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**The Thin Blue Line Between Operation and Policy: Examining
the Accountability Deficit in New Zealand Policing**

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Abstract

The Armed Response trial was a controversial Police initiative that proposed arming teams of full-time police officers. Despite heavy public criticism, the government could not control whether the Police permanently implemented these teams. This paper investigates how this situation arose, and exposes an accountability deficit for police operational policy decisions. Police decisions are usually labelled "operational" or "policy". This categorisation determines the nature and depth of the decision's accountability. Notably, policy decisions are accountable to the government, whereas operational decisions are independent and therefore not democratically accountable. This paper investigates accountability for decisions falling in the middle of the operational–policy spectrum. These decisions are usually classified as operational. The Armed Response trial is used as a case study to explore the relevant accountability relationships and demonstrate their shortcomings. This paper argues the current classification of decisions has resulted in an accountability deficit. Two possible approaches forward are proposed: interpreting more decisions as "policy", or introducing a new category of "operational policy", allowing both the government and Police decide on matters and be held accountable jointly.

Subjects and Topics: "s 16 of the Policing Act 2008", "Police accountability", "Operational decisions", "Armed Response team trial".

Word count

The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises approximately 12,061 words.

I Introduction

In October 2019, the Police Commissioner announced a trial of armed teams of police officers who would roam communities and address high-risk situations. Despite public backlash to the trial, the government claimed their hands were tied: the decision was solely for the Police Commissioner, who is not democratically accountable. The Commissioner ultimately decided against permanently implementing the Armed Response teams, but he could have easily decided differently.¹ I argue this demonstrates an accountability deficit.

The Police have far-reaching powers. The Crimes Act 1961 allows police officers to use necessary force, which in some cases is fatal.² It is therefore crucial to have controls around the police's use of legitimate force.³ However, this accountability must be finely tuned.⁴ If the Police are too democratically answerable, political pressure could risk their independent and unbiased approach.⁵ As political parties compete to demonstrate their "tough on crime" approaches, police independence acts as a safeguard.⁶

A balance has been struck, allowing the government and Police to each have partial control of policing. Decisions are labelled either "operational" or "policy", dictating the nature and depth of accountability.⁷ *Policies* encompass decisions on policing methods, resource allocation and police priorities.⁸ The Police Commissioner's policy decisions are accountable to the Minister of Police.⁹ Policy work helps design systems and approaches at a higher level, where ultimately it will be applied in an *operational* context, on the ground.¹⁰ Operational decisions include investigations, prosecution and law enforcement.¹¹ The Police Commissioner is ultimately

¹ New Zealand Police "Armed Response Teams will not continue" (9 June 2020) <www.police.govt.nz>.

² Crimes Act 1961, ss 39, 40 and 44. But see s 62. See also New Zealand Police *Tactical Options: 2019 Annual Report* (2019) at 57 and following.

³ Dermot PJ Walsh and Vicky Conway "Police Governance and Accountability: Overview of Current Issues" (2011) 55 *Crime, Law and Social Change* 61 at 61 and 71.

⁴ Robert Reiner "Police Accountability: Principles, Patterns and Practices" in Robert Reiner and Sarah Spencer (eds) *Accountable Policing: Effectiveness, Empowerment and Equity* (Institute for Public Policy Research, London, 1993) 1 at 1.

⁵ Policing Act 2008, s 8(1)(a) and (e).

⁶ Geoffrey Palmer "The Legislative Process and the Police" in Neil Cameron and Warren Young (eds) *Policing at the Crossroads* (Allen & Unwin New Zealand, Wellington, 1986) 86 at 87; and Benjamin Bowling, Robert Reiner and James Sheptycki *The Politics of the Police* (5th ed, Oxford University Press, Oxford, 2019) at 15. See also Bryn Caless and Jane Owens *Police and Crime Commissioners: The transformation of police accountability* (Bristol University Press, Bristol, 2016) at 25.

⁷ Reiner, above n 4, at 6.

⁸ Terence Arnold "Legal Accountability and the Police: The Role of the Courts" in Neil Cameron and Warren Young (eds) *Policing at the Crossroads* (Allen & Unwin New Zealand, Wellington, 1986) 67 at 71.

⁹ Policing Act 2008, s 16(1).

¹⁰ Keith Manch "Exploring issues about regulation: policy and operations (also known as chalk and cheese)" (August 2019) Government Regulatory Practice Initiative <<http://g-reg.govt.nz>>.

¹¹ Policing Act 2008, s 16(2).

accountable for these decisions and is not responsible to the Minister of Police.¹² This divide between operation and policy is recognised by s 16 of the Policing Act 2008.

This paper focuses on areas of overlap between operation and policy, which are usually higher-level decisions made by senior leadership. These decisions are often labelled "operational", meaning they are not subject to democratic scrutiny. This lack of accountability is especially problematic given these decisions' importance – policies influence police actions on a broad scale, and operational policies can change the nature of policing drastically.

The Armed Response team trial from 2019–2020 is an example of higher-level operational policy. The trial deployed one vehicle of armed police officers in three locations: South Auckland, Waikato and Canterbury.¹³ The arming of the officers was significant, as New Zealand police are characterised by their generally unarmed status.¹⁴ Police officers routinely carry tasers¹⁵ and have both handguns and rifles locked in their cars to access if they deem it necessary.¹⁶ The only police officers always armed are the Armed Offenders Squad, who are part-time and on-call, contrasting with the full-time Armed Response teams.¹⁷

The trial was subject to significant public criticism, and the Police Commissioner ultimately decided against permanently implementing Armed Response teams.¹⁸ The public pressure on the Police is demonstrated by their decision in June 2020, despite not having completed a full trial evaluation.¹⁹

The Police and government categorised the Armed Response trial as an "operational" matter.²⁰ This operational status limited the available accountability mechanisms and, in particular, the democratic accountability the trial faced. I argue the decision on the trial was a higher-level operational policy and therefore could have been categorised as either operation or policy. I agree the decision was at least partly operational as it related to policing methods. However, this was not a decision pertaining to individuals, but instead was higher-level. The trial, if

¹² Policing Act 2008, s 16(2).

¹³ Jordan Bond "Police Armed Response Team arrest in suburban area raises concerns" *RNZ* (online ed, Wellington, 11 November 2019).

¹⁴ Kelly Buchanan "New Zealand" in *The Law Library of Congress Police Weapons in Selected Jurisdictions* (September 2014) 65 at 65; and "Arming the police - is it a step NZ wants to take?" *RNZ* (online ed, New Zealand, 11 August 2021).

¹⁵ "All frontline police to be armed with Tasers" *The New Zealand Herald* (online ed, Auckland, 31 July 2015).

¹⁶ Buchanan, above n 14, at 66; and "Arming the police - is it a step NZ wants to take?"; above n 14.

¹⁷ Donna-Marie Lever "Unmasking the armed offenders squad" *North and South* (New Zealand, January 2019); Buchanan, above n 14, at 65; New Zealand Police "Armed Offenders Squads" <www.police.govt.nz>; and Baz Macdonald "For six months, cops in NZ has guns - campaigners say it can't continue" *Re:* (online ed, New Zealand, 5 June 2020).

¹⁸ New Zealand Police, above n 1.

¹⁹ New Zealand Police, above n 1; and New Zealand Police "Armed Response Team publications" (November 2020) <www.police.govt.nz>.

²⁰ Bond, above n 13; and New Zealand Police, above n 1.

successful, would have been implemented throughout New Zealand.²¹ Additionally, these teams would have seriously impacted how the New Zealand public viewed the Police. While this issue is partly operational, it is also political. In the case of the Armed Response trial, the Police Commissioner listened to public criticism and decided not to implement Armed Response teams.²² However, this was not required of him as the Police Commissioner is not democratically accountable.

The lack of democratic accountability for something that could have impacted New Zealand's policing so profoundly highlights an issue with the current approach. I argue the current division of operation and policy categorises too many decisions in the grey area as "operational". The Police Commissioner did not misinterpret s 16 in relation to the Armed Response trial. The ambiguous legislative wording means it was open to the Police to understand the trial as operational. This exposes an issue with both current practice and the legislative framework.

Part II will introduce the problem raised by higher-level operational policy and further outline what constitutes policy and operational decisions. I will then explore the overlap between these two categories. In Part III, I explain the Minister and Commissioner's relationship, comparing it to other relationships and explaining its uniqueness.

In Part IV, I introduce a relational definition of accountability and three frameworks to evaluate accountability relationships. I will use these to explore the Police Commissioner's accountability for operational and policy decisions, demonstrating how this applied to the Armed Response trial. Examining this trial provides an insight into the web of the Police's accountability relationships and exposes the gaps. Finally, I will address whether the Armed Response trial is best understood as operation or policy.

Finally, Part V will draw the threads together, suggesting tweaks that could increase the Minister of Police's accountability for operational policy decisions. One such way could be reconsidering where the line is drawn between operation and policy, to allow for more decisions to be labelled as policy. Another possibility is acknowledging a hybrid category of operational policy, where the Minister of Police and Police Commissioner share the decision-making and accountability.

²¹ Evidence Based Policing Centre *Armed Response Team Trial: Evaluation Report* (New Zealand Police, November 2020) at 24–25.

²² New Zealand Police, above n 1.

II Operational Policy

Labelling a decision "operational" or "policy" determines who is ultimately accountable for that decision, as well as the nature and depth of that accountability. Despite the importance of this distinction, it is unclear what falls into either category, meaning many decisions have aspects of both operation and policy.

The Dawn Raids in the 1970s and 1980s demonstrate the danger of this blurred line. The government had a policy to arrest and deport people overstaying visas, which disproportionately targeted Pasifika people.²³ The Minister of Police likely then instructed the Police Commissioner to pursue this policy objective.²⁴ The Police acted accordingly. District Commanders, for example, were told to question people of non-Pākehā ethnicity on the street and generally target Pasifika people.²⁵ Following an adverse public reaction, the Minister distanced himself, saying he was "not responsible for the day-to-day operations... That's for the commissioner."²⁶ Despite these statements, individual police officers stated they did not feel they could disobey his policy.²⁷ The Minister of Police adopted the operational label to reduce the government's accountability for controversial operational policy. The Armed Response trial is another example of the government distancing itself from a controversial initiative by describing it as operational.

The primary policing legislation in New Zealand is the Policing Act. This Act sets out the actors with ultimate accountability for police decisions. Government departments usually follow ministerial instructions, and in return the Minister takes ultimate responsibility for the decision.²⁸ The Police are different: although they are part of the executive, they behave independently from the government on operational matters.²⁹ This concept is called constabulary independence.³⁰

Constabulary independence allows police to be impartial, without political motivation to treat groups or individuals differently.³¹ This prevents the politicisation of "safety, security and

²³ Jacinda Ardern, Prime Minister "Speech to Dawn Raids Apology" (Auckland Town Hall, Auckland, 1 August 2021); and Ann Beaglehole "Immigration regulation – Controlling Pacific Island immigration" Te Ara – The Encyclopedia of New Zealand <<http://teara.govt.nz>>.

²⁴ (2 November 1976) 407 NZPD 3538; and Gordon Orr "Police Accountability to the Executive and Parliament" in Neil Cameron and Warren Young (eds) *Policing at the Crossroads* (Allen & Unwin New Zealand, Wellington, 1986) 46 at 57.

²⁵ Orr, above n 24, at 56.

²⁶ At 57. See also (2 November 1976) 407 NZPD 3537.

²⁷ Orr, above n 24, at 57.

²⁸ Cabinet Office *Cabinet Manual 2017* at [3.27].

²⁹ Policing Act 2008, s 16(2).

³⁰ Cabinet Policy Committee Paper "Police Act Review – Paper 2: Governance and Accountability" (September 2007) at Appendix 1 at [5]; and Jack Elder *Review of Police Administration and Management Structures* (New Zealand Police, Preliminary Draft Report, 9 June 1998) at Appendix 1.

³¹ Walsh and Conway, above n 3, at 61 and 71; and Elder, above n 30, at Appendix 1.

justice", and therefore is seen to justify reduced democratic governance and accountability.³² Police independence also benefits the Minister of Police and the wider government by sheltering them from the political controversy that often results from policing policy.³³

This paper focuses on the accountability of the Police Commissioner, as they are often ultimately responsible for Police decisions. Frontline police are known to be independent – they swear an oath, and therefore have independent authority from being public office holders of the Crown.³⁴ They are also prohibited from acting under a Minister's direction by s 30(4) of the Policing Act. While this appears to suggest frontline police are only "answerable to the law", officers' independence is restricted by the Police's strong hierarchical structure. The Police has a unique organisational culture, where officers must obey their superiors.³⁵ Discipline is critical, and there is a "strictly enforced chain of command".³⁶ As a result, the Police relies on a robust internal accountability structure, and the top of the hierarchy (the Police Commissioner) is responsible externally if needed.³⁷ The accountability the Commissioner faces is therefore extremely important.

Section 16 provides "basic parameters" for the Police Commissioner and Minister of Police's relationship and codifies constabulary independence.³⁸ Section 16(1) outlines the functions of the Police Commissioner where they are responsible to the Minister. I will describe these as "policy" decisions. The Police Commissioner's functions independent from government are found in s 16(2) of the Policing Act. This section confirms the Commissioner's authority is not delegated from the Minister of Police,³⁹ and states the Commissioner is not responsible to ministers for certain matters. These matters are maintaining order and enforcing the law relating to individuals or groups, investigating and prosecuting offences, and decisions about individual employees.⁴⁰ In this paper, I describe these as "operational" matters.

³² Walsh and Conway, above n 3, at 61 and 71.

³³ Elder, above n 30, at Appendix 1.

³⁴ Warren Young and Neville Trendle *Laws of New Zealand Police* (online ed) at [1].

³⁵ Steve Uglow "Police" in Peter Cane and Joanne Conaghan (eds) *The New Oxford Companion to Law* (Oxford University Press, Oxford, 2008).

³⁶ Orr, above n 24, at 46.

³⁷ United Nations Office on Drugs and Crime *Handbook on police accountability, oversight and integrity* (United Nations Office, July 2011) at 12.

³⁸ Cabinet Policy Committee Paper, above n 30, at [17].

³⁹ Letter from JJ McGrath (Solicitor-General) to John Banks (Minister of Police), Don Hunn (State Services Commissioner) and William Birch (Minister of State Services) regarding the constitutional relationship between the Commissioner of Police and the Minister of Police (8 March 1993) at [2(a)]. See also Elder, above n 30, at [91(i)].

⁴⁰ Policing Act 2008, s 16(2).

A Operational Decisions under s 16(2)

The Policing Act codified police independence of frontline police and amalgamated the preceding Police Act 1958, common law, convention and practice.⁴¹ The founder of the initial police force in 1829 suggested officers should be impartial, rather than catering exclusively to public opinion.⁴² Constabulary independence has since become a defining feature of the police.⁴³ When the Policing Bill was first introduced, the Minister of Police commented the Bill "confirm[s] the relative areas of responsibility" of the Police Commissioner and Minister of Police.⁴⁴ The legislation did not substantively change police operational independence, other than making it more explicit and transparent by writing it down.⁴⁵

Section 16(2) of the Policing Act communicates four categories of operational police functions. However, the wording of s 16 is broad, meaning it is not entirely clear what the section covers. There is also no available guidance from the Police to explain what is an operational function, compared to a policy. I will therefore draw on the statutory wording and scholarly sources to explain what is covered by s 16(2).

Firstly, under s 16(2)(a) and (b), maintaining order and enforcing the law are operational matters. This section echoes the influential 1968 House of Lords case *R v Commissioner of Police of the Metropolis, ex parte Blackburn (Blackburn)*.⁴⁶ In this decision, Lord Denning MR held the Police Commissioner had specific compulsory and independent duties, to which "[h]e is answerable to the law and the law alone".⁴⁷ These duties included enforcing the law and keeping the peace.⁴⁸

Secondly, the investigation and prosecution of offences is operational under s 16(2)(c). As said in *Blackburn*, "the responsibility for law enforcement lies on [the Police Commissioner]".⁴⁹ This section would cover frontline decisions made during criminal investigations, such as which suspects to focus on or how evidence should be gathered. Regarding prosecution, s 16(2)(c) would include deciding who to prosecute, whether the matter is in the public interest, what charges to bring and other procedural issues.⁵⁰ As with s 16(2)(a) and (b), policies or

⁴¹ Cabinet Policy Committee Paper, above n 30.

⁴² Home Office "Definition of policing by consent" (10 December 2012) United Kingdom Government <www.gov.uk>.

⁴³ Neil Cameron "Developments and Issues in Policing New Zealand" in Neil Cameron and Warren Young (eds) *Policing at the Crossroads* (Allen & Unwin New Zealand, Wellington, 1986) 7 at 7; Cabinet Policy Committee Paper, above n 30; and Elder, above n 30, at [38].

⁴⁴ (19 February 2008) 645 NZPD 14357.

⁴⁵ Elder, above n 30, at Appendix 1; and New Zealand Police "Policing Act 2008 commences tomorrow" (press release, 30 September 2008).

⁴⁶ *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118.

⁴⁷ At 135–136. But see Orr, above n 24, at 49.

⁴⁸ *Blackburn*, above n 46, at 136.

⁴⁹ At 136.

⁵⁰ Elder, above n 30, at Appendix 1.

reviews of these decisions would also likely be deemed operational. For example, it would not be appropriate for the Minister of Police to suggest police oppose bail on all burglaries, as this is an operational matter for the Commissioner.⁵¹

Finally, s 16(2)(d) covers decisions about individual police employees. This includes deployment of police staff, and likely also decisions around individuals' employment.⁵² That said, a decision to deploy police staff offshore, for example, would need to consider government foreign policy objectives.⁵³ It seems the deployment of resources (including staff) must be checked to ensure it is "consistent with government priorities and objectives".⁵⁴

For frontline police, operational matters cover much of their general duties policing and interactions with the public. Their approach to diverse operations from crowd control to arrests, both generally and relating to individuals, is operational. Frontline decisions are reviewed internally by supervisors when needed.⁵⁵ For leadership roles such as the Commissioner, the resourcing, strategy and policies relating to maintaining order and law enforcement would likely also be deemed "operation". However, this would only include decisions about individuals or specific groups per the legislation – rather than a broad policy.⁵⁶ The Police Commissioner is ultimately responsible for law enforcement resources used in particular cases, such as specific lower-level funding decisions. They are also responsible for law enforcement strategy and "reasonable policy directions" for classes of cases.⁵⁷ This enables them to direct police discretion regarding different kinds of offending or to tailor policing to particular locations.⁵⁸ For example, operational guidelines exist to help police determine if they should pursue a fleeing vehicle.⁵⁹ "Operation" therefore covers a broad spectrum of decisions made by all members of police, from frontline officers to the Commissioner themselves.

B Policy Decisions under s 16(1)

Section 16(1) of the Policing Act covers functions for which the Police Commissioner is responsible to the Minister of Police. These are policy decisions. "Policy" in a general sense covers courses of action or general principles to be followed.⁶⁰ These decisions are typically higher-level and decided by leadership rather than frontline police. The s 16(1) functions are

⁵¹ Cabinet Policy Committee Paper, above n 30, at Appendix 2.

⁵² At Appendix 2.

⁵³ At Appendix 2.

⁵⁴ At Appendix 2.

⁵⁵ Reiner, above n 4, at 7–11.

⁵⁶ Policing Act 2008, s 16(2)(a)–(b).

⁵⁷ McGrath, above n 39, at [2(b)]–[2(d)].

⁵⁸ Cabinet Policy Committee Paper, above n 30, at Appendix 1 at [7].

⁵⁹ Sam Sherwood and Sophie Cornish "Speeding drivers now more likely to get police pursuit reprieve" *Stuff* (online ed, New Zealand, 19 December 2020).

⁶⁰ Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (eBook ed, Oxford University Press, 2005) at "policy".

the Police Commissioner's functions. However, ultimately, the Commissioner is accountable to the Minister of Police for their delivery.

Section 16(1)(a) and (b) are phrased extremely broadly, providing little insight into what is classified as a "policy" decision. Section 16(1)(a) covers the carrying out of the "functions and duties of the Police". There are eight police functions detailed in the Act, including maintaining public safety, law enforcement and crime prevention.⁶¹ The fact that the Commissioner is responsible to the Minister for the function of law enforcement appears to be at odds with s 16(2)(b), which clearly states law enforcement of individuals and groups is an operational matter. This overlap demonstrates the broad wording of s 16. One way of reconciling this issue is to read the Minister of Police's ambit as limited to wider policy, rather than anything regarding "any individual or group of individuals".⁶² Section 16(1)(b) covers the "general conduct" of the Police. This ambiguous wording means it is unclear what would be covered by this subsection.

A few categories of decision seem to fall within s 16(1)(a) and (b). Firstly, the Minister may be involved in law enforcement programmes, particularly those of high public interest – such as the 1981 Springbok Tour crackdown on protesters and the Rainbow Warrior inquiry.⁶³ The Minister justified their involvement by describing their role as deciding the resource allocation for these initiatives.⁶⁴ In the same vein, policies about political demonstrations, when to intervene in industrial disputes, and how to deal with passive resistance may be accountable to the Minister.⁶⁵ Section 16(2) may also cover advising on general law enforcement or policing style, as well as perhaps general policy objectives.⁶⁶

Section 16(1)(c) covers the effective, efficient and economical management of the Police. The Commissioner is ultimately responsible for overall resourcing and administration, which is comparable to the responsibilities of public service chief executives.⁶⁷ For example, the Labour-led government in 2017 stated their intention to hire 1800 new police officers, which required a commitment to resourcing.⁶⁸ Finally, s 16(1)(d) covers tendering advice to the Minister of Police and other ministers of the Crown, and s 16(1)(e) covers giving effect to any lawful ministerial directions.

⁶¹ Policing Act 2008, s 9.

⁶² Policing Act 2008, s 16(2)(b).

⁶³ McGrath, above n 39, at [2(f)].

⁶⁴ Cabinet Policy Committee Paper, above n 30, at Appendix 1 at [8].

⁶⁵ Orr, above n 24, at 54; and Reiner, above n 4, at 6–7.

⁶⁶ Reiner, above n 4, at 6–7 and 9–10.

⁶⁷ Cabinet Policy Committee Paper, above n 30, at [13]; Elder, above n 30, at [91(i)]; John Hughes and others *Mazengarb's Employment Law* (online ed, LexisNexis) at [PCA16.4]; and Cabinet Office, above n 28, at [3.11]–[3.13].

⁶⁸ Ben Strang "Police welcome 1800th officer, government yet to meet second target" *RNZ* (online ed, Wellington, 22 November 2019).

C *Where Operation and Policy Meet*

The distinction between operation and policy is not clear from the statutory wording. This ambiguity can result in situations like the Dawn Raids or the Armed Response trial. In these cases, it benefitted the government to label controversial policies "operational" to reduce democratic accountability. There are two main reasons for the blurred line between operation and policy.

First, there is legislative ambiguity as to what functions fit in each category.⁶⁹ The wording of s 16 of the Policing Act is unclear, and many functions may appear to be both operation and policy. Non-specific and overlapping functions include "carrying out the functions and duties of the Police", "general conduct of the Police", "maintenance of order" or "the enforcement of law".⁷⁰ The resulting confusion is understandable and is caused by an attempt to condense a spectrum of functions (with both operational and policy aspects) into two discreet boxes. There is no case law clarifying the wording (or distinction between) s 16(1) and (2). Arguably case law could further muddy the waters, as precisely defining the line between operations and policy may be impossible.⁷¹

Secondly, decisions are not made in a vacuum: policy decisions may have operational impacts and vice versa.⁷² Senior leadership's administrative or policy decisions may impact operations, due to the connection between administration, resources and frontline work.⁷³ For example, if the Minister does not allocate resourcing to address white-collar crime, then frontline police cannot adequately pursue it.⁷⁴ Even a policy decision to reduce funding for computers could impact an investigative team's effectiveness and lessen prosecutions.⁷⁵ The Minister of Police may decide that police should spend more time pursuing un-renewed gun licences, or perhaps set up a drug squad.⁷⁶ Both of these decisions would significantly impact police operational capacity.

The boundaries are therefore unclear. The ambiguity also can lead to reduced political accountability for the Minister of Police from Parliament, further compounding the accountability deficit described. Members of Parliament may worry about misunderstanding the distinction, and therefore may shy away from questioning the Minister of Police on operational policy matters.⁷⁷ Members of Parliament do not debate issues around police

⁶⁹ Orr, above n 24, at 54; and Reiner, above n 4, at 7.

⁷⁰ Policing Act 2008, s 16.

⁷¹ See Laurence Lustgarten *The Governance of Police* (Sweet & Maxwell, London, 1986) at 20–22.

⁷² Reiner, above n 4, at 11; and Elder, above n 30, at Appendix 1.

⁷³ Elder, above n 30, at Appendix 1.

⁷⁴ Arnold, above n 8, at 72.

⁷⁵ Elder, above n 30, at Appendix 1.

⁷⁶ At Appendix 1; and Lustgarten, above n 71, at 21.

⁷⁷ Cameron, above n 43, at 19.

accountability in detail, which means the distinction remains unclear.⁷⁸ Finally, this ambiguity may harm police independence itself. The broad definition of "policy" could allow the Minister of Police to involve themselves in more of the Police Commissioner's functions if they see fit.

III The Relationship between the Two Key Players

The Minister of Police and Police Commissioner are the two key figures in charge of New Zealand policing. Their relationship is complex and human, and practically impacts how the Police functions.

The Minister of Police is a government minister. They oversee police functions, duties and general conduct, as well as the "effective, efficient, and economical management of the Police".⁷⁹ The Police Commissioner is the Police's operational leader.⁸⁰ They provide direction, maintain relationships and develop the organisational culture.⁸¹ They formally lead through communicating general instructions to guide Police staff and prescribing a code of conduct which includes behavioural standards.⁸² The Commissioner is also the official Police spokesperson.⁸³

The Commissioner's appointment is impartial and managed by the Public Service Commissioner.⁸⁴ However, the Minister of Police and Prime Minister make the final decision and then instruct the Governor-General accordingly.⁸⁵ The Minister comes to their position through democratic election and appointment.⁸⁶ First they must be elected as a Member of Parliament by the public. Then, once they are in government, they are given the Police portfolio through party mechanisms.

The Minister is, by definition, politically motivated. The Commissioner's role is said to be independent of both the executive government and, supposedly, politics. As a public servant, the Police Commissioner is politically neutral.⁸⁷ For example, it is common practice for the government to advise the leader of the opposition before they announce the appointment.⁸⁸

⁷⁸ At 19.

⁷⁹ Department of the Prime Minister and Cabinet "Ministerial Portfolio: Police" (12 October 2017) <<http://dpmc.govt.nz>>.

⁸⁰ See Letter from Una Jagose (Solicitor-General) to Jacinda Ardern (Prime Minister) about an IPCA report on complaints about Deputy Commissioner of Police (20 December 2018) at [13].

⁸¹ Letter from Jacinda Ardern (Prime Minister) and Stuart Nash (Minister of Police) to Chair of Cabinet regarding the appointment of Andrew Coster as Commissioner of Police (2020).

⁸² Policing Act 2008, ss 20 and 28–29.

⁸³ Cameron, above n 43, at 18.

⁸⁴ Cabinet Policy Committee Paper, above n 30, at [20].

⁸⁵ Policing Act 2008, s 14; Ardern, above n 81, at [18]; and Policing Act 2008, s 12(1).

⁸⁶ Department of Prime Minister and Cabinet "Ministerial List" (22 December 2020) <<http://dpmc.govt.nz>>.

⁸⁷ Public Service Commission "Standards of Integrity and Conduct" (30 November 2007) <www.publicservice.govt.nz>; and Public Service Act 2020, s 12(1)(a).

⁸⁸ Ardern, above n 81, at [19].

Instances of political criticism of the Commissioner have been condemned.⁸⁹ Despite this, the Commissioner holds office "at the pleasure of the Governor-General".⁹⁰ If the government loses confidence in the Police Commissioner's ability to perform their role, the Prime Minister may recommend the Governor-General remove them.⁹¹

The Police has a unique constitutional position due to constabulary independence, which is reflected in the relationship between the Minister of Police and the Police Commissioner. On the one hand, the Police is a department of the executive branch of government and has a responsible minister.⁹² For example, the Police are still subject to reporting requirements under the Public Finance Act 1989.⁹³ However, the Police is not classified as a "public service" department,⁹⁴ but rather an "instrument of the Crown".⁹⁵ This distinction suggests Police can be treated like other departments for financial management and performance, but not regarding governance or their relationship with their Minister.⁹⁶

In most government departments, the Minister and the department have a "close and hierarchical relationship".⁹⁷ The Police Commissioner and the Minister of Police are no exception and have a very close relationship – it is likely they often consult with one another.⁹⁸ Official channels seem to be eschewed in favour of a close relationship of trust.⁹⁹ It is "essential" the Commissioner cooperate with the Minister due to the close connection of their roles.¹⁰⁰ The relationship has been described as "human" and "ill suited to hard-and-fast definition".¹⁰¹ The quality and nature of the relationship will vary greatly depending on the personal relationship between the two individuals. In 1986 it was said, "there is no bureaucracy between [the Police Commissioner] and his Minister".¹⁰² There is no evidence this position has changed, despite the introduction of the Policing Act in 2008.

There is limited information about the Commissioner and Minister's relationship, as their meetings are out of the public gaze. In 2007, a Cabinet Paper stated that the Commissioner and

⁸⁹ See Justin Giovannetti "Andrew Coster on claims of racism, Police Ten 7 and the future of the force" *The Spinoff* (online ed, Wellington, 6 April 2021); and Zane Small "Jacinda Arden responds after Simon Bridges labels Police Commissioner Andrew Coster 'wokester'" *Newshub* (online ed, Wellington, 23 February 2021).

⁹⁰ Policing Act 2008, s 12(2).

⁹¹ Cabinet Policy Committee Paper, above n 30, at [25]; and Jagose, above n 80, at [3] and [15].

⁹² Department of the Prime Minister and Cabinet "The public service, the state services, and the state sector" (24 June 2017) <<http://dpmc.govt.nz>> at [3.4].

⁹³ Public Finance Act 1989, s 2 definition of "department".

⁹⁴ Public Service Act 2020, sch 2.

⁹⁵ Policing Act 2008, s 7.

⁹⁶ Cabinet Policy Committee Paper, above n 30, at Appendix 1 at [1].

⁹⁷ State Services Commission *Reviewing the Machinery of Government* (February 2007) at [54].

⁹⁸ Elder, above n 30, at Appendix 1.

⁹⁹ Cabinet Policy Committee Paper, above n 30, at [15].

¹⁰⁰ Roma Mitchell *Report of the Royal Commission on the Dismissal of Harold Hubert Salisbury* (Office of Commissioner of Police, 1978) at 43, cited in Orr, above n 24, at 61.

¹⁰¹ Cabinet Policy Committee Paper, above n 30, at [15].

¹⁰² Cameron, above n 43, at 18.

Minister had a Memorandum of Understanding with performance expectations.¹⁰³ It is unclear whether there is still such a memorandum or if they currently use other mechanisms. Whether or not there are formal measures in place, the Minister and Commissioner are unlikely to differ meaningfully on significant matters.¹⁰⁴ Because both people usually agree, an incident has not arisen to provoke a comprehensive definition of each sphere of authority. However, it still is possible that the two would differ on important matters. In that situation, the absence of formal infrastructure regulating the relationship may result in problems.

Despite this close relationship, there is some evidence the Police Commissioner does not always keep the Minister of Police fully informed. A recent example is the Police's decision to stop the use of helicopters and planes to spot cannabis operations.¹⁰⁵ The media reported "top brass at Police National Headquarters" decided to stop the program.¹⁰⁶ However, when approached by the media, the Minister of Police Poto Williams stated she was unaware of this change. She commented, "While this is an operational matter, I have asked for a full briefing as to the rationale behind this decision".¹⁰⁷

The Police is not unique in its distinction between operational and policy matters. The Cabinet Manual states that ministers decide the direction and priorities of their departments, but that they are not usually involved in day-to-day operations.¹⁰⁸ Ministers generally determine, promote and defend policies, while officials should support ministers, serve their aims and implement government decisions.¹⁰⁹

Other departments, Crown agents and Crown entities distinguish between functions with ministerial influence and functions independent of government.¹¹⁰ The difference between operation and policy is used to determine what is for ministers and what is for chief executives (which are equivalent to the Police Commissioner).¹¹¹ For example, Statistics NZ has close ties with their Minister, but its decisions on statistical methods and publication are independent of government.¹¹²

While there are similarities between the Police and other departments, the Police Commissioner is also unique. Comparing the governing legislation illustrates these differences.

¹⁰³ Cabinet Policy Committee Paper, above n 30, at [24].

¹⁰⁴ Cameron, above n 43, at 19.

¹⁰⁵ Sam Sherwood "Police slash annual cannabis operation, blind siding frontline staff and officials" *Stuff* (online ed, Christchurch, 20 January 2021).

¹⁰⁶ Sherwood, above n 105.

¹⁰⁷ Sherwood, above n 105.

¹⁰⁸ Cabinet Office, above n 28, at [3.7].

¹⁰⁹ At [3.7] and [3.9].

¹¹⁰ State Services Commission, above n 97, at [68]–[69].

¹¹¹ At [68].

¹¹² At [68].

Most government departments are covered by the Public Service Act 2020.¹¹³ However, this list does not include the Police, meaning the Police are not subject to most of the Act.¹¹⁴ The Public Service Act 2020 gives the "general responsibilities of chief executives" of other government departments.¹¹⁵ Section 52 states these chief executives are responsible to their minister for a list of eight things, including their agency's operation, advising ministers and delivering goods and services provided by the agency.¹¹⁶ This list is quite broad and is more expansive than the Police Commissioner's responsibilities to their Minister.

The Public Service Act does not detail functions chief executives should perform independently from their ministers. The only nod to this is at s 54, which states chief executives should decide on individual employment matters independently.¹¹⁷ However, this is still subject to s 70, which states chief executives must regard their minister's wishes when deciding on issues relating to staff.¹¹⁸ The Policing Act provides a different scheme, where the Police Commissioner is much more independent than chief executives.

As most other departments are not analogous with the Police, I will make a final comparison with the relationships within the Defence Force. The New Zealand Defence Force is similarly not subject to most of the Public Service Act.¹¹⁹ The functions of both departments can also be compared: officers wield force, and both organisations are hierarchical, uniformed and secretive. However, comparing the Defence Act 1990 with the Policing Act again demonstrates significant differences.

The Minister of Defence controls the Defence Force through the Chief of Defence Force.¹²⁰ The Chief of Defence Force acts as the principal military adviser to the Minister of Defence, and the closest comparison to the Police Commissioner.¹²¹ Key similarities include the fact that both people in the roles are appointed by the Governor-General and have similar responsibilities to their ministers.¹²² Indeed, the functions the Chief of Defence Force is responsible for in s 25(1)(b) of the Defence Act are almost precisely mirrored in the s 16(1) responsibilities of the Police Commissioner to their Minister in the Policing Act. Both sections state responsibilities for "carrying out the functions and duties" of their departments, "the general conduct" of their departments, and the department's efficient, effective, and economical management.¹²³

¹¹³ Public Service Act 2020, sch 2.

¹¹⁴ Public Service Act 2020, sch 2. But see Public Service Act 2020, ss 26(3) and 33(3).

¹¹⁵ Public Service Act 2020, s 52.

¹¹⁶ Public Service Act 2020, s 52(1).

¹¹⁷ Public Service Act 2020, s 54(1).

¹¹⁸ Public Service Act 2020, s 54(2).

¹¹⁹ Public Service Act 2020, sch 2.

¹²⁰ Defence Act 1990, s 7.

¹²¹ Defence Act 1990, s 25(1).

¹²² Defence Act 1990, s 8; and Policing Act 2008, s 12(1).

¹²³ Defence Act 1990, s 25(1)(b).

Despite these similarities, the Chief of Defence Force is not independent of their Minister. The Defence Act does not have the equivalent of s 16(2) of the Policing Act, detailing independent functions of the Chief of Defence Force. The Minister provides the Chief of Defence Force with written terms of reference, including how the government expects their duties and obligations to be performed.¹²⁴ Therefore, what initially appears like a similar relationship is, in reality, very different.

The Police Commissioner's relationship with the Minister of Police is unique. How the two relate profoundly impacts policing, as both play fundamental roles in designing how New Zealand polices. The Commissioner and Minister have different motivators, objectives and skills. Their respective areas of control are governed by s 16 of the Policing Act and the underlying convention of constabulary independence. Despite these differences, the two work closely and likely meet regularly.

IV Accountability Analysis

This paper compares the accountability relationships for operational and policy decisions. To undertake this comparison, a framework is needed to pull apart the elements of accountability and assess its efficacy. Accountability is inherently subjective and political.¹²⁵ It is often confused with values such as transparency or responsiveness.¹²⁶ It is important to tightly define accountability as the more stretched the wording, the "fuzzier" the standards of accountable behaviour.¹²⁷

In this paper, I will draw from the relational view of accountability provided by Bovens:¹²⁸

... a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.

Four key concepts from this definition arise: the forum, the actor, if the actor is obliged to render to account, and finally what the accountability process requires.

¹²⁴ Defence Act 1990, s 25(2).

¹²⁵ Mark D Jarvis and Paul G Thomas "The Limits of Accountability: What Can and Cannot Be Accomplished in the Dialectics of Accountability?" in Herman Bakvis and Mark D Jarvis *From New Public Management to New Political Governance: Essays in Honour of Peter C. Aucoin* (McGill-Queen's University Press, Montreal, 2012) 271 at 275 and 304.

¹²⁶ Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 *European Law Journal* 447 at 449–450.

¹²⁷ Jarvis and Thomas, above n 125, at 280.

¹²⁸ Bovens, above n 126, at 450.

The accountability *forum* is the entity passing judgement on the behaviour and can be a person, agency or group. Four kinds of forums are relevant to the Armed Response trial: political, legal, administrative and social.¹²⁹ Political accountability describes a chain of accountability, where the voting public ultimately passes judgement.¹³⁰ The forum for social accountability is also the public, or interest groups or stakeholders.¹³¹ Administrative accountability is owed to quasi-legal forums, and legal accountability is where the court applies legal standards to decision-makers.¹³²

It is sometimes difficult to find a singular accountable *actor* due to "the problem of many hands".¹³³ Accountability is inherently associated with control, so identifying the actor usually requires finding who ultimately made the decision.¹³⁴ Next is the question of whether the actor is *obliged* to render to account.¹³⁵ This asks whether rendering to account is required or voluntary.¹³⁶ Finally, there is a question of *what the process involves*. The actor may have to provide information, debate or justify their conduct, or otherwise face judgement and consequences.¹³⁷

The best accountability mechanisms provide democratic monitoring of government, prevent power concentration and allow for systems to improve.¹³⁸ To evaluate accountability relationships, Bovens provides three evaluative frameworks: the democratic, constitutional and learning perspectives.¹³⁹

The democratic perspective asks how effectively the accountability mechanism provides a democratic means to monitor and control governmental conduct.¹⁴⁰ Accountability to the public is an essential condition for this democratic perspective.¹⁴¹ The constitutional perspective asks whether the mechanism offers sufficient incentives to prevent actors from abusing their executive authority.¹⁴² Accountability forums should be "visible, tangible and

¹²⁹ At 455–457.

¹³⁰ At 455.

¹³¹ At 457.

¹³² At 456.

¹³³ At 457.

¹³⁴ At 457–459.

¹³⁵ At 455.

¹³⁶ At 460.

¹³⁷ At 451–452; and Mark Bovens, Thomas Schillemans and Paul Hart "Does Public Accountability Work? An Assessment Tool" (2008) 86 *Public Administration* 225 at 230–234.

¹³⁸ Bovens, above n 126, at 465–466. See also Rayner Thwaites and Dean Knight "Administrative Law Through a Regulatory Lens: Situating Judicial Adjudication Within a Wider Accountability Framework" in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, Wellington, 2013) 529.

¹³⁹ Bovens, above n 126, at 462.

¹⁴⁰ At 463.

¹⁴¹ At 463; and Thwaites and Knight, above n 138, at [14.2.1].

¹⁴² Bovens, above n 126, at 465.

powerful", able to reveal corruption or mismanagement, and include strong sanctions.¹⁴³ The final evaluative framework is the "learning perspective".¹⁴⁴ From this lens, accountability is a tool to provide actors with feedback to increase their effectiveness and efficiency.¹⁴⁵ This perspective is often overlooked;¹⁴⁶ however it is valuable as its ultimate objective is allowing governments to learn and improve.¹⁴⁷

A Unpacking the Accountability Relationships

Using the definition and evaluative perspectives discussed, I will analyse the accountability mechanisms available for the Armed Response trial. First, I will address the Commissioner's accountability for operational, independent work under s 16(2). The Armed Response trial was labelled "operational", so this analysis discusses the available mechanisms in this situation, finding them weak and ineffective. Secondly, I will discuss the Police Commissioner's accountability to the Minister of Police for policy matters under s 16(1). The Armed Response trial was not labelled a policy matter, so this analysis asks how the accountability for the trial would have changed if it was instead seen as policy. Throughout, I will define the relevant accountability relationships and assess the strength of these mechanisms using the democratic, constitutional and learning perspectives.

The accountable actors in this analysis are the Police Commissioner and Minister. While there are "complicated and dynamic" accountability relationships within both the Police and government,¹⁴⁸ both the Police and the government approach accountability in a hierarchical way. The Minister and Commissioner assume responsibility to the outside world, while internal accountability processes are also followed inside their organisations.¹⁴⁹ Both are also involved in the final sign-offs of higher-level operational policy.

1 Police Commissioner's operational decisions under s 16(2)

The Police Commissioner is accountable to several forums for their functions under s 16(2) of the Policing Act. These operational functions are maintaining order, enforcing the law, investigating and prosecuting offences, and making decisions about individual police employees.¹⁵⁰ The Armed Response trial was labelled "operational" by those involved, including the government.¹⁵¹ The Police's Executive Leadership Board decided to run the

¹⁴³ At 465.

¹⁴⁴ At 463–464.

¹⁴⁵ At 466.

¹⁴⁶ Thwaites and Knight, above n 138, at [14.1].

¹⁴⁷ Jarvis and Thomas, above n 125, at 273.

¹⁴⁸ At 271–272.

¹⁴⁹ Bovens, above n 126, at 458.

¹⁵⁰ Policing Act 2008, s 16(2).

¹⁵¹ Bond, above n 13.

Armed Response trial.¹⁵² The Board comprises nine members, including the Police Commissioner, Deputy Commissioners and Deputy Chief Executives.¹⁵³ The same Executive Leadership Board would have decided to discontinue Armed Response teams after the trial. The Armed Response trial therefore was subject to the s 16(2) accountability mechanisms.

Using the Armed Response trial as an example, I will explain the possible accountability relationships the Police Commissioner is subject to for operational decisions. There are five key accountability relationships that the Police Commissioner has: with the government, Parliament, the public, the Independent Police Conduct Authority and the courts. These forums encompass political, social, administrative, and legal accountability.

Political accountability to the government

The first accountability forum is the government, or Minister of Police. This accountability relationship is a form of political accountability. Political accountability describes forums where "voters delegate their sovereignty to popular representatives", who then form a government and authorise public servants to act.¹⁵⁴ The voting public ultimately passes judgement, albeit accountability to them is only possible periodically through elections.¹⁵⁵

There is very limited scope for the Police Commissioner to be accountable to the Minister of Police for their functions under s 16(2). For these functions, the Policing Act states "[t]he Commissioner is not responsible to, and must act independently of, any Minister of the Crown".¹⁵⁶ This corresponds with the government's lack of public involvement in the Armed Response trial. A spokesperson for the Minister of Police said the decision to launch the Armed Response teams was made solely by police, as it was an operational matter.¹⁵⁷ The government was therefore also not involved in the final decision to discontinue the teams.

Formally, one of the only powers the government has is the ability to dismiss the Police Commissioner.¹⁵⁸ The Police Commissioner holds office "at the pleasure of the Governor-General", meaning the government may technically dismiss them without notice or reasons.¹⁵⁹ This is because the Police Commissioner and the government must work so closely:

¹⁵² Evidence Based Policing Centre, above n 21, at 14.

¹⁵³ New Zealand Police "Commissioner and Executive" <www.police.govt.nz>.

¹⁵⁴ Bovens, above n 126, at 455.

¹⁵⁵ Andrew Le Sueur "Accountability" in Peter Cane and Joanne Conaghan (eds) *The New Oxford Companion to Law* (Oxford University Press, Oxford, 2008); and Bovens, above n 126, at 455.

¹⁵⁶ Policing Act 2008, s 16(2).

¹⁵⁷ Bond, above n 13.

¹⁵⁸ Policing Act 2008, s 12(2); and Young and Trendle, above n 34, at [5].

¹⁵⁹ Policing Act 2008, s 12(2); and Young and Trendle, above n 34, at [23].

if the elected government loses confidence in the Police Commissioner, "the person's position becomes untenable".¹⁶⁰

That said, natural justice concerns still apply.¹⁶¹ Crown Law has suggested there must be a "clear and proper basis" to remove the Commissioner in these situations, which relates to their fitness to hold office.¹⁶² This is to ensure constabulary independence. The wording of s 16(2) suggests the Police Commissioner could not be dismissed for their work on operational matters, as for this the Commissioner "is not responsible to... any Minister".¹⁶³ It therefore appears the threshold for dismissing the Commissioner is high and would only be available if there were concerns about their competence, rather than a difference of opinion. The Armed Response trial is not a situation where the Police Commissioner's competence would be questioned in such a way, and therefore their employment would not have been at risk.¹⁶⁴

While the power to dismiss the Commissioner is the only form of consequences-based accountability available to the government, other, less overt forms of accountability are also available. The Police Commissioner is still accountable through their obligations to provide the government with information. The Police must provide an annual report covering its performance and operations to the Minister.¹⁶⁵ At any point, the Minister of Police may require the Police to provide information on strategic intentions.¹⁶⁶ In addition, the Police must regularly publish their strategic intentions every three years.¹⁶⁷ The Police Commissioner is also obliged to give the Minister access to information on specific police investigations on the Minister's request, although the Commissioner can decide the contents of this report.¹⁶⁸ These are general obligations, and while this form of accountability can be useful, it is unlikely these reporting obligations were impactful for the Armed Response trial.

Informally, the Minister may also ask the Police Commissioner to report to them on significant or controversial operations. As mentioned, the relationship between the two individuals is close. I suggest the Minister of Police likely discussed the Armed Response trial with the Police Commissioner, albeit informally. This is supported by an alleged Twitter conversation released to media in 2019, where the Prime Minister was reported as saying, "We can't tell the police what to do operationally, but a few of us did meet with the Commissioner recently and share

¹⁶⁰ Cabinet Policy Committee Paper, above n 30, at [25].

¹⁶¹ New Zealand Bill of Rights Act 1990, s 27(1). See also Jagose, above n 80, at [12].

¹⁶² Jagose, above n 80, at [3] and [15].

¹⁶³ Policing Act 2008, s 16(2).

¹⁶⁴ Cabinet Policy Committee Paper, above n 30, at [25].

¹⁶⁵ Policing Act 2008, s 101(a); and Public Finance Act 1989, s 43.

¹⁶⁶ Public Finance Act 1989, s 38A.

¹⁶⁷ Public Finance Act 1989, s 38(1)(a) and 38(4)(a). See New Zealand Police *Four Year Plan: 2017/2018–2020/2021* (May 2017).

¹⁶⁸ Cabinet Policy Committee Paper, above n 30, at Appendix 2.

our views on [the Armed Response Trial]".¹⁶⁹ The close relationship between the Police and government would have been damaged if the Commissioner did not at least discuss the trial with the Minister. The Armed Response trial also would have required funding, which the Minister oversees.

Perhaps if the Police Commissioner were firmly in favour of the policy, and the Minister of Police were firmly against (or vice versa), an issue would arise. It is unclear what would happen if the government and Police Commissioner disagreed on a significant matter. Technically the Police Commissioner is able to implement impactful operational policy decisions against the government's wishes, due to the independence s 16(2) provides. However, this seems practically unlikely, and given the close relationship it is likely the two would instead come to a compromise.

Finally, the Police Commissioner can be held to account through a governmental or public inquiry, or a royal commission.¹⁷⁰ However, these commissions tend to focus on significant and systemic failings, rather than controversial policy. For example, the last commission of inquiry into the Police was initiated in 2004 to address allegations of systemic mistreatment of sexual assault cases.¹⁷¹ This accountability mechanism does not seem appropriate for general operational policy and is retrospective in nature, meaning it was not available for the Armed Response trial.

The limited effectiveness of the accountability relationship with the Minister is demonstrated by the fact the democratic, learning and constitutional evaluative perspectives are not satisfied. Firstly, while there are some obligations for the Police Commissioner to provide information to the government, the government cannot interfere with operational decisions due to s 16(2) of the Policing Act. From a democratic perspective, this relationship falls short as the public cannot hold the Police Commissioner to account through the government, apart from in very serious cases where the Police Commissioner should be dismissed. The constitutional perspective is also unlikely to be satisfied, as the mechanisms do not appear sufficient to prevent abuse of power. The governmental and public inquiry function is retrospective, meaning that issues can only be addressed once they have become a significant problem. However, these inquiries may inspire behaviour changes, meaning that arguably the learning perspective is partially satisfied. The conversations between the Police Commissioner and the Minister may also result in feedback on operational decisions.

¹⁶⁹ "Avantdale Bowling Club's Tom Scott leaks direct messages with Jacinda Ardern" *The New Zealand Herald* (online ed, New Zealand, 29 November 2019).

¹⁷⁰ Briony Davies "Official Inquiries in New Zealand: Options, Powers and Processes" MinterEllisonRuddWatts (17 May 2018).

¹⁷¹ Margaret Bazley *Report of the Commission of Inquiry into Police Conduct* (Commission of Inquiry into Police Conduct, vol 1, March 2007) at 25.

Political accountability to Parliament

The second possible accountability forum is Parliament. This accountability relationship is political, as Parliament is directly responsible to voters through elections.¹⁷² The Police Commissioner is not accountable to Parliament for the Police's operational decisions. As a public servant, the Police Commissioner is intended to be apolitical, and therefore not the subject of political criticism.¹⁷³ Recently a situation arose demonstrating this: Simon Bridges called the Police Commissioner a "wokester".¹⁷⁴ When questioned, he did not see his comments as inappropriate, while Jacinda Ardern pointed to the convention for all political parties to "acknowledge the operational independence of the police", stating this "personal attack on the Commissioner... is a bit of a departure from convention".¹⁷⁵ However, the Prime Minister did acknowledge the Police Commissioner was not above criticism.¹⁷⁶

Parliamentary scrutiny of police operations is possible through the formal inquiry function of select committees. Committees are authorised by the standing orders to undertake detailed investigations into specific issues and report to the House of Representatives.¹⁷⁷ However, while the Police Commissioner may be subject to explanatory accountability to Parliament or select committees, this does not erode the Commissioner's authority and independence over operational matters.¹⁷⁸ Therefore, while it may be possible for the Commissioner to be obliged to give information or answer questions in some circumstances, the Commissioner retains autonomy over operational decisions. The Armed Response trial was not subject to such a formal inquiry, and the trial was not materially addressed in Parliamentary debate, despite its important and controversial nature.¹⁷⁹

Finally, Parliament does have some form of ultimate control over the Police Commissioner through legislation. While it might be practically difficult for Parliament to legislate to directly interfere in operations, they may legislate to change the scope of the Police Commissioner's role and the laws which guide police operations. Changing the empowering legislation for the Police would be a significant decision, which the Police and public would undoubtedly meet with criticism due to the convention of constabulary independence. Therefore, the chance that Parliament would legislate to control police operations is remote.

¹⁷² Bovens, above n 126, at 455.

¹⁷³ Public Service Commission, above n 87.

¹⁷⁴ Small, above n 89.

¹⁷⁵ Small, above n 89.

¹⁷⁶ Small, above n 89.

¹⁷⁷ Standing Orders of the House of Representatives 2020, SO 189, 190(b) and 192. See also New Zealand Parliament "Parliament Brief: Select committees" (17 February 2021) <www.parliament.nz>.

¹⁷⁸ Cameron, above n 43, at 18–21.

¹⁷⁹ But see one mention in (7 May 2020) 745 NZPD 17570–17571.

The Police Commissioner is not directly accountable to Parliament for operational activities, meaning that from the democratic, constitutional and learning perspectives, the relationship does not provide strong accountability. The Commissioner is not democratically accountable for operational decisions, and Parliament does not provide a way to curb the Police's power or provide feedback to allow the Police to learn. At most, the Commissioner could be subject to explanatory accountability through a formal inquiry, but this seems more suitable for serious incidents, rather than to provide accountability for regular operational policy.

Social accountability to the public

The Police discontinued the Armed Response teams due to significant public criticism. In their press release announcing their decision in June 2020, the Police Commissioner stated the "response teams do not align with the style of policing that New Zealanders expect".¹⁸⁰

There was significant public criticism of the trial, and the group Arms Down Aotearoa was formed to protest the Armed Response teams, which encouraged and coordinated public submissions.¹⁸¹ The hashtag "#ArmsDownNewZealand" became the top trending hashtag on Twitter in New Zealand.¹⁸² People objected to the teams' general use of firearms, and activists such as Julia Whaipooti and Emilie Rākete argued Armed Response teams would inevitably lead to citizen deaths.¹⁸³ There was also a criticism of the Armed Response teams' "mission creep". While the Armed Response teams' stated purpose was to address high-risk situations, Armed Response officers often responded to non-violent, low-risk offending.¹⁸⁴ This included bail checks, responding to suspicious activity and traffic stops. Statistics published after the trial showed that only 2.6 per cent of the incidents the Armed Response teams attended were firearms offences.¹⁸⁵ Finally, there was also public criticism that the Police opportunistically referred to the Christchurch mosque shootings to justify the trial, even though it was found the attacks did not demonstrate any vulnerabilities in the Police's response capacity.¹⁸⁶

This public criticism impacted the Police Commissioner's decision on an operational matter, but this does not indicate a strong accountability relationship with the public. Instead, this speaks to the current police leadership. The Police Commissioner is indirectly accountable to the public, not as voters, but rather as a form of social accountability. However, this accountability relationship with the public is weak and variable. The Police Commissioner is

¹⁸⁰ New Zealand Police, above n 1.

¹⁸¹ "Arms Down: End racist police violence" Arms Down NZ <<http://armsdown.nz>>.

¹⁸² Gregory Warner "New Zealand Leaders Reconsider Arming Police In The Wake Of George Floyd's Killing" *NPR* (United States, 10 June 2020).

¹⁸³ Warner, above n 182; and Macdonald, above n 17.

¹⁸⁴ Bond, above n 13.

¹⁸⁵ Evidence Based Policing Centre, above n 21, at 20.

¹⁸⁶ Tim McKinnel "Police are trialling new heavily armed units. This ex-cop thinks that's a very dangerous idea" *The Spinoff* (online ed, Wellington, 20 October 2019).

appointed rather than elected.¹⁸⁷ This means the relationship between the Commissioner and the public is a form of horizontal accountability. The public does not wield any formal power over the Commissioner, and instead any accountability is voluntary, for moral reasons.¹⁸⁸

As this accountability is voluntary, the individual Police Commissioner matters. This is demonstrated by the distinction between Andrew Coster, the current Police Commissioner, and his predecessor Mike Bush. Mike Bush was considered a traditionalist Police Commissioner.¹⁸⁹ Andrew Coster's approach to the role has been characterised by his steadfast commitment to policing by consent.¹⁹⁰ This policing approach sees it necessary that police gain legitimacy through public approval.¹⁹¹ While policing by consent is not a new concept, Andrew Coster repeatedly mentions public consent, and it is clear it guides his decisions.¹⁹² The Chair of the IPCA commented that Andrew Coster's appointment has led to positive change, especially relating to police culture.¹⁹³

The Commissioner's view on policing by consent is crucial. This policing approach has been debated since the beginning of the British police. Policing by consent is a theme running through the nine principles Sir Robert Peel outlined when creating the British police.¹⁹⁴ These principles state that the public must approve of the police's actions and willingly follow the law, and the police should use the least force possible.¹⁹⁵ These themes are also reflected in s 8 of the Policing Act 2008, which states policing services should rely "on a wide measure of public support and confidence".¹⁹⁶ The current Police Commissioner has commented, "without [the public's] support and without that sense of legitimacy, [the Police] can't actually operate".¹⁹⁷ As Andrew Coster hints, the effectiveness of modern policing relies heavily on public support – consent is not a luxury but rather "the lifeblood" of police.¹⁹⁸

¹⁸⁷ Policing Act 2008, s 12.

¹⁸⁸ Bovens, above n 126, at 460.

¹⁸⁹ Giovannetti, above n 89.

¹⁹⁰ Giovannetti, above n 89.

¹⁹¹ Home Office, above n 42. But see Bowling, Reiner and Sheptycki, above n 6, at 15.

¹⁹² See Audrey Young "Police Commissioner Andrew Coster asks for clarity over intelligence gathering" *The New Zealand Herald* (online ed, Auckland, 11 March 2021); and Giovannetti, above n 89.

¹⁹³ Sophie Cornish "A new generation of policing: Andrew Coster on navigating change, and a 'holistic approach' to gangs" *Stuff* (online ed, Wellington, 12 June 2021).

¹⁹⁴ Home Office, above n 42.

¹⁹⁵ Home Office, above n 42.

¹⁹⁶ Policing Act 2008, s 8(b).

¹⁹⁷ Young, above n 192. See also Giovannetti, above n 89; and New Zealand Police *Annual Report 2019/20* (2020) at 3 and 6.

¹⁹⁸ Robert Reiner and Sarah Spencer "Conclusions and Recommendations" in Robert Reiner and Sarah Spencer (eds) *Accountable Policing: Effectiveness, Empowerment and Equity* (Institute for Public Policy Research, London, 1993) 172 at 176. See also Khylee Quince "Policing by consent is not 'woke' – it's the only way it can work" *Stuff* (online ed, New Zealand, 6 March 2021).

Andrew Coster was not involved in the preliminary work on the Armed Response trial, as he became Commissioner on 3 April 2020, just before the trial ended.¹⁹⁹ It is clear Andrew Coster felt accountable to the public and, in particular, wanted to police with the consent of the communities that would be most impacted. Māori and Pacifica people are highly policed, especially young men and people in low socio-economic areas.²⁰⁰ In 2019, a Police report showed Māori men between 17 and 40 years old were subject to 35 per cent of all force used by police, despite only making up 3 per cent of the population.²⁰¹

The significant backlash to the trial meant the Police decided not to continue Armed Response teams in June 2020, despite the full evaluation not being completed.²⁰² However, this accountability was voluntary and "horizontal". The Police Commissioner was not required to follow the public's wishes, and another Police Commissioner may not have done so in the same circumstances.

When considering policing by consent, a central question is: whose consent?²⁰³ Neil Cameron argues policing by consent provides middle-class people with "visible, polite security symbols".²⁰⁴ In contrast, Cameron states police provide people with lower incomes with more important services and reassurances that crime is being addressed. Those with experience of policing are more likely to be critical of police. In the New Zealand Police's 2020 annual citizen satisfaction survey, people who had contact with police in the previous six months were two times more likely to say they had "not much/no trust and confidence" in the Police.²⁰⁵ Regularly policed groups observe what frontline officers do on a daily basis and feel the true impact of operations. Therefore, the most important consent is from those in communities interacting with police regularly.

The issue of whose consent was particularly significant for the Armed Response trial.²⁰⁶ The final evaluation of the Armed Response trial showed 72 per cent of survey participants supported the initiative.²⁰⁷ Māori were significantly less supportive of the trial.²⁰⁸ People opposing the armed teams raised the fact that many young men in South Auckland have felt unfairly targeted in their interactions with police.²⁰⁹ Further arming officers in this area was

¹⁹⁹ New Zealand Police, above n 153.

²⁰⁰ Quince, above n 198.

²⁰¹ New Zealand Police, above n 2, at 42.

²⁰² New Zealand Police, above n 1.

²⁰³ "Arming the police - is it a step NZ wants to take?"; above n 14.

²⁰⁴ Cameron, above n 43, at 10.

²⁰⁵ Gravitas Research and Strategy Ltd Research *New Zealand Police: Citizens' Satisfaction Survey Report for 2019/20* (New Zealand Police, August 2020) at 12.

²⁰⁶ McKinnel, above n 186; and Macdonald, above n 17.

²⁰⁷ Evidence Based Policing Centre, above n 21, at 102.

²⁰⁸ At 106.

²⁰⁹ "Arming the police - is it a step NZ wants to take?"; above n 14.

therefore met with trepidation.²¹⁰ This was exacerbated by the lack of police consultation with relevant groups before the trial.²¹¹ For example, the executive director of the NZ Māori Council stated he was not informed of the trial prior to the public announcement, and that he did not know of any Māori groups consulted about it.²¹² Police decided to run the Armed Response trial despite researchers' advice that the limited consultation with affected communities could damage police relationships with Māori and Pacifica communities.²¹³

The context of the Black Lives Matter movement is relevant when assessing the public's view of the Armed Response trial. There were worldwide protests in June 2020, following a video released of George Floyd's murder by a police officer in the United States.²¹⁴ The Black Lives Matter movement highlighted the intersection of violence and systemic racism in the police. This movement caused many New Zealanders to think carefully about the policing system, and particularly the structural racism that would mean Māori and Pacifica people would bear the harm of more armed police. There were protests in New Zealand, and both international and domestic protests were covered extensively by local media.²¹⁵ Against the backdrop of these ongoing protests, the Police decided in June 2020 to discontinue the Armed Response teams.²¹⁶ This is unlikely a coincidence. The Black Lives Matter movement would have inspired people to submit against the policy through the group Arms Down Aotearoa. The protests also demonstrated the outcome of not policing by consent to the New Zealand police leadership.

The Commissioner's accountability relationship with the public does not satisfy the democratic, constitutional and learning perspectives. Public accountability depends on how much the Commissioner personally subscribes to policing by consent. First, the Police Commissioner is not democratically accountable to the public. The Armed Response trial demonstrates an example of the Police Commissioner listening to the public voice and policing by consent. However, their relationship with the public is voluntary. Accountability depends on who the Police Commissioner is, their opinion of policing by consent and whose consent they view to be necessary.

The constitutional perspective asks whether the public provides incentives to prevent the Police Commissioner from abusing their executive authority. The forum should be "visible, tangible and powerful", able to reveal corruption or mismanagement, and include strong

²¹⁰ See Evidence Based Policing Centre, above n 21, at 93–95.

²¹¹ At 91–92.

²¹² Michael Neilson "Armed Response Teams trial: Police warned not consulting Māori could have 'severe' consequence" *Stuff* (online ed, Auckland, 29 May 2020).

²¹³ Macdonald, above n 17.

²¹⁴ Billy Perrigo "Crowds Protest in New Zealand Against George Floyd's Death and Police Brutality Against Indigenous Communities" *Time* (online ed, Auckland, 1 June 2020).

²¹⁵ See "Thousands of NZers march for Black Lives Matter" *RNZ* (online ed, 14 June 2020); and "Black Lives Matter: tear gas and arrests in chaotic Wisconsin protest" *The New Zealand Herald* (online ed, 11 October 2020).

²¹⁶ New Zealand Police, above n 1.

sanctions.²¹⁷ The public is able to shine a spotlight on the decisions that the Police Commissioner makes through pressure groups and in the media. The group Arms Down Aotearoa is an example of a successful grassroots organisation used to educate the public, coordinate submissions and put pressure on the Police.

In some cases, strong public pressure can result in the tangible consequence of officials stepping down. A recent example is the resignation of the Chief Executive of Oranga Tamariki Grainne Moss in January 2021.²¹⁸ In that case, Grainne Moss faced criticism from the public and media for several months following the poor performance of her department.²¹⁹ Due to this, she ultimately resigned. However, this was an exceptional case. The public's influence on the Police Commissioner is generally weak as there are usually no real sanctions associated. While public pressure may disincentivise the Police Commissioner from abusing their authority, there is no concrete method of enforcement.

Finally, the learning perspective asks whether the accountability mechanism allows the Police Commissioner to increase their effectiveness and efficiency.²²⁰ Public criticism may provide the opportunity for the Police Commissioner to learn and adapt their strategies, but again this requires the Police Commissioner to adhere to the idea of policing by consent.

Administrative accountability to the Independent Police Conduct Authority

The Police is accountable to the Independent Police Conduct Authority (IPCA). The IPCA is the independent oversight body for the New Zealand Police.²²¹ It receives complaints and performs independent reviews on police practices, policies and procedures.²²² To investigate, it usually must receive a complaint.²²³ While investigating, the IPCA may use its powers as a commission of inquiry to summon witnesses and gather evidence.²²⁴ The IPCA communicates its findings and recommendations to the Police Commissioner. The Commissioner then communicates any changes they have made as a result to the IPCA.²²⁵

The accountability to the IPCA is "diagonal". This refers to an indirect relationship with an administrative accountability forum, which gains its authority through reporting to a minister

²¹⁷ Bovens, above n 126, at 465.

²¹⁸ "Timeline: Oranga Tamariki chief executive Grainne Moss' road to resignation" *RNZ* (online ed, New Zealand, 23 January 2021).

²¹⁹ "Timeline: Oranga Tamariki chief executive Grainne Moss' road to resignation", above n 218. But see Martin Van Beynen "Oranga Tamariki boss Grainne Moss under fire - but for what exactly?" *Stuff* (online ed, Christchurch, 19 December 2020).

²²⁰ Bovens, above n 126, at 466.

²²¹ Independent Police Conduct Authority "About us" <www.ipca.govt.nz>.

²²² Young and Trendle, above n 34, at [40].

²²³ Independent Police Conduct Authority Act 1988, s 12(1).

²²⁴ Independent Police Conduct Authority Act 1988, ss 23–26; and Young and Trendle, above n 34, at [40].

²²⁵ Independent Police Conduct Authority "What we do" <www.ipca.govt.nz>.

or Parliament.²²⁶ The IPCA has no direct power over the Police Commissioner. However, if they are unsatisfied with the changes made, they may refer the matter to the Attorney-General and the Minister of Police.²²⁷ The IPCA can also table their recommendations in Parliament.²²⁸

The IPCA was not the correct forum for the Police Commissioner to be held accountable for the Armed Response trial. Although complaints may be made about policies,²²⁹ the IPCA usually investigates and reports on isolated incidents.²³⁰ The threshold used to ascertain whether to investigate a matter also appears to be high: many reports are written on allegations of corruption, misconduct and other serious errors.²³¹ Additionally, the IPCA requires complaints to act, and it is possible none were made to them about the Armed Response trial.²³² If anyone made a complaint, then any subsequent investigation has not been publicly released.

The Commissioner's diagonal accountability to the IPCA means the Commissioner is not directly democratically accountable under this mechanism. While the IPCA provides limited democratic accountability, this relationship does disincentivise the Police Commissioner from abusing their authority. The IPCA can investigate and report to other entities, although it is still debatable whether the IPCA is visible and powerful enough to sanction the Police meaningfully.²³³ The IPCA primarily provides the Police with an opportunity to learn. The IPCA offers recommendations to the Police to enable them to improve their processes and actions in the future. However, these learning opportunities are only present in the case of an IPCA investigation and report, which are only made in some instances.

Legal accountability to courts

The final accountability relationship for operational decisions is with the courts. In *Blackburn*, Lord Denning MR stated the Police Commissioner is "answerable to the law and the law alone".²³⁴ While clearly police are no longer considered accountable *only* to the law, police should always be legally accountable for their independent actions. Legal accountability of police occurs through judicial review. Police officers are mainly held to account if they breach the legal framework within which they operate.²³⁵

²²⁶ Bovens, above n 126, at 460.

²²⁷ Independent Police Conduct Authority Act 1988, s 29(2)(a).

²²⁸ Independent Police Conduct Authority Act 1988, s 29(2)(b).

²²⁹ Independent Police Conduct Authority "What you can complain about" <www.ipca.govt.nz>.

²³⁰ See Independent Police Conduct Authority "Reports on independent investigations 2021" <www.ipca.govt.nz>; and Independent Police Conduct Authority "Reports on independent investigations 2020" <www.ipca.govt.nz>.

²³¹ Independent Police Conduct Authority *Statement of Performance Expectations - 2017/18* (2018).

²³² Independent Police Conduct Authority, above n 229.

²³³ Bovens, above n 126, at 465.

²³⁴ *Blackburn*, above n 46, at 136.

²³⁵ Arnold, above n 8, at 68.

Despite this, police officers' actions are rarely challenged in the courts. The Police as an organisation is even less likely to be judicially reviewed on higher-level operational policy. Some scholars argue that this kind of policy would only be found illegal where police have decided not to enforce a law at all.²³⁶ Terence Arnold cynically argued legal accountability barely exists, but that it instead functions to claim there is no need for other forms of responsibility (for example, to the public).²³⁷ As the courts are rarely used as the forum to test the legality of police policy, it practically does not provide accountability under any of Bovens' mechanisms. The Armed Response trial's legality was not tested in court, which is understandable as it does not seem there were sufficient legal grounds for questioning it.

The Armed Response trial demonstrated the Police Commissioner is subject to limited accountability for the Police's operational functions under s 16(2). Accountability mechanisms must balance the fine line between too much oversight and not enough. An accountability deficit allows errors or bad decisions to go unnoticed, but too much accountability may also cause problems by slowing decision-making and muddying the waters.²³⁸ For operational decisions, there is simultaneously too much accountability, but also not enough. While there are many different mechanisms available, most of them only apply in exceptional circumstances. For example, the government may dismiss the Police Commissioner, but this is only likely where their competence is seriously questioned. Similarly, Parliament could change the Police's empowering legislation to impact their operational functions, but this is very unlikely. Select committee, governmental or public inquiries are only established if serious errors are found, and these inquiries are also limited by their retrospective nature.

Some accountability methods simply require the Police Commissioner to provide information, such as their reporting requirements to government. This form of accountability is the weakest as it does not offer the opportunity for debate or tangible consequences. Finally, judicial review and the IPCA investigations do not seem fit to assess operational policy, and instead are best used for specific instances of police officers acting beyond their powers.

For operational matters, the Police Commissioner is mainly held to account using weak and informal mechanisms. While these mechanisms allow the Police Commissioner to learn and improve policy, they are ultimately voluntary. One example of this is the Commissioner's ability to discuss operational policy with the Minister informally. While the nature of their conversations is unknown due to their confidential relationship, it is likely the Minister provides the Commissioner with feedback and did so in the case of the Armed Response trial.²³⁹

²³⁶ Cameron, above n 43, at 23; and Arnold, above n 8, at 72.

²³⁷ Arnold, above n 8, at 67.

²³⁸ Thwaites and Knight, above n 138, at [14.1].

²³⁹ "Avantdale Bowling Club's Tom Scott leaks direct messages with Jacinda Ardern", above n 169.

The most meaningful accountability relationship for the Armed Response trial was that with the public. Andrew Coster's strong focus on policing by consent meant public criticism from affected groups was instrumental in ensuring the Armed Response teams did not go ahead. However, as discussed, this form of accountability is voluntary and depends on senior leadership.

2 *Police Commissioner's policy decisions under s 16(1)*

If the Armed Response trial were labelled policy rather than operation, the Police Commissioner would have been subject to accountability under s 16(1) of the Policing Act. Policy decisions are not impacted by constabulary independence, and therefore are not independent of government. In fact, s 16(1) states that "the Commissioner is responsible to the Minister for" these functions. However, this section does not state what this accountability relationship should look like or any possible consequences for the Police Commissioner if they do not comply.

For policy decisions, the Police Commissioner is still subject to the accountability mechanisms already mentioned. However, as well as these, the Commissioner has additional political accountability to the Minister of Police. The Minister is then accountable to their political party, government, Parliament and the public. The additional accountability for policy decisions demonstrates the importance of the labels "policy" or "operation".

The first additional accountability mechanism is between the Minister of Police and Parliament. Parliament can directly hold the Minister of Police accountable for the Police Commissioner's errors. There is explanatory accountability through the tabling of the Police's annual report in Parliament by the Minister.²⁴⁰ The convention of individual responsibility also means ministers are accountable to Parliament for ensuring the department carries out their functions "properly and efficiently".²⁴¹ The Cabinet Manual states that ministers may be responsible for their department's errors even if they were unaware of or uninvolved in them.²⁴²

The Minister of Police can therefore be held accountable for policy decisions made by the Police Commissioner, even if the Minister was uninvolved in the matter. Accountability to Parliament is said to be first explanatory and amendatory.²⁴³ The Minister of Police would first front to Parliament and parliamentary committees about the error, and then seek to fix the mistake.²⁴⁴ The Minister may be questioned by Members of Parliament on the matter. The final

²⁴⁰ Policing Act 2008, s 101(a); and Public Finance Act 1989, s 44.

²⁴¹ Cabinet Office, above n 28, at [3.27].

²⁴² At [3.27].

²⁴³ Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004) at 89.

²⁴⁴ Cameron, above n 43, at 20.

form of accountability to Parliament is culpability. This may involve the Minister of Police facing consequences, such as being asked to resign if the Prime Minister loses confidence in them.²⁴⁵ That said, in recent times, ministers have shied away from accepting the culpable aspect of individual ministerial responsibility.²⁴⁶ In the case of the Armed Response trial, it does not seem the Commissioner or Minister made an error requiring individual ministerial responsibility to Parliament.

The government's accountability to the public is the most significant additional accountability relationship for policy decisions. The voting public is the end of the "chain" of accountability.²⁴⁷ The government's democratic accountability motivates key players such as the Minister of Police to listen to the public's views. As mentioned, the public viewed the Armed Response trial in a negative light. If the Minister of Police was ultimately accountable to the public for the decision on the trial, it would be much more likely the public's view would be taken into account.

The distinction between policy and operational decisions therefore fundamentally changes the nature and depth of accountability. The label given to the decision is consequential, as operational decisions are not democratically accountable, and policy decisions are. The Commissioner may take into account public opinion for operational decisions, but this is voluntary. When making policy decisions, the government is strongly influenced by public views as they wish to keep the country's support and stay in power. As the decision's label radically changes the accountability mechanisms, it is worth examining whether the Armed Response trial's operational label was accurate.

B Armed Response Team Trial: Operation or Policy?

The Armed Response trial's operational status dictated the nature and depth of accountability the decision was subject to. There is a strong argument the Armed Response trial should have instead been understood as a policy matter. The decision would have then been accountable to the Minister of Police, and therefore to Parliament and the voting public. However, the wording of s 16 of the Policing Act is ambiguous, meaning the Armed Response trial could be interpreted either as falling under s 16(1) or (2).²⁴⁸ The trial could either be seen as "general conduct of the Police" in s 16(1)(b) or instead law enforcement relating to a group per s 16(2)(b).

²⁴⁵ Palmer and Palmer, above n 243, at 91–94.

²⁴⁶ See Chris Eichbaum "Some Background Information on Individual Ministerial Responsibility" (July 2020) Institute of Public Administration New Zealand <<http://ipan.z.org.nz>>; and Peter Dunne "Still here, Minister?" *Newsroom* (online ed, New Zealand, 26 June 2020).

²⁴⁷ Bovens, above n 126, at 455.

²⁴⁸ Macdonald, above n 17.

The Armed Response trial fits the plain meaning of "policy". The proposal for these teams was a suggested course of action from senior leadership.²⁴⁹ It proposed a change in practice, impacting those teams and broader society. These teams of police officers would be armed at all times, which would change the way the public saw police generally. That said, although the plain meaning of "policy" appears to be satisfied here, s 16(1) has more specific requirements.

Section 16(1)(b) states general police conduct is a policy matter where the Commissioner is responsible to the Minister. The introduction of Armed Response teams was a shift in policing direction, as the police officers on the teams were constantly armed. The impact on public trust in police is an argument for seeing this as a matter relating to the Police's "general conduct". However, "general conduct" in s 16(1)(b) is a vague term that has not been defined in case law. One reading of "general conduct" would require the decision to apply to police officers generally, rather than a decision impacting a small group of officers, such as the Armed Response teams.

Professor Robin Palmer notes the Armed Response trial could also be interpreted as an operational decision under s 16(2)(b). This section states the Police Commissioner independently makes decisions regarding law enforcement in relation to any individual or group of individuals.²⁵⁰ The Armed Response teams could be characterised as a law enforcement strategy to better respond to groups of dangerous offenders. In this light, the decisions regarding the trial can be seen as operational.

Even if the trial was characterised as an operational decision, on a practical level the Minister of Police was likely closely involved in the discussions. This is supported by Jacinda Ardern's alleged statement that she met with the Commissioner to share her views on the Armed Response trial.²⁵¹ As mentioned, the Minister and Commissioner have a close relationship. It is likely that while the Commissioner was the one to make the final decision, the Minister provided advice.

The criticism of the operational labelling of the Armed Response trial seemingly arose from a public "sniff test". Intuitively, when faced with a strategic direction that many disagreed with, the public seemed frustrated there was no way to impact the decision-making. The trial could have been understood as a democratically accountable policy under s 16(2), and it seemed though it was labelled "operational" to avoid difficult questions.

During the public discussion about the trial, the NZ Council for Civil Liberties published a statement arguing that while individualised decisions are operational, the general arming of

²⁴⁹ Deverson and Kennedy, above n 60, at "policy".

²⁵⁰ Macdonald, above n 17.

²⁵¹ "Avantdale Bowling Club's Tom Scott leaks direct messages with Jacinda Ardern", above n 169.

police teams is political.²⁵² They stated the decision should have been democratically accountable, rather than something for the Police Commissioner's independent judgement. The Arms Down Aotearoa group also disputed the operational nature of the trial for similar reasons.²⁵³

These criticisms dispute the outcome of the operational label. The argument is that the trial was not subject to sufficient accountability mechanisms, and that democratic accountability was warranted. This does not necessarily suggest an incorrect application of s 16. The statutory wording of s 16 is broad enough for the trial decision to have been classified either "operation" or "policy". While legally an operational label may have been open to the Police due to legislative ambiguity, normatively the appropriateness of this can be challenged. The lack of democratic accountability may demonstrate s 16 does not strike the correct balance between operation and policy.

V Readjusting the Balance

Police decisions can be conceptualised as a spectrum, with operational decisions on one side, and policy decisions on the other. Higher-level operational decisions are in the grey area. Despite these decisions' importance, the current balance struck allows many hybrid decisions to be categorised as operational. The ambiguously worded s 16 facilitates this. The government can therefore avoid accountability for controversial and important police policy through the label "operation". This is what occurred with the Armed Response trial. Police leadership ultimately listened to public criticism of the trial and decided to discontinue the teams.²⁵⁴ However, another Police Commissioner may not have made the same decision.

Taking a step back, it does seem strange how the Police have "escaped" from democratic and political structures.²⁵⁵ Whether or not the Police seeks public consent for their independent decisions depends on who is in charge. Further involving the Minister of Police in these decisions would allow the existing democratic infrastructure of Parliament to provide the public's consent on policing, rather than ad hoc consultation managed by the Police. While this would limit the ambit of constabulary independence, it would not remove the concept's application altogether.

I will discuss two possible approaches that would further involve the Minister of Police in operational policy decisions. I discuss these approaches in broad terms – the intention is not to

²⁵² NZ Council for Civil Liberties "No to police patrolling in armed squads" (23 June 2021) <<http://nzcl.org.nz>>.

²⁵³ Macdonald, above n 17.

²⁵⁴ Quince, above n 198.

²⁵⁵ Cameron, above n 43, at 21 and 36.

suggest that either is the solution to the accountability deficit, but instead to start a discussion about possible changes to the status quo.

First, hybrid decisions in the middle of the policy-operation continuum could be interpreted as policy, rather than operation. Section 16(1) would therefore include more operational policies in its ambit. This would allow matters such as the Armed Response trial to be ultimately accountable to the Minister of Police. This would subject the decisions to democratic accountability, meaning the public's views would be more influential.

This change is unlikely to occur through statutory interpretation of s 16 in the common law. Operational policy matters are rarely challenged through the courts. Even if an opportunity to address the issue arose, the courts would likely shy away from reducing the ambit of constabulary independence. This change would therefore realistically only occur through legislative amendment.

The second approach would acknowledge the third category of operational policy as its own concept. The Minister of Police and the Police Commissioner could have overlapping accountability for this area, and be jointly responsible for operational policies such as the Armed Response trial. This would reflect the hybrid policy and operational nature of these decisions: they significantly impact operations, but also are higher-level and strategic. It is therefore logical both leaders would be involved in the decision-making.

An operational policy category could be accompanied by the release of more information about the relationship and conversations between the Minister of Police and Commissioner.²⁵⁶ If the Minister directs the Commissioner to do something under s 16(1)(e), for example, such directions could be released in writing – perhaps to Parliament.²⁵⁷ Providing this information would uncover the Minister's role in important decisions and incentivise the government to weigh the political consequences of the direction.²⁵⁸

This third category may also better manage the Minister and Commissioner disagreeing on significant operational policy. If this were to occur currently, the tendency to classify matters as operational would mean the Commissioner would likely have the final say, even if the government and Minister disagreed. So far, serious disagreements between the Minister and Commissioner have likely been avoided through communication and compromise in confidential meetings. That may not always be successful, especially given the nature of the relationship strongly depends on who is in each role.

²⁵⁶ Cameron, above n 43, at 37.

²⁵⁷ Cabinet Policy Committee Paper, above n 30, at [44].

²⁵⁸ Orr, above n 24, at 64.

A hybrid category would also recognise the practical reality that the Commissioner and Minister likely consult and discuss important issues with one another.²⁵⁹ Modern decisions have multiple decision-makers, and the Minister and Commissioner have a close relationship.²⁶⁰ In the Armed Response trial, it appears the Prime Minister met with the Police Commissioner to share the government's views.²⁶¹ The third category would recognise the role the government already plays in these decisions and fairly attribute accountability to both decision-makers.

A recent joint announcement from the Minister of Police and the Police Commissioner demonstrates how such a category could operate. In September 2021, both spoke at a press conference on new tactical prevention teams to undertake dangerous police work.²⁶² This announcement included details on extra funding and employment positions, which are generally accepted to be policy matters under s 16(1).²⁶³

It was unclear whether the Police and government saw this model as operation or policy. Both the Minister and Commissioner was present at the announcement, which suggests an understanding that the model has elements of both. It is unlikely this model could be categorised as pure operation, given the Minister's comments linking the model to the government's "absolute commitment to tackling gangs and organised crime".²⁶⁴

There is nothing clearly distinguishing this model and the Armed Response initiative. Both decisions required the policy elements of governmental funding, higher-level strategy, and employment decisions. One difference is that the new tactical response teams will not always be armed, whereas the Armed Response teams were. However, I argue general arming would instead suggest a policy label, given the controversy around arming and its impact on trust in police. The Armed Response trial was more politically controversial, possibly meaning the government did not want to be publicly involved. The joint announcement on this model demonstrates the Minister and Commissioner can work together and jointly take responsibility for some projects. It therefore illustrates how a third category could operate.

The suggestions I have raised both have similar drawbacks. Interpreting more decisions as "policy" and creating a third hybrid category are both forms of democratisation – indeed, that is why I suggested them. However, the democratisation of policing does have legitimate dangers. The more control the government has, the greater their ability to use police to solidify

²⁵⁹ Elder, above n 30, at Appendix 1.

²⁶⁰ Bovens, above n 126, at 457.

²⁶¹ "Avantdale Bowling Club's Tom Scott leaks direct messages with Jacinda Ardern", above n 169.

²⁶² Sophie Cornish and Sam Sherwood "No return of controversial armed teams as part of police shakeup" *Stuff* (online ed, 22 September 2021); and Zane Small "Police Minister Poto Williams insists new Tactical Response Model is not Armed Response Teams" *Newshub* (online ed, 22 September 2021).

²⁶³ Cabinet Policy Committee Paper, above n 30, at Appendix 1 at [8].

²⁶⁴ Cornish and Sherwood, above n 262.

political power, or implement populist policies disadvantaging marginalised groups. The rationale behind constabulary independence is therefore that policing decisions should be made according to apolitical pragmatism.

The Armed Response trial demonstrates this risk. There was an overwhelmingly negative public response to the trial in mainstream media, social media and advocacy platforms. Advocacy groups for criminal justice reform and Māori issues were particularly critical of the trial.²⁶⁵ However, the final Police report on the Armed Response trial showed 72 per cent of survey participants supported the initiative.²⁶⁶ While the police only surveyed 574 people, the survey's methodology created a nationally representative sample.²⁶⁷ This survey suggests the Armed Response teams might have become permanent if the general population had decided the trial's fate. This demonstrates the limits of democratic accountability – it allows majoritarian policies to flourish, even if those most impacted by them are not in favour. The general population is also often uninformed on policing and crime matters and tend to be more punitive than rational.²⁶⁸ Bearing this in mind, the Police Commissioner's approach of focusing on the consent of more-policed groups seems fairer. This example demonstrates the associated risks of democratisation. In exchange for increased accountability, decisions would become more majoritarian, and therefore possibly more punitive and damaging for marginalised groups.

VI Conclusion

Both independence and accountability are required for an effective police force, but the balance must be struck correctly. Two thousand years ago, the question was posed, "Who will guard the guardians?"²⁶⁹ Today, our guardians are police, and they are guarded by the accountability mechanisms discussed in this paper. However, the nature and depth of this accountability depend on an operational or policy label. The "operational" Armed Response trial demonstrates the issue. On the spectrum between operation and policy, between independence and democratic accountability, the line has been drawn to favour the operational label. This pushes issues outside of the government's ambit, reducing democratic accountability and creating an accountability deficit.

For operational matters, the Commissioner's accountability to the government and Parliament is weak. Similarly, accountability forums such as the public, the IPCA and the courts cannot control these decisions. The Commissioner is mainly accountable to them in an explanatory

²⁶⁵ See JustSpeak "Open Letter to the Police Commissioner" (1 April 2020) <www.justspeak.org.nz>.

²⁶⁶ Evidence Based Policing Centre, above n 21, at 102.

²⁶⁷ At 102–103.

²⁶⁸ John Pratt and Marie Clark "Penal populism in New Zealand" (2005) 7 *Punishment & Society* 303 at 304–307.

²⁶⁹ Juvenal *Satire VI* (Rome, approximately 100AD) at 346–348.

sense, or otherwise only in exceptional circumstances. Loud public opposition impacted the ultimate decision on the Armed Response trial. However, although the Police Commissioner listened to the public's criticism in this instance, this was voluntary.

The Armed Response trial is just one example of an operational policy subject to weak accountability mechanisms. Recent newspaper articles provide many other instances of hybrid decisions labelled "operational". The decision on regular use of police body cameras, and whether to stop using helicopters to find backcountry cannabis plots are just two examples.²⁷⁰ Generally arming police officers is another controversial initiative that likely would not require democratic sign-off. While Jacinda Ardern has previously suggested the government has "a say" on this issue,²⁷¹ she has since stated this decision is for the Police, agreeing with the Police Association and Commissioner.²⁷² Therefore, the Armed Response trial is not unique, and similar issues will arise and be approached in a non-democratic way unless change occurs.

In this paper I raised two possible suggestions for increasing the Minister of Police's involvement and accountability for operational policy decisions. One approach would redraw the lines between operation and policy, shifting some higher-level operational matters to within the government's ambit. The second suggestion would reflect the hybrid nature of operational policy by creating a third category where both the Minister and Commissioner were responsible. This category would also reflect the practical reality of the close relationship between the two. Both suggestions would adjust how constabulary independence currently operates in New Zealand, allow for oversight, feedback and policing by consent. However, increased public control over policing matters would not be purely positive. Democratic oversight could also result in populist policies disadvantaging marginalised groups such as Māori. Shifting matters into the Minister of Police's ambit may therefore not be a cure-all.

Accountability is not something that can be solved, but instead must carefully balance opposing interests.²⁷³ Different arrangements may be suitable depending on context. The current dichotomous approach of operation and policy does not fit with the spectrum of police decisions. The status quo insufficiently captures the nuances of reality. Significant decisions such as the Armed Response trial are labelled "operational", resulting in an accountability deficit. My suggested tweaks to the current approach increase democratic accountability, but at the expense of creating other problems. While this paper therefore cannot "solve" this

²⁷⁰ Julia Gabel "Race Relations Commissioner calls for police body cameras to address bias" *The New Zealand Herald* (online ed, New Zealand, 2 June 2021); and Sherwood, above n 105.

²⁷¹ "Avantdale Bowling Club's Tom Scott leaks direct messages with Jacinda Ardern", above n 169.

²⁷² "General arming of police not the answer, say Ardern, Minister Williams, Commissioner Coster" *RNZ* (online ed, New Zealand, 5 August 2021); Police Association "We Need General Arming" (1 August 2021) <www.policeassn.org.nz>; and Ben Strang "Support among police for carrying arms at highest level in decade, survey shows" *RNZ* (online ed, Wellington, 5 August 2021).

²⁷³ Jarvis and Thomas, above n 125, at 304.

accountability deficit, it suggests a renegotiation of the current framework is perhaps warranted.

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