

**The New Zealand System for Dealing with  
Complaints Against the Police**

**A Comparative Evaluation**

by

Geoff Bilkey

I. INTRODUCTION

The object of this paper is to look at the system that exists in New Zealand relating to complaints against the police. Most people realise they can, if they have a complaint to make against the police force, freely go into a police station and make that complaint. But how effectively is this complaint dealt with by the police, in what way and for what result? If the system is not as effective as it should be, in what ways could it be improved?

As a starting point the police, by the nature of their profession, must demand of themselves a much higher standard of conduct than is expected from members of the public. Their actions both whilst on duty and in private life being judged by the public in their role as law enforcement officers not as private citizens. It has been stated<sup>1</sup> "that the police wield the greatest power that the state has over the individual citizen. They have such far-reaching and exceptional power that we must have effective and exceptional processes to complain about those rare occasions when that power is abused". In the light of this statement I will examine the options open to an aggrieved citizen in New Zealand wishing to make a complaint against the police.

The first alternative would be to go to the police station and make a written complaint. The police state that their instructions are that all complaints should be dealt with speedily, an investigation carried out and an adequate evaluation made. The police department's procedures are as follows:

<sup>1</sup> Morris and Hawkins, *The Honest Politician's Guide to Crime Control* (1970), 100.

The police divide substantiated complaints into two categories — those that come under section 33 of the Police Act where a tribunal is appointed either by the Minister of Police or the Commissioner and secondly those that arise out of internal disciplinary offences contained in the Police Regulations.

Under section 33 of the Police Act an inquiry will be made into a breach of duty alleged against a member of the police. If that allegation is made against an officer below the rank of Chief Superintendent the Minister will decide on what action is to be taken after an inquiry by two or more persons. If the allegation is against a non-commissioned officer or constable, the Commissioner is the person who decides what action is to be taken on the inquiries of that person, whether a member of the police or not, who has been appointed to investigate the matter.

In the majority of cases the complaint will be investigated by an officer of Inspector's rank although a senior sergeant or officer of higher rank may be called in, possibly from another district, depending on the seriousness of the charge. If further action is to be taken following an investigation the member concerned will be notified, as will be the district commander who in turn notifies the Commissioner.

Regulation 46 of the Police Regulations 1959<sup>2</sup> contains disciplinary offences in addition to specific regulations. There are some sixty-two disciplinary offences within this regulation and they include:

- 46 (9) treating any person or prisoner cruelly, hastily or with unnecessary violence
- (20) using indecent, insulting, abusive or threatening language in or on police premises or while on duty
- (21) being guilty of immoral or disgraceful conduct or conduct tending to bring discredit on the police
- (62) any act, conduct or disorder or neglect to the prejudice of good order, morality or discipline of the police, though not specified in these regulations

The maximum fine at present for a violation of the offences contained in the Police Regulations is \$300 for a commissioned officer, \$150 for a sergeant and \$100 for a constable. Demotion and/or reduction in seniority is also possible.

The regulations lay down procedures that must be complied with. These include that the member must be notified as soon as possible that he is to be reported and the nature of the report to be made. A member shall not be charged with an offence after 12 months from the date of the offence.

If the member is a constable the District Commander shall arrange

<sup>2</sup> S.R. 1979/89.

the hearing, if a sergeant or above the matter will be referred to the commissioner. The inquiry, known as a tribunal, follows judicial procedure except for the fact that no member of the public or press may be admitted except with the express permission of the Minister.

Thus it can be seen that a policeman is entitled to the full protection of the law: he has a right to silence, representation, etc., but conversely he is also subject to the rigours of the law and as the police state, the investigation against a policeman might be more thorough than had the charge been made against a member of the public.

Under Regulation 52 a policeman can appeal to an Appeal Board which may, at its discretion, rehear whole or part of the evidence relating to the disciplinary hearing or any other evidence not adduced at the hearing. A member convicted in a court can also appeal to this body, as did former Sergeant D. Gilfedder following his dismissal from the force as a result of his conviction for an assault on a teenage boy. In that case the Appeal Board was made up of a Stipendiary Magistrate, a member of the police and a representative of the Police Association. The Appeal Board upheld his dismissal.

It is difficult on the basis of the procedures outlined above to form any accurate conclusion as to the effectiveness of the complaints system in New Zealand for want of details as to the way in which the system actually operates. The annual Parliamentary report on the police tabled by the Commissioner every year makes no mention of complaints against the police. This is, in my opinion, a serious deficiency and the police should make this information freely available. In my research, lacking any source material in this area I wrote to the Auckland District Commander. I asked him to supply to me information on the number of complaints, their nature, how they were handled by the police and the way in which they have been resolved.

Assistant Commissioner Trappitt could make no decision on this matter and sent on my request to National Headquarters. In due course the police forwarded a schedule of disciplinary offences for 1979, the other information not being available. Thus appears the 1979 Schedule of Disciplinary Offences.

The table itself is self-explanatory except perhaps concerning Regulation 49 (5A). This subsection was introduced by the 1975 amendment to the Police Regulations and provides in effect for a streamlining of procedures when a member of the police pleads guilty to the charge made against him. The procedure involved is that the officer sends a letter to the Commissioner admitting the charge and his plea in mitigation, the officer's District Commander sends his report to the Commissioner. As a result of this the Commissioner reaches a decision and notifies the parties concerned. There is no police tribunal or hearing and no evidence is considered except of course that of the

District Commander.

From the table of disciplinary offences some general comments can be made. If one takes the total number of disciplinary offences as seventy-four for the year, i.e., including those pending, the following features emerge.

Of the seventy-two cases forty-six percent were dealt with by the police themselves—either the Commissioner or a police tribunal. If one disregards the traffic offence cases in the Magistrates Court as of little importance, the remaining fifteen incidents of criminal hearings in the Magistrates Court or only twenty percent of the total were decided in open court with public access and reporting.

As to the results of the various hearings, sixteen percent of the cases were dismissed (this is a very low percentage indicative of the screening complaints will go through before the member concerned actually comes before some sort of disciplinary hearing) of the remainder, forty-nine percent were dealt with by a minor form of punishment, i.e., discharged without penalty, warned or fined. Four percent were subject to a reduction in rank, four percent were dismissed and seventeen percent resigned during the course of the Inquiry.

It is very difficult to draw conclusions from these figures but it would seem that these seventy-two cases where the police instigate proceedings against one of their members would be considerably less in number than the numbers of complaints made. It is unfortunate these figures concerning the number of complaints are not obtainable in order to obtain a truly accurate picture. As a result of this it is virtually impossible to reach a conclusion on the effectiveness of the system as it exists and I would submit that the very secrecy that shrouds the procedure in all but those in the Magistrates Court is a major impediment to its effective functioning. The question must be asked, how many people who make a complaint against the police actually receive satisfaction for what they may have regarded as unreasonable treatment by the police. Any complaint made will be subject to a formal disciplinary system, its investigation and the decision as to what action will be taken being entirely in the hands of the police. This situation would seem to be less than satisfactory.

There are, however, other avenues open to members of the public who wish to make a complaint against the police. It is possible to complain to the Ombudsman about the police—but the Ombudsman can investigate a particular complaint only if it has first been made to the police and they have failed to investigate it within a reasonable time or if the outcome was unsatisfactory in the complainant's opinion. In only a few cases will the Ombudsman carry out his own investigation *de novo*. Although he has that right in most cases he is able to satisfy

himself<sup>3</sup> “by an examination of the police files that the police have carried out a thorough and speedy investigation and that the outcome has been reviewed by senior officers at police headquarters”.

Thus, while this is an option open to a complainant it is somewhat restrictive both in terms of the Ombudsman’s authority to investigate police decisions—limited to those decisions<sup>4</sup> “relating to matters of administration”, and in the mechanics of his going about such an investigation.

If a citizen fails to receive satisfaction from the procedure already outlined it is possible to make a complaint to a Member of Parliament or the news media.

The police are particularly sensitive to public opinion and will always react to criticism in the press or Parliament. When in 1979 a television “Eye Witness” programme on drugs alleged police corruption it led to a full-scale internal police inquiry lasting five months. The script for the programme had been given publicity before the programme was shown by the Member of Parliament for Auckland Central, Mr R.W. Prebble. Commissioner Walton stated that the inquiry was ordered because of preserving the integrity of the police. For this reason it was essential that even rumour of misconduct by police be fully checked. Two Detective Inspectors found no evidence to support criminal charges, or suggesting misconduct of a disciplinary nature by any police officer.

Another avenue open to an aggrieved citizen is to bring a civil action against the police on the grounds of false imprisonment, trespass to property or assault, however, due to the state of the law this alternative is not as straightforward as it may appear. The Accident Compensation Act 1972 contains in section 5(1) the following:

Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand . . . no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

The effect of this provision was for some time uncertain. This uncertainty has, however, to some extent been remedied by some more recent decisions on this question. The major question seems to be whether an assault is an “accident” for the purposes of punitive damages.

Under section 5(1) of the Accident Compensation Act the relevant inquiry is whether damages sought arise directly or indirectly out of the personal injury by accident. R.M. McInnes in a letter to the *New Zealand Law Journal*<sup>5</sup> states that if the circumstances of the battery

<sup>3</sup> *Report of the Ombudsmen for the Year Ended 31 March 1980* (1980), 7.

<sup>4</sup> Ombudsmen Act 1975, s.13(1).

<sup>5</sup> [1979] N.Z.L.J. 227.

are such as to constitute "personal injury by accident" the touching must surely be the accident. Therefore damages arising directly or indirectly out of the injury are statute barred. The courts in a series of decisions confirmed this view.

In the case of *Lucas v. A.R.A.*<sup>6</sup> the action complained of involved what was held to be high-handed and oppressive action by a traffic officer employed by the A.R.A. at Auckland Airport towards a member of the public. This entailed the officer concerned ramming the plaintiff's vehicle with his patrol car after the plaintiff had allegedly committed a speeding offence.

The plaintiff succeeded in his claim for special damages but considerable discussion was devoted to his claim for exemplary and aggravated damages. The defendant had argued that such a claim insofar as it relied upon injury to the plaintiff's feelings is itself a species of claim for personal injuries and accordingly comes within the exclusive jurisdiction of the Accident Compensation Commission.

His Honour, Prichard J., stated:

Aggravated and exemplary damages, although treated as a separate head in assessing damages are essentially an augmentation of compensatory damages recoverable by the plaintiff on a substantive course of action. To be successful it must be grafted onto some course of action entitling the plaintiff to compensatory damages.

In order to determine whether a claim for aggravated or exemplary damages is within the ambit of the exclusive jurisdiction of the Commission one has to identify the basic or substantive course of action and see whether that is a claim in respect of personal injuries—if it is then that is within the exclusive jurisdiction of the Commission.

In the case of *Haywood v. Phillips*<sup>8</sup> the plaintiff claimed damages as a result of an incident in which he was set upon by a police dog. The Court of Appeal followed the decision of *L v. M*<sup>9</sup> in that the issue as to whether the plaintiff had suffered personal injury by accident needed to be referred to the Commission. In the court's view the Commission had exclusive jurisdiction to decide whether there was personal injury by accident and also to decide what categories of personal injury he suffered.

The *Lucas*<sup>10</sup> case mentioned above was concerned with trespass to goods rather than to the person and the only way the defendant could pray in aid the Accident Compensation Act was to use the theory that exemplary damages are a way of compensating for injury to the plaintiff's feelings—and that basis was firmly rejected by Prichard J. But the *Haywood*<sup>11</sup> case has authoritatively stated that where physical

<sup>6</sup> [1980] BCL (401).

<sup>7</sup> *Idem.*

<sup>8</sup> [1980] BCL (101).

<sup>9</sup> [1979] 2 N.Z.L.R. 519.

<sup>10</sup> *Supra.*

<sup>11</sup> [1980] BCL (101).

injury is involved then the question as to whether or not an assault is an accident is not for the Court to decide, it must be referred to the Commission.

It can be seen from the above authorities that in an action for battery, claiming punitive damage is not available. Criminal sanctions may in some cases be insufficient and the question must be asked what steps, if any, remain open to the private citizen to protect himself against over-zealous officials. The answer would have to be that there are more and that the law should provide an adequate remedy. Further, as more of these cases arise and more citizens feel that some measure of punitive damage is owed then such a remedy should be available. This has been recognised by the judiciary; McMullin J. in *Stowers v. Accident Compensation Commission*<sup>12</sup> stated the need for punitive damages to curb official high-handedness, and if the criminal law is inadequate for this task containing as it does provisions such as section 378 of the Crimes Act 1961 and section 77A of the Summary Proceedings Act 1957 then there is a need for change. It would be possible then that where there was some element of affront to the plaintiff's pride, honour or dignity, that his right of action should not be barred by section 5(i) of the Accident Compensation Act 1972 and the plaintiff would receive adequate satisfaction for any harm he has suffered.

Another possibility is to bring criminal proceedings against a particular policeman. However, the difficulties for a private individual of mounting and succeeding in such proceedings are such as to make them of little practical value—this according to the Ombudsman in his 1978 report.<sup>13</sup>

One point that can be considered in relation to evidence and bringing proceedings against the police relates to the numbers worn by policemen. If a policeman chooses not to give his name, the only course open to anyone wishing to make a complaint about the policeman's behaviour is to take his number. But in a statement released by the Auckland Council for Civil Liberties in 1975 it was stated that this is of no use as neither the Assistant Commissioner nor the Minister can be compelled, even after being informed of the number to disclose the policeman's name. The case was cited of a policeman unlawfully evicting a number of tenants, the officer's number had been removed but identification was still possible from photographs. The Assistant Commissioner and the Minister refused to disclose his name, thereby protecting him from civil and criminal proceedings which might otherwise have been instituted on the part of the

<sup>12</sup> [1979] N.Z.L.J. 262.

<sup>13</sup> *Report of the Ombudsmen for the Year Ended 31 March 1978* (1978).

aggrieved citizens. This police practice does frustrate the efforts of concerned individuals who may wish to test in a court of law the legality of the actions of any particular policeman. This area of police procedure is one that does perhaps need change.

From the above exposition on the procedures adopted by the police to deal with complaints against its members and the alternatives available to a member of the public wishing to make a complaint against the police, obvious defects arise. The major of these is the restrictive nature of the system as it exists in New Zealand, the police are judges in their own cause in the majority of cases, once a complaint is made the police themselves investigate and decide what further action if any is required.

Principles of administrative law and natural justice would indicate that no Government authority should be judge in its own cause and the complainant should have the opportunity to bring his case before an impartial tribunal. The principle was expressed by Lord Campbell in 1852:<sup>14</sup>

It is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred, and it is not confined to a course in which he is a party, but applies to a course in which he has an interest.

The system is essentially a formal disciplinary one. The way in which complaints are handled has originated and evolved within the discipline system and as a consequence displays the same characteristics. To be not only fair but effective a public complaints system must to some extent be divorced from the disciplinary system, this would lead to a more remedial approach that would ensure effective policing through the improvement of the police and the public.

The Chief Ombudsman has recently suggested that a tribunal<sup>15</sup> "independent of the police structure be established to investigate complaints against the police". This tribunal would have the power to summon witnesses before it and examine and cross-examine them on oath. According to the report the tribunal should include<sup>16</sup> "representation from outside the police structure, it should be seen to be impartial and its procedure should be readily accessible to the public at minimum costs to them".

He also recognised the importance of the remedial aspect of a public complaints system.

## II. ALTERNATIVES

If the New Zealand system is not as effective as it should be from

<sup>14</sup> Morris and Hawkins, *op. cit.*, 99.

<sup>15</sup> *Report of the Ombudsmen for the Year Ended 31 March 1978* (1978), 13.

<sup>16</sup> *Idem*.



the point of view of the public what alternatives are available? The question of methods of dealing with complaints against the police has been considered in a number of jurisdictions similar to our own—in Australia, England and Canada and a review of their deliberations would prove useful. In a Commission of Inquiry into the Royal Canadian Mounted Police in 1976<sup>17</sup> the Commission, in an attempt to resolve what was the most efficacious method of dealing with police complaints outlined what it regarded as the alternative categories of complaint procedures based on the nature of public involvement in the process. The alternative models are:

- (1) *The "in house" method.* Here the duty to record the complaint, to investigate and adjudicate upon it, would be in the hands of the police themselves. It was submitted by the Commission that the appellate role played by Boards of Police Commissioners and the like (as used in Canada) does not introduce a sufficiently disinterested factor to remove current practices from this category.
- (2) *The externally supervised "in house" model.* Here the investigation and adjudication functions follow the in house method model but there is an external review factor built in at the end of the process. This reviewing role could be played by the independent lawyer who would have the task of considering the whole conduct of the case to ensure that just and fair treatment was received by either the complainant or both the complainant and officer about whom the complaint was made. It would be the duty of this independent review on application of an aggrieved party to make recommendations to the Solicitor General about further action, if any, which should be taken, either in the instant case or henceforth to ensure a proper disposition of the case.
- (3) *Police investigation with independent adjudication model.* Investigation would be conducted by police but once the investigation was completed the adjudication and disposition would be in the hands of a body independent of the police. This adjudication function might be undertaken by a judge, a lawyer appointed for the purpose of a board upon which the public would be represented by civilian members.
- (4) *The independent investigation with police adjudication.* Here investigation is in the hands of investigators employed especially for the purpose and under the control of an Ombudsman or Commissioner of Rights whose duty it would be to report back to the

<sup>17</sup> The Report of the Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure within the Royal Canadian Mounted Police (1976).

Chief of Police with recommendations of necessary action, leaving final disposition in the hands of the police.

- (5) *Truly independent model.* Here all facets of the complaint from its initially being rewarded until disposition would be kept out of police hands entirely. In effect the Chief of Police would be notified of the disposition of the complaint by the authority here created and would have no discretion but to comply with the order although the officer complained of, or the police force itself, would of course be represented at the board hearing by counsel or agents.

The Canadian Commissioner favoured Model Two where the external review adopted holds open the dual possibility of safe-guarding a complainant's interest in complaint procedures and protecting the force from the suspicion that its procedures operate to the detriment of the citizens it serves.

In their 1981 report, the Royal Commission on Criminal Procedure stated they were aware of the criticisms being levelled at the present arrangements for investigation using the Police Complaints Board. The Commission felt major importance should be attached to the complaints system having credibility with the public. They welcomed the idea proposed by the Board in their 1980 Triennial Report that the most serious complaints involving unexplained injuries should be investigated by a specialist body of investigating officers secure from all police forces and under the direction of someone having judicial experience. The commission also proposed that a more open system of recording police decisions during the investigative process should facilitate subsequent scrutiny by supervising officers and by the Board of the way the police have conducted themselves.<sup>18</sup>

These proposals have however yet to be put into practice. The specialist investigating body proposal is still being studied by the Government. If instituted they would go some considerable distance towards restoring public confidence in the complaints system. Yet again I must stress they are only proposals and it will not be until they are actually instituted and working that a proper evaluation can be made.

When evaluating these models, one can say that the situation in New Zealand is represented by Model Two and this must be regarded as unsatisfactory. Models Four and Five involve independent investigation and should, in my opinion, be discounted as possibilities. It is well established that an independent investigation will not receive the full co-operation of the police whilst making an investigation.

<sup>18</sup> Royal Commission on Criminal Procedure (1981) Cmnd. 8092. p.4.119.

One of the most obvious impediments to the use of external investigators is seen in the experience of investigators employed by civilian review boards in the United States. In many instances these were met with undisguised hostility and there were cases where the police simply closed ranks to severely frustrate the external examination. In other cases, where the external investigator was a relative stranger to the police organisation he was more easily sidetracked or frustrated than an internal investigator would have been. There is also the difficulty of recruiting experienced investigators who are in fact and in appearance independent of the police community.

Investigative skills are acquired only after extensive training and lengthy experience. These skills are mandatory if complaints investigations are to be adequately dealt with. An experienced police investigator will have these skills and know how to use them in regard to the legal aids available to him in terms of search, seizure, arrest and custody and when to invoke them.

Thus in terms of the skill and co-operation required by investigators to effectively complete their task, the police themselves are best qualified to take on this role. Therefore the two alternatives worthy of consideration are Models Two and Three. Both of these will now be considered in turn.

As has already been mentioned, the Canadian Commission favoured this second alternative. They recommended that an independent agent of the Attorney General be charged with review of the investigation of all complaints which allege criminal misconduct on the part of the police. Such an agent would advise the Attorney-General on the proper course of action and when necessary prosecute. Where there is *prima facie* evidence sufficient to establish criminal misconduct, prosecution should be entered. Such cases should not be remitted to the force for disciplinary action as a substitute for criminal prosecution. The Commission recommended that the concept of involvement by a civilian review board, the Solicitor-General or tribunals be rejected in favour of a Police Ombudsman. Such a Police Ombudsman would be responsible for:

- (i) Ascertaining that all complaints are investigated in an appropriate manner
- (ii) Recommending such remedial action as he believes necessary at both individual and organisational level
- (iii) Providing a review of any particular complaint or the procedures followed by the force in its response, and
- (iv) Serving as an authority with whom a complaint may be lodged.

Such a federal Police Ombudsman would have the authority to appoint tribunals to hold hearings convened for the purpose of determining the merits of a complaint—although this would be only in

special cases where special representation is required, e.g., where a police officer is working under the authority of a provincial Attorney-General and representation from the area in which the complaint arose might be needed on the tribunal.

Thus the proposed measures in Canada involve the retention of the existing system with the additional element of supervision by a Police Ombudsman and the involvement of an agent of the Attorney-General in complaints alleging criminal misconduct.

The alternative to this is Model Three, this modifies the existing system with the replacement of the police disciplinary tribunal by one of an independent nature. This was the model preferred by the Australian Law Reform Commission when making recommendations on review of the complaints procedure for the Australian Police, comprising 3,000 members of the Australian Capital Territories, Northern Territory and Federal Bureaux. The Commission recognised that an independent element should be introduced into the handling of complaints by the police and recommended the establishment of an independent tribunal which would constitute outside review and would have the confidence of all parties concerned. There would also be an appeal procedure to a judge of superior court status. There was also mention made of the valuable role that could be played by the Ombudsman in protecting the interests of members of the public. There are, however, some disadvantages to a system of this kind. In England a Police Complaints Board was established under the Police Act 1976, the Board itself comprised three retired civil servants who were, in the opinion of some commentators, less than willing to question police findings. Further, in the first year of its operation the volume of complaints dropped drastically, research led to the conclusion that a large number were being withdrawn shortly after being lodged. It seemed that police investigating officers were pressing people to drop complaints during the early stages of the investigation, possibly under the police's right to sue complainants under the act. The police were thus screening the complaints before the Board could test them. Derek Humphrey recommended that to be more effective from the public's viewpoint all complaints should go first to the Complaints Board for a preliminary assessment and then be passed down to the police for investigation. This would, in that writer's view, stem the tide of the public's apparent loss of confidence in the new system.<sup>19</sup>

In the field of civilian review boards being employed to exercise an independent review authority for the handling of public complaints one can gauge their usefulness by looking at experience gained by such

<sup>19</sup> Humphreys, "The Complaints System" *Policing the Police* (1977) i,63.

boards in the United States. Research has indicated that, for a variety of reasons such boards have met with less success than anticipated. Instead of providing *ex post facto* review and recommending a relevant approach that would obviate the causes of complaints many of these boards served to exacerbate the already existing adversarial character of the complaint process. In these situations public confidence in both the police and the boards themselves eroded in equal measure. Civilian review boards constitute further institutionalising of the notion that a complaint signals a dispute between two individuals alone. What is needed instead is the acceptance of the view that a citizen's complaint about a policeman deserves the attention of superior administrators who are intent upon reducing irritations and improving services. There should be a review of what the superiors did, not a trial of what the subordinates are accused of having done.

A slightly modified version of Model Three has also been recommended in Victoria. In the State of Victoria, which has a state police force of 7,500, only 1,500 larger than the New Zealand Police, an inquiry headed by a former Supreme Court Judge, Mr J.G. Norris, made significant recommendations dealing with procedures relating to complaints against the police. Other members of the committee were the immediate past Chief Commissioner of Police. The former head of the Law Department, and the incumbent head of the Police and Emergency Services Department.

The Commission's findings were kept secret for almost two years until leaked to the *Melbourne Age* in March of this year.<sup>20</sup> The inquiry report said:

It is evident that without public co-operation the task of the police in preventing crime and detecting criminals is rendered much more difficult. A significant element in the maintenance of public confidence in and respect for the police is the existence of a proper system for investigating complaints by members of the public against the police.

It concluded:<sup>21</sup>

We believe there is a need for greater participation by citizens in the system of dealing with complaints against the police by members of the public.

To achieve these ends the Commission recommended restructuring of the two police disciplinary bodies, the Police Discipline Board (PDB) and the Police Service Board (PSB) to allow public representation and press coverage.

The PDB would achieve in addition to the existing senior police officer and Stipendiary Magistrate a third person representing the public. The inquiry further urged that Mr Miller the current Chief Commissioner of Police in Victoria should have the power to appeal against any penalty handed down by the PDB that he regarded as

<sup>20</sup> *The Melbourne Age*, 20 March 1980, 1.

<sup>21</sup> *Idem*.

“inadequate”. For in the body of the report, the inquiry twice referred to Mr Miller and unnamed senior police officers giving evidence that the PDB had previously been in the judgement of the police “too lenient” with some police found guilty of disciplinary offences. The inquiry said that the Chief Commissioner should have power to appeal to the Police Service Board.

This Board comprises a retired County Court Judge, a nominee of the Police Association who is a police inspector and a nominee of the State Government who is a former police superintendent. The inquiry said:<sup>22</sup>

The present Government representation on the PSB when sitting to hear appeals arising out of complaints by members of the public should be replaced by a representative of the public at large.

The Commissioner recognised the independent element already provided through the retired Judge and the Stipendiary Magistrate but concluded that the composition of each tribunal would be improved by the introduction of a representative of the general public.

A further finding on the vexed question of providing for a totally independent “repository” for the public to lodge complaints against the police was that it was impracticable other than for the police to investigate the police. As a result all complaints by public against police should be channelled directly to the office of the Chief Commissioner where a central register of complaints would be kept. The Commission recommended an increase in the numbers of the internal police investigations unit known as B11, to render it completely effective, this would mean an increase from eight to, say, forty members to investigate the up to 700 public complaints per annum involving the police.

If the public was not satisfied with the B11 investigation of a complaint then they should appeal directly to the state Ombudsman. The Ombudsman, or his nominee, would have access to the Bill investigation files:

In our view the Ombudsman with the aid of his staff is quite capable of effectively assessing the quality and reliability of any investigation that he examines. If no action or inadequate action has been taken in consequence of defects in the investigation the matter will be raised with the Chief Commissioner and if necessary reported to Parliament by the Ombudsman. While this does not of itself inevitably ensure that all relevant facts are ascertained or placed before a tribunal, we believe that it does, and will continue to ensure careful and honest investigation by B11.<sup>23</sup>

Thus one can see that in Victoria, the Norris Commission was established by the State Government to make recommendations regarding both police procedure and complaints and to advise what should be adopted. The Commission, as has been seen, recommended reform regarding an independent tribunal to investigate complaints

<sup>22</sup> *The Melbourne Age*, 20 March 1980, 1.

<sup>23</sup> *Idem*.

against police. A report in the *National Review* in May 1980 describes the Government's reaction as:<sup>24</sup>

At best one of indifference and at worst the sort of secrecy that bespeaks a total unwillingness to implement the recommendation outlined in the report.

The Norris report is both a pertinent and a practical document which could possibly contain the solution to a problem of defining the relationship between the citizen and the police in Victoria. It has been recognised as a first class legal work and is so definitive about rights it was studied by British Law Reform Commissioners while they were in Melbourne last year.

This report is therefore extremely useful. The situation in Victoria being very similar to that in New Zealand. However, it must be viewed in the light of the fact that in Victoria the existing police complaints system already had an independent judicial element—the Stipendiary Magistrate on the PDB—the recommendation being a restructuring to allow public representation.

Thus, if either of Models Two or Three were to be adopted in New Zealand, Model Two might be regarded as the more appropriate. If one accepts that change is desirable within the New Zealand system of complaints against the police as many commentators do—the Chief Ombudsman as has already been mentioned and also practitioners involved in the area, among them Rodney Harrison, the present Chairman of the Auckland Council for Civil Liberties, then Model Two would seem the best option. This is due to the fact it would fulfil the task effectively in the eyes of all concerned, on the one hand the police and on the other the public and organisations (e.g., the various civil liberty councils) acting on their behalf. This would involve a specialisation of the Ombudsman role in this area, this office would provide the necessary independent element. There is practically unanimous agreement that both citizens and Government officials including the police are well satisfied with the work of the Ombudsman. His usefulness is a result of the fact that he derives his authority from and is answerable to the legislature, secondly he has powers to investigate all administrative but not legislative decisions and finally while he has the power to criticise administrative decisions and recommend change he does not have the authority to reverse administrative decisions nor to reprimand malefactors. Through the Ombudsman the legislature ensures the continued accountability of public servants and a candid assessment of their exercise of delegated authority. In the Commission of Inquiry on the R.C.M.P. mention was made of the comment of Professor Grosman, Chairman of the Saskatchewan Law Reform Commission in support of his proposal

<sup>24</sup> *The National Review*, May 1980, 32.

for the introduction of an Ombudsman into the complaint handling process, addressed the protective role such an official could play.<sup>25</sup>

The impartiality of the Ombudsman may also be useful to support the police against unwarranted complaints. Rejection of complaints by an impartial agency and indication that they were not justified is obviously of substantial support to an agency which is continually subjected to criticism which may or may not be warranted.

The police stating as they do that they welcome the appointment of an independent tribunal to investigate the police could have no grounds for criticism, it being in their own best interests from a public relations viewpoint that the complaints system be seen to be both effective and fair. An Ombudsman having the respect of all parties would provide the solution.

One must, when reaching a decision on what form a police complaints procedure should take, also mention the suspicion some practitioners involved in this area have towards the judiciary as completely unbiased, independent reviewers of police actions. This being especially true of District Court Judges. One must appreciate that a judge in the District Court hearing prosecutions brought by the police every day might not perhaps constitute the completely unbiased element that would be called for. They must by the nature of all their previous contact with the police be somewhat prejudiced in the police's favour. This would of course not be applicable in all cases, but the possibility of its occurring could have some impact on the effectiveness of the complaints system. On the other hand an Ombudsman would be seen to be totally independent and would I am sure have the full confidence of all parties who might become involved in the proceedings.

The police contend the system as it now operates is effective and further that the results of that system would hold up anywhere in the world. That may have been the case in the past but it is my contention that now and in future the present system is inadequate, for not only must justice be done it must be seen to be done, and with the present "closed shop" procedures this is impossible.

The need for an effective complaints system must be viewed in light of the fact that in our society members of the public are, perhaps as a result of increased information flow through the news media, becoming increasingly aware of their rights as citizens and they seem more prepared to lodge a complaint if they feel they have been unfairly treated by the police. Allied to this seems to be change in attitude towards the police force, an example of this is the way in which public confidence in the police has been undermined by the Royal Commission of Inquiry into the Thomas case,<sup>26</sup> notwithstanding what the

<sup>25</sup> Grosnan, *Police Command* (1975), 130-131.

<sup>26</sup> New Zealand Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas for the murders of David Harvey Crewe and Jeanette Lenore Crewe Report (1980).



Minister or Commissioner of Police may claim to the contrary. The police themselves recognise the Commission's value in questioning police procedures. However, the Commission and the publicity it has generated has been to the detriment of the police from a public relations viewpoint.

I cannot stress too strongly the importance to the police of public co-operation and assistance from the public in order that their law enforcement work be effectively carried out. For this to be achieved the public must feel confident that any grievance they have against the police will be dealt with to their satisfaction—provided of course that the complaint can be substantiated.

It is well established, and accepted by our own police force, that the independent determination of such matters is in the interests of and desired by responsible police officers, and in New Zealand both the Police Association and the Police Officers' Guild welcome the appointment of *ad hoc* independent tribunals.

However, an overhaul of the present complaints system would require the establishment of several new principles that would have to be followed by the police to be truly effective. Amongst these would be that formalities should be kept to a minimum. This would emphasise understanding, communication and mutual respect between the police and the citizens they serve. Thus perhaps a large number of the complaints received by the police could be resolved at the organisational level at which they occur. This would require the co-operation of the policeman concerned although an officer whose conduct is alleged to have given rise to a complaint may in some cases find some incentive to admit to a degree of impropriety or indiscretion on the understanding that the discipline he may receive will be relatively minor and that the entire matter will be disposed of quickly without the delay caused by a lengthy investigation. These incentives could possibly include that research of complaints and the informal discipline that may result will not form part of an officer's personal or service file. It would, however, be important to record and report even those complaints which are resolved informally—these records possibly being monitored by the Ombudsman, if one were appointed to cover this area, who could recommend changes in policy, practices and training.

If the formalities of complaint procedures were kept to a minimum this could possibly encourage timorous complainants to come forward, also those with language difficulties. In addition there should not be an embargo on anonymous complaints. It would seem to me as a result of the research I have done that there is a need for more flexibility in the police response to citizens' complaints, especially where they would be capable of resolution by clarification, explanation and

apology—a more human element is required. An example of the inflexible attitude the police sometimes take is found in a letter sent by Assistant Commissioner Overton, the then Auckland Police Commander, to the Auckland Council for Civil Liberties in April 1978. In this letter the Assistant Commissioner states:

I acknowledge the fact that we have previously acted on complaints received from organisations on behalf of citizens but the high percentage of these which, on investigation, prove groundless, has caused me to decide on a policy that complaints would only be received on behalf of others when they were lodged by:

- (a) A solicitor acting for the complainant.
- (b) A Supreme Court or Magistrates Court on the direction of the Judge or Stipendiary Magistrate.
- (c) A recognised leader in the case of a polynesian, particularly if language difficulties existed.
- (d) A parent or guardian in the place of a young person.

This is a far from flexible approach to public complaints, although it must be noted the police did not in future cases reject complaints forwarded by the Council on the basis of this policy and refuse to accept and investigate them.

Another important factor concerns the proper recording of complaints and the action taken. This could possibly be achieved by the centralisation of reports and files. Thus, instead of files being held by both District Commanders and the Commissioner there would be a central repository of complaint files. This would mean that all complaints would be kept. The Ombudsman would have direct access to those files, and those relating to their investigations including complaints records and findings. While it has been stated that the Ombudsman already has police co-operation in access to files, a central repository of all complaints would make his task that much easier.

#### CONCLUSION

To conclude it must be accepted that the system of police complaints in New Zealand is in need of change. I have submitted that an Ombudsman specially charged with overseeing all aspects of the complaint procedure plus a change in police policy relating to the introduction of more flexible procedures would be most efficacious in producing a far more effective system. The alternative to this, comprising an independent tribunal would, in my opinion, in the light of the English and American experiences not instil the same degree of public confidence that an Ombudsman would. Change is inevitable in this area, the police recognise this fact, especially concerning a specialist investigating unit within the Police Department and also that change will come as a result of public opinion and pressure. What concerns me is what will actually precipitate this change? In England the Civilian Review Board was a result of the discovery of massive corruption within Scotland Yard and some provincial police forces. In

Australia also, widespread police corruption led to an alteration in complaints procedures and further recommendations (e.g. the Norris report) for even more opening up of the complaint procedures. Will change come to New Zealand only after similar irregularities occur here?

Generally the New Zealand public have confidence in the law enforcement ability of the police, but this, as has been mentioned, is becoming less prevalent than once was the case. This erosion of public confidence could be halted by an effective complaints system that would ensure through a remedial approach that improvements would be made where necessary to procedures for the benefit of the community. It would be unfortunate if New Zealand could not learn from experience overseas and adopt a more flexible system to restore public confidence and consequently improve the police's enforcement ability before the damage becomes irreparable.

The police have a right to protect themselves from malicious complainants but the citizen has a greater right to be accorded the privileges of natural justice. It can only be hoped that change, when it does come, is a result of foresighted planning and not, as it has been overseas, due to the discovery of a large degree of police impropriety. If a new complaints system were established in New Zealand then this eventuality possibly would not arise.

SCHEDULE OF DISCIPLINARY OFFENCES — 1979

Hearing Type	Case Dismissed	Discharged with/out Penalty	Warned	Fined	Reduced in Rank Other	Dismissed from Police	Resigned during course of Inquiry	Pending	Total
Commissioner			5				5		10
Reg. 49(5A)		1		7	2	1		1	12
Police Tribunal	6	1		8	1		2	3	21
SM Tribunal									
MC Criminal	3	2		1		4	5		15
MC Traffic	3			8				1	12
Minor Offence		2							2
TOTALS	12	6	5	24	3	5	12	5	72