proceeding."

Wiltshire[37] and *Wills*[38] were similar in result to *Biron,* but different in reasoning.

In *Wills* case, the defendant was charged with assaulting three police constables in the execution of their duty. Wills' defence was that the arrest was invalid because she had not actually been committing an offence. The House of Lords held (3-2) that an honest belief, based on reasonable grounds, that an offence is being committed is sufficient to make the arrest lawful.

In *Wiltshire,* while the plaintiff appeared to have been breaking the law, he had in fact not been, and the arresting constable was being sued for an assault resulting from the use of force during the arrest. In that case, Lord Denning M.R. reasoned that the defendant constable's actions were quite lawful — the power to arrest a person committing an offence also includes the power to arrest a person "apparently" committing an offence.

35 *R.* v. *Biron* (1975) 23 C.C.C. (2d) 513.
36 Ibid. 515, per Laskin C.J.C.
37 *Wiltshire* v. *Barrett* [1966] 1 Q.B. 312.
38 *Wills* v. *Bowley* [1982] 2 All E.R. 654.

The basis for the decisions in both these cases was the absence of a statutory protection provision for reasonable but mistaken arrests. The courts felt obliged, it seems, to cater for the interests of the police where the statutes had failed to do so. The fear of the courts was that without such protection the police might be hesitant to arrest in situations where guilt was less than certain. Although *Wills* involved a criminal prosecution of an arrestee, rather than a civil suit against an arresting constable, that fear still prevailed. The construction given to a statute in order to protect a constable from civil suit must equally be given when the statute is to be construed in the context of a criminal prosecution of an arrestee.

It is unlikely, however, that *Wills* or *Wiltshire* will be followed in New Zealand: the fear of the English courts does not apply in the light of section 37A(5), which provides protection for that police constable from civil suit. It does not lie with the courts to radically extend that protection to enable the prosecution of others.

Moreover, in *Wills* Lord Bridge placed some weight on the fact that the arrest provision in question was coupled with an obligation to take the person arrested before a justice "forthwith".[39] Section 37A, however, is not the first step towards any judicial proceeding.

With the expected rejection of *Biron, Wills* and *Wiltshire,* a diabetic reasonably resisting an arrest, made pursuant to section 37A, cannot be prosecuted. However, if the resistance is excessive, s/he may be prosecuted for some other offence — e.g., assault. (But not assault of "a constable . . . acting in the execution of his duty".)

D. Section 37A: Safeguards against Abuse

By decriminalising public drunkenness, yet still putting in the hands of the police a power of arrest, section 37A was seen as having potential for abuse. Since the proposed changes were first mooted in 1973, this potential was one of the major legal concerns of the submissions. There was clearly an issue in the apparent removal of the safeguards previously offered by the old system of detention plus charge under the Police Offences Act. The new provision was seen as carte blanche for detention without charge, and without the opportunity for an appearance before a court, at which point the validity of the detention might have been examined.

In the words of the Auckland Council for Civil Liberties:[40]

> It would be necessary in the Council's submission to build in *safeguards* to such a civil power to ensure that the police did not abuse the authority. The Council envisages a *maximum compulsory retention period of 12 hours* and an obligation on the police to have the person examined by a medical practitioner within a reasonable period to ascertain his condition, and a *right* given to the person detained to have access to his own medical adviser and lawyer at any time.

39 Ibid. 680.
40 Supra n.7.

It is worth laying out in full the appropriate section of the 1974 Finlay Report which addressed itself to submissions such as the Council's:[41]

> The committee is aware that to permit the Police to exercise custodial powers over a person in respect of conduct which is not a criminal offence and which does not therefore involve a formal charge and subsequent court appearance is somewhat novel. Objections that such a power may be open to abuse can readily be foreseen. The committee concedes that objections of this nature must be taken into account when a detailed draft is prepared and that safeguards will need to be incorporated. For example, the maximum possible period of detention of a drunk person in the Police cells should not exceed 12 hours from the time when he was found in a drunken condition. A further suggestion was that the person held in custody should have the right to ask to be taken before the court which would then investigate the action taken by the Police. The committee is, however, firmly of the view that considerations of this nature do not constitute a justification for retaining an offence of public drunkenness. It is content to see difficulties on matters of detail thrashed out at the point when a draft Bill is under discussion.

Much must have been thrashed right out. The draft Bill in 1981 contained one of the "safeguards" mentioned in the 1974 Report — a person would not be detained for more than twelve hours. That this token sop was, in reality, no safeguard at all was illustrated by the 1981 submissions. More effective safeguards were being demanded:[42]

> In order to avoid any suggestion that a suspect could be unlawfully detained by the police without arrest or charge and without the constable having to justify his detention before a Court, we suggest that a provision be added allowing the person detained pursuant to subclause (2)(c) to elect to be dealt with under the existing provisions as to drunkenness (i.e. that it is an offence) if he so wishes.

The Council was not alone in this suggestion. The advantages of a person being charged, and consequently being able to appear before a judge, were recognised: or more to the point, the disadvantages that the removal of this practice portended were all too apparent.

If public drunkenness could (optionally) be treated as a crime, and a person detained could appear before a court, then the effective safeguard of judicial review would be retained. But for section 37A, it was not to be offered. Nor was a person given the right to appear before a court without being charged, a move which would have overcome the Finlay Report's misgivings about retaining any "offence" element in public drunkenness. The benefits of the old system (i.e., court appearance) could have been offered, but without detracting from the moves to decriminalise.

At the end of the road, the twelve hour detention period remained in the final Act, with the additional dubious safeguard provided under subsection (4) — the statutory telephone call. The Act contains no medical examination; no right to elect to be charged with the offence of public drunkenness; no right to be brought to court.

41 *Report on Police Offences Act 1927.* (The Finlay Report) supra n 4 22-23.

42 Auckland Council for Civil Liberties. Submission to the Statutes Revision Committee, 1981. It would appear that in the seven years since their previous submission, the full impact of the proposed legislation had been brought home to the A.C.C.L. and consequently they felt that stronger safeguards were called for.

E. The Need for Safeguards

As long as the police use section 37A for the sole purpose of detaining genuine drunks, then the absence of judicial review from the powers conferred by the section would be a minor issue, and to argue otherwise might simply be a puerile exercise. Section 37A would have achieved what the police want, or at least claim to want — the power to deal with the soft criminal without hauling him through the court system and the ability to prevent crime without pressing a criminal charge in the process.

However, the old section 41 lent itself to abuse, and the new section 37A looks likely to follow suit. Consideration of the section leads to the conclusion that it holds frightening potential for abuse, being, as it is, a power to detain without charging.

The framework around which much of the police rule-bending fits is this. The police are under immense pressures, from all quarters, to keep down the rate of crime. However, often the powers conferred upon the police by law do not extend to meet those pressures. The police, then, become not averse to stretching the law, using some Acts — e.g., the former Police Offences Act, section 41 — as levers to achieve the ends demanded of them.

Quite simply, the police are given a job to do, but not always given the necessary tools with which to do it. Section 41 was a handy catch-all provision. A minor example of section 41 abuse was outlined above — the detention of drugged persons. It could also be used as an incentive for assisting the police. It was, for example, easier to give one's name and address when asked, than to spend a night in the cells for being drunk, regardless of whether or not one actually was. Self-claimed sobriety was a difficult thing to prove many hours after the time of detention.

The judicial review safeguard has always been an effective brake on police abuse (or maybe simply "over-use") of the law. The extension and misuse of a power was recognised by the judges and eventually checked: e.g. by handing down nothing but "not guilty" findings, thus demonstrating that a more selective use of the provision by the police would be both advisable and appreciated.

Now, however, with the police having the power to detain under section 37A but without the person ever being brought to court, the lever that was section 41 is reborn as section 37A, unfettered. The question is whether the police will always use section 37A for the purpose for which it was presumably intended. The potential draconian abuse of section 37A is theoretically countered by two checks:

(1) The individual's right to bring a civil action against the police for false imprisonment. This demands, however, some positive and costly action on the part of the individual, which may prove to be a disincentive to adopting this course of action;

(2) The individual is entitled to make one telephone call, courtesy of subsection (4). He can, therefore, call a lawyer. But it must be asked: what can a lawyer do? He cannot demand to see his "client", since there has been no

crime committed (and even if there had, a lawyer has no forcible right to see his client). The police are unlikely, under the pressure of running a police station, to appreciate social calls to prisoners. This would involve dispatching a constable to fetch the prisoner, take him to an interview room, supervise the interview, and then return the prisoner to his cell. The situation is complicated even more if the prisoner has no lawyer of his own. What lawyer is likely to wish to come down to the station in the early hours of a morning, at the request of a stranger who is allegedly drunk? The prisoner could always call a relative or friend, but like the lawyer, they have no statutory right to see the prisoner.

The strongest safeguard — the appearance before a judge — is the one that no longer exists.

F. Telephone Call

Section 37A(4) says: "Where any person is being detained under subsection (2)(c) of this section, he shall be entitled to telephone 1 person of his choice." This provision was thrown into the Act at the last moment, on the day before the Bill was presented for its final reading, as a gesture, it would seem, to appease those worried about the lack of safeguards in the section. As it stands, it is a wide, undefined subsection. It allows, if read literally, for a phone call to be made for twelve hours to anywhere in the world, if such be the prisoner's fancy. The use of this provision as an aid to interpreting "intoxicated" has already been discussed. One may still be intoxicated even though one is able to make a phone call. Alternatively, if the detainee can remember the phone number of a friend or relative, then was it in fact impracticable for the police to take him home, where "impracticable" refers to the inability to obtain from the intoxicated person an address?

Finally, it should be noted that although a person has a right under section 37A(4) to make a phone call, there is no provision ensuring that he be told of this right. If one need not be told of one's rights, and one is not otherwise aware of them, is such a "right" truly a right at all? Altogether, this subsection remains to be explained some time in the future, as litigation involving section 37A proceeds.

G. Armed Forces

Section 37A(6) states:

> Notwithstanding the foregoing provisions of this section, any constable who finds any person subject to the Armed Forces Discipline Act 1971 intoxicated in any public place may, instead of dealing with him under those provisions, deliver or cause him to be delivered into service custody to be dealt with in accordance with that Act.

It would appear that this provision has been added simply because there may be occasions on which an intoxicated person may be better dealt with under the Armed Forces Discipline Act 1971. For example, if the detainee should be on duty with his service, his public intoxication is compounded by this additional element of a separate offence. Or perhaps the intoxicated person is in his service uniform. It may be the wish of the service to deal with him themselves, not

because the services still regard drunkenness as a crime, but because it may be deemed to be a discredit to the service for a uniformed serviceman to be found drunk in public. On other occasions, when the serviceman is, for all intents and purposes, simply another citizen, there remains the discretion for him to be dealt with according to the Summary Offences Act.

V. THE RESULTS OF DECRIMINALISATION: CONCLUSIONS

The most immediate of the results have been canvassed in the foregoing discussion. There is, however, a small number of indirect ramifications which deserve mention, albeit brief. They may only be possibilities, but food for thought nonetheless.

The decriminalisation of public drunkenness may prove antithetical to that other argument behind section 37A — "drunkenness demands treatment, not punishment." The criminal record that accompanied the old section 41 convictions may, ironically, have been a key step towards seeking medical treatment. One, maybe two, section 41 convictions might have been attributed to youthful high-spiritedness. A string of convictions, on the other hand, may have been seen as reflecting a serious drinking problem, and for that reason (but not for the criminal record per se) employment doors may have been closed. This might, in turn, have prompted the individual to seek treatment. The removal of the record which closed the doors might, paradoxically, become a removal of the incentive for treatment.

Under the old system, after a third conviction a drunk was liable to be imprisoned. It was a common practice amongst the regular offenders to time a third conviction to coincide with the festive season, thus assuring oneself of a substantial Christmas dinner à la Her Majesty's Prison. In the same vein, incarceration could be arranged for the colder months of the year by following the same scheme. Under the new Act, this opportunity disappears. However, the police ought not to be surprised should there be a short spate of minor offences (e.g. window-breaking) in the weeks prior to Christmas.

The Salvation Army used to utilise the court appearances of section 41 subjects as an opportune contact point between the Army and the accused public drunks. At these contacts, the Army could offer assistance to the more regular offenders who might be in need of help with their problems. This contact has been lost under the Summary Offences Act system.

The argument proffered to justify the new legislation strayed from the medical to the social to the legal. Consequently, in its final format section 37A requires the participation of the two unrelated departments of Police and Health.

In respect of the Health Department's involvement, the conclusion is simple. The absence of the temporary shelters and detoxification centres means that section 37A is effectively little different from the Police General Instructions, paragraph A-111, i.e. the previous practice. To be effective as a piece of health legislation, it is necessary for moves to be made in the direction of introducing these centres/shelters. They need not be new, sparkling facilities. They may be simply a more efficient use of existing resources.