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**LIQUOR CONTROL BYLAWS:  
THE MISUSE OF AN UNNECESSARY SLEDGEHAMMER  
FOR A VERY SMALL NUT**

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**Abstract**

*This paper examines the liquor control bylaws system in New Zealand. It explores wider concerns about alcohol use and the legislative situation relating to liquor control bylaws in order to contextualize the environment in which territorial authorities make liquor control bylaws. This paper focuses on a range of issues that arise from the liquor control bylaw system, including the rationale for liquor control bylaws, the implications of using bylaws for liquor control purposes, how police enforce these bylaws, implications under the New Zealand Bill of Rights 1990, and concerns surrounding evidentiary standards and penalties. It recommends potential options to ameliorate some of these issues, examining both the possible repeal of and amendments to the liquor control bylaw system. This paper also examines the recent alcohol law reform proposals in respect to the impact they may have on liquor control bylaws.*

**Word length**

*The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 15,469 words.*

**Subjects and Topics**

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Alcohol Law Reform Bill 2010

## *I Introduction*

Liquor control bylaws, or liquor bans, are widespread throughout New Zealand and are increasing in number and scope. These bylaws enable territorial authorities to prohibit the possession and consumption of liquor in public places. Liquor control bylaws have the effect of criminalising many otherwise law-abiding people who choose to have a wine or a beer in the park or on a beach, often without realising that this otherwise legal activity is banned in that area. In this paper, I will suggest that these bylaws are a disproportionate response to the perceived harms of drinking in public. I will argue that territorial authorities and the Police are misusing these bylaws to address wider problems associated with alcohol. I will contend that the direct harms associated with drinking in public are not significant, and that if drinking in public results in alcohol-related offending it should more appropriately be dealt with the Summary Offences Act 1981.

The paper addresses the recent recommendations made by the Law Commission on liquor control bylaws. Hon Simon Power, the Minister of Justice, has accepted most of these proposals and recommended them to Cabinet. In this paper I use the Wellington City Council liquor control bylaw as the main example of a liquor control bylaw, as it has been evaluated by both the Police and the Council, and in 2010 the Council consulted on extending the bylaw to cover the entire city, on a permanent basis.

This paper is divided into three parts. The first part will place liquor control bylaws in the wider context of concern about the harms caused by alcohol, and outline how liquor control bylaws have become the main legislative tool used to address the problems perceived to be associated with drinking in public. The second part analyses five issues I have identified with liquor control bylaws. These are the rationale for liquor control bylaws; the implications of using bylaws for liquor control purposes; issues around police enforcement; the implications under the New Zealand Bill of Rights Act 1990 (Bill of Rights Act 1990); and concerns with the evidentiary standards and the penalties for the offence. The paper concludes by suggesting potential options for change. One option is to repeal the liquor control bylaw system and either address the direct problems associated with drinking in public through the enforcement of offences under the Summary Offences Act 1981 or by introducing primary legislation that bans drinking in public, with possible exceptions. I acknowledge that this option is likely to be politically unpalatable, especially given the views of the Police, the desire of territorial authorities to have control over alcohol management in their communities, and the recent recommendations considered by Cabinet. Consequently, this paper provides alternative options to address some of the legal, policy and practical issues with liquor control bylaws. These options are introducing some of the Minister of Justice's recommendations, introducing a behavioural requirement to the offence of

breaching a liquor control bylaw, making liquor control bylaws an infringement offence, and increasing monitoring of liquor control bylaws.

## *II Background*

This background section briefly explores concerns around alcohol use and availability in New Zealand and the past and current legislation relating to drinking in public in order to contextualise the environment in which territorial authorities make liquor control bylaws. It discusses the proposed alcohol law reform which, if passed into legislation, will make significant changes to the current liquor control bylaw system.

### *A The New Zealand Context: “It’s Not The Drinking, It’s How We’re Drinking”<sup>1</sup>*

In this section, I outline the recent developments in respect to alcohol reform (including reform of the liquor control bylaw system); the context which has given rise to the proposed reform, such as increased availability and the harms associated with excessive consumption; and issues around drinking in public.

#### *1 Recent developments*

The harms associated with excessive alcohol consumption have received significant public and government attention in recent months. The Law Commission consulted widely on a range of issues relating to the sale, supply, demand for and consumption of liquor in New Zealand between July and October 2009.<sup>2</sup> As part of this consultation, views were sought on the issue of drinking in a public place and the current liquor control bylaw situation. This consultation resulted in the Law Commission receiving 2,939 submissions and presenting a report to the Minister of Justice, Hon Simon Power, which proposed a wide range of recommendations to change the current policy and legislation relating to the sale, supply and consumption of liquor in New Zealand.<sup>3</sup> The recommendations in this report have been considered by Cabinet, with the Minister of Justice recommending the adoption in full, or in part, of 126 of the Law Commission’s 153 recommendations as well as proposing other changes.<sup>4</sup> The Government intends to introduce an Alcohol Reform Bill in October 2010 and plans to pass the legislation before the end of this parliamentary term.<sup>5</sup>

The Minister of Justice has said that the “key for the government is to get a legislative response which zeroes in on where the harm is actually occurring and not to the detriment of those New Zealanders who are drinking in moderation and reasonably”.<sup>6</sup> He further indicated

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<sup>1</sup> Tagline from a series of Alcohol Advisory Council of New Zealand advertisements launched in 2005.

<sup>2</sup> Law Commission *Alcohol in Our Lives: An Issues Paper on the Reform of New Zealand’s Liquor Laws* (NZLC IP15, 2009) [Law Commission, IP15].

<sup>3</sup> Law Commission *Alcohol in Our Lives: Curbing the Harm* (NZLC R114, 2010) [Law Commission, R114].

<sup>4</sup> Hon Simon Power “Government outlines balanced plan for alcohol reform” (press release, 23 August 2010).

<sup>5</sup> *Ibid.*

<sup>6</sup> Interview with Hon Simon Power, Minister of Justice (Paul Holmes, Q&A, TV One, 4 July 2010).

that he was particularly concerned about the drinking of young people.<sup>7</sup> Consistent with this, the Minister of Justice's Cabinet paper focuses on reducing harm, while not unduly inconveniencing low and moderate drinkers.<sup>8</sup> These proposals therefore target those who drink excessively, particularly at licensed premises and in the public domain<sup>9</sup> and include recommended changes to the liquor control bylaw system, which are discussed in detail later in this paper. When introduced, the Alcohol Reform Bill will go through the usual parliamentary process, and the Minister of Justice has indicated that the proposals are a "starting point for Parliament's consideration" and that the public will have the opportunity to comment in the select committee process.<sup>10</sup>

## 2 *The need for the reform proposals*

The availability of alcohol in our communities has long been a source of debate, since the prohibition and temperance movements of the late 1800s, public debates around six o'clock closing (which was introduced in 1917 and abolished in 1967 as a result of a public referendum), and further reforms in the 1970s and 1980s which liberalised the liquor licensing system. The 1984 Labour Government established a Working Party on Liquor, which was not persuaded that restrictions on the number of liquor outlets and trading hours had a direct relationship with consumption levels.<sup>11</sup> The Working Party report led to the Sale of Liquor Act 1989 which significantly liberalised New Zealand's liquor laws, leading to a simplified licensing system and a proliferation of liquor outlets, including the ability of supermarkets and grocery stores to sell wine.<sup>12</sup>

Today the alcohol industry is a multi-billion dollar sector. Over 80% of New Zealand adults drink at least occasionally.<sup>13</sup> The number of liquor licences has more than doubled over the last twenty years (to over 14,000 in June 2009), providing New Zealanders with more choices than ever before in where to purchase and consume their alcohol.<sup>14</sup> In 2008, there was roughly \$85 million spent in retail sales each week.<sup>15</sup> Alcohol is a major contributor to New Zealand's GDP, with the wine sector alone contributing \$1.5 billion in

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<sup>7</sup> Ibid.

<sup>8</sup> Cabinet "Alcohol Law Reform" (5 August 2010) at [9] <[www.beehive.govt.nz/sites/all/files/alcohol-law-reform-cabinet-paper-final.pdf](http://www.beehive.govt.nz/sites/all/files/alcohol-law-reform-cabinet-paper-final.pdf)> [Alcohol Law Reform Cabinet paper].

<sup>9</sup> Ibid.

<sup>10</sup> Hon Simon Power "Government outlines balanced plan for alcohol reform" (press release, 23 August 2010).

<sup>11</sup> Working Party on Liquor *The Sale of Liquor in New Zealand* (1986) at 18.

<sup>12</sup> The Sale of Liquor Amendment Act 1999 (introduced by the National Government) enabled supermarkets and grocery stores to also sell beer, and lowered the legal age to purchase liquor from 20 to 18.

<sup>13</sup> Ministry of Health *Alcohol Use in New Zealand: Analysis of the 2004 New Zealand Health Behaviours Survey – Alcohol Use* (2007) at 10.

<sup>14</sup> Law Commission, IP15, above n 2, at 17. This is based on licence numbers from the Liquor Licensing Authority as at June 2009.

<sup>15</sup> Ibid, at 18. This equates to an estimated \$4 - 5 billion a year, with an approximate sales breakdown of \$1.3 billion in sales from cafes and restaurants, \$1.2 billion in sales from specialist liquor stores, \$1 billion in sales from supermarkets, \$1 billion in sales in bars and clubs, and \$0.3 billion in sales from accommodation. These estimates are based on the Statistics New Zealand *Retail Trade Survey December 2008 Quarter* and industry advice on what proportion of retail sales were alcohol beverages.

2008.<sup>16</sup> The alcohol industry is responsible for employing large numbers of people in the hospitality, retail and manufacturing sectors. The amount of alcohol available for consumption in New Zealand, and the amount of pure alcohol contained in those beverages, has increased in volume in recent years.<sup>17</sup> Overall, alcohol has become more affordable.<sup>18</sup>

While the consumption of alcohol provides social benefits for many New Zealanders and drinkers have benefitted from the liberalised, competitive environment, the harms associated with alcohol abuse have also been increasing in recent years. New Zealand has a traditionally heavy drinking culture and the Alcohol Advisory Council of New Zealand categorises a quarter of adult drinkers as “binge drinkers”.<sup>19</sup> A variety of harms result from this drinking culture. Every year about 1,000 New Zealanders die from alcohol-related causes, including from motor vehicle and other type of accidents, and alcohol-related cancers.<sup>20</sup> Many more are injured as a result of such accidents or assaults. Approximately 22% of all ACC claims have alcohol as a contributing factor, at a cost of around \$650 million each year.<sup>21</sup> In 2007/08, at least 31% of all recorded crime involved an offender who had consumed alcohol before committing the offence.<sup>22</sup>

These harms are related to the availability and excessive consumption of liquor in general, not as a direct result of drinking in public. However, drinking in public places is a focus of concern for local communities. Issues raised by communities include litter (such as broken bottles), damage to property, intimidatory or offensive behaviour (such as urinating and vomiting), and residents feeling unsafe or unable to utilise their public spaces as a result of these behaviours.<sup>23</sup> The Minister of Justice has indicated that one of the objectives of alcohol law reform is to reduce the harm caused by alcohol use, including crime, disorder, and public nuisance.<sup>24</sup> Drinking in public is reasonably common, and includes people having picnics with a glass of wine in the park in summer, those drinking in transit on a night out,

<sup>16</sup> New Zealand Institute of Economic Research *Economic Impact of the New Zealand Wine Industry: An NZIER Report to the New Zealand Winegrower* (2009) at 7.

<sup>17</sup> Law Commission, IP15, above n 2, at 17. This is based on information from Statistics New Zealand reports *Infoshare; Alcohol Available for Consumption (year ended December 2008)* and *Alcohol and Tobacco Available for Consumption (year ended December 2008)*.

<sup>18</sup> Law Commission, IP15, above n 2, at 24. Since 1989, average weekly earnings rose by 82%, while the price of alcohol rose by 76%. (calculation based on Statistics New Zealand Infoshare data of the CPI for all alcoholic beverages, the CPI for all goods and average weekly earnings).

<sup>19</sup> S Palmer, K Fryer and E Kalafateli *ALAC Alcohol Monitor – Adults & Youth: 2007-08 Drinking Behaviours Report* (Alcohol Advisory Council of New Zealand, 2009) at 7. “Binge drinking” is described as a session in which a person consumes seven or more standard drinks, and a “binge drinker” is someone who reported drinking that amount on the last occasion on which they drank, or on any occasion in the last two weeks.

<sup>20</sup> J Connor, J Broad, R Jackson, S Vander Hoorn and J Rehm *The Burden of Death, Disease and Disability Due to Alcohol in New Zealand* (ALAC Occasional Publication 23, 2005).

<sup>21</sup> Katie Sadleir, ACC General Manager of Injury Prevention, as quoted in Mike Houlahan “Academics slam result of study into alcohol abuse” *The Press* Christchurch, 18 June 2009 and ACC “Submission to the Law Commission’s Issues paper 15: Alcohol in our lives: an issues paper on the reform of New Zealand’s liquor laws” (October 2009) at 1.

<sup>22</sup> New Zealand Police *National Alcohol Assessment* (2009) at 7.

<sup>23</sup> Wellington City Council, *Statement of Proposal to Amend the Liquor Control Bylaw* (2010) [Wellington City Council Bylaw Proposal] at 5 and Law Commission IP15, above n 2, at 64.

<sup>24</sup> Alcohol Law Reform Cabinet paper, above n 8, at [57].

groups of teenagers drinking in the street, and the homeless who have nowhere else to drink. Many people currently enjoy the right to be able to drink in a public place, for example at picnics on the beach or in the park, and do so responsibly without committing an offence (providing no liquor control bylaws cover the area in which they are drinking). A recent evaluation report observed that drinkers who have breached liquor control bylaws in Wellington fall into two categories – the majority who were drinking as they moved from one place to another, and the minority who congregate in public to drink.<sup>25</sup> The same report found men, women, teenagers and older adults have all been observed breaching the bylaw, and men were more likely to be carrying multiple drinks or drinking in vehicles while older women were more likely to be drinking from wine glasses.<sup>26</sup>

Some individuals who drink in public go on to commit offences. In 2007/08, 18% of all alleged offenders (or 14,838 individuals) who had consumed alcohol prior to offending identified public places as the place where they had their last drink.<sup>27</sup>

## ***B Drinking in public places - the legislative situation***

It is only an offence for an adult to drink in a public place if the area is covered by a liquor control bylaw. In this section, I explore other legislation that could apply to an individual who has been drinking in public. I then address the legislation relating to liquor control bylaws, outlining the changes in this legislation over time and the current ambit and use of liquor control bylaws.

### *1 Drinking in public places is not a general offence*

There is no primary legislation in New Zealand which makes it an offence for adults to drink alcohol in public places.<sup>28</sup> The only exception is drinking liquor on an aircraft, hovercraft, ship or ferry or other vessel, train or vehicle that is carrying passengers for reward which is not a licensed premise under the Sale of Liquor Act 1989.<sup>29</sup> The Summary Offences Act 1981 removed the offence of being “drunk in any public place”.<sup>30</sup> There had been widespread discontent with this offence, and many considered that public drunkenness was the symptom of a larger social problem and should be dealt with in a more appropriate way than by criminalisation.<sup>31</sup>

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<sup>25</sup> Sim, M et al *Wellington City Council Liquor Control Bylaw Evaluation Report* (Wellington, New Zealand Police, 2005) at 29.

<sup>26</sup> *Ibid*, at 28 and 30.

<sup>27</sup> New Zealand Police *National Alcohol Assessment* (2009) at 69. Note, this information is used by the Police as an indicator only, as it is taken from intoxicated people and the answers are not always accurate.

<sup>28</sup> It is an offence under s 38(3) of the Summary Offences Act 1981 for persons under the age of 18 to drink or possess for consumption, liquor in a public place, if they are not accompanied by their parent or guardian. This offence is punishable by a maximum fine of \$300.

<sup>29</sup> Summary Offences Act 1981, s 38.

<sup>30</sup> This had previously been an offence under the Police Offences Act 1927, s 41.

<sup>31</sup> Gordon Wallace Stewart “Public Drunkenness: From Section 41 to Section 49 – No Offence Taken” (LLB(Hons) Dissertation, University of Victoria, 1982) at 3-6.

The Summary Offences Act 1981 contains a variety of other offences that may arise as a result of being intoxicated in public; such as disorderly behaviour, offensive behaviour or language, disorderly assembly, fighting in a public place, common assault, wilful damage, vandalism, intimidation, obstructing public way, being found in a public place preparing to commit a crime, and excreting in a public place.<sup>32</sup> These summary offences are punishable by a fine (ranging from a maximum of \$200 for excreting in a public place to \$4,000 for common assault). Some offences also carry a term of imprisonment (ranging from a maximum of 3 months for intimidation to 6 months for common assault).

Section 36 of the Policing Act 2008 gives a constable who finds a person intoxicated in a public place or trespassing on private property the power to take that person to their place of residence, to a temporary shelter, or if those options are not reasonably practical, to detain and take the person into custody until they cease to be intoxicated.<sup>33</sup> In 2007/08 21,263 people were taken home, to a temporary shelter or detained under this section.<sup>34</sup> While this shows that thousands of New Zealanders are found to be very intoxicated in public, it does not mean that these people all became intoxicated by drinking in public.

## 2 *Liquor control bylaws make it an offence to drink in some public places*

The Local Government Act 1974 and the Local Government Act 2002 have provided the main legislative framework for regulating drinking in public places. Measures were first introduced in December 1984, when councils could prohibit the consumption of, bringing of and possession of liquor in specified public places for particular public events, functions or gatherings.<sup>35</sup> In 1999 further amendments were made to give councils the power to prohibit the consumption of, bringing of or possession of liquor into a public place on a specified day.<sup>36</sup> The council had to be satisfied on reasonable grounds that liquor will be present in a public place on the specified day and was likely to lead to the commission in the public place of an offence under the Summary Offences Act 1981.<sup>37</sup> In *Police v Hall* these amendments were tested and the Court held that a bylaw banning the consumption and possession of

<sup>32</sup> Summary Offences Act 1981, ss 3, 4, 5A, 7, 9, 11, 11A, 21, 22, 28 and 32.

<sup>33</sup> Such detention cannot be for longer than 12 hours, unless recommended by a health practitioner for a further period of up to 12 hours. Intoxication is defined as being observably affected by alcohol, other drugs, or substances to such a degree that speech, balance, co-ordination, or behaviour is clearly impaired. In addition, the constable needs to reasonably believe that the person is incapable of protecting himself or herself from physical harm, or is likely to cause physical harm to another person or is likely to cause significant damage to property. This section replaced the similar provision under s 37A of the Alcoholism and Drug Addiction Act 1966, which had been introduced by the Summary Offences Act 1981 (at the same time as when the offence of being drunk in public was repealed).

<sup>34</sup> New Zealand Police *National Alcohol Assessment* (2009) at 26. The Law Commission is concerned at the lack of consequence for these individuals (as they have not committed an offence) and has recommended the adoption of a civil cost-recovery regime which provides police with the discretion to serve a notice of debt on any individual to whom s 36 of the Policing Act 2008 has been applied, suggesting a amount of around \$250 (Law Commission, R114, above n 3, at 393).

<sup>35</sup> Local Government Act 1974, s 709A(1).

<sup>36</sup> *Ibid*, s 709C(2).

<sup>37</sup> *Ibid*, s 709C(1)(a).

liquor in specified public places in Gore was invalid on the grounds of unreasonableness as it was not limited to the constraints outlined in ss 709A and 709C.<sup>38</sup>

It is likely that the invalidation of the bylaw in this case and the looming threat of excessive drinking in public places over the summer in 2001-2002 provided some of the impetus for the enactment of the Local Government (Prohibition of Liquor in Public Places) Amendment Act 2001. The Bill was introduced under urgency on 18 December 2001 and came into force on 22 December 2001. The Local Government (Prohibition of Liquor in Public Places) Amendment Act 2001 enabled a member of the Police, who believed on reasonable grounds, that a person is, or has been, carrying or consuming liquor in a designated public place or intends to consume liquor in such a place to require that person not to consume the liquor or surrender it to the Police.<sup>39</sup> The Police were obligated to inform a person that failure, without reasonable excuse, to comply with these requirements was an offence.<sup>40</sup> This offence was punishable on summary conviction to a fine not exceeding \$500.<sup>41</sup> The Police did not have the power to search, seize or arrest under this Act.

The Local Government (Prohibition of Liquor in Public Places) Amendment Act 2001 also specified how a public place could be designated as a place where liquor could not be carried or consumed. A territorial authority could identify, by special order, a “designated public place” if it was satisfied that nuisance, annoyance or disorder has in the past been associated with the consumption of liquor in that place or it considered there were sufficient grounds to act to prevent community concern that there may be disorder.<sup>42</sup> However, a drafting error in the preceding subsection<sup>43</sup> had the effect of automatically making all public places designated public places where the carrying and consumption of liquor was prohibited. Not surprisingly this created controversy at the time and there were media reports about a “dry summer” and the fact that Parliament had made it illegal to carry alcohol in public.<sup>44</sup> Parliamentary rules meant that the government needed unanimous support to change the offending word, which the Opposition refused to give.<sup>45</sup> Given the drafting error, the Police were reluctant to prosecute offenders, and the fact that it did not give them the ability to search, seize or arrest offenders or even demand their name or address made it “virtually unenforceable”.<sup>46</sup> The Local Government (Prohibition of Liquor in Public Places) Amendment Act 2001 remained in force until 25 December 2002, when it was repealed by

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<sup>38</sup> *Police v Hall* [2001] DCR 239 at 255.

<sup>39</sup> Local Government (Prohibition of Liquor in Public Places) Amendment Act 2001, ss 5(1) and 5(2).

<sup>40</sup> *Ibid*, s 5(5).

<sup>41</sup> *Ibid*, s 5(4).

<sup>42</sup> *Ibid*, s 6(2).

<sup>43</sup> *Ibid*, s 6(1).

<sup>44</sup> For example: TVNZ “Booze Bungle leads to dry summer” *TVNZ* (New Zealand, 20 December 2001) <[www.tvnz.co.nz/content/73205/425825/article.html](http://www.tvnz.co.nz/content/73205/425825/article.html)>.

<sup>45</sup> *Ibid*.

<sup>46</sup> NZPA “Police papers say drink ban toothless” *The New Zealand Herald* (New Zealand, 29 January 2002) <[www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=887176](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=887176)>.

the Local Government Act 2002. The Local Government Act 2002 introduced new provisions relating to the possession and consumption of liquor in public places.

Section 147 of the Local Government Act 2002 specifically enables territorial authorities to make bylaws for the purpose of prohibiting or otherwise regulating or controlling the consumption, possession or bringing of liquor into a public place.<sup>47</sup> The presence or use of a vehicle in conjunction with these activities is also covered.<sup>48</sup> A public place is defined as a place under the control of the territorial authority and that is open to, or used by, the public regardless of whether there is a charge for admission.<sup>49</sup> A public place also includes a road, whether or not the road is under the control of a territorial authority.<sup>50</sup> The definition of public place does not currently cover privately owned car-parks, even if they are accessible to the public. The Police have identified this as an issue, especially in Christchurch where large numbers of people drink in a privately owned carpark with impunity, next door to the central police station.<sup>51</sup> The Law Commission has recommended that such areas should be covered by the definition.<sup>52</sup> The Minister of Justice has recommended that the definition of a public place under the Local Government Act 2002 be extended to cover any place that is open to being used by the public, which would include privately owned carparks, school grounds and other private spaces to which the public has legitimate access.<sup>53</sup> A liquor control bylaw does not prohibit the transport of unopened liquor through an area covered by the bylaw where liquor is being taken to or from private premises, or has been purchased from, or is being delivered to, licensed premises that adjoin the area covered by the bylaw.<sup>54</sup>

Under the Local Government Act 2002 the Police are given particular powers to enforce liquor control bylaws. Sections 169 and 170 set out the powers of the Police to search a container or vehicle, seize liquor and arrest a person. A member of the Police may, without a warrant, search a container (for example, a parcel, package, bag or case) in a person's possession, or search a vehicle, if that person or vehicle is in a public place covered by a liquor bylaw.<sup>55</sup> Before exercising this search, the Police must inform the person in possession of the container or the vehicle that he or she has the opportunity of removing the container or vehicle from the liquor bylaw area and provide the person with a reasonable opportunity to do so.<sup>56</sup> In some specific circumstances the Police may conduct a search immediately and

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<sup>47</sup> Local Government Act 2002, s 147(2).

<sup>48</sup> *Ibid*, s 147(2)(d).

<sup>49</sup> *Ibid*, s 147(1)(a).

<sup>50</sup> *Ibid*, s 147(1)(b)(i).

<sup>51</sup> New Zealand Police "Submission to the Law Commission's Issues paper 15 "Alcohol in our lives: an issues paper on the reform of New Zealand's liquor laws" (October 2009) at [16.24] [New Zealand Police Submission to the Law Commission].

<sup>52</sup> Law Commission, R114, above n 3, at [21.43].

<sup>53</sup> Alcohol Law Reform Cabinet paper, above n 8, Recommendation 176 at 82. This would be consistent with the definition of a "public place" under the Summary Offences Act 1981.

<sup>54</sup> Local Government Act 2002, s 147(3).

<sup>55</sup> *Ibid*, s 169(2)(a).

<sup>56</sup> *Ibid*, s 170(1).

without further notice.<sup>57</sup> These search and seizure provisions are not among those proposed to be amended by the Search and Surveillance Bill 2009.<sup>58</sup>

The Police can arrest an individual whom they find in breach of a liquor bylaw, or who has refused to comply with a request by the Police to surrender his or her liquor or leave the public area covered by the bylaw.<sup>59</sup> The Police also have the power to seize and remove liquor when a bylaw is being breached, in which case the liquor is forfeited to the Crown if the person in possession of the liquor is convicted of breaching the bylaw.<sup>60</sup> If arrested and prosecuted, an individual in breach of a liquor control bylaw is liable on summary conviction to a maximum fine of \$20,000.<sup>61</sup> The Police are not required by these provisions to search an individual before making an arrest; if that person is observed drinking or in possession of liquor in an area covered by a liquor control bylaw, they can be arrested without being given a reasonable opportunity to leave the liquor control bylaw area.

There are currently about 170 liquor control bylaws in force around New Zealand.<sup>62</sup> The number of territorial authorities implementing such bylaws has been increasing; the percentage of territorial authorities with at least one liquor control bylaw has risen from 64% in 2005<sup>63</sup> to 93% in 2009.<sup>64</sup> In addition, more liquor control bylaws are now operating on a 24 hours a day, seven days a week (24/7) basis. The percentage of territorial authorities with liquor control bylaws who have at least one that operates on a permanent basis increased from 64% in 2005<sup>65</sup> to 71% in 2009.<sup>66</sup> While the general perception is that communities tend to support liquor control bylaws, it appears there is less public interest in extending them. For example, the Wellington City Council consulted in April and May 2010 on extending the current liquor control bylaw to cover the entire Wellington city, so that it would be an offence to possess or consume liquor in all public places, in most situations, on a permanent basis.<sup>67</sup> The proposal contained an alternative option of extending the current bylaw to include Mount Cook and Newtown.<sup>68</sup> The Council received 604 submissions, of which 76% were against the

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<sup>57</sup> Ibid, ss 170(2) and 170(3).

<sup>58</sup> The Search and Surveillance Bill 2009 (45-1) was referred to the Justice and Electoral Select Committee on 4 August 2009 and the Committee is due to report back to Parliament in October 2010. The explanatory note to the Bill states that it aims to reform the law relating to search and surveillance powers to provide a coherent, consistent and certain approach in balancing the complementary values of law enforcement and human rights. Clauses 244 and 245 of the Search and Surveillance Bill 2009 amend ss 165, 166, 167, 168, 171, 172 and 173 of the Local Government Act 2002. It is not clear, on the face of the Bill, why ss 169 and 170 have not been included.

<sup>59</sup> Local Government Act 2002, ss 169(2)(c) and 169(d).

<sup>60</sup> Ibid, ss 169(2)(b) and 169(3).

<sup>61</sup> Ibid, ss 239 and 242(4).

<sup>62</sup> Law Commission R114, above n 3, at [21.25].

<sup>63</sup> Buddle Findlay *Report on Liquor Control Bylaws* (prepared for the Department of Internal Affairs 2005) at [116] [*Report on Liquor Control Bylaws*].

<sup>64</sup> Law Commission IP15, above n 2, at [11.43].

<sup>65</sup> *Report on Liquor Control Bylaws*, above n 63, at [118].

<sup>66</sup> Law Commission IP15, above n 2, at [11.44].

<sup>67</sup> Wellington City Council Bylaw Proposal, above n 23, at 3.

<sup>68</sup> Ibid, at 14.

extension to the entire Wellington city, and decided on 25 June 2010 to extend the bylaw to cover Mount Cook and Newtown only.<sup>69</sup>

This part of the paper has explored the context for the proposed alcohol reforms; identified offences under the Summary Offences Act 1981 that could relate to alcohol-induced offending; outlined the background to liquor control bylaw legislation; explained how liquor control bylaws are made and enforced; and provided information on their widespread use. This background knowledge equips us to now consider the issues surrounding liquor control bylaws, and analyse the problems with these bylaws.

### *III Analysis of Issues associated with Liquor Control Bylaws*

In this part of the paper I analyse the rationale for liquor control bylaws; the implications of using bylaws for liquor control purposes; issues around police enforcement; the implications under the Bill of Rights Act 1990 and evidentiary standards, disproportionate penalties and the impact of a conviction. In the first section, I will argue that liquor control bylaws are being misused to address wider-alcohol related harms and as a pre-emptive measure to reduce other offending that is perceived, often wrongly, to result from drinking in public. If liquor control bylaws are to continue to be used for this purpose, there needs to be much stronger evidence than is currently available to justify a rationale on the grounds of preventing future harm or offences. In the next section I will describe how using bylaws, as opposed to Acts or regulations, for liquor control purposes means that they can be invalidated for a variety of reasons, if they are not properly made. I then outline the rule of law issues associated with liquor control bylaws, and explain how improvements in signage requirements and less regional variation would ameliorate these issues.

In my analysis of police enforcement of liquor control bylaws I will show how the number of arrests are increasing, with young people, males and Māori being disproportionately over-represented in the conviction rates. Regional variation in enforcement means that the chances of being arrested for breaching a liquor control bylaw varies depending on the police district in which an offence occurs. In the Bill of Rights Act 1990 section, I analyse the potential for liquor control bylaws to be invalidated under that Act, and conclude that territorial authorities may not be sufficiently considering Bill of Rights Act 1990 implications, especially in relation to homeless people, when making liquor control bylaws. The final section analyses concerns surrounding proposed changes to evidentiary standards, the current disproportionality of penalties and briefly discusses the consequences faced by individuals who have a criminal conviction.

#### ***A The Rationale for Liquor Control Bylaws***

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<sup>69</sup> Wellington City Council “Liquor Ban” (press release 5 July 2010).

This section analyses the rationale of liquor control bylaws, and argues that they are being misused, in the absence of reliable evidence, to address wider harms than their original purpose.

Under the Local Government Act 2002 liquor control bylaws are intended to be used for the purpose of prohibiting or otherwise regulating or controlling the consumption, possession or bringing of liquor into a public place.<sup>70</sup> This provision can be read alongside the general bylaw-making power in s 145, which states that a territorial authority may make bylaws to protect the public from nuisance; protect, promote and maintain public health and safety; or to minimise the potential for offensive behaviour in public places. The Act requires that, before making a liquor control bylaw under s 147, a territorial authority must determine whether a bylaw is the most appropriate way of addressing the perceived problem and, if so, whether the proposed bylaw is the most appropriate form of bylaw and whether it gives rise to any implications under the Bill of Rights Act 1990.<sup>71</sup> The special consultative procedure must be used when making, amending or revoking a bylaw.<sup>72</sup>

This raises the question of what territorial authorities, and their local communities, consider the “perceived problem” to be. A number of territorial authorities have interpreted the “perceived problem” widely, and are making liquor control bylaws so that they can be used as a pre-emptive measure to prevent potential offending or reduce alcohol related harms in general.<sup>73</sup> In 2005 a selection of youth workers, Walkwise and Streetwise staff<sup>74</sup>, Police, retailers and business owners all agreed that the Wellington City Council liquor control

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<sup>70</sup> Local Government Act 2002, s 147(2).

<sup>71</sup> Ibid, ss 155(1) and 155(2).

<sup>72</sup> Ibid, s 156. This procedure requires the territorial authority to prepare a statement of proposal, which must include a draft of the proposed bylaw, the reasons for the proposal and a report on the determinations made by the territorial authority regarding appropriateness and NZBOR Act 1990 implications. A summary of that information must be prepared and distributed as a basis for consultation. The special consultative procedure also requires the territorial authority to give public notice of the proposal, the consultation period, and has requirements relating to the process for requesting, receiving and hearing submissions.

<sup>73</sup> These territorial authorities include: Auckland, Marlborough and Westland, where bylaws aim to reduce disorderly behaviour and criminal offending; Manukau, where bylaws aim to help reduce alcohol-related problems; Taupo, Whakatane, Napier, Gisborne, Kapiti, and Mackenzie, where bylaws aim to reduce the incidence of alcohol-related offences of a violent or destructive nature; Opotiki and Carterton, where bylaws address concerns relating to potential criminal offending and are a proactive restriction to reduce offending; Tauranga, where bylaws aim to encourage responsible behaviour where groups of people gather frequently, and to limit the effects of alcohol on those people and places; Horowhenua, Tararua, Grey and Southland, where bylaws aim to reduce the incidence of alcohol related offences; Wellington, where the bylaw aims to address concerns relating to potential offending; and Timaru and Waimate, where bylaws aim to reduce the incidence of property damage. Some of these bylaws also included public safety concerns as part of the purpose of the bylaw. See Law Commission *Stocktake of Liquor Bans* (Wellington, 2009).

<sup>74</sup> Walkwise staff are “city safety officers” who operate 24/7 in the central city. Their role is to prevent and deter crime and anti-social behaviour through visibility and acting as ambassadors for the Wellington City Council. Streetwise staff are primarily contracted for cleaning but contribute to city safety by liaising with Walkwise staff and police.

bylaw was a useful tool to minimise crime and disorder associated with alcohol and had the potential to prevent alcohol-related problems in the inner city.<sup>75</sup>

Wellington City Council has stated that, when people are arrested for breaching the liquor control bylaw, it is because the Police have determined the behaviour of those individuals will lead to more serious offending.<sup>76</sup> The Council extrapolates this idea to find that “in effect, being apprehended for a lesser offence is of benefit to those subject to a charge of being in breach of the liquor control bylaw”.<sup>77</sup> However, one can argue that that a breach of the liquor control bylaw (with a maximum penalty of \$20,000 on summary conviction) is not a “lesser offence” than the offences under the Summary Offences Act 1981 which are also solely punishable by a fine (of between \$200 and \$2,000) on summary conviction.<sup>78</sup>

The Police strongly support liquor control bylaws and consider that significant harm and costs result from the consumption of alcohol in public places.<sup>79</sup> The Police have stated that liquor control bylaws “give us the legal authority to go out and deal with something that we believe may develop into a more serious problem, whereas in the past we had to wait for it to be a problem”.<sup>80</sup> The Police consider that the power of arrest is a critical feature of the liquor control bylaw system, as the “ability to apprehend and remove offenders from hotspots, and to physically take them to the local police station for processing, allows them to cool down in an environment which is safer for them and others”.<sup>81</sup> The Police further stated that the “primary consideration for many arrests is the likelihood of future victimisation of the offender” and that the power of arrest is critical for being able to “nip alcohol-related problems in the bud” before they escalate and prevent offenders becoming repeat offenders or victims.<sup>82</sup> Arresting someone to prevent them from being a victim raises serious justice issues. The current Minister of Police, the Hon Judith Collins, appears to endorse this approach by describing arrests for breaches of liquor control bylaws as a “proactive policing statistic”, going so far as to suggest that they should not be included in the crime statistics.<sup>83</sup>

There is nothing to suggest that Parliament’s intention when enacting the Local Government Act 2002 was for liquor control bylaws to be used as a proactive policing measure to prevent potential offending or reduce alcohol-related harms in general. It also does not appear to have been discussed in the Cabinet papers preceding the introduction of

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<sup>75</sup> Sim, M et al *Wellington City Council Liquor Control Bylaw Evaluation Report* (Wellington, New Zealand Police, 2005) at 75.

<sup>76</sup> Wellington City Council Bylaw Proposal, above n 23, at 13.

<sup>77</sup> Ibid.

<sup>78</sup> See Summary Offences Act 1981, ss 4,7,22,28 and 32 (offensive behaviour, fighting in a public place, obstructing public way, being found in a public place preparing to commit crime, and excreting in public place).

<sup>79</sup> New Zealand Police Submission to the Law Commission, above n 51, at [16.1].

<sup>80</sup> Sim, M et al *Wellington City Council Liquor Control Bylaw Evaluation Report* (Wellington, New Zealand Police, 2005) at 40.

<sup>81</sup> New Zealand Police Submission to the Law Commission, above n 51, at [16.11].

<sup>82</sup> Ibid at [16.12].

<sup>83</sup> Derek Cheng, “More police at weekends ‘making dent’ in murder rate”, *The New Zealand Herald* (New Zealand, 20 July 2010) <[www.nzherald.co.nz/news/print.cfm?objectid=10659934](http://www.nzherald.co.nz/news/print.cfm?objectid=10659934)>.

the Local Government Bill 2001.<sup>84</sup> The Local Government and Environmental Committee did not address this in its report back to the House, instead simply stating that there was no intention that the Local Government Bill 2001 would invalidate existing liquor prohibitions under the current liquor ban system.<sup>85</sup> If this is interpreted as an endorsement of the previous rationale for liquor control bylaws, some help can be gleaned from the explanatory note of the Local Government (Prohibition of Liquor in Public Places) Bill 2001 which stated:<sup>86</sup>

The purpose of the Bill is to limit the level of public disorder often associated with the unrestricted consumption of alcohol in public places and to curb the growing number of incidents of liquor-induced criminal offending, and the public nuisance and community fear arising from unrestricted or unsupervised liquor consumption, by restricting liquor usage in designated public places.

The Law Commission is concerned about the way liquor control bylaws are made and developed and considers that the criteria need to be clarified.<sup>87</sup> It has recommended that there be additional evidential requirements on territorial authorities to show that a liquor control bylaw is the most appropriate way to address the problem, before creating such a bylaw.<sup>88</sup> These are:<sup>89</sup>

- the proposed area and timing can be justified as a reasonable limitation on the rights and freedoms of individuals;
- evidence that there is a high volume of offending or disorder in the proposed area that can be linked to alcohol;
- the evidence demonstrates that the density of offending and disorder, and the location of the offending, is such that the boundaries of the liquor ban are appropriate and proportionate.

The Law Commission further stated that evidence should also demonstrate the proposed timing is a justified and proportionate response to the alcohol-related harm that occurs.<sup>90</sup> The Minister of Justice has recommended that these additional evidential requirements be met before a liquor control bylaw can be created.<sup>91</sup>

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<sup>84</sup> There was a suite of papers dealing with regulatory functions (including regulating drinking in public places) submitted to the Cabinet Policy Committee in 2001.

<sup>85</sup> Local Government Bill 2001 (191-2) (Local Government and Environmental Committee report) at 42.

<sup>86</sup> Local Government (Prohibition of Liquor in Public Places) Bill 2001 (197-1) (explanatory note). The resultant Local Government (Prohibition of Liquor in Public Places) Amendment Act 2001 was in force from 22 December 2001 until 25 December 2002 (when it was repealed by the Local Government Act 2002).

<sup>87</sup> Law Commission, R114, above n 3, at [21.40].

<sup>88</sup> *Ibid*, at [21.41].

<sup>89</sup> *Ibid*, Recommendation 137, at 402.

<sup>90</sup> *Ibid*, at [21.41].

<sup>91</sup> Alcohol Law Reform Cabinet paper, above n 8, Recommendation 177 at 67 and [311]. Note there is some variance between the recommendations in the body of the paper and the recommendation section of the paper. In the body, the Minister of Justice includes a recommendation that there is evidence that the proposed area has experienced a high level of offending or disorder that is shown to be linked to, or exacerbated by, alcohol use within the area (at [311]). The use of the words “or exacerbated by” are different to the Law Commission’s

These recommendations would require territorial authorities to provide evidence of the actual harms that are occurring in a proposed liquor control area as a result of alcohol. It may not be straightforward to find such evidence. In 2005, an Evaluation Report (commissioned by the New Zealand Police) of Wellington City Council's liquor control bylaw in its first year of operation [Sim Evaluation Report], showed that there was no evidence to support the assertion that the bylaw contributed to less inner city crime, such as violence, disorder or wilful damage.<sup>92</sup> It questioned whether the lack of demonstrable impact on public place offending may be related to the relatively light handed approach that the Police took in enforcing the ban by issuing warnings for the vast majority (97%) of breaches.<sup>93</sup> However, there was also no evidence to suggest a correlation between heightened periods of enforcement of public place drinking laws (as measured by recorded alcohol offences) and alcohol harm indicators (as measured by violence, disorder and property damage offences).<sup>94</sup> Wellington City Council's own evaluation of its liquor control bylaw in 2005 found that there was no evidence that offending related to public alcohol consumption reduced.<sup>95</sup> Instead the evidence suggested that despite a drop in some alcohol-related offence categories, offending related to drinking in public places increased.<sup>96</sup>

These findings are in stark contrast to the perception that liquor control bylaws reduce criminal offending. In August 2010 Wellington Mayor Kerry Prendergast said that the Wellington city liquor control bylaw was working, and that her understanding is that there has been a 9% decrease in violent offences in public.<sup>97</sup> This assertion does not appear to be supported by the Police crime statistics, which show no significant change over the past three years in Wellington.<sup>98</sup> There was a small increase in reported public-place assaults in the Wellington police district in the June 2009 to June 2010 year, rising from 122 to 136.<sup>99</sup> The Wellington City Council reported that Police statistics in 2007 showed that violent offending related to alcohol consumption decreased when enforcement of the bylaw increased, although it is difficult to assess the true correlation and statistical significance of this based on the data relied upon by the Council.<sup>100</sup> Earlier evidence in Auckland showed the recorded offence statistics for assault declined by 12% and disorderly conduct by 21% between 2001 and 2003 during the times when that liquor control bylaw was in force; and in Whangarei there was a

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recommendation, and may imply a lower standard of evidence that the words "linked to". In addition the body of the paper refers to the need for the timeframes of the proposed ban to be appropriate and proportionate given the evidence of alcohol-related harm, however, the reference to timeframes has not been included in the recommendation section. This was most likely an oversight.

<sup>92</sup> Sim, M et al *Wellington City Council Liquor Control Bylaw Evaluation Report* (Wellington, New Zealand Police, 2005) at 71.

<sup>93</sup> *Ibid*, at 72-73.

<sup>94</sup> *Ibid*, at 71.

<sup>95</sup> Wellington City Council *Liquor Control Bylaw Evaluation* (2005) at 6.

<sup>96</sup> *Ibid*.

<sup>97</sup> Jim Chipp "50,000 liquor ban warnings in Wellington" *The Wellingtonian* (Wellington, 5 August 2010) <[www.stuff.co.nz/dominion-post/local/the-wellingtonian/3990238/50-000-liquor-ban-warnings-in-Wellington](http://www.stuff.co.nz/dominion-post/local/the-wellingtonian/3990238/50-000-liquor-ban-warnings-in-Wellington)>.

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid*.

<sup>100</sup> Wellington City Council Bylaw Proposal, above n 23, at 11.

downward trend in the level of reported violence offences throughout 2002 and 2003 when the liquor control bylaw was in force.<sup>101</sup> Further analysis may be needed to establish whether there is a causal link between these statistics.

In addition, Wellington City Council's own evaluation of its liquor control bylaw in 2005 found that there was no evidence to suggest that the bylaw has reduced public alcohol consumption in central Wellington during the times the bylaw was in force.<sup>102</sup> The Council had expected there would be a decrease in litter, vomit and broken bottles in the liquor control area; however only 29% of Wellington residents thought there was less glass and litter as a result of the liquor control bylaw and the bylaw had made little impact in respect of retailers and Citywise staff perceptions about how clean the city is on Friday and Saturday nights.<sup>103</sup>

Given that breaching a liquor control bylaw can result in a conviction and a potentially high fine, it is hard to justify why they should be used as a pre-emptive measure in order to reduce the likelihood of other offences, especially when those offences do require a behavioural element and have smaller maximum fines.<sup>104</sup> The use of liquor control bylaws to prevent future harm raises issues of fairness and justice. It is virtually impossible to justify using liquor control bylaws to prevent those drinking in public from becoming victims of other offences, especially as the Police can already detain intoxicated people to prevent this occurring.<sup>105</sup> In addition, given the paucity of evidence that supports the argument that the use of liquor control bylaws reduces the incidence of other offending, it is difficult to see why liquor control bylaws should be made for this purpose. I consider that the evidence base needs to be much stronger if liquor control bylaws are to be used to prevent the risk of future harm. An analogy can be drawn with drink-driving; a drunk-driver may not actually cause any harm while driving under the influence of alcohol, but he or she has still committed an offence, as sufficient amounts of alcohol have been consumed to increase the risk of such harms occurring. There is good reason to criminalise the conduct as it is suitably related to an identifiable harm (for example, losing control of the vehicle and injuring other motorists or pedestrians).<sup>106</sup> There is no such identifiable harm in relation to drinking a glass of wine in a public park. It is also difficult to see how liquor control bylaws, which only regulate drinking in public, will reduce the more general harms associated with excessive alcohol consumption such as injuries and alcoholism. In addition, these self-harms are not considered to be criminal behaviours.

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<sup>101</sup> Michael Webb, Paul Marriot-Lloyd and Marty Grenfell (2004) "Banning the bottle: Liquor bans in New Zealand" (paper presented to 3rd Australasian Drug Strategy Conference, Alice Springs, May 2004) at 7.

<sup>102</sup> Wellington City Council *Liquor Control Bylaw Evaluation* (2005) at 5.

<sup>103</sup> *Ibid*, at 66-67.

<sup>104</sup> The highest fine to date for breaching a liquor control bylaw has been \$5,000: *Police v Maxwell* DC Auckland CRI-2006-004-008145, 16 June 2006.

<sup>105</sup> See discussion of s 36 of the Policing Act 2008 at 7.

<sup>106</sup> R A Duff *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing, Oxford, 2007) at 123.

Consequently, it appears that territorial authorities are wrongly using liquor control bylaws in a misguided attempt to address wider alcohol-related harms and/or to prevent other offending from occurring. If, as the evidence suggests, liquor control bylaws do not actually have an effect on the level of offending or disorder in the bylaw area, it is difficult to rationalise why they are needed.

### ***B Implications of the Use of Local Government Bylaws for Liquor Control Purposes***

This section describes how bylaws are more open to legal challenge than other forms of legislation, and analyses the rule of law issues that relate to liquor control bylaws. Bylaws are a form of tertiary legislation (like Codes of Practice, Standards and Guidelines) and are not subject to scrutiny by Parliament or the Regulations Review Committee.<sup>107</sup> Bylaws can be invalidated for being ultra vires the empowering Act, inconsistent with the Bill of Rights Act 1990, unreasonable, uncertain or repugnant to the laws of New Zealand.<sup>108</sup> Bylaws can be invalidated under the Bylaws Act 1910, which enables any person to apply to the High Court for an order quashing the bylaw, or any part thereof, on the ground that the bylaw (or part of it) is for any reason invalid.<sup>109</sup> Under this Act, the Court has the power to amend the bylaw in order to make it valid.<sup>110</sup> It is possible to apply for a judicial review of the creation or enforcement of a bylaw, under the Judicature Amendment Act 1972. Collateral challenge, where the validity of a bylaw is raised in the course of defending a criminal or civil proceeding, is also available. This is called a “collateral challenge” as it is raised in proceedings which do not directly impeach the validity of the bylaw, unlike in judicial review proceedings.<sup>111</sup> Such a challenge is available when the assessment of validity of delegated legislation is central to a defence in civil or criminal proceedings in the District Court.<sup>112</sup>

There are rule of law issues with liquor control bylaws in terms of their accessibility and variation. People need to be able to know what the law is, in order to be guided by it.<sup>113</sup> This requires the law to be open and adequately publicised.<sup>114</sup> The importance of the law being accessible has been described as:<sup>115</sup>

The law must be accessible and so far as possible intelligible, clear and predictable. This seems obvious: if everyone is bound by the law they must be able to, without undue

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<sup>107</sup> Fiona Wright “Sound Check: Bylaws, Busking and the Local Government Act 2002” (2005) 36(1) VUWLR 105 at 112 and 117.

<sup>108</sup> For a discussion of the requirements for these grounds, see Dean Knight “Power to make bylaws” [2005] NZLJ 165 and Kenneth Palmer *Local Government Law in New Zealand* (2<sup>nd</sup> ed, The Law Book Company Limited, Sydney, 1993) at 430-445.

<sup>109</sup> Bylaws Act 1910, s 12(1).

<sup>110</sup> *Ibid*, s 12(5).

<sup>111</sup> *Brady v Northland Regional Council* [2008] NZAR 505 (HC) at [19].

<sup>112</sup> *Ibid* at [45].

<sup>113</sup> Joseph Raz *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford, 1979) at 214.

<sup>114</sup> *Ibid*.

<sup>115</sup> Lord Bingham “The Rule of Law” (2007) 66(1) CLJ 67 at 69-70.

difficulty, find out what it is, even if that means taking advice (as it usually will), and the answer when given should be sufficiently clear that a course of action can be based on it.

Under s 157 of the Local Government Act 2002, a territorial authority must give public notice of the bylaw as soon as practicable after it is made, stating the date on which the bylaw will come into operation and that copies may be inspected.<sup>116</sup> The territorial authority must keep a copy of the bylaw at its office, make its bylaws available for public inspection, and supply to any person (on request and on payment of a reasonable charge) a copy of its bylaw.<sup>117</sup> It is common practice for territorial authorities is to put copies of their liquor control bylaws on their websites, which makes them readily accessible to those with an internet connection. However, knowledge of these bylaws is not necessarily widespread.<sup>118</sup> Territorial authorities also meet the requirement for giving public notice by affixing signs in the public place(s). The Law Commission observed that it was often hard to locate or read the notices, especially in the dark.<sup>119</sup> In Wellington city it is not clear from the displayed signs exactly where the liquor control area begins and ends. It would be almost impossible for someone who may be drinking outside Regional Wine and Spirits (in Hania Street) to know that they are in a liquor control area, but that if they walked several metres onto Ellice Street they would no longer be covered by the bylaw. Similar situations will be present in a large number of streets across New Zealand. It is unrealistic to expect the general public, including tourists and young people, to have a firm understanding of the boundaries of liquor control areas, especially at the rate they are being introduced and extended.

The introduction of uniform signage requirements would ameliorate some of these issues, especially if a map of the area was required on the signs, but it would be impracticable for territorial authorities to have signs at every entry point of the liquor control area. The Law Commission has recommended that the government prescribe by regulation uniform signage requirements for liquor control bylaws.<sup>120</sup> Consequently, the Minister of Justice has recommended that the Local Government Act 2002 be amended to provide for such regulations.<sup>121</sup> If such signage requirements are introduced, territorial authorities will need to comply with them or run the risk that the Courts will find that their liquor control bylaws were not validly created. This occurred in *Kelly v Wellington City Council* where the Court held that the absence of appropriate signs as required under regulation was a serious

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<sup>116</sup> Local Government Act 2002, s 157(1).

<sup>117</sup> Ibid, s 157(2).

<sup>118</sup> Two evaluations of the Wellington City Liquor Control Bylaw had different results around knowledge of the bylaw. One found that the the level of awareness of those interviewed was low: Sim, M et al *Wellington City Council Liquor Control Bylaw Evaluation Report* (Wellington, New Zealand Police, 2005) at 36. The other found that those surveyed maintained a consistently high level of awareness of the bylaw (at 80%): *Wellington City Council Liquor Control Bylaw Evaluation* (2005) at 5 and 25.

<sup>119</sup> Law Commission, IP15, above n 2, at [11.50].

<sup>120</sup> Law Commission, R114, above n 3, Recommendation 140, at 403.

<sup>121</sup> Alcohol Law Reform Cabinet paper, above n 8, Recommendation 178 at 83.

omission, a recipe for doubt as to boundaries and showed substantial non-compliance.<sup>122</sup> This led to the finding that the infringement notice (in this case for parking in a coupon parking area while not displaying a clearly validated coupon) could not stand as the coupon parking scheme had been demarcated in a manner contrary to law and was therefore not validly created.<sup>123</sup> It should be noted that the current liquor bylaw system already imposes costs on territorial authorities, which would increase with more stringent signage requirements. Havelock North has conservatively estimated their costs for implementing, maintaining and evaluation their liquor control bylaw at \$60,000 with annual operational costs (which do not include defending challenges to the bylaw in court) at between \$10,000 and \$15,000.<sup>124</sup>

The problem of ascertaining the boundaries of a liquor control area are compounded by the significant regional variations that exists between the different territorial authorities, with some bylaws only covering the central business districts while others are more far reaching.<sup>125</sup> Some beaches and parks throughout New Zealand are covered by liquor control bylaws while others are not. In addition, some territorial authorities have 24/7 bylaws while others only have them at night or during certain periods of the year. There is currently no standard template being used by territorial authorities in their creation of liquor control bylaws, which compounds these regional variations and lack of consistency. The Law Commission has recommended that Local Government New Zealand and the Parliamentary Counsel Office collaborate in producing an appropriate drafting template to assist territorial authorities to make liquor control bylaws.<sup>126</sup> The Minister of Justice has accepted this recommendation.<sup>127</sup> As liquor control bylaws currently carry the power to arrest (and be prosecuted and convicted) it appears to be a significant failing that it is so difficult for people to know what areas are covered by a liquor control bylaw.

While greater consistency across regions and uniform signage requirements would help address the rule of law issues, the risk of a liquor control bylaw being found to be invalid if it is not properly made will remain as long as the regulation of the possession and consumption of liquor in public places is addressed through local government bylaws.

### ***C Police Enforcement of the Liquor Control Bylaws***

This section examines the statistics, and some possible explanations, in relation to how the police are enforcing liquor control bylaws across New Zealand and who is most likely to be convicted for breaching a liquor control bylaw.

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<sup>122</sup> *Kelly v Wellington City Council* [1995] 3 NZLR 750 (HC) at 760. The signs demarcating the coupon parking zone did not comply with Regulation 123(1) and 123(2) of the Traffic Regulations 1956.

<sup>123</sup> *Ibid* at 762.

<sup>124</sup> Law Commission, IP15, above n 2, at [11.52].

<sup>125</sup> *Ibid*, at [11.45].

<sup>126</sup> Law Commission, R114, above n 3, Recommendation 138, at 403.

<sup>127</sup> Alcohol Law Reform Cabinet paper, above n 8, at 136.

Police enforcement of liquor control bylaws has increased over time.<sup>128</sup> The number of arrests for breach of liquor control bylaws has increased from 5,050 in 2003/04 to 9,359 in 2007/08.<sup>129</sup> The number of arrests is an under-estimate of the actual offences, as in some regions the Police exercise alternative actions such as warnings, rather than arrest, for these offences.<sup>130</sup> It is likely that the number of offences and arrests will increase further if the trend towards more liquor control bylaws and increased use of 24/7 bylaws continues. This is also in accordance with the Police's Alcohol Action Plan for 2006 - 2010 which states that the Police's proactive emphasis on compliance with liquor control bylaws will continue.<sup>131</sup> While the Police resolve the "vast majority" of offences with a warning or caution, they consider the power of arrest and detention to be particularly important at events such as New Year's Eve celebrations, where the Police are often greatly out-numbered.<sup>132</sup> The Police are likely to use mass arrest processing facilities in areas that have previously been trouble-spots, and adjust the balance between warnings/cautions and stricter enforcement of liquor control bylaw breaches.<sup>133</sup>

In Wellington the majority of people breaching the liquor control bylaw are warned and not arrested, although rates of arrest are now increasing. In the period November 2003 to February 2005, police intelligence records reveal that over 4,000 breaches of the Wellington city liquor control bylaw were identified, but only 114 arrests were made (being an arrest rate of just under 3%).<sup>134</sup> All the others were dealt with by a warning, which were not recorded in official crime statistics.<sup>135</sup> In total, over the past seven years, more than 50,000 warnings have been given for breaches of the Wellington city liquor control bylaw, with 2,000 arrests made (being an arrest rate of 4%).<sup>136</sup> However, the Wellington City Council records that 29% of those in breach of the liquor control bylaw between July 2008 – February 2010 were arrested, and 71% were warned.<sup>137</sup> This shows that the rate of arrest is dramatically increasing in Wellington. This is likely to be related to the suggestion in the Sim Evaluation Report that the pro-warning enforcement style could be impeding crime reduction outcomes, as that knowledge then helped inform the Wellington Area Commander's tactical and resource deployment decisions.<sup>138</sup>

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<sup>128</sup> New Zealand Police *National Alcohol Assessment* (2009) at 7.

<sup>129</sup> *Ibid.*, at 101.

<sup>130</sup> *Ibid.*, at 20.

<sup>131</sup> New Zealand Police *New Zealand Police Alcohol Action Plan* (2006) at [5.41].

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> Sim, M et al *Wellington City Council Liquor Control Bylaw Evaluation Report* (Wellington, New Zealand Police, 2005) at 54.

<sup>135</sup> *Ibid.*

<sup>136</sup> Jim Chipp "50,000 liquor ban warnings in Wellington" *The Wellingtonian* (Wellington, 5 August 2010) <[www.stuff.co.nz/dominion-post/local/the-wellingtonian/3990238/50-000-liquor-ban-warnings-in-Wellington](http://www.stuff.co.nz/dominion-post/local/the-wellingtonian/3990238/50-000-liquor-ban-warnings-in-Wellington)>. This equates to an average of 20 people a day breaching the liquor control bylaw in Wellington since it was introduced in October 2003.

<sup>137</sup> Wellington City Council Bylaw Proposal, above n 23, at 16.

<sup>138</sup> New Zealand Police *New Zealand Police Alcohol Action Plan* (2006) at [5.66].

There is significant regional variation in the enforcement of liquor control bylaw and the balance between warnings and arrest. For example, Waikato and Bay of Plenty have high levels of arrest with 61.4 reported offences per 10,000 residents in the Bay of Plenty police district and 48 in the Waikato police district in 2004.<sup>139</sup> The Eastern and Southern police districts also rate relatively highly with 22.5 and 20.1 offences per 10,000 residents respectively. In comparison, other districts have a very low rate of reported offending.<sup>140</sup> In the North Shore/Waitakere police district there was just 0.1 reported offences per 10,000 residents, and there are similarly low rates in Counties/Manukau and Northland.<sup>141</sup> The remaining police districts – Auckland, Central, Wellington, Tasman and Canterbury – have rates of reported offending per 10,000 residents ranging from 2.8 to 11.3 offences per 10,000 residents.<sup>142</sup> This shows that, in 2004, the rate of reported offending per 10,000 residents in Bay of Plenty was 614 times higher than that in the North Shore/Waitakere.

It is likely that these figures will have changed since 2004 as some police districts may have changed their enforcement strategy. Without a common approach, it is likely that regional variation still exists, which means that a person breaching a liquor control bylaw may be much less likely to be arrested if they were caught drinking in the North Shore compared to Tauranga. It is possible that different police enforcement strategies throughout New Zealand reflect the desires of the local community. While it seems inherently unfair that location appears to be a key determinant of whether a person is arrested for breaching a liquor control bylaw or not, prosecutorial discretion (including the discretion of the Police to arrest someone or not) is an important concept in New Zealand law. The Crown Law Prosecution Guidelines make it clear that not all offences for which there is sufficient evidence must be prosecuted, and that prosecutors must exercise their discretion as to whether a prosecution is required in the public interest.<sup>143</sup> The Guidelines outline some illustrative examples of public interest considerations which may be taken into account by a prosecutor.<sup>144</sup> Some of the public interest considerations against prosecution are if the Court is likely to impose a very small or nominal penalty; the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by an error of judgement or a genuine mistake; the offence is not on any test of a serious nature, and is unlikely to be repeated; the defendant is a youth or the defendant has no previous convictions.<sup>145</sup> Some of the public interest considerations for prosecution are if the defendant was a ringleader or an organiser of the offence; there are grounds for believing that the offence is likely to be continued or repeated, for example, where there is a history of recurring conduct; or the offence is prevalent.<sup>146</sup> This

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<sup>139</sup> *Report on Liquor Control Bylaws*, above n 63, at [132].

<sup>140</sup> *Ibid*, at [132].

<sup>141</sup> *Ibid*, at [133].

<sup>142</sup> *Ibid*, at [133].

<sup>143</sup> *Crown Law Prosecution Guidelines* (2010) at [6.5].

<sup>144</sup> *Ibid*, at [6.8] and [6.9].

<sup>145</sup> *Ibid*, at [6.9.1], [6.9.2], [6.9.3], [6.9.7] and [6.9.8].

<sup>146</sup> *Ibid*, at [6.8.3], [6.8.16] and [6.8.8].

last example may partly explain regional variations in liquor control bylaw enforcement. As a whole, these illustrative examples indicate the myriad of factors that the Police need to take into account on a case by case basis and the importance of prosecutorial discretion. The broad discretion of the Police to choose between exercising the power of arrest and warning someone in breach of a liquor control bylaw has also been reaffirmed in the Courts.<sup>147</sup>

The Police do not keep demographic records of those who are warned.<sup>148</sup> However, the 114 arrests made in Wellington city in November 2003 to February 2005 were mainly young men. Males comprised 89% of all arrests, and 67% of those arrested were aged 24 years and under.<sup>149</sup> This pattern is consistent across New Zealand, where in 2004, around 90% of those convicted of a liquor control bylaw offence were male and 62% were aged between 18 and 24 years.<sup>150</sup> In 2004, the median age of those convicted was 21 years, with the vast majority of offenders aged between 17 and 30.<sup>151</sup> In Northland and the Waikato 100% and 90% respectively of those apprehended fell into this age group.<sup>152</sup> In some districts the majority of those apprehended in 2004 were aged between 17 and 20.<sup>153</sup>

Between 2000 and 2004 the proportion of New Zealand Europeans convicted for liquor control bylaw offences declined from 70% of those convicted to less than 45%.<sup>154</sup> Conversely, the proportion of Māori convicted over this period increased from 28% of those convicted to 46%.<sup>155</sup> The Wellington City Council's Evaluation of their Liquor Control Bylaw found that Māori were over-represented in arrests for breaching the bylaw; Māori comprised 52% of all arrests between 21 November 2003 and 17 July 2005, with the balance being comprised of European (at 36%), Pacific Island (at 11%) and Asian (at 1%).<sup>156</sup> This over-representation in Wellington, and the large nationwide increase from 2000 to 2004, raises the question of whether more Māori are breaching the liquor control bylaws, or whether they are being disproportionately targeted in enforcement activity.

British research has attempted to examine whether the over-representation of black people in the crime statistics might be in part due to discriminatory decision-making in the criminal justice system.<sup>157</sup> Doubts have been raised about whether statistical data will ever allow for a "confident inference of racist motives" as race cannot be easily separated out from other demographic indicators that those over-represented in the criminal justice system also

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<sup>147</sup> *Ngeru v Police* HC Wellington CRI-2006-485-76, 17 November 2006 (discussed further in this paper).

<sup>148</sup> Sim, M et al *Wellington City Council Liquor Control Bylaw Evaluation Report* (Wellington, New Zealand Police, 2005) at 62.

<sup>149</sup> *Ibid*, at 60 and 62.

<sup>150</sup> *Report on Liquor Control Bylaws*, above n 63, at [126] and [127].

<sup>151</sup> *Ibid*, at [127] and [128].

<sup>152</sup> *Ibid*, at [128].

<sup>153</sup> *Ibid*, at [129]. Districts where people in this age group are particularly likely to be apprehended are Tasman, Northland, Southern, Waikato and Central.

<sup>154</sup> *Ibid*, at [130].

<sup>155</sup> *Ibid*.

<sup>156</sup> Wellington City Council *Liquor Control Bylaw Evaluation* (2005) at 52.

<sup>157</sup> Hindpal Singh Bhui (ed) *Race & Criminal Justice* (SAGE Publications Ltd, London, 2009) at 33.

share (such as socio-economic disadvantage and youth).<sup>158</sup> The research to date has rarely found explicit evidence of racism in the criminal justice system, and there is now a shift towards a greater focus on “institutional or unwitting racism”.<sup>159</sup> This lack of clear evidence has also been confirmed in the New Zealand context, in a recent review of international and New Zealand research on bias in the criminal justice system.<sup>160</sup> The review found that both international and New Zealand research has consistently shown that certain ethnic-minority groups are disproportionately represented in adverse criminal justice outcomes.<sup>161</sup> The research has consistently shown that most of the variation between different ethnic groups can be attributed to legal factors such as offence seriousness, evidentiary strength, offending history, the direct context of decision making, victim charging preferences, and non-legal factors such as socioeconomic status.<sup>162</sup> There are competing views in the literature about how to interpret this, and whether these factors can be interpreted as a result of racial bias, either within the system or as a result of broader structural biases that have become entrenched in criminal justice decision making criteria.<sup>163</sup>

The potential for racially bias police enforcement was discussed in the Health Committee’s report “Inquiry into the public health strategies related to cannabis use and the most appropriate legal status”.<sup>164</sup> In the year ended 31 December 2001, Māori accounted for 41.44% of all recorded apprehensions and 39.35% of recorded cannabis apprehensions.<sup>165</sup> The Committee was “particularly concerned with the suggestion that a high level of police bias is leading to the disproportionate arrest and conviction rates of Māori for cannabis offences, based on the irrelevant attribute of ethnicity rather than the actual extent of offending”.<sup>166</sup> The Police disputed the claim of bias, agreeing that males and Māori are disproportionately represented in cannabis arrests and convictions but commented that this situation is characteristic of almost all offences.<sup>167</sup> It should also be noted that the New Zealand Police 2008/09 Annual Report outlines key initiatives to reduce offending by Māori so as to reduce the over-representation of Māori in the criminal justice system.<sup>168</sup>

The statistics show that the Police appear to be taking a stricter approach in respect of enforcement of liquor control bylaws, with rates of arrests increasing over time. Regional variation is likely to remain, with individuals more likely to be arrested in some police districts than others. While young people, males, and Māori are over-represented in the

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<sup>158</sup> Ibid at 34.

<sup>159</sup> Ibid at 45.

<sup>160</sup> Bronwyn Morrison *Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research* (prepared for the Ministry of Justice 2009).

<sup>161</sup> Ibid, at 12.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

<sup>164</sup> Health Committee *Inquiry into the public health strategies related to cannabis use and the most appropriate legal status* (August 2003).

<sup>165</sup> Ibid, at 29.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> New Zealand Police *New Zealand Police 2008/09 Annual Report* (2009) at 17.

conviction rates, it is more difficult to determine whether this is due to police discretion in enforcement or because that demographic is simply more likely to breach the bylaws or live in areas where the bylaws are more strictly enforced.

#### ***D Implications under the New Zealand Bill of Rights Act 1990***

In this section, I explore some of the ways that liquor control bylaws could be invalidated on the grounds of inconsistency with the Bill of Rights Act 1990 and argue that, despite a legal requirement to do so, territorial authorities may not be sufficiently considering implications under the Bill of Rights Act 1990 before creating liquor control bylaws.

Liquor control bylaws can only be made if they are consistent with the Bill of Rights Act 1990, notwithstanding s 4 of that Act.<sup>169</sup> Territorial authorities are required to include, in their statement of proposal, a determination on whether there are any implications under the Bill of Rights Act 1990 before making, amending or revoking a bylaw.<sup>170</sup> A liquor control bylaw can be invalidated if it is not consistent with the Bill of Rights Act 1990, either under the Bylaws Act 1910 or potentially through a collateral challenge in criminal proceedings. A recent High Court decision examined the use of collateral challenge and, in an obiter dicta statement, indicated that it might be possible for bylaws to be invalidated if they are found in a criminal prosecution to be inconsistent with the Bill of Rights Act 1990.<sup>171</sup> This would allow those arrested for breach of a liquor control bylaw to raise issues under the Bill of Rights as part of their criminal defence.

A declaration of inconsistency by the Courts is a potential remedy if a challenge is brought directly under the Bill of Rights Act 1990.<sup>172</sup> In deciding whether a liquor control bylaw is consistent with the Bill of Rights Act 1990, an assessment of whether or not the bylaw has limited a right or freedom under the Bill of Rights Act 1990 is required. If so, such a limit needs to be examined to decide whether it is reasonable and demonstrably justified in a free and democratic society.<sup>173</sup> To do this the Supreme Court has endorsed the following approach:<sup>174</sup>

- (a) Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
- (b) (i) Is the limiting measure rationally connected with its purpose?

<sup>169</sup> Local Government Act 2002, s 155(3).

<sup>170</sup> Ibid, ss 155(2)(b), 156 and 86(2)(c).

<sup>171</sup> *Moore v Police* [2010] NZAR 406 (HC) at [26].

<sup>172</sup> Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [1.3.13].

<sup>173</sup> New Zealand Bill of Rights Act 1990, s 5.

<sup>174</sup> *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

(ii) Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

(iii) Is the limit in due proportion to the importance of the objective?

A limitation will only be inconsistent with the Bill of Rights Act 1990 if it cannot be reasonably and demonstrably justified. Section 6 of the Bill of Rights Act 1990 provides that where an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights Act 1990, that meaning shall be preferred. Bylaws are unlikely to fall within the ambit of s 6 so that rule requiring consistency with the Bill of Rights Act 1990 will not apply.<sup>175</sup> Where a local government bylaw is inconsistent with the Bill of Rights Act 1990 that inconsistency renders the bylaw invalid and of no effect.<sup>176</sup> This is in contrast to primary legislation which is subject to s 4 of the Act. Section 4 explicitly prevents the Courts from using the Bill of Rights Act 1990 to invalidate enactments. New Zealand has balanced Parliamentary supremacy with a system of safeguards under the Bill of Rights Act 1990. These safeguards require legislation to be scrutinised for consistency with the Bill of Rights Act 1990 as it is being developed and the Attorney-General is required to report to Parliament if a Bill appears to be inconsistent with the Bill of Rights Act 1990.<sup>177</sup> In contrast bylaws are made under delegated powers and territorial authorities cannot act inconsistently with the Bill of Rights Act 1990.<sup>178</sup>

As liquor control bylaws increase in number and scope, it is likely that there could be more challenges on the grounds of breaches of the Bill of Rights Act 1990. In this section I consider potential grounds of inconsistency with ss 9, 19 and 22 of the Bill of Rights Act 1990, and identify possible ways to develop the arguments used (unsuccessfully) in the case of *Ngeru v Police*.<sup>179</sup> In *Ngeru v Police* the appellant was arrested for drinking in breach of a liquor control bylaw and argued that he had been subject to an arbitrary arrest, in contravention of s 22 of the Bill of Rights Act 1990 (the right not to be arbitrarily arrested or

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<sup>175</sup> Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [7.6.3]. Note this conflicts with the decision in *Auckland City Council v Finau* [2002] DCR 839 where the District Court held that a bylaw falls within the definition of an “enactment” under the Interpretation Act 1999 because it is an instrument that extends the scope of the enabling statute by giving effect to a power conferred by the statute to regulate certain matters. Drs Butler argue that most bylaws do not fall within this definition as they do not extend the scope of their enabling statute, but rather implement and give effect to it. In any event, both the District Court and Drs Butler agree that a bylaw that is inconsistent with the Bill of Rights Act 1990 is invalid. (*Auckland City Council v Finau* [2002] DCR 839 at [70]). In addition, in accordance with *Drew v Attorney-General* [2002] 1 NZLR 58 (CA), even if bylaws are considered to be covered by the definition of an “enactment” they would only be protected by s 4 of the Bill of Rights Act 1990 if they are explicitly or implicitly authorised to be inconsistent with the Bill of Rights Act 1990 by the statute under which they are made (which is not the case with the Local Government Act 2002).

<sup>176</sup> *Ibid.*

<sup>177</sup> Ministry of Justice *The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector* (2004) and the New Zealand Bill of Rights 1990, s 7.

<sup>178</sup> Local Government Act 2002, s 155(3).

<sup>179</sup> *Ngeru v Police* HC Wellington CRI-2006-485-76, 17 November 2006.

detained).<sup>180</sup> Both the District and High Court held that the arrest was not arbitrary and was in accordance with the test in *Neilson v Attorney-General* which states that:<sup>181</sup>

whether an arrest or detention is arbitrary turns on the nature and extent of any departure from the substantive and procedural standards involved. An arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.

The Police have a broad discretion in how they enforce the bylaw and in 2005, when Mr Ngeru was arrested, only 3% of breaches of the liquor control bylaw in Wellington resulted in an arrest.<sup>182</sup> The High Court noted that while another officer may have made a different decision, that in itself does not make the decision to arrest arbitrary.<sup>183</sup> The arguments that the appellant was not behaving in a threatening way, or in a manner likely to endanger himself or others, or exhibiting disruptive behaviour, was not sufficient to make the arrest arbitrary. Justice Mackenzie did not consider that the “decision of the arresting officer to arrest the appellant was so irrational or unreasonable as to be outside the scope of the wide discretion conferred by s 169(2)(c)”.<sup>184</sup> This decision reinforces the wide discretion of the Police, and makes it clear that a behavioural element (other than simply drinking in breach of the bylaw) is not required to be present before an arrest can be made. Instead, for an arrest to be arbitrary, the test in *Neilson v Attorney-General* must be met.

Mr Ngeru, a homeless alcoholic, also argued that the Wellington City Council’s liquor control bylaw was ultra vires as it discriminated against homeless alcoholics, contrary to s 19 of the Bill of Rights Act 1990 and/or that it inflicted cruel or degrading treatment or punishment upon homeless alcoholics, contrary to s 9 of the Bill of Rights Act 1990. In respect of the discrimination claim, the Court held that the bylaw does not, either directly or indirectly, discriminate against the appellant or a group to which the appellant belongs.<sup>185</sup> As a result of this decision, it was not necessary to decide whether homeless alcoholics are a class against whom discrimination is prohibited, although s 21(h) of the Human Rights Act (discrimination on the grounds of disability) was thought to “may have some relevance”.<sup>186</sup> The Court was clear that there was no direct discrimination, but was more equivocal in terms of indirect discrimination. In *Ngeru v Police* there was insufficient evidence to prove indirect discrimination,<sup>187</sup> but such a finding may occur in a later case if appropriate and sufficient evidence is presented.

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<sup>180</sup> Ibid at [4].

<sup>181</sup> *Neilson v Attorney-General* [2001] 3 NZLR 433 (CA) at [34].

<sup>182</sup> *Ngeru v Police* HC Wellington CRI-2006-485-76, 17 November 2006 at [4] and Sim, M et al *Wellington City Council Liquor Control Bylaw Evaluation Report* (Wellington, New Zealand Police, 2005) at 55.

<sup>183</sup> Ibid, at [8].

<sup>184</sup> Ibid, at [7].

<sup>185</sup> *Ngeru v Police* HC Wellington CRI-2006-485-76, 17 November 2006 at [14].

<sup>186</sup> Ibid.

<sup>187</sup> Ibid.

*Ngeru v Police* also dismissed the claim that the Wellington City Council’s liquor control bylaw was ultra vires as it inflicted cruel or degrading treatment or punishment upon homeless alcoholics, contrary to s 9 of the Bill of Rights Act 1990. The Court held that this was not the case as the bylaw only prevented the possession or consumption of alcohol in certain locations and only between particular times on particular days, and was punishable by a conviction and fine only.<sup>188</sup> A homeless person was found to be able to avoid these consequences by remaining out of those locations when the bylaw was in force.<sup>189</sup> Consequently the steps necessary to avoid breaching the bylaw, and the punishment, were not considered to be sufficiently serious to meet the threshold required by s 9 as it did not “shock the community conscience” so as to be cruel, or grossly humiliate or debase so as to be degrading.<sup>190</sup> The chances of meeting this threshold improve in areas where there is a city wide liquor control bylaw imposed on a permanent basis. A homeless alcoholic (or any homeless person who wishes to drink liquor) would not be able to avoid breaching the liquor control bylaw if it covered the entire city. However, it remains doubtful whether the Courts would consider this to be inconsistent with s 9 of the Bill of Rights Act 1990. An argument on the grounds of “disproportionately severe treatment” (the third element of s 9, which was not raised in *Ngeru v Police*) might stand a better chance. Supreme Court Justices Blanchard and McGrath considered this to be treatment that was “grossly disproportionate to the circumstances”.<sup>191</sup> Prohibiting homeless alcoholics from drinking anywhere in their city could possibly be considered by the Courts to be grossly disproportionate.

One way that territorial authorities could address potential implications of the Bill of Rights Act 1990 in regards to 24/7 liquor control bylaws would be by the establishment of “wet houses” for the homeless. There was an attempt in late 2009 to establish the first wet house in New Zealand for homeless people who are chronically dependent on alcohol.<sup>192</sup> However, it was met with strong community opposition and changes in funding conditions means that plans have been put on hold.<sup>193</sup>

The Wellington City Council considered that the rights and freedoms under the Bill of Rights Act 1990 were not affected by its proposal to extend its liquor control bylaw to cover the entire city on a 24/7 basis but did not specifically address the issue of homeless people.<sup>194</sup> Instead it considered that the rights contained in the Bill of Rights Act 1990 (using freedom

<sup>188</sup> *Ngeru v Police* HC Wellington CRI-2006-485-76, 17 November 2006 at [15].

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.* Note that this is the test as stated in the Court of Appeal in *Taunua v Attorney-General* [2006] 2 NZLR 457 (CA) at [255]. The Supreme Court discussed this test and s 9 in detail in *Taunua v Attorney-General* [2008] 1 NZLR 429 (SC) but did not reach agreement on a definition of the requirements.

<sup>191</sup> *Taunua v Attorney-General* [2008] 1 NZLR 429 (SC) at [176] and [340].

<sup>192</sup> Charlotte Tonkin “Wellington to open New Zealand’s first wet house” *3 News* (New Zealand, 25 August 2009) <[www.3news.co.nz/Wellington-to-open-New-Zealands-first-wet-house/tabid/209/articleID/118208/Default.aspx](http://www.3news.co.nz/Wellington-to-open-New-Zealands-first-wet-house/tabid/209/articleID/118208/Default.aspx)>.

<sup>193</sup> Britton Broun and Kiran Chung “Plans for Island Bay wet house put on hold” *The Dominion Post* (New Zealand, 14 November 2009) <[www.stuff.co.nz/dominion-post/local/3062194/Plans-for-Island-Bay-wet-house-put-on-hold](http://www.stuff.co.nz/dominion-post/local/3062194/Plans-for-Island-Bay-wet-house-put-on-hold)>.

<sup>194</sup> Wellington City Council Bylaw Proposal, above n 23, at 15.

of expression, peaceful assembly and association as examples) are “not reliant on alcohol”.<sup>195</sup> The Council considered the proposed bylaw did not preclude the enjoyment of those rights, instead it “merely requires that they are exercised without alcohol”.<sup>196</sup> Overall it considered that the rights and freedoms under the Bill of Rights Act 1990 are not affected by the proposed bylaw, and any limitations that may arise are justified and reasonable under s 5.<sup>197</sup> The Council stated that any limitations were justified by the reasons outlined in the proposal to justify the proposed bylaw.<sup>198</sup> Any limitations were also reasonable as the proposed bylaw applied “equally to all people” and also allowed any person to apply for permission to possess or consume alcohol in any public place.<sup>199</sup> In addition, the Council stated that “the limitation was prescribed by law” as it was empowered to make such bylaws under the Local Government Act 2002.<sup>200</sup> The Council’s reasoning is debateable as it is effectively banning the consumption of alcohol, a legal substance, in public throughout the entire city without a proper assessment under the Bill of Rights Act 1990, and s 5 in particular. One can argue that that such a broad infringement on the legal right to drink in public is a limitation under s 5, and it is not sufficient to say that such a limitation is reasonable and justified by the arguments made by the Council. The Police have stated that there is “nothing stopping liquor bans being extended to cover much larger areas, such as regions/cities if the community want this”, without appearing to consider any implications under the Bill of Rights Act 1990.<sup>201</sup> A proposal to ban the possession and consumption of alcohol in public throughout entire regions makes a proper assessment under the Bill of Rights Act 1990 even more important. Such a Bill of Rights Act 1990 assessment should follow the established framework (as outlined on page 27) and look at both the general effect of the bylaw and the particular effect it would have on the homeless, who would effectively be banned from drinking alcohol at all (which is not currently illegal under New Zealand law).

While liquor control bylaws have not yet been invalidated on the grounds of inconsistency with the Bill of Rights Act, the likelihood of successful challenges will increase as more bylaws are made on a permanent basis and which cover larger areas. The effect of such bylaws on homeless people deserves specific consideration. It appears that territorial authorities may not be sufficiently considering implications under the Bill of Rights Act 1990 before creating liquor control bylaws, and could as a result find their bylaws are invalidated.

### ***E Evidentiary Standards, Disproportionate Penalties and the Impact of a Conviction***

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<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid, at 15-16.

<sup>199</sup> Ibid, at 15.

<sup>200</sup> Ibid.

<sup>201</sup> New Zealand Police Submission to the Law Commission, above n 51, at [16.8].

This final section of the analysis examines the current and proposed evidentiary process required to convict an individual for breaching a liquor control bylaw, and the penalties that apply.

Currently, to be convicted for a breach of a liquor control bylaw, it is necessary to prove that an individual was drinking “liquor”. This is defined as any fermented, distilled or spirituous liquor that is found on analysis to contain 1.15% or more alcohol by volume.<sup>202</sup> For offences committed under the Sale of Liquor Act 1989 it is not necessary for the prosecution to prove that the beverage contains 1.15% or more alcohol by volume, unless the defendant raises it, in writing, as an issue at least 20 working days before the hearing.<sup>203</sup> This obviates the need for “analysis” of the beverage to be undertaken in the vast majority of cases prosecuted under that Act. However, this provision does not apply to offences committed under the Local Government Act 2002. That means that for every breach of a liquor control bylaw, the Police are required to undertake an analysis of the beverage to prove that it is indeed liquor.

The Police have raised concerns about the operational burden of this requirement.<sup>204</sup> They note that their current practice of taking samples of liquor as an exhibit which they can submit for analysis in the event of a defended hearing is expensive, and at times, impractical.<sup>205</sup> The approved sampling kit costs \$5 per kit and the number of prosecutions (currently around 9,000 and increasing) each year means that this is a large cost on the Police.<sup>206</sup> If analysis of the sample is undertaken, the ESR charge for such analysis is, on average, \$190 per sample.<sup>207</sup> In addition, if the offender finishes or tips out their drink before a sample can be taken the Police state that a prosecution cannot succeed.<sup>208</sup> The Police note that offenders can deliberately frustrate enforcement in this way, and that the requirement to take a sample is restrictive on frontline staff and a disincentive to enforce liquor bans through bringing a prosecution.<sup>209</sup> However, if the purpose of liquor control bylaws is to stop drinking in public, this aim would be fulfilled by an offender tipping out their liquor. Of those arrested and prosecuted from 2003/04 to 2007/08, between 86 - 91% pleaded guilty and in 2007/08, 62% were convicted.<sup>210</sup> Therefore, in the vast majority of cases, the Police would not have to prove that the beverage was “liquor” as the defendant has pleaded guilty. The Law Commission was sympathetic to these issues and considered that the costs place an “undue financial and administrative burden” on the Police and that it should be simplified.<sup>211</sup> The

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<sup>202</sup> Local Government Act, s 147 and Sale of Liquor Act 1989, s 2.

<sup>203</sup> Sale of Liquor Act 1989, s 179.

<sup>204</sup> New Zealand Police Submission to the Law Commission, above n 51, at [16.37] – [16.41].

<sup>205</sup> *Ibid*, at [16.39] – [16.41].

<sup>206</sup> *Ibid*, at [16.40].

<sup>207</sup> *Ibid*, at [16.39].

<sup>208</sup> *Ibid*, at [16.41].

<sup>209</sup> *Ibid*, at [16.41].

<sup>210</sup> Email from Ministry of Justice to the Law Commission providing statistics on breaches of liquor control bylaws (8 June 2009).

<sup>211</sup> Law Commission R114, above n 3, at [21.52].

Police noted that in the vast majority of cases individuals breaching a liquor control bylaw are drinking the liquor from the labelled container in which it was purchased (for example a beer bottle); and that many apprehended admit what they are drinking when questioned.<sup>212</sup> The Court of Appeal recently held that labelling was sufficient proof of the contents of a box that contained material that were precursor substances for the making of methamphetamine.<sup>213</sup> The Law Commission thinks that this approach should be applied to breaches of liquor control bylaws, while acknowledging that the Police may still be required to take a sample and undertake analysis in situations where the nature of the beverage is in issue (for example, if alcohol has been decanted into a water bottle).<sup>214</sup> The Law Commission made the following recommendation:<sup>215</sup>

We recommend that the evidential standard for determining a substance is alcohol be that it is sufficient proof, in the absence of other evidence, where:

- the container is labelled as containing an alcoholic beverage and is of a type sold in the ordinary course of trade; or
- the content of a container, when opened, smells like an alcoholic beverage and the container appears to be one that contains an alcoholic beverage; or
- the defendant has admitted the container contains an alcoholic beverage.

The Law Commission's recommendation is consistent with the submission made by the Police, who commented that a provision of this sort would be of great assistance in terms of enforcement as it would eliminate the need for sample storage and analysis in all but a few cases.<sup>216</sup> Such a change would most likely result in more prosecutions for breach of liquor control bylaws, as the current disincentive on the Police of being required to take a sample would be removed. It would also open the possibility of people being convicted when they were not in fact drinking liquor.

The recommendation of "smelling like an alcoholic beverage" is a low, and highly subjective, standard, which could unfairly capture low alcohol beers (such as Macs Light at 1% alcohol by volume), or alcohol free wines (such as Australian Loxton Cabernet Sauvignon at 0.5% alcohol by volume), which are not covered by the definition of "liquor".<sup>217</sup> It could also potentially capture other non-alcoholic substances which the Police

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<sup>212</sup> New Zealand Police Submission to the Law Commission, above n 51, at [16.42].

<sup>213</sup> *R v Lenaghan* [2008] NZCA 123. Leave to appeal on the basis that "a label on a package purporting to describe what the package contains is not admissible evidence of what the package does in fact contain" was declined by the Supreme Court in *Lenaghan v R* [2008] NZSC 53 at [1] and [4].

<sup>214</sup> Law Commission R114, above n 3, at [21.53].

<sup>215</sup> *Ibid*, Recommendation 142 at 403.

<sup>216</sup> New Zealand Police Submission to the Law Commission, above n 51, at [16.43].

<sup>217</sup> *L D Nathan & Co Ltd v Hotel Assn of NZ* [1986] NZLR 385 (CA) examined the sale of low alcohol beers (Isenbeck Light and Northern Light) without a liquor licence and confirmed that as the beer contained less than 1.15% alcohol by volume, it was not "liquor" as defined in the Sale of Liquor Act 1962 (the 1962 Act defined

think smell like alcohol, even if it is not. The recommendation regarding labelling and a defendant's admission would not cover a situation where someone was drinking, for example ginger ale, out of a beer bottle as a result of peer pressure.<sup>218</sup> Instead the labelling on the bottle would be sufficient proof that he was drinking beer, even if this was not the case. While the Law Commission's recommendation does include the clause "in the absence of other evidence" it is not clear whether a defendant who is, for example, drinking out of a standard labelled bottle can raise the issue of standard of proof and require the Police to take a sample of the beverage to be further analysed. If this is the intention, it would need to be made explicit in any changes to the legislation, especially as the Police have stated that these recommendations would eliminate the need for sample storage and analysis in all but a few cases.<sup>219</sup> In addition the Law Commission, when outlining its recommendation, stated that "in order to rebut this presumption the defendant would need to provide evidence that the substance was not alcohol".<sup>220</sup> While the Commission also commented that the Police may be required to submit a sample for analysis, this further statement seems to impose the obligation of proving the burden of proof (and possibly the expense of doing so) back on the defendant. If this is the intention, attention will need to be paid to the Supreme Court decision in *R v Hansen*.<sup>221</sup> In this case, the reversal of the burden of proof under s 6(6) of the Misuse of Drugs Act was found to be inconsistent with the presumption of innocence, but the appeal was dismissed due to s 4 of the Bill of Rights Act 1990. However Justices Tipping, McGrath and Anderson examined whether the reversal of the burden of proof was a justified limitation on the presumption of innocence under s 5 of the Bill of Rights Act 1990, and found that it was not.<sup>222</sup> If legislation proceeds on this basis, it is likely that the Attorney-General will raise this issue for consideration by Parliament in his s 7 report.

The Minister of Justice has accepted the Law Commission's proposals relating to these evidentiary standards and has made the same recommendations for change.<sup>223</sup> He did not consider any of the issues I have identified with these standards, but one hopes that these concerns will be canvassed in either the drafting of the Alcohol Reform Bill or at the select committee stage.

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liquor as containing "more than 2 parts percent of proof spirit". This is the equivalent of "1.15% or more alcohol by volume", which was used in the definition in the 1989 Act).

<sup>218</sup> This occurred in *Burton v New Zealand Police* HC Rotorua CRI-2005-470-16, 27 May 2005 where the defendant claimed to have filled an empty beer bottle with ginger ale so his friends would not suspect him of being "unable to hack it". His appeal was dismissed on the basis that he had signed a notice pleading guilty and had been discharged without conviction.

<sup>219</sup> New Zealand Police Submission to the Law Commission, above n 51, at [16.43].

<sup>220</sup> Law Commission R114, above n 3, at [21.55].

<sup>221</sup> *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

<sup>222</sup> *Ibid*, at [129], [260] and [281]. Blanchard J dissented at [83], stating that it was a demonstrably justified limitation. Elias J did not need to decide this in her judgement but commented that she had some doubt whether the presumption of innocence can be "limited" under s 5 as any limitation of the presumption of innocence effectively denies the right altogether" at [41].

<sup>223</sup> Alcohol Law Reform Cabinet paper, above n 8, Recommendation 180 at 83.

If arrested and prosecuted, a person found in breach of a liquor control bylaw is liable on summary conviction to a maximum fine of \$20,000.<sup>224</sup> Of the liquor control bylaws in force in New Zealand only six have deviated from the maximum \$20,000 penalty.<sup>225</sup> This penalty is significantly higher than the fines under the Summary Offence Act 1981 for drinking in public (being a \$300 maximum fine) and excreting in a public place (being a \$200 maximum fine) and has been described by the Law Commission as “absurd and disproportionate to the nature of the offence”.<sup>226</sup> The average fines imposed by the courts for a breach of a liquor control bylaw, which were \$347.63 in 2000,<sup>227</sup> \$257.77 in 2004,<sup>228</sup> and \$231 in 2007/08.<sup>229</sup> However, in a recent case the Justices of the Peace fined the defendant \$800, after noting that the level of the maximum available fine indicated that the Legislature intended breaches of liquor control bylaws to be taken “very seriously”.<sup>230</sup> This penalty was upheld in the High Court.<sup>231</sup> The highest fine ever imposed for a breach of a liquor ban bylaw was \$5,000 in July 2006, followed by a fine of \$3,000 in December 2004.<sup>232</sup> These fines are clearly disproportionate to the nature of the offence. In imposing the \$5,000 fine the District Court judge considered both the maximum penalty available and the defendant’s history – the defendant had “persistently abused the laws relating to alcohol consumption for years and years” and had, by the judge’s calculation, at least 20 convictions of breaching liquor bans.<sup>233</sup> The Minister of Justice has recommended that the maximum fine for breach of a liquor control bylaw be reduced to \$250, which is similar to the average fines imposed in recent years and would solve the problem of disproportionately high fines.<sup>234</sup>

The majority of those convicted under liquor control bylaws are aged under 25.<sup>235</sup> The effects of a criminal conviction are wide ranging, with those convicted being required to disclose any such conviction when applying for a visa to travel, or on arrival in another country. Many employers also ask about convictions as part of the job application process. Convictions for breach of a liquor control bylaw would be covered under the Criminal Records (Clean Slate) Act 2004 (providing no other convictions had been received in the last seven years) but this legislation does not apply outside New Zealand so disclosure is still required for international travel. In addition, the seven year time period required before the “clean slate” comes into effect would still mean that young people would have to disclose

<sup>224</sup>Local Government Act 2002, ss 239 and 242(4). This fine covers all bylaws (apart from trade wastes bylaws) made under the Local Government Act 2002.

<sup>225</sup> Law Commission R114, above n 2, at [21.46].

<sup>226</sup> Ibid, at [21.46].

<sup>227</sup> *Report on Liquor Control Bylaws*, above n 63, at [131].

<sup>228</sup> Ibid.

<sup>229</sup> Email from Ministry of Justice to the Law Commission providing statistics on breaches of liquor control bylaws (8 June 2009).

<sup>230</sup> *Oldfield v Police* HC Hamilton CRI-2009-419-62, 11 February 2010 at [4].

<sup>231</sup> Ibid.

<sup>232</sup> *Police v Maxwell* DC Auckland CRI-2006-004-008145, 16 June 2006 and *Police v Kingi* DC Hamilton CRI-2004-019-009310, 24 December 2004.

<sup>233</sup> *Police v Maxwell* DC Auckland CRI-2006-004-008145, 16 June 2006 at [3].

<sup>234</sup> Alcohol Law Reform Cabinet paper, above n 8, Recommendation 179 at 83.

<sup>235</sup> *Report on Liquor Control Bylaws*, above n 63, at [128].

their conviction, if asked, while they are trying to enter the job market. In 2004, 61% of those convicted for breaching a liquor control bylaw had a previous conviction for another type of offence.<sup>236</sup> However, the significant minority (39%) did not have any prior convictions and, unlike many other criminal convictions, breaching a liquor control bylaw does not require a behavioural element or show any serious wrongdoing.

While it is heartening that it seems that the maximum penalty for breaching a liquor control bylaw will dramatically reduce, changes to the evidentiary standard for proving that a substance is liquor raise concerns that people will be wrongly arrested. Having a criminal conviction also results in significant consequences for individuals.

#### *IV Potential Options for Change*

The paper concludes by suggesting potential options for change. These options would address the issues canvassed in this paper. The first option is to repeal the liquor control bylaw system and either address the direct problems associated with drinking in public through the enforcement of offences under the Summary Offences Act 1981 or by introducing primary legislation that bans drinking in public, with possible exceptions. The second option is to amend the liquor control bylaw system. This could be done by introducing some of the Minister of Justice's recommendations (which were mainly based on the Law Commission's recommendations); by making liquor control bylaws an infringement offence, and potentially remove or limit the power of arrest; by introducing a behavioural requirement to the offence of breaching a liquor control bylaw; and by increasing monitoring of liquor control bylaws. This section analyses the benefits and drawbacks of each of these options.

##### *A Repeal the Liquor Control Bylaw System.*

Repealing the liquor control bylaw system in its entirety would address all of the issues explored in this paper, and I recommend it on the basis that liquor control bylaws are a disproportionate and unnecessary response to the perceived harms of drinking in public. It would acknowledge the direct problems associated with drinking in public can be addressed through the enforcement of other offences under the Summary Offences Act 1981. The specific offence under s 38(3) of this Act which prohibits underage people to drink, or possess for consumption, liquor in a public place would remain. However the Police consider that having no restrictions on drinking in a public place would significantly undermine public safety and increase demands on police services.<sup>237</sup>

Repealing the liquor control bylaw system and replacing it with primary legislation that prohibits or regulates the possession and consumption of liquor in public places would

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<sup>236</sup> Ibid, at [149].

<sup>237</sup> New Zealand Police Submission to the Law Commission, above n 51, at [16.3].

require a change in Government policy relating to the devolution of responsibilities to territorial authorities to develop liquor control bylaws. Such primary legislation could ban drinking in public, with possible exceptions. This has been done in Queensland, through the Queensland Liquor Act 1992 which bans drinking in public places, apart from areas that local government designates as a public place where liquor may be consumed.<sup>238</sup> Legislation banning drinking in all public areas would allow for proper consideration by Parliament of Bill of Rights Act 1990 implications and address concerns relating to the accessibility of the law and nationwide consistency but is unlikely to receive wide public support. When Wellington City Council consulted in 2010 on introducing a city-wide liquor control bylaw, it received 604 submissions, with 76% not in favour of the proposal.<sup>239</sup> The Police have strong objections to such a regime, commenting that they would lack the resources to enforce it appropriately, which could damage community perceptions of the Police, and that it would bring a significant number of people into the criminal justice system.<sup>240</sup> There could also be practical problems if the legislation allowed for exemptions. The Police have commented that it is likely that very few areas would be designated as public places where liquor could be consumed as local communities would not want their area to become such a place.<sup>241</sup> The Law Commission suggested a proposed new offence of consuming or possessing an open container of alcohol on a road or in a carpark to which the public has access when that possession or consumption occurs between the hours of 8pm and 8am.<sup>242</sup> The Law Commission suggested that this could be an infringement offence under the Summary Offences Act 1981, and as such should not be accompanied by a power of arrest.<sup>243</sup> This idea was not supported by the Police, who remain committed to the liquor control bylaw system, and as such the Law Commission felt unable to press this recommendation further.<sup>244</sup>

## ***B Amend the Liquor Control Bylaw System***

Since repealing the liquor control bylaw system may be politically unpalatable, given the views of the Police and the desire of territorial authorities to have control over alcohol management in their communities, the following suggestions would improve the current system by addressing some of the issues identified in this paper. They do not address the issues relating to the nature of bylaws and their risk of invalidation, nor potential implications under the Bill of Rights Act 1990. They could be implemented separately or in tandem.

### *1 Introduce some of the Minister of Justice's recommendations*

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<sup>238</sup> Queensland Liquor Act 1992, ss 173B and 173C.

<sup>239</sup> Wellington City Council "Liquor Ban" (press release, 5 July 2010).

<sup>240</sup> New Zealand Police Submission to the Law Commission, above n 51, at [16.6] and [16.7].

<sup>241</sup> Ibid at [16.10].

<sup>242</sup> Law Commission R114, above n 3, at [21.36].

<sup>243</sup> Ibid, at [21.38].

<sup>244</sup> Ibid, at [21.37] and [21.39].

The following recommendations, made by the Minister of Justice, ameliorate some of issues relating to liquor control bylaws. These recommendations are:<sup>245</sup>

- 1) amend the definition of a public place, so that it includes school grounds, private carparks and other private spaces to which the public has legitimate access
- 2) create additional criteria and evidentiary requirements before liquor control bylaws are created
- 3) produce an appropriate drafting template to assist territorial authorities in making liquor bans
- 4) create regulations for uniform signage provisions for liquor control bylaws
- 5) reduce the maximum fine for breach of a liquor control bylaw to \$250.

The Minister of Justice's recommendation around reducing the evidential standard for determining whether a substance is liquor, may have unintended consequences as discussed earlier (at pages 32-33) and amendments to that recommendation could be considered by the select committee.<sup>246</sup> The Minister of Justice also recommended, contrary to the statements of the Law Commission, that a breach of a liquor control bylaw become an infringement only offence with the power to arrest.<sup>247</sup> This recommendation is discussed below.

## *2 Make liquor control bylaws an infringement offence, and potentially remove or limit the power of arrest*

If liquor control bylaws became an infringement only offence, those in breach of such bylaws would not face a criminal conviction. It would also be cost effective as it would save the Police and the Courts the time and expense of a prosecution. It would enable the Police to take enforcement action on the spot and allow the Police to remain in public and be visible during peak times.<sup>248</sup>

Currently, infringement offences do not carry the power of arrest. This is consistent with the fact that people cannot generally be prosecuted for infringement offences, and infringement offences do not result in a conviction.<sup>249</sup> The Police acknowledge that retaining the power of arrest would be unprecedented for an infringement offence, but support this idea so they can still remove offenders from public areas if necessary.<sup>250</sup> The Minister of Justice

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<sup>245</sup> Alcohol Law Reform Cabinet paper, above n 8, Recommendations 176-179 at 82-83 and 136.

<sup>246</sup> Alcohol Law Reform Cabinet paper, above n 8, Recommendation 180, at 83.

<sup>247</sup> Ibid, Recommendation 179, at 83.

<sup>248</sup> Ibid, at [320].

<sup>249</sup> Section 21 of the Summary Proceedings Act 1957 outlines the circumstances where an infringement offence can be heard in the District Court, which includes on the request of the alleged offender. Section 78A of the Summary Proceedings Act 1957 states that if this happens and the defendant is found guilty, the Court shall not convict them.

<sup>250</sup> New Zealand Police Submission to the Law Commission, above n 51, at 44-45.

has stated that the power of arrest for liquor control bylaw offences is critical for managing high-risk situations and preventing escalation of alcohol-related offending.<sup>251</sup> The Law Commission has a firm view that infringement offences should not attract a power of arrest as infringement offences are considered to be “too small a matter to warrant the use of coercive power”, and if there is a power of arrest then the protections of court processes need to be preserved.<sup>252</sup> However, these protections can be activated if an alleged offender requests a hearing under s 21 of the Summary Proceedings Act 1957.

Removing the power of the arrest does run the risk of a return to “unreasonable police enforcement strategies”, as discussed in *Police v Hall*.<sup>253</sup> The Court, when invalidating the bylaw on the grounds of unreasonableness, commented that the unreasonableness of the bylaw was compounded by the enforcement strategy used by the Police.<sup>254</sup> In that case, the liquor control bylaw (made under the Local Government Act 1974) did not empower the Police to arrest those in breach of the bylaw or to seize their liquor.<sup>255</sup> Consequently, when people continued to drink in breach of the bylaw, the Police then relied on a strategy of confrontation to encourage the commission of other offences for which arrests might be made.<sup>256</sup>

If the power of arrest was retained, it could be limited by requiring the Police to give people a reasonable opportunity to remove their liquor from the liquor control area before they exercise the power of arrest. This would be consistent with the warning which must currently be given before Police exercise their search powers under s 170 of the Local Government Act 2002. While it would increase national consistency in enforcement, it would also limit the current powers of the Police.

The Minister of Justice has recommended that there breach of a liquor control bylaw be punishable by an infringement notice, which may be issued by the Police on the spot or following arrest.<sup>257</sup> He notes that an infringement only offence with the power to arrest raises issues of consistency with s 22 of the Bill of Rights Act 1990, which is the right not to be arbitrarily arrested or detained.<sup>258</sup> These concerns have arisen as a result of advice from the Crown Law Office and the Ministry of Justice that Police discretion to arrest and detain for an unspecified period of time prior to issuing an infringement notice.<sup>259</sup> The Police consider that these concerns could be addressed by developing appropriate guidelines to significantly reduce the risk of each individual arrest decision by an officer being found to be an arbitrary

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<sup>251</sup> Alcohol Law Reform Cabinet paper, above n 8, at [320].

<sup>252</sup> Law Commission R114, above n 3, at [21.38].

<sup>253</sup> *Police v Hall* [2001] DCR 239.

<sup>254</sup> *Police v Hall* [2001] DCR 239 at 255.

<sup>255</sup> The power of arrest for breaching a liquor control bylaw was introduced for the first time by the Local Government Act 2002.

<sup>256</sup> *Ibid*, at 254.

<sup>257</sup> Alcohol Law Reform Cabinet paper, above n 8, Recommendations 179 at 83.

<sup>258</sup> *Ibid*.

<sup>259</sup> *Ibid*, at [373].

detention.<sup>260</sup> The Police already have the power to detain, albeit for a specified time period, under s 36 of the Policing Act 2008.

Given the recommendations of the Minister of Justice, it is likely that a new precedent of an infringement offence that also carries a power of arrest will be enacted, although this is likely to depend on the Attorney-General's advice on the implications under the Bill of Rights Act 1990. An infringement offence does avoid the consequences of a criminal conviction, but controls and limits should be placed around the length of time an individual can be detained in custody and consideration given to limiting the power of arrest to certain circumstances.

### *3 Introduce a behavioural requirement*

This option could involve amending s 147 of the Local Government Act 2002 to require a behavioural element as a pre-requisite to the offence of breaching a liquor control bylaw. This could potentially reduce regional variation in enforcement, while still addressing community concerns about the harms associated with drinking in public places. It would also make it clear that these harms are the focus of the bylaw and not criminalise those who are, for example, enjoying a glass of wine with their picnic. Currently a decision not to arrest someone in this situation is entirely at the discretion of the Police (assuming the picnic takes place in a liquor control area). As discussed earlier in this paper, issues raised by communities around drinking in public have focused on behavioural elements (such as littering, damage, offensive behaviour, and other behaviour that makes residents feel unsafe), and the Police often choose to exercise their power of arrest when they feel the behaviour of those in breach of liquor control bylaws will lead to further problems. It may be difficult to define such a behavioural element, when the Summary Offences Act 1981 already provides offences for many of the behaviours perceived to be associated with drinking in public. A lower standard than that required in the Summary Offences Act could be a possibility, for example behaving in a manner likely to endanger oneself or others, or exhibiting disruptive behaviour. However, communities and the Police may still want the Police to have the ability to act pre-emptively to prevent such behaviours occurring and there could be more challenges to alleged breaches based on the nature of the behaviour exhibited.

### *4 Increase monitoring of liquor control bylaws*

This option could focus on increasing the monitoring of liquor control bylaws through the provision of nationwide information on liquor control bylaws to a central monitoring agency, so that this information could be compared on a national level. Such information could include the location, size and number of liquor control bylaws. It could also include the rationale and evidence for these bylaws, so that it would be possible to check whether the bylaws were the most appropriate way of addressing the perceived problem. This would also

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<sup>260</sup> Ibid, at [374].

identify how often territorial authorities are reviewing their liquor control bylaws. They are currently only required to review a bylaw five years after the date on which it was made, and thereafter at 10 year intervals.<sup>261</sup> If territorial authorities are not reviewing their bylaws more frequently, there is a risk that a bylaw is no longer the most appropriate way of addressing the perceived problem. The monitoring agency could also be given the power to suggest or require territorial authorities to review their liquor control bylaws more frequently if this was the case. It might also be helpful for the monitoring agency to report back to Parliament within five years on the application of the liquor control bylaws and their impacts. Increased monitoring is likely to be uncontroversial and supported by the Police who have said that if national data was available on the location, number and size of areas covered by a liquor control bylaw, it would be possible to identify whether changes in those areas have contributed to the increase in arrests for breach of liquor control bylaws.<sup>262</sup> It would also help the Police in identifying if they have reaching their suggested target by 2010 of reducing the number of liquor control bylaw breaches detected, relative to the number of such bylaws in force.<sup>263</sup>

## V Conclusion

This paper has argued that liquor control bylaws are an “unnecessary sledgehammer” which is being misused, in the absence of solid evidence, as a pre-emptive measure to prevent potential offending or to reduce alcohol-related harms in general. The direct problems associated with adults drinking liquor in public are a “very small nut” and behavioural problems that occur as a result should be able to be addressed under the Summary Offences Act 1981.

Liquor control bylaws are commonly used throughout New Zealand, but it is not easy to find out exactly where or when they apply. Liquor control bylaws are not enforced in a uniform fashion around New Zealand, which leads to regional variation in terms of the likelihood of being arrested and prosecuted for breaching a bylaw. The bylaws are predominantly enforced against young men, particularly Māori. It is unlikely that they are the only ones breaching the bylaws, which raises questions of possible bias in enforcement. The liquor control bylaw system raises potential Bill of Rights Act 1990 issues, especially in terms of whether territorial authorities are adequately considering this Act before making liquor control bylaws. In addition, the penalties are disproportionate, with an absurdly high maximum fine. An arrest for breaching the liquor control bylaws is followed by a guilty plea in the vast majority of cases, and a criminal conviction has serious consequences for individuals.

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<sup>261</sup> Local Government Act 2002, ss 158 and 159.

<sup>262</sup> New Zealand Police *National Alcohol Assessment* (2009) at 91.

<sup>263</sup> New Zealand Police *New Zealand Police Alcohol Action Plan* (2006) at [7.1].

This paper has recommended the repeal of the liquor control bylaw system, as I consider that liquor control bylaws are a disproportionate and unnecessary response to the perceived harms of drinking in public. This view, however, is not shared by the Police, territorial authorities, the Law Commission or the Minister of Justice. Consequently, this paper has provided alternative options to address some of the legal, policy and practical issues with liquor control bylaws. One of these options is introducing some of the Minister of Justice's reform recommendations. His recommendations around creating additional criteria and evidentiary requirements before liquor control bylaws are created will help ensure that the bylaws are being used appropriately. This recommendation also partly addresses the concern I have raised that territorial authorities may not be sufficiently considering Bill of Rights Act 1990 implications. His recommendations for introducing signage requirements and producing a drafting template will improve consistency between territorial authorities and make it easier to know where a liquor control bylaw area is. Reducing the maximum fine and making the breach of a liquor control bylaw an infringement offence (without a criminal conviction) will address the concerns raised around penalties. However, some of the Minister's other recommendations raise concerns about the adequacy of the proposed new evidentiary standards to prove that a beverage is in fact liquor, and he traverses into unprecedented territory by recommending that the Police retain the power of arrest if liquor control bylaws become an infringement offence. I have also identified two other options in this paper, namely introducing a behavioural requirement to the offence of breaching a liquor control bylaw, and increasing the monitoring of these bylaws.

Liquor control bylaws are a topical, and potentially controversial, issue. These bylaws prevent people from enjoying an otherwise legal activity, and their creation, rationale, scope, enforcement and penalties deserve to be carefully considered in the forthcoming months as alcohol law reforms are debated.

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