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**POLICE ACCOUNTABILITY FOR THE INVESTIGATION
AND PROSECUTION OF SEXUAL OFFENDING: WHAT
THE ROASTBUSTERS INVESTIGATION REVEALED**

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Abstract

The recent Roast Busters investigation exposed serious flaws in the processes of New Zealand Police, specifically in relation to the investigation and prosecution of sexual offending. Sexual violence complaints in New Zealand are rarely made and when they are, it is of upmost importance that police respond to and investigate the allegations sensitively and comprehensively. This reinforces the need for strong police accountability. Police accountability is limited by the important principle of police independence, which is designed to ensure that the police are not improperly influenced by political motivations. This paper uses Bovens' framework of accountability to assess the key mechanisms that hold the police to account for their investigative and prosecutorial decisions making. This paper examines internal investigation procedures, ministerial accountability, the courts, the Independent Police Conduct Authority and the media. The paper recommends improvements be made to increase accountability of the police. The key recommendations of the paper are that the courts be more willing to consider judicial review of prosecutorial decisions and the Independent Police Conduct Authority be given the power to investigate of its own motion.

Key Words

Police Independence, IPCA, Accountability, Roast Busters, Prosecution

Word Length

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I Introduction

Police have a unique role to play in our democratic system. On the one hand, their criminal investigations must be absolutely free of political influences. Yet on the other, they must not become the law unto themselves.¹

The New Zealand Police play a vital role in ensuring the effective investigation and prosecution of sexual offending. They are the public face of the criminal justice system and their handling of sexual offence complaints has the ability to either empower or re-victimise complainants. The recent Roast Busters group and related sexual offence complaints highlighted serious flaws in the police processes used in that case. These were exposed by the Independent Police Conduct Authority (IPCA). The investigation showed that the police failed both to adequately investigate the multiple complaints made against the group and to consider multiple opportunities to prosecute.

The findings of the IPCA cause concern regarding the conduct of police in other sexual violence cases and the processes used by police to investigate and decide whether prosecution should be pursued. Complaint rates for sexual offending are very low and the logical colliery of this is that complaints against police conduct in relation to sexual offence allegations will also be low. The likely result is that unacceptable processes and conduct of the police are going unnoticed, as the Roast Busters' case revealed. This requires an examination of police accountability in relation to both the investigation and prosecution of sexual offending is therefore necessary.

Police accountability is limited by the important principle of police independence. Police independence means that for operational decisions, including the investigation and prosecution of offences, police are not accountable to their minister or the executive. The only external mechanism holding the police to account is the IPCA, who have strong investigative powers. Aside from the IPCA, internal investigation provides an opportunity to hold individual police officers to account for their decision-making. The media can be considered as an additional, though weak form of accountability. Its weakness comes from its profit-driven nature, which results in inconsistent reporting, reliant on a 'juicy' story.

¹ Kent Roach "The Overview: Four Models of Police-Government Relations" in Maragaret E Beare and Tonita Murray (ed) *Police and Government Relations: Who's Calling the Shots?* (University of Toronto Press, Toronto, 2007) 1 at 18.

I will conclude in this paper that police accountability is limited and can be increased by a number of improvements. Most significantly, I recommend that the courts assume more responsibility in holding police to account for prosecutorial decisions, particularly in relation to decisions not to prosecute. I further recommend that the IPCA should be given more power to investigate of its own authority, which would allow it to conduct larger scale inquiries and transform the body into more than a complaints mechanism. A prosecutorial review authority is considered as an alternative, although I conclude that such a significant addition may not fit well into New Zealand's administrative structure.

In order to reach this conclusion, the current situation in relation to sexual offence complainants and their experience with the police investigation and prosecution process is examined. Consideration is given to the Roast Busters' inquiry and other examples to illustrate the essential role of police in ensuring the correct treatment of sexual violence claims. I then turn to the principle of police independence and the balance which must be reached between independence and accountability to ensure effective and acceptable conduct and decision-making.

Bovens' framework of accountability is employed in the paper to define and assess the effectiveness of the accountability mechanisms that the New Zealand Police are held to. Some of the mechanisms currently do not provide accountability or provide ineffective accountability. Improvements are examined regarding each mechanism and in relation to accountability for both the investigation of offending and the decision whether or not to prosecute.

I will address improvements that could be made to internal investigation procedures. Ministerial accountability will then be examined, which provides no official accountability, though can provide it informally in practice. I will then turn to the potential for accountability to the courts for prosecutorial decisions through the judicial review mechanism, which has traditionally been refused by the courts for policy reasons. Potential changes to the IPCA are examined including allowing them to investigate of their own motion and create binding decisions. The media will be examined as an accountability mechanism although I find that it provides weak accountability, with little prospect of significant improvement. Finally the paper will examine the potential of a prosecutorial review authority before reaching conclusions regarding the most appropriate mechanisms for change.

II Police Investigation and Prosecution of Sexual Offending

A Introduction

It is important that effective accountability mechanisms are in place to ensure police are accountable for their actions and seek to improve their practices. The recent example of the Roast Busters demonstrates the failings of police in the investigation and prosecution of sexual offending. The IPCA's investigation and report of the incident will first be analysed to identify the key problems with police processes. This helps to illustrate the importance of effective handling of complaints by police, both at the investigative stage and at the stage where a decision is made regarding whether a prosecution will be initiated.

B The Roast Busters Investigation

In 2013, the news media drew attention to a group of young men in Auckland, who referred to themselves as the 'Roast Busters', and reported stories of their sexual activities which prompted wide spread public concern.² This led to a joint inquiry by the New Zealand Police and Child, Youth and Family and a consequential investigation by the IPCA into the adequacy of the police investigation and handling of complaints made against the group. The investigation identified seven different cases where the activities of the group were brought to the attention of police, either by complaint or other means.³ No prosecutions resulted for a number of reasons. In some cases, officers recommended that no further action be taken, based on their decisions that there was insufficient evidence to lay charges. In others cases files were inactivated for no given reason and some of the young women were not prepared to give formal statements.⁴ On more than one occasion, police failed to take action in response to allegations which required further inquiries and no explanation was provided for this.⁵ A lack of explanation demonstrates itself a deficiency in police accountability.

The IPCA addressed both the investigation by police and the decision not to prosecute. In relation to the investigation, they stated that the process was hampered where there was no

² "Report on Police's Handling of the Alleged Offending by the 'Roast Busters'" (Investigative report by the Independent Police Conduct Authority, March 2015) at 5.

³ One case was reported to Police by Child, Youth and Family and a second was drawn to the attention of Police due an unrelated incident. At 8, 10.

⁴ At 9, 10.

⁵ At 9.

cooperation from the young women. However, due to their young age, police policy required that all reports of child abuse be thoroughly investigated even if the child or young person recants.⁶ The IPCA found that the “failure to undertake basic investigative tasks resulted in a lack of sound and evidence-based decision-making in each case.”⁷ The failure of police to conduct basic inquiries to determine the young men’s history with police meant that they did not link the cases together or identify that the incidents presented a common theme.⁸ Further findings of the IPCA were that there was a failure to obtain statements from witnesses, to attempt to speak to the young men involved, to adequately consider evidence or secure further evidence such as CCTV footage.⁹ One suspect interview was undertaken in relation to one case, although the IPCA found that the preparation for, and the standard of, the interviews was unsatisfactory at this critical phase of the investigation.¹⁰

In relation to prosecution, the IPCA considered whether this was evaluated properly in relation to all available offences. The IPCA found that the young men were alleged to have committed offences such as sexual violation by rape and unlawful sexual connection, attempted rape, and assault with intent to commit sexual violation.¹¹ At issue was whether the victim consented to the sexual connection which was clearly a relevant consideration, given the influence of alcohol on the women during some of the incidents investigated. The IPCA reported that the issue of capacity to consent was never adequately investigated by police and in some instances was not even considered.¹² The other issue not adequately considered was the fact that the young women were under 16.¹³ This did not require a determination of whether there was consent, only whether a sexual connection occurred and if the complainant was under 16. Despite the two men also being under 16, the IPCA noted that there were a number of aggravating factors that should have prompted consideration of prosecution.¹⁴ These factors included that in some of the cases the young women were two or three years younger than the men and were vulnerable due to intoxication. Further, “the extent to which they were willing parties was at best equivocal”

⁶ “Report on Police’s Handling of the Alleged Offending by the ‘Roast Busters’”, above n 2, at 15.

⁷ At 15.

⁸ At 15.

⁹ At 16.

¹⁰ At 16.

¹¹ At 22.

¹² At 22.

¹³ At 23.

¹⁴ At 23.

and they were subject to sexual acts by more than one man.¹⁵ They concluded that police staff “did not properly evaluate all available offences when determining the outcome of their respective investigations”.¹⁶

The importance of careful and thorough handling of sexual assault allegations is demonstrated by this case study. In only one case was the investigation by police sufficient to make prosecution a “realistic consideration.”¹⁷ In this case, the young woman (aged 13) made a preliminary statement to police and participated in a formal evidential interview. Failure by police officers to adequately assess the evidence and refer the matter for a legal opinion, meant prosecution was not considered where it should have been.¹⁸ The young woman is now unwilling to be involved in a prosecution, which is likely to be a result of the way her complaint was handled by police.¹⁹

C Police Handling of a Sexual Assault Allegation

In November 2012, a woman told police she had been sexually assaulted by a security guard at a hospital when she was a patient, although the police took very little action in relation to the allegation.²⁰ At the time of the sexual assault, the woman was being treated for self-harm injuries and was suffering from severe mental illness and this coloured the actions of police following the allegations made by the woman.²¹ Limited inquiries were made of hospital staff and the security guard and no further questions were asked of the victim.²² The police admitted during the IPCA investigation that further investigation into the complaint would have only taken place following additional evidence supporting the allegation.²³ They stated that she had lost credibility in the years police had dealt with her.²⁴ A police investigation into the complaint was therefore not commenced. Eight months later, the same guard was arrested for an unrelated sexual assault and once the link was made to the original complaint, was charged with sexually assaulting the woman.

¹⁵ “Report on Police’s Handling of the Alleged Offending by the ‘Roast Busters’”, above n 2, at 23.

¹⁶ At 24.

¹⁷ At 23.

¹⁸ At 22.

¹⁹ At 22.

²⁰ “Police Handling of a Sexual Assault Allegation” (Investigative report by the Independent Police Conduct Authority, February 2015).

²¹ At 3.

²² At 3.

²³ At 3.

²⁴ At 3.

The IPCA found that the officers involved did not comply with police policy in relation to sexual assault allegations, by failing to sufficiently inquire with witnesses to determine what further action was required.²⁵ They also failed to ensure the complaint was handled and investigated appropriately, to the required standard.²⁶ Further, the IPCA found that the police unfairly predetermined the outcome of the complaint based on her history and nature of contact with police.²⁷ This case again demonstrates inadequate and unacceptable conduct on the part of police in relation to a sexual violence complaint and reinforces the importance of accountability. If it were not for the defendant being accused of another sexual assault, this conduct would have gone undiscovered.

D Sexual Assault Generally

Police response to rape may be the most crucial link in the chain to ensure fair treatment of rape victims. The police officer is the first representative of the criminal justice system the reporting victim encounters; the quality of her contact with the police officer may color her perception of the entire prosecution process.²⁸

The police are the public face of the criminal justice system and act as ‘gatekeepers’ for victim access to the system.²⁹ “Sexual violence is the most severe and traumatic crime that can be inflicted on a person whether adult or child...it is a crime capable of inflicting harm on an individual’s essential sense of being.”³⁰ The impact of reporting sexual violence to the police can be damaging and there is a strong chance of police re-victimisation.³¹

There is a multitude of challenges relating to sexual violence complaints made to police. Police officers and prosecutors over-estimate the amount of false allegations made, leading

²⁵ “Police Handling of a Sexual Assault Allegation”, above n 20, at 8.

²⁶ At 8.

²⁷ At 9.

²⁸ Lynne Goodstein and Faith Lutze “Rape and Criminal Justice System Responses” in Imogene Moyer (ed) *The Changing Roles of Women in the Criminal Justice System: Offenders, Victims and Professionals* (Waveland Press, Illinois, 1992) at 169.

²⁹ Caroline Taylor and Leigh Gassner “Stemming the Flow: Challenges for Policing Adult Sexual Assault with Regard to Attrition Rates and Under-Reporting of Sexual Offences” (2009) 11 *Police Practice and Research* 240 at 240.

³⁰ At 241.

³¹ Jan Jordan “True “Lies” and False “Truths”: Women, Rape and the Police” (Doctor of Philosophy in Criminology Thesis, Victoria University of Wellington, 2001) at 75.

to a sceptical attitude and a lack of confidence between complainants and the police.³² Complainants are often discouraged by early police assessments as to the difficulties of prosecution and research has explained this with evidence of poor investigation and understanding of the law by police, and a tendency to emphasis discrediting features.³³ If the police response is perceived negatively by the complainant, it will make it less likely that he or she will proceed with legal action and may deter others from making initial police contact.³⁴ In many countries where studies have been conducted, reported rape offences have increased in the last two decades, yet prosecutions for rape have failed to increase proportionally.³⁵ A New Zealand study, conducted in 1998, found that half of sexual assault complainants surveyed expressed dissatisfaction with the police, especially in relation to insensitive and disbelieving attitudes.³⁶

Research in this area illustrates the importance of appropriate police responses and investigations of sexual violence complaints. Accountability is important in ensuring that police are held to a high standard of conduct in relation to investigations and prosecution of such complaints. There are mechanisms in place that hold the police accountable to some extent, although questions remain as to whether these mechanisms are adequate.

III The Principle of Police Independence

In New Zealand, the political independence of police is extensive and regarded as important. However, there is also recognition that independence must be accompanied by strong and effective accountability mechanisms.³⁷ The New Zealand Police are regarded as an “instrument of the Crown”, although not a government agency or department, creating some uncertainty as to the status of police officers.³⁸ The police are led by the Commissioner of Police, appointed by the Governor-General for a term not exceeding five years.³⁹ A fundamental characteristic of the New Zealand Police and the Commissioner is

³² Liz Kelly, Jo Lovett and Linda Regan “A Gap or a Chasm? Attrition in Reported Rape Cases” (February 2005) Home Office Research, Development and Statistics Directorate at xii.

³³ At xii.

³⁴ Jordan, above n 31, at 75.

³⁵ Jo Lovett and Liz Kelly “Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe” (Child and Women Abuse Studies Unit, London, 2009) at 5.

³⁶ Jordan, above n 31, at 80.

³⁷ Philip Stenning “Origins of the Concept of Police Independence” (2011) 13 FLJ 241 at 241.

³⁸ Policing Act 2008, s 7, Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 255.

³⁹ Policing Act, s 12.

their independence from the Crown and the Commissioner is therefore not responsible to, and must act independently of, any Minister of the Crown in relation to certain matters.⁴⁰ This is codified in Section 16 of the Policing Act 2008.⁴¹

Section 16 Responsibilities and independence of Commissioner

- (1) The Commissioner is responsible to the Minister for—
 - (a) carrying out the functions and duties of the Police; and
 - (b) the general conduct of the Police; and
 - (c) the effective, efficient, and economical management of the Police; and
 - (d) tendering advice to the Minister and other Ministers of the Crown; and
 - (e) giving effect to any lawful ministerial directions.

- (2) The Commissioner is not responsible to, and must act independently of, any Minister of the Crown (including any person acting on the instruction of a Minister of the Crown) regarding—
 - (a) the maintenance of order in relation to any individual or group of individuals; and
 - (b) the enforcement of the law in relation to any individual or group of individuals; and
 - (c) the investigation and prosecution of offences; and
 - (d) decisions about individual Police employees

The changes delivered by the Policing Act 2008, which replaced the Police Act 1958, endorsed the approach of Lord Denning in *ex-parte Blackburn*, defining the independence of police in relation to operational aspects of their role.⁴² The Policing Act codified the concept of police independence for the first time in New Zealand, although a lack of clarity remains regarding what may be defined within section 16(2) of the Act.

The doctrine of police independence has historically existed only in certain common law jurisdictions, with no clear constitutional or statutory basis.⁴³ The doctrine arose in response to radical reforms to Parliament in the nineteenth century in the United Kingdom,

⁴⁰ Section 16.

⁴¹ Section 16.

⁴² Police Act 1958.

⁴³ Philip Stenning “The Idea of the ‘Political Independence’ of the Police: International Interpretations and Experiences” in Margaret E Beare and Tonita Murray (ed) *Police and Government Relations: Who’s Calling the Shots?* (Toronto: University of Toronto Press, 2007) 183 at 188.

which meant that the police were no longer governed by the Judiciary.⁴⁴ These reforms coincided with the police becoming increasingly subject to political governance and accountability.⁴⁵ In response to this increasing authority and accountability, the concept of police independence emerged. The modern doctrine of police independence is generally quoted from *ex parte Blackburn*. Lord Denning stated:⁴⁶

No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.

The case of *Blackburn* addressed the question of the legal relationship between the government and a police officer and whether the relationship was one of “master and servant” within the law of torts.⁴⁷ The courts concluded that they were not a ‘servant’ for this purpose and this was subsequently cited as the basis for the doctrine of police independence. This citation is often criticised as not being doctrinally sound, due to the specific context in which the decision was made.⁴⁸

The Supreme Court of Canada held in 1999 in the case of *R v Campbell* that police are independent of the control of the executive government and this principle underpins the rule of law.⁴⁹ Commonwealth countries have accepted differing interpretations of the concept of police independence, exhibiting differing levels of independence from political accountability and control. Australia is reluctant to recognise a wide range of decision making which should be made by the police independently. Similarly, the United Kingdom appears to be seeking to narrow the concept of police independence to ensure that it does not imply increased immunity from accountability, direction and control.⁵⁰

⁴⁴ Stenning, above n 37, at 249.

⁴⁵ At 249.

⁴⁶ *R v Metropolitan Police ex parte Blackburn* [1968] 2 QB 116 at 135-136.

⁴⁷ Stenning, above n 43, at 191.

⁴⁸ At 191.

⁴⁹ *R v Campbell* 1999 1 SCR 565.

⁵⁰ Stenning, above n 37, at 206, 241.

IV Defining and Analysing Accountability

A Background

The police response to complaints of sexual violence is of great importance in ensuring that a complaint may proceed where possible to a successful prosecution of a perpetrator of violence. Effective responses and decision making by police is important both at the investigation stage and when the decision is made regarding whether a prosecution will commence. The Roast Busters investigation exposed a significant failing within the police to effectively respond to sexual violence. Due to the sensitive and confidential nature of these crimes, it is unclear where other police failings may lie. Police independence remains an important principle of our democracy, although the principle of accountability is equally important and cannot be discounted. Accountability serves the purpose of both exposing these failings and providing incentives for the police to maintain the high standard of conduct which the public demands. Finding the balance between these two principles is difficult, as it may result in either an accountability deficit or an accountability overload, which have the ability to produce equally negative effects.

This section of the paper will ask how the police are held to account for prosecution decisions, using Bovens' framework of accountability to assess whether police accountability mechanisms exist and how effective they are. First, the internal investigation mechanisms is assessed and improvements identified. I then turn to look at ministerial accountability, which does not play an official role currently in police accountability for operational decisions. Despite the lack of an official accountability relationship, the Minister of Police does have informal accountability power. I then turn to the courts, which do not play a key role in police accountability for prosecutorial decisions currently. The IPCA is then addressed, which provides the most important form of external accountability for the police, although weaknesses in its current form could be addressed to make it stronger. I then turn to look at the media as a form of accountability and find that it is a weak and unreliable form of accountability with no prospect of significant improvement. Finally, I consider a prosecutorial review commission as an addition to the constitutional framework to ensure independent oversight over prosecutorial decisions made by all government departments.

Bovens provides a clear analytical and evaluative framework for the assessment of accountability, in terms of whether accountability exists and assessing mechanisms

systematically. He defines and assesses accountability in a tangible way which is applicable to many situations, including the focus of this paper. He defines accountability as:⁵¹

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

Bovens' clarifies the final requirement of 'consequences', as there is academic debate regarding whether an accountability mechanism requires the ability of the forum to sanction the actor. He asserts that the possibility of sanctions "makes the difference between the non-committal provision of information and being held to account."⁵² Other academics suggest that answerability without sanctions can still be accountability, albeit 'weak accountability'.⁵³ Brinkerhoff argues that sanctions can be thought of more broadly, and "may include an array of incentives that are intended to reward good behaviour and action and deter bad behaviour and action."⁵⁴ Conversely, he states that sanctions are "intimately connected to democratic governance" and without enforceability, accountability is significantly diminished.⁵⁵ Bovens determines a middle ground, requiring consequences. Consequences can include formal and legalised penalties and disciplinary action, while also acknowledging that unwritten rules, such as the convention requiring minister resignation, can be regarded as consequences.⁵⁶

Bovens identifies three perspectives from which accountability relations should be assessed. The democratic perspective is grounded in the idea of accountability as an essential condition of democracy. Public organisations are tasked with spending taxpayer money and using their discretion and are held to account through an agent-principle chain.⁵⁷ At the end of that chain are citizens, who are tasked with passing judgement on the

⁵¹ Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 ELJ 447 at 450.

⁵² Bovens, above n 51, at 451.

⁵³ Derick Brinkerhoff "Taking Account of Accountability: A Conceptual Overview and Strategic Options" (paper presented to the U.S. Agency for International Development Center for Democracy and Governance Implementing Policy Change Project, March 2001) at 2.

⁵⁴ At 3.

⁵⁵ At 3.

⁵⁶ Bovens, above n 51, at 452.

⁵⁷ At 465.

conduct of the government.⁵⁸ The effectiveness of an accountability arrangement from this perspective can be assessed by asking:⁵⁹

Do these accountability arrangements help to provide political principals with sufficient information about the behaviour of their agents and do they offer enough incentives to agents to commit themselves to the agendas of their democratically elected principals?

The constitutional perspective is grounded in the idea that accountability helps to prevent the tyranny of absolute rulers and elected leaders and expansive and privatised executive power, as “good governance arises from a dynamic equilibrium between the various powers of the state”.⁶⁰ The question to be asked from this perspective is:⁶¹

Does the accountability forum have enough inquisitive power to reveal corruption or mismanagement; are the available sanctions strong enough to have preventative side effects?

Finally, the learning perspective is grounded in the idea of accountability to induce learning within the executive branch. Accountability should provide a regular mechanism to “confront administrators with information about their own functioning and force them to reflect on the successes and failures of their past policy”.⁶² This allows them to increase their own effectiveness and efficiency to achieve desirable social outcomes. The question to determine the effectiveness of accountability from this perspective is:⁶³

Do the accountability arrangements offer sufficient feedback, but also the right incentives to officials and agencies to reflect upon their policies and procedures and to improve upon them?

Bovens’ framework provides an opportunity to examine what mechanisms *can* be defined as police accountability, using a clear and applicable definition. His perspectives allow the relevant accountability mechanisms to be assessed and categorised, to identify where among the perspectives there may be a significant deficiency or overload of accountability.

⁵⁸ At 463.

⁵⁹ At 465.

⁶⁰ Bovens, above n 51, at 463.

⁶¹ At 465.

⁶² At 464.

⁶³ At 466.

Many mechanisms play a role from more than one perspective and it is important to identify where multiple roles are present, in order to accurately assess whether the combination of accountability is adequate. I will now apply Bovens' framework to the key accountability mechanisms by which the New Zealand Police are held to account, assessing whether each institution can be defined as accountability, from what perspective and where improvements can be made.

B Internal Investigation

1 Introduction

Internal investigation is arguably the most important mechanism for holding individual police officers and groups of officers to account for their actions as they deal with all matters which occur internally within the police organisation. It is therefore important that the police have robust accountability mechanisms and processes within the leadership hierarchy and the organisation. Currently, the complaints process within the police is closely linked to the IPCA. The process is, for the most part, kept behind closed doors which raises questions about its effectiveness.

2 Current internal investigation processes

When a complaint is made to the police or the IPCA, each body will notify the other as to the nature of the complaint. The IPCA will then be responsible for classifying each complaint under one of five categories, in order to determine the correct cause of action.⁶⁴ The first category requires a police investigator to be responsible for the investigation, with regular contact and oversight from the IPCA.⁶⁵ The second category requires both regular contact with the IPCA and the submission of the investigation report to the IPCA following the investigation for review.⁶⁶ The third category regards the situation where the investigation is completed by the police alone without any IPCA involvement.⁶⁷ Category four refers to the situation where conciliation is considered appropriate and there is no need for formal investigation, instead focusing on early engagement and negotiation with the affected parties.⁶⁸ The final category relates to the situation where the complaint has been

⁶⁴ Letter from Superintendent M Johnson (National Manager, Police Prosecution Service) to Laura Neale (Author) regarding police complaint processes (28 August 2015).

⁶⁵ Johnson, above n 64.

⁶⁶ Independent Police Conduct Authority Act 1988, s 20(1).

⁶⁷ Johnson, above n 64.

⁶⁸ Johnson, above n 64.

declined by the IPCA and is forwarded to the police to complete a review of the complaint and decide on the appropriate course of action.⁶⁹

The Commissioner of Police is responsible for the investigation and prosecution of offences and decisions about individual police employees, independently of the Minister of Police.⁷⁰ As will be discussed, the rationale for this independence is to ensure that police “act only in the broad public interest, rather than in partisan, political, corporate or personal interests”.⁷¹ This makes internal investigation important, as the chain of accountability ends with the Commissioner. The internal investigation process is headed by the Commissioner, although practical responsibility lies with the District Commander of the area where the complaint is made.⁷²

The internal investigation process is set out in internal ‘General Instructions’, which are issued by the Commissioner of Police.⁷³ The District Commander will oversee the investigation of the complaint and will appoint an appropriate staff member to conduct the investigation.⁷⁴ In the situation where the District Commander considers the allegation “trivial, frivolous, vexatious or not in good faith”, they may suspend the investigation.⁷⁵ If that investigation is suspended a report must be sent to the IPCA, providing accountability for the decision to dismiss a complaint.⁷⁶

A Commission of Inquiry was conducted between 2004 and 2007 to investigate the way in which sexual assault allegations were dealt with by the police. A report was released in 2007 by the Commission and included an analysis of the internal investigation process for complaints.⁷⁷ The report raised concerns of a lack of public awareness regarding both the right to complain and the rights of a complainant. Today, the New Zealand Police website provides comprehensive information in multiple languages regarding the different options

⁶⁹ Johnson, above n 64.

⁷⁰ Policing Act, s 16.

⁷¹ Philip Stenning “Governance of the Police: Independence, Accountability and Interference” (2011) 13 FLJ 241 at 251.

⁷² Dame Margaret Bazley “Report of the Commission of Inquiry into Police Conduct: Volume 1” (Commission of Inquiry into Police Conduct, Wellington, March 2007) at 55.

⁷³ Policing Act, s 28.

⁷⁴ Bazley, above n 72, at 58.

⁷⁵ At 58.

⁷⁶ At 58.

⁷⁷ At 1.

for making a complaint to police, including information about the IPCA.⁷⁸ Despite this, it is important to remember the small proportion of sexual violence complaints reported to the police and the logical colliery that this will translate into a small proportion of complaints made about police. This remains a concern and publicity of the complaints mechanism should continue to be promoted.

The police will, on occasion, release internal investigation documents and reviews which they deem to be “of public interest”.⁷⁹ These are made available to the public through the New Zealand Police website. Due to the intense media scrutiny at the time, the police released the ‘Redacted Investigation Overview Report’ regarding the multi-unit investigation into the Roast Busters group. At the time, the police stated that they had taken “the rare step of releasing the report to provide transparency and assist the public in understanding the complexities involved”.⁸⁰

The internal investigation mechanism can be defined as a relationship between an actor, being the police employee or police as an organisation, and a forum being the Commissioner of Police. The actor will have an informal obligation, through the course of their employment, to explain and justify their conduct and respond to questions from the investigator. The question of consequences can be answered by the possibility of termination of individual employment, or demotion, depending on the outcome of the investigation. In terms of Bovens’ definition, this mechanism can be defined as accountability.

Internal investigation can hold the police democratically accountable when reports are released publicly. This allows police to remain directly accountable to the taxpayer while avoiding political interference, though reports are rarely released. Within the police organisation, the democratic perspective may also be relevant, as it provides the Commissioner as the political principal with information regarding the conduct of individual employees. The investigation process provides an incentive for employees to act in accordance with the law and their duty. Internal investigation also has the ability to hold individual police officers constitutionally accountable, as it can reveal corruption and mismanagement. The sanction of an employee or employees losing their job due to corruption or mismanagement is a powerful one, though requires detection and complaint by another person, whether a staff member or a member of the public. If such corruption

⁷⁸ “Praise and Complain” New Zealand Police <police.govt.nz>.

⁷⁹ “Investigations and reviews” New Zealand Police <police.govt.nz>.

⁸⁰ “Operation Clover- Investigation Overview” (October 2014) New Zealand Police <police.govt.nz>.

or mismanagement is occurring at a high level it may be difficult to detect, therefore creating potential for it to continue.

3 Recommendations for change

Current processes used to respond to complaints appear robust, given the involvement of the IPCA which ultimately makes the decision regarding the way in which a complaint should be dealt with. They have the ability to request oversight and play a key role in the dismissal of frivolous or vexatious complaints. The interaction between these two bodies ensures that police remain accountable in the way they respond to complaints.

The strength of this mechanism is limited by the lack of transparency and public availability of complaints which makes it difficult to assess how effective the process is. Internal investigation procedures could strengthen the democratic accountability of the police by requiring more investigation reports be published. This would allow the police to be held directly accountable to the public more often and ensure that the standard of handling complaints is of a high level. There are obvious sensitivities associated with publishing public reports, relating to privacy and victim identification. Official Information Requests have been rejected on these grounds, citing the significant amount of personal information contained in investigation reports.⁸¹ This can be managed in the same way it is managed by the IPCA, by removing names and identifying details. The benefit of publishing reports publicly more often could be significant, as it would ensure that the standard of professional behaviour on the part of police was higher given the increased accountability they would face. More frequent publishing of reports would also ensure the standard of investigation, as it would be of a standard that the public would find acceptable. Currently, it is impossible to verify the quality of reports, as they are not released to the public. It is reasonable to expect that all reports would, notwithstanding public release, be of a quality that the public would find acceptable. This change in policy would ensure this is always the case.

C Ministerial Accountability

1 Introduction

Ministerial accountability of the police is limited by the principal of police independence. This independence means that in relation to operational decisions, the police will not be accountable to the Minister for Police. This is codified in legislation, specifically in the

⁸¹ Letter from Superintendent M Johnson, above n 64.

Policing Act 2008.⁸² The Minister can therefore not be described as an official accountability mechanism in relation to investigation and prosecutorial decisions, as this is excluded from their role as Minister for Police. In practice, the Minister is involved and informed about all issues of policing, creating a conflict with the principle of police independence.

2 *Current ministerial accountability*

In practice, the relationship between the Commissioner and the Minister is one of ‘no surprises’, which involves the Minister being informed of issues as they arise, regular phone contact and weekly meetings.⁸³ A recent report noted that “police seek regular verbal feedback from the Minister and her staff on the service police are providing.”⁸⁴ In the report, no distinction is provided between operational and policy decisions and it seems that in general, police will report to the Minister on matters of either classification.

This is exemplified by the response of the Minister of Police at the time, the Honourable Anne Tolley, to the Roast Busters saga. When media attention became fixed on the group, she asked for the facts from the Commissioner of Police and was told that no complaint had been made against the Roast Busters.⁸⁵ Upon learning that a complaint had in fact been made, she stated to the media that not being given accurate information was “unacceptable” and she wrote to the IPCA, requesting a formal inquiry be conducted.⁸⁶ The issue arose again recently, with the Honourable Michael Woodhouse recently commenting on the Roast Busters’ investigation and IPCA report. He stated, “I have received assurance from Commissioner Bush that the steps that are required to be taken to ensure that this doesn’t happen again are being taken, and I will continue to monitor those reports.”⁸⁷

This suggests that the police are expected to report to the Minister on operational matters, due to the role that ministers have as the public figurehead of the organisations they are responsible for. As identified by Pitman and Pitman, if the police get it wrong, “it is

⁸² Policing Act, s 16.

⁸³ “Formal Review of the New Zealand Police” (State Services Commission, the Treasury and the Department of the Prime Minister and Cabinet, September 2012) at 60.

⁸⁴ At 60.

⁸⁵ Simon Wong and Kate Harley “Minister Orders Roast Busters Inquiry” (7 November 2013) TV3 News <www.3news.co.nz>.

⁸⁶ Above, n 85.

⁸⁷ Nikki Papatsoumas “IPCA: Police ‘let down’ Roast Busters’ alleged victims” The New Zealand Herald (online ed, Auckland, 19 March 2015).

eventually the minister's neck that is put squarely on the chopping block" and it is the minister who must account to Parliament and the people for the actions of the police.⁸⁸ Part of the problem is that the majority of the public is probably unaware that unlike all other Ministers, the Minister of Police does not provide an accountability mechanism for his or her organisation. In effect this means that the police and the Commissioner of Police are accountable to the Minister, due to the accountability which the Minister has to the public. From a practical perspective, the Minister is being briefed on both policy and operational matters, has the ability to monitor progress and in all probability has some influence over the actions of the police. This is what the independence principle seeks to avoid and is arguably a breach of legislation.

3 Recommendations for change

Accountability of the police to the Minister in relation to operational decisions is legislated against, due to the importance of upholding police independence. In practice, the Minister does have an accountability function in relation to particular cases that are likely to attract media attention. It is unclear how far reaching this accountability is where media attention is not likely. It could be argued that due to this accountability role and the fact that the public, through the media holds the police to account, a more official accountability relationship is appropriate. This would have wide reaching implications in relation to the principle of police independence that plays an important role in minimising the risk of corruption and undue political influence on the police in relation to operational decisions.

It is difficult to assess how wide reaching the Minister's role is in relation to accountability, due to the privacy of meetings with police. According to the State Services Commission report, the working relationship between the police and the Minister is positive and working well.⁸⁹ Although this relationship does raise questions about legality, I submit that this unofficial 'no secrets' approach is important in practice due to the Minister's accountability to the public. The Minister and the Commissioner of Police must continue their working relationship with caution, as the principle exists for an important purpose and is legislated for, for that reason.

⁸⁸ Brian Pitman and Grant Pitman "Can Our Police Commissioners Cope" (1997) 2 Themis: The Journal for Justice 23 at 25.

⁸⁹ State Services Commission, above n 83, at 60.

D Courts

1 Introduction

Accountability to the courts for prosecutorial decisions is extremely limited, to the point that it cannot be defined as a mechanism for holding the police to account. This is due to common law doctrine which means that the courts will only interfere in prosecutorial decisions in extreme cases. Changes in other common law jurisdictions suggest that the courts could provide an accountability mechanism in relation to decisions made not to prosecute. Allowing the courts to judicially review these decisions would not unjustifiably interfere with government discretion.

2 Current court accountability

Traditionally, the courts have shown reluctance to interfere with the exercise of the discretion to prosecute. Some cases have said that such powers are not reviewable at all.⁹⁰ Case law indicates that there are many policy reasons for this reluctance. The discretion to prosecute on behalf of the state is regarded as a function of the executive rather than the courts, recognising the governmental interest and community expectation in justice being done.⁹¹ Further, the decision is said to involve a “high content of judgment and discretion” and there is concern regarding “constitutional sensitivities” given the court’s own responsibilities for the conduct of criminal trials.⁹² Another consideration is that allowing challenges to this decision, outside of the trial and appeal process, would disrupt the criminal justice system. It is commonly argued that a better avenue to deal with abuse of decision making discretion is the court’s inherent power to dismiss or stay a prosecution for abuse of process. However, the use of this judicial power is likely to only be used where conduct is in bad faith or there is an improper motive for bringing the prosecution and “is an extreme step which is to be taken only in the clearest of cases”, making it of limited use.⁹³ There are no recent cases where a stay of proceedings has been ordered due to a prosecution initiated for an improper purpose, raising questions about how far this power can go to protect adequate prosecutorial decision making.⁹⁴ Additional reasons given by the court for their lack of intervention include that the conclusion by an authority that an

⁹⁰ *Polynesian Spa Ltd v Osborne* [2005] NZAR 408, *R v Sloan* [1990] 1 NZLR 474 at 478.

⁹¹ *Polynesian Spa Ltd v Osborne*, above n 80, at [61].

⁹² *Fox v Attorney General* [2002] 3 NZLR 62 (CA) at [31].

⁹³ At [37].

⁹⁴ John Spencer “Review of Public Prosecution Services” (September 2011) Crown Law <www.crownlaw.govt.nz> at 63.

offence has been committed is an expression of opinion which can be challenged in court, as can factual errors.⁹⁵ It is also possible for the courts to address the issue after conviction, through the ability to discharge a defendant without conviction.

The case of *Polynesian Spa Ltd v Osborne* addressed the discretionary nature of the decision to prosecute. The case concerned an investigation which took place following the death of a bather at the Polynesian Spa.⁹⁶ A report recommending that prosecution be brought against Polynesian Spa Limited for breach of the Health and Safety in Employment Act was issued and the company applied for judicial review.⁹⁷ The Judge held that it will only be in rare cases that a judicial review challenge of this nature will be successful, due to “substantial policy and constitutional reasons” discouraging the courts from interfering with the exercise of prosecutorial discretion.⁹⁸ This indicates that in all but the most extreme cases, the court will not act as an accountability mechanism to review decisions made in regard to prosecutions.

Although the case has opened the door to judicial review in the case of prosecutorial decision making, practically doing so remained unlikely. Russell and Dunne note that the court will be very hesitant to disturb a prosecutorial decision and “unwilling to substitute its own decision for that of a prosecutor unless the charges have been laid in bad faith or for a collateral purpose”.⁹⁹ In practice, judicial review remains unattainable in the case of the decision to or not to prosecute and there has never been a successful judicial review of such a decision.¹⁰⁰

3 Recommendations for change

Judicial review could be used to ensure accountability for prosecutorial decisions. In particular, the decision not to prosecute could benefit from judicial intervention where the decision making process has been flawed. I recommend that the court be more willing to judicially review decisions not to prosecute, which is a development that has been seen in other common law jurisdictions.

⁹⁵ *Polynesian Spa Ltd v Osborne*, above n 90, at [61].

⁹⁶ At [2].

⁹⁷ *Polynesian Spa Ltd v Osborne*, above n 90, at [3]-[4], Health and Safety in Employment Act 1992, s 16(2)(b).

⁹⁸ At [68].

⁹⁹ Nick Russell and James Dunne “Three Strikes and You’re Out, Version 2: The New Proposed Sentencing and Parole Reform Bill” (5 Feb 2010) Chen Palmer <www.chenpalmer.com>.

¹⁰⁰ Spencer, above n 94, at 63.

Canada provides an example of a common law jurisdiction whose courts have been more willing to consider the option of judicial review for prosecutorial decisions. The Canadian case of *Jewitt* reversed a line of authority previously holding that prosecutorial decisions were immune from judicial review.¹⁰¹ It was found that the courts “cannot turn a blind eye to the conduct of one of the principal litigants appearing before them”.¹⁰² The Supreme Court of Canada has since continued to judicially review prosecutorial decisions. This has caused some concern from academics regarding the “unspecified relaxed standard” of judicial review which the courts appears to be using in these cases.¹⁰³

The United Kingdom is another common law jurisdiction that has taken a similar approach to judicially reviewing such decisions and has made an important distinction between decisions to prosecute, as opposed to decisions *not* to prosecute. The case of *R v Director of Public Prosecutions ex parte Kebilene* concerned a decision to prosecute.¹⁰⁴ The Court held that where a decision was an obvious abuse of process it may be open to a defendant to apply for judicial review, though exceptional circumstances must be present.¹⁰⁵ An older case, *R v Inland Revenue Commissioners, ex parte Allen* held that a lower standard was appropriate for judicial review of the decision to prosecute.¹⁰⁶ The case importantly concluded that a decision to prosecute could be amenable to judicial review if it is an unjustified departure from established prosecution practice. Lowering the standard further, the Judge decided that absent of a departure from policy or practice, if there was a breach of contract or representation resulting in unfairness it could result in judicial review.¹⁰⁷ Differing thresholds for judicial review are clear from these cases, although *Kebilene* seems to be the accepted standard, with multiple cases citing the “exceptional circumstances” threshold.¹⁰⁸

The courts in the United Kingdom appear more willing to accept a lower threshold in the case of the decision not to prosecute, which is likely due to the lack of remedies that exist

¹⁰¹ *R v Jewitt* [1985] 2 SCR 128 at 131.

¹⁰² Michael Code “Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg” (2008) 34 Queen’s L J 863 at 873.

¹⁰³ Code, above n 102, at 889.

¹⁰⁴ *R v Director of Public Prosecutions ex parte Kebeline* [2000] 2 AC 326.

¹⁰⁵ At 371.

¹⁰⁶ *R v Inland Revenue Commissioners, ex parte Allen* [1997] STC 1141.

¹⁰⁷ *R v Inland Revenue Commissioners, ex parte Allen*, above n 98.

¹⁰⁸ The Crown Prosecution Service “Appeals: Judicial Review of Prosecutorial Decisions” (21 May 2009) The Crown Prosecution Service <www.cps.gov.nz>.

for such a decision. In *R v DPP ex parte C*, the Divisional Court found that it had the power to interfere with a decision not to prosecute where it could be shown that the prosecutor had not followed the policy set out in the United Kingdom's 'Code for Crown Prosecutors'.¹⁰⁹ The judgment included a warning that this power should be used sparingly.¹¹⁰ It gave three situations in which the courts are able to act, namely if the decision was arrived at because of an unlawful policy, if the actor failed to follow settled policy or because the decision was perverse.¹¹¹ The case of *R (on the application of Peter Dennis) v DPP* held that the prosecutor had not provided clear reasons for his decision. The Court in that case asserted that they will be likely to order a review of a decision not to prosecute where:¹¹²

- 1 It can be demonstrated objectively that a serious point or multiple points supporting the prosecution have not been considered
- 2 It can be demonstrated that a conclusion about the nature of some evidence supporting a prosecution is irrational
- 3 The points are such to make it strongly arguable that the decision would be different

Since that decision, the courts in the United Kingdom have continued to judicially review decisions made not to prosecute, though in most cases refusing the application.¹¹³ It is clear that the courts are more willing to consider a decision for judicial review where the conclusion is that prosecution will not be pursued and it raises question as to why such a distinction is not made in New Zealand. In a report produced by Crown Law, this concern was raised by a Judge who commented that the problem of under-charging was much greater than the problem of over-charging.¹¹⁴ His rationale for this suggestion was that there is "virtually no available remedy for improper decisions not to prosecute."¹¹⁵ Many of the policy reasons for the court not intervening in prosecutorial decisions, are irrelevant to the decision not to prosecute. If the irrelevant justifications are removed, what remains is the highly discretionary nature of the decision and constitutional sensitivities relating to the courts' own role in the trial process. With no remedies available for a failure to

¹⁰⁹ *R v Director of Public Prosecutions ex parte Chaudhary* [1995] 1 Cr App R 136 at 143.

¹¹⁰ At 139.

¹¹¹ *R v Director of Public Prosecutions ex parte Chaudhary*, above n 109, at 140.

¹¹² *R (on the application of Peter Dennis) v Director of Public Prosecutions* [2006] EWHC 3211 at [30].

¹¹³ The Crown Prosecution Service, above n 108.

¹¹⁴ Spencer, above n 94, at 53.

¹¹⁵ At 53.

prosecute, it is important to look at the rationales for the courts' hesitance to intervene through judicial review where a decision is made not to prosecute.

The first rationale relates to the highly discretionary nature of the decision. The court is well versed in dealing with matters of a discretionary nature and as in any case, can be presented with evidence from the Crown as to the matters which they considered in the decision. Regardless, the standard for judicial review remains high and it will only be met where the decision making process is improper or outside the law.¹¹⁶

The other rationale relates to constitutional sensitivities given the role of the court in conducting the trial. This is less of an issue where the decision has been made not to prosecute, as the judicial system has not had any interaction with the individual or parties. Most significantly, the court is the only institution with the ability to make binding decisions in regard to a decision by the police not to commence prosecution. Although the IPCA has the ability to issue recommendations, these will not automatically result in a prosecution. Judicial review could provide an important avenue to allow a decision not to prosecute to be reviewed, to determine whether there has been an abuse of process.

In my view, the courts should become more open to the possibility of judicially reviewing prosecutorial decisions. In particular, judicial review should be more readily available where decisions holding that prosecution should not be pursued are made. These decisions lack both strong policy justifications and alternative remedies. The high standard required for judicial review to be successful is enough to safeguard the process and ensure that prosecutorial independence is maintained.

Applied to the particular case of the police and sexual offending, judicial review is the only option to legally challenge a decision not to prosecute. The police are limited in their accountability and the IPCA is currently the only external body with the power to review prosecutorial decisions and can only make recommendations. If the courts were to intervene more frequently it would provide stronger accountability and send a message that the court will not tolerate unacceptable processes and decision making, where prosecutorial decisions are concerned.

¹¹⁶ "Introduction: What is Judicial Review" New Zealand Law Society <www.lawyerseducation.co.nz> at 2.

E The Independent Police Conduct Authority

1 Introduction

The IPCA, as mentioned above, is the only external body with the power to hold the police to account for their actions. In order to fulfil its function, the IPCA and the police have a close working relationship as discussed in relation to police internal investigation procedures. The IPCA works well as an accountability mechanism which allows the police to maintain their political independence, though its strength could be increased by allowing it to investigate of its own accord, as is recommended in this paper.

2 Current IPCA accountability

The IPCA is an independent crown entity, which was created by the Independent Police Conduct Authority Act 1988. The IPCA is led by a judge and consists of up to five members, who are selected by the Governor-General on recommendation from the House of Representatives.¹¹⁷ Broadly, it aims to “reassure the public and Parliament that policing standards are the highest possible.”¹¹⁸ The IPCA is the “only organisation outside of the police with responsibility for investigating and establishing whether the conduct, policies, practices and procedures of the police are appropriate.”¹¹⁹ It is therefore the only organisation to which the police are formally accountable for investigative and prosecutorial decisions.

The function of the IPCA is to receive complaints alleging misconduct or neglect of duty by any police employee or concerning any practice, policy or procedure of the police and to investigate the complaint where it is in the public interest.¹²⁰ The IPCA may only investigate of its own motion where there is a death or serious bodily injury caused by the police employee in the course of their duty, and there are reasonable grounds to investigate in the public interest.¹²¹ Upon completion of the investigation, they will form an opinion as to whether the subject of the investigation was “contrary to law, unreasonable, unjustified, unfair or undesirable.”¹²² That opinion will be conveyed to the Commissioner,

¹¹⁷ Independent Police Conduct Authority Act 1988, s 5, 5A.

¹¹⁸ Law and Order Committee “2013/14 Annual Review of the Independent Police Conduct Authority” (Report of the Law and Order Committee to Parliament, 26 March 2015) at 2.

¹¹⁹ Mai Chen *The Public Law Toolbox* (Lexis Nexis, Wellington, 2012) at 827.

¹²⁰ Independent Police Conduct Authority Act, s 12.

¹²¹ Section 12, 13.

¹²² Section 27(1)

along with recommendations as it sees fit.¹²³ The Commissioner must then notify the IPCA of actions taken to implement the recommendations and give reasons for any decision to depart from any recommendations.¹²⁴ If the IPCA is unsatisfied with the response to the recommendations, they must send a copy of the opinion and recommendations to the Attorney General and the Minister of Police.¹²⁵ Where they consider it appropriate, the IPCA shall provide the Attorney-General with a report on the matter for tabling in the House of Representatives.¹²⁶

Bovens' definition of accountability requires a relationship between an actor and forum, which is met by the relationship between either the New Zealand Police collectively or individual police officers as the actor and the IPCA as the forum. The IPCA may require any person to provide information in relation to any matter under investigation.¹²⁷ Additionally, they may summon and examine any person to give information in relation to any matter under investigation.¹²⁸ Further, the Commissioner of Police is required to provide the IPCA with all necessary information and assistance in relation to any investigation.¹²⁹ As stated above, the IPCA will form an opinion on the subject of investigation and issue recommendations to the Commissioner. The IPCA has no formal power to enforce those recommendations, nor is it capable of prosecuting, or taking disciplinary action against the police itself.

The IPCA has the ability to issue public reports "from time to time, in the public interest or in the interest of any person."¹³⁰ This will generally happen where "there is a death involving police, or where, in the interests of both the police and the public, circumstances need to be explained or a better approach suggested for the future."¹³¹ An example of this is the "Report on Police's Handling of the Alleged Offending by Roast Busters", released to the public following the investigation conducted by the IPCA.¹³²

¹²³ Section 27(2).

¹²⁴ Section 29(1).

¹²⁵ Section 29(2).

¹²⁶ Section 29(3).

¹²⁷ Independent Police Conduct Authority Act, s 24(1).

¹²⁸ Section 24(2).

¹²⁹ Section 21.

¹³⁰ Section 37.

¹³¹ Chen, above n 119, at 836.

¹³² Independent Police Conduct Authority, above n 2.

The IPCA would not meet the definition of accountability if strict sanctions were required. It has no authority to discipline members, or to force the police to make changes. However, it does have the power to make the actor face consequences. The recommendations which they are capable of making are powerful due to the legal requirement that the Commissioner of Police must consider and respond to them. The ability of the IPCA to report to Parliament if unsatisfied with the police response, is a serious political consequence. Additionally, the power to publish public reports may result in consequences demanded by the public, such as institutional change and resignations. However, a powerful public response to a report is only likely in the case of serious misconduct. The powers of the IPCA to make recommendations and report to Parliament, meets the requirement that the actor may face consequences. Therefore the IPCA meets Bovens' definition of accountability.

Although the IPCA meets the definition of accountability, the effectiveness of it as an accountability mechanism can be questioned. The IPCA provides an effective form of accountability from a constitutional perspective due to its inquisitive powers allowing it to reveal corruption, although this is weakened by their limited ability to investigate of their own motion. The IPCA has significant inquisitive power, with the ability to require any person to give evidence on any matter. This inquisitive power should play a role in revealing any corruption or mismanagement within the police. The IPCA has the ability to investigate without complaint in very limited circumstances, which weakens accountability, as there is reliance on outside parties to draw attention to a situation and make a complaint.

The IPCA also has a role in providing education and learning, giving feedback and encouraging officials to reflect and improve policies and procedures. The IPCA provides an independent and comprehensive investigation report into wrongdoing which officials can use to reflect and improve on their processes and practices. Further, the IPCA can issue recommendations that include specific improvements that can be made to policies and procedures. These recommendations are not binding, though the Commissioner is legally required to consider them and give reasons for any departure, making them powerful and persuasive.

3 Recommendations for change

The IPCA is a powerful authority and the only external body with the capability to hold the New Zealand Police and its employees to account for their actions and decisions. The

IPCA is limited by two key features, namely the lack of ability to investigate of their own accord in the majority of cases and the fact that their recommendations cannot be made binding. As will be discussed, it would be beneficial for the IPCA to be able to investigate of their own accord.

The IPCA is currently only able to investigate without complaint where there are reasonable grounds to carry out an investigation in the public interest any incident notified to them by the Commissioner, where a police employee acting in the course of their duty, causes or appears to have caused death or serious bodily harm.¹³³ Aside from this situation, there is no opportunity for the IPCA to initiate an investigation unless a complaint is made.¹³⁴

As discussed, the number of sexual crimes reported to police in the first instance is extremely low and in New Zealand sits at nine per cent.¹³⁵ The amount of complaints withdrawn following initial inquiries is high and police handling of the complaint is likely to contribute to this. It is unlikely that a complaint to police or the IPCA will result in these cases, where victims may be distrusting of the justice system or unaware that the complaint mechanism exists. Giving the IPCA the power to investigate where there has not been a complaint would ensure greater accountability in relation to sexual crimes in particular. Practically, amending the IPCA Act for this purpose could be as simple as removing the need for police to cause death or serious bodily harm, to allow the IPCA to investigate. This would leave a test of whether an investigation would be in the public interest. The IPCA is required by legislation to be led by a current or former judge, therefore it seems reasonable to trust them to decide what may or may not be in the public interest, a common test which judges apply.

An example of a police review authority with the power to conduct investigations of its own initiative is the Police Integrity Commission, which reviews police conduct in New South Wales, Australia. The Commission has the ability to investigate both on complaint and of its own initiative, with a principal function of preventing, detecting and investigating officer misconduct.¹³⁶ Investigation without complaints have been infrequent in New South

¹³³ Independent Police Conduct Authority Act, s 13.

¹³⁴ Independent Police Conduct Authority Act, s 12.

¹³⁵ "Sexual Violence in Aotearoa New Zealand" Rape Prevention Education <rpe.co.nz>.

¹³⁶ Police Integrity Commission Act 1996 (NSW), s 13, 23.

Wales, with most investigations still resulting from complaints.¹³⁷ Despite this fact, having the ability to investigate of its own motion where necessary would give further strength to the IPCA. A further opportunity if there was no requirement of complaint, would be the ability to investigate general police practice at a wider scale, for example examining generally prosecution decisions in relation to sexual offending. This would provide further accountability of the police, encourage consistency between police districts and stations and therefore improve the practices of the police.

The IPCA at present has the ability to issue persuasive recommendations. If we are seeking to heighten the sanctioning ability of the IPCA, allowing them to issue binding directions is a way to do this. This could be in the form of both broad recommendations of changes which the police should make to their investigation or prosecution policy and individual sanctions which the police should enforce against officers.

There are both benefits and risks associated with increasing the power which the IPCA has. As mentioned, it has the ability to increase accountability and ensure transparency. Having an external body ensuring sanctions are administered and individual employees are held to account means less risk of corruption. Further, it ensures complaints will be responded to in line with public expectations of the police. Allowing the IPCA to make binding decisions of this nature may raise the question of whether members should be elected. The IPCA has recently moved away from having panel members which have an employment history with the police.¹³⁸ It could be suggested that a move to binding decisions would require greater police insight into the process given the complex nature of police decision making. Further, the ability to directly sanction individual employees rather than recommend criminal prosecution or sanctions may be considered inappropriate. Is it better to allow the police to determine what the appropriate sanction is for an individual employee based on context and factors which may not be known or understood by the IPCA?

Allowing the IPCA to issue binding decisions and directives would be a significant increase in its power and would dramatically change the nature of the IPCA and the relationship it has with the New Zealand Police. It could frustrate the relationship and remove the transparency and openness which it currently holds. The IPCA is working well as an advisory authority and it may be a mistake to change its nature in such a fundamental way.

¹³⁷ Colleen Lewis and Tim Prenzler "Civilian Oversight of Police in Australia" (1999) 141 Australian Institute of Criminology: Trends and Issues in Crime and Criminal Justice 1 at 5.

¹³⁸ "Statement of Intent 2014/15 to 2017-18" (Independent Police Conduct Authority, June 2014) at 8.

Conversely, allowing it to investigate of its own accord is a positive development, which would increase IPCA power without changing the fundamental nature of the mechanism.

F The Media

1 Introduction

The media provides a form of public democratic accountability, holding the police directly to account. Due to the direct link to the public, concerns about political independence are removed. Media accountability has its own challenges and it cannot be considered as a reliable form of accountability, due to its commercial motivations that results in inconsistent accountability which will only exist where there is a ‘newsworthy’ story. Significant improvements to the mechanism are not appropriate, due to the importance of freedom of speech in our democratic society.

2 Current media accountability

The media is the key forum which links the public with the activities of the government, and today it is an essential part of creating democratic accountability. The media can draw attention to policing issues and create a forum for general public discussion. The rise of ‘citizen journalism’ and the increase in mobile technology, has reduced the level of control that police have over information disclosure.¹³⁹ Increased public access to information through the media has enabled it to play a “watchdog role”, particularly in relation to the exposure of police corruption and malpractice.¹⁴⁰ A recent example of this was mobile video footage recorded of a shooting by a police officer in the United States of an African American man, causing outrage as one of a number of well publicised shootings.¹⁴¹ The capturing and publication of footage disproved initial reports that the victim was shot by a Taser and resulted in a formal investigation being launched.¹⁴² Similarly, extensive media coverage and public outrage regarding the police handling of the Roast Busters situation resulted in a complaint being made to the IPCA. The consequential investigation revealed serious flaws in police handling of the allegations.¹⁴³ Despite its success in these cases,

¹³⁹ Louise Cook and Paul Sturges “Police and Media Relations In An Era of Freedom of Information” (2009) 19 Policing and Society 406 at 421.

¹⁴⁰ At 421.

¹⁴¹ Andy Campbell “Video Shows Officer Michael Slager Shooting Unarmed Black Man in the Back in South Carolina” The Huffington Post (online ed, United States of America, 7 April 2015).

¹⁴² Campbell, above n 133.

¹⁴³ Independent Police Conduct Authority, above n 2, at 33.

questions must be asked about the functioning and effectiveness of the media as a form of accountability.

Bonner refers to the media as a form of social accountability, involving the activities of civil society and the media.¹⁴⁴ He argues that the media provides a forum for debate “to establish who should be held accountable, what they should be held accountable for, and how they should be held accountable.”¹⁴⁵ Bovens refers to the media as a form of political accountability, with the media acting as an informal forum.¹⁴⁶ However, Bovens raises concerns regarding media accountability, making the point that an important element of accountability is allowing the actor sufficient opportunity to explain and justify their conduct.¹⁴⁷ The media may fall short of effective accountability in this regard where “the principle of hearing and being heard is wantonly disregarded” in favour of a better story or headline.¹⁴⁸ This point goes to the weakness of the media as a form of accountability, rather than its existence.

The media provides the most common vehicle for public organisations to be held accountable to the citizens of New Zealand. With the police as the actor, and the media as the forum, the actor will often have an informal obligation to explain and justify their conduct, and to answer questions posed by the media. This obligation may be limited due to the media’s search for newsworthy stories. Many examples have been seen of consequences faced by political actors as a result of media scrutiny. Judith Collins and the ‘Oravida scandal’ illustrates how the media can force action from other accountability mechanisms such as ministerial accountability, to hold the individual or organization to formal account.¹⁴⁹

The media can, therefore, be regarded as a relatively weak form of accountability, due to its lack of formal power to hold bodies to account and the purpose of the media itself, which

¹⁴⁴ Michelle Bonner “Media as Social Accountability: The Case of Police Violence in Argentina” (2009) 14 *Int Journal of Press/Politics* 296 at 296.

¹⁴⁵ Bonner, above n 144, at 296.

¹⁴⁶ Bovens, above n 51, at 455.

¹⁴⁷ Mark Bovens “Public Accountability: A Framework for the Analysis and Assessment of Accountability in the Public Domain” (paper presented to CONNEX Research Group 2, Democracy and Accountability in the EU, the Netherlands) at 23.

¹⁴⁸ At 23.

¹⁴⁹ “Timeline: Judith Collins and Oravida” (5 May 2014) TV3 News <www.3news.co.nz>.

is driven by profit.¹⁵⁰ Its profit driven nature means that it will only report what is of interest to a significant proportion of our population, making it an inconsistent form of accountability. The media does remain the most effective mechanism which exists for holding the police democratically accountable for their actions. It holds the police accountable for the spending of tax payer funds, without involving political bodies who have the potential to compromise police independence. It also conveys the findings of other accountability mechanisms, such as IPCA reports, to the general public who are likely to be otherwise unaware of such findings.

The media has an important constitutional role in revealing corruption or mismanagement, although this is limited by the lack of information in their possession. An example of the media working to reveal corruption and mismanagement, is the case of Louise Nicholas. Media broke a story in which Nicholas alleged she had been raped by police officers in Rotorua in the early 1980's.¹⁵¹ One of the alleged offenders was the Assistant Commissioner and District Commander responsible for the Auckland City Police District at the time.¹⁵² The media reports sparked an internal investigation by police, a Commission of Inquiry and a review by the IPCA into the internal inquiry undertaken by the police.¹⁵³ Those reports, initially prompted by media, exposed corruption and mismanagement within the police force and showed the media working effectively to expose corruption. The effectiveness of accountability from this perspective is, again, limited by the media goal of finding good news, rather than holding the police to account.

3 Improvements to media accountability

Improvements to the accountability which media provides are difficult, given the important principle of freedom of press and speech. This in itself has benefits and means that the media is, in theory, independent of the government and therefore provides a form of external accountability, albeit weak. The weakness of this form of accountability comes from the commercial nature of the media and the fact that they seek to get the best story, rather than the most accurate. I do not attempt to suggest that there is an easy way to change this, nor should we given the fundamental principles of our democracy and the importance

¹⁵⁰ Dasia Skinner "When News Media's Bottom Line is Profit" (November 2012) The Chicago Monitor <chicagomonitor.com>.

¹⁵¹ "Independent Police Conduct Authority Review of Operation Austin" (December 2007) The Independent Police Conduct Authority <ipca.govt.nz> at 8.

¹⁵² At 9.

¹⁵³ At 8.

of the human right to free speech. Other accountability mechanisms rely on complaints to act while the media is not limited by this. The media should continue to draw attention to issues which other accountability mechanisms may be unable to uncover. This is an important element of our democracy and one which should continue.

The main improvement which could be made in relation to the media relates to education. Education can inform journalists about areas in which they are reporting, in particular in relation to legal issues and therefore allow them to write articles with greater accuracy and understanding. That in turn means that the information provided to the general public will have greater accuracy.

G A Prosecutorial Review Authority

Another option which is worth exploration is the possibility of a new body to review prosecutorial decisions made across government agencies. This would draw attention to the issue of prosecutorial consistency and place importance on ensuring that decision making processes are transparent and accountable. A new body would be a significant development and there are examples of successful bodies overseas of this nature.

New Zealand has no centralised decision-making agency in relation to prosecution decisions. Decisions relating to serious offences prosecuted on indictment are made by the Crown Solicitors in each region of New Zealand, while prosecution decisions in relation to summary offences are made by the New Zealand Police and government agencies.¹⁵⁴ The Crown Law Office does provide Prosecution Guidelines, which all prosecuting agencies of government follow.¹⁵⁵ The Guidelines provide a test for the decision to prosecute, requiring that “the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction” (the Evidential Test) and that “prosecution is requiring in the public interest” (the Public Interest test).¹⁵⁶

The New Zealand Police are just one government entity which makes prosecutorial decisions using the guidelines, creating the potential for inconsistency between government departments. Given the absence of judicial intervention, there is a lack of accountability for these important prosecutorial decisions. A prosecutorial review commission would provide oversight and accountability across all government departments and organisations

¹⁵⁴ Crown Law “Solicitor General’s Prosecution Guidelines” (Prosecution Guidelines, July 2013) at [1.1].

¹⁵⁵ At 1.

¹⁵⁶ At [6.1].

which are responsible for making prosecutorial decisions. Its purpose would be to control abuse of prosecutorial discretion and would likely be of a similar nature to bodies such as the IPCA and other commissions.

The commission could be comprised in a similar fashion to the IPCA, led by a Judge, with membership given to upstanding citizens within our community who we would trust to uphold the rule of law and provide robust and meaningful civilian oversight. Another option would be for the panel to consist of civilians, chosen at random in the same manner as we currently select jury members in court. Japan's Prosecutorial Review Commission selects its members by this process. Japan has a perceived problem in relation to the non-prosecution of political and economic elites and the Commission sought to provide accountability for prosecutorial decisions and therefore address this issue.¹⁵⁷ In New Zealand, the non-prosecution of elites is not perceived as a significant problem. It would be more consistent with our constitutional structure and other commissions and authorities to have a panel consisting of upstanding citizens rather than a jury system, which would also create inefficiency and cost. The panel being led by a Judge would further protect the integrity and standard of the authority and ensure that investigations are only carried out where appropriate and necessary.

The authority would be focused mainly on the propriety of decisions not to institute prosecution and the process which occurred in making the decision.¹⁵⁸ They would be likely to act on complaints but an important element would be their ability to investigate of their own initiative. The commission's investigations would take place behind closed doors given the sensitive and confidential material they would be dealing with. They would have similar powers to the IPCA, allowing them to "summon witnesses for examination, question prosecutors, ask them for additional information when necessary and seek special expert advice on a given case".¹⁵⁹ After completing its investigations, the authority would make a finding based on the legitimacy of the decision and whether or not prosecution should or should not have been initiated. This finding could be binding or not, although it is suggested that it should not be binding based on experience overseas and New Zealand's current constitutional arrangements.

¹⁵⁷ Mark West "Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion" (1992) 92 Colum L Rev 684 at 694.

¹⁵⁸ "The Criminal Justice System in Japan: Prosecution" (2011) United Nations Asia and Far East Institution <unafaei.or.jp> at 51.

¹⁵⁹ Hiroshi Fukurai "Japan's Prosecutorial Review Commissions: Lay Oversight of the Government's Discretion of Prosecution" (2011) 6 U of Penn EA L Rev 1 at 8.

Until recently, decisions of the Japanese Commission were non-binding, though highly persuasive. Recently, changes were made to the Commission which have led to wide spread criticism regarding the usurping of the government role of prosecuting. The new legislation allows the case to go back to the Commission following re-examination by the prosecutors resulting in an outcome which could be contrary to the decision of the Commission.¹⁶⁰ The Commission then has the ability to make a second recommendation, which will be legally binding. This results in the formal criminal prosecution of a suspect, whom the prosecutor has decided twice not to prosecute.¹⁶¹ It would be unlikely that such broad discretion would be given to such a commission in New Zealand, given the common theme within most of our commissions that they are able to make recommendations only. Further, it is inappropriate for civilians to be able to force the government to prosecute an individual. Recommendations may lack sanctioning power, although as has been seen with the IPCA they can be very persuasive and encourage positive accountability relationships.

There are significant benefits in having an authority which has oversight across all prosecutorial decisions made by the Crown, including those by the police. It would enable a group of civilians who should not swayed by political influence to hold prosecutorial authorities to account. They would be able to ensure consistency and fairness is present in the decision making process and that the Prosecution Guidelines are properly adhered to. Despite these benefits, I submit that the decision whether or not to prosecute is highly discretionary and the result of the decision burdensome. It would therefore be inappropriate to allow a commission to bind the government to prosecute. Another important feature of such a commission, is the ability to investigate of its own accord. I have recommended such a change to the IPCA and would recommend the same for a prosecutorial review commission. Another recommendation would be that if a commission be established, an ability to investigate groups of offending such as 'sexual offending', would increase accountability and therefore improve practices in relation to said groups.

The creation of a new authority may be a disproportionate response to the problem, which could result in an 'accountability overload' and inefficiency in an already inefficient criminal justice system. The problem dealt with in this paper relates to issues of police investigative and prosecutorial decision making. I believe that the deficiency in accountability which exists in this context can be addressed by improvements to the IPCA and the court system. A prosecutorial review authority may be an appropriate development

¹⁶⁰ At 2.

¹⁶¹ Fukurai, above n 159, at 3.

in the future. It has the potential to create greater consistency and accountability across government departments, although I do not find it to be a necessary recommendation in relation to the problem I seek to address in this paper.

V Conclusion

The police play a vital role from both a victim and public interest perspective in relation to the investigation and prosecution of sexual offending. This paper shows the implications of police failing to meet an acceptable standard of conduct. The Roast Busters' case study is an example of unacceptable processes resulting in a failure to conduct an adequate investigation and properly consider all prosecution options. From a victim's perspective, these kinds of failings result in a distrust of the justice system and the withdrawal of complaints. This is not in the public interest. What is in the public interest is ensuring that crimes are dealt with efficiently and effectively. It would be naïve to think that improving police accountability can solve the complex problem of increasing the reporting and prosecution of sexual offences. However, it is one element of the problem which can be addressed and therefore contribute to a solution.

It is clear that police independence is an important principle which must be carefully considered to ensure that the correct balance is met between independence and accountability. Internal investigation, the IPCA and the media provide limited accountability of individual police officers and the police as an organisation in relation to investigative and prosecutorial decision making. The courts and the Minister of Police provide no formal accountability relationship, although the Minister may be providing an informal and potentially inappropriate form of accountability. Using Bovens' framework, police are held to account from the democratic, constitutional and learning perspectives although there is significant room for improvement in all three areas. Three key possible improvements to police accountability in relation to both investigation and prosecutorial decisions have been assessed.

I have recommended that the potential for the courts to use judicial review for prosecutorial decisions be considered in more detail. The orthodox position of the courts has been to refrain from intervening in such decisions due to their highly discretionary nature and constitutional sensitivities. Many of the policy reasons behind this decision do not apply to the decision not to prosecute. This is reflected in United Kingdom decisions, where courts are more willing to consider judicial review in the case of the decision not to prosecute. I recommend the same approach be taken in New Zealand and that more leniency be given

to the review of prosecutorial decisions. This will increase accountability and provide another mechanism for those seeking to have such decisions reviewed or investigated.

The IPCA is the most important vehicle for formal accountability of police, providing external investigation while maintaining police independence. The IPCA is limited in power by its inability to investigate of its own accord, particularly in the case of sexual offending where complaints about police conduct are likely to be infrequent. I have also argued that it is weakened by its inability to formally sanction, though at present the power to issue persuasive recommendations is adequate. This paper recommends that the IPCA be given the power to investigate police conduct without requiring a complaint. This would open the door to the IPCA to conduct wider scale investigations into police processes in relation to a specific type of offending such as sexual violence. It could therefore uncover problems with processes prior to the involvement of a complainant and avoid victim suffering.

The paper has considered the possibility of a prosecutorial review authority to review decisions made by all prosecuting authorities. A likely model for New Zealand would be one similar to the IPCA, made up of selected citizens and given the power to make recommendations only. This seems like an unlikely development, with very little attention given in the New Zealand political arena to prosecutorial discretion across the executive.

Prosecutorial discretion is an important function of the police, serving to provide independence from political influence throughout the investigation process and when deciding whether to prosecute. Notwithstanding the importance of this independence, the Police must be held to account effectively. Improvements to the IPCA and a willingness of the courts to use judicial review where necessary will improve accountability. It will contribute to better practice and results in relation to the investigation and prosecution of sexual offence complaints.

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